DETENTION FOR INVESTIGATION BY THE POLICE: AN ANALYSIS OF CURRENT PRACTICES

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INTRODUCTION

One of the most controversial areas in current criminal justice administration concerns the detention of suspects by the police for purposes of investigation. In part, the dispute has been over when the police should be able to take custody in the first instance. Although this essentially involves the never-ending inquiry into what kind and quantity of evidence is sufficient to satisfy the "reasonable grounds" test for arrest, much attention has been given to the issue of whether custody should ever be allowed upon grounds insufficient for arrest. This latter question is usually discussed in terms of the provisions found in the Uniform Arrest Act. Although first proposed in the year 1942 and subsequently adopted by only three states, the debate over the desirability and constitutionality of such an enactment continues to this day.[1]

Even more controversy has surrounded the related issue of whether, after a legitimate taking of custody, the police should be allowed to continue to hold the arrestee while additional evidence against him is sought. The focal point of this aspect of the dispute has been the celebrated case of *Mallory v. United States*.[2] While much of the attention given to *Mallory* has been directed toward the Court's use of an exclusionary-rule type sanction,[3] the importance of the case lies in the

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1. See Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L., C. & P.S. 402 (1960); Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P.S. 395 (1960).

2. 354 U.S. 449 (1957).

3. See *Admission of Evidence (Mallory Rule), Hearings on H.R. 11477, S. 2970, S. 3325 & S. 3355 Before a Subcommittee of the Committee on the Judiciary*, 85th Cong., 2d Sess. (1958) [hereinafter cited as *Hearings* # 2]; *Confessions and Police Detention, Hearings Pursuant to S. Res. 234 Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary*, 85th Cong., 2d Sess.

declaration that Rule 5(a)[4] contemplates "a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate."[5]

Of course, it is clear that *Mallory* is not controlling over state criminal justice systems.[6] This means that the Supreme Court will not invalidate a confession solely because it was received during a period of detention which, if authorized by federal officers, would be in violation of Rule 5(a). However, many would argue not only that the Court's no-detention norm is appropriate for federal law enforcement officers, but that it is a proper declaration of the rule which should be followed by the police at every level of government.

Indeed, it is sometimes erroneously assumed that the law of all the states is in accordance with the *Mallory* detention norm.[7] Nothing could be farther from the truth. Not only do the statutes of some states expressly provide for a period of detention prior to initial appearance, but the courts in other states have held such detentions, under certain circumstances, to be proper.

The relevant statutes are those which state how promptly a police officer must bring an arrestee before the magistrate after arrest without warrant.[8] Fourteen states have failed to enact any such general provision,[9] although many of them have adopted statutes pertaining to limited situations.[10] Of the remaining states, the most predominant

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(1958) [hereinafter cited as *Hearings* # 1]. The Court first applied this type sanction in McNabb v. United States, 318 U.S. 332 (1942).

4. The reference is to FED. R. CRIM. P. 5(a), which requires federal officers to take arrestees before a commissioner "without unnecessary delay."

5. Mallory v. United States, 354 U.S. 449, 453 (1957).

6. Gallegos v. Nebraska, 342 U.S. 55 (1951).

7. *E.g.*, "There is no law, statute, or judicial decision anywhere in the nation that designates a charge of 'investigation' or which permits prosecution officials to hold an accused in custody for 72 hours, before the official may make a personal determinations to either charge the accused with a crime or release him." VARON, SEARCHES, SEIZURES AND IMMUNITIES vii (1961).

8. It is thought that the statutes directed to arrests without a warrant, as compared to those with a warrant, are of principal importance. The arrest warrant is seldom used prior to arrest in current practice, and when used there is almost always no need for further investigation.

9. They are: Alabama, Colorado, Kansas, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Tennessee, Vermont, Virginia, Washington, West Virginia and Wisconsin.

10. Some common limited statutes are those applying only to arrest by a private person, *e.g.*, ALA. CODE ANN. tit. 15, § 160 (1958); only to extradition arrests, *e.g.*, COLO. REV. STAT. ANN., § 39-14-2 (1953); only to arrest with warrant, *e.g.*, KAN. GEN. STAT. ANN., § 62-602 (1949); only to fresh pursuit situations, *e.g.*, MD. ANN. CODE art. 27, § 596 (1957); or only to misdemeanors, *e.g.*, VT. STAT. ANN., tit. 13 § 5507 (1959).

provision is that requiring a bringing before the magistrate "without unnecessary delay," found in fifteen jurisdictions.[11] Eleven others employ similar language, such as "without delay,"[12] "forthwith,"[13] "with reasonable promptness,"[14] "immediately,"[15] "immediately and without delay,"[16] or "until a legal warrant can be obtained."[17]

Some states have by statute attempted to set a time limit on police detention. A few merely set a time limit without indicating that anything shorter is required.[18] Others use terminology like that quoted above, but in addition impose outside time limitations.[19] Finally, the remaining three states have adopted a most interesting provision whereby a maximum detention time is set by statute, but may be extended for a further set period by judicial order for "good cause shown,"[20] a procedure not unlike that found in some other countries.[21]

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11. ARIZ. REV. STAT. ANN. § 13-1418 (1956); FLA. STAT. ANN. § 901.23 (1961); IDAHO CODE ANN. § 19-615 (1948); ILL. REV. STAT. ch. 38, § 660 (1961); IOWA CODE ANN. § 758.1 (1950); LA. REV. STAT. § 15:80 (1950); MICH. STAT. ANN. § 28.872 (1959); MISS. CODE ANN. § 2473 (1942); MONT. REV. CODES ANN. § 94-6016 (1947); NEV. REV. STAT. § 171.300 (1960); N.Y. CODE CRIM. PROC. § 165; N.D. Cent. Code tit. 29, § 29-05-20 (1960); OHIO REV. CODE ANN. § 2935.05 (Baldwin 1961); OKLA. STAT. tit. 22, § 181 (1951); S.D. CODE § 34.1619 (Supp. 1960); UTAH CODE ANN. § 17-13-17 (1953).

12. ORE. REV. STAT. § 181 (1951).

13. ARK. STAT. ANN. § 43-601 (1947); Ky. Crim. Code § 46; S.C. CODE § 17-261 (1952).

14. CONN. GEN. STAT. § 6-49 (1958).

15. N.C. GEN. STAT. § 15-46 (1953) ("or . . . as soon as may be"); TEX. CODE CRIM. PROC. ANN. art. 217 (1948).

16. D.C. CODE ANN. § 4-140 (1961).

17. IND. ANN. STAT. § 9-1024 (1950); ME. REV. STAT. ANN. ch. 147, § 4 (1954); NEB. REV. STAT. § 29-401 (1956); WYO. COMP. STAT. ANN. § 7-155 (1957).

18. HAWAII REV. LAWS § 255-9(e) (1955) (48 hours); MO. REV. STAT. § 544.170 (1959) (20 hours).

19. ALASKA COMP. LAWS ANN. § 66-5-34 (Supp. 1958) ("without unnecessary delay, and in any event within twenty-four hours"); CAL. PEN. CODE ANN. § 825 (Deering 1961) ("without unnecessary delay, and, in any event, within two days"); GA. CODE ANN. § 27-212 (Supp. 1961) ("without delay, . . . and any person who is not conveyed before such officer within forty-eight hours shall be released").

20. DEL. CODE ANN. tit. 11, § 1911 (1953) ("without unreasonable delay, and in any event he shall, if possible, be so brought within twenty-four hours of arrest, Sundays and holidays excluded" but the judge may grant additional time not exceeding 48 hours); N.H. REV. STAT. ANN. §§ 594:20, -:22, -:23 (1955) (similar, with some minor variations); R.I. GEN. LAWS § 12-7-13 (1957) (similar, except that the remand time is not to exceed 24 hours for residents or 48 hours for non-residents). The remand provision is a part of the Uniform Arrest Act, adopted in these three states with some minor variations.

21. *E.g.*, in England, under the MAGISTRATES' COURTS ACT §§ 6, 38, & 105, an arrestee is to be brought before a magistrate "as soon as practicable" (a normal standard of 24 hours is set, with special screening otherwise), but the magistrate

In states with statutes employing general terminology without express time limits, police rights of detention must be clarified by case law, just as in jurisdictions without statutes. As might be expected, states with identical statutes have placed different interpretations upon them. For example, the phrase "without unnecessary delay" has been interpreted most strictly in New York,[22] and the contention that delay was needed for purpose of investigation has been said to be "no excuse under the statutes."[23] Yet, in interpreting the same words other courts have approved detentions where "the officers in good faith were energetically endeavoring to discover the true facts"[24] or where "the crime committed has not been fully solved."[25] States without statutes are in similar disagreement.[26]

This brief excursion into the law of the states makes it apparent that there is no agreement on the question of when, if ever, the police are entitled to detain a suspect for investigation. Moreover, it is a fair statement that the law of the several states demonstrates the problem has not received careful consideration. Most of the states with statutes have merely adopted provisions found elsewhere, suggesting adequate attention was not given to the issue by the legislatures. More significant, however, is the fact that the great majority of the appellate cases on police detention lack satisfactory analysis of the conflicting interests involved.

In recent years the day-to-day practices of the law enforcement agencies in some states have been observed extensively.[27] A review of

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has the power to remand the accused in custody without bail for a period not exceeding three days if remand is to the police, or for a period not exceeding eight days, if remand is to prison. In France, under their new code, if it is necessary to hold a person over 24 hours, he is to be taken before a *procureur de la Republique,* who can authorize a further 24-hour period; See Berg, *Criminal Procedure: France, England, and the United States,* 8 DE PAUL L. REV. 256, 286-87 (1959). In Japan, normally detention for investigation shall not exceed 10 days, but where a judge finds that "unavoidable circumstances" exist, the detention may be extended ten or, in the case of certain specified crimes, fifteen days; See Dando and Tamiya, *Conditional Release of an Accused in Japan,* 108 U. PA. L. REV. 323-24 (1960).

22. People v. Kelly, 8 App. Div. 2d 478, 188 N.Y.S.2d 663 (1959); People v. Trinchillo, 2 App. Div. 2d 146, 153 N.Y.S.2d 685 (1956); Bass v. State, 196 Misc. 177, 92 N.Y.S.2d 42 (Ct. Cl. 1949).

23. People v. Snyder, 297 N.Y. 81, 92, 74 N.E.2d 657, 662 (1947).

24. Mooradian v. Davis, 302 Mich. 484, 489, 5 N.W.2d 435, 437 (1942).

25. People v. Kelly, 404 Ill. 281, 289, 89 N.E.2d 27, 29 (1949).

26. Compare State v. Beebe, 13 Kan. 589 (1874) with Peloquin v. Hibner, 231 Wis. 77, 285 N.W. 380 (1939).

27. The observations have been a part of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. This study, underwritten by a Ford Foundation grant, is concerned primarily with isolating and identifying the critical problems in current criminal justice adminis-

the data collected suggests that the courts and commentators have not infrequently based their hypotheses concerning proper police norms on assumptions that the criminal justice process is quite different than it actually is, at least in these states. To the extent that the practices observed in these few jurisdictions can be said to be typical of those which would be found in other states, it may be well to re-examine the obscured police detention problem through resort to analysis of these practices. Such is the purpose of this article.

The practices to be reported below were observed in the states of Michigan and Wisconsin, and predominantly in the cities of Milwaukee and Detroit.[28] The information was received through the fullest cooperation of law enforcement officials with American Bar Foundation field research personnel. Every effort has been made to preserve the confidentiality of the sources of information. And, it would be well to note at the outset that the purpose of this article is not to criticize any department with respect to these most difficult problems, but rather to report and analyze such practices as were observed in the hope that it will provide a solid basis for improvement.

I. A Look at Current Practices

An appreciation of the nature of the police detention problem requires, initially, an adequate understanding of current detention practices. It is necessary to inquire into police investigation procedures, and to learn of the possible opportunities persons in custody have to obtain their release. Because the police are usually seeking evidence which will either clear the suspect or justify proceeding against him further, some discussion of the next possible step in the process, a decision to charge, is warranted. Finally, the initial appearance before the magistrate, the point at which police detention of those being proceeded against may be terminated, also deserves some consideration.

A. Police Investigation Procedures

Sometimes persons are detained by the police for purposes of investigation without actually being taken to police headquarters. Per-

tration. The complete study, to be published soon, is based upon detailed observation in 1956-7 of the actual practices of police, prosecutors, courts and probation and parole agencies in selected areas of the United States. Because references in this article to "current" practices are also based upon these observations, it must be emphasized that some of the practices may have changed since the time of observation.

28. The confidential nature of much of the American Bar Foundation's data requires that some practices not be identified with a specific locality. While all of the practices reported in the following section were observed with sufficient regularity to warrant the assumption they occur with some frequency, it should not be assumed that any particular practice is to be found in both of these states or that they are found throughout either of the jurisdictions.

sons found under suspicious circumstances, especially at night, are often stopped by patrolmen and questioned as to their identity and purpose for being about. This practice, referred to by the police as "field interrogation," may be accompanied by a frisk of the suspect when the officer deems it necessary for his own protection. Reports are often made of these field interrogations, which may later prove most useful; for example, if a burglary is later reported in the area where the suspicious person was found, the police then have a particular suspect who can be investigated further. Sometimes the suspect is checked upon immediately, either by calling headquarters to see if he is wanted or by checking out the suspect's story. While these detentions usually last only a matter of minutes, the making of a check may require additional time. If the suspect's story does not check out, if he cannot provide adequate identification or if he refuses to respond to the officer's questions, then an actual arrest will probably be made.

There are other kinds of investigations which may involve actual detention of suspects but which the police do not view as actual arrests. Both, while not observed with any great frequency, require the presence of the suspect at police headquarters. One practice is for the patrolman to "invite" the suspect to headquarters so that the matter can be cleared up. Another is for the officer to take the suspect to headquarters, but to not regard or record the detention as an actual arrest. In either instance, the suspect will remain at the station for a matter of a few hours at the most unless an actual arrest is ultimately made.

As to the actual arrests which are followed by detention for purposes of investigation, most of them (especially in the larger cities) are made in the early hours of the morning. The suspect is brought to the local district or precinct station by the arresting officer. The supervisory officer on duty often will conduct a preliminary and limited interrogation of the suspect, usually for the purpose of merely deciding whether the suspect should be released, held for a warrant (meaning the police feel no further investigation is called for) or held for investigation.

In Milwaukee, a person held for investigation is usually booked on "suspicion of" a particular offense rather than "on the nose," a practice supported by regulations there.[29] An identical practice prevails in

29. While it was indicated that this booking procedure is not condoned by the department at the present time and reflects an older practice, the current regulations instruct:

> Arrested persons brought to any station by any member of the police force shall be booked on the specific charge on which they are arrested. If an arrest is made on suspicion, the prisoner shall be booked in the Register of Arrests on Suspicion until the proper charge is determined, and then booked in the Register of Arrests accordingly, using as the date and time of arrest on such charge the same date and time as appear for the arrest on suspicion.

Milwaukee Police Dep't, Rules and Regulations, rule 33, § 2 (1950).

Detroit, and again authority for the practice can be found in their police manual.[30] This investigation booking in both cities is merely a bookkeeping function, in that it distinguishes those cases which are to be handled by the detectives, and does not of itself show that the arrest was illegal.[31] Sometimes, particularly if grounds for arrest of the offense suspected are in doubt, the booking may take a different form. Perhaps the suspect is guilty of another offense, such as vagrancy, in which case he will be booked on that charge. If the suspect is a probationer or parolee, his suspicious conduct may constitute possible grounds for revocation, in which case a "hold" booking is used to signify that he is being held for the probation-parole authorities.

Those held for investigation are processed to the detective bureau for interrogation or other checking. Thus, the availability of detectives is a significant factor in the time a particular suspect is held.[32]

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30. The distinction between when the booking will be for "investigation of" as opposed to "on the nose" is apparently the same as the distinction between what is termed in the Police Manual a preliminary arrest and regular arrest. A regular arrest includes only those cases in which the officer directly views the offense, in which the arrest was by virtue of a warrant or capias, or where the arrest is for violation of probation or for other authorities. Detroit Police Dep't, Revised Police Manual, ch. 16 § 98 (1955).

31. It is sometimes assumed that all "investigation of" bookings are illegal:

> Prior to the *Mallory* decision in the District of Columbia a very large percentage of all arrests were arrests made on the so-called charge of investigation. Since there is no such crime and no such charge known to the law, naturally all of these arrests for investigation were illegal arrests.

Statement of National Bar Association in *Hearings* # 1, at 180, and see United States v. Killough, 193 F. Supp. 905, 910 (D.D.C. 1961), where the court in dictum suggests that a "suspicion" booking in itself makes the custody illegal.

Similarly, it is assumed that "investigation of" bookings are a useful statistic in tabulating the number of illegal arrests. *E.g.*, Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 26 (1957). And, as to the Detroit practice, a Detroit Bar Committee reported:

> The measures taken by the Department during the past year have been constructive and have undoubtedly reduced the number of illegal arrests. Statistics submitted to us show that "investigation" arrests were reduced from 15,465 during the first six months of 1958 to 11,686 during the first six months of 1959 (a reduction of 3,767 or 24.4%).

28 DETROIT LAWYER 21 (1960).

32. The availability is in turn affected by the working hours of the detectives. For example, in Detroit at the time of the observations, the bulk of the detective force came on duty at 8:00 A. M. Though cases in which the suspect is in custody take precedence over others, Detroit Police Dep't, Revised Police Manual, ch. 16, § 57 (1955), each detective team has a number of cases assigned to it, often more than can be disposed of in a day's time. Most judges in Recorders Court will not handle initial appearances after 11 o'clock in the morning, and this means that the detectives must have satisfied themselves that there is sufficient evidence for a warrant and must be at the prosecutor's office not later than 10 o'clock so that the complaint and warrant can be prepared and approved. Thus, unless the investigation can be completed in two hours, the suspect who is to be charged will

The investigation usually involves questioning, but may also include the holding of a showup, the checking of records on recent offenses or the checking of physical evidence. Some of these investigative devices take considerable time, and additional time is often required when the suspected offense is of a kind investigated by a specialized bureau in the department.

Interrogation is the principal investigative device, though relatively little use is made of specialized and skilled interrogation techniques. Questioning often begins with the officer obtaining basic information concerning the suspect's prior record and the like for completion of an "interrogation form." Then the inquiry moves on to the other matters suggested by the arresting officer's report or the suspect's property.

Where no investigation is deemed necessary following arrest, the arrestee will appear before the magistrate on the day of the arrest or the morning following. In those cases in which investigation is desired, detention up to 72 hours may occur.

B. Opportunities for Release

Generally speaking, it can be said that those persons being detained for investigation cannot obtain their immediate release. Usually the first opportunity for release on bail comes only after the police have taken the suspect before the magistrate. If some informal release procedures exist for the convenience of persons who have been arrested, they are not made available to persons the police desire to detain for further investigation. Thus, while in Detroit many persons avoid having to remain in custody pending the availability of a magistrate by resort to the "release bureau," the bureau will not normally grant releases contrary to the wishes of the investigating officers.

Of course, persons being detained may attempt to obtain their release by way of a writ of habeas corpus, as this remedy is intended to allow determination of the legality of official custody.[33] Particularly in Detroit, but to a lesser extent elsewhere, the writ is resorted to by persons detained by the police for investigation.

When a writ is received by the police, the officer in charge of the investigation responds to it in court. If the officer arrives before the time for the hearing, he will often contact the judge in his chambers and explain the case to him, particularly any matters he does not want

probably be held over to the following day. It seems clear that if more detectives were on hand at night when these cases arise many of the suspects could be charged or released by the next morning; at the urging of the Detroit Bar Association such a change has recently been accomplished. 28 Detroit Lawyer 21 (1960).

33. Mich. Stat. Ann. §§ 27.2250-.2270 (1938); Wis. Stat. Ann. § 292.01-.21 (1958).

to disclose in open court, and may give his investigation report to the judge to read. At the hearing in court, attended by the officer, the prisoner and the prisoner's counsel, the officer will state briefly the need for added time to conduct an investigation. The judge then determines whether continued custody is to be allowed and, if so, for how long.

The continuation of custody is accomplished by the judge granting an adjournment or continuance (the terms are used interchangeably by the judges) of the hearing for a given time. The time is usually either 24 or 48 hours, though a lesser time may be set where it clearly appears the investigation is about concluded.[34] Because persons resorting to the writ usually do so soon after arrest (with the hearing set not more than a half day off), the judges are not allowing detention in excess of 72 hours. In the relatively few cases in which a hearing on writ discloses the person has already been in custody nearly this long or perhaps longer, the judge will grant an outright release or a very brief continuance. When a continuance for purposes of investigation is granted, the judge will almost always refuse to release the suspect on bail.

In a few situations, where some special procedure is resorted to by the police, the suspect may be retained in custody for a longer period, perhaps a week or ten days. The police may view such an extended investigation necessary in very serious cases, or when it is imperative to communicate with the F.B.I. or other law enforcement agencies.

One device by which this extended detention is made possible is the so-called "ten-day vag check." In such a case the officer handling the investigation obtains a vagrancy warrant from the prosecutor. When the case comes up in court, the suspect may be convicted for vagrancy, or an assistant district attorney or police officer appears and asks for a ten-day continuance, which is granted by the judge. If the suspect is cleared before the ten days are up (sentences, where conviction is obtained, are typically ten days), the untried vagrant is released without trial and the convicted vagrant is often released without serving the balance of his time.

A second device employed in order to detain suspects for investigation a longer time, though only against suspects having either probationer or parolee status,[35] is the "probation hold" or "parolee hold." It is merely another kind of booking, indicating that the person in

34. Some cases were observed in which the officer indicated that all that remained to be done was to consult with an assistant prosecutor. The judge adjourned the hearing for a half hour.

35. This fact is usually determined by a routine check of police records, a finding of a card indicating same in the suspect's wallet, questioning of the suspect or contact with the probation or parole authorities.

custody is being held by the police for the parole or probation authorities, which might be used when it is desired that the probationer or parolee be held for investigation for a week or ten days.[36] Sometimes the "hold" is used for investigative purposes with the consent and concurrence of the probation or parole authorities, while on other occasions no such concurrence is obtained or even requested. These "holds" have proved very effective notwithstanding the uncertainty of their exact legal status. The probationer or parolee now suspected of a new offense has, in the usual case, done something which constitutes a violation of the conditions of his parole or probation. Thus, he is not in any position to challenge his continued detention. By cooperating he has a good chance that the authorities will overlook the violation, while challenge of his continued detention presents a considerable threat of revocation.

C. The Charging Decision

When a suspect is detained for purposes of investigation following the decision to arrest, the investigation is normally pursued with the hope of obtaining additional information for use in making the next decision in the process—the decision of whether or not to charge the suspect with a crime. Because this is so, it is important to understand the nature and function of this later decision.

The charging decision is usually made by the prosecutor or his assistant, although a highly specialized and well-trained member of the police department may perform this function in some cases. But, by whomever made, the decision constitutes a judgment of whether or not the suspect should be subjected to trial. It is a decision by a representative of the prosecution that there appears to be sufficient probability of guilt to warrant expending further resources of the criminal process for the purpose of obtaining a conviction.[36a] Also, it is a determination that the suspect is so probably guilty that the state is justified in taking this next step, although it means the accused must bear the economic costs of gaining his release and preparing for trial and the social costs of loss of prestige and damage to reputation.

In the usual case the decision to charge is manifested by the prose-

36. For example, one probationer was arrested for investigation of a statutory rape charge. The case was particularly difficult from the investigation standpoint, as the girl involved had since been committed to a mental institution. After the 72 hours had passed, the maximum time the police thought a court would allow, a probation hold was placed on the subject, and in this way the suspect was held a total of seven days.

36a. It is not suggested, however, that it is always assumed that a full-blown trial will be necessary or that any substantial expenditure of the prosecutor's resources will be required. Most cases will be followed by a plea of guilty.

cutor's approval of a police request for a warrant.[37] The arrest warrant issued after a person is already in custody serves the sole function of being a charging document. Although the law concerning who has authority to issue an arrest warrant varies from state to state,[38] it is clear that the only real decision made in connection with its issuance is that by the prosecutor or his representative.

How much evidence of guilt is required before a prosecutor is justified in charging a suspect? This is a difficult question to answer, as a distinct probability of guilt standard for the charging decision has not been expressly provided for by the law. Although it is clear that an arrest warrant is to issue only upon "probable cause,"[39] it would not be accurate to declare this to be an assertion of the charging standard, as the formal law has seldom conceived of the arrest warrant as a charging document.

It might be said that the charging process really extends through the preliminary examination, for at that time the prosecutor, if he has decided to charge, must present sufficient evidence to the magistrate to justify holding the defendant for trial. In this sense, it might very well be said that the standard for charging contemplated by law is that which must be met at the time of the preliminary. The magistrate will hold the defendant for trial only if "probable cause" is established,[40] so it can be expected that the prosecutor at the time of charging will test the case by at least this standard.

When will the prosecutor "test" the evidence and make the charging decision? It is clear that the charging decision is not of necessity wedded to the warrant-issuing step; occasionally such warrants are issued prior to arrest without any commitment to charge.[41] Yet, the prosecutor can hardly be expected to forego this decision until the

37. A warrant is rarely obtained prior to arrest. Rather, almost all arrests are made without warrant. If an arrest is made with a warrant, the decision to charge has usually already been made.

38. The statutes may give the full authority to the magistrate, *e.g.*, KAN. GEN. STAT. § 62-602 (1949); may require concurrence between the magistrate and prosecutor, *e.g.*, MICH. STAT. ANN. § 28.860 (1959); or may allow either a magistrate *or* district attorney to issue a warrant, *e.g.*, WIS. STAT. ANN. §§ 954.01-.02 (1958).

39. *E.g.*, WIS. STAT. ANN. § 954.02(2) (1958); People v. Beelby, 239 Mich. 386, 214 N.W. 183 (1927).

40. It should be cautioned at this point that the "probable cause" needed to get by the preliminary examination is not necessarily the same as the "probable cause" required for issuance of an arrest warrant, notwithstanding the identity of label.

41. This may occur, for example, when it is desired to obtain prior testing of the evidence so as to minimize the chances of a search being invalidated, or when the whereabouts of the suspect is unknown and the warrant is needed to allow arrest elsewhere.

preliminary examination itself is upon him.[42] Even more important, it does not seem likely that the decision can be expected to be delayed beyond the time at which the defendant is able to obtain his release on bail, *i.e.*, the initial appearance before a magistrate. Not only would it probably be thought improper to demand bail of a person who may not even be required to appear at any later proceedings, but also the prosecutor will usually believe that he will not have any more information relevant to his decision a few days hence than he possesses at the present time. Thus it is that the preparation and approval of the warrant, usually the last step before the initial appearance, has become the manifestation of the charging decision in the usual case.

D. The Initial Appearance

The initial appearance, as the name suggests, is the first appearance which the arrestee normally makes before a judicial officer. This stage of the process is sometimes referred to as an arraignment, but this tends toward confusion with the later arraignment on the information, the point at which the defendant is called upon to plead.[43] This first appearance has also been called the preliminary hearing, which also causes confusion.[44] One function of the initial appearance is to determine whether the defendant desires a preliminary hearing, at which testimony would be taken to determine whether there is probable cause to hold for trial.

In the observed jurisdictions the initial appearance does *not* include a testing of the evidence by a judicial officer. In *Mallory* the Supreme Court was concerned with prompt appearance "so that the issue of probable cause may be promptly determined."[45] The Court was appar-

42. This is because at the preliminary hearing the prosecutor will have to be prepared to present sufficient evidence to the magistrate so that the defendant may be held for trial. In Michigan the statutes require the preliminary be held within ten days of the initial appearance, MICH. STAT. ANN. § 28.922 (1954), and they are usually scheduled within a week. In Wisconsin, the statutes require the preliminary be held within ten days unless the defendant consents to a longer period. WIS. STAT. ANN. § 954.05 (1958).

43. See, for example, Exhibit 31, *Hearings* # 1, where state statutes concerning arraignment on the information are collected, though the hearings were conducted to study the problem of arraignment on the warrant.

44. See Goldsmith v. United States, 277 F.2d 335, 338 n.2a (D.C. Cir. 1960), where the court indicates that "the hearing called for by Rule 5 [FED. R. CRIM. P.] is *not* an 'arraignment' but a preliminary examination of the arrested person." However, the court failed to note that the rule also makes it clear that the first appearance, which the court was actually concerned with, is not the preliminary. Rule 5 merely calls it an "appearance before the commissioner," at which time the commissioner, *inter alia*, is to "inform the defendant . . . of his right to have a preliminary examination," which is to be held "within a reasonable time."

45. Mallory v. United States, 354 U.S. 449, 454 (1957).

ently referring to the fact that the federal rules require that a complaint be filed with the commissioner and that the commissioner determine the question of probable cause when issuing a warrant upon a complaint.[46] Similarly, in the states observed no initial appearance would be concluded without the issuance of a warrant to the person originally arrested without a warrant. However, in practice this decision as to whether a warrant should issue is made by the prosecutor, and even if the statutes contemplate some participation in the warrant-issuing decision by the magistrate,[47] he does not actually test the evidence.

But, one significant aspect of the initial appearance is that bail is set.[48] Thus, if the suspect can make bail, the in-custody investigation will be brought to a close. The suspect may be warned of his constitutional rights,[48a] and in many localities will be insulated from the police to some extent by being remanded to other authorities if he cannot make bail.[48b]

II. The Basic Issues Presented

Again it must be emphasized that the practices described above were observed only in Michigan and Wisconsin, and predominantly in Detroit and Milwaukee. But, even though it cannot be presumed that the reported practices prevail country-wide, they nonetheless suggest a number of significant issues which merit consideration in any attempt to deal with the general problem of detention by the police. Of these issues, those thought to be of primary importance are as follows:

(1) When, if ever, is it desirable to allow a taking and continuance of custody of a person who cannot be charged with a crime? This is the most significant issue presented. Current practice demonstrates that often custody is taken of a suspect, followed by a process of inquiry or investigation designed to obtain sufficient information to satisfy the prosecutor. If a taking of custody is proper only when there appears to be sufficient evidence to charge, then this detention

46. Fed. R. Crim. P. 3-5.

47. See note 38 *supra.*

48. In Michigan the general bail statute provides for the setting of bail by "officers before whom persons charged with crime shall be brought." Mich Stat. Ann. § 28.888 (1954). The Wisconsin statutes recognize a right to bail set by the magistrate pending the preliminary examination. Wis. Stat. Ann. § 954.05 (1958).

48a. By statute in Michigan, a person charged with a felony is to be "informed as to his rights," Mich. Stat. Ann. § 28.885 (1959), but not infrequently the only warning given was of the right to a preliminary examination.

48b. For example, the suspect may be placed in the county jail rather than back in the local police station lock-up. See note 202 *infra.*

is difficult to support. However, if there are occasions when custody has been validly taken, but a prosecutor would rightly refuse to charge without additional evidence, then there may be some basis for allowing in-custody investigation in some cases in order to reach the higher standard.

(2) When, if ever, is it desirable to allow a taking and continuance of custody of a person who cannot be arrested for the crime suspected? Assuming that in-custody investigation of persons who cannot be charged is sometimes possible, are there ever circumstances which justify a like investigation of a person against whom there does not even exist that amount of evidence needed to make a valid arrest for the offense to be investigated? For example, what of a supposed "voluntary" appearance at the police station at the "request" of the police? What of a brief "detention" for investigation such as that contemplated by the Uniform Arrest Act? Is it appropriate to detain the suspect for investigation of the suspected offense on the basis of his violation of probation or parole or his commission of another, less serious offense?

(3) When, if ever, is it desirable to allow the continuance of custody of a person who can be charged with the offense suspected? Assuming now that the suspect could be charged, so that the prosecutor could approve the issuance of a warrant and a taking of the suspect to the magistrate for possible release on bail, confident that sufficient evidence is at hand to show "probable cause" at the preliminary examination, should a right of in-custody investigation still exist for the purpose of obtaining evidence sufficient for conviction? Or, what of the recurring situations in which the police have reason to believe that the suspect can provide information concerning another offense or another offender and desire to continue the investigation along these lines?

(4) What safeguards are desirable in order to guard against police impropriety in the area of detention for investigation? Much of the concern is directed to the fact that custody is frequently accompanied by interrogation. Should questioning be allowed at all? If questioning by the police is to be allowed, what added protections are needed for the suspect? Should the interrogation be put in the hands of a magistrate? Or, should instances of police in-custody investigation be subject to prior approval by a judicial officer? Should the police be free to release those suspects they decide are not to be charged without some judicial check?

A. Taking and Continuance of Custody of a Person Who Cannot Be Charged

The precise issue being put here is whether, under any circumstances, it is possible that an arrest has been lawfully made but yet,

given this evidence upon which the arrest was based, the standard contemplated by law for the charging of a person with a crime cannot be met. In short, are the legal norms for arrest and charging the same, or is the latter a more rigid standard? This issue is obviously basic to our general inquiry; if arrest is sometimes legally possible when charging is not, it would seem to follow that some interval for post-arrest investigation must be allowed prior to the time at which the prosecutor is to decide whether to charge the arrestee.

The assumption underlying the *Mallory* case seems to be that an arrest is not to be made unless sufficient evidence is at hand to charge the suspect. The Court said, "It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.' "[49] It has sometimes been asserted that this is also the system contemplated by the law in many states.[50]

Language from a recent federal case[51] decided under *Mallory* is most representative of a contrary position. The two arrestees in that case were suspected of being the two masked gunmen responsible for a recent armed robbery, but they were arrested solely because a police informant said that the brother of one of them had told him the two were responsible, and the two fit the general description given by the victims of the robbery. Said the court, in dicta:

> Though the statements . . . afforded grounds for *arrest*, the officers must necessarily have had some doubts about whether the two suspects should be formally charged with the crime in the face of the vigorous denials of the suspects. . . . The quantum of evidence necessary to sustain an arrest is not, in all circumstances, the same quantum necessary to make out probable cause for charging a person with the crime. . . . We must not forget that interrogation is not an evil *per se* but an absolute necessity and that it often leads to releases, not charges. . . . Since the hearsay evidence . . . was undoubtedly sufficient probable cause for arrest, . . . the inquiry was not needed to bolster defendants' arrest; but it could be conducted to determine whether the suspects should be arraigned or released.[52]

49. Mallory v. United States, 354 U.S. 449, 456 (1957). If one places emphasis upon the phrase "and to use an interrogating process at police headquarters," it might be contended the Court was really concerned with arrests in which it was anticipated the charging standard would be met by resort to interrogation.

50. See memo by Committee on the Bill of Rights, American Bar Association, reprinted in *Hearings* # 1, at 36-38. See also statement by Edward Bennett Williams, *id.* at 96.

51. Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960).

52. *Id.* at 342-44. A similar approach was expressed by Justice Jackson in Watts v. Indiana, 338 U.S. 49, 58 (1949) (separate opinion):

> In each case police were confronted with one or more brutal murders which the authorities were under the highest duty to solve. Each of these

1. *Arrest and Charging Standards Compared*

Of course, the position that it is improper to arrest a person who cannot be charged is not indefensible, but it implies that the privilege to be free from detention (however brief) as a suspected offender is as broad as the privilege to be free from prosecution as a criminal defendant. The observed practice is not in accord with this view. Moreover, notwithstanding the uncertainty resulting from a failure of either courts or legislatures to directly approach this question, it can be said that the law contemplates arrest sometimes being proper where charging would not. That is, there is some evidence that the arrest and charging standards, *by law*, are not identical.

In what respects are the arrest and charging norms different? For one thing, it would appear that the nature of the decision-maker itself creates a difference. As the United States Supreme Court has observed with regard to the requirements for arrest, "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[53] No norm or standard can be precisely defined without consideration of the persons to whom it is directed. Telling a police officer that he may arrest those against whom there is "reasonable grounds to believe" is different from telling a district attorney that he may charge those against whom there exists "probable cause" to believe in guilt.[54] The prosecutor, being the "legal technician," might determine the evidence inadequate for charging even though the making of an arrest by the police officer was not at all unreasonable.

Of course, what this will come down to in many cases is that the

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murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer. In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him . . . .

[N]o one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble.

53. Brinegar v. United States, 338 U.S. 160, 175 (1949). Similarly, the Michigan court has said that whether there are grounds for arrest

depends in every case upon the peculiar circumstances confronting the arresting officer. . . . He makes this determination, and we review it, not as a legal scholar determines the existence of consideration in support of a promise, but as a man of reasonable prudence and caution would determine whether the person arrested has committed a felony.

People v. Harper, 113 N.W.2d 808, 811 (Mich. 1962).

54. It is not suggested that the verbal formulation creates the difference. The arrest norm is also sometimes stated to be "probable cause," but it still may be different in fact from the charging standard.

kind of evidence required by the prosecutor will be diffrent from that required by the officer before an arrest is made. As a practical matter, the prosecutor will test the evidence in terms of its admissibility in the actual prosecution of the case, and for this reason will consider only that evidence which he knows will be received in court. He may therefore have to ignore considerable information directly relating to the guilt of the arrestee, as "much evidence of real and substantial probative value goes out on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury."[55]

Even more important is the fact that a prosecutor who makes the charging decision in strict conformance with the legal standard, as reflected by the norm applicable when the decision to charge is tested at the preliminary, will likewise apply the rules of evidence to the available information.[56] Yet, a police officer, in deciding whether there are sufficient grounds for arrest, may consider such things as the character of the suspect,[57] his past record,[58] and hearsay concerning the commission of the offense.[59] If an arrest is based in part upon such information, the prosecutor is going to require that additional evidence of guilt be obtained before charging.

Finally, the arrest and charging standards are bound to be different because of the different circumstances under which the two decisions are made. Because the police officer must frequently make the arrest decision on the spur of the moment in remote locations and under difficult circumstances, some special factors may allow for a lawful arrest to be made on evidence which in other cases would not be sufficient for arrest. The seriousness of the offense is one such factor—a suspected murderer could be arrested on a lesser probability of guilt than a

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55. Brinegar v. United States, 338 U.S. 160, 173 (1949).

56. Thus, hearsay is not be considered in determining whether there is probable cause at the preliminary. People v. Asta, 337 Mich. 590, 60 N.W.2d 472 (1953). Since the evidence at the preliminary is heard only by the judge, the reason for exclusion stated in *Brinegar* (text at footnote 55) could hardly apply. Rather, the apparent rationale is that since the issue is whether there is enough evidence to justify subjecting the defendant to trial, it involves some consideration of the likelihood of conviction, in which case the evidence must be considered in terms of admissibility at the trial.

57. People v. Ward, 226 Mich. 45, 196 N.W. 971 (1924).

58. Smith v. Hern, 102 Kan. 373, 170 Pac. 990 (1918).

59. People v. Asta, 337 Mich. 590, 60 N.W.2d 472 (1953). In this case the court held that hearsay evidence was admissible at the preliminary examination for the purpose of showing that the officers were justified in making an arrest, but not for the purpose of proving probable cause at the preliminary.

State v. Cox, 258 Wis. 162, 45 N.W.2d 100 (1950); Scaffido v. State, 215 Wis. 389, 254 N.W. 651 (1934). The dissenting judge in *Cox* said, "It does not seem to me to be logical to contend that an arrest can be justified if it is based only upon what an officer may have heard from others."

suspected numbers carrier.[60] While the *Restatement of Torts'* definition of the peace officer's privilege lists this as a factor,[61] such express recognition by the commentators[62] or the courts[63] is unusual. There is evidence, however, that the seriousness of the offense actually plays a part in a court's determination of whether a given arrest is valid.[64]

Often immediate action is necessary on the part of a police officer

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60. The rationale of such a position is that a greater interference with individual liberty is warranted where the crime is of a very serious nature. Though speaking of searches, Justice Jackson expressed such a view when he said:

> If we assume, for example, that a child is kidnaped [*sic*] 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.

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

61. The nature of the crime committed or feared, the chance of the escape of the one suspected, the harm to others to be anticipated if he escapes and the harm to him if he is arrested, are important factors to be considered in determining whether the actor's suspicion is sufficiently reasonable to confer upon him the privilege to make the arrest.

1 RESTATEMENT, TORTS § 119, comment *j* (1934).

62. An exception is the following:

> If the police were reliably informed that a given crime was committed by a man fitting a certain description, and they could determine that there were in the vicinity 50 men answering that description, any one of these 50 would be the object of the justified suspicion to the extent that it was much more probable than the average that he was guilty. Yet as the chances of guilt as to any one of these individuals would still be only one in 50, it would hardly seem proper to arrest all of them, in the hope that a process of interrogation at police headquarters would isolate the guilty person. In determining whether such drastic action would ever be reasonable, one would probably weigh the seriousness of the crime; a kidnapping where the life of the victim was at stake might be considered to warrant such greater invasion of personal liberty than would be the case in a routine burglary.

Problems of the Protection of Human Rights in Criminal Law and Procedure, U.N. SEMINAR ON THE PROTECTION OF HUMAN RIGHTS IN CRIMINAL LAW AND PROCEDURE, Working Paper H [TE 326/1 (40-2) LA] (1958).

63. An exception is the following from United States v. Kancso, 252 F.2d 220, 222 (2d Cir. 1958):

> The word "reasonable" is not to be construed in the abstract or in a vacuum unrelated to the field to which it applies. Standards which might be reasonable for the apprehension of bank robbers might not be reasonable for the arrest of narcotics peddlers.

64. For example, the Michigan court has upheld an arrest for kidnapping where made upon the sole basis that an officer had observed a car circling the block with the occupants "apparently closely watching all onlookers," People v. Minchella, 268 Mich. 123, 255 N.W. 735 (1934), but has declared invalid an arrest for bootlegging made because the occupants of a car traveling very slowly looked back at the motorcycle officer who passed them. People v. Roache, 237 Mich. 215, 211 N.W. 742 (1927). Thus, to the extent the seriousness of the offense is a factor, it has been relegated to a *sub rosa* position.

because the opportunity to arrest may soon pass. For this reason the courts have indicated that such facts as the chance of a quick getaway, danger to the public or threat of further harm to the victim may justify arrest upon evidence which would otherwise be insufficient.[65] By comparison, the prosecutor makes the charging decision within the confines of his own office, faced with no emergency and with time for reflection. For this reason, a legal arrest in an emergency situation may not justify charging without more evidence. For example, while it might be proper for the police to arrest three persons leaving a crime scene and fitting the general description given by the victim,[66]

65. Thus, in one case the court hypothesized concerning a bank robber who could be expected to make a quick getaway, and stated:

> If the officer must delay to ascertain that the information received comes from a responsible person, in many cases the opportunity to arrest will have passed. That officers do make arrests on such information, and that they are complimented on their promptness in doing so, is a matter of common knowledge.

People v. Ward, 226 Mich. 45, 51, 196 N.W. 971, 972 (1924). Similarly, the court on another occasion noted that "delay in arrest may endanger the public by permitting a felon to remain at large" and "may also permit his escape." Leisure v. Hicks, 336 Mich. 148, 57 N.W.2d 473 (1953). And, in another case the court also mentioned the need for action without checking the story of the accuser (which might otherwise be necessary). The facts indicated that further harm might be caused the supposed victim if there were delay. Hammitt v. Straley, 338 Mich. 587, 61 N.W.2d 641 (1953).

66. It would seem that the "reasonable grounds to believe" test would sometimes allow for arrest of more than one suspect. See 1 RESTATEMENT, TORTS § 119, illustration 2 (1934). The problem is precisely what degree of belief is required with respect to the arrestee; if the arrestee must be more probably guilty than any other suspect, then obviously only one suspect can be arrested. Commentators who assert that the police are acting illegally when they arrest more than one suspect rarely cite authority, nor do those taking the contrary position.

Professor Waite, commenting on the famous Degnan murder case in Chicago, where two janitors were held for questioning, says: "As the news accounts make rather clear that no one supposed the two janitors had coöperated, but that if one was guilty the other was not, it would be extremely difficult to justify *both* arrests on this ground of reasonable belief in the arrestee's guilt." Waite, *The Law of Arrest*, 24 TEXAS L. REV. 279, 297 (1946). The *Mallory* case may be the best authority that, at least in the federal system, such a practice is illegal. One professor has asserted: "Remember that in the Mallory case the police suspicions extended also to the defendant's two nephews, and they were arrested and detained four hours without the slightest shadow of justification." Letter from Prof. J. D. O'Reilly, in *Hearings* # 1. Thus, the *Mallory* case is said to require evidence sufficient to charge one and only one person prior to arrest. Statement of National Bar Association, *Hearing* # 1, at 179. Similarly, the president of the Washington Bar Association took the position that the "probable cause" arrest norm on the federal level prevents arrest of more than one person for a single person crime. *Hearings* # 2, at 110-13.

Compare with the preceding the following statement concerning *Mallory:* "In that case there were three suspects. There was reasonable ground to arrest every one of them. After an interrogation of each of the three, two were cleared within

it would not seem appropriate for the prosecutor to charge all three, or to charge any one of the three without more evidence of his guilt than was apparent at the time of arrest.

Thus, notwithstanding the lack of judicial language expressly recognizing a difference in the arrest and charging standards, a comparison of the criteria recognized by law for these two decision-points in the process suggests the police may sometimes have properly arrested a person the prosecutor would likewise quite properly refuse to charge. It might be added that the prosecutor's refusal will sometimes gain added justification because of events subsequent to arrest. For example, if two armed robbery suspects should vigorously deny any implication in the crime after their arrest, based upon their general resemblance to the responsible parties and their being identified by a police informant, would it not be inappropriate for the prosecutor to charge the suspects without first at least requiring the accuser to confront them and repeat the accusation?[67] The added fact of the denial following arrest might warrant a refusal to charge even when the original grounds for arrest were also sufficient for charging purposes.[68]

2. *Detention to Obtain Evidence Sufficient for Charging*

Perhaps the best evidence that at least some courts consider the arrest and charging standards to be different is the fact that they uphold detention following arrest on the basis that the police were seeking evidence sufficient to charge. The observed jurisdictions, Michigan and Wisconsin, hold to this view, and in this sense present a most interesting contrast to the familiar *Mallory* position.

Notwithstanding earlier judicial language to the contrary,[69] it would appear that both jurisdictions now approve of the observed practice

a few hours and the third was held." Statement of the Honorable Alexander Holtzoff, U.S. district judge for the District of Columbia, in *Hearings* # 1, at 4-5. Perkins writes that reasonable cause only requires

> grounds sufficient to induce a reasonably prudent man to believe the arrestee guilty of the crime for which the arrest is made or to cause him to believe there is likelihood of such guilt. The latter qualification is sufficient to permit an officer to arrest two persons, for example, if he has reason to believe a felony has been committed by one or the other.

Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 238 (1940).

67. These facts are from Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960), wherein the court said, "If a suspect, arrested or not, denies knowledge of a crime, the police are entitled, if indeed not obligated, to confront him with those who have implicated him." *Id.* at 344.

68. Even the *Mallory* Court seemed to grant this, saying, "Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties." Mallory v. United States, 354 U.S. 449, 455 (1957).

69. See Bailey v. Loomis, 228 Mich. 338, 200 N.W. 148 (1924); Geldon v. Finnegan, 213 Wis. 539, 252 N.W. 369 (1934).

of arresting a suspect on "reasonable grounds to believe" and then detaining him for a brief period in an attempt to obtain evidence sufficient for charging. The Michigan case of *Mooradian v Davis*[70] is an excellent example of a situation in which the prosecutor might properly want more evidence before charging the arrestee. After a fire of apparently incendiary character, all of the evidence seemed to point toward the individual who was purchasing the building on land contract: he was in default of payments; foreclosure was threatened; because of a previous fire, he had received insurance payments which he applied on the contract; he had shortly before the fire materially increased the amount of his insurance coverage; he was the last person to leave the building and the only person with a key; and evidence of arson was found within. He was placed under arrest on Monday, but on Tuesday the prosecutor refused a warrant and asked for further investigation. On Thursday the man was taken into court because a writ of habeas corpus had been filed, and the judge directed the man be charged or released by 3 P. M. The prosecuting attorney again refused to approve a warrant, stating that he wanted proof the suspect was in the area at the time of the fire. The supreme court approved the lower court's referral of the reasonableness of detention question to the jury (which found the time reasonable). The court emphasized that, "the record leaves no doubt that the officers in good faith were energetically endeavoring to discover the true facts and circumstances throughout the short period during which appellant was in custody."[71]

The court did not expressly state that the investigation was (or must be) for purposes of obtaining evidence to charge, although the facts made it clear the police were attempting to obtain evidence to satisfy the prosecutor. However, a more recent decision by the court suggests such a limitation. This is the case of *People v. Hamilton*,[72] which also happens to be the first state case adopting the *Mallory* sanction of exclusion of statements received during illegal detention.[73] The police investigated the murder of one Hirmiz, and questioned the decedent's wife, who had been found at the murder scene bound hand and foot. She contended that a stranger had entered the apartment and killed her husband, but upon further questioning the police detected some flaws in her story. Hamilton, a friend of the family, arrived on the scene shortly after the police, and for reasons not set forth he was arrested with Mrs. Hirmiz. These arrests occurred Friday morning, and Saturday morning Mrs. Hirmiz confessed that she and Hamilton

70. 302 Mich. 484, 5 N.W.2d 435 (1942).

71. *Id.* at 489, 5 N.W.2d at 437.

72. 359 Mich. 410, 102 N.W.2d 738 (1960).

73. The *Hamilton* case illustrates well that the appropriateness of the *Mallory* norm and of the *Mallory* sanction are two quite separate and distinct questions.

had done the killing. Using her confession, the police then questioned Hamilton, who finally gave a confession the following Monday evening.

Although some of the court's language suggests adoption of the *Mallory* norm as well as the *Mallory* sanction,[74] the primary concern of the court seems to be the fact that prior to the time of Hamilton's confession the police had sufficient evidence at hand for charging him with murder:

> *Hamilton's continued detention . . . was unlawful because* the delay was unnecessary, and unlawful because its manifest purpose was that of "sweating" a confession after *the officers were fully enabled to complain and arraign . . . .* Here the delay *(from and after, at least, the time of Mrs. Hirmiz' confession)* was "unnecessary" as a matter of law . . . . Hamilton should have been taken before a magistrate no later than Saturday afternoon, immediately following the confession of his co-defendant.[75]

The Wisconsin court has taken a similar approach. In *Peloquin v. Hibner*[76] the plaintiff was held while her co-suspects were apprehended and brought back to the county, where all could be questioned and their stories checked. The court noted the grounds for arrest were present, and then said that the two-day detention was proper.

> This was the earliest opportunity the sheriff had to obtain statements from the Peloquins and to check their statements with the information he had obtained up to that time relative to the bank robbery. The reasonableness or unreasonableness of the period of detention must be determined from the facts and circumstances in each case. There is no suggestion that the sheriff and the district attorney of Columbia county did not expedite their investigation following the examinations on Monday night, with due diligence and dispatch. *The defendants [police] and the district attorney were entitled to a reasonable time* on Tuesday, June 1st, as a matter of law, *to determine whether to make a formal complaint against the plaintiff or release her from custody.*[77]

The implication in *Peloquin* that in some cases where there are grounds to arrest it is necessary to obtain further evidence before

74. From time to time the court makes statements suggesting the Michigan rule is now the equivalent of the federal standard: "[T]he reasoning of *Mallory* . . . and *Upshaw* . . . should be inosculated with quoted sections 13 and 26 [the Michigan statutes requiring production before the magistrate "without unnecessary delay"] quite as firmly as if written therein." People v. Hamilton, 359 Mich. 410, 415-16, 102 N.W.2d 738, 741-42 (1960). "Said sections 13 and 26, and Rule 5(a) of the Federal rules of criminal procedure are quite alike and equally mandatory." *Id.* at 416, 102 N.W.2d at 742.

That the court did not really adopt the federal standard seems clear from the more recent case of People v. Harper, 113 N.W.2d 808 (Mich 1962).

75. People v. Hamilton, 359 Mich. 410, 416-17, 102 N.W.2d 738, 742 (1960). (Emphasis added.)

76. 231 Wis. 77, 285 N.W. 380 (1939).

77. *Id.* at 86-87, 285 N.W. at 385. (Emphasis added.)

charging, with reasonable detention for this purpose proper, is further supported by *State v. Francisco.*[78] In proceedings in juvenile court to determine the mental condition of a 17-year-old girl, she told of having sexual relations with her stepfather. Upon this evidence the stepfather was arrested, and was questioned in the district attorney's office for an hour prior to initial appearance. In response to the defendant's reliance on the *McNabb* case, the court said:

> Was the mere taking of defendant to the district attorney's office for questioning a violation of his constitutional rights? It would appear that *the district attorney had not made up his mind to prosecute at the time he sent for the defendant.* The intelligence of the girl was below normal. The district attorney had the duty of checking her story, and the method selected by him was not unreasonable.[79]

Thus, both states recognize a right of detention following a valid arrest where it is necessary to obtain additional evidence sufficient for charging. As to the length of the detention, no set time period applies to every case; a detention does not automatically become unreasonable because of the passage of two hours, ten hours, twenty-four hours or some other span of time.[80] The investigation must be carried on with "due diligence and dispatch,"[81] and if the police have made no progress after a time they may be obligated to release the suspect.[82] The nature of the crime is a factor, so that offenses usually requiring detailed investigation allow longer detention.[83]

3. *Challenge of Detention by Writ of Habeas Corpus*

The practice, described earlier, of judges postponing hearings based upon writs of habeas corpus and remanding the suspects into police custody would undoubtedly be labeled by many as highly improper. Indeed, this may be why there has been some disbelief that such a

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78. 257 Wis. 247, 43 N.W.2d 38 (1950).

79. *Id.* at 252, 43 N.W.2d at 40-41. (Emphasis added).

80. Geldon v. Finnegan, 213 Wis. 539, 252 N.W. 369 (1934). Rather, the circumstances of the particular case must be looked to. Peloquin v. Hibner, 231 Wis. 77, 285 N.W. 380 (1939).

In view of the above Wisconsin position, it is interesting to note that a movement in Wisconsin to adopt the Uniform Arrest Act detention provision, allowing 24 hours and 48 additional hours upon good cause shown to a judge, was defeated primarily because of the opposition of law enforcement officers, who viewed the flexible rule as more desirable.

81. Peloquin v. Hibner, *supra* note 80.

82. Leisure v. Hicks, 336 Mich. 148, 57 N.W.2d 473 (1953).

83. "The crime of arson, of which plaintiff was suspected, is generally one requiring detailed and sometimes prolonged investigation." Mooradian v. Davis, 302 Mich. 484, 488-89, 5 N.W.2d 435, 437 (1942).

practice exists at all.[84] A jurisdiction conforming to *Mallory* could hardly justify such procedures. But in states like Wisconsin and Michigan, where the appellate courts have recognized a right to detain suspects for investigation in given circumstances, it would seem to follow that there may be times when such a remand is quite appropriate.[85]

The writ of habeas corpus is intended to be available in order that authorities may be required to establish the legality of the detention of persons being held by them.[86] If there is a legal basis for the custody, then the person is not entitled to release. Consequently, a judge acting in accordance with the law on arrest, charging and detention discussed above might properly find that the police are legally detaining the suspect. He could remand the suspect into police custody if he found (a) that sufficient grounds for arrest exist, (b) that sufficient grounds for charging do not exist and (c) that the appropriate time for investigation has not expired.[87]

Assuming, then, that the judge at the hearing may have an alternative other than setting the suspect free if he cannot presently be charged, it still might be questioned whether it is appropriate for the judge to proceed to set a time limit on the further investigation. However, such power would seem a necessary consequence of the right to determine whether the time for in-custody investigation had yet ended. It is undoubtedly true that at the hearing on the writ the judge cannot possibly correctly predict the course which the continuing investigation will take, so that the time in the future at which it no longer would be proper to hold the suspect cannot be exactly determined. Yet, the setting of such a time is undoubtedly preferable to the alternative of limiting the hearing to the question of whether detention at the present time is lawful, for this would require and allow the suspect to petition for these writs continually until it was finally determined that the permissible time had run.

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84. If *habeas corpus* was brought, we believe that no court would permit custody without commital to be continued an instant because of the desirability of interrogation or the inadvisability of warning confederates. We know of no case which could be cited to bar the writ on such grounds. Memorandum by A.B.A. Committee on the Bill of Rights, 1944, reprinted in *Hearings* # 1, at 37-38.

85. The practice has come to the attention of the supreme court in both Michigan and Wisconsin, and neither court criticized it. Mooradian v. Davis, 302 Mich. 484, 5 N.W.2d 435 (1942); State v. Babich, 258 Wis. 290, 45 N.W.2d 660 (1951).

86. MICH. STAT. ANN. §§ 27.2250-.2270 (1938); WIS. STAT. ANN. § 292.01 (1958).

87. The practice in these states, then, if it is to be criticized, might best be criticized on the grounds that (1) defense counsel and judges have neglected to insure that at least the original arrest was legal, and (2) the need for further investigation is not as carefully considered as it should be, and is often in part based upon information received *ex parte* in the judge's chambers.

Still assuming a criminal justice system like that made possible by the law in Michigan and Wisconsin, it must follow that at a writ of habeas corpus hearing at which it has been determined that the time has not run, denial of bail may be warranted. The provisions for bail in the habeas corpus statutes are not inconsistent with this assertion,[88] nor are the general bail statutes.[89] Indeed, the release of a person on bail when the time for in-custody investigation had not expired would be improper.[90]

Yet, it is not clear that denial of bail will *always* be the proper course. Conceivably an arrest may sometimes be made on evidence insufficient for charging, but the mode of investigation most appropriate to determine whether to charge or release may not require the continued presence of the suspect. For example, it may become apparent that the charging decision can be made after tracing certain property found on the person of the suspect at the time of arrest. Under these circumstances, it might be contended that (a) the suspect should be released outright; (b) the suspect should be released on bail; or (c) the suspect should not be released until the investigation is completed. The first of these positions rests upon the notion that it should not be necessary for a person to pay money to gain his release when he cannot even be charged and his presence is not essential to the continuance of the investigation. The second stresses the fact that one reason behind allowing arrest of one who cannot be charged is the fear that the suspect will not later be amenable to arrest. The third position suggests that the insured continued availability of the suspect is a benefit not outweighed by the additional inconvenience to the suspect of having to remain in custody for a short period of investigation. No court decision dealing with this issue has been found.

B. Taking and Continuance of Custody of a Person Who Cannot Be Arrested for the Crime Suspected

Even if the arrest norms allow a taking of custody on evidence insufficient for charging, the police still may sometimes suspect persons of complicity in outstanding offenses but lack sufficient evidence to arrest for the offenses suspected. Should the police have any rights

88. The Michigan and Wisconsin habeas corpus statutes merely speak of bail "if the case be bailable." MICH. STAT. ANN. § 27.2274 (1938); WIS. STAT. ANN. § 292.23 (1958). Thus, it would appear that no right to bail is given which does not otherwise exist.

89. The general statutes on bail merely refer to cases where the person has been "charged" or where a "warrant issued." See MICH. STAT. ANN. § 28.888 (1938); WIS. STAT. ANN. § 954.034 (1958).

90. The Michigan court indicated that absolute release under such circumstances was not proper. Hammitt v. Straley, 338 Mich. 587, 61 N.W.2d 641 (1953).

to conduct an in-custody investigation under these circumstances? Should the police be entitled to detain the suspect briefly on grounds insufficient for arrest if the detention is not considered as, or recorded as an arrest? What rights should the police have to induce suspects to accompany them to the station for questioning? Is it ever proper for the police, solely because they desire to investigate the offense suspected, to arrest the suspect for another, minor offense or to take the suspect into custody for violation of the conditions of his parole or probation?

1. *Short Detention Not Considered an Arrest*

Any inquiry into the question of whether the police should ever be entitled to detain a suspect briefly without making an arrest must of necessity include consideration of the Uniform Arrest Act. The Act, proposed in 1942 by the Interstate Crime Commission, has been adopted in three states.[91] Section 2 of the Act provides:

> (1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going,
>
> (2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
>
> (3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.[92]

The above language describes two different situations in which officers supposedly might briefly detain a suspect without making an arrest. One is the momentary stopping on the street, usually denominated "field interrogation" by the police,[93] in order to make inquiries concerning the suspect's identity and business. The second is a brief detention at precinct headquarters not recorded as an arrest. Notwithstanding a lack of express authority for either practice in the jurisdictions observed, both occur with some regularity. Although the two procedures raise similar questions, they are best dealt with separately.

91. DEL. CODE ANN. tit. 11, § 1902 (1953); N.H. REV. STAT. ANN. § 594.2 (1955); R. I. GEN. LAWS ANN. tit. 12, ch. 7 (1957).

92. The Act is reprinted in its entirety in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-47 (1942).

93. See BRISTOW, FIELD INTERROGATION (1958).

a. "Field Interrogation"

It would seem apparent that the mere asking of questions, without the presence of actual restraint, can hardly be labeled as improper.[94] However, many instances of field interrogation seem subject to possible objection because the circumstances reasonably suggest to the suspect that failure to cooperate will result in actual restraint.[95] Thus, the precise question is whether brief field interrogation, accompanied with such restraint, can ever be proper when sufficient grounds do not exist for the making of an arrest.

A most distressing fact is that courts confronted with exactly this issue have seldom faced up to it squarely. In part this is due to the way in which field interrogation cases have reached the appellate courts. Either the suspect sues for false imprisonment,[96] in which case the officer will assert that an arrest was made in order to bring himself within the one generally recognized privilege category, or the suspect ultimately finds himself trying to keep out of evidence materials found in a frisk accompanying the interrogation, in which case the prosecution will argue that there has been a search incident to a lawful arrest.[97] In either case the legality of field interrogation is never determined.

One unfortunate result has been an oversimplified "single problem" conception of quite different situations. The reasoning employed has been as follows: requiring a suspect to delay his journey while questions are put to him constitutes a restraint, "any restraint of liberty is an arrest,"[98] therefore it follows that an officer cannot engage in such conduct unless the grounds for arrest are present.[99] This is

94. Note, *Arrest—Stopping and Questioning as an Arrest*, 37 MICH. L. REV. 311 (1938).

95. Custody is "an actual restraint of the person to be arrested," which occurs at the moment an individual is no longer a free agent to do as he pleases. . . . Often this is not easy to determine, as where an officer says to a pedestrian, "Just a minute, I want to ask you a few questions." Were a civilian to ask such a question there would certainly be no restraint, but what on their face are merely words of request take on color from the officer's uniform, badge, gun and demeanor.
Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L., C. & P.S. 402, 403 (1960).

96. I believe the relative dearth of authority in point can be explained by the fact that few litigants have ever seriously contended that it was illegal for an officer to stop and question a person unless he had "probable cause" for a formal arrest.
United States v. Bonanno, 180 F. Supp. 71, 78 (S.D.N.Y. 1960).

97. See 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. 386-87 (1960).

98. People v. Esposito, 118 Misc. 867, 872, 194 N.Y. Supp. 326, 332 (Ct. Spec. Sess. 1922).

99. The best illustration of this is *Esposito, supra* note 98. Other cases holding

clearly a non sequitur, as is the equally absurd proposition that the practice of stopping and questioning *must* be denominated an arrest in order to allow persons to bring suit for its abuse.[100] This is not to say that the law might not ultimately take the position that field interrogation is to be allowed only when there are grounds to arrest. But, such a result should not be reached upon the assumption that stopping and questioning *must* be called an arrest and *must* be dealt with as such.

Decisions made at different points in the criminal justice process vary in their impact upon the person being subjected to them. However, an overall view of the system allows the generalization that those decisions having more serious consequences for the individual require a greater degree of certainty that he is that person against whom the official power of the state should be used. Thus, actual conviction of a criminal offense, whereby the imposition of penal sanctions is made possible and the status of criminal is fully bestowed upon the defendant,[101] requires proof of guilt "beyond a reasonable doubt." Charging a person with a crime, a formal and public accusation of criminal conduct which requires the accused to defend himself at trial, is possible only when there is "probable cause" to believe the accused guilty. And, as has been discussed in more detail earlier, the arrest of a suspect, with its less serious implications, may sometimes be possible on even a lesser quantum of evidence. The probability of guilt profile of the system, under this analysis, would be that of a series of successively higher steps. The present inquiry, as related to this profile, is whether there should be a still lower step at an even earlier stage in the process—the decision to investigate.[102]

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there is no right to question: Arnold v. State, 255 App. Div. 422, 8 N.Y.S.2d 28 (1938); People v. Tinston, 6 Misc. 2d 485, 163 N.Y.S.2d 554 (City Magis. Ct. 1957); Shirey v. State, 321 P.2d 981 (Okla. Crim. 1958); Commonwealth v. Doe, 109 Pa. Sup. 187, 167 Atl. 241 (1933); Travis v. Bacherig, 7 Tenn. App. 638 (1928).

100. By a literal application of the narrower definition, 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. Note, 100 U. PA. L. REV. 1182, 1186 (1952).

101. See Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Criminal Justice*, 69 YALE L.J. 543, 590-92 (1960), on status degradation.

102. The same question might be asked concerning some other investigative devices. The police must use active detection methods against prostitution, homosexuality, sale of narcotics and the like. It was observed that some judges were throwing out cases for supposed "entrapment" or "enticement," not because entrapment had occurred in the strict legal sense, but because it became apparent that the police were not being sufficiently selective in deciding whom to approach.

The step profile suggests that the probability of guilt required to subject a person to official action is directly correlated to the degree of interference with individual freedom contemplated by the action. If this is so, the propriety of field interrogation of persons not subject to arrest might be determined by resort to analysis of the consequences flowing from such investigation as compared to those following actual arrest.[103] Does it make any difference that the field interrogation typically results in a much shorter period of detention than actual arrest?[104] Does it make any difference that the suspect will not have a recorded arrest, but that at most a field interrogation report bearing his name will be filed?[104a] Does it make any difference that the suspect will undoubtedly not consider himself under arrest,[105] and consequently could in all honesty answer in the negative if later asked whether he had ever been arrested?[106] Is being subjected to field interrogation as damaging to reputation as actual arrest? These questions have not been adequately explored, even by the courts which have upheld the right of the police to stop and question suspects.[107]

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103. This approach may be equally apropos for determining whether the practice is contrary to the constitutional prohibition against "unreasonable" seizures. For a contrary view, see Foote, *supra* note 95, and Foote, *Safeguards in the Law of Arrest*, 52 Nw. U.L. REV. 16, 36-37 (1957). The issue was presented to the Supreme Court in Rios v. United States, 364 U.S. 253 (1960) and Henry v. United States, 361 U.S. 98 (1959), but the cases were decided upon other grounds.

104. The stopping and questioning of a person on the street usually takes only a few minutes, while a person taken to the station is detained at least a matter of hours and perhaps substantially longer. The distinction does not hold true in all cases, however. Sometimes persons who have been arrested are released almost immediately, and a person detained on the street may be kept from going his way for a substantial period of time if the investigating officer is awaiting the arrival of witnesses or a report from headquarters.

104a. It might also be relevant to inquire into permanency of arrest records and field interrogation records in cases not ultimately resulting in further action. Some states have legislated on the subject, *e.g.*, MICH. STAT. ANN. § 28 (1959), requiring the return of arrest records where the person arrested was not brought to trial, or if brought to trial was acquitted; N.Y. CODE CRIM. PROC. § 944 (1961); OHIO REV. CODE § 5149.05 (1961); ILL. REV. STAT., c.38, §5 (1961), all requiring return of photographs, fingerprints, and other records of identification under certain circumstances. Query the application of such statutes to field interrogation reports.

For a more complete discussion of these statutes, including similar provisions found in England and Australia, see 22 CALIF. ASS'Y INTERIM COMM. RPTS. 1959-61, no. 1, *Report of Ass'y Interim Comm. on Crim. Proc.* 58-71 (1961).

105. "A layman, if asked if he had even [*sic*] been arrested, would not be likely to describe situations where he had been stopped by a police officer . . . ." United States v. Bonanno, 180 F. Supp. 71, 78 (S.D.N.Y. 1960).

106. However, employment forms may also inquire as to non-arrest police detention. See note 124 *infra*.

107. The cases cited in Remington, *supra* note 97, at 391 nn.30 & 31.

Of course, were a new "step" recognized in the process, it would be necessary to articulate and define the probability of guilt required. If something less than "reasonable grounds" or "reasonable cause" to believe is needed, precisely what quantum of evidence is enough? The Uniform Arrest Act proposes "reasonable grounds to suspect," which on one occasion has been interpreted as synonymous with the arrest norm.[108] Difficulty in developing a workable test can be anticipated, but it has quite properly been observed that "the obvious difficulty of the task does not justify the easy alternative of ignoring the issue."[109]

b. Brief Unrecorded Detention at the Station

Once again the basic assumption is that we are dealing with a situation in which grounds for actual arrest are lacking. If there are grounds for arrest, then it would seem clear that the suspect might be detained in a manner which does not include all the attributes of the usual arrest, as long as he is not denied any of the protections available to arrestees. However, admittedly some courts would probably have difficulty with such a situation, as notwithstanding the presence of grounds for arrest and the actual detention, a lack of booking, for example, might influence a finding of illegality. Yet, if the police refrain from formal arrest when an arrest could legally be made in order to allow the suspect to exculpate himself before his possible responsibility for the offense can be publicized, then the police have acted for the suspect's benefit and should not be charged with illegality.[110]

Putting that situation aside, the inquiry here is whether the police might ever briefly detain a suspect at headquarters when the suspect cannot be arrested, the basis of detention being that the imposition on the suspect is less than an actual, formal arrest. This question has received even less consideration from the courts than that concerning field interrogation. As in the case of on-the-street questioning, if the practice ever reaches a court of law, either in a false imprisonment

108. In De Salvatore v. State, 163 A.2d 244, 249 (Del. 1960) the court said that any attempt to draw a distinction between the "reasonable grounds to believe" needed for arrest and the "reasonable grounds to suspect" test of the Act would be "a semantic quibble."

109. Remington, *supra* note 97, at 392.

110. This is not just an abstract proposition. Consider the case of a man suspected of a sexual assault against a minor. The child gives the name of a man living in the same building. Her story seems plausible to the police for the man had access to the child. Clearly, the police at that point would have a sufficiency of evidence to arrest the man formally and bring him before a magistrate for arraignment. Clearly also, the newspapers would have the right to state that the man had been arrested for a sexual attack. His friends, his business associates, his neighbors would be made aware of the charge by the publicity and the police activity and forever after he would have a record for having been arrested for a sexual crime.
United States v. Bonanno, 180 F. Supp. 71, 82 (S.D.N.Y. 1960).

action or an attempt to suppress evidence obtained incident to the detention, the usual approach is to view the police action as an arrest and then inquire whether grounds for the arrest were present.[111]

No case has reached the appellate courts under the Uniform Arrest Act in which the two-hour detention was on grounds insufficient for arrest.[112] Indeed, it is far from clear that the Uniform Act contemplates detention at the station on grounds insufficient for arrest. It must be remembered that the Act does not allow at-the-station detention on "reasonable ground to suspect," but only in those cases where in addition to these grounds (which were the basis for the field interrogation) the suspect has failed to identify himself or explain his actions satisfactorily. An arrest in such a case might well be legal without resort to the language of the Act. While refusal to answer a question by a police officer does not in itself furnish grounds for arrest,[113] and while some courts have asserted that "no adverse inference may be drawn" from a refusal to answer,[114] the majority view seems to be that it is appropriate to consider the refusal along with other

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111. And, as with field interrogation, there has been a tendency to either say that if the detention is not an arrest it is legal or that the detention *must* be considered an arrest in order to allow suit for its abuse. The former approach is found in United States v. Bonanno, *supra* note 110, at 77, wherein it is said, "It is axiomatic that before a finding can be made that there has been an *illegal* arrest, a showing must be made that there has been an arrest." However, Judge Kaufman later observes that to rely solely upon the fact no arrest was made, in the common meaning of the word, would be to fall into a "semantic trap." *Id.* at 78.

And, the other approach referred to above appears in Foote, *supra* note 95, at 404, where *Bonanno* is criticized:

> It is apparent, however, that such a construction is absurd, for inasmuch as it makes the officer's intent the controlling factor, it would substitute the policeman for the court and law as a protector of liberty. Seizures or arrests without probable cause would be illegal only if the officer ultimately entered a formal charge of crime on insufficient evidence. . . .

112. In De Salvatore v. State, 163 A.2d 244 (Del. 1960), the only case found, it seems clear that there were adequate grounds for arrest notwithstanding the reliance by the police on the language of the Act.

113. State v. Gibbs, 252 Wis. 227, 31 N.W.2d 143 (1948).

114. Poulas v. United States, 95 F.2d 412, 413 (9th Cir. 1938).

Some courts apparently support the right of police to stop and question on the supposition that refusal to answer cannot in any way adversely affect the suspect. For example, in United States v. Bonanno, 180 F. Supp. 71, 86 n.21 (1960), the court said:

> It must be borne in mind that the defendants in this case had a constitutional right to remain silent when questioned by police or other investigatory agents or bodies, but they chose not to do so. Had they chosen such a course, they would have suffered no penalty.

See also the dicta in Green v. United States, 259 F.2d 180 (D.C. Cir. 1958); Brooks v. United States, 159 A.2d 876 (D.C. Munic. Ct. 1960).

evidence.[115] Interestingly enough, the few courts that have recently been asserting a police right to detain for questioning were those faced with the task of dealing with the exclusionary effects of the *Mallory* rule.[116]

Notwithstanding this lack of attention to the problem, the observed practice makes it clear that brief at-the-station detentions, not regarded or reported as arrests, sometimes occur. The officer may bring the suspect to the station, absent grounds for arrest, because he feels that his suspicions can be resolved by a short investigation. It may be contemplated that the station officer or a detective will question the suspect briefly, that a quick records check or analysis of physical evidence can thus be accomplished or that the suspect will be viewed by a witness known to be at hand. The validity of any such practice would seem to depend in part upon whether the effects of such a detention are sufficiently less severe than those of an actual arrest.

One difference, at least under the Uniform Arrest Act approach, would be that the detention would be for a limited period, no longer than a few hours, while police custody after an actual arrest might continue for a day or two when evidence sufficient for charging is being sought. To some, however, this would not be considered a real difference, the reasoning being that all restraints, regardless of their length, must initially be justified by the same quantum of evidence.[117] A convincing argument can be made that even brief detention at the station, unlike on-the-street questioning, is substantially like custody after actual arrest, as it makes possible similar investigative methods —detailed search, questioning of unreasonable intensity, and interrogation behind closed doors.[118] The contrary position, that even brief interrogation is a significantly lesser imposition than actual arrest, might be more convincing if it were clear suspects are informed at the outset that they will be released within the hour if additional evidence justifying arrest is not then at hand.

The fact that the detention is not called an arrest does not of itself

115. Dickerson v. United States, 120 A.2d 588 (D.C. Munic. Ct. 1956); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955); People v. Romero, 156 Cal. App. 2d 48, 318 P.2d 835 (2d Dist. Ct. 1957); Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (2d Dist. Ct. 1908); Baines v. Brady, 122 Cal. App. Supp. 957, 265 P.2d 194 (Super. Ct. 1953); Harrer v. Montgomery Ward & Co., 124 Mont. 295, 221 P.2d 428 (1950).

116. United States v. Vita, 294 F.2d 524 (2d Cir. 1961); United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960). Since *Mallory* says there is no right to arrest one who cannot be charged, this attempt to find a right to "detain" on less evidence might be said to really be a move toward a result like that of the Michigan and Wisconsin courts, although slightly different terminology is used.

117. Foote, *supra* note 95, at 404; Foote, *supra* note 103, at 37-38.

118. This argument is well stated in Foote, *supra* note 103, at 38.

seem to be an actual basis for distinction. This is conceded by both proponents[119] and opponents[120] of non-arrest detention. However, the fact that the detention is not recorded as an arrest may be of some importance. Again some would argue that this fact is "irrelevant,"[121] but it seems clear that a detention which results in the person detained obtaining an arrest record is more severe than one which does not.[121a] Of course, whether this distinction, along with any others, is sufficient to justify the practice is another matter.

It also may be important whether the suspect regards the detention as an arrest. Judge Kaufman, in *United States v. Bonanno*,[122] was of the opinion that "a layman, if asked if he had even [*sic*] been arrested, would not be likely to describe . . . even situations where his questioning had been continued at a police station. . . ."[123] It is not entirely clear that this is so. As with field interrogation, it may be of considerable importance whether the person investigated will still be able to respond in the negative when asked whether he has ever been arrested. However, if questionnaires should be revised so as to inquire whether the person has been "arrested or detained," the distinction may lose its importance.[124]

Finally, it may be of considerable significance how compulsory detention at a police station affects one's reputation. It has been suggested that the stigma is equivalent to that of an actual arrest:

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119. Thus, an immediate problem of definition arises. Joined to that problem, is the danger, that the defining process will cast an air of deceptive simplicity over the broader task actually faced by the Court. One must never forget that this is a decision on the rights of individuals and the duties of government, and not an abstract exercise in definition.
United States v. Bonanno, 180 F. Supp. 71, 77 (S.D.N.Y. 1960).

120. Foote, *supra* note 95, at 403.

121. Foote, *supra* note 95, at 403; Foote, *supra* note 103, at 37-38.

121a. However, here again it would be important to consider the permanency of arrest records. See note 104 *supra*.

122. 180 F. Supp. 71 (S.D.N.Y. 1960).

123. *Id.* at 78.

124. The Application for Federal Employment Standard Form 57 (Revised May 1954) asked: Have you ever been arrested, charged, or held by Federal, State, or other law-enforcement authorities for any violation of any Federal law, State law, county or municipal law, regulation or ordinance?
The newer form 57 (revised March 1961) inquires: Have you ever been arrested, taken into custody, held for investigation or questioning or charged by any law enforcement authority?

In 22 CALIF. ASS'Y INTERIM COMM. RPTS. 1959-61, no. 1, *Report on Ass'y Interim Comm. on Crim. Proc.* 57 (1961), it is noted that the employment application form used by the state personnel board asks: "Have you as a juvenile or adult ever been detained by law enforcement officers, or arrested, or convicted of any offense other than traffic violations?" The committee recommended that it be made unlawful for any employment application form used by the state to ask whether the applicant has ever been detained or arrested.

> The fact remains that . . . the [Uniform Arrest] Act does not wholly eliminate the ignominy which results from a conventional arrest and charge of crime. Inferences are bound to be drawn against anyone who is taken to a police station against his will to be investigated, and the attempt to minimize this stigma is more apparent than real.[125]

This argument carries considerable weight, and it is here that the at-the-station questioning may clearly be of greater consequence than field interrogation. A conversation with a policeman on a street corner is not as likely to be mistaken by the public as an arrest as is an actual taking of the suspect to the station for further questioning.

Assuming for the moment that such a detention might be considered a lesser imposition on the suspect, there may also be an inherent danger in allowing unrecorded detention. While immediate booking may in one sense operate to the disadvantage of the suspect—giving him an arrest record, it nonetheless operates to his advantage in that the detention becomes visible and thus less subject to abuse. Also, if certain rights are afforded the suspect at the time of booking,[125a] it would seem improper to deny such rights to the suspect held without booking. To alleviate these difficulties, a distinctive kind of booking might be employed in these cases, but it would then be even less certain that such a detention is less severe than a regular arrest.[125b]

By way of conclusion, it should be pointed out that beyond the kind of analysis suggested above there exist issues of administrative feasibility. The point is that a court or legislature might recognize a right of field interrogation of those not subject to arrest, using the lesser imposition analysis, but yet might for good reason decline to establish any at-the-station detention other than arrest, notwithstanding a conclusion that a nonarrest detention would be less severe. It is true that problems of definition should not dissuade us from attempting to resolve important issues.[126] However, it may well be that any attempt to establish three distinct probability of guilt standards for application by the police and interpretation by the courts would result in detriments to the system outweighing the supposed benefits from separate

125. Foote, *supra* note 103, at 37.

125a. In California a statute allowing a person to use the telephone "immediately after he is booked" has been recently amended to read "immediately after he is booked, and, except where physically impossible, no later than three hours after his arrest." CALIF. PENAL CODE § 851.5 (Supp. 1961).

125b. We have previously noted that "suspicion of" booking is employed in cases where further investigation is contemplated. Some police justified this booking on the added ground that it had less of an impact on the suspect than a booking "on the nose." For a similar view by a California district attorney, see BARRETT, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 27-28 n. 73 (1962).

126. Remington, *supra* note 97, at 392.

recognition of three distinct law enforcement problems. In short, still viewing the profile of the system as a series of steps it may be administratively necessary to limit the number of expressly recognized steps in the process.

2. *"Voluntary" Custody*

Closely related to the practice discussed above is the so-called "voluntary" appearance at the police station. From time to time the police, suspecting a person of an offense but not having grounds for arrest, "invite" or "request" the person to come to the police station in order to facilitate further investigation. It is a fair statement that such a situation was not frequently observed, especially as compared with other police practices grounded on the supposed voluntary actions of the suspect. However, the fact that the alleged voluntary appearance has received little attention from the law would seem to warrant consideration of the practice, even though it is true that the problem is a minor one compared to the common practice of searching because of supposed consent by the suspect.[127]

Of course, if a person suspected of criminal conduct actually does voluntarily agree to accompany an officer to the station in order to exculpate himself, then the police can hardly be criticized for taking advantage of this opportunity to advance their investigation. Indeed, the police have sometimes been criticized for not employing this less offensive device in checking out suspects. The only serious question arising out of this practice, therefore, is that of determining when these appearances are in fact voluntary.

Of the sparse legal treatment of this issue, the Wisconsin decision of *Gunderson v. Struebing*[128] is undoubtedly a leading case. A police officer was informed by a merchant that a pair of gloves were taken from his store while three customers were there. The officer approached one of three, and said, "I would like to see you down to the station a minute." The suspect accompanied the officer to the station, at which time the officer explained in detail the nature of his suspicions, and the suspect then consented to a search of his person and left when the gloves were not found. In holding that the trial court erred in finding for the suspect-plaintiff as a matter of law, the court said:

> There was sufficient evidence to support an inference that . . . there was no array of force exhibited by the officer such as would warrant, necessarily, the plaintiff in believing that if he did not obey the invitation to go to the police station he would be arrested or restrained of his liberty. . . .

127. Because the police frequently attempt to justify searches on the basis of supposed consent, it appears the courts are becoming more strict. See People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960).

128. 125 Wis. 173, 104 N.W. 149 (1905).

> If the officer, in the discharge of his duty, in good faith invited plaintiff to the police station for the purpose of interrogating him and investigating the charge, with a view of deciding upon future action, and without any intention at that time of putting plaintiff under arrest or restraint, no case was made by plaintiff. . . .[129]

Generally, the test set forth by the Wisconsin court seems sound. The one objection which could be made is that something less than "an array of force" may be sufficient to warrant the suspect in believing he has no choice but to accompany the officer to the station. The officer will have no occasion to threaten or use force unless the suspect shows some signs of resistance. And, by analogy to the search cases, the suspect should not be required to put up actual resistance in order to later receive recognition of the fact that his rights have been violated.[130]

Indeed, the difficult cases are not those in which any degree of force was exhibited by the officer. Rather, the situations observed in practice are those in which a person known to be a police officer speaks to the suspect in a manner which could be interpreted as either a request or a command. The statement made in *Gunderson*—"I would like to see you down to the station a minute"—could be either, depending upon how it was said. In such a situation, whether the suspect has actually agreed to go to the station because he wants the opportunity to clear himself or whether he has accompanied the officer because he reasonably believes he has no choice is not an easy determination.

The officer who desires to protect himself from possible liability for what he now views as a request, and who at the same time desires to treat the suspect with fairness, might well be advised to fully warn the suspect of the exact circumstances. That is, the suspect should be told that under the circumstances he cannot be arrested,[131] that he is under no obligation to go to the station and that the investigation at the station may either clear him or provide evidence justifying his continued detention. An absolute requirement of such a warning would not be inconsistent with developments in the law in other areas where the question of the voluntary nature of a criminal suspect's actions has come into question. Whether a person from whom a statement has been received was warned of his rights beforehand has always been an important factor to be considered in determining the trustworthiness of the confession.[132] However, more recent decisions have suggested

129. *Id.* at 176-77, 104 N.W. at 150.

130. Stroud v. Commonwealth, 295 Ky. 694, 175 S.W.2d 368 (1943); Dade v. State, 188 Okla. 677, 112 P.2d 1102 (1941); State v. Warfield, 184 Wis. 56, 198 N.W. 854 (1924).

131. That is, assuming this is so. Obtaining a voluntary appearance has been recommended even when the officer has grounds for arrest. PERKINS, ELEMENTS OF POLICE SCIENCE 302 (1942).

that the failure to warn the suspect might in itself render the statement inadmissible.[133] Likewise, while earlier cases have found the fact of warning significant in finding a search to be with consent, there is now evidence of a move toward requiring such a warning before the evidence can be found admissible.[134] The only conceivable objection to requiring such a warning would seem to be the fear that having to prove the warning would merely inject a side issue into the trial of a criminal case.[135]

3. *Arrest for Another Offense*

There is yet another way in which custody of a suspect may be obtained notwithstanding the lack of sufficient grounds to make an arrest for the offense suspected. That is by making an arrest for another lesser offense committed by the suspect. With the arrest presumably validated by the grounds for arrest on the other offense, the suspected offense can be investigated during the period the suspect is awaiting trial on the other offense or even while he is serving out a short sentence for this lesser offense.

Of course, if there are not even sufficient grounds for arrest on the lesser offense, then the practice is obviously illegal. Such instances were occasionally observed. However, the more frequent occurrence, and that raising more difficult issues, is the arrest for a lesser offense on sufficient evidence but motivated by the desire to investigate another, more serious crime.

Often the suspicious conduct of the person which creates the desire for investigation is itself a violation of the law. Sometimes it appears that by the adoption of certain provisions, the legislatures have intended to give the police power to arrest for a minor offense such as vagrancy or disorderly conduct when there is general suspicion relat-

132. See Payne v. Arkansas, 356 U.S. 560 (1958), where the failure to warn the suspect he could remain silent along with other factors resulted in the confession being barred, and Crooker v. California, 357 U.S. 433 (1958) and Ashdown v. Utah, 357 U.S. 426 (1958), where the giving of such a warning was a factor considered by the court in upholding the admissibility of the confession.

133. *E.g.*, "A confession is inadmissible unless accused was advised of his rights under the law and it is shown the confession was made voluntarily." State v. Seward, 163 Kan. 136, 144, 181 P.2d 478, 484 (1947) (dicta).

134. *E.g.*, People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960).

135. Such an objection has been voiced with respect to the proposal to require warning before confessions are received. Statement of Judge Holtzoff, *Hearings* #1, at 8.

A similar problem can arise as to the so-called "voluntary" custody. See United States v. Vita, 294 F.2d 524 (2d Cir. 1961), where the detention is upheld on the basis that it was voluntary. The opinion relates that there was a substantial difference in the testimony of the defendant and the F.B.I. agents as to what was said before the defendant accompanied them to headquarters.

ing to other criminal conduct.[136] Thus, the statutes cover one "found loitering without visible means of support"[137] or "found in or loitering near any structure, vehicle or private grounds . . . without the con-

136. "The underlying purpose [of the vagrancy laws] is to relieve the police of the necessity of proving that criminals have committed or are planning to commit specific crimes." N.Y. Law Revision Comm'n Report 591 (1935). The police stressed this same point in testimony to the Congress prior to congressional revision of the District of Columbia vagrancy provision. H.R. REP. No. 1248, 77th Cong., 1st Sess. 1 (1941).

Also interesting on this point of legislative cognizance of the use of these provisions to investigate and arrest suspicious persons is the California experience. A modern disorderly conduct statute was drafted eliminating anything comparable to the then existing vagrancy provisions defining as a vagrant "every person who roams about from place to place without any lawful business . . ." and "every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business. . . ." CAL. PEN. CODE § 647 (Deering 1949). Governor Brown vetoed the bill, giving the following explanation:

> The bill proposed to repeal subdivisions 3 and 6 [those quoted above] 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.

The draftsman then suggested an amended bill which would include in the definition of disorderly persons one "Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do."

See Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557-73, 562 n.38, 568-69, 569 n. 67, 571 n.73 (1960).

This language with the qualifying phrase "if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification," was adopted. CALIF. PENAL CODE § 647 (Supp. 1961).

How a legislature might be considering procedural problems when drafting such substantive legislation is also demonstrated by the comments to the Model Penal Code provision on "suspicious loitering":

> The proposals here made to penalize what might be called "suspicious loitering," are all that would be left in the law of that ancient protean offense designated "vagrancy," if indeed even this much should be retained in a code of substantive penal law. The reasons for doubt on that score are that a statute which makes it a penal offense for a person to fail to identify himself and give an exculpatory account of his presence is in effect an extension of the law of arrest, and trenches on the privilege against self-incrimination. It authorizes arrest of persons who have not given reasonable ground for believing that they are engaged in or have committed offenses. Alternatively, it can be regarded as a legislative determination that in "suspicious" circumstances, failure to respond to police inquiries supplies reasonable ground. In either view, extension of the law of arrest might be regarded as a matter for a code of procedure rather than an end to be achieved indirectly by creating a substantive offense of failure to respond to the police.

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

137. KAN. GEN. STAT. § 21-2409 (1949).

sent of the owner and . . . unable to account for his presence."[138] Where state legislation is lacking, which is unusual,[139] such suspicious conduct may be covered by local ordinances.[140]

Clearly a number of these provisions are of doubtful constitutionality. Defining the offense in terms of reputation is highly questionable,[141] as is defining it in terms of association.[142] Even the provisions concerning failure to account may have to be narrowly construed in order to be held constitutional.[143] Yet most of these statutes and ordinances have not been subjected to serious constitutional challenge. And, because of the attitude that these statutes provide a necessary basis for the detention and investigation of suspicious characters, no attempt is made at reform of these provisions by the legislatures.[144] The police do not attempt to fully enforce these provisions, but instead limit their application to those persons they in fact desire to investigate. Other minor offenses, not in themselves based upon suspicious conduct but yet not normally enforced, are sometimes employed for the same purpose.[145]

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138. WIS. STAT. ANN. § 947.02 (1958).

139. See 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); Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960); Comment, *Who Is a Vagrant in California*, 23 CALIF. L. REV. 506 (1935); Comment, *Police Controls over Citizen Use of the Public Streets*, 49 J. CRIM. L., C. & P.S. 562 (1959); Comment, *The Constitutionality of Loitering Ordinances*, 6 ST. LOUIS U.L.J. 247 (1960); Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950).

140. *E.g.*, CITY OF DETROIT COMP. ORDINANCES ch. 223, § 1 (1954).

141. People v. Licavoli, 264 Mich. 643, 250 N.W. 520 (1933). See generally Lacey, *supra* note 139.

142. People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (1934); Hechinger v. City of Maysville, 22 Ky. L. Rep. 486, 57 S.W. 619 (Ct. App. 1900); *Ex parte* Smith, 135 Mo. 223, 36 S.W. 628 (1896); see Annot., 92 A.L.R. 1228, 1230 (1934).

143. A Denver ordinance provided that one "who is found abroad at late or unusual hours of the night without any visible or lawful business" may be required to give "a satisfactory account of himself" or be deemed a vagrant. Interpreting the ordinance in such a way as to be consistent with constitutional rights, the Supreme Court of Colorado held that it did not apply to a person "conducting himself in such manner as not to give reasonable grounds for belief that his purpose . . . is an unlawful one. . . ." Dominguez v. Denver, 363 P.2d 661, 665 (Colo. 1961). The phrase "without a lawful business," according to the court, means "that his conduct or the circumstances of his presence constitute an offense or the suggestion of an intent to commit an offense." (*Ibid.*)

144. For the interesting California experience, see note 136 *supra*.

145. There are a host of criminal statutes which do not receive full enforcement. See LaFave, *The Police and Nonenforcement of the Law—Part I*, 1962 WIS. L. REV. 104, *Part II*, *id.* at 179.

If the propriety of police conduct in the kind of case just described were to be questioned, it might be asked: Is it proper for the police to arrest for a minor offense in order to conduct an in-custody investigation concerning a more serious offense when there is not sufficient evidence to arrest for the more serious crime and when, absent the desire for investigation, no arrest would have been made? This kind of question has seldom reached the appellate courts.

An exception is a California case in which the testimony of the arresting officers frankly revealed that the vagrant would *not* have been arrested *except* for the desire to investigate. Said the court:

> Whether this is an entirely commendable attitude towards appellant's class of misdemeanants we need not stop to consider, but we think the admitted fact that the appellant would not have been arrested if he had confined himself to vagrancy did not render his arrest for that offense illegal.[146]

In sharp contrast is the following attitude of an English court:

> It seems to me to be an abuse of the process of the criminal law to use the purely formal charge of a trifling offense upon which there is no real intention to proceed, as a cover for putting the person charged under arrest, and obtaining from that person incriminating statements, not in relation to the charge laid . . . but in relation to a more serious and altogether different offense. . . .[147]

In support of the practice, it might be said that the substantive offense was probably adopted by the legislature for exactly such a purpose.[148] While the commentators are not in agreement on the

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146. People v. Craig, 152 Cal. 42, 47, 91 Pac. 997, 1000 (1907).

147. Rex v. Dick, [1947] Ont. 105, 695, 2 D.L.R. 213, 225, quoted in Culombe v. Connecticut, 367 U.S. 568 (1961). In *Dick* the judge used his discretionary power to exclude from evidence the statements made by the prisoner who had been charged with vagrancy, cautioned concerning that offense (or not at all) and then questioned with the purpose of eliciting information about the murder of which she was suspected.

148. See note 136 *supra*. Probably best suited to this purpose, however, is not the usual vagrancy statute, but provisions like that recommended but not adopted in Wisconsin (declaring as a vagrant "a person who loiters on the streets, whose actions give rise to suspicion of wrongdoing and who is unable to give a satisfactory account of himself") or like that found in the Model Penal Code ("A person who loiters or wanders without apparent reason or business in a place or manner not usual for law-abiding individuals and under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes.") 5 Wis. Legis. Council, Judiciary Comm. Report on Criminal Code 210 (1953); MODEL PENAL CODE § 250.12 (Tent. Draft No. 13, 1961).

However, the most common judicial explanation of vagrancy's place in a penal code is that it is used in cases of suspected future criminality, rather than past criminality. Yet many of the appellate cases disclose that the latter purpose was the real reason for the arrest. See Foote, *supra* note 139, at 625, 628-29.

legitimacy of such a purpose,[149] probably the most valid criticism made is that questioning the appropriateness of adopting substantive provisions to solve procedural problems. One writer on the subject says:

> If it is necessary to . . . legalize arrests for mere suspicion, then the grave policy and constitutional problems posed by such suggestions should be faced. If present restrictions on the laws of attempts or arrest place too onerous a burden upon the police because of the nature of modern crime, then such propositions should be discussed and resolved on their merits, as, for example, the proposals in the Uniform Arrest Act.[150]

In short, the issue is whether these statutes and ordinances are the most appropriate way of dealing with the suspicious person problem, considering all the alternatives available.[151]

Of course, in those cases in which the police do not make an arrest for vagrancy or disorderly conduct or under some other suspicious conduct type statute, but for some other lesser offense which does not receive full enforcement, the problem takes on a slightly different complexion. Here the complaint is not against the form of the statute itself, as it does not proscribe suspicious conduct nor was it likely passed for the purpose of aiding the police in this fashion. The fact that a given statute might be used for this purpose does not seem a persuasive basis for repeal of the provision, any more than would the

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149. *E.g.*, compare: "Arrest of a person who is not known to have committed a crime simply to discover whether he might possibly have done so someplace . . . is clearly unjustifiable." Comment, 23 CALIF. L. REV. 506 (1935), with:

> If a crime is specified for which the officer has power to arrest on reasonable suspicion, the mere fact that the person arrested is subsequently charged with a different crime does not make the arrest wrongful, for *non constat* that the officer did not reasonably believe that the stated crime had been committed when he made the arrest . . . . So it seems that an otherwise valid arrest on a minor charge is not rendered illegal by the fact that the real or principal motive of the police is to prevent the suspect's escaping from justice on some major charge which they are preparing against him . . . . This means that there is no legal objection to the practice of making a "holding charge," provided of course that the holding charge is a genuine one and that it operates to justify the detention.

Williams, *Requisites of a Valid Arrest*, [1954] CRIM. L. REV. (Eng.) 6, 17.

150. Foote, *supra* note 139, at 649. A similar position is taken in Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950).

151. The various alternatives are set forth in the Model Penal Code comments, and the difficulties of each of the alternatives are also discussed there. In brief, the alternatives are (1) making the suspicions a criminal offense; (2) making suspicions the basis for police inquiry to which the actor must respond (the Code position); (3) making suspicions the basis for a brief detention period (the Uniform Arrest Act position); (4) allowing the police to order suspicious persons to "move on"; or (5) allow the police to merely make inquiries, with a view to having the person's identity established if it is later learned an offense has been committed. MODEL PENAL CODE § 250.12, comments (Tent. Draft No. 13, 1961).

possibility that the statute is susceptible to selective enforcement.[152] If the practice is to be controlled, it would mean that the motive of the officer making the arrest would have to be determined, which usually will not be an easy task.

4. *Arrest for Probation or Parole Violation*

A somewhat similar device which has been used to justify the arrest of a person suspected of an offense is the "probation hold" or the "parolee hold." Although it can be used only against suspects having either probationer or parolee status, it sometimes serves as a basis for arrest when the police do not have sufficient evidence to make an arrest for the new offense to be investigated. The "hold" is merely another kind of booking, and indicates that the person in custody is being detained for the probation or parole authorities.

The exact legal status of these "holds" is not clear. This is so because the law on the rights, duties and privileges of probationers and parolees is clouded with ambiguity. Statutes seldom deal specifically with these problems, though authority for the "hold" might be found in legislation declaring that parolees and probationers remain in the "legal custody" of the state authorities.[153] Case law has not developed for the simple reason that the tenuous position of the probationer or parolee makes him hesitant to attempt to establish the fact of police illegality.

Yet, even assuming that a "hold" may be properly employed, it would nonetheless seem unlikely that it may be used for purposes other than those directly relating to the determination of the question of revocation. For this reason, the basic issue involved is not unlike that discussed with regard to arrest for a lesser offense for purposes of investigation. Is the use of the "hold" proper, even assuming it is otherwise legal, when it is employed for the sole reason of allowing the police to take custody in order to investigate another offense? While it might be said that this issue can be answered in much the same way as in the vagrancy arrest situation, the situation here is admittedly more complex. Here the basis for the arrest and the motives of the officer are not completely separable, as it might well be

152. On the fallacy of arguing for repeal of a provision (or for exclusion from a proposed code) because of the possibility of selective enforcement, see Remington and Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 493-94. For a criticism of this view, see Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 911-12 (1962).

153. In Michigan it is expressly stated that a person on parole is in the legal custody of the commission, MICH. STAT. ANN. § 28.2308(38) (1954), but no similar statutory language as to probationers has been found. In Wisconsin both probationers and parolees remain in the legal custody of the department of public welfare. WIS. STAT. ANN. §§ 57.02, .06 (1957).

contended that investigation of the new offense suspected is directly relevant to the determination of the revocation question.

C. Continued Custody of a Person Who Can Be Charged

If there is sufficient evidence available to allow the prosecutor to charge the suspect with an offense, then obviously further detention to enable charging is not necessary. However, if invocation of the process against this person is to be successful it will later be necessary to establish his guilt "beyond a reasonable doubt." Some would argue that further detention of the person who can be charged is necessary in order to allow for the obtaining of the additional evidence required.

If the suspect can be charged, there may also be reasons for desiring in-custody investigation unrelated to the gathering of additional evidence on the commission of this offense by this offender. In the course of investigating the principal offense, the police may have come to suspect that the offender is also responsible for other offenses as well, and may now desire to conduct further inquiries in this regard. Or, the nature of the suspect's offense may suggest either that he acted with accomplices or that he of necessity had contact with other offenders. If so, continued custody may be desired in hopes of learning their identity.

1. *Custody to Obtain Evidence Sufficient for Conviction*

Should the police be entitled to retain custody of a suspect who can be charged, in order to obtain additional evidence sufficient for conviction? Such a practice was sometimes observed, although specific authority for such a procedure is lacking in those jurisdictions.[154] The need of the police to "wrap up the case" by obtaining that evidence necessary to insure conviction has been used as a basis for objecting to the *Mallory* rule.[155] And, at least some courts appear to view in-custody investigation for this purpose to be proper.[156]

In discussing earlier the possibility of custody being justified on the basis that the police were expeditiously attempting to obtain evidence sufficient for charging, it was noted that an acknowledgment of the validity of such detention could not be expected from all courts. The

154. Admittedly the courts in Michigan and Wisconsin, in allowing post-arrest detention for investigation, have not made it absolutely clear that the investigation is limited to obtaining evidence sufficient to charge. But, see language quoted in the text at notes 71, 75, 77 and 79. On the uncertainty in Wisconsin, see Note, 1960 Wis. L. Rev. 164, 167.

155. Coakley, *Restrictions in the Law of Arrest*, 52 Nw. U.L. Rev. 2 (1957); Statement of Oliver Gasch, United States Attorney for the District of Columbia, in *Hearings* # 2, at 22.

156. *E.g.*, People v. Kelly, 404 Ill. 281, 89 N.E.2d 27 (1949).

reason is that if, as in *Mallory,* it is denied that the grounds for arrest and for charging are distinguishable, then any admission that grounds for charging are being sought is an admission of an illegal arrest.

A contention that grounds for conviction are being sought would not be subjected to the same analysis by any court. All would agree that the "beyond a reasonable doubt" test required for conviction is more demanding than the test of a valid arrest. The validity of the arrest in such a case would require independent inquiry, and the only basis for automatic disapproval of the detention would be that the added evidence required is not to be obtained by continuing the custody of the suspect.

The difference between the two situations cannot be over-emphasized. It is one thing to say that after a person has been taken into custody a brief period of investigation might be allowed where necessary to enable the prosecuting authorities to decide whether to charge or release; it is another to contend that the detention should continue while evidence sufficient to insure the suspect's conviction is gathered. A court might well approve the former and condemn the latter.

Because detention of the suspect who cannot be charged has been discussed earlier, it is desirable at this point to determine in what respects the practice presently under consideration might be said to require different treatment. As with all the other detention situations which have been discussed, the basic task is that of reaching a fair compromise between the conflicting values of individual freedom and effective law enforcement. With that task in mind, the principal bases for drawing a distinction between detention of the person who cannot be charged and the person who can would appear to be: (1) the possibility that the needs of in-custody investigation are not as great once it is determined the person can be charged, and (2) the possibility that the fact the person has become an accused, rather than a suspect, requires cloaking him with added protections from official inquiry.

As to the first of these, it could be argued that the investigatory job of the police is less difficult once sufficient evidence is at hand to charge the suspect. When the suspect cannot be charged, immediate in-custody investigation may be of significant importance. Time is needed to learn the true identity of the suspect who will not identify himself, but who resembles a wanted person; to check the serial numbers on a bankroll flashed by a well-known hoodlum; to determine whether a break-in has occurred in the area where the suspect was found lurking; to confront the suspect with his accuser; to check the stolen property file on an expensive ring worn by a known burglar; to compare the suspect's fingerprints or shoe prints with those found at a crime scene; to determine whether the suspect's alibi is false; to hold a showup so that the victim can view the suspect or suspects found

who fit the general description; to administer a handwriting test, a drunkometer test, or a thorough search; to watch for withdrawal symptoms on the one-time addict found with fresh scars; to question the unemployed man carrying a toy gun and large sum of money about recent unsolved holdups; and for chemical analysis of a powder which appears to be narcotics.

In all the above situations, and in many more similar situations, no prosecutor would or should charge the suspect with a crime until the appropriate investigation has provided the necessary nexus between the suspect and a particular offense. As the examples illustrate, without the investigation it may not be clear that any crime has been committed, that the suspect has been connected with any particular outstanding offense or that the suspect has been found more probably guilty of a particular offense than other suspects. Without the investigation there does not exist that evidence necessary to proceed to prosecution, as "probable cause" requires that "the evidence worthy of consideration, in any aspect for the judicial mind to act upon, brings the charge against the prisoner within the reasonable probabilities."[157]

Yet, in most of the above situations the investigation which results in evidence sufficient for charging will not insure conviction. The traced stolen property, the accusation repeated face to face, the alibi proven false and many other fruitful results of in-custody investigation may establish the guilt of the suspect "within the reasonable probabilities," but not "beyond a reasonable doubt." As the conviction test suggests, the prosecution must be prepared to put in sufficient evidence so that when the triers of fact engage in the self-analysis needed to determine their degree of persuasion they will conclude "that there is no reasonable explanation of the facts proven except upon the hypothesis that the accused committed the crime charged. . . ."[158]

Now, the question which cannot be answered with any certainty is whether the investigation needed to get from the charging standard to the conviction standard really necessitates the further custody of the accused. Custody to reach the charging decision may be explained by the necessity to determine whether any crime has been committed, whether the suspect can be connected with any outstanding offense or whether any one suspect is more probably guilty than some others. But, if the person now can be charged, it usually has been conclusively determined that a crime has in fact been committed.[159] And it has been

157. State *ex rel.* Wojtycski v. Hanley, 248 Wis. 108, 111, 20 N.W.2d 719, 720 (1945).

158. Emery v. State, 92 Wis. 146, 151, 65 N.W. 848, 850 (1896). See 9 WIGMORE, EVIDENCE § 2497 (3d ed. 1940); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944).

159. Indeed, some states require that at the preliminary it be established that

established that the suspect has probably committed it. What remains is the task of "filling the gaps," the job of eliminating other reasonable explanations of the evidence against the accused. With the crime and the probable guilt of the accused established, it may well be that this remaining investigation does not pose the kind of difficulties present in pre-charging investigation, and that for this reason a fair balancing of the conflicting interests does not require a further right of detention of the accused.

A second reason for possibly viewing investigation of one who cannot be charged and one who can be charged in a different light is the very fact that the status of the individual has changed from that of "suspect" to "accused." As Lord Justice Devlin has pointed out, this distinction is viewed to be a most important one in England:

> The inquiry that is conducted by the police divides itself naturally into two parts, which are recognizably different, although it is difficult to say at just what point the first part ends and the second begins. In the earlier part the object of the inquiry is to ascertain the guilty party and in the latter part it is to prove the case against him. The distinction between the two periods is in effect the distinction between suspicion and accusation. The moment at which the suspect becomes the accused marks the change.
>
> The first phase of the inquiry is in England accepted as belonging solely to the administrative process. It has not been subjected to any form of judicial restraint. On the contrary the freedom of the police has been judicially declared. . . .
>
> The second phase of the inquiry begins when the suspect becomes the accused. If thereafter questions are asked of the accused, the main object must be to obtain proof against him by means of admissions. This makes it a proper subject for judicial restraint. . . .
>
> What test is employed to decide the moment when the suspect becomes the accused? If the first part of the inquiry were simply a matter of selecting the right person from a number of suspects, the dividing line would be easy to draw. But . . . that is rarely the case. When, for example, a man has been assaulted or a woman raped, the individual alleged to be the criminal is often identified, and then there is no question of charging anyone except him. But the police cannot charge him until they have reasonable grounds for thinking not only that he committed the act alleged but also that he was guilty of the crime. The first interview with him must almost inevitably be begun on the footing that he is still a suspect; admitting that he was the person involved, he may say in the case of rape that the woman consented or in the case of an assault that he was acting in self-defense. It then becomes the

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"the offense charged had been committed, and that there was probable cause to believe that the defendants were guilty." People v. Asta, 337 Mich. 590, 609, 60 N.W.2d 472, 482 (1953). While usually this is no problem, it can be in cases involving negligent homicide, obscene literature, and the like, where the only question in the case is whether any crime has been committed.

> task of the police to check his statements, and when they are doing that they are engaged in the twofold task of ascertaining whether he is guilty and of collecting the evidence which, if he is charged, will be used to prove his guilt. In such a case it is hard to know where to draw the line, but nevertheless there will be a point when the police become sufficiently convinced of his guilt that their subsequent inquiries are directed toward acquiring legal proof of that which they already believe.[160]

Once the "suspect" becomes an "accused" in England, he immediately gains added rights.[161]

The accused-suspect distinction was also viewed as being of great importance by four justices of the Supreme Court in *Spano v. New York*.[162] They would hold that a constitutional right to counsel arises when the person in custody is an "accused" rather than a mere "suspect." Though *Spano* was concerned with a person who was indicted prior to arrest, they saw a right of counsel arising because the person had been "formally charged" and because it was not a case "where the police were questioning a suspect in the course of investigating an unsolved crime." Such an approach is now followed in New York.[163]

Although the above references to the distinction concern questions of when a warning must be given and when counsel must be allowed into the case, the rationale behind these positions might well be applicable to the issue of police detention. Once the suspect becomes an accused, there is a "declaration of war," as Justice Devlin puts it, and "the police . . . are no longer representing themselves to the man they are questioning as the neutral inquirer whom the good citizen ought to assist," rather they now "are the prosecution and are without right, legal or moral, to further help from the accused. . . ."[164] This

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160. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 31, 33-34 (1958).

161. At that point, under the Judges' Rules, the accused must be cautioned that he need not say anything and that any statement made will be taken down and may be used in evidence. The Rules are reproduced and discussed in detail in DEVLIN, *op. cit. supra* note 160.

Proponents of *Mallory* sometimes cite the English system as proof that law enforcement is not hampered by requiring arrest only on grounds for charging and by denying a right to interrogate those in custody. However, close observers of the English system point out that such is not the practice. Smith, *Questioning by the Police: Some Further Points— I* [1960] CRIM. L. REV. (Eng.) 347; Williams, *Arrest for Felony at Common Law*, [1954] CRIM. L. REV. (Eng.) 408; Williams, *Questioning by the Police: Some Practical Considerations*, [1960] CRIM. L. REV. (Eng.) 325; Memorandum by Street in *Hearings* # 1, at 13.

162. 360 U.S. 315 (1959).

163. People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825 (1960). For a careful study of the growth of the New York rule out of the *Spano* case, see Rothblatt and Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment*, 27 BROOKLYN L. REV. 24 (1960).

164. DEVLIN, *op. cit. supra* note 160, at 37.

being so, the added need for protection of an accused may itself warrant bringing police detention to a close at that point.

Assuming for the moment that detention of one who can be charged is improper, a few practices related to those described earlier must be commented on briefly. It was noted in the prior discussion that police sometimes obtain custody absent grounds for arrest by either making an arrest for a lesser offense committed, such as vagrancy, or by use of the probation or parolee "hold." These same tactics have sometimes been employed where evidence sufficient for arrest (or perhaps even sufficient for charging) was available, in order that the detention might be continued while evidence sufficient for conviction is sought. The "hold" has made it possible for the police to continue custody for ten days. In the vagrancy situation, the suspect may be convicted and given a ten-day sentence, or the judge may continue the case for that period at the request of the prosecution.

As with the situation discussed earlier, it might be said that if there are grounds for conviction of the lesser offense or if there is a basis for revocation of probation or parole, then the motive is irrelevant. A contrary position, however, is reflected in a recent Supreme Court decision. A suspect was arrested for questioning in the case of a double murder-robbery which took place unwitnessed. The arrest was made Saturday night; on Monday morning the suspect was booked for breach of the peace and on Tuesday morning he was taken into police court on this charge. At the suggestion of the investigating officer, the prosecutor moved for a continuance, which was granted without the defendant having an opportunity to contest the motion or participate in the proceedings in any way. Said Justices Frankfurter and Stewart of this procedure:

> Instead of bringing him before a magistrate with reasonable promptness, as Connecticut law requires, to be duly represented for the grave crimes of which he was in fact suspected (and for which he had been arrested under the felony-arrest statute), he was taken before the New Britain Police Court on the palpable ruse of a breach-of-the-peace charge concocted to give the police time to pursue their investigation. This device is admitted. . . . [I]t kept Culombe in police hands without any of the protections that a proper magistrate's hearing would have assured him. Certainly, had he been brought before it charged with murder instead of an insignificant misdemeanor, no court would have failed to warn Culombe of his rights and arrange for appointment of counsel.[165]

Their reasoning is most interesting, as it would seem to apply even though the charge on which the suspect is actually taken into court is fully substantiated, and even though the person's detention is

165. Culombe v. Connecticut, 367 U.S. 568, 631-32 (1961).

brought about by actual conviction. The point of it is that whatever other legal reasons might exist for detention, if it is used for investigative purposes it must include the protections ordinarily available to one arrested and detained for the offense being investigated.

2. *Custody to Investigate Other Offenses*

It was frequently observed that persons were not immediately sent through the charging and appearance process, although there was sufficient evidence to do so, because the police desired to question these persons while they were still in custody concerning offenses other than that for which they were apprehended. Since initial appearance would result in the possibility of the suspect making bail, it is thought necessary to conduct this investigation prior to this time. Questioning concerning other offenses is usually considered appropriate when the offense for which the arrest was made suggests that the offender has in the past committed other like offenses, or when it makes the offender suspect with regard to some other crime of a greater magnitude.[166]

When a person is arrested for an offense such as breaking and entering or robbery, it is usually presumed to be likely that this same person has also been responsible for similar such offenses in the past. Because there usually are a great number of these crimes as yet unsolved, an attempt is made to determine whether any of them are attributable to this particular arrestee. Interrogation, either by precinct detectives or by personnel of specialized agencies, is the investigation technique most often employed.[167] The usual approach is for

166. It would be well to note that we are not here concerned with the arrest for one offense for the specific purpose of investigating another, discussed earlier.

167. If the interrogation is being conducted by precinct detectives, they first go over outstanding similar offenses within the precinct. Particular attention is apt to be given to other cases with a *modus operandi* similar to that for which the person was apprehended. If interrogation on these offenses is fruitful or if the person is known to have been operating elsewhere in the city, the precinct detectives may take the suspect to other precincts and review their outstanding cases. In one such case in Detroit the detective took the arrestee to a neighboring precinct and obtained from the detective lieutenant on duty there all outstanding breaking and entering cases for 1956, numbering approximately 300. Speaking to the defendant, the detective said, "Now, remember, listen to these carefully. Remember, you're going to tell me whether any of these jobs are yours or the jobs of any of the other boys in your group." The detective then proceeded to read off the names of the premises that were broken into, the street address and then read the officer's report describing the items that were taken. In going through this file, the detective read only those reports which were for premises in the general area in which these fellows operated.

After the precinct has firmed up the case for which the arrest was made, they also might send him to a specialized bureau for interrogation concerning similar offenses. For example, individuals arrested for auto theft are transferred to the

the interrogating officer to proceed with a list of outstanding offenses of the kind which the person has committed, asking the suspect about them one by one. Such interrogations often prove fruitful. This is particularly true in Detroit, where the interrogating detectives stress the fact that any offenses admitted would be "free offenses" in the sense that there would be no prosecution for them.[168] Often a considerable number of offenses are admitted and placed on a "cleanup sheet"; in one case 127 felonies were admitted to.

Often the fact that an individual is known to have committed a particular offense makes him a suspect with regard to a more serious kind of offense. For example, a person arrested for carrying a concealed weapon is usually questioned concerning recent holdups. A similar tactic is employed with regard to sex offenses when there is an outstanding offense of a serious nature.[169]

This investigation of other offenses has proven very fruitful. Even if no prosecution for these other offenses is contemplated, it does allow the police to clear from their books a number of offenses and consequently directs police resources to other outstanding crimes. But, be this as it may, it is apparent that there must exist some meaningful limitations upon the power of the police to investigate for this purpose. The mere fact that a person is in custody and can be charged with one offense hardly is a basis for granting the police carte blanche in investigating other offenses. The difficulty is that the law has seldom indicated what limitations should apply in this situation.

Assuming the state of the law to be as noted earlier in Michigan and Wisconsin, so that detention following legal arrest is proper when an expeditious investigation is conducted for the purpose of obtaining evidence sufficient to charge, the following situation may frequently arise. The suspect has been arrested on reasonable grounds to believe that he has committed offense *A*. Investigation uncovers evidence sufficient to charge, which means he should now be charged and taken

auto recovery squad at headquarters for questioning about other auto thefts. Similarly, persons arrested for breaking and entering or robbery are transferred to the holdup bureau for questioning on other offenses.

168. The police appear to consider these additional offenses as free because the law in Michigan does not allow the imposition of consecutive sentences. 2 O.A.G. 1955-56 No. 2381 (1956); In the Matter of Lamphere, 61 Mich. 105, 27 N.W. 882 (1886); In the Matter of the Petition of Bloom, 53 Mich. 597, 19 N.W. 200 (1884).

169. Thus, because of two unsolved sex slayings in Detroit, it was the policy of the department that when anyone was arrested for a sex offense, he would be booked for the offense and for investigation of murder, a copy of the arrest report would be sent to the homicide bureau and the person would be questioned by homicide detectives. Other departments in the area also made subjects available for questioning after their arrests for sex offenses. Over a four-year period approximately 600 persons in custody were questioned, and one of the slayings was solved after questioning of a man arrested for indecent exposure.

before a magistrate, where he might gain his release. However, a by-product of the investigation may be that the police now have reasonable grounds to believe (but not sufficient evidence to charge) that this person has committed offense *B*. The central issue in such a situation is: Since, absent the fact of arrest and detention for offense *A*, the police would now be justified in arresting and detaining for investigation of offense *B*, are their rights any less because of the fact that the investigation of offense *A* has reached the point where detention for investigation of offense *A* is no longer proper?[170]

Under the stricter *Mallory* rule, it would seem less likely that continued detention to investigate other offenses could be justified. Thus the Supreme Court, in *United States v. Mitchell*,[171] concluded that when a confessed burglar was further detained while the police cleared up 30 other housebreakings and recovered the property, "undoubtedly his detention during this period was illegal."[172] As a result, District of Columbia police have been cautioned not to jeopardize their case by attempting to clear other offenses,[173] and this has been one of their chief criticisms of the *Mallory* rule.[174] However, assuming the Wisconsin-Michigan approach is accepted (for the reasons stated earlier), the better result would seem to be that detention for investigation of the second offense is just as proper as was the earlier detention at which evidence sufficient to charge on the first offense was obtained. As one writer has put it, only if custody is viewed as inherently coercive should a person be immune from inquiry merely because he has already been arrested for another offense.[175]

Of course, this is not to say that the police should have a similar right to investigate other offenses when the original detention has not provided "reasonable grounds to believe" with regard to one or more

170. A slightly different problem has arisen in England. There, the accused is not to be interrogated after arrest concerning the offense of which he is accused. However, it is not clear whether the police can interrogate concerning other offenses. See Brownlie, *Police Questioning, Custody and Caution*, [1960] CRIM. L. REV. (Eng.) 298.

171. 322 U.S. 65 (1944).

172. *Id.* at 70. The court admitted the earlier confession of the burglary for which arrest was made, refusing to apply any sort of *ab initio* doctrine.

173. The United States Attorney's office advised the police not to take chances with a case like *Mitchell*—"you'd better be sure of the bird in hand and not go after the bird in the bush." However, it was also pointed out: "Now, of course, you recover property in many cases where you don't prosecute for that particular offense. To the extent that you can continue to do that without jeopardizing your main criminal case, you should do it." *Hearings* # 2, at 400.

174. See criticism of the chief of police, *Hearings* # 2, *supra* note 31, at 42, and the deputy chief, Scott, *The Mallory Decision and the Vanishing Rights of Crime Victims*, Police May-June, 1960 p. 61.

175. Brownlie, *supra* note 170.

other outstanding offenses. In such a case, it is clear that further detention cannot be justified on the same basis as above. Rather, if any further detention is to be allowed in these cases, it must be concluded that a person in custody who can be charged as to one offense has fewer rights than he would otherwise have—that he can be detained concerning offenses for which he could not even be arrested. This would seem to be a difficult position for a court to take. If any right of further detention were recognized in such a case, the only possible justification would seem to be that since the person is already in custody a brief extention of the custody time would not be a substantial interference with the person's freedom (that is to say, less of an interference than an arrest, and thus justifiable on less evidence). However, it would seem to follow from this that the added detention would have to be most brief and that it could not be used for actual interrogation but merely as an opportunity for the arrestee to admit to other offenses.[176]

Assuming that the dividing line between proper and improper detention to investigate other offenses is whether or not an arrest could be made for them, the critical question in many cases will be when grounds to charge for one offense equals reasonable grounds to believe that the arrestee has committed one or more other offenses. For example, can a person arrested and chargeable with a burglary-safecracking be further questioned about a murder which occurred in the midst of another attempted safecracking in a building next to that in which the arrestee was previously employed?[177] Can he also be questioned as to 15 outstanding safecrackings with a similar *modus operandi* which occurred in the same general area?[178] Can a sex offender be further questioned about an unsolved sex slaying?[179] While these questions will not always be easy to answer, at least the test is identical to the one the police must employ every day in determining whether they have adequate grounds for arrest.

Allowing further detention to investigate other offenses will cause some problems even if limited as suggested above. For one thing, there is a possibility that the detention for the second offense will be used to justify what actually is an unreasonably long detention in order to obtain evidence for charging of the first offense. Or, perhaps it will be

176. Thus, Judge Prettyman, concurring in Trilling v. United States, 260 F.2d 677, 708 (D.C. Cir. 1958), stressed that the confessed safe-cracker was not interrogated at length about other similar offenses, but rather was asked "just one question about each of these crimes."

177. The majority of the court in Trilling v. United States *supra* note 176, held such questioning improper under *Mallory*.

178. These are also the facts in *Trilling*, and the conclusion was that such questioning was illegal under *Mallory*.

179. See note 169 *supra*.

used, even when the suspect can be charged as to the first offense, to obtain even more evidence on the first offense so as to insure conviction. The first problem possibly could be obviated by requiring charging and arraignment on the first offense, with the magistrate remanding the suspect to police custody if reasonable grounds exist as to another offense.[180] The second problem would perhaps cause more trouble; it might not always be clear whether a statement concerning the original offense during detention related to a second offense was spontaneous or the result of questioning.

3. *Custody to Investigate Other Offenders*

When the arrestee is known to be one of a number of persons responsible for a particular offense, and some of the others are unknown, or when the offender because of the nature of his conduct has had to deal with other criminals, the initial appearance may be put off to enable in-custody investigation for the purpose of attempting to learn the identity of these other persons.

Thus a robber arrested while in the act of committing the robbery may not be taken immediately before a magistrate because it is desired to learn the identity and whereabouts of others who escaped when the officer came upon the scene. Similarly, in other cases the nature of the offense makes it clear that the offender has had to deal with persons connected with an organized criminal operation. Narcotics users are questioned about their source of supply, and persons found with numbers slips or other gambling paraphernalia are interrogated in an attempt to learn the identity of others in the syndicate.

Generally speaking, the detentions for this purpose are not for any extended period; it usually is possible to convince the arrestee to name his more fortunate colleagues or else it becomes apparent that he will not provide the police with this information. Even after others are named, arraignment may nonetheless be delayed until the police have had an opportunity to arrest the others. This is done when the police desire to avoid the possibility of the others being warned, or the police desire to confront the others with the accusations of their accomplices.

The legality of such detentions is unclear, even under the Wisconsin-Michigan detention rules. It would appear to be improper under the *Mallory* rule; at least the police have assumed so and have criticized the rule on this basis.[181] Again, the gain from such detentions in terms

180. This would hardly appear to be a denial of the right to bail since the suspect could be immediately arrested on the other offenses even if he were bailed.

181. A criticism of *Mallory* on this score was voiced by both the chief and deputy chief of the District of Columbia at the same time they objected to not being able to question on other offenses. See note 174 *supra*.

of effective and efficient law enforcement is clear, but it does not necessarily follow from this, that a person who can be charged and who himself is not suspected of another offense should for this reason have his custody continued. As in the case where the arrestee is merely suspected of (but could not be arrested for) another offense, it might be contended that some slight extension of the otherwise legal detention period is not a significant interference with the person's liberty in view of the possible benefits to be derived.

However, perhaps a more meaningful way of approaching this problem is by analogy to the other powers to detain persons who are in a position to possibly identify criminal offenders. These other powers are not placed in the police, but rather in the hands of the courts.[182] These provisions allow for compelled appearance and actual testimony under oath of persons who might be able to give information concerning offenses for which there is not sufficient evidence for charging.[183]

These statutes are relevant in that they are evidence of a recognition by the legislature that the objective of identifying criminals sometimes warrants the use of the power of the state against those who are likely to be able to provide the necessary information. However, resort to such proceedings every time an offender is arrested but his unknown accomplices have escaped, or every time an offender is arrested who clearly has had to deal with other offenders, would not only be cumbersome but would present problems of granting immunity in exchange for testimony. This being so, the basic question, unresolved by the law in these jurisdictions at least, is whether the police, acting for the same purpose, may properly extend an otherwise legal detention for questioning *not* under oath.

D. Desirable Safeguards Against Police Impropriety

A number of different situations have been described in which the police may take and continue custody of a suspect in order to obtain evidence. Each of the situations requires separate analysis, and it may well be that some of them will be considered proper while others

182. Thus, in Michigan the one-man grand jury provisions allow a judicial officer, following the filing of a complaint or after application of the prosecutor, to require a person to appear before him and testify where the judge has "probable cause to *suspect*" that a crime has been committed and that the person can give material evidence. MICH. STAT. ANN. § 28.943 (1954). (Emphasis added.) Similarly, in Wisconsin there may be a John Doe proceeding upon complaint that there is "reason to believe" a crime has been committed, and again persons who might provide information can be called to testify. WIS. STAT. ANN. § 954.025 (1958).

183. The investigations in Michigan and Wisconsin are to determine if there is probable cause. People v. Birch, 329 Mich. 38, 44 N.W.2d 859 (1950); WIS. STAT. ANN. § 954.025 (1958).

are prohibited. Even approved occasions for detention are subject to abusive practices. Thus, in any criminal justice system which recognizes *some* form of police detention, effective controls are necessary to insure that detentions occur only in the proper circumstances and that the investigations incident thereto are conducted fairly. Some of the possible safeguards are explored in this section.

1. *Prohibition of In-Custody Interrogation*

It would seem to be a fair statement that much of the concern over police detention has not been merely the fact that the freedom of an individual has been interrupted while police investigation is pursued, but rather that detention is frequently coupled with interrogation of the suspect. Indeed, the emphasis of the court in *Mallory* upon the confession problem suggests that what the court was really condemning was the use of in-custody interrogation to obtain the evidence needed to charge. The Court condemned the use of "an interrogating process at police headquarters" or "a process of inquiry that lends itself . . . to eliciting damaging statements," and said they could not "sanction this extended delay, resulting in confession." They added that what brief delay was to be allowed "must not be of a nature to give opportunity for the extraction of a confession."[184] Thus, it may well be that the *Mallory* sanction would be applied not to all evidence obtained during illegal detention, but only to statements from the suspect.[185] The police governed by *Mallory* were not advised to refrain from all in-custody investigation. But rather to avoid only a combination of questioning and less than brief detention.[186]

If the real concern is in-custody interrogation, then it would not be completely illogical to allow detention but prohibit interrogation.[187] There is not necessarily an inconsistency in the conclusion, for example, that the arrest of three suspects and the interrogation of the three to find the one guilty is improper,[188] but that the arrest of the

184. Mallory v. United States, 354 U.S. 449, 455 (1957).

185. See Payne v. United States, 294 F.2d 723 (D.C. Cir. 1961), where the defendant was identified in a lineup held during an illegal detention. The court refused to decide whether evidence of the victim's identification in the lineup could have been introduced, but said that in any event it was not reversible error to permit the victim to make identification at the trial.

186. See the lectures given to District of Columbia police, reprinted in *Hearings* # 2, at 400. However, it is unclear whether *Mallory* has even had this effect upon the D.C. police, or whether the police use even greater pressures in hopes of obtaining an early confession, with even untimely confessions sought because the fruits thereof may further the police investigation.

187. The English system, in theory at least, demonstrates this well, as it is precisely at the point where custody may be taken that the Judges' Rules contemplate that interrogation stop. See DEVLIN, *op. cit. supra* note 160, ch. 2, at 31.

188. These, it will be recalled, were the facts in *Mallory*.

three in order to hold a lineup is proper. Implicit in such a system would be recognition of the necessity of taking custody in some cases though the person cannot as yet be charged, along with an attitude that interrogation of a person in custody is either inherently coercive or that actual coercion in such cases is so difficult to establish that the only practical guarantee possible to persons in custody is to bar all interrogation.

Both of these objections to in-custody questioning undoubtedly have some validity, and some have taken the position that this justifies prohibition of all such interrogation.[189] However, the courts of all the states are in agreement that custody does not render a suspect's confession inadmissible,[190] and it does not appear likely that any change in this view will occur. The importance to effective law enforcement of in-custody interrogation has been stressed persistently in this country.[191] As Justice Frankfurter recently observed:

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.[192]

And it is not at all clear that the ten years under the *McNabb-Mallory* rule has proved to the contrary.[193]

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189. See Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958). The authors are of the view that arrest, even on probable cause, is not a proper vehicle for the investigation of crime.

190. For voluminous citations to cases in all states, see Culombe v. Connecticut, 367 U.S. 568, 590-94 n.38 (1961).

191. For many citations, see *id.* at 579 n.17. In addition to the oft-stated view that many cases would not be solved without interrogation, it may be that "our system for the trial of criminal cases would be burdened to verge of collapse" if confessions, resulting in guilty pleas, were not obtained in a great number of cases. BARRETT, *Police Practices and the Law—From Arrest to Release or Charge* 50 CALIF. L. REV. 11, 45 (1962).

192. *Id.* at 571.

193. Some would contend that the experience under *Mallory*—really since McNabb v. United States, 318 U.S. 332 (1943)—demonstrates the contrary: "The Techniques of the Federal Bureau of Investigation have proved that secret prolonged interrogation is dispensible." Rothblatt and Rothblatt, *supra* note 163, at 67. However, putting aside the better training and equipment of the F.B.I., it may well be that the law enforcement task in a large city is substantially different from that faced by the F.B.I., and that separate consideration should be given to the kinds of criminality with which the force must deal, as contrasted to the kinds handled by the other federal police agencies. See the colloquies between Senator Carroll and witnesses Oliver Gasch (United States Attorney for the District of Columbia), Robert Murray (Chief, Metropolitan Police

2. *Controls on Police Interrogation*

If it is thought that absolute prohibition of in-custody interrogation would unduly hamper law enforcement, then it may be that some measure of added control over police questioning is feasible. Thus, interrogation of persons in custody might be allowed only subsequent to certain steps taken to insure the voluntary nature of any statement given. It might be required, for example, that prior to interrogation the police warn the suspect that he need not answer,[194] or that the suspect be given the opportunity to first consult with counsel.[195] With few exceptions, requirements of this kind have not been imposed upon the police in this country.[196]

One objection which has been voiced against any change to a warning requirement is that it would interject an additional fact question

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Dep't, D.C.), and Irving Ferman (Director, D.C. Chapter A.C.L.U.), in *Hearings* #2. There has been some judicial recognition that the problems of a large city might justify in-custody interrogation under circumstances which would not warrant its use elsewhere. *E.g.*, Bailey v. Loomis, 228 Mich. 338, 200 N.W. 148 (1924).

194. Such is the requirement in Texas by statute. TEX. CODE CRIM. PROC. art. 727 (1941). While the failure to warn the defendant will ordinarily bar the use of an otherwise voluntary confession, White v. State, 163 Tex. Crim. 77, 289 S.W.2d 279 (1956), this is not so where the truthfulness of the confession is independently established. Grimes v. State, 154 Tex. Crim. 199, 225 S.W.2d 978 (1950).

195. "I would hold that any confession obtained by the police while the defendant is under detention is inadmissible . . . unless the accused is . . . accorded an opportunity to consult counsel." Such is the view expressed by Justice Douglas in his concurring opinion in Reck v. Pate, 367 U.S. 433, 448 (1961).

196. As to warning, only Texas requires a warning. See Note 194 *supra*. However, it is always a factor in determining the trustworthiness of a confession. See cases cited note 132 *supra*. See S. 1893, 86th Cong., 1st sess. (1959), which would have required warning of the suspect "that he is not required to make a statement and that any statement made by him may be used against him," in lieu of the *Mallory* rule.

As to counsel, in New York a confession from an accused without counsel has been barred. People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825 (1960). See earlier discussion of the "suspect"-"accused" distinction. In Indiana, where the state constitution has been interpreted as giving a right to counsel at the police station, a confession most likely would be barred on this basis alone. Dearing v. State, 229 Ind. 131, 95 N.E.2d 832 (1951); Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920). Dicta can be found in cases from other states suggesting the courts there might so hold. Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment*, 27 BROOKLYN L. REV. 24, 33 n.40 (1960).

In determining if a confession was obtained in violation of due process, it is relevant to inquire whether the police refused the suspect's request for counsel, Lisenba v. California, 314 U.S. 219 (1941), or whether they denied retained counsel access to his client, Haley v. Ohio, 332 U.S. 596 (1948). It is unclear at what point the constitutional right to counsel really begins. See BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 127 (1955).

into the criminal trial.[197] Whether this is an "evil" of sufficient proportions to justify rejection of a warning requirement is debatable. However, the observed practices do make it clear that the presence or absence of a warning prior to the receiving of a statement would often be uncertain. The defendant, of course, can always allege he was not warned, and even the insertion of a warning statement in a signed confession does not necessarily mean that the caution was administered *before* the confession was received or that it was given except in a casual, joking or half-hearted manner.

As to requiring the suspect be given an opportunity to consult with counsel, it is clear that the presence of an attorney can impair the investigation in a number of ways. He probably will advise the suspect to say nothing.[198] His visits to the suspect may require the police to interrupt their questioning. He may by use of a writ of habeas corpus or other means attempt to obtain his client's release, which means at least an interruption of the interrogation process. Yet, the suspect may need the services of counsel more at that stage of the case than at any other time.[199]

If any trend at all is to be discerned in the state confession cases, it would be increased concern over lack of warning and denial of counsel. Although it is still true that confessions will rarely be invalidated on either of these grounds alone, more and more courts have indicated by dicta a possible willingness to strike down any statement received when the suspect was not warned[200] or when he was not allowed to contact counsel.[201] If the courts really are willing to exclude confessions in certain circumstances on a lesser showing than testimonial trustworthiness, this would be a most significant development.

It might be well in passing to take note of a few other suggestions which have been made for controlling police interrogation. One possibility would be for the custody of the suspect to be put in the hands of another agency, one not having the function of obtaining evidence.[202]

197. Statement of Judge Holtzoff, in *Hearings* # 1, at 8.

198. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances. Watts v. Indiana, 338 U.S. 49, 59 (1949) (concurring opinion of Jackson, J.).

199. See Watts v. Indiana, *id.* at 59 (1949) (concurring opinion of Jackson, J.) and Crooker v. California, 357 U.S. 433, 445-46 (1958) (dissent).

200. *E.g.*, People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960); State v. Bronston, 7 Wis. 2d 627, 97 N.W.2d 504 (1959).

201. See Rothblatt and Rothblatt, *supra* note 196, at 33 n.40.

202. Thus, Glanville Williams has proposed:

It would, however, be a step towards preventing possible abuses if the accused were removed from the custody of the police. Only long familiarity

Or, questioning might be allowed only in the presence of a disinterested third party.[203] Neither of these procedures is required by law in this country.

3. *Interrogation before the Magistrate*

Another alternative which deserves to be mentioned is that of interrogation not by the police but by a judicial officer. This might be said to be a compromise position between the view that in-custody interrogation is a profitable investigative technique and the view that the coercive aspects of such interrogation are so difficult of proof to justify denial of the right to interrogate while in police custody.[203a]

There is no evidence that such a practice exists anywhere in this country today, though it does exist elsewhere.[204] Some commentators

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causes us to accept without surprise the arrangement under which a suspect is placed in the absolute power of those whose duty it is to obtain evidence against him. Consider: we employ police to investigate crime, and expect them to attain a measure of success in the apprehension and conviction of criminals; at the same time, we allow those who are arrested to remain for a time in the custody of the police themselves. . . . The conclusion is that where a local jail is available, it should be made a rule that persons arrested should be lodged forthwith in this jail rather than in a police cell. This would mean that the physical safety of the accused person would be the responsibility of a different set of officials from the police.

Williams, *Questioning by the Police: Some Practical Considerations*, [1960] CRIM. L. REV. (Eng.) 325, 345-46.

In some circumstances, something similar to Williams' proposal is practiced in this country. For example, in the District of Columbia the prisoner after arraignment is not remanded to the Metropolitan Police Department, but to the U.S. Marshal or his deputy. See the interesting case of Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960), where the magistrate instead remanded to the police. Also, in the states it is not unusual for a prisoner to be in the county jail, while the police investigating the case are associated with some other level of government. See, for example, the facts in Culombe v. Connecticut, 367 U.S. 568 (1961).

203. The real problem [of police interrogation] is the need for protection against police third degree methods, culminating in a coerced confession. The value of having counsel present during the police interrogation lies not in his being trained in the law, but in the protection against coercion afforded by his mere presence.

Note, 107 U. PA. L. REV. 286, 288 (1958). For expression of a similar view by the Supreme Court, see Haley v. Ohio, 332 U.S. 596 (1948).

Having an objective observer present during interrogation was proposed as a possible alternative to *Mallory* in Statement of J. R. Scullen, in *Hearings* # 1, at 177.

203a. Interestingly enough, adoption of such an alternative would be a partial reversal of the earlier shift of investigative functions from the magistrate to the police. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND, ch. 1 (1958). It has been suggested that the present disparity between law and practice is in part due to a failure of the courts to take account of the fact that the magistrate no longer performs these functions. BARRETT, *supra note* 191, at 16-20.

204. This, of course, is the inquisitorial system, such as that found in France.

have taken the position that magisterial interrogation would be not only unrealistic[205] but unconstitutional as well.[206] Yet, just such a system has been proposed by such persons as Dean Pound, Professor Waite and Professor Warner, and, though it is seldom remembered, such a recommendation followed the oft-quoted condemnation of the third degree in The Wickersham Report.[207]

4. Remand to Police Custody by the Magistrate

Two practices described in full earlier deserve mention here, as they are directly related to consideration of a possible remand system. One is the initial appearance, as practiced in the observed jurisdictions. It will be remembered that the appearance takes place *after* the detention for investigation has been completed, that it does not involve a determination of the validity of the arrest and that it does not even include a judicial testing of the evidence for charging, inasmuch as the warrant-issuing function has been assumed by the prosecutor. The appearance sometimes includes a warning to the suspect of his rights, constitutes notice to him of the charge against him and, most important, marks the point at which release on bail is made possible. The other practice is the writ of habeas corpus hearing, a sort of defendant-initiated appearance. While, strangely enough, defense counsel do not usually inquire into the grounds for arrest at the hearing, the judge will learn of the detention time which has already transpired, of the progress which has been made on the investigation and of the supposed basis for additional time for investigation. The judge often will

See Berg, *Criminal Procedure: France, England, and the United States*, 8 DE PAUL L. REV. 256 (1959); Keedy, *The Preliminary Investigation of Crime in France*, 88 U. PA. L. REV. 692 (1940); Smith, *Public Interest and the Interests of the Accused in the Criminal Process—Reflections of a Scottish Lawyer*, 32 TUL. L. REV. 349, 251-52 (1958).

205. Proposals to have judicially supervised interrogation seem unrealistic. They ignore the likelihood of silence in response to official warnings. There is no assurance that the judicial questioner will be skilled. The defendant's silence or bungled questioning would not help the police to solve crimes. . . . Beaney, *The Effective Assistance of Counsel*, FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 52-53 (1959).

206. "Such a procedure, being inquisitorial, would be in direct conflict with the American accusatorial form of criminal procedure. . . . Indeed, it would be in violation of the constitutional privilege against self-incrimination." Moreland, *Some Trends in the Law of Arrest*, 39 MINN. L. REV. 479, 487 (1955).

207. National Commission on Law Observance & Enforcement, "Lawless Enforcement of the Law" (1931). Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L., C. & P.S. 1014 (1934); Warner, *How Can the Third Degree be Eliminated*, 1 BILL OF RIGHTS REV. 24 (1940). Professor Waite proposed to the original Advisory Committee on the federal criminal rules that the commissioner before whom the accused was brought be entitled to interrogate the accused. Orfield, *Proceedings Before the Commissioner in Federal Criminal Procedure*, 19 U. PITT. L. REV. 489 (1958).

set a time limit on added in-custody investigation, which means that bail will be set only in those cases in which it is clear that custody of the suspect is not required for the conclusion of the investigation.

Neither of these practices, it seems clear, provides a sufficient modicum of protection for the suspect being detained for investigation. The initial appearance occurs after the investigation is completed, and the habeas corpus hearing must be prompted by the suspect himself in order to obtain the limited inquiry which it provides. However, both practices suggest another procedure might be feasible—immediate appearance before a magistrate once custody is taken, with the magistrate having the power to remand the suspect to police custody when it is established that there are grounds for in-custody investigation.

Some form of remand system has been suggested as a desirable alternative to the *Mallory* rule.[208] Courts operating under the rule have assumed that only confessions prior to appearance and warning are barred.[209] And, there is some evidence that remand to police custody in the District of Columbia has been the response to the strict requirements of *Mallory*.[210] A form of remand to police custody is expressly provided for in a few states[211] and in other countries as well, including England.[212]

Assuming detention by the police for investigative purposes is to be allowed, a remand system may well provide the needed guarantees to insure that these detentions occur only in the proper circumstances and that the investigation proceed fairly. In favor of immediate appearance and remand, it may be said:

(1) It would allow for an immediate testing of the grounds for arrest, and thus would prevent any "process of inquiry . . . to support the arrest" condemned in *Mallory*.[213] The threat of illegal arrests could be minimized because a judicial officer would, at the outset of the detention, have to determine that sufficient evidence was at hand to

208. Comment, *Prearraignment Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure*, 68 YALE L.J. 1003 (1959).

209. The courts have not hesitated to uphold confessions after appearance and warning. Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960); McNabb v. United States, 142 F.2d 904 (6th Cir. 1944), *cert. den.* 323 U.S. 771 (1944).

210. In *Goldsmith, supra* note 209, the commissioner remanded the suspect for a three-hour period; in Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960), the "case was put over for one day" and the defendant returned to police custody; in Trilling v. United States, 260 F.2d 677 (D.C. Cir. 1958), where the suspect was returned to the police without the express consent of the magistrate, Judge Bazelon, in a concurring opinion, took the position that "the magistrate may not lawfully return him to the custody of the police." *Id.* at 694.

211. See note 20 *supra*.

212. See note 21 *supra*.

213. Mallory v. United States, 354 U.S. 449, 454 (1957).

justify the original taking of custody. Recalling the earlier discussion of the distinction between the arrest and charging norms, this would require the magistrate to test the available evidence not as a "legal technician," but from the point of view of an officer considering all probative evidence of guilt and the need to obtain custody promptly.

(2) It would allow for an immediate determination of whether there are any grounds for further investigation. Thus, assuming a system like that apparently contemplated in the observed jurisdictions, the magistrate would want to insure that there was not sufficient evidence for charging at hand and that the desired investigation was not merely for purposes of obtaining additional evidence to increase the probabilities of conviction. Other possible bases for further investigation might also be tested by the magistrate, such as the police contention in some cases that further custody is needed if the police are to clear other offenses of which the arrestee is suspected or if they are to learn the identity of other offenders.

(3) It would allow a setting of time for investigation based upon the unique facts of the particular case. The magistrate could set a time at which the police were to return with the suspect (at which time a further extension might be granted in exceptional cases). As with the present practice in the habeas corpus hearing, it might be said that the magistrate cannot foresee the exact course of the pending investigation and thus cannot accurately determine at what time in the future the detention is no longer warranted. This is true, yet determination of the probable needs based upon the facts of the case would be far superior to the system now contemplated in some states in which the same time limit is applicable to all cases.

(4) It would minimize the coercive nature of in-custody interrogation. The magistrate could issue a warning to the suspect that he need not respond to police questioning, and could apprise him of the actual time his detention might continue. Unlike warning by the police themselves, the caution by the magistrate might be more effective and would not be so apt to create a side issue later of whether any warning was actually administered.[214]

(5) It conceivably could be coupled with a system whereby custody upon remand was given to an agency not responsible for the investigation. As has been noted earlier, some evidence of this change in responsibility for custody is to be found in current practices.[215]

Availability of magistrates has proven a problem on both the state and federal levels.[216] Perhaps it is necessary that there be enough

214. See note 97 *supra* and accompanying text.

215. See note 202 *supra*.

216. Ginoza v. United States, 279 F.2d 616 (9th Cir. 1960); Williams v. United States, 273 F.2d 781 (9th Cir. 1959); United States v. Bando, 244 F.2d 833 (2d

magistrates so that they either sit around the clock or can be located when needed. However, if the immediate appearance-remand system is not practical for all situations, it might be desirable to at least provide this added protection in those cases in which it is thought to be needed most. Perhaps it is only needed where the desire is to interrogate the suspect. If detention beyond the point at which the suspect can be charged is recognized, perhaps it is at the point he becomes an "accused" that these added safeguards are needed.

However, even with some such limitation, the principal objection may still be that in many locales magistrates cannot be available around the clock. Furthermore, even if the magistrates were given express authority to remand, would this power soon be abdicated to the prosecuting authorities, as has occurred already with respect to the warrant-issuing power.[216a] If this is likely to happen, as apparently it has in England,[216b] then it might be considered whether it would not be better to assign this responsibility to the prosecutor in the first instance.

No constitutional barriers appear to stand in the way of a remand system. If custody is originally taken upon evidence sufficient to meet the constitutional test of reasonableness, then it would appear that a reasonable period of further detention for investigation is permissible. If the present practice of the states in conducting the in-custody investigation prior to appearance does not violate the constitution,[217] then the fact of prompt appearance before the investigation would not seem to call for a contrary conclusion. The same can be said of a remand system on the federal level.[218]

5. *Police Release of Those Not to Be Charged*

As noted in the earlier descriptive materials, it is not uncommon for the police to release a person they have earlier taken into custody because they now believe the evidence does not warrant carrying the

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Cir. 1957); Commonwealth v. DiStasio, 294 Mass. 273, 1 N.E.2d 189 (1936); Hicks v. Matthews, 153 Tex. 177, 266 S.W.2d 846 (1954); Beeland v. State, 149 Tex. Crim. 272, 193 S.W.2d 687 (1946).

216a. See note 10 *supra*.

216b. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 95 (1958).

217. Gallegos v. Nebraska, 342 U.S. 55 (1951), held the *McNabb* rule not applicable to the states. And, in a long series of cases the Court has held that the fourteenth amendment does not prohibit a standard for such detention and examination of a suspect as, under all the circumstances, is found not to be coercive. *E.g.*, Cicenia v. Lagay, 357 U.S. 504 (1958); Brown v. Allen, 344 U.S. 443 (1953); Lyons v. Oklahoma, 322 U.S. 596 (1944); Lisenba v. California, 314 U.S. 219 (1941).

218. Comment, *supra* note 208, at 1035-37.

case through the process any further.[219] Release by the police may come at one of a number of different stages subsequent to arrest. The suspect may be released by the station officer immediately after arrest,[220] he may be released after a superficial investigation or he may be released by the detectives after a more extensive investigation process has either cleared the suspect or else provided no additional evidence of guilt. Generally, release is a formalized function delegated to supervisory officers.[221] It is generally not the practice of the police to obtain waivers of the right to sue for false arrest before release.

The practice of the police releasing suspects without taking them before a magistrate suggests three distinct issues: (1) Is release of suspects in custody without resort to prosecution proper? (2) If so, is this function appropriately performed by the police? and (3) If improper, should the police officer have to respond in damages?

As to the first question, an affirmative answer is suggested by the earlier discussion. In a system in which arrests are properly made upon a lesser probability of guilt than is required for charging, it is apparent that there will frequently be occasion to release persons without charging because investigation has disclosed no further evidence of the guilt of the suspect. And, even if the same standard is applied at arrest and charging, some persons will be released without being charged because evidence exculpating them is uncovered after their arrest but before they were charged.[222]

The question of whether the release decision is for the police is not as easy to answer. Allowing the police to release without concurrence of another agency certainly benefits the suspect in the usual case, as further delay could be expected if the approval of the prosecutor or

219. Release by the court occurs only when the suspect has been brought into court on a writ of habeas corpus. Release by the prosecutor occurs only when the prosecutor disagrees with the conclusion reached by the police investigators that there exists sufficient evidence to charge the suspect.

220. *E.g.*, in Milwaukee the arresting officer is to take the suspect to the nearest district station, where the commanding officer is to determine whether the arrest is proper. Milwaukee Police Dep't, Rules and Regulations, rule 30, § 34 (1950). If he thinks there is not sufficient basis for arrest, he may release the prisoner. Milwaukee Police Dep't, Rules and Regulations, rule 7, § 4 (1950).

221. In Detroit, the investigating officer may decide that release is proper, but the reason for release must be noted on the arrest ticket and countersigned by this officer's immediate superior and the officer in charge. Detroit Police Dep't, Revised Police Manual, ch. 16, §§ 94, 98 (1955).

222. For instance, a person suspected of crime may be taken into custody by an officer without a warrant, the arrest being entirely justifiable because of the existence of probable cause to believe him guilty. Before he can be taken before a magistrate it may happen that circumstances develop showing his innocence. There can be no doubt that on all accounts he ought to be at once discharged.

Atchison, T. & S. F. Ry. v. Hinsdell, 76 Kan. 74, 80, 90 Pac. 800, 802 (1907).

court must be obtained. It is the exception rather than the rule for prosecutors' offices or magistrates' courts to function around the clock. Thus, as far as the rights of the suspect are concerned, it would appear that release by the police can be characterized as improper only when the suspect desires an opportunity to clear his name by appearing before a magistrate.[223]

If release by the police is wrong in the ordinary case, it must be so because it has an adverse effect upon the proper functioning of the criminal justice system itself. For example, it could reasonably be contended that since a decision to release is in effect a decision not to charge, it is a decision which is properly exercised by the prosecutor, not by the police. A decision to charge ordinarily requires concurrence by the prosecutor, and it might be said that a decision not to charge is also for the prosecutor, the reason being that the prosecutor is better equipped to determine whether the essential evidence needed to justify subjecting the suspect to the entire process is at hand. In short, police release might be deemed improper because of a fear that some of the guilty are thus escaping prosecution, the reason being that the prosecutor is better equipped to determine whether evidence essential to prosecution is lacking[223a] or whether valid policy reasons exist for not proceeding to prosecution.[223b] In short, police release might be deemed

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223. Of course, if the person thus arrested will not accept his release, and demands to be taken before a magistrate, his wish should be respected, but in the absence of any such demand, the simple act of a constable in thus releasing a person against whom he finds no evidence of guilt would not of itself suffice . . . as the basis of a claim for damages.

Mayer v. Vaughan, [1902] 11 Qué. B.R. 340, 350, quoted in Hinsdell, *supra* note 222, at 79-80, 90 Pac. at 802.

223a. Sometimes this decision may be expressly recognized as for the police to make. *E.g.*, CALIF. PENAL CODE § 849(b) (Supp. 1961):

> Any peace officer may release from custody instead of taking such person before a magistrate, any person arrested without a warrant whenever: (1) He is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only.

223b. Prosecutors generally exercise a broad range of discretion in deciding which of the guilty should actually be subjected to prosecution. INBAU & SAWLE, CASES ON CRIMINAL JUSTICE 33-35 (1960); the series of articles by Baker and DeLong, 23-26 J. CRIM. L., C. & P.S. (1933-36); Munro, *Functions of a Prosecuting Officer*, 11 U. DET. L. J. 1 (1927); Snyder, *The District Attorney's Hardest Task*, 30 J. CRIM. L., C. & P. S. 167 (1939); NOTE, 34 IND. L.J. 477 (1959); NOTE, 30 IND. L.J. 74 (1954); NOTE, 103 U. PA. L. REV. 1057 (1955); NOTE, 65 YALE L.J. 209 (1955). Although less frequently recognized, a substantial degree of discretion is also assumed by the police in deciding which of the guilty to arrest. LaFave, *The Police and Nonenforcement of the Law*—Part I, 1962 WIS. L. REV. 104;—Part II *id.* at 179. Some view the exercise of such discretion by the police to be improper, Goldstein, *Police Discretion Not to*

improper because of a fear that some of the guilty who should be proceeded against are thus escaping prosecution.

Denying the police the right to release suspects without taking them before a magistrate might be justified on the ground that requiring appearance in every case constitutes an effective control over police practices.[224] The point is that the cases in which it is later decided to grant release are those where an illegal arrest in the first instance is most likely. If the police are aware that in each and every case the arrestee must be presented to a judicial officer, the added visibility given their procedures by this device might influence a more careful weighing of the evidence prior to arrest. However, perhaps an adequate degree of visibility could be maintained if the police were required to keep records and submit reports concerning cases where release was granted.

The question of whether the police should be allowed to grant release, then, is not capable of easy solution. Some judgment is required as to which of the conflicting policy reasons is of greater weight. Police release may save individual arrestees from added inconvenience, but yet may prevent the use of safeguards intended to avoid the release of the guilty and the arrest of the innocent.

Finally, should a police officer be required to respond to damages to the suspect for releasing him without taking him before a magistrate? Tort recovery against a police officer has been made possible in some states by the combined use of the *trespass ab initio* doctrine, whereby any subsequent wrong makes the arrest illegal, and the statutory or judicial requirement that the officer take the offender to a magistrate.[225]

Imposing liability for release under ordinary circumstances is difficult to justify. In the usual case the arrestee has been benefited, rather than injured, by the release without the further delay of taking him

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Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice, 69 YALE L.J. 543 (1960). Although it might be argued that pre-arrest discretion *must* as a practical matter be exercised by the police rather than prosecutor, LaFave, *supra* at 116-25, post-arrest selection apparently could be made the sole responsibility of the prosecuting authority. Yet it is clear that in current practice a substantial number of "no charge" decisions are made by the police.

224. The Cleveland practice bypasses the requirement that all persons taken into custody be brought before a judicial officer; and while this may be a kindness to the released suspects in some or many cases, it has the undesirable feature of making it very difficult to determine what the police are doing and thus handicaps control of police practices.
Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 25 (1957).

225. 1 HARPER & JAMES, TORTS § 3.22 (1956); Bohlen & Shulman, *Effect of Subsequent Misconduct Upon a Lawful Arrest*, 28 COLUM. L. REV. 841, 853-5 (1928).

before a magistrate.[226] Compensation of the arrestee seems justified only if his reputation has been damaged by being unable to obtain an official refutation of the crime charged against him.[227]

Of course, we have already noted that police release might be thought improper for reasons relating to the effective operation of the criminal process. However, to allow the obviously undamaged arrestee to bring suit in these cases because of the officer's action contrary to the public interest in proper administration seems questionable.[228] The use of tort law for such a purpose would appear warranted, if at all, only after it has been determined that no other effective sanction is available.[229]

At most, the release in the usual case would appear to be *some* evidence of the illegality of the original arrest.[230] However, even here caution is needed, as a subsequent lack of sufficient evidence to charge does not *per se* make the arrest illegal on the basis that it was made

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226. Indeed, it might be asked whether the magistrate can make any determination unless the case is formally brought before him—that is, either by the complaint and warrant process or by writ of habeas corpus.

227. Thus, perhaps the best advice to the police is that found in the Pontiac, Michigan manual:

> If additional facts coming to the attention of the arrester dispel the suspicion of guilt under which an arrest has been made . . . the person arrested should be released before taken before a magistrate, unless he himself desires to be taken there to obtain official refutation of the crime charged against him.

Pontiac Police Dep't, Training Manual, § XI D 1 (1954).

It has been questioned whether such damage is likely because of the police release. "The release itself would seem to be a sufficient refutation of the charge of criminality implied in the arrest. . . . But even if he is forcibly released, he could probably still get either a hearing or an official refutation of the charge against him." Bohlen & Shulman, *supra* note 225, at 854 nn.67 & 68. This article contains an excellent analysis of the *ab initio* doctrine and the release problem. General liability because of release is also rejected by the *Restatement*, as it is there asserted that the officer has a duty to release without first taking the person to the magistrate unless the person so desires in order to remove the stigma of the arrest. 1 RESTATEMENT, TORTS § 134, comment f, and § 136, comment f (1934).

228. See the excellent discussion of this point in Bohlen & Shulman, *supra* note 225, at 843-46.

229. The problem is not unlike the issue of whether punitive damages have any place in the law of torts. The policy of giving punitive damages has been condemned as undue compensation of the plaintiff, but has been defended as an appropriate and effective method of discouraging improper conduct. PROSSER, TORTS 10-11 (2d ed. 1955).

230. The court in *Hinsdell*, *supra* note 222 at 81, 90 Pac. at 802, pointed out, "The circumstances of [a prisoner's] discharge, however, may be of great importance as a matter of evidence, in so far as they throw light upon whether the detention was at any time legal—whether the arrest was made in good faith."

on insufficient grounds. Because the legality of the arrest depends upon the information at hand at the time of arrest,[231] the fact that exculpating evidence comes to light later can hardly make the arrest illegal.[232] If no exculpating evidence was later obtained, failure to charge because of lack of evidence might be quite relevant *if* the arrest and charging standards are identical.[233] But, a determination that there is not sufficient evidence to charge can hardly be viewed as conclusive evidence that there was not sufficient evidence to justify arrest where the two standards are different.

CONCLUSION

The complexities of the detention for investigation problem cannot be overemphasized. Examination and evaluation of current practices suggests that it is a mistake to even consider it as a single problem. Rather, the present-day uses of detention for investigation are many, and each of the many different practices presents distinct issues requiring resolution from the law.

In each instance, the task is one of accomplishing a fair balance between individual freedom and effective law enforcement:

> Both unbounded liberty and its restriction place basic human rights in jeopardy. Unbounded liberty jeopardizes the security of life and property and, indeed, the security of our free society. Were this not so, there would be no need to place any restrictions on liberty. Restricting liberty, on the other hand, jeopardizes the basic human right to freedom in movement and conduct.
>
> The problem, then, is to prescribe restrictions which will provide an acceptable degree of security without unduly infringing upon individual freedom. . . . They must be so regulated that the price paid in inconvenience and restraint has an equal compensat-

231. State v. Cox, 258 Wis. 162, 45 N.W.2d 100 (1950); Odinetz v. Budds, 315 Mich. 512, 24 N.W.2d 193 (1946).

232. An exception may be where "the means are at hand of either verifying or dissipating those suspicions without risk . . . ." Filer v. Smith, 96 Mich. 347, 355, 55 N.W. 999, 1002 (1893).

233. It would not seem that the reverse is true, that is, that later charging or conviction establishes the arrest as lawful. Yet, occasionally a court will declare that later conviction "is a conclusive determination that there was probable cause" for arrest. See Hill v. Day, 168 Kan. 604, 215 P.2d 219 (1950); Doak v. Springstead, 284 Mich. 459, 279 N.W. 898 (1938). A common statutory arrest provision declares an officer can arrest a person for a felony "when such person has committed a felony," MICH. STAT. ANN. § 28.874(b) (1954); ALI CODE OF CRIMINAL PROCEDURE § 21 (1930), and may be said to justify such a result. But, if such a result is reached, it seems the only justification is a policy that a person in fact guilty should not be able to recover in tort from the arresting officer. The only case on this common provision found is People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955), which said that whatever the provision means, it does not justify a search incident to an arrest made on less than reasonable grounds.

> ing value in the advantages of greater security. To keep the scales of justice in balance, the advantages to a free society resulting from a reasonable degree of security in one pan must hold in precise equilibrium the other containing the disadvantages that result from restrictions.[234]

The difficulties in accomplishing this task should not deter its undertaking. Those precise instances in which investigative detention has social benefits outweighing the imposition upon the individual must be identified and articulated. Moreover, the criminal administration structure must be carefully scrutinized with a view toward creating even more effective controls over the power granted to those acting in the name of society. This much is owed both to the police agencies charged with enforcement responsibilities and to those individuals who find themselves the subject of official inquiry.

234. Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P.S. 395-96 (1960).

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