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cause of action will not lie based upon the injury inflicted prior to the amendment. The court held that such an application of the statute would be retroactive and contrary to the Constitution. Since there was no expression of legislative intent that the statute be applied retroactively, the court had no occasion to consider the question of whether any vested rights would be affected by such an application.⁷⁰

CONCLUSION

The problem posed by the Montana Legislature is not an easy one. There are many facets of the problem which will require the Montana court to exercise sound judgment in an attempt to achieve the legislative expression of intent and to effectuate paramount policy choices. It is a general rule that the legislative expression of intent must be given controlling force if possible. The Montana court expressed this rule in *Tipton v. Sands*:⁷¹

Every reasonable doubt must be resolved in favor of legislative action. The court must determine not whether it is possible to condemn, but whether it is possible to uphold the Act which is attacked; every presumption being in favor of its validity.

It is submitted that the court can achieve this end in the manner indicated above. The court need not fear that a deteration that the statute is procedural for purposes of the constitutional question of retroactive application binds it to this determination for all questions which might arise in the future. As noted by Professor Cook, the distinction between substantive and procedural law is "drawn for a number of different purposes, each involving its own social, economic, or political problems."⁷²

The Montana court has previously held the survival statute to be procedural.⁷³ Public policy, coupled with the court's prior decision and the legislative intent provide the court with a solid basis for such a decision. The court should find the statute to be procedural, at least for purposes of retroactive application. This would not be an encroachment upon constitutional safeguards.

ROBERT G. ANDERSON

ROADBLOCKS AND THE LAW OF ARREST IN MONTANA

INTRODUCTION

Revised Codes of Montana, 1947, section 94-6030 provides:
The duly elected or appointed law enforcement officers of this state, and their deputies, are hereby authorized to establish, . . . temporary roadblocks on the highways of this state for the purpose of identifying drivers, and apprehending persons wanted for viola-

⁷⁰*Ibid.*

⁷¹103 Mont. 1, 16, 60 P.2d 662, 669 (1936).

⁷²Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 342 (1932-33).

⁷³*Dillon v. Great No. Ry.*, *supra* note 65.

tions of the laws of this state, or of any other state, or of the United States, who are using the highways of this state.

Section 94-6030 is framed in broad and general terms and appears to grant the law enforcement officials of this state unlimited authority to establish roadblocks. This presents several important constitutional questions relative to the law of arrest. It is the object of this article to delineate, as far as possible, the law of arrest and to illustrate why and how it should limit section 94-6030.

At the outset a brief resume of the law of arrest will be helpful. The basic rule is that before there can be a lawful arrest there must be probable cause to believe that the arrestee has committed or is committing an offense.¹

The Supreme Court of the United States has impliedly held that if an officer, with probable cause, stops a vehicle in order to search it, an arrest of the driver does not necessarily result.² The right of an officer to stop and question, as an act separate from an arrest, an individual abroad is recognized by the majority of courts so long as reasonable grounds for an investigation are present. The majority of courts, using this same reasoning, allow the stopping of an automobile and the questioning of occupants as an act separate from an arrest, provided that reasonable grounds for investigation are present.³ However, the stopping of an individual abroad on mere suspicion is not permissible. This constitutes a departure from an objective standard and places reliance solely on the subjective intent of the officer. Where the officer stops a vehicle at a general roadblock, there is not even a suspicion on the part of the officer, for he is relying merely on the "law of averages," *i.e.*, that out of a given number of cars stopped there is *likely* to be discovered a certain number of violations of the law.

WHAT IS AN ARREST?

At the outset it must be recognized that the term "arrest" is not subject to precise definition. There is no set formula which can be applied in every case to determine just *when* an arrest has taken place. The peculiar circumstances of each case are important in ascertaining the ultimate scope

¹U.S. CONST. AMEND. IV: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST., AMEND. XIV, § 1: "No state shall . . . deprive any person of life, liberty, or property without due process of law."

MONT. CONST., ART. III, § 7: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation reduced to writings." MONT. CONST., ART. III, § 27: "No person shall be deprived of life, liberty, or property without due process of law."

Probable cause has been defined to exist when the facts and circumstances known to the officer warrant a prudent man in believing that an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 161 (1925); *Henry v. United States*, 361 U.S. 98, 104 (1959).

²*Carroll v. United States*, 267 U.S. 132 (1925).

³*E.g.*, *Jenkins v. United States*, 161 F.2d 99 (10th Cir. 1947); *Busby v. United States*, 296 F.2d 323 (9th Cir. 1961); *People v. Martin*, 46 Cal. 2d 106, 293 P.2d 52 (1956).

of the term. An arrest has been defined as a taking, seizing, or detaining of the person of another.⁴ It has been defined as the apprehension or detention of the person of another in order that he may be forthcoming to answer for an alleged or supposed crime.⁵ It has also been defined as the taking of a person into custody.⁶ At times the courts have attempted to specify the basic requirements of an arrest: (1) a purpose to take the person into the custody of the law; (2) under real or pretended authority; (3) an actual or constructive seizure or detention of his person; and, (4) so understood by the person arrested.⁷ The area of greatest dispute and with which this article is primarily concerned is the third, *i.e.*, an actual or constructive seizure or detention of the person. This may be accomplished by touching or putting hands on the person or by an act that indicates an intention to take him into custody⁸ and that subjects him to the actual control and will of the person making the arrest.⁹ There can be no arrest where the person sought to be arrested is not conscious of the restraint.¹⁰ The problem is how much interference with freedom of movement is allowable before a technical arrest occurs. When an officer detains a person for the purpose of questioning him, does this constitute an arrest, and if not, at what point is a legal arrest made?

REQUIREMENT OF PROBATE CAUSE

The Constitution of the United States¹¹ and of the state of Montana¹² require a showing of probable cause before a warrant of arrest may be issued. In the case of an arrest without a warrant, Montana legalizes an arrest of one who has in fact committed a felony without a showing of probable cause.¹³ In all other cases, Montana requires probable cause when there is an arrest without a warrant, except where the offense is committed in the

⁴Harrer v. Montgomery Ward & Co., 124 Mont. 295, 221 P.2d 428 (1950); Jenkins v. United States, *supra* note 3; Hoppes v. State, 70 Okla. Crim. 179, 105 P.2d 433 (1940).

⁵Patterson v. United States, 192 F.2d 631 (5th Cir. 1951), *cert. denied* 343 U.S. 951 (1952); Cornish v. State, 215 Md. 64, 137 A.2d 170 (1957); Rhodes v. Walsh, 55 Minn. 542, 57 N.W. 212 (1893); Hoppes v. State, *supra* note 4; Wyatt v. State, 120 Tex. Crim. 3, 47 S.W.2d 827 (1932); State v. Phillips, 262 Wis. 303, 55 N.W.2d 384 (1952).

⁶United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960), *rev'd on other grounds*, 285 F.2d 408 (2d Cir. 1960).

⁷State *ex rel.* Sadler v. Dist. Ct., 70 Mont. 378, 225 Pac. 1000 (1924); Harrer v. Montgomery Ward & Co., *supra* note 4; Some courts do not list the second element, *e.g.*, under real or pretended authority, as one of the basic elements which must be present before there can be an arrest, but their decisions show that this is a requisite. Jenkins v. United States, *supra* note 3; People v. Foster, 176 N.E.2d 397 (1961).

⁸Harrer v. Montgomery Ward & Co., *supra* note 4; Rhodes v. Walsh, *supra* note 5; Hoppes v. State, *supra* note 4; State v. Phillips, *supra* note 5.

⁹Harrer v. Montgomery Ward & Co., *supra* note 4; Hoppes v. State, *supra* note 4; State v. Phillips, *supra* note 5; State *ex rel.* Sadler v. Dist. Ct., *supra* note 7. The court in the Sadler case *requires* an actual touching of the person to be arrested before there is an arrest. The case is subject to criticism on this point.

¹⁰Harrer v. Montgomery Ward & Co., *supra* note 4; State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960).

¹¹*Supra* note 1.

¹²*Supra* note 1.

¹³REVISED CODES OF MONTANA, 1947, § 94-6003(2). Mason, *Arrests Without a Warrant in Montana*, 11 MONT. L. REV. 1, 3 (1950). Hereinafter REVISED CODES OF MONTANA are cited R.C.M.

presence of the officer.¹⁴ Thus, if there is no right, as an act separate from an arrest, to stop and question, whenever an officer stops a person for questioning there is presumptively an arrest and probable cause must be established before this detention occurs or the police officer's action will be illegal.¹⁵ It is obvious that an officer may ask an individual a question without there being an arrest so long as he does not confine or restrain the individual without his consent.¹⁶ The problem arises when an officer without probable cause for an arrest restrains an individual *by force or display of authority* for a brief period of time for the purpose of questioning.

RIGHT TO STOP AND QUESTION AS AN ACT SEPARATE FROM AN ARREST

In *Carroll v. United States*¹⁷ the Supreme Court of the United States recognized the right of a law enforcement official to stop and search a vehicle on the basis of probable cause to believe that it was carrying contraband although there was not present the necessary probable cause to support an arrest of the driver. The court allowed the search because of the mobility of the automobile and the quickness with which it can be moved out of the locality or jurisdiction. Thus, the Supreme Court has recognized that the stopping of a vehicle for the purpose of searching it does not necessarily constitute an arrest of the driver.

The courts are in disagreement regarding the right of a law enforcement official to stop and question, as an act separate from an arrest, an individual abroad where there are reasonable grounds for investigation. They may be divided into three groups:¹⁸ (1) courts where the right to stop and question, as an act separate from an arrest, has typically been recognized;¹⁹ (2) courts which, although not having considered the question fully, have given an indication that there may be a recognized right to stop and question, as an act separate from an arrest, under some circumstances when an arrest would be improper;²⁰ and, (3) courts which refuse to recognize any right to stop and question apart from an authorized arrest.²¹

¹⁴R.C.M. 1947, § 94-6003 (1), (3), (4), (5).

¹⁵*Shirey v. State*, 321 P.2d 981 (Okla. Crim. 1958); *United States v. Scott*, 149 F. Supp. 837 (D.D.C. 1957). Cf. *Robertson v. State*, 184 Tenn. 277, 198 S.W.2d 633 (1947). The Tennessee court in dicta stated that the stopping of a car to check a driver's license constituted an arrest although the restraint may be just momentary in some cases. The arrest is said to be excusable because of revenue necessities and the protection of the public against unqualified or dangerous drivers. The court at no point discusses probable cause and even infers that in such a case probable cause is not necessary for there to be a legal arrest. The case is probably erroneous on this point.

¹⁶Note, *Arrest-Stopping and Questioning as an Arrest*, 37 MICH. L. REV. 311 (1938).

¹⁷*Supra* note 2.

¹⁸This grouping of the courts is merely representative. It is not intended to be a comprehensive classification.

¹⁹*Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908); *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955); *People v. Jackson*, 164 Cal. App. 2d 759, 331 P.2d 63 (1958); *People v. Ambrose*, 164 Cal. App. 2d 513, 318 P.2d 181 (1957); *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956). In all these cases the circumstances were such that there is no doubt that reasonable grounds for an investigation were present.

²⁰*People v. Henneman*, 367 Ill. 151, 10 N.E.2d 649 (1937); *State v. Hatfield*, 112 W. Va. 424, 164 S.E. 518 (1932); *State v. Guleznski*, 32 Del. 120, 120 Atl. 88 (1922).

²¹*People v. Esposito*, 118 Misc. 867, 194 N.Y. Supp. 326 (1922); *Arnold v. State*, 255 App. Div. 422, 8 N.Y.S.2d 28 (1938); *Shirey v. State*, *supra* note 15.

Section 2 of The Uniform Arrest Act²² recognizes the right to stop and question where there are "reasonable grounds to suspect."²³ If the person so questioned refuses to answer or explain his actions to the satisfaction of the officer, he may be detained and further questioned and investigated for a period not exceeding two hours.²⁴ The two hour limitation prevents the detention from being transferred into imprisonment *ex communicado* without the safeguards of arrest.

The classic California case in this area is *Gisske v. Sanders*²⁵ where the court stated:²⁶

. . . A police has a right to make inquiry *in a proper manner* of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, *if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification.* (Emphasis added.)

The court recognized that there must be present reasonable grounds for investigation and that the inquiry must be in a proper manner. This prevents an officer from lawfully stopping an individual on the basis of whim or caprice.

The majority of the federal cases support the right to stop and question, as an act separate from an arrest.²⁷ The district court in *United States v. Bonanno*²⁸ held that if individuals are stopped for questioning while leaving a gathering of known criminals, there has been no arrest. The circuit court reversed the case on other grounds. Judge Clark, in a concurring opinion,²⁹ stated that the ruling of the district court was at variance with the holding of the United States Supreme Court in *Henry v. United States*³⁰ and the rationale contained therein. The *Henry* case dealt

²²THE UNIFORM ARREST ACT, § 2:

(1) A peace officer may stop any person abroad whom he has reasonable grounds 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 by this section shall not exceed two hours. Such 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.

Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 325 (1942).

²³*Supra* note 22.

²⁴*Ibid.*

²⁵9 Cal. app. 13, 98 Pac. 43 (1908).

²⁶*Id.* at 16, 98 Pac. at 45.

²⁷*Husty v. United States*, 282 U.S. 694 (1931); *Busby v. United States*, 296 F.2d 328 (9th Cir. 1961); *United States v. Bonanno*, 180 F. Supp. 71 (S.D.N.Y. 1960), *rev'd on other grounds*, 285 F.2d 408 (2d Cir. 1960). *Cf.*, *Carroll v. United States*, 267 U.S. 132 (1925). In the *Carroll* case the court recognized the right of those lawfully within this country to use the highways without interruption or search unless there is probable cause for believing that their vehicles are carrying contraband or illegal merchandise. *But see Long v. Ansell*, 69 F.2d 386, 398 (D.C. Cir. 1934), where the court declared: ". . . the restraint arrest may be applied to any case where a person is taken into custody or deprived of his full liberty, or where the detention of a person in custody is continued for even a short period of time."

²⁸*Supra* note 27.

²⁹*United States v. Bonanno*, 285 F.2d 408 (2d Cir. 1960).

³⁰361 U.S. 98 (1959).

with the stopping of a car without probable cause for an arrest, its search, and the seizure of contraband goods found therein. The evidence was rejected by the court as having been obtained through a search and seizure stemming from an illegal arrest. The Supreme Court affirmed this decision, but based its affirmance upon the government's unnecessary concession that the arrest had taken place when the federal officers stopped the car.⁸¹ Due to this concession, the decision was narrow in scope, turning on the question of probable cause to arrest at the moment the vehicle was stopped. Apparently Judge Clark erroneously interpreted the *Henry* case as standing for the proposition that law enforcement officers must have probable cause to arrest before they can lawfully stop an automobile. This position might arguably be supported by a statement of the United States Supreme Court in *Carroll v. United States*:⁸²

. . . those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption . . . unless there is . . . probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

A careful reading of this statement shows that the court permitted a vehicle to be stopped on the basis of probable cause for a search and did not require probable cause for an arrest. If stopping a vehicle for the purpose of search is not an arrest, it would appear that the stopping of a vehicle for the purpose of interrogation or identification of the occupants is still further removed from a technical arrest. But one important distinction must be made. That is, the stopping of a vehicle in order to search it must be based on probable cause.⁸³ If the right to stop a vehicle for purpose of interrogation or identification of the occupants is limited to those instances when reasonable grounds for investigation are present, it would be constitutionally permissible.⁸⁴ The extreme mobility of a vehicle, which was the crucial factor in allowing the search of a vehicle on the basis of probable cause,⁸⁵ is an important element in allowing the stopping of a vehicle on the basis of reasonable grounds for investigation. Also, the reasoning of those courts which allow the stopping of an individual abroad where reasonable grounds for investigation exist would be equally applicable to the stopping of an automobile.

ROADBLOCKS

The establishment of a general roadblock for the purpose of checking drivers' licenses has been justified as a valid exercise of the police power for protection of the citizenry by attempting to remove the unqualified driver from the highways.⁸⁶ The toll of traffic deaths and injuries is the public necessity which makes such an interference with the motorists' freedom of movement permissible.

⁸¹*Id.* at 171.

⁸²267 U.S. 132, 154 (1925).

⁸³*Ibid.*

⁸⁴*Supra* note 3.

⁸⁵*Supra* note 2.

⁸⁶*Aronovity v. City of Miami*, 114 So. 2d 784 (Fla. 1959); *Commonwealth v. Mitchell*, 355 S.W.2d 686 (Ky. 1962).

The courts have refused to allow police officers to use the device of stopping to check drivers' licenses as a mere subterfuge for conducting a detailed search of the vehicle.³⁷ As the court in *Aronovitz v. City of Miami*³⁸ stated:³⁹

Other states . . . have impliedly recognized the propriety of stopping vehicles for driver's license inspection. Similarly many of these courts have condemned the idea of employing the driver's license inspection merely as a surreptitious subterfuge for embarrassing a motorist and making a detailed search of his automobile without cause to believe that the law is being violated or in the absence of a violation in the presence of the officer.

Even with this limitation, a roadblock allegedly established for the purpose of driver's license inspection is likely to be primarily established for a *chance finding* of other and more important violations of the law. With such an uncontrolled avenue of abuse open to law enforcement officials, it is submitted that the public interest would be better served by prohibiting the establishment of roadblocks for the purported purpose of checking drivers' licenses. Section 94-6030 is not limited to the checking of drivers' licenses but on the surface allows the establishment of a general roadblock for the purpose of a *chance finding* of any violation of the law.

The stopping of vehicles to apprehend a wanted criminal or for the purpose of investigating a serious crime which has been committed is recognized as a valid exercise of the police power. In *United States v. Bonanno*⁴⁰ Judge Kaufman discussed at some length this question and felt that if every detention of a person was held to be within the protection of the Fourth Amendment to the Constitution of the United States, police investigation would be dealt a crippling blow by imposing a radical sanction unnecessary for the protection of the citizenry. He might well have stated this proposition in reverse form. That is, such a right, subject to certain limitations, is necessary for the protection of a free citizenry. A police officer should be allowed to question everyone leaving the scene of a suspected crime, even if it is obvious that all of the persons could not have committed the crime. Judge Kaufman argued that there is more justification for stopping a car leaving the vicinity of a suspected crime because if action is not taken immediately there may not be another opportunity.⁴¹ In support of his position, he cited the concurring opinion of Justice Burton in *Brinegar v. United States*⁴² that law enforcement officers could take affirmative action not only where there are reasonable grounds for an arrest or probable cause to search, but when there are *reasonable grounds for investigation*.

Also in the *Brinegar* case,⁴³ Justice Jackson, though dissenting, suggested the propriety of setting up a roadblock around the scene of a kidnapping and stopping all cars seeking to pass through, even though it would

³⁷*Ibid.*

³⁸*Aronovitz v. City of Miami*, *supra* note 36.

³⁹*Id.* at 789.

⁴⁰*Supra* note 27.

⁴¹*Ibid.*

⁴²338 U.S. 160 (1949).

⁴³*Ibid.*

be clear that most of the cars stopped could have nothing to do with the criminal activity. However, he would not extend the use of the roadblock to stopping of a bootlegger to see if he was carrying liquor. Justice Jackson would seemingly base the propriety of a roadblock on the seriousness of the crime and the possible injury to the public if the roadblock were not used. This position is sound. It does not fall within the prohibition set down by the Supreme Court in *Carroll v. United States*:⁴⁴

It would be intolerable and unreasonable if a prohibition agent were authorized to stop *every* automobile *on the chance* of finding liquor and thus subject all persons lawfully using the highway to the inconvenience and indignity of such a search. (Emphasis supplied.)

Justice Jackson balanced the protection of those rights guaranteed to an individual under the Constitution of the United States with the interest of society as a whole in adequate enforcement of the criminal laws. He would not sanction the stopping of vehicles at a general roadblock unless the crime was of such magnitude that the interest of society in adequate enforcement of the criminal law must prevail. The vicinity within which roadblocks could be established would depend on the circumstances of the particular case. A general roadblock might be justified in the case of kidnapping, murder and armed robbery; but it would not be permissible where crimes of a lesser magnitude, such as the transportation of illegal liquor or the violation of state vehicle or driver licensing regulations, were involved. This rationale is *contra* to the holding of Judge Kaufman in the *Bonanno* case⁴⁵ where he allowed a general roadblock for the purpose of questioning those leaving a gathering of known criminals. A general roadblock in such a case would violate constitutional limitations and be an illegal restraint, even though there may be no arrest.

STATUTORY LIMITATIONS ON THE RIGHT TO STOP A VEHICLE IN MONTANA

Revised Codes of Montana, 1947, sections 32-21-155⁴⁶ and 94-6030⁴⁷ cover the stopping of vehicles to check for unsafe conditions and the failure to be equipped as required by law. The scope of the authority granted under section 94-6030 goes far beyond the mere checking of unsafe conditions and the failure to be equipped as required by law, while section 32-21-155 is limited to these specific situations. Section 32-21-155 provides that a vehicle may be stopped when there is *reasonable cause* to believe

⁴⁴*Supra* note 2 at 154.

⁴⁵*Supra* note 27.

⁴⁶R.C.M. 1947, § 32-21-155: "The supervisor, members of the state highway patrol, and such other officers and employees of the department as the supervisor may designate, may at any time upon *reasonable cause* to believe that a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of such vehicle to stop and submit such vehicle to an inspection and such test with reference thereto as may be appropriate." (Emphasis supplied.)

⁴⁷R.C.M. 1947, 94-6030: "The duly elected or appointed law enforcement officers of this state, and their deputies, are hereby authorized to establish . . . temporary roadblocks on the highways of this state for the purpose of identifying drivers, and apprehending persons wanted for violations of the laws of this state, or of any other state, or of the United States, who are using the highways of this state."

that the vehicle is unsafe or not equipped as required by law. This statute is an extension of the holding of the *Carrol* case.⁴⁸ The stopping is not necessarily an arrest of the driver but rather an investigation of the vehicle. This statute does not prohibit the stopping of a vehicle on the basis of reasonable grounds for investigation when checking on other types of criminal activity. The policy considerations in the two areas are entirely different. In the area of safety the concern is for protection of those who use the highways of this state and the legislature has required reasonable cause. Regarding prevention of other types of criminal activity, the legislature has not placed such a limitation on the power of the law enforcement officials.

Section 94-6030 seemingly sanctions the stopping of all vehicles on the *mere chance* that a violation of the law might be discovered.⁴⁹ This is not constitutionally permissible.⁵⁰ There is no requirement of probable cause or reasonable grounds for investigation. In view of the policy of the legislature as to the stopping of a single vehicle for a safety check,⁵¹ section 94-6030 can not be held to have been enacted for such a purpose.

PRACTICAL CONSIDERATIONS RELATIVE TO THE RIGHT TO STOP AND QUESTION

Professor Warner, who was largely responsible for the drafting of the Uniform Arrest Act, made inquiries of many judges, prosecutors and police officers and spent about a week each in Boston, Chicago, Los Angeles, San Francisco and Portland, Oregon, riding around in squad cars and watching the police at work.⁵² He stated that he observed "very few police practices that did not seem to have a good deal of justification, but a large number that were illegal."⁵³ It is a common practice for police to stop suspects on the street for the purpose of questioning.⁵⁴ He points out that the law of arrest is completely outdated and that if we expect the police to respect the law and still perform their duty of protecting the public, we must revise the law of arrest *so that as a practical matter it can be obeyed*.⁵⁵ Continued violations of the law, even in unimportant details, is calculated to breed disrespect for law and to create a standard of conduct based on other principles.⁵⁶

The right of an officer to stop and question was an established right at common law.⁵⁷ Considering the simple society of yesterday, the need for such a right today is even more apparent in view of our highly complex and mobile society.

⁴⁸*Supra* note 2.

⁴⁹*Supra* note 47.

⁵⁰*Supra* note 44 and corresponding text.

⁵¹*Supra* note 46.

⁵²Warner, *Investigating the Law of Arrest*, 26 A.B.A.J. 151, 153 (1940).

⁵³*Ibid.*

⁵⁴Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182.

⁵⁵Warner, *supra* note 52 at 155.

⁵⁶*Ibid.*

⁵⁷2 Hale, *Pleas of the Crown*; 2 Hawkins, *Pleas of the Crown*; cited in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 318-19 (1942).

RIGHT TO SEARCH INCIDENT TO A LAWFUL ARREST

As has already been pointed out, the courts have refused to allow the inspection of drivers' licenses to be employed "... as a surreptitious subterfuge for embarrassing a motorist and making a detailed search of his automobile. . . ."⁵⁸ This is the generally accepted rule with regard to an arrest for any traffic violation.⁵⁹ As the California court in *People v. Blodgett*⁶⁰ stated:⁶¹

The cab driver could have been arrested for illegal parking, but a search could not be justified on this ground as it would have no reasonable relation to the arrest for a traffic violation.

The Supreme Court of the United States has held that the legality of a search incident to an arrest depends on the reasonableness of the search under the circumstances.⁶²

Thus we are presented with the problem of what right to search a police officer has when he stops a vehicle for a traffic violation. It would appear that under such circumstances there is no right to search. An arrest for a traffic violation would furnish no reasonable grounds for or bear any reasonable relation to a search of the automobile. But if, while in the process of arresting the traffic violator, the police officer observes an offense being committed in his presence,⁶³ he may arrest the offender for such offense and conduct such a search of the vehicle as is reasonable in relation to the crime and the circumstances.⁶⁴ It has been held that if the original stopping of the vehicle was a mere subterfuge to examine the car by sight inspection, then even if there is an offense being committed in the presence of the officer, the arrest is illegal and any evidence obtained is illegally obtained evidence.⁶⁵

The right to search a vehicle on reasonable cause should not be confused with the right to search the vehicle incident to an arrest made on the basis of reasonable cause. The two are distinct. The right to search a vehicle on reasonable cause may be independent of the right to arrest; hence, an arrest need not precede the search.⁶⁶ The probable cause which forms the basis for an arrest may in many instances be the same as that which serves as the basis of probable cause for a search.⁶⁷ In this case the search could be substantiated as being incident to a lawful arrest or on the basis of probable cause. If the search goes beyond the bounds of that which would be reasonable in connection with a lawful arrest, it may be substantiated on the basis of probable cause.

⁵⁸*Supra* note 39 and corresponding text.

⁵⁹*People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956); *Aronovitz v. City of Miami*, 114 So. 2d 784 (Fla. 1959); *Cf.*, *United States v. Lefkowitz*, 235 U.S. 452 (1932); *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955); *Elliott v. State*, 173 Tenn. 203, 116 S.W.2d 1009 (1938).

⁶⁰*Supra* note 59.

⁶¹*Id.* at 58.

⁶²*United States v. Rabinowitz*, 339 U.S. 56 (1950).

⁶³*Supra* note 14.

⁶⁴*Busby v. United States*, 296 F.2d 328 (9th Cir. 1961); *People v. Murphy*, 173 Cal. App. 2d 367, 343 P.2d 273 (1959); *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956).

⁶⁵*Robertson v. State*, 184 Tenn. 277, 198 S.W.2d 633 (1947).

⁶⁶*Carroll v. United States*, *supra* note 2; *Brinegar v. United States*, *supra* note 42.

⁶⁷*People v. Lujan*, 141 Cal. App. 2d 143, 296 P.2d 93 (1956).

If the probable cause necessary for a valid arrest exists, it makes no difference whether the search is made before or after the arrest technically occurs.⁶⁸ This position is supported by the decision of the Montana Supreme Court in *State ex rel. Wong You v. District Court*.⁶⁹ In that case the officer searched the gambling establishment of the arrestee before he technically placed him under arrest. The arrestee was present at all times during the search and probable cause on which an arrest could have been based was present before the search occurred.

CONCLUSION

The basic principle underlying the problems presented is that what constitutes an allowable interference with personal liberty should be determined by weighing the public interest to be served against the degree of interference, rather than by matching the facts against a rigid category called "arrest." Factors to be considered include possible harm to the public if detention is not accomplished, necessity of immediate detention, degree of interference and duration of the interference with personal liberty.

In accordance with this principle and the case law, the following general principles are submitted. On the basis of reasonable grounds for investigation, the right to stop and question individuals abroad, as an act separate from an arrest, is a permissible interference with an individual's freedom of movement. Such questioning can continue for only a short period of time and must be done in a proper manner. The potential arrestee cannot be required to accompany the police officer anywhere and if probable cause for an arrest does not become immediately apparent, the individual must be allowed to proceed. Whether reasonable grounds for investigation exist is a factual question and must be left to the court's determination under the facts of each particular case. This rule should also apply to the stopping of a vehicle. The extreme mobility of a vehicle is an additional factor which illustrates the need for such a right.

A general roadblock may only be established in attempting to apprehend those who have committed a serious crime. This does not mean that a general roadblock may be established *on the chance* of finding someone who has committed a serious crime. There must be some reasonable relation between the commission of the crime and the establishment and location of the roadblock. Although it has been held that a general roadblock may be established for the purpose of checking drivers' licenses,⁷⁰ it is submitted that a statute authorizing such a roadblock is unconstitutional. It constitutes an unreasonable interference with an individual's freedom of movement.

Section 94-6030 permits the establishment of a roadblock on the *mere chance* that some violation of the law will be discovered. It is not limited as set forth above. Section 94-6030 is an unreasonable interference with personal freedom of movement and should be declared unconstitutional.

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⁶⁸*People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955); *Husty v. United States*, 282 U.S. 694 (1931).

⁶⁹106 Mont. 347, 78 P.2d 353 (1938).

⁷⁰*Supra* note 36.