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ENFORCEMENT OF THE COMMON LAW RULES
OF ARREST: A HANDCUFFING OF POLICE?

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INTRODUCTION

"In the streets, the only law is that at the end of the policeman's nightstick." The degree of truth in this statement has long been a subject of concern among civil libertarians. Nevertheless, police agencies were for many years left to their own devices in meeting the essential problem of keeping order on the streets; only a small portion of their actions were subject to judicial review.

In the past decade however, this almost absolute discretion which was vested in the police has been challenged. This challenge has taken two primary forms: (1) the establishment of government agencies such as the Neighborhood Legal Services which work to ensure the full spectrum of legal protections and remedies to every person, and (2) judicial decisions which have redefined the scope of police action in some areas of enforcement.

Much attention has been focused on the latter. It has been repeatedly argued that recent decisions of the United States Supreme Court, because of the restrictions they impose on police investigations, are a substantial factor in the rapidly rising crime rate.

Much less attention has been given to the problems involving the policeman's power to effect arrests for minor offenses. In such offenses none of the "big" questions of search and seizure or interrogation apply. Nevertheless, it is in this area that the law has truly "handcuffed" the policeman in the sense that it prohibits him from functioning in a manner consistent with the general expectations of the community.

It is not the purpose of this article to add to the growing body of literature which criticizes the new legal restraints placed on the police, whether in the form of judicial decisions or legal agencies working to enforce legal restraints which have long existed. Rather, the purpose here is to objectively examine the effect of these restrictions on the policeman's attitude toward his job and on his ability to perform it. To this end, the first section of the article will deal with the limitations placed on police authority in the enforcement of selected summary and misdemeanor statutes and some of the problems which these limitations impose. The second section will discuss the effect of recent landmark decisions of the United States Supreme Court in terms of the overall effect which they have had on the police officer's ability to do his job.

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I

There are two rules which govern the law of arrest for minor offenses, both of which have a common law background. One might be denominated the strict rule: A police officer may make an arrest without a warrant for an offense which does not amount to a felony only when that offense is a breach of peace committed in the presence of the arresting officer. This is the rule which pertains in Pennsylvania.\(^1\) The other rule is that a police officer may effect an arrest without warrant for a breach of the peace upon the same grounds as for a felony, that is, the officer need not view the offense, but may arrest when he has probable cause to believe that the offense has been committed. There is no conflict between this second, less restrictive, rule and the "fundamental criteria" on what constitutes a reasonable seizure of the person set forth in the decisions of the United States Supreme Court.\(^2\) Several States have by statute given their peace officers the expanded authority to arrest represented by the second rule.\(^3\)

The continuing existence of the "strict" rule in Pennsylvania coupled with the new focus on the enforcement of this rule has left peace officers in this state with inadequate powers to enforce some provisions of the substantive criminal law. The paragraphs below will examine the effect of the limitations which the rule places on law enforcement practices in a number of selected areas.

**Shoplifting.** Shoplifting is, in Pennsylvania, a summary offense.\(^4\) The statute provides that a merchant or peace officer apprehending a person with concealed goods either inside or outside a store may detain that person for a reasonable length of time "in order that recovery of such goods may be effected." The statute does not, however, authorize the offender's arrest and transportation to a magistrate. Thus if, as is usually the case, the merchant apprehends the shoplifter and recovers his merchandise before the police arrive, the police have no power to assist the merchant in bringing the shoplifter to justice. The officer who did not view the summary offense cannot effect an arrest and the burden is upon the merchant to file a complaint before a magistrate and see that a summons is issued to the shoplifter.\(^5\) However, if the merchant should attempt to proceed in this manner, he will be unsuccessful unless he can ascertain the name and address of the offender. While a John Doe summons may be issued when the identity of the offender is unknown, such summons

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2. This area has been left open in leading cases on the subject. See Ker v. California, 374 U.S. 23 (1963); Beck v. Ohio, 379 U.S. 89 (1964). The common law distinction between a misdemeanor and a felony has been blurred. In today's criminal law some misdemeanors are more serious, and call for more severe punishment, than many felonies. Thus, there is nothing unreasonable in providing that an arrest for a misdemeanor may be made upon the same grounds as those for a felony.
are, for obvious reasons, almost impossible to serve. The police officer arriving on the scene after the crime has been committed has no authority to compel the suspect to reveal his identity. Thus, a shoplifter caught in the act of his offense can walk away from his victim and from any police officer who has been called to the scene. Unless his identity is known to either the merchant or the officer, he is, for all practical purposes, immune from punishment.

Street Peddlers. Second class cities in Pennsylvania are given the power to regulate street sales within their jurisdiction. A Pittsburgh city ordinance provides that no peddler shall operate in the city without a permit and that no permits shall be issued for sales within certain specified areas of the city. Police are responsible for the enforcement of this ordinance. If a police officer observes a peddler operating within one of the prohibited areas, he may approach the peddler and inform him that he is violating the law, but he must not arrest him. Even though in this case he has observed the commission of the offense, street peddling does not amount to a breach of the peace. If the peddler is to receive the prescribed punishment for his offense, the officer who observed the violation must ascertain the peddler's identity, swear out a complaint before a magistrate, and serve a summons on the offender. But how is the officer to learn who the peddler is or where the summons can be served? He has no authority to compel the peddler to reveal this information. Thus, the peddler who refuses to disclose his identity to the police may proceed in open violation of the law with impunity.

Loitering. Pittsburgh's loitering ordinance states in part that "any person or persons who shall be found loitering at the corners of or on the public streets . . . and shall refuse to vacate such place, when requested so to do by any policeman . . . shall be fined." While this ordinance is patently unconstitutional it has not been challenged in the courts and is still in effect in Pittsburgh. However, application of this ordinance has been limited to situations viewed by police involving: (1) the blocking of streets or sidewalks, (2) the blocking of entrances to public buildings, and (3) the verbal harassment of peaceful passersby.

In a typical situation the police receive a call from a merchant complaining that a gang of youths is blocking the sidewalk or entrance to his store. But no action can be taken unless the condition exists when the police arrive. Furthermore, police have no power to prevent the youths from assuming the same posture after their departure.

If residents of a neighborhood complain to police that they cannot

7. Pittsburgh, Pa., ordinance No. 375 of 1934, § 1.
leave their homes without being harassed or insulted by youths idling on
the streets or without having their property vandalized by youths, the
police, unless they actually view the harassment or vandalism taking
place, can offer little protection to the complaining citizens.

If a prostitute stands on a street corner and openly solicits passersby,
no action can be taken unless the police actually hear the solicitation, or
one of the persons solicited signs a complaint against the prostitute. The
police officer cruising by a woman he knows to be a prostitute can do
nothing to remove her from the street.

Disorderly Conduct. The statute prohibits any "loud, boisterous and
unseemly noise . . . to the annoyance of the peaceable residents near
by. . ." The resident or merchant who is intimidated by a disorderly
gang can and usually does call the police. With the approach of the
police car, the disturbance naturally subsides. But because the officer
arriving on the scene does not actually view the elements of the offense,
he lacks the authority to restore lasting order. If he commands the youths
to stop disrupting the neighborhood, his only way to enforce such a com-
mand is to remain at the scene. Once he leaves, the gang will resume its
disorderly demeanor. The youths can tell the officer to "get lost" and, as
long as the reply is not in a loud and boisterous manner, remain immune
from lawful arrest.

Assault and Battery. A person who makes an unprovoked attack on
another citizen, whether it be a mere touching resulting in no significant
injury or a malicious beating or stabbing resulting in "grievous bodily
harm" to the victim, is immune from arrest without a warrant unless
the attack is witnessed by a police officer. If the officer arrives on the
scene seconds after the attack and the injured victim is able to point out
his attacker fleeing down the street, the officer may pursue the attacker,
detain him momentarily, and frisk him. If in this frisk he finds a con-
cealed weapon, he can arrest the attacker on another charge; if no
weapon is found, the offender must be released. When the victim is able
and willing to go downtown and sign a complaint against his attacker, a
warrant can be issued for his arrest. But, again, no arrest is likely to be
made unless the assailant can be identified. If the officer should take steps
to compel the assailant to reveal his identity, the officer is subject to
criminal and civil action for assault and battery.

Similarly, if an officer answers a domestic disturbance call involving a
husband beating his wife, the officer cannot remove the husband unless
the wife first signs a complaint. Often because she cannot leave her
children or because she fears her husband's reprisals, the woman refuses

to swear out the complaint. The officer is then forced, under the law, to leave her to the dubious mercies of her irate mate. If the woman should sign the complaint, the husband is usually gone when the police officer returns to serve it.

Malicious Mischief. "Whoever shall willfully and maliciously destroy damage or injure any article of real or personal property of another . . . is guilty of a misdemeanor. . . ."118 If the police receive a call that a gang of four boys meeting a certain description is roaming a neighborhood, breaking windows, damaging automobiles, and otherwise destroying property, and if the police proceed to that neighborhood and discover four boys meeting the description given them by the complainant, they cannot arrest the boys without a warrant unless they actually see the acts of vandalism. Again, they have no authority to compel the boys to reveal their identity or where they live. Unless the identity of the offenders can be learned from some other source, making an arrest pursuant to a duly issued warrant possible, there is no way to bring them to justice.

Although the rules of arrest affecting the situations outlined above have long existed, they were, until recently, largely ignored. Police readily took custody of shoptlifters turned over by storekeepers who had caught them in the act. The street peddler who exhibited his wares without a permit or in a location prohibited by the ordinance was promptly arrested and fined.

Loitering arrests were made under a vast number of circumstances. Arrests on the loitering charge have been the primary tool for the control of street corner prostitutes. A prostitute well known to the police for her activity, when observed standing on the sidewalk or in a doorway but in no way obstructing the sidewalk, was likely to be arrested, charged with loitering, and held at the station during the evening hours when her business would have been brisk. This approach had the effect of encouraging the prostitute to move on to a different city. The loitering charge was also used by police to arrest cruising homosexuals and "tricks" who were likely to be beaten and robbed if allowed to remain on the streets. As in the case of prostitutes, these persons were, in most cases, in no way interfering with the use of the sidewalk or the street by other citizens.

The loitering charge was also used to implement effective police patrol. Gangs of youths roaming high crime neighborhoods, without regard to whether they were actually blocking the sidewalk, were told by the police to disperse and move on. No command is effective if the one who issues it lacks a remedy to apply to those who disobey. For the police, the usual remedy for disobedience of such a command was arrest on the loitering charge. Thus, police who observed a gang which left to follow its own instincts would commit acts ranging from vandalism to robbery were able to exert control and prevent such crimes by removing the likely offenders from the street.

Finally, the loitering charge was used to assist merchants in areas where large numbers of youths on the street discouraged potential customers from visiting their stores. These merchants received quick response from police when they reported systematic harassment of passersby or even blocking of display windows. When the police appeared, the harassment naturally stopped, but orders were given to the offenders to leave the area. These orders were usually obeyed.

The disorderly conduct charge was used not only when a police officer observed a person being loud and boisterous to the disturbance of the public, but also when insulting remarks were directed to and heard solely by an officer. Thus, if the officer's badge and demeanor were not sufficient to command the outward demonstration of respect considered essential by the policeman to maintain order on his beat, he "enforced" respect by the use of his arrest power and an attendant fine.

As for misdeanors such as assault and battery or malicious mischief, the police officer and citizen alike never so much as considered the restrictions in the common law rules of arrest as a bar to immediate apprehension of the offender. If a police officer had refused to arrest a fleeing criminal in situations such as those outlined above because he had not actually seen the offense, he would have been considered derelict in his duty by all concerned.

As pointed out above, the legal restrictions on arrest are not new, but recent years have seen the emergence of factors which have focused on their enforcement. Chief among these factors has been the organization of the Neighborhood Legal Services under the Economic Opportunity Act. The Neighborhood Legal Services has filled the vacuum which existed in legal representation for those persons who were the most usual targets of the described police practices. The work of the Neighborhood Legal Services has been supplemented by that of active civil rights organizations and an increasingly general interest among members of the bar in providing legal representation for the poor.

As a consequence, the police officer finds that his testimony on a summary offense or misdemeanor arrest, far from being met with the former almost automatic finding of guilt or prima facie case by the police magistrate, is now often subject to rigorous cross examination, review by higher courts, and perhaps, even becomes the source of civil or criminal action against him.

Further, this greatly increased after-the-fact supervision over the police officer's action on arrests for minor offenses has occurred concurrently with a change in attitude toward him and toward his position. Youth in low income neighborhoods who once regarded the policeman with unquestioned respect and even fear now taunt and deride him. The officer has become the visible and vulnerable target of the revolution which is occurring in our country. The removal of the broad powers that he once exercised, however unauthorized they were by the law, has left
him ill-equipped to deal with the present crisis. Residents and merchants in low income, high crime neighborhoods, not understanding the circumstances behind the increasing enforcement of the restrictions on arrest powers, realize only that the policeman is not serving them as he once did and accuse him of “throwing in the towel.”

Thus, the police officer is subjected to attack from two sides; from the youth on the streets who are his responsibility to control and from the “law abiding” residents of the neighborhoods he is charged to protect. And into his daily battles with these two sides and their legal representatives has been thrust the increasing outcry and protest over the actions of the United States Supreme Court.

II

In recent years, much attention has been focused on the decisions of the United States Supreme Court in the areas of search and seizure, interrogation, and line-up identifications. It is these decisions, not the common law rules of arrest, which have been the most frequently blamed for “handcuffing the police” and creating the “barbed wire of legalisms” which make it impossible for the policeman to perform his job. These decisions have indeed created difficulties in police investigation, but not to the extent and not in the manner claimed by their detractors.

First it should be noted that decisions of the Supreme Court in such cases as *Mapp v. Ohio, Aguilar v. Texas, Miranda v. Arizona* and *United States v. Wade* have little if any effect on the apprehension and conviction of the perpetrators of the common types of “street crime.” If a citizen is assaulted, robbed, or raped by a person whom he has never seen before, unless the police are nearby and able to apprehend the criminal immediately, there is little chance that he will ever be brought to justice.

The “street criminal” usually attacks swiftly and from behind. Often his crime is committed on impulse arising from his sudden awareness that he and his victim are the only persons on a dimly lit side street. He leaves no fingerprints and no witnesses other than his victim. When the police receive the report of such a crime they have no leads to follow, no place to begin an investigation. When police have no identifiable suspect, judicial restrictions on search or interrogation never come into play.

Thus, it is not the Supreme Court's decisions, but rather the facts of the case, which “handcuff” the police and prevent apprehension of the
criminal. If any part of the responsibility for the alarming increase in hit and run street crime is to be laid to legal restrictions on police action, it is the common law rules governing arrest and the actual enforcement of these rules (which preclude the once common police practice of preventive arrest) which should be cited.

The same point is valid with respect to a different type of crime. The nighttime burglar, the bank robber, the narcotics dealer, or the murderer may leave fingerprints on fixtures or other physical evidence at the crime scene. He may have been photographed by hidden cameras or noticed by passersby while "casing" his "job." Informants or undercover agents may have passed information about him to the police, or he may be betrayed by the existence of a motive growing out of his discoverable relationship with his victim.

Crimes of this type do lend themselves to follow-up investigations, and the effect of the Supreme Court's decisions on these investigations cannot be denied. Generally, however, experienced detectives and competent, uniformed officers have found that, while the decisions do require a refinement of technique, they pose no real obstacle to their investigations.

The intelligent investigator seldom loses evidence because of an inadequate search warrant. He has learned from his training and experience how to draft an acceptable affidavit, and he is inclined to agree with the principles on which such cases as Mapp25 and Aguilar26 are based. He is well aware of cases such as McCray v. Illinois,27 which allows him to protect the confidentiality of his informants, and Warden v. Hayden,28 which allows him to search for any evidence which might implicate his suspect. He has also learned the patience which allows him to refrain from making a search before obtaining a warrant when time permits; he is, however, also aware of Kerr v. California,29 which sanctions the search without a warrant when circumstances demand it.

The Court's decision in Wade30 establishing the right to counsel of a suspect placed in a police line up was accepted by the intelligent police officer without complaint. The presence of counsel makes the officer conducting the line up careful to avoid mistakes which, brought out in cross examination of the identifying witness, could destroy the probative value of the identification.

Even the Miranda31 decision which established that the suspect had to be informed of his right to remain silent and to confer with counsel before

25. See note 19, supra.
26. See note 20, supra.
27. 386 U.S. 300 (1967).
30. See note 22, supra.
31. See note 21, supra.
being interrogated, while having a measurable effect, has not "handcuffed" the police in their investigations.32

There are many competent and intelligent police officers who have come to accept the Court's decisions as a necessary condition of their employment. These men, many of them detectives responsible for investigations of major crimes, continue to function effectively. Unfortunately, however, there are a substantial number of policemen who have made no attempt to understand the restrictions arising from recent court decisions and who react to their imposition with hostility and resentment. This latter group consists mainly of patrol officers whose job it is to keep order on the streets and to apprehend offenders in the act of committing crimes. They seldom conduct investigations in which the problems of search and seizure and interrogation arise.

One might ask, then, how the recent court decisions affect these men at all. Paradoxically, the effect is very real. It is found not in the exclusion of evidence or the loss of prosecutions, but rather in the depressed morale and bitter attitudes toward our system for the administration of justice. The incessant editorial comment and political oratory relating to the "coddling of criminals" by the United States Supreme Court has led these men, who have often never so much as been called to testify in a hearing or a motion to suppress evidence, into a malaise of self-pity.

This general depression takes its toll in the policeman's performance of his duty. He feels, however incorrectly, that he has been stripped by the Court of his power to perform under pressures on his beat which are increasing daily. He may even blame the Courts for the uncontrollable conditions he meets. The defensiveness engendered by these feelings in turn exacerbates the worsening conditions and increases the lack of respect for the policeman felt in the community.

Those upon whom the patrol officer formerly relied for support—the community, the courts, and even his own superiors—seem to the defensive policeman to have taken a stand against him. For many of these men, the answer to our present problems of a rising crime rate and community unrest seems simple—a speedy return to the old order. In view of the impossibility of this solution, their effectiveness remains impaired.

CONCLUSION

While the decisions of the United States Supreme Court have had their effect on the growing inability of the police to maintain order and safety on our streets, they are less responsible than is widely claimed. The primary cause of our present problems (the increasing dissatisfaction with the social injustice inherent in our society) has little relation to the procedural law. But even if the procedural law is to be singled out as a

contributing factor to the partial impotence of our police in holding the control they so long maintained, it is not the recently imposed restrictions on search, interrogation, and other investigatory techniques upon which attention should focus. Rather, it is the newly established supervision over the application of our long-standing common law rules of arrest.

In viewing the problems which our changing system of laws and administration of justice have brought upon the police, the reader must remember that adjustment by individual police officers calls for far more than the simple learning or relearning of these rules. The police officer who worked for many years under a system which imposed few actual restraints on the methods he used in performing his assigned tasks developed what might be called an occupational personality. The values of human decency, common sense, and fairness were elements of this personality. So too, were the expectations of unquestioning respect for his badge, the authority it represented, and, above all, support when he "got the right man," regardless of how he got him.

Now, however, the police officer finds himself increasingly unable to exert the control he once exercised over those persons who, in his view, constituted a threat to the peace and safety of his district. He can no longer expect the support he once received as a matter of course from the minor judiciary. In place of this support has appeared the defense attorney whose questions focus not on the guilt or innocence of his client, but on the methods exercised in the apprehension of that person. This phenomenon has had the effect of undermining many of those qualities in the policeman's personality and approach to his job which once were the only factor in insuring the fair and decent disposition of cases at the minor judiciary level. The policeman has been put on the defensive and this in turn has increased the polarization between police and youth and police and minority groups.

Mere changes in the law will never resolve these basic problems. However, if our society expects its peace officers to enforce the substantive laws it has promulgated, it must give these officers adequate powers, without doing violence to the fundamental principles in our constitution, to perform this task.

33. See J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966). See ch. 3, 9, 10 and 11 for a discussion of the policeman's personality and other factors contributing to his present dilemma.