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Arrest and Citation: Definition and Analysis

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I. INTRODUCTION

The United States Constitution does not use the word "arrest". The fourth amendment provides: "The right of the people to be secure in their persons, . . . against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, . . . particularly describing . . . the persons . . . to be seized."[1] Thus, any definition of "arrest" must be sought in statutes and cases. The courts have defined "arrest" as falling somewhere between two extremes. In its most inclusive sense, it is any interference with a person's freedom of locomotion, which if unprivileged, would generally constitute common-law false imprisonment. In its most exclusive sense, an arrest consists of taking custody of a person for the purpose of conducting a criminal proceeding.[2]

Questions such as what, when, how, why, and, by what authority, concerning an arrest, have troubled Anglo-American legal institutions for centuries.[3] The concern aroused by such questions contributed to the American Revolution and the adoption of the Fourth Amendment to the United States Constitution.[4] These questions remain critically important today, even without the added pressure of recent judicial developments.

In human terms, the consequences of the arrest may be ulti-

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1. U.S. CONST. amend. IV.
2. W. LAFAVE, ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY 3-4 (Remington ed. 1965).
3. 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 84-97 (1st Am. ed. 1847). For a discussion of contemporary arrest law in the United Kingdom, see Telling, *Arrest and Detention—The Conceptual Maze*, 1978 CRIM. L. REV. 320; Lidstone, *A Maze in Law!*, 1978 CRIM. L. REV. 332.
4. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 396-98 (1963).

mately more damaging to the person arrested than the charge filed or final outcome of the criminal proceedings. To an individual under arrest, it generally means at least a temporary loss of freedom, a damaged reputation,[5] and an arrest record which may not be expungable even if the arrest was illegal.[6] These human consequences are in addition to the frightening experience of being completely subject to the will of another person, usually armed.

In legal terms, the occurrence and moment of an arrest can be vital factual issues in criminal proceedings, due to the exclusion of evidence obtained incident to an unlawful arrest.[7] Whether probable cause to arrest existed at the critical moment is the issue generally raised when the legality of an arrest is challenged.[8] For example, the defense might contend no arrest was made in order to prevent the prosecution from justifying a disputed search as incident to a lawful arrest. In such a case, the prosecution would have the burden of proving the occurrence of a lawful arrest. In other cases, the defense might contend an arrest occurred, but without probable cause. To escape the burden of proving probable cause, the prosecution incurs the burden of proving no arrest took place at the time alleged by the defense.[9] The ultimate burden al-

5. For example, for persons residing permanently in a rural area, the community will quickly forget or never know a termination of criminal proceedings favorable to the accused, but will long remember the fact of the arrest if consummated publicly. *See also* W. LAFAVE, *supra* note 2, at 5; Meyer, *Arrest Under the New Kansas Criminal Code*, 20 KAN. L. REV. 685 (1972).

6. Comment, *Criminal Procedure: Expungement of Arrest Records*, 62 MINN. L. REV. 229 (1978); Comment, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087 (1979); Comment, *Arrest Record Expungement—A Function of the Criminal Court*, 1971 UTAH L. REV. 381 (1971). L.B. 450 (1979), dealing in part with expungement of arrest records, was killed in the 1979 session of the Nebraska Legislature.

7. Sibron v. New York, 392 U.S. 40 (1968); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); State v. Mercurio, 96 R.I. 464, 194 A.2d 574 (1963). Also, without an arrest, the implied consent statute is not triggered so as to render admissible the results of non-consensual chemical analyses of blood or urine samples. NEB. REV. STAT. § 39-669.08 (Reissue 1978). *See* Otte v. State, 172 Neb. 110, 108 N.W.2d 737 (1961).

8. Both the operation of the exclusionary rule and the nature of probable cause are beyond the scope of this article. Also, while this article is primarily concerned with warrantless arrests, the principles discussed apply as well to arrests supported by warrants.

9. W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 346 (1972); Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 289 (1971).

Whether an arrest occurred, and, if so, whether it was lawful, is not the full extent of the problems posed in text accompanying notes 7-8 *supra*. Even though an arrest did not occur in a given case, a seizure of the person still may have taken place. Seizures not amounting to arrests are governed by a different set of rules. Brown v. Texas, 99 S. Ct. 2637 (1979); Dunaway v. New York, 442 U.S. 200 (1979); Delaware v. Prouse, 440 U.S. 648 (1979); Penn-

ways remains on the state.

Some events are not arrests by virtue of statute. Under Nebraska law, a peace officer may take into custody, under specified conditions, a child under eighteen years of age.[10] Such custody, by the terms of the statute, "shall not be deemed an arrest." Also, under the Nebraska Mental Health Commitment Act, certain persons can be taken into custody with or without issuance of a mental health board warrant.[11] Mental health custody does not appear to be an arrest.

According to statutory law in Nebraska, persons found on public property in a dangerous, intoxicated state or otherwise incapacitated may be taken into custody.[12] After reasonable attempts have been made, without success, to place such persons in preferred alternative situations, such persons may be held for not more than twelve hours in civil protective custody. By the terms of the statute, such custody is not an arrest and no arrest record is to be made based upon such custody.[13]

As *United States v. Bonanno*[14] indicates, constitutional analysis of an arrest/detention case previously focused on the occurrence of an arrest under traditional principles of arrest law.[15] However,

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sylvania v. Mimms, 434 U.S. 106 (1977); Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

10. NEB. REV. STAT. § 43-205.01 (Reissue 1974).

11. *See* NEB. REV. STAT. § 83-1028 (Reissue 1976); §§ 83-1020, 83-1021, 83-1030 (Cum. Supp. 1978).

The mental health boards do not have the power to issue arrest warrants, even though they are empowered to issue warrants for the custody of persons alleged to be mentally ill and dangerous. *Id.* § 29-403 (Reissue 1975).

12. NEB. REV. STAT. § 53-1,121 (Supp. 1979).

13. L.B. 376, § 2(4), ch. —, 1979 Neb. Laws (codified at NEB. REV. STAT. § 53-1,121 (4) (Supp. 1979)).

14. 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub. nom.*, U.S. v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

15. The nature of the definitional problem was highlighted in *Bonanno.*

> 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. 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. In dealing with words there is always a temptation to allow them to become separated from their objective correlatives in the everyday world, and to treat them as if they have, or ought to have, one single simple meaning, unaffected by the contexts in which they occur and divorced from the world of things and events which give them their content and justification.
>
> 'Arrest' is just such a word, not only because it is necessarily unspecific and descriptive of complex, often extended processes, but because in different contexts it describes different processes, each of

in a line of decisions beginning in 1968, the United States Supreme Court changed the critical inquiry from the occurrence of an arrest to the occurrence and scope of a seizure of the person. By so doing, the Court has since diluted the significance of the law of arrest for purposes of constitutional analysis in some types of cases.

In the first of this line of cases, *Terry v. Ohio*,[16] the Court reviewed an investigative detention and protective frisk and held the applicable test was whether the frisk was reasonable, not whether probable cause existed to support the stop.[17] The decision caused considerable confusion because the Court specifically decided "[N]othing . . . concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation."[18]

Four years after *Terry*, the Court reviewed another investigative detention and protective seizure in *Adams v. Williams*.[19] In that case the Court held: "a brief stop of a suspicious individual . . . may be most reasonable in light of the facts known to the officer at the time."[20] The Court, without any specific explanation in *Adams*, seemed to approve the police practice of stops on less than probable cause.

In *United States v. Robinson*,[21] the Court held it was "the lawful arrest which establishe[d] the authority to search, . . . [I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."[22] By virture of this holding, a lawful arrest establishes probable cause for any warrantless, full search of the arrestee. Consequently, the determination of when the arrest took place can be vitally important in criminal proceedings.

In *Dunaway v. New York*,[23] the Court required that before police may detain a suspect for purposes of custodial interrogation, they must have probable cause to support the detention. The

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which has built up, in both legal and common parlance, sharply divergent emotional connotations.

180 F. Supp. at 77.

16. 392 U.S. 1 (1968).
17. *Id.* at 20-21.
18. *Id.* at 19 n.16.
19. 407 U.S. 143 (1972).
20. *Id.* at 146. The Nebraska Supreme Court has adopted the holding of *Adams v. Williams*. *E.g.*, State v. Irwin, 191 Neb. 169, 214 N.W.2d 595 (1974); State v. Brewer, 190 Neb. 667, 212 N.W.2d 90 (1973); State v. Brown, 195 Neb. 321, 237 N.W.2d 861 (1976). Even before the *Terry* decision, Nebraska's Legislature adopted NEB. REV. STAT. § 29-829 (Reissue 1975), the "stop and frisk" statute.
21. 414 U.S. 218 (1973).
22. *Id.* at 235.
23. 442 U.S. 200 (1979).

Court explained the intended application of its *Terry* decision and took the opportunity to review the propriety of investigative seizures upon less than probable cause for purposes of detention and interrogation: the issue not decided in *Terry*. No search issues were presented in *Dunaway*.

The effect of an unlawful arrest on jurisdiction should also be noted. It is the rule in almost all American jurisdictions, that whenever the accused is personally before the court, the court's jurisdiction is not impaired by the means used to bring the accused before it.[24] This rule seems to apply in most of the readily imaginable situations (*e.g.*, arrest without probable cause; forcible return from another state without authority; defective warrants; stops by local police outside municipal boundaries; etc.).[25] The rationale supporting this rule is that the only issue in a criminal case is the guilt or innocence of the accused. The manner of securing personal jurisdiction of the accused is collateral, and, therefore, irrelevant,[26] except for possible effects on admissibility of evidence obtained in violation of the fourth, fifth or sixth amendments.

This article presents and analyzes the various definitions of an arrest as formulated in several jurisdictions. Furthermore, it focuses on the law of arrest in Nebraska. Finally, a practical and sensitive alternative to formal arrest procedure, the citation-in-lieu of arrest, is examined along with the special problems presented by the citation procedure.

II. ARREST IN OTHER STATES

A majority of the courts that have considered the question have agreed upon a set of elements which, when taken together, constitute an arrest: 1) a purpose or intention to effect an arrest; 2) real or presumed authority; 3) actual or constructive seizure or detention of the arrestee by a person having present power to control

24. E. FISHER, LAWS OF ARREST 401-03 (1967).

25. *See id.* at 402-03.

26. State v. Poynter, 70 Idaho 438, 220 P.2d 386 (1950). *See* Ker v. Illinois, 119 U.S. 436 (1886).

Nebraska follows this rule. In State v. Knudsen, 201 Neb. 584, 270 N.W.2d 926 (1978), the Nebraska Supreme Court held the possible illegality of the arrest was not a defense to the crime for which the arrest was made. *Knudsen* was a driving-while-intoxicated case in which the accused was arrested outside the Blair city limits by a Blair police officer. Had the case depended upon the fruits of a search of the arrestee's person or vehicle, the case might have been decided differently. However, the fourth and fifth amendments generally have little application to these cases. *See* State v. Costello, 199 Neb. 43, 256 N.W.2d 97 (1977); State v. Nicholson, 183 Neb. 834, 164 N.W.2d 652 (1969); Maddox v. Sigler, 181 Neb. 690, 150 N.W.2d 251 (1967); Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124 (1946).

the arrestee; 4) communication by the arrestor to the arrestee of his purpose or intention to make an arrest; and 5) an understanding by the arrestee of the arrestor's intention to then and there arrest or detain him.[27]

In applying this elemental approach to actual cases, courts agreeing on these elements are, nevertheless, hopelessly divergent on the question of which element or set of elements should be of controlling importance within a given factual context.

A. The Purposive Approach

The view that the intent or purpose of the officer is the critical, and possibly the only, factor which determines whether an arrest has occurred seems to have been legitimated by the United States Supreme Court in *Terry* and *Adams*. It is epitomized by cases and statutes which state: "[A]n arrest is the taking of a person into custody in order that he may be held to answer a criminal charge."[28]

United States v. Bonanno,[29] was one of the leading pre-*Terry* authorities supporting the purposive approach. In *Bonanno*, the police officers knew that a meeting was taking place at the estate of a known syndicate leader. They did not know the purpose of the meeting. Nevertheless, the police set up a roadblock on a public road leading from the estate. They then stopped every unfamiliar car using the road in order to identify the occupants. Nearly everyone so identified was asked to report to a nearby police station. All who reported were questioned for periods not exceeding half an hour. The ultimate issue was the admissibility of statements made by the defendants during their period of detention. The court stated:

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27. Range v. State, 156 So. 2d 534 (Fla. App. 1963); Clements v. State, 226 Ga. 66, 172 S.E.2d 600 (1970); State v. Loyd, 92 Idaho 20, 435 P.2d 797 (1967); People v. Jackson, 98 Ill. App. 2d 238, 240 N.E.2d 421 (1968); State v. MacKenzie, 161 Me. 123, 210 A.2d 24 (1965); People v. Woods, 16 Mich. App. 718, 168 N.W.2d 617 (1969); State v. District Court, 70 Mont. 378, 225 P. 1000 (1924); State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966); Hoppes v. State, 70 Okla. Crim. 179, 105 P.2d 433 (1940).

28. State v. Glick, 87 S.D. 1, 201 N.W.2d 867 (1972); Range v. State, 156 So. 2d 534 (Fla. App. 1963). *See* UNIFORM ARREST ACT § 1 (1942) [hereinafter cited as UAA]; ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2, Note (P.O.D. No. 1, 1972) [hereinafter cited as ALI CODE]; DEL. CODE ANN. tit. 11, § 1901 (1974); N.H. REV. STAT. ANN. § 594:1 (1974); R.I. GEN. LAWS § 12-7-1 (1969).

29. 180 F. Supp. 71 (S.D.N.Y. 1960).

> It is clear that a technical arrest demands an intent on the part of the arresting officer to bring in a person so that he might be put through the steps preliminary to answering for a crime such as fingerprinting, booking, arraigning, etc. . . . The common conception of an arrest, like the technical definition, comprehends the formal charging with a crime.[30]

The court then concluded the fourth amendment was not violated by the police actions, because "it cannot be contended that every detention of an individual"[31] is a seizure in the fourth amendment sense.

Were the *Bonanno* definition of an arrest applied literally, any detention, irrespective of its reasonableness, would be constitutionally valid so long as the police officer would testify he had no intention of initiating criminal charges against the detainee until probable cause could be obtained.[32] Further, if the intent of the police officer is the controlling factor, then the Constitution and the courts are supplanted by the police officer in the field as the protectors of the peoples' liberty.[33] Unfortunately, the *Bonanno* definition of an arrest has been persuasive to a number of courts, including the Nebraska Supreme Court.[34]

At the time of the *Bonanno* decision, there was at least inferential support for the position that the officer's purpose or intent is the dispositive factor. In *Henry v. United States*,[35] the F.B.I. was investigating the theft of an interstate shipment of whiskey. The agents had received information implicating one of the defendants. The agents followed the defendants' car after it left a tavern. Defendants eventually parked in an alley. One of the defendants left the car and returned carrying some cartons, which he put in the car. The car left the alley and eluded the agents. Later, the agents again found the car parked in front of the tavern. Defendants left the tavern and again drove to the alley. Again, one of the defendants left the car and returned with some cartons. This time, after defendants left the alley, the agents stopped the car and searched it. Finding an out-of-state address on the cartons, the agents took the defendants into custody and held them for approximately two hours. During this period, the agents discovered stolen radios in the suspect cartons and then formally arrested the defendants.[36]

Rather than contesting the time of the arrest, the prosecution conceded the arrest occurred when defendants' car was stopped,

30. *Id.* at 77-78.
31. *Id.* at 78.
32. Cook, *Subjective Attitudes of Arrestee and Arrestor as Affecting Occurrence of Arrest*, 19 KAN. L. REV. 173, 181 (1971).
33. Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L.C. & P.S. 402, 404 (1960).
34. State v. Carpenter, 181 Neb. 639, 150 N.W.2d 129 (1967).
35. 361 U.S. 98 (1959).
36. *Id.* at 100.

and argued the probable cause issue.[37] The issue before the Supreme Court was whether, at the time the defendants' car was stopped, the agents had probable cause to arrest. The Supreme Court decided they did not.

In view of the government's concession, the Court could state nothing binding about the moment of arrest. The Court did, however, state that in its opinion, "when the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."[38] That statement reveals little. The Court could have been indicating agreement with the theory that any restraint is an arrest.[39] Having thus commented on the question, the Court left the impression it would have decided the question that way had the prosecution not conceded the issue.[40]

In *Rios v. United States*,[41] state police officers were patrolling a neighborhood known for its narcotics activity. Upon observing the defendant, who was not previously known to the officers, enter a taxi, the officers followed for two miles. At a traffic light, the officers got out of their car and approached the cab on opposite sides. Alarmed, the defendant dropped a package, recognizable to the officers as a package of narcotics. The officers tried unsuccessfully to stop the defendant's escape into an alley, but stopped him by shooting him in the back.[42] The officers testified that they had not been investigating any particular crime and did not intend to arrest the defendant up to the point of approaching the cab.[43] They simply wanted to question him.

The Supreme Court found there was no probable cause for an arrest up to the point of the initial encounter.[44] In this case, the government chose to contest the issue of the time at which the arrest occurred. The Supreme Court did not decide the question, but remanded to the district court for a determination.[45]

Henry and *Rios* can be distinguished only on the inferences flowing from the manner of the officers' approaches to the defendants. In *Henry*, the officers believed they had probable cause and approached the defendants' car with pistols drawn, which indi-

37. *Id.* at 103.
38. *Id.*
39. *See* note 47 *infra*.
40. Cook, *supra* note 9, at 292.
41. 364 U.S. 253 (1960).
42. *Id.* at 256 n.1.
43. *Id.* at 262.
44. *Id.*
45. The district court found, on remand, that the officers' approach to the cab did not constitute an arrest. United States v. Rios, 192 F. Supp. 888 (S.D. Cal. 1961).

cated their intent. In *Rios*, the officers knew they had nothing and testified they did not intend an arrest. The difference in the decisions appears to have been based upon the difference in the officers' intentions.[46]

1. Terry v. Ohio[47]

In *Terry*, a plainclothes detective assigned to a downtown patrol observed two men looking into a store window. The men walked to a street corner and stopped to talk. Subsequently, the men took turns walking past the same store, stopping on each pass to look into the window. A third man arrived at the corner and talked with the men. He then walked quickly away. The two continued looking at the store, until they left to rejoin the third man.[48]

After witnessing this ritual the detective became suspicious. He approached the three men, identified himself and asked their names. One of the men, Terry, mumbled something. The detective grabbed Terry, spun him around and patted down his outer clothing. The detective felt a pistol in Terry's left breast pocket which he took into his possession. Terry and one of his companions were charged with carrying concealed weapons.[49]

The Supreme Court did not determine the propriety of the initial intrusion,[50] but considered the issue to be "[w]hether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."[51] The Court applied the traditional balancing test to rule the limited search lawful.

> In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion . . .[52]

46. Cook, *supra* note 32, at 181.
47. 392 U.S. 1 (1968).
48. *Id.* at 6.
49. *Id.* at 7.
50. *Id.* at 19 n.16. Chief Justice Warren limited the focus of the Court's decision:
> We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred. We cannot tell with any certainty upon this record whether any such 'seizure' took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.
51. *Id.* at 15.
52. *Id.* at 21.

> . . . .
> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. . . .[53]
> . . . .
> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others . . . to conduct a carefully limited search . . . to discover weapons . . .[54]

The Court concerned itself with the reasonableness and scope of the additional intrusion, the pat down, rather than the reasonableness of the initial intrusion.

The same balancing test could have been used to justify the stop if framed in terms of the officer's purpose or intent to prevent crime as opposed to an intent to apprehend a criminal. The governmental interest of crime prevention and detection was alluded to by the Court as underlying "the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."[55]

The Court, in *Terry*, also made several particularly relevant remarks, similar to language used in *Bonanno*:

> It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person[56] . . .
>
> A seizure occurs whenever an 'officer' by means of physical force or show of authority, . . . in some way restrain(s) the liberty of a citizen[57]
> . . . .
>
> An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.[58]

The Court seemed to distinguish a field detention or investigative stop from an arrest on the basis of the officer's purpose or intent. Reasonableness, not probable cause, was sufficient to justify the stop. Even though the stop/arrest distinction was purely dic-

53. *Id.* at 27.
54. *Id.* at 30.
55. *Id.* at 22.
56. *Id.* at 16.
57. *Id.* at 19 n.16 (cited and rephrased in Pennsylvania v. Mimms, 434 U.S. 106, 116 n.2 (1977) (Stevens, J., dissenting)).
58. *Id.* at 26.

tum, the distinction carried the symbolic support of the majority of the Court.[59]

It should be noted that Justice Harlan, in his concurring opinion, indicated that the limited search was justifiable only if the initial forcible stop was lawful.[60] He believed the conclusion that the stop was justified was necessarily implied in the majority opinion on the facts presented. In his view, a police officer could not lawfully conduct a protective search if he had contributed to the dangerous situation by his own action in making an unlawful stop.[61]

2. Adams v. Williams[62]

In *Adams*, a police officer patrolling a high crime area during the early morning hours was given a tip by an anonymous informer, to the effect that Williams, the defendant, was sitting in a car carrying narcotics and had a gun at his waist. The officer approached Williams' car, tapped on the window and asked Williams to open the door. Williams responded by rolling down the window, at which time the officer immediately reached inside the car and grabbed the gun from Williams' waistband. The officer could not see the gun from outside the car.[63] Notwithstanding this, the Court held the seizure of the gun permissible under *Terry* in order to protect the officer. When the gun proved to be where the informer said it would be, the officer had probable cause for the subsequent arrest.[64]

The Court held that under *Terry*, a police officer is constitutionally authorized to insist upon an encounter with a citizen despite the absence of probable cause to believe that a crime has been or is being committed.[65] Apparently, the *Adams* majority accepted the views of Justice Harlan in *Terry* that the legality of the initial stop was implicitly upheld by the *Terry* majority on the facts presented in that case.[66]

Through its decisions in *Terry* and *Adams*, the Supreme Court obscured whatever understanding there once may have been as to the meaning of the word "seizure" by supporting a distinction between an arrest and an investigative detention. The problem is that the Court emphasized the purpose or intent of the officer in

59. *Id.* at 20-27.
60. *Id.* at 33.
61. *Id.* at 33-34. *See* Young v. United States, 435 F.2d 405 (D.C. Cir. 1970). *But see* United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971).
62. 407 U.S. 143 (1972).
63. *Id.* at 145.
64. *Id.* at 148.
65. *Id.* at 146-7.
66. *Id.*

upholding the stops in *Terry* and *Adams* on something less than probable cause. By that emphasis, the Court may have changed the general law of arrest by setting up the officer's intent, revealed after the fact in his testimony, as the most important element of an arrest. Perhaps the Court was asserting that the only time an arrest occurs is when the suspect is actually taken in.[67] In like fashion, the Court has not indicated whether the duration of the "seizure" is a significant factor in determining whether an arrest has occurred. The passage of time considered alone, is, after all, an arbitrary measurement.

3. Dunaway v. New York[68]

Some of the conceptual problems created by the *Terry* and *Adams* decisions have been solved and replaced by new problems as a result of the decision in *Dunaway v. New York*.[69] In *Dunaway*, the arresting officers admitted they lacked probable cause for an arrest. Nevertheless, they subdued Dunaway at a neighbor's house, took him to police headquarters and questioned him in an interrogation room after giving him his *Miranda*[70] warnings.[71] Dunaway's trip to the station house was involuntary. He was not told he was under arrest, nor was he told he was free to go. In fact, he would have been physically restrained had he refused to accompany the officers or had he tried to escape their custody.[72] The Court said:

> [T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. . . . The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law. The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, . . . obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny.[73]

The *Dunaway* Court rejected the use of the *Terry* balancing test and required probable cause for the seizure. The balancing test was reserved for intrusions falling "far short of the kind of intrusion associated with an arrest."[74]

While the Court still considered the subjective intent of the officers and their purpose in effecting the seizure, the Court appears

67. Meyer, *supra* note 5, at 734.
68. 442 U.S. 200 (1979).
69. *Id.*
70. 384 U.S. 436 (1966).
71. 442 U.S. at 203.
72. *Id.*
73. *Id.* at 212-13.
74. *Id.* at 212.

to have considered these factors as nothing more than supporting considerations. The *scope* of the intrusions involved in this line of decisions[75] now appears to have been the primary inquiry, not the purpose or intent of the officers. However, these decisions are all fourth amendment seizure cases wherein the occurrence of a seizure is the critical fact, not the occurrence of an arrest, except where a purported search incident to arrest was being reviewed. Even so, the scope of the intrusion concept could be useful in determining whether an arrest has occurred.

B. The Understanding of the Arrestee

The United States Supreme Court has not acknowledged the role of the arrestee or the importance of his or her attitude as it relates to the arrest situation.[76] However, a cogent argument based upon the history of the fourth amendment has been made indicating that perhaps the attitude of the arrestee should be an important factor in determining whether an arrest has occurred.[77]

Historically, the English colonial administration subjected the colonies to a strictly enforced system of trade restriction. As part of the enforcement program, the English customs officials made extensive use of the writs of assistance, which, due to a lack of a specified time for return, were in substance general warrants of unlimited legal duration. No sworn factual showing was necessary to obtain such a writ. With writ in hand, a customs officer could search at will any house during daytime hours and any ship, any time, for unspecified goods, wares and merchandise.[78] The colonists not only demonstrated against the use of writs of assistance, but also complained to the Crown in the 1772 Petition of the Colonial Congress to the King.[79] The arbitrary power of the customs officials acting under authority of the writs of assistance was considered as one of the basic violations of colonial rights.[80]

After the Revolution and the passage of time during which the

75. Delaware v. Prouse, 440 U.S. 648 (1979); Pennsylvania v. Mimms, 434 U.S. 106 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

76. The Court has, however, dealt at length with the feelings and understanding of the detainee for purposes of fourth amendment analysis in motor vehicle stop cases. *See* Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). *See also* Pennsylvania v. Mimms, 434 U.S. 106 (1977).

77. Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093 (1967).

78. *Id.* at 1098.

79. *Id.* at 1099.

80. *Id.*

failure of the Articles of Confederation had become apparent, the Constitutional Convention assembled.[81] The Convention had available to it several examples of bills of rights in the states' constitutions, but chose to seek ratification of the new constitution without a bill of rights. This omission formed a central argument of the anti-Federalists against adoption of the proposed Constitution.[82] The danger of arbitrary arrest, searches pursuant to general warrants and searches pursuant to warrants not based upon sworn testimony were mentioned as some of the specific incidents of tyranny not precluded by the proposed constitution. A popular pamphlet of the day declared: "The rights of individuals ought to be the primary object of all government, and cannot be too securely guarded by the most explicit declarations. . . ."[83]

This statement was directed toward what the pamphleteer labeled subjection to "the insolence of any petty revenue officer to enter our houses, search, insult and seize at pleasure."[84] Similarly, a major concern of the framers of the Bill of Rights seems to have been the prevention of arbitrary police powers committed to the discretion of the enforcing officers.[85] The framers were concerned with the rights of individuals, rather than providing for the "needs of law enforcement" due to the abuses perpetrated under that banner.

At least one contemporary authority adheres to this philosophy:

> [I]f the policeman's conduct presents ambiguity as to the existence of a restraint, then the state of mind of the individual is controlling. This is a sound approach, for it is the citizen's right to be protected from intrusion which is forbidden by the fourth amendment. If he believes that he is in custody, then all of the legal protections that flow from that consequence should be his.
>
> It might be argued that rather than considering the subjective state of mind of the individual, an objective, reasonable man test should be employed. Proponents of this test argue that the police will be intolerably burdened if they have to guess what is in every foolish or irrational mind. However, the Bill of Rights was enacted to protect every man and although the police may be burdened from time to time, the subjective test seems appropriate and required.[86]

The American Law Institute apparently adopted this approach in its proposed Model Code of Pre-Arraignment Procedure.[87] The Code provides that where a police officer has assumed control over

81. *Id.* at 1100.
82. *Id.*
83. *Id.* at 1100 (quoting FORD, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 12-13 (1888)).
84. Abrams, *supra* note 77.
85. *Id.* at 1100-01.
86. Abrams, *supra* note 64, at 1103-04 (footnotes omitted).
87. ALI CODE, *supra* note 28.

a person other than by the authority of or for the time permitted by the Code's investigative detention provisions, then the restrained person is entitled to all the protections afforded a formally arrested person.[88] The specified acts of the officer which would trigger the operation of this provision are: an indication by a specific order or by the officer's conduct that the person is obliged to remain in the officer's presence when no such obligation exists; or, a failure by the officer to inform such a detained person that he is free to go.[89]

At least one state court of last resort has accepted the theory forwarded by the ALI. In *Huebner v. State*,[90] the defendant was convicted of a sex crime. He contended his arrest was not based on probable cause and that the inculpatory statements he made at the police station were inadmissible because he had not been advised of his constitutional rights. The day after the crime was committed, a police officer stopped defendant's car because it matched a description given the police. The officer, after learning defendant had used his car the preceding night, asked defendant to come to the police station for further questioning. The defendant was not told he was under arrest, nor was he ordered to appear. He drove his own car to the station. He did not understand himself to be under arrest, his liberty was not restricted and the officer testified that he had no intention of restraining the defendant.[91] The Wis-

88. *Id.* § 120.5(1).

89. The drafters of the Code felt section 120.5 was "necessary to make clear that the Code's protective provisions for arrested persons are applicable, whether or not the assumption of custody over the person was legal, or constituted an arrest in the mind of the officer." *Id.* at 145 (commentary).

Section 120.5(2) deals with situations arising where a police officer has requested "a person to come to or remain at a police station, prosecutor's office, or other similar place," and has failed to "take such steps as are reasonable under the circumstances to make clear that", *id.* § 120.5(2), such person is under no legal obligation to comply with such a request. Where such situations arise, the Code conclusively presumes that such a person, if he complies with the officer's request, proceeds under compulsion and is therefore entitled to all the protections afforded a formally arrested person.

As a rationale for section 120.5(2), the Code drafters state:

> The practical significance of the safeguards provided for in-custody investigation would be greatly undermined if it were open to the police to contend that none of those safeguards applied since the accused had appeared and remained at the police station voluntarily, although the accused may not have known that he was not under constraint.

Id. at 145. Should the police violate section 120.5, the exclusionary rule is to be applied to any statements or other evidence obtained by such violation. It should be noted the effect of section 120.5 is intended to be limited such that "the person involved is not to be deemed to have been arrested for any purpose other than invoking the protective provisions of . . . this Code." *Id.* at 21.

90. 33 Wis. 2d 505, 147 N.W.2d 646 (1967).

91. *Id.* at 516, 147 N.W.2d at 651.

consin Supreme Court held the stopping of the car followed by the questioning at the police station did not constitute an arrest because the facts did not show an intent on the part of the officers to arrest the defendant, nor an understanding by the defendant that he was under arrest.[92]

In its concern for the power of the police legally to detain for investigation, the court admonished that despite that power:

> It must be made plain to the person he is not under arrest and there is no legal obligation to comply with the request to appear at the station, and the act of the person must be voluntary and uncoerced. However, if the law enforcement officer by order or conduct indicates the person is obliged to remain in the officer's presence or to come to the [police] station, such person is for practical purposes arrested because of the imposition of the will of the police officer over the freedom of the person. . . . The same result is reached by a voluntary submission to [such] custody.[93]

Most of the courts faced with this problem have held an arrest is not effected when the suspect consents to accompany a police officer to the station or another place.[94] Such decisions seem to be based on the idea that an arrest can occur only when the individual is detained against his will. If an individual consented to accompany the officer, then the coercive element is absent.[95]

Dupree v. United States[96] is illustrative of situations in which the events take place so quickly that isolating the first moment of the arrest is very difficult. Upon seeing the defendant walking late at night in a recently burglarized area, police officers stopped to question him. Both officers were out of their car when Dupree was asked if he was carrying a weapon. Dupree abruptly stepped back, reaching for his right coat pocket. One of the officers immediately grabbed him by the arm, while the other drew his revolver. One of the officers then removed a revolver and formally arrested Dupree for carrying a concealed weapon.[97]

The defense contended the arrest was illegal because it took place when Dupree was first detained, before there was probable cause to support an arrest. Citing *Schook v. United States*[98] for the proposition that "arrest connotes restraint," the court held that "[m]ere questioning absent a submissive feeling of forced detention does not constitute an arrest."[99] Accordingly, the weapon was admissible as the fruit of a search incident to a valid arrest, since

92. *Id.* at 516-17, 147 N.W.2d at 652.
93. *Id.* at 516, 147 N.W.2d at 651.
94. *See* notes 96-120 & accompanying text *infra*.
95. Cook, *supra* note 32, at 177.
96. 380 F.2d 233 (8th Cir. 1967).
97. *Id.* at 234.
98. 337 F.2d 563, 566 (8th Cir. 1964).
99. 380 F.2d at 235.

"[e]very officer has the right to arrest and make search when he feels his life is in danger."[100] The court completely overlooked the fact that the officers had contributed to the danger to themselves by stopping appellant and inexplicably inquiring whether he was carrying a weapon.[101] The court's rationale in *Dupree* was nothing more than bootstrapping.

In *State v. MacKenzie*,[102] the Maine Supreme Court held that the belief of the detained person as to whether he was under arrest was "not controlling."[103] MacKenzie arguably understood that he was under arrest because the police had handcuffed his companion and told him to come along. However, no arrest occurred according to the court, since the police had not physically detained the defendant. The court ignored the effect of voluntary submission.

The *MacKenzie* decision raises the questions of how much restraint is necessary to give the "arrestee" a reasonable basis for believing himself arrested, whether the police must formally announce their intention to arrest, and how such an announcement relates to the arrestee's understanding of his situation. Generally, no formal declaration of arrest nor any actual application of physical force is required. If the officer's conduct clearly implies his purpose or intent to arrest, any announcement would be superfluous,[104] except for evidentiary purposes. This general rule is based upon the premises that intent can be manifested by conduct,[105] and that the purpose of the announcement is to make the officer's intent unquestionably clear. Consequently, if the arrestee chooses not to cooperate, he cannot later complain that he did not realize his failure to cooperate risked any physical or legal reprisals.[106] The arrestor's announcement or lack thereof can have interesting results.

In *People v. Woods*,[107] the question before the court was not the legality of the arrest, but whether an arrest had occurred prior to a fatal shooting for purposes of a felony murder conviction. Woods had been involved in a barroom disturbance during which he fired

100. *Id.*
101. Terry v. Ohio, 392 U.S. 1, 31-34 (Harlan, J., concurring).
102. 161 Me. 123, 210 A.2d 24 (1965).
103. *Id.* at 138-39, 210 A.2d at 33.
104. Miles v. Commonwealth, 8 Pa. Commw. Ct. 544, 304 A.2d 704 (1973); Cook, *supra* note 32, at 174. However, the right to use force in effecting an arrest may depend upon whether a formal declaration has been made under NEB. REV. STAT. § 28-1412(2)(a) (Cum. Supp. 1978).
105. People v. Ruiz, 265 Cal. App. 2d 766, 71 Cal. Rptr. 519 (1968); State v. Contursi, 44 N.J. 422, 209 A.2d 829 (1965).
106. *See* Pullins v. State, 253 Ind. 644, 256 N.E.2d 553 (1970).
107. 16 Mich. App. 718, 168 N.W.2d 617 (1969).

a pistol into the floor. The police arrived at the scene after Woods had gone home. They went to his home, surrounded the house and demanded he surrender his gun. He offered to come out, but refused to turn over his gun. As the police entered the house, Woods shot and killed one of the entering officers.[108]

The defense contended Woods was not under arrest at the time of the shooting. Therefore, he could be convicted of manslaughter but not first degree murder.[109] The Michigan Court of Appeals held "defendant knew and acknowledged that the police were in pursuit of him. This was sufficient coercion albeit not manual seizure to constitute lawful arrest."[110] Under the facts in *Woods*, it was clear that the defendant was not confused as to his status. The combination of the police surrounding the house, their demands for surrender, and the defendant's knowledge of the intent and purpose of the police clearly fit within the general rule.

In contrast to *Woods*, is *People v. Jackson*,[111] where the precise issue was "whether the officers' pronouncement of an intention to arrest, as presumably understood by defendant, was sufficient to effectuate his arrest. . . ."[112] The police had announced their intention to arrest Jackson from a distance of ten to twelve feet. Jackson was on a public sidewalk and took flight, disposing of some incriminating evidence as he fled. The court distinguished these facts from an earlier decision in *People v. Pruitt*,[113] where the officer's announcement in a close confrontation, coupled with the arrestee's submission, was held to have constituted an arrest at the moment of the announcement and submission. The *Jackson* court, on the other hand, emphasized that the officers had not brandished any weapons and that no actual or constructive restraint was achieved until later. The officer's proclamation was characterized as a communication of "mere naked words of intention."[114] The court held: "[B]y his resisting efforts, defendant had thus remained free from the power of control intended to be exercised by the authorities, without which element he cannot be heard to submit that his arrest had been made."[115]

The *Jackson* decision might seem to represent a narrow, minority viewpoint based upon distinctions concerning the distance separating arrestor and arrestee. However, the fact that the defendant did appear to have the physical capability of escape by simple

108. *Id.* at 719, 168 N.W.2d at 617.
109. *Id.*
110. *Id.* at 720, 168 N.W.2d at 618.
111. 98 Ill. App. 2d 238, 240 N.E.2d 421 (1968).
112. *Id.* at 244, 240 N.E.2d at 424.
113. 79 Ill. App. 2d 209, 223 N.E.2d 537 (1967).
114. 98 Ill. App. 2d at 245, 240 N.E.2d at 425.
115. *Id.* at 245-46, 240 N.E.2d at 425.

flight, may serve as a valid basis for a distinction. As a result, in circumstances similar to that in *Jackson*, it might be unreasonable to hold that an arrest could occur in the absence of a present ability on the part of the officer to effectuate the officer's intent, or, at least, such an ability in the belief of the arrestee.

Overemphasizing the role of the arrestor's intent or purpose to the exclusion of the knowledge or understanding of the arrestee can lead to questionable results, as evidenced by *State v. Hutton*.[116] In *Hutton*, the defendants were riding in a taxi. After stopping the taxi, a police officer told the driver in private to drive to the police station while the officer followed. In the event the defendants asked why, the driver was instructed to tell them he had been stopped for a traffic violation. The court held the officer's conversation with the driver and the driver's compliance with the officer's request could not possibly constitute an arrest because there was nothing to show that the defendants were under the officer's control or had submitted to his control.[117] The court felt defendants were under arrest only after the cab arrived at the police station. At that time, one of the defendants was locked in a cell and the other was held in a room with five policemen. At that point, the court determined the defendants must have known or understood themselves to have been under restraint[118] and that the officer intended to arrest defendants only after their arrival at the station.

Because deception was involved, the defendants had no way of knowing their status during the drive to the station, but the court failed to recognize the parallel between this situation and that of an unconscious arrestee. Unless the arrestee is conscious of his status, there can be no submission to arrest. Where there is no seizure of the arrestee's person his understanding should assume controlling importance.[119] In *Hutton*, there was at least a constructive seizure. The driver was acting as the agent of the officer and was under the control of the officer to that extent.

The general rule is that an inividual is not under arrest if he has no knowledge or reason to know he is under arrest.[120] The New Hampshire Supreme Court apparently felt *Hutton* presented a proper case in which to apply the general rule. One exception to this general rule has been developed to meet the special situation of the unconscious arrestee.

116. 108 N.H. 279, 235 A.2d 117 (1967).
117. *Id.* at 286, 235 A.2d at 122.
118. *Id.*
119. E. FISHER, *supra* note 24, at 52.
120. Schindelar v. Michaud, 411 F.2d 80 (10th Cir. 1969); Harrer v. Montgomery Ward Co., 124 Mont. 295, 221 P.2d 428 (1950).

1. Unconscious Arrestee

An unconscious person presents a special situation, because an unconscious person lacks any present ability to understand his status. Further, an unconscious person lacks the ability to approve or deny a proposed search of his person. Generally the essential element of the arrestee's understanding is missing whenever an officer seeks to arrest an unconscious person. Without a special rule to deal with the situation of an unconscious person, there could be no warrantless search of an unconscious individual incident to a lawful arrest, because there could be no arrest. Further, unless such a person can be arrested, which some courts deem essential to the admissibility of body fluid specimen test results,[121] then no samples could be obtained validly, because no consent could be given.

In *Virgin Islands v. Quinones*,[122] defendant Quinones had been knocked unconscious in a traffic accident and taken to a hospital, along with the other driver, defendant Washington. At the direction of a police officer, a blood sample was taken from each defendant. An analysis of the samples was used at trial. The question of whether an arrest had occurred was important because of a statute declaring evidence of blood alcohol content admissible if taken within two hours of the time of arrest. The reviewing court felt both defendants were under arrest at the time the samples were taken.[123] The court's reasoning was that had Quinones regained consciousness and attempted to leave, the investigating officer would have restrained him.[124]

121. The issue has not been decided squarely in Nebraska. However, Otte v. State, 172 Neb. 110, 108 N.W.2d 737 (1961), shows a definite leaning. *See* Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957); Mercer v. State, 256 Ark. 814, 510 S.W.2d 539 (1974); Carrington v. Superior Court, 31 Cal. App. 3d 635, 107 Cal. Rptr. 546 (1973); People v. Kokesh, 175 Colo. 206, 486 P.2d 429 (1971); State v. Austin, 282 So. 2d 711 (La. 1973); State v. Mangels, 166 Mont. 190, 531 P.2d 1313 (1975); State v. Cram, 176 Or. 577, 160 P.2d 283 (1945); Scales v. State, 64 Wis. 2d 485, 219 N.W.2d 286 (1974). *See also* State v. Rocheleau, 117 N.H. 792, 378 A.2d 1381 (1977); Virgin Islands v. Quinones, 301 F. Supp. 246 (D.V.I. 1969).

122. 301 F. Supp. 246 (D.V.I. 1969).

123. [E]ven though defendant Quinones was unconscious and defendant Washington was in a drunken stupor from the time the officer arrived at the hospital throughout the proceedings that followed that night, there is no problem in finding that both men were under arrest from the moment the police investigator arrived at the hospital. From that moment on, having been identified as the drivers in the accident under investigation, both men were in the custody and control of the police.

Id. at 249.

124. *Id.*

In *Bouldin v. State*,[125] the defendant was injured in an accident while driving a motorcycle. Bouldin was conscious enough at the scene to ask an ambulance attendant to give him a flight bag which was lying in the street. The investigating officer heard Bouldin's request for the bag. Later, when the officer arrived at the hospital intending to arrest Bouldin, whose identity the officer did not yet know, Bouldin was unconscious. The bag and Bouldin's clothes were on a shelf beneath his stretcher. The officer searched Bouldin's jacket and bag and found a large quantity of heroin. Bouldin was then placed under twenty-four hour guard at the hospital. The issue was whether the officer had arrested Bouldin prior to the search.[126]

The court noted that the officer said and did nothing to indicate to any of the hospital personnel that he was arresting Bouldin prior to the search. The first indication given that Bouldin was in custody was the posting of the guard, after the search.[127] The state argued that the officer's subjective intention to arrest and his visual contact with Bouldin as he lay on the stretcher were enough to constitute an arrest. Rejecting this argument, the court held:

> [T]o consummate an arrest of [such] an individual [unconscious person], there must be an objective manifestation of acts or words unequivocally showing that an arrest is being made, that the arrestee is being detained or restrained, and his person brought within the custody and control of the law. A ritualistic touching is hardly required in such circumstances . . . nor is communication of the fact of arrest to an unconscious person either possible or prerequisite. . . . [T]he requisite detention of his person may be effectuated without force or without any physical restraint, so long as the acts or conduct of the arrestor sufficiently demonstrate that the arrestee is within his power or control.[128]

The court felt the element of detention in arresting an unconscious person, rather than the technical prerequisites to arrest, should be emphasized.[129] It formulated an objective test in *Bouldin* and emphatically rejected the notion that the arrestor's knowledge and intention should alone be determinative of the arrest of unconscious persons.[130] Rather than the knowledge of the arrestee, the knowledge of anyone other than the arrestee who is or could have been present becomes the crucial element in arrests of unconscious persons—a sort of vicarious knowledge requirement.

In *Scales v. State*,[131] the arresting officer did manifest, by his acts and conduct, his intention to arrest an unconscious person.

125. 276 Md. 511, 350 A.2d 130 (1976).
126. *Id.* at 515, 350 A.2d at 132.
127. *Id.* at 519, 350 A.2d at 134.
128. *Id.* at 518, 350 A.2d at 134.
129. *Id.* at 519, 350 A.2d at 135.
130. *Id.*
131. 64 Wis. 2d 485, 219 N.W.2d 286 (1974).

The officer was present in the emergency room when Scales, severely injured, was brought in following a traffic accident. The officer asked Scales his name, but received no reply. Not knowing whether Scales was conscious or unconscious, the officer issued two citations, one for driving while intoxicated and one for not having a valid driver's license. He placed the citations on Scales' chest, believing he had thereby arrested Scales. He then directed the taking of a blood sample.[132]

The Wisconsin Supreme Court, without elaboration, held that this action did constitute an arrest.[133] The court seems to have relied upon the officer's intent; however, the opinion can only be supported by the issuance of the citations coupled with the officer's intent. Further, the citing officer and two fellow officers stayed to interrogate Scales after he was treated. Under these circumstances, no reasonable observer could have believed Scales was not under the officer's control.[134]

One authority states that an unconscious arrestee's understanding of his situation is simply delayed until he regains consciousness. Sufficient understanding is presumed when he recovers and "finds himself handcuffed, in jail or perhaps confined to a hospital room with a policeman standing guard over him."[135] Therefore, an unconscious person may be arrested when his body is actually seized and restrained.[136] Stating the rule so simply without mention of the need for acts or conduct clearly showing the arrestor's intention, risks misunderstanding. The arrestee's understanding is delayed, but the arrestor must do something that will provide objective evidence of his intentions, so that the arrestee's rights may be protected and insured by subsequent judicial review. Insistence on such objective evidence will guard against *ex parte* arrests, a concept "chilling in its implication and absurd in its application."[137]

With the sole exception of the unconscious arrestee (which exception should extend to any case involving a person lacking mental capacity to understand his situation) the majority rule with respect to the importance and role of the arrestee's understanding remains "the time and place of arrest cannot be based solely upon

132. *Id.* at 488, 219 N.W.2d at 289.
133. *Id.* at 490, 219 N.W.2d at 290.
134. *Id.* at 492, 219 N.W.2d at 291.
135. E. FISHER, *supra* note 24, at 53.
136. *Id.*
137. Yam Sang Kwai v. Immigration and Naturalization Serv., 411 F.2d 683, 686 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969). One court was able to review the facts and insure the arrestee's rights by holding arrest of an unconscious person impossible. Carrington v. Superior Court, 31 Cal. App. 3d 635, 107 Cal. Rptr. 546 (1973).

the subjective thoughts of the individual citizen. Instead, it must be determined by the objective circumstances and the responses which they are likely to evoke . . . ."[138] The focus of the inquiry must be: what would a reasonable person, innocent of any crime, have thought had he been in the same or similar situation?[139] Assigning controlling importance to the arrestee's subjective understanding in ambiguous situations has been rejected. The United States Supreme Court, however, has indicated a willingness to give more emphasis to the privacy expectations of the individual in its most recent seizure decisions.[140]

C. The Role of Restraint

State v. Lloyd[141] and *Clements v. State*[142] illustrate the general rule that an actual or constructive seizure or detention of the arrestee by a person having the present power to control him is an essential element of an arrest. There can be no arrest in the absence of this element.

In *Lloyd*, two armed officers stopped the defendants' vehicle, ordered them out of the car and searched them for weapons. One of the officers then walked around the car looking inside with his flashlight. He spotted a cashbox on the floor partially beneath a seat.[143] The defense contended the search was not incident to, but preceded the arrest, because no arrest took place until after the box was found and the defendants had been hand-cuffed and were told they were under arrest. The court held the arrest occurred at the moment the car was stopped and the defendants were ordered out, observing that an arrest "is complete when the person arrested is first detained,"[144] without considering the officers' intent.

In *Clements*, the police stopped defendant's car, ordered him out at gunpoint and searched his person and car. The Georgia Supreme Court found the arrest occurred at the moment the police approached defendant's car and compelled him to get out. The court declared:

> An arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The [arrestee] may voluntarily submit to being considered under arrest

138. Cook v. Sigler, 299 F. Supp. 1338, 1343 (D. Neb. 1969). *Accord*, United States v. Grandi, 424 F.2d 399 (2d Cir. 1970); Coates v. United States, 413 F.2d 371 (D.C. Cir. 1969); United States v. McKethan, 247 F. Supp. 324 (D.D.C. 1965).
139. United States v. Lampkin, 464 F.2d 1093 (3d Cir. 1972); Hickes v. United States, 382 F.2d 158 (D.C. Cir. 1967).
140. *See* note 76 *supra*.
141. 92 Idaho 20, 435 P.2d 797 (1967).
142. 226 Ga. 66, 172 S.E.2d 600 (1970).
143. 92 Idaho at 22, 435 P.2d at 799.
144. *Id. Accord*, State v. Wolfson, 116 N.H. 227, 356 A.2d 692 (1976).

> without any actual touching or show of force, and the arrest is complete.[145]

The approach adopted by the court in *Clements* not only represents the general rule, but also the ideal rule.[146] This ideal rule rejects the *Terry* line of decisions and fails to recognize any type of seizure short of an arrest.

If the detainee was not free to leave the detainor's presence, the courts have generally found an arrest,[147] or, at least a "detention . . . indistinguishable from a traditional arrest."[148] *Price v. United States*[149] presents an interesting application of this view. In *Price*, an officer seized an envelope as it was being passed from a known criminal to another man. The officer then looked inside the envelope and told the men they were under arrest. The defense contended the seizure of the envelope preceded the arrest and could not be justified as incident to the arrest. The court disagreed, holding the arrest occurred at the precise moment the officer seized the envelope, because "[w]e doubt that appellants had liberty to take leave of the officer's presence once he seized the envelope."[150] Therefore, the seizure of the envelope was incident to the arrest.

Some courts have held an arrest occurs only when the arrestor touches the arrestee or tells the arrestee he is under arrest and he submits.[151] The touching need not be a physical contact with the arrestee's person or clothing, but may be contact with the arrestee's vehicle.[152] *Price* may be this type of case.

A legal fiction has been created to dispose of those cases where an actual seizure was attempted, but failed. In *State ex. rel. Sadler v. District Court*,[153] the court stated "[a] constructive detention is accomplished by merely touching, however slightly, the body of the accused by the person making the arrest and for that purpose, although he does not succeed in stopping or holding [the accused] even for an instant . . ."[154] The rationale supporting the rule of

145. 226 Ga. at 67, 172 S.E.2d at 601. *See* Sibron v. New York, 392 U.S. 41 (1968).
146. *See also* People v. Smith, 62 Misc. 2d 473, 477, 308 N.Y.S.2d 909, 914 (1970), where the court held "the term 'arrest' may be applied where a person is restrainted in his full liberty and such detention is continued for even a short period of time." Such a holding necessarily excludes consideration of the "arrestor's" purpose or intent and renders the understanding of the "arrestee" totally irrelevant. It would have been analytically preferable had the court used the word "seizure" instead of the word "arrest."
147. State v. Vaughn, 12 Ariz. App. 442, 444, 471 P.2d 744, 746 (1970).
148. Dunaway v. New York, 442 U.S. at 212.
149. 119 A.2d 718 (D.C. App. 1956).
150. *Id.* at 719.
151. McChan v. State, 238 Md. 149, 157, 207 A.2d 632, 638 (1965).
152. Weissengoff v. Davis, 260 F. 16 (4th Cir. 1919).
153. 70 Mont. 378, 225 P. 1000 (1924).
154. *Id.* at 386, 225 P. at 1002.

constructive seizure or detention is that since the arrestor was close enough to touch the arrestee, the arrestee should be considered to have come within the power of the law, as represented by the arrestor.[155] The operation of this fiction is limited to the extent that the arrestor must have intended to arrest the person touched. Without such an intent, there can be no arrest. This theoretical limitation on the doctrine of constructive seizure gives police the right to forcibly detain for investigative purposes without being held to have arrested the person detained.[156] Legal metaphysics aside, it is clear that an actual physical restraint is not necessary.[157] Further, the arrestee's submission to the arrestor's imposition of control is sufficient restraint for purposes of satisfying this element of an arrest.

D. Authority to Arrest

If a warrant has been obtained, the authority of the holder of the warrant to arrest the person named in the warrant is generally not open to question. The questions raised in such cases usually focus on the propriety of the issuance of the warrant.[158] In the warrantless arrest situation, the authority to arrest is derived from the circumstances surrounding the arrest. At early common law, any person was authorized to arrest for a felony committed or attempted in their presence.[159] This standard was extended to authorize arrest for felony on reasonable grounds to believe the proposed arrestee had committed it.[160] Authority to arrest for misdemeanors was restricted to offenses constituting breaches of the peace, committed in the presence of the arrestor.[161] The purpose of the requirement that the action taken be under real or assumed authority has been explained as an assurance that taking custody of another person is not a mere abduction, devoid of legality.[162]

The indefinite standard of the fourth amendment has allowed courts to tip the balance between the competing interests of effective law enforcement and individual rights, in favor of law enforce-

155. E. FISHER, *supra* note 24, at 50; text accompanying notes 92-100 *supra*.
156. Jenkins v. United States, 161 F.2d 99 (10th Cir. 1947).
157. *See* United States v. Santana, 427 U.S. 38 (1976).
158. There are questions when the police act on a teletype or radio message indicating a warrant has been issued. *See* State v. Foust, 262 So. 2d 686 (Fla. Dist. Ct. App. 1972). Questions dealing with the use of force by either the arrestor or the arrestee can come up whether the arrest is supported by a warrant or is attempted without a warrant. *See* NEB. REV. STAT. §§ 28-1406 to -1416 (Cum. Supp. 1978).
159. E. FISHER, *supra* note 24, at 124.
160. *Id.*
161. *Id.* at 125.
162. *Id.* at 44.

ment needs. The fourth amendment, unlike other protective provisions of the Bill of Rights, is phrased in terms of reasonableness. Thus, the balancing approach can be applied legitimately to the law of arrest. The current national trend is to emphasize the importance of the arrestor's intent or purpose to the detriment of individual rights, although there is a fresh breeze from the United States Supreme Court.[163] It is only against this backdrop that Nebraska's law of arrest is understandable.

III. ARREST, NEBRASKA-STYLE

A. General Principles

An examination of Nebraska statutes and Nebraska Supreme Court decisions reveals that neither the Legislature nor the court has ever defined arrest in the criminal context. The lack of a principled definition has caused the court to seem inconsistent and unpredictable in distinguishing detentions from arrests.[164] The court has not taken advantage of the opportunity presented by statute[165] to make a clear distinction between detention and arrest.

Nebraska's equivalent of a "stop and frisk" law[166] is patterned

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163. *See* note 76 *supra*.

164. The distinction could become important in escape prosecutions under the Nebraska Criminal Code. NEB. REV. STAT. § 28-912(1) (Cum. Supp. 1978) provides:

> A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail.

165. NEB. REV. STAT. § 29-829 (Reissue 1975) provides:

> A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects he is in danger of life or limb, he may search such person for a dangerous weapon. If the peace officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. For purposes of this section, peace officer shall include credentialed conservation officers of the Game and Parks Commission.

In State v. Huffman, 181 Neb. 356, 148 N.W.2d 321 (1967), the court referred to a section 29-829 stop as an informal detention. In State v. Micek, 193 Neb. 379, 227 N.W.2d 409 (1975), the court discussed a stop and detention, followed by an arrest.

166. NEB. REV. STAT. § 29-829 (Reissue 1975).

after the detention and protective search provisions of the Uniform Arrest Act.[167] However, Nebraska has not adopted the accompanying arrest provisions of the Uniform Act. In *State v. Klinehoffer*,[168] the Delaware Superior Court made a clear distinction between detention and arrest, based upon the Uniform Arrest Act approach. Under that Act, an officer may stop any person he reasonably suspects is committing, has committed or is about to commit a crime and demand the person's name, address, purpose in being where he is and eventual destination. If the detainee's answers are unsatisfactory, the officer may continue the detention for further investigation, not to exceed two hours, unless an arrest is made.[169] In *Klinehoffer*, the officer stopped and questioned Klinehoffer relating to suspected drunken driving. The officer took Klinehoffer to the police station where he was questioned further, tested, and told he was being arrested and jailed overnight.

Klinehoffer argued that if he was merely detained, the detention exceeded the two-hour limit and that immediately after the expiration of the two-hour period he was not "arrested and charged with a crime or released," as required by the statute. He further argued that, if he was arrested and charged properly, then he was not taken before the nearest available magistrate within a reasonable time as required by a superior court rule. He had been held in jail from 1:00 a.m. until 10:00 a.m. of the same day before being taken before a magistrate.[170]

On the question of whether Klinehoffer had been detained or

167. *See* UAA §§ 2, 3. The legislative history of NEB. REV. STAT. § 29-829 (Reissue 1975) indicates the Legislature was only aware the statute was modeled on the New York "stop and frisk" law, N.Y. Code Crim. Prac. § 180a (McKinney Supp. 1967), which, in turn, is based upon the UAA. The Nebraska Legislature gave its primary attention to the frisk portion of the statute, but did realize they were also authorizing investigative detentions. *See Comm. on Judiciary, Minutes*, L.B. 76, Neb. Leg., 75th Sess. (Jan. 27, 1965); *Floor Debates* 53-54 (Feb. 2, 1965); *Floor Debates* 205-07 (Feb. 17, 1965); *Floor Debates* 212 (Feb. 18, 1965).

168. 173 A.2d 478 (Del. Super. Ct. 1961). Delaware, New Hampshire and Rhode Island have all adopted the UAA, which their highest courts have construed several times. *See generally* Cannon v. State, 53 Del. 284, 168 A.2d 108 (1961); De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960); State v. Rocheleau, 117 N.H. 792, 378 A.2d 1381 (1977); State v. Wolfson, 116 N.H. 227, 356 A.2d 692 (1976); State v. Schofield, 114 N.H. 454, 322 A.2d 603 (1974); State v. Hutton, 108 N.H. 279, 235 A.2d 117 (1967); State v. Murray, 106 N.H. 71, 205 A.2d 29 (1964); Berberian v. Smith, 99 R.I. 198, 206 A.2d 531 (1965); State v. Mercurio, 96 R.I. 464, 194 A.2d 574 (1963); Kavanagh v. Stenhouse, 93 R.I. 252, 174 A.2d 560 (1961).

169. Compare the much more detailed provisions of ALI CODE, *supra* note 28, § 110.2. *See* State v. Micek, 193 Neb. 379, 227 N.W.2d 409 (1975), holding a 27 minute detention reasonable for purposes of an investigative detention.

170. 173 A.2d at 479-80.

arrested, the court held: "[T]here is nothing . . . which in the slightest degree indicated that defendant was 'detained', i.e. was taken into custody for the purpose of ascertaining his name, address, business abroad and where he was going, . . . he was taken to the . . . [police station] and that constituted an arrest."[171] The Act provides that an arrest is the taking of a person into custody so that he may be required to answer for the commission of a crime.

Under such an interpretation, a detention pursuant to Nebraska law[172] in its strictest sense, should similarly be construed to authorize police officers to stop and hold persons fitting the statutory description for no longer than is necessary to determine their identity and an explanation of their actions. Anything more would constitute a more severe intrusion than the statutory detention and should be supported by a stricter standard of reasonable belief or probable cause. Moreover, in view of the common origin of the Delaware and Nebraska statutes on detention, the interpretations of the statutes should be the same.

Rather than adopting a definition of arrest in the criminal context, the Nebraska Supreme Court, to date, has used a case by case, fact-based approach. This approach fails to provide any certainty and predictability in an area of law vitally affecting individual rights. In a sense, the court has defined arrest in the civil context.

In *Schmidt v. Richman Gordman, Inc.*,[173] a security guard apprehended and detained the plaintiffs. The guard personally decided not to allow plaintiffs to leave the store. Plaintiffs testified to their belief that they could not leave the room in which the guard confined them. The guard testified that had plaintiffs attempted to leave, she would have pursued them. The police officer who came to pick up reported shoplifters testified that when he arrived at the store the plaintiffs were in the custody of the guard and were under arrest. At the point of the initial confrontation between plaintiffs and the guard, she showed them her badge and credentials and asked them to accompany her to the office, where they were later confined. The defense contended that the trial court instructed the jury erroneously with respect to what constitutes an arrest. The Nebraska Supreme Court approved the jury instruction, which followed closely a standard definition of arrest.[174]

171. *Id.* at 480. For a discussion of detention as a status for purposes of an escape statute, see State v. Shook, 45 Ohio App. 2d 32, 340 N.E.2d 423 (1975). For a good discussion of police contacts with citizens not amounting to a detention, see Batts v. Superior Court, 23 Cal. App. 2d 435, 100 Cal. Rptr. 181 (1972).

172. NEB. REV. STAT. § 29-829 (Reissue 1975).

173. 191 Neb. 345, 215 N.W.2d 105 (1974).

174. *Id.* at 350, 215 N.W.2d at 109-110.

Since a jury instruction is "an exposition (of) the rules or principles of law . . . which the jury are bound to accept and apply,"[175] the approval of the encyclopedia definition of arrest is tantamount to an adoption of that definition as Nebraska law. The definition approved in *Schmidt* comprises all the elements of an arrest.[176] As a general proposition, arrest for purposes of a civil case and a criminal case should mean the same thing, since the same privacy and liberty interests are involved in either type of litigation. Nebraska has not adopted the Uniform Arrest Act definition or any other statutory definition, thus nothing prevents consistent judicial treatment.

An examination of Nebraska criminal arrest cases must begin with *State v. O'Kelly*.[177] In *O'Kelly*, the court adopted the federal constitutional exclusionary rule and interpreted the Nebraska Constitution to require exclusion of evidence obtained as the fruit of illegal searches or seizures.[178] Citing *Ker v. California*[179] for the proposition that the lawfulness of an arrest is to be determined according to state law as long as the pertinent state law does not violate the fourth amendment, the Nebraska Supreme Court said: "[I]t has long been established in Nebraska that a police officer may arrest without a warrant when it appears that a felony has been committed and that there are reasonable grounds to believe that the person arrested is guilty of the offense."[180] Despite the fact that the court cited Nebraska statutory law[181] as authority for that proposition (although the statute is limited by its terms to warrantless arrests by persons other than police officers),[182] this statement was necessary to reach the conclusion that Nebraska's warrantless arrest law complied with the fourth amendment. The court then concluded "reasonable ground to believe the person arrested is guilty of such offense" is the equivalent in statutory lan-

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> An arrest is the taking, seizing, or detaining of the person of another, (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested.
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> 5 AM. JUR. 2d *Arrest* § 1 (1962).

175. BLACK'S LAW DICTIONARY 769 (5th ed. 1979).
176. *See* text accompanying note 27 *supra*.
177. 175 Neb. 798, 124 N.W.2d 211 (1963).
178. *Id.* at 804, 124 N.W.2d at 215.
179. 374 U.S. 23 (1963).
180. 175 Neb. at 805, 124 N.W.2d at 215.
181. NEB. REV. STAT. § 29-402 (Reissue 1975).
182. NEB. REV. STAT. § 29-402 (Reissue 1975), which has not been altered since *O'Kelly*, provides: "Any person not an officer may, without warrant, arrest any person, if a petit larcency or a felony has been committed, and there is reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained."

guage of the fourth amendment's prohibition of unreasonable seizures[183] and is another way of describing probable cause.[184]

The occurrence of an arrest was not an issue in *O'Kelly*. However, there would have been no grounds for controversy as to when it occurred. The police were waiting at O'Kelly's residence when he arrived. He was asked to step out of his vehicle, searched, and told he was under arrest and would have to go to the police station.[185] There was an announcement of the officers' intent, as well as physical restraint when he was put in the cruiser. Even if the officers' announcement would not have made their intent clear, their subsequent conduct would have sufficed to make it clear under both the objective and subjective tests. Unfortunately, clarity in the Nebraska cases ends with *O'Kelly*.

In *State v. Dillwood*,[186] the court adopted the Nebraska version of the *Terry* rule. A plainclothes detective was patrolling at night in an unmarked car. A burglar alarm alerted police of a break-in in the vicinity in which the detective was patrolling. The detective responded by driving to the location of the alarm. Witnessing neither pedestrian nor vehicular traffic, but observing a broken store window, the detective drove further. He followed a car with round taillights but soon lost sight of the car. He turned on the first perpendicular street, continued for a block, looked up a cross street and saw a car with round taillights. He followed it. Eventually, the car with round taillights stopped for a stop sign.

By this time, another detective also in plainclothes and an unmarked car, was helping in the pursuit. At the stop sign, the detectives blocked the suspect vehicle. The occupants of the blocked vehicle "exited on the run."[187] The detectives jumped from their vehicles with pistols drawn and threatened to shoot. At the threat, Dillwood stopped. One detective led Dillwood back by the arm to the suspect car and frisked him. Both detectives observed several furs plainly visible on the back seat of Dillwood's car.

Dillwood contended that an arrest occurred when the detective took him by the arm to return to the car. The purpose of this contention was to show an illegal arrest, in order to defeat the search as incident to a lawful arrest.[188] The real thrust of this contention was to invalidate the initial stop, an approach which, if successful,

183. 175 Neb. at 805, 124 N.W.2d at 216.
184. *Accord*, People v. Sullivan, 214 Cal. App. 2d 404, 29 Cal. Rptr. 515 (1963); De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960); State v. Harris, 265 Minn. 260, 121 N.W.2d 327 (1963); Schnepp v. State, 82 Nev. 257, 415 P.2d 619 (1966).
185. 175 Neb. at 803, 124 N.W.2d at 214.
186. 183 Neb. 360, 160 N.W.2d 195 (1968).
187. *Id.* at 362, 160 N.W.2d at 197.
188. *Id.* at 360, 160 N.W.2d at 195.

would have rendered the furs inadmissible even under the plain view doctrine.

The court's decision is difficult to understand at best. The court emphasized that the detectives were not uniformed, they drove unmarked cars and failed to announce their authority or purpose when they threatened the fleeing Dillwood. The *Dillwood* court opined that "[i]t was almost impossible for the drawn pistols . . . to be either a cause or a consequence of defendant's decision to flee."[189] The court concluded that the forcible stop was reasonable, because necessary to freeze the situation. To Dillwood's contention that grasping his arm constituted an arrest, the court replied: "We think not."[190] The court based its decision on the *Terry* distinction in purpose, character and extent between a search incident to arrest and a limited protective weapons search, and its position that probable cause is not necessary to justify any intrusions short of an arrest.[191]

Factually, *Terry* and *Dillwood* are significantly different. In *Terry*, the officer did not approach the suspects with his pistol drawn; he did identify himself; initially, he did not forcibly stop the suspects. The circumstances of the cases are similar in that a set of articulable facts formed the bases for the respective officers' conclusions that criminal activity was afoot. However, in *Dillwood* there was nothing said to connect the car with the round taillights to the broken store window. Further, there was nothing in the court's rendition of the facts to show that the car with round taillights was the same car the detective initially decided to follow. In *Terry*, the connection between the suspects and the store window was plain. Under the *Terry* rationale, the detectives unquestionably seized Dillwood in the fourth amendment sense.[192]

In terms of the law of arrest, there is little doubt that the detectives' conduct in *Dillwood* created some ambiguity in the mind of the detainee. There was an actual seizure, complete with physical touching and an obvious display of force. Dillwood submitted to the unidentified officers' assertion of control over him. His reasonable interpretation of his status should have been controlling. There was an arrest, if not at the moment when the detectives blocked Dillwood's car,[193] then certainly under the *Schmidt* defini-

189. *Id.* at 363, 160 N.W.2d at 198.
190. *Id.*
191. *Id. See* text accompanying notes 44-59, 61-62 *supra*. This position, following Delaware v. Prouse, 440 U.S. 648 (1979), and Dunaway v. New York, 442 U.S. 200 (1979), is clearly no longer valid, if it ever was.
192. 392 U.S. at 19 n.16.
193. *Cf.* Berberian v. Smith, 99 R.I. 198, 206 A.2d 531 (1965) (blocking car constitutes an arrest).

tion of arrest, at the moment they threatened to shoot.[194] However, the court held otherwise.[195]

It is interesting to note that *Dillwood* was decided without reference to Nebraska's "stop and frisk" statute.[196] The court could have relied on the statute in *Dillwood*, as it had in *State v. Carpenter*.[197] In *Carpenter*, two local officers patrolling in a cruiser observed an out-of-county car at about 3:30 a.m. in an area where several burglaries had recently occurred. The officers stopped the car after it seemed to purposely elude them. While speaking with the passenger of the car, one of the officers saw a pry bar protruding from under the car seat. The officers asked the men to accompany them to the police station. At the station, the officers learned one of the men was a known burglar. At that time, the decision was made to arrest both men.[198]

Carpenter contended an arrest occurred outside the city limits when the police stopped the car without probable cause. The court held, that under the "stop and frisk" statute,[199] a police officer has the authority to stop and question on less than probable cause. The court did not discuss the meaning of the statutory language "reasonably suspects." The officers had testified their only intent in stopping the car was to identify the occupants. This is proper under the statute, if the officer reasonably suspects any person in a public place of criminal activity.[200] Following the purposive approach, the court felt such official behavior was constitutional.[201]

The court cited *Bonanno* as authority for the proposition that "every temporary restriction of the absolute freedom of movement is not an arrest."[202] A stop for purposes of identification is "not in any sense an arrest."[203] In this case, the court held the arrest was made at the police station, after Carpenter had been given a chance to exculpate himself.[204] The *Carpenter* decision was

194. *See* text accompanying notes 173-74 *supra*. In fairness to the court, the reader should note *Schmidt* was decided in 1974, six years after *Dillwood*. However, the principles underlying *Schmidt* date from as early as Kyner v. Laubner, 3 Neb. (Unoff.) 370, 91 N.W. 491 (1902). *See also* text accompanying note 38 *supra*.

195. 183 Neb. at 363, 160 N.W.2d at 198.

196. NEB. REV. STAT. § 29-829 (Supp. 1965).

197. 181 Neb. 639, 150 N.W.2d 129 (1967).

198. *Id.* at 643, 150 N.W.2d at 132.

199. NEB. REV. STAT. § 29-829 (Reissue 1975).

200. *See* note 162 *supra*.

201. 181 Neb. at 646, 150 N.W.2d at 134.

202. *Id.* at 646, 150 N.W.2d at 134.

203. 181 Neb. at 645-46, 150 N.W.2d at 134. An identification stop is, however, a seizure. Brown v. Texas, 99 S. Ct. 2637, 2640 (1979).

204. 181 Neb. at 645-46, 150 N.W.2d at 134. The chance-to-exculpate-himself idea was also a factor which impressed Judge Kaufman in *Bonanno* as a policy

clearly correct and in line with the *Terry* rule. Further, the court was consistent with the general law of arrest,[205] at least under the purposive approach.[206]

The rationale of *Adams v. Williams*,[207] was incorporated into Nebraska case law in *State v. Brewer*[208] and *State v. Irwin*.[209] In *Brewer*, the police had received detailed information from a reliable informant concerning plans for a robbery and the persons involved in the planning. The police observed the home of one of the alleged conspirators. When a car which had been described by the informant drove by and the occupants waved to the police, the police stopped the car. Brewer complied with a request to get out of the car. He gave a name, stated he had no identification with him, and gave evasive answers to questions about his activities. One officer knew from prior contact that the person whose name Brewer used that Brewer was not that person. The officers con-

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consideration in favor of upholding the power to detain for investigation on less than probable cause. United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub. nom.*, United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). Other courts have interpreted the words "reasonable suspicion" when used in a statute as equivalent to the probable cause requirement of the fourth amendment. *See* text accompanying notes 183-84 *supra*.

205. State v. Carpenter, 181 Neb. 639, 150 N.W.2d 129 (1967), *aff'd*, State v. McCune, 189 Neb. 165, 201 N.W.2d 852 (1972), *cert. denied*, 412 U.S. 954 (1973).

206. Brown v. Texas, 99 S. Ct. 2637 (1979), should not be interpreted to cast doubt upon the constitutionality of NEB. REV. STAT. § 29-829 (Reissue 1975). The stop-and-identify statute involved in *Brown* criminally penalized any person intentionally refusing to report his name and address to a peace officer who has lawfully stopped and requested the information from him. The Court declined to decide whether a person may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies fourth amendment requirements. *Id.* at 2641 n.3. The Court simply decided that "none of the circumstances preceding the . . . detention . . . justified a reasonable suspicion that he [Brown] was involved in criminal conduct." *Id.*

In reaching that result, the Court noted:

> We have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. . . . However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

Id. Michigan v. DeFillippo, 99 S. Ct. 2627 (1979), while concerned with the effect of an arrest under the same type of stop-and-identify ordinance as the statute in *Brown* for purposes of a search incident to that arrest, has no application to the validity of statutes like NEB. REV. STAT. § 29-829 (Reissue 1975).

207. 407 U.S. 143 (1972).

208. 190 Neb. 667, 212 N.W.2d 90 (1973).

209. 191 Neb. 169, 214 N.W.2d 595 (1974). *See* State v. Anderson, 204 Neb. 186, 281 N.W.2d 743 (1979); State v. Booth, 202 Neb. 692, 276 N.W.2d 673 (1979); State v. Von Suggs, 196 Neb. 757, 246 N.W.2d 206 (1976); State v. Brown, 195 Neb. 321, 237 N.W.2d 861 (1976); State v. Micek, 193 Neb. 379, 227 N.W.2d 409 (1975).

ferred and decided to arrest Brewer for giving false information to an officer. A search ensued, netting several weapons.[210]

Brewer contended the stop was an unlawful arrest because not based upon probable cause. The court relied on *Adams v. Williams* for the proposition that information given the police by a credible informant can form the basis for an officer's reasonable suspicion that criminal activity is occurring.[211] Pursuant to Statute,[212] the court held "[a] police officer may in appropriate circumstances and in an appropriate manner approach a person *for the purpose of investigating possible criminal behavior* even though there is no probable cause to make an arrest."[213]

In *State v. Irwin*, the court seems to have decided that the arrestor's intent is the controlling factor in determining whether an arrest has occurred.[214] The officers stopped Irwin's car apparently by use of their flashing red lights. After Irwin stopped, one officer approached each side of the car. The officer on the driver's side displayed his badge and asked Irwin if he would accompany them to the police station to talk. Meanwhile, the other officer tapped on the passenger window. Irwin unlocked the door. The officer opened the door and asked if he could ride along to the station. Irwin consented.[215]

Both officers subsequently testified that, at that time, neither had any intention of arresting Irwin and neither officer told, nor in any other manner indicated to, Irwin that he was under arrest. One officer testified Irwin would have been free to go had he refused to go to the station. The other officer testified Irwin would not have been allowed to leave the station after he tried to discard some incriminating evidence.[216] In holding the arrest did not occur until after Irwin arrived at the station, the court articulated only three factual bases for their conclusion: 1) it was reasonable to ask Irwin to go to the station because it was raining at the time of the stop; 2) Irwin agreed to go to the station before the second officer asked to ride along (although this point is not at all clear); and 3) the officers' testimony as to their intentions at the time of the stop.[217]

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210. 190 Neb. at 672, 212 N.W.2d at 93.
211. *Id.* at 675, 212 N.W.2d at 94.
212. NEB. REV. STAT. § 29-829 (Reissue 1975).
213. 190 Neb. at 674, 212 N.W.2d at 94 (emphasis added).
214. 191 Neb. at 182-83, 214 N.W.2d at 603-04.
215. *Id.* at 175, 214 N.W.2d at 600.
216. *Id.* at 176, 214 N.W.2d at 600.
217. 191 Neb. at 182, 214 N.W.2d at 603. The Eighth Circuit Court of Appeals, also relying on *Adams v. Williams*, upheld the decision of the Nebraska Supreme Court, but limited its holding to one based "upon the facts found." Irwin v. Wolff, 529 F.2d 1119, 1123 (8th Cir. 1976).

The troublesome feature of this decision is not simply the court's reliance on the officers' intention, but that the court ignored the question of whether the officers' intention was effectively communicated to the defendant. The officers testified they neither told nor indicated to Irwin that he was under arrest[218] at the time of the request to go to the station. The court failed to consider whether Irwin could have understood the officers' apparently private intent, and whether a reasonable person in Irwin's situation would have recognized the officers' intent. Would a reasonable person have felt himself free to do as he pleased after being asked to go to a police station with an officer riding along? Reasonable minds could differ on that point, yet the court failed to mention the existence of the question.[219]

These Nebraska criminal cases demonstrate that under Nebraska law, the controlling element is the intent of the arrestor in determining whether an arrest has occurred. More precisely, it is the intent that the arresting officer is willing to attest to entertaining at the crucial time. Of only secondary importance in determining the occurrence of an arrest in Nebraska is: the force used, the arrestee's understanding, and the communication or lack thereof to the arrestee of the arrestor's identity, authority, and intent.[220]

The overemphasis of the arrestor's intent has obscured the function of the arrestor's purpose in general legal terms. It is the arrestor's purpose of bringing the arrestee before a court, body or official, or otherwise securing the administration of the law, which confers a privilege upon the arrestor to take the steps necessary to effect an arrest. Unless an arrest is effected for that purpose, it is not privileged.[221] It is this purpose which properly is and should be important, not the arrestor's characterization of his acts as a simple detention as opposed to an arrest.

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218. One must query whether an officer's testimony of what his actions indicated to another person can be competent evidence.

219. After Dunaway v. New York, 442 U.S. 200 (1979), it should be apparent that police officers must make it clear to anyone they wish to interview at the station that they are not under any constraint to do so. Otherwise, the interview may be open to attack. It is in precisely the *Irwin* and *Dillwood* type of cases where the arrestors' actions are ambiguous that the arrestee's understanding should assume controlling importance. If the arrestor simply tells his subject what his status truly is, then the ambiguity is resolved.

220. The court has held that if exigent circumstances exist, then a prior disclosure of purpose and authority is unnecessary. In State v. Brooks, 189 Neb. 592, 204 N.W.2d 86 (1973), the court allowed the police to enter a home without prior disclosure of their purpose or authority because the officers had seen what looked like a drug sale going on inside the house. The screen door was closed, but the inside door was sufficiently ajar in order for the officers to see inside.

221. RESTATEMENT (SECOND) OF TORTS § 127 (1965).

B. Nebraska Warrantless Arrest Authority

Initially, Nebraska followed the common law, supplemented by its own statutory authority.[222] The common law authorized warrantless felony arrests only when the arrestor had reasonable grounds to believe the arrestee had committed a felony. Warrantless misdemeanor arrests were authorized only when the crime involved a breach of the peace committed in the arrestor's presence.[223] Both the Nebraska Supreme Court and the Nebraska Legislature have extended the common law in Nebraska.

As noted, in *State v. O'Kelly*,[224] the court construed specific legislation as authority for an arrest without a warrant when it appears a felony has been committed and there are reasonable grounds to believe the arrestee committed it, even though that statute only deals with arrests by persons who are not peace officers.[225] Six years later, in *State v. Beasley*,[226] the court held: "[a] peace officer may *now* arrest a person without a warrant if he has reasonable cause to believe that such person has committed a felony."[227] Ignoring its decision in *O'Kelly*, the *Beasley* court recognized the enactment of a new arrest statute.[228]

In 1967, the Nebraska Legislature adopted a set of statutes, based upon section 120.1 of the Model Code of Pre-Arraignment Procedure.[229] The Act was said to codify the common law and significantly extend warrantless arrest authority.[230] The extension of

222. NEB. REV. STAT. § 29-401 (Reissue 1975) provides:

> Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman, police officer, or peace officer as defined in subdivision (17) of section 49-801, shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained; *Provided*, that (1) within twenty-four hours of the arrest, with or without warrant, of any child under eighteen years of age, the parent, guardian, or custodian of such child shall be notified of the arrest, and (2) the court in which the child is to appear shall not accept a plea from the child until finding that the parents of the child have been notified or that reasonable efforts to notify such parents have been made.

NEB. REV. STAT. § 29-402 (Reissue 1975) provides: "Any person not an officer may, without warrant, arrest any person, if a petit larceny or a felony has been committed, and there is reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained."

223. *See* text accompanying notes 128-31 *supra*.
224. 175 Neb. 798, 124 N.W.2d 211 (1963).
225. *See* text accompanying note 177 *supra*.
226. 183 Neb. 681, 163 N.W.2d 783 (1969).
227. *Id.* at 685, 163 N.W.2d at 786 (emphasis added).
228. *Id.*, 163 N.W.2d at 786-87.
229. L.B. 395 (1967) (codified at NEB. REV. STAT. §§ 29-404.01 to -404.03 (Reissue 1975)).
230. *Id.*

the common law represents a legislative policy determination that warrantless misdemeanor arrests by peace officers should be allowed for misdemeanors not committed in the arresting officer's presence in what has been characterized as cases of necessity.[231] Such cases of necessity occur when the officer has reasonable cause to believe the arrestee has committed a misdemeanor and reasonable cause to believe the arrestee either "will not be apprehended unless immediately arrested; [or] may cause injury to himself or others or damage to property unless immediately arrested."[232] The Nebraska Legislature added a third "case of necessity" to the American Law Institute's formulation: reasonable cause to believe the arrestee "may destroy or conceal evidence of the commission of" the misdemeanor.[233]

It has been argued that the inherent limitations in this expanded warrantless arrest authority may restrain abuse.[234] The officer must be able to show, in addition to traditional probable cause to believe the arrestee has committed a misdemeanor, an articulable set of facts to support a reasonable belief at the time of the arrest that the arrestee would not have been apprehended; or, personal injury or property damage might have resulted; or, evidence might have been lost, had the arrest not been effected immediately.[235] Further, it has been observed that "as a policy matter, it may well be that this statute only recognizes what has been occurring. No doubt, it is best to recognize reality and thus be able to exert some control over the situation."[236]

As a matter of abstract theory, the inherent limitations idea is a good one. However, *State v. McCune*,[237] has shown that Nebraska practice will not always be so limited. In *McCune*, a Buffalo County deputy sheriff saw McCune's car parked on a county road late at night in Sherman County. There were beer cans lying around the car on the fresh snow. The only tracks on the road were those made by the McCune vehicle. Since he was without his jurisdiction, the deputy drove on. He later contacted the Sherman County Sheriff. The two officers returned to the place where McCune's car had been parked. The car was gone. An hour later, the two officers stopped McCune's car in Buffalo County. The deputy

231. ALI CODE, *supra* note 28, § 120.1, Commentary at 130.
232. NEB. REV. STAT. § 29-404.02(2)(a), (b) (Reissue 1975).
233. NEB. REV. STAT. § 29-404.02(2)(c) (Reissue 1975). Also, "[t]he provisions of section 29-404.01 to 29-404.03 shall be supplemental and in addition to any other laws relating to the subject of arrest." NEB. REV. STAT. § 29-404.01 (Reissue 1975).
234. Meyer, *supra* note 5, at 718.
235. *Id.*
236. *Id.*
237. 189 Neb. 165, 201 N.W.2d 852 (1972), *cert. denied*, 412 U.S. 954 (1973).

approached the car to ask about the beer cans on the snow in Sherman County. He detected a strong odor of liquor in the car and could see several people in the car. He asked the occupants to get out of the car. One of them was a fifteen-year-old girl, while the others were of legal age. There was a beer can on the floor of the car where McCune had been sitting. McCune was arrested and later convicted of contributing to the delinquency of a minor.[238]

McCune contended the evidence resulting from the arrest should have been suppressed because there was no probable cause to arrest at the time his car was stopped. First, the court emphasized the right and duty of peace officers to investigate and prevent crime. The stop was held to have been authorized under the "stop and frisk" provision,[239] because the court believed the facts (the parked car surrounded by beer cans), were sufficient to justify a reasonable suspicion that a crime had been committed.[240] The court announced that it was not essential for an officer to immediately stop and investigate under the statute.[241] Here, it was reasonable to delay the investigation since the deputy was outside his jurisdiction at the time he formed his reasonable suspicion.[242]

The arrest was held lawful under the statute.[243] Unfortunately, the court did not specify which of the three "cases of necessity" it relied upon for this conclusion, but simply listed all three.[244] Based upon *McCune*, it appears that this section, though a departure from the common law, may not be strictly construed. As a result, its inherent limitations could go unnoticed in Nebraska.[245] It is possible the court was simply recognizing the realities of police procedure so it could exert its control in the future. It should also be noted that the facts of *McCune* may not have presented a good case in which to test the inherent limitations concept before the court.

With the exceptions noted above, warrantless arrest authority in Nebraska is not significantly different than in other jurisdictions

238. *Id.* at 166, 201 N.W.2d at 853.
239. NEB. REV. STAT. § 29-829 (Supp. 1972).
240. 189 Neb. at 169, 201 N.W.2d at 855.
241. *Id.*
242. *Id.* at 169, 201 N.W.2d at 855.
243. NEB. REV. STAT. § 29-404.02 (Supp. 1972).
244. 189 Neb. at 169, 201 N.W.2d at 855.
245. *But see* State v. Brady, 202 Neb. 221, 274 N.W.2d 559 (1979), where the court very carefully and strictly applied NEB. REV. STAT. § 29-404.02 (Reissue 1975) in approving an arrest.

For an excellent discussion of the meaning and determination of "reasonable cause" as used in NEB. REV. STAT. § 29-404.02 to .03 (Reissue 1975), see ALI CODE, *supra* note 28, § 120.1, Commentary at 132-42. Useful Nebraska legislative history can be found in *Comm. on Judiciary, Minutes*, L.B. 395, Neb. Leg., 77th Sess. 1-8 (Feb. 13, 1967).

and presents no significant problems. The question of whether any particular arrest was authorized by Nebraska law is generally presented in the context of the arrestor's possession of probable cause for the arrest, not whether the arrestor possessed authority to arrest at all.[246]

IV. CITATION IN LIEU OF ARREST

Without a statutory alternative to full custodial arrest, it would be impossible to obtain jurisdiction over the person of a criminal defendant except by arrest and bail procedures, no matter how insignificant the offense charged. The statutory alternative in Nebraska is the citation in lieu of arrest procedure, originally enacted in 1974, based upon the American Law Institute's Model Code of Pre-Arraignment Procedure provisions.[247] While the citation procedure does provide a practical, sensitive alternative to formal arrest procedure, it also presents disadvantages and questions of its own.

In testimony before the Committee on the Judiciary, Nebraska

246. Authority to arrest ordinarily is a state law question in the first instance. Michigan v. DeFillippo, 99 S. Ct. 2627, 2631 (1979). Therefore, the reader may also wish to review the following additional arrest-related statutes when considering whether any particular arrestor had authority to arrest, under Nebraska law: NEB. REV. STAT. §§ 14-221, 14-604 to -606 (Reissue 1977) (relating to police officers of cities of the metropolitan class); *id.* § 15-326 (Reissue 1977) (relating to police officers of cities of the primary class); *id.* § 16-323 (Supp. 1979) (relating to police officers of cities of the first class); *id.* § 17-118 (Reissue 1977) (relating to police officers of cities of the second class); *id.* § 17-213 (Reissue 1977) (relating to police officers of villages); *id.* § 23-1710 (Reissue 1977) (relating to sheriffs); *id.* §§ 23-1811 to -1813, § 23-1819 (Reissue 1977) (relating to arrest and warrant issuance powers of county coroners); *id.* § 26-1,177 (Reissue 1975) (relating to constables); *id.* §§ 29-402.01 to .03 (Reissue 1975) (dealing with arrests in shoplifting situations); *id.* § 29-416 (Reissue 1975) (dealing with arrest power of peace officers from other states engaged in fresh pursuit in Nebraska); *id.* § 29-2266 (Reissue 1975) (dealing with arrest powers of probation officers); *id.* § 37-603 (Reissue 1978) (relating to conservation officers, their status as peace officers and arrest powers); *id.* § 49-801(15) (Reissue 1978) (defining "peace officers"); *id.* §§ 55-212 to -216 (Reissue 1978) (dealing with the arrest authority of the National Guard of Nebraska and of other states in fresh pursuit and other situations); *id.* §§ 55-409 to -414 (Reissue 1978) (dealing with apprehension, arrest and restraint for purposes of the Nebraska Code of Military Justice); *id.* §§ 60-434 to -435 (Reissue 1978) (relating to the Nebraska State Patrol).

247. *Id.* §§ 29-423, 29-426 to -430 (Reissue 1975); *id.* §§ 29-422, 29-424, 29-425 (Cum. Supp. 1978); *id.* §§ 39-6,105, 39-6,107, 39-6,108 (Reissue 1978). *See* ALI CODE, *supra* note 28, § 120.2.

The following interrelated statutes have since been enacted: NEB. REV. STAT. § 29-432 (Cum. Supp. 1978); *id.* §§ 29-431, 29-435 (Supp. 1979). A separate summons or notice procedure relating to game and fish law violations appears in *id.* § 37-603 (Reissue 1978).

Attorney General Clarence Meyer expressed a belief that adoption of the citation in lieu of arrest procedure would accomplish several salutary goals. Meyer said it would help solve bail problems because people would not be jailed as frequently; and would allow for charging a person with a crime, but doing so without causing the employment problems that would likely result from arresting the person at work. Finally, some of the distance problems faced by rural police officers would be alleviated.[248]

The American Law Institute believed use of the citation in lieu of arrest procedure would avoid both a prolonged pre-appearance detention of the accused and the necessity for a cited person to state subsequently that he had been arrested. The Institute also felt the power to issue a citation should reduce the pressure on police officers to arrest someone in those situations where the officers lack authority to effect warrantless arrests, but must do something to stabilize a given situation.[249]

The Nebraska Legislature enacted its intent into law:

> It is hereby declared to be the policy of the State of Nebraska to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law and the protection of the public. In furtherance of that policy, *any peace officer shall be authorized to issue a citation* in lieu of arrest or continued custody for any offense which is a traffic infraction, any other infraction, or misdemeanor and for any violation of a city or village ordinance.[250]

Further, "[w]henever any person shall be charged with a traffic infraction, such person *shall be issued a citation. . . .*"[251] Finally, the citations may also be issued "*[i]n any case* in which the prosecuting officer is convinced that a citation would serve all of the purposes of an arrest warrant",[252] and "when the court is convinced that a citation would serve all of the purposes of the arrest warrant procedures," following the filing of a complaint or information charging any offense, specifically including felonies.[253]

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248. *Comm. on Judiciary, Minutes*, L.B. 829, Neb. Leg., 83d Sess. 13-14 (Jan. 28, 1974) (remarks of Neb. Attorney General Clarence Meyer).

249. ALI CODE, *supra* note 28, § 120.2, Note at 19, Commentary at 143. For further discussion of the purposes and policy of citation procedure, see Kirkpatrick, *Arrest, Citation and Summons—The Supreme Court Takes a Giant Step Forward*, 30 ARK. L. REV. 137, 144-55 (1976).

250. NEB. REV. STAT. § 29-422 (Cum. Supp. 1978) (emphasis added).

251. *Id.* § 39-6,105 (Reissue 1978) (emphasis added); "traffic infraction" is defined in *id.* § 39-602 (107) (Supp. 1979).

252. *Id.* § 29-425(1) (Cum. Supp. 1978) (emphasis added). A practical problem here is that "prosecuting officer" is not defined by any statute. "Prosecuting attorney" is defined in *id.* § 29-104 (Reissue 1975), but the two labels do not necessarily have the same meaning.

253. *Id.* § 29-425(2) (Cum. Supp. 1978). There is a partial conflict between the discretion to issue a citation conferred upon any court in this statute and the mandatory language of *id.* § 29-404 (Cum. Supp. 1978), which provides in part:

It is apparent from the statutes that citations can be used not only as a substitute for an arrest, but also after an actual arrest as a substitute for the bail procedure. However, beyond this point the legislative language is unclear. In the pure citation in lieu of arrest situation (where the officer intends only a stop for the issuance of a citation and not an arrest), after the officer has filled out the citation, the cited person must sign the promise to appear in order to be released from custody.[254] As a general rule, refusal by the cited person to sign the promise to appear does not seem to constitute a separate offense.[255] However, such a refusal in the case of citations issued for traffic infractions is a misdemeanor.[256]

The officer is granted considerable flexibility in deciding whether to cite or arrest and whether to detain, but not arrest, subject to several conditions. An officer having grounds for making an arrest may take the accused into custody, or, if he already has, may "detain him further" whenever:

(a) the accused fails to identify himself satisfactorily;
(b) refuses to sign the citation; or,
(c) the officer has reasonable grounds to believe:
  (1) the accused will refuse to respond to the citation;
  (2) such custody is necessary to protect the accused or others when his continued liberty would constitute a risk of immediate harm;
  (3) such action is necessary in order to carry out legitimate investigative functions;
  (4) the accused has no ties to the jurisdiction reasonably sufficient to assure his appearance; or,
  (5) the accused has previously failed to appear in response to a citation.[257]

It would be simpler in some cases for the officer to arrest the ac-

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Whenever a complaint shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest of the person accused, if he shall have reasonable grounds to believe that the offense charged has been committed.

"Magistrate" means any municipal, county or associate county judge. *Id.* § 29-103 (Reissue 1975).

The availability of the citation procedure is not to be construed to have any effect on "the rights, lawful procedures, or responsibilities of law enforcement agencies or peace officers using the citation procedure in lieu of the arrest or warrant procedure." *Id.* § 29-428 (Reissue 1975).

254. *Id.* § 29-424 (Cum. Supp. 1978).
255. *Id.* § 29-424 (Cum. Supp. 1978); *id.* §§ 29-426 to -427 (Reissue 1975).
256. *Id.* § 39-6,105 (Reissue 1978).
257. *Id.* § 29-427 (Reissue 1975). The complexity of this statute alone may contribute to reluctance by peace officers to use the citation procedure, instead of the more familiar arrest procedure. The officers' problem is compounded when this statute is compared with *id.* §§ 29-401, 29-404.02, 29-829 (Reissue 1975). Peace officers in the field must act quickly. They do not have the time to refer to detailed statutes, a luxury possessed by reviewing lawyers and courts, not acting under field pressures.

cused, than to try to sort out the facts required in deciding whether to detain the accused further under the citation procedure.[258]

258. The position of the officer has been made even more confusing by the adoption of recent legislation which defines an infraction as "the violation of any law, ordinance, order, rule, or regulation, not including those related to traffic, which is not otherwise declared to be a misdemeanor or a felony" L.B. 534, § 1, ch. —, 1979 Neb. Laws (amending NEB. REV. STAT. § 29-431 (Cum. Supp. 1978)), except for the situations listed in NEB. REV. STAT. § 29-427 (Reissue 1975), "for any offense classified as an infraction, a citation *shall be issued* in lieu of arrest or continued custody pursuant to sections 29-422 to 29-430." *Id.* § 29-435 (Supp. 1979) (emphasis added). The statutes already had specifically provided that a person alleged to have committed an infraction could be taken into custody if harm would likely occur to the individual or society if such a person were not taken into custody. *Id.* § 29-432 (Cum. Supp. 1978).

Under the general rule of NEB. REV. STAT. § 29-401 (Reissue 1975), an officer must arrest and detain, until a warrant can be obtained, anyone found violating any state law or city or village ordinance. But, under NEB. REV. STAT. § 29-431 (Supp. 1979), ordinance violations are infractions, for which officers must issue citations, unless one of the exceptions of NEB. REV. STAT. § 29-427 (Reissue 1975) applies. In addition, there is a conflict between the duty to issue citations for infractions on one hand and the specific arrest powers of municipal police officers on the other. It is clear L.B. 534 (1979) has not changed the status of any violations of state law with respect to classification as felony, misdemeanor, traffic infraction, or other infraction under state statute. However, the same cannot be said for ordinance violations. Prior to the adoption of NEB. REV. STAT. § 29-431 (Supp. 1979), non-traffic ordinance violations were not classified as anything but ordinance violations, with several rare exceptions that were misdemeanors under specific statutes. *See* NEB. REV. STAT. §§ 19-913 (Reissue 1977), 39-669.07 (Reissue 1978); Note, *State Legislative Authority to Grant Municipalities and Counties Crime-Making Power*, 27 NEB. L. REV. 473 (1948). Senator John DeCamp, through his legislative assistant, led the Judiciary Committee to believe the infraction category was not going to have any real, present effect, by telling the Committee:

> LB 534 is a bill that grew out of a legislative resolution dealing with taking some minor offenses and setting up a category that might include certain minor offenses that wouldn't have a jail sentence and would not carry a criminal record . . . .
> This bill merely sets up a category. It doesn't grandfather in any current acts. It merely sets up a category. What we put in the category still must be determined by the legislature . . . .
> Again, . . . I wish to stress . . . what is hoped to be accomplished . . . is the establishment of an infraction category. This category would not grandfather any current laws in with it. It would merely set up a category to be . . . available . . . .

Comm. on Judiciary, Minutes, L.B. 534, Neb. Leg., 86th Sess. 2, 3, 13 (Feb. 27, 1979) (remarks of Sen. DeCamp). Despite this expressed intention, the adopted statute does not contain any such limiting language. The result may be that non-penalized violations of existing statutes may now be infractions. Further, the effect of the infraction classification on arrest powers in ordinance violation cases was never mentioned. *See* NEB. REV. STAT. §§ 14-606, 15-326, 17-118, 17-213 (Reissue 1977). Nor was the fact that jail sentences can be imposed for certain ordinance violations. *See id.* §§ 14-102(25), 15-263, 16-225 (Reissue 1977); § 39-669.07 (Reissue 1978).

The same problems have existed in the traffic infraction statutes for some

The state of current statutory requirements lends considerable support to the criticism that the citation procedure commits too much to the discretion of the individual peace officer.[259] The decision to cite actually involves the exercise of no more discretion than does the decision to detain or arrest. The additional discretion comes into play after arrest, in deciding whether to then cite and release the accused or take him before a magistrate. Traditionally, the discretion to release an arrestee has been entrusted to magistrates using the bail procedure.[260] To this extent, the policy supporting the citation procedure seems to have balanced away the fourth amendment policy of restricting the discretion of law enforcement officers in favor of a new policy seeking a reduction in the incidence of pre-appearance custody.[261]

There is no statutory requirement that a stop for the purpose of issuing a citation be preceded by probable cause to believe an offense has been committed. However, this should not pose a problem. Under the principles of *Brown v. Texas*,[262] *Dunaway v. New York*,[263] and *Delaware v. Prouse*,[264] it should be clear that more than the reasonable suspicion necessary to justify an investigative detention is required under the fourth amendment to support a stop for issuance of a citation. Whether true probable cause is a constitutional requirement remains open to debate. The wise officer will initiate any stop as an investigative detention, unless he is sure he has probable cause. It has been shown that probable cause for an arrest can develop following an investigative deten-

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time. *Id.* § 39-6,105 (Reissue 1978); § 39-602(107) (Supp. 1979). The officer in the field is confronted not only with the conflicting arrest versus citation provisions with respect to ordinance violations, but also with the different approaches to be applied to misdemeanor versus infraction stops. For misdemeanors, the officer may arrest, cite and release, or detain in continued custody, if one or more of the appropriate exceptions applies. For infractions, the officer must cite and release, unless one or more of the exceptions applies. At present, there is only one state offense classified as an infraction as part of the Nebraska Criminal Code. *Id.* § 28-416(6) (Cum. Supp. 1978).

259. Kirkpatrick, *supra* note 249, at 152-55.

260. LaFave, *Alternatives to the Present Bail System*, 1965 U. ILL. L.F. 8.

261. The effectiveness of the bail system as it applies in minor offense situations has been seriously questioned. *See, Introduction*, ABA STANDARDS, PRETRIAL RELEASE (1968); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

The threat of a failure to appear charge, NEB. REV. STAT. § 29-426 (Reissue 1975), is probably a more effective deterrent to flight than a simple personal recognizance bond or most misdemeanor ten percent cash bonds (at least in Class IIIA to Class V misdemeanor cases). *See id.* § 29-908 (Cum. Supp. 1978).

262. 99 S. Ct. 2637 (1979).

263. 442 U.S. 200 (1979). *See* text accompanying notes 68-70, 71-75 *supra*.

264. 440 U.S. 648 (1979).

tion.[265]

Regardless of the resolution of the constitutional question, before a citing officer may take an accused into custody or continue the custody as part of the citation procedure, he must have grounds for making an arrest.[266] No valid arrest can be made without probable cause. Further, the language "citation in lieu of arrest" implies that probable cause must be obtained before a citation can issue. If the procedure is to serve as a substitute for arrest, the same probable cause standard should apply—if not as a constitutional requirement, then certainly as a necessary implication of the statutes themselves.

Whether a stop for the purpose of issuing a citation is an arrest is a difficult question, due partly to a poor choice of language. There is little question that an officer seizes any person stopped for the purpose of issuing a citation. When an officer accosts an individual and restrains the individual's free exercise of liberty by means of physical force or show of authority, a seizure occurs.[267] But not every seizure constitutes an arrest in the constitutional sense.[268]

Courts which have considered the question of whether a stop for the purpose of issuing a citation or notice to appear is an arrest have gone both ways.[269] The California Supreme Court has adopted the following approach:

> Viewing the situation functionally, the violator is being detained against his will by a police officer, for the purpose of obtaining his appearance in connection with a forthcoming prosecution. The violator is not free to depart until he has satisfactorily identified himself and has signed the written promise to appear . . . . The detention which results (during the

265. *See, e.g.*, State v. Anderson, 204 Neb. 186, 281 N.W.2d 743 (1979); State v. Micek, 193 Neb. 379, 227 N.W.2d 409 (1975).

266. NEB. REV. STAT. § 29-427 (Reissue 1975).

267. *See* note 50 *supra*; Dunaway v. New York, 442 U.S. 200 (1979).

268. *See* text accompanying notes 56-58 *supra*.

269. For cases holding no arrest occurs, see Barrier v. Alexander, 100 Cal. App. 2d 497, 224 P.2d 436 (1950); Hart v. Herzig, 131 Colo. 458, 283 P.2d 177 (1955); Connecticut v. Commonwealth, 387 S.W.2d 285 (Ky. 1965); Berry v. Bass, 157 La. 81, 102 So. 76 (1924); State v. Murray, 106 N.H. 71, 205 A.2d 29 (1964); Jones v. State, 8 Misc. 2d 140, 167 N.Y.S.2d 536 (Ct. of Cl. 1957); City of Toledo v. Lowenberg, 99 Ohio App. 165, 131 N.E.2d 682 (1955). For cases holding an arrest occurs, see People v. Superior Court of Los Angeles County, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972); District of Columbia v. Perry, 215 A.2d 845 (D.C. Ct. App. 1966); Patterson v. State, 253 Ind. 499, 255 N.E.2d 520 (1970); People v. Bannan, 372 Mich. 292, 125 N.W.2d 875 (1964); Terry v. State, 252 Miss. 479, 173 So. 2d 889 (1965); Barth v. Flad, 99 R.I. 446, 208 A.2d 533 (1965); Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1947). Several of these cases do not decide the specific issue presented, but do hold the stopping of or pursuit of a car constitutes an arrest. Since a driver cannot be cited until stopped, it would be only simple logic to carry such decisions to the citation situation.

> citation process) is ordinarily brief, and the conditions of restraint are minimal. Nevertheless the violator is, during the period immediately preceding his execution of the promise to appear, under arrest.[270]

This rationale seems to follow the purposive approach to the law of arrest. The emphasis is placed upon the idea that, although a citing officer does not possess the specific intent to bring the cited person in, the officer does intend to cause the cited person to answer for an offense. The difference is that the citation supplants the need for taking the usual preliminary steps such as booking and fingerprinting.

It cannot be argued that such a stop is not a detention for the purpose of initiating a prosecution. However, to label such a stop an arrest, is to place undue emphasis on the procedural function of a citation and ignore the elements of an arrest. The brief detention incident to the issuance of a citation is not performed with the intent or purpose of taking custody of the cited person or to substantially deprive him of his liberty. The real intent or purpose is to avoid taking the cited person into custody.[271] To that extent, the issuance of a citation is no different than the service of a summons or subpoena.[272]

Unfortunately, under Nebraska law the detained person, while awaiting issuance of a citation, is in custody.[273] Only upon signing the promise to appear is the cited person to be released from custody.[274] Is this the same type of custody which may be continued for enumerated causes?[275] If so, then a detention for the purpose of issuing a citation is "in important respects indistinguishable from a traditional arrest,"[276] in that the person awaiting issuance of a citation is not free to leave the citing officer's presence until completion of the citation issuance. While such a person is not transported to a police station, nor placed in an interrogation room or jail, such person is not free to go before signing the promise to

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270. People v. Superior Court of Los Angeles County, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972). This decision may be a very narrow construction of the provisions of the Vehicle Code referring to the person awaiting citation as an "arrested person," *id.* at 200, 496 P.2d at 1215, 101 Cal. Rptr. at 847, as was State v. Cook, 194 Kan. 495, 399 P.2d 835 (1965).

271. E. FISHER, *supra* note 24, at 44.

272. Berry v. Bass, 157 La. 81, 102 So. 76 (1924).

Many of the cases holding the stopping of a motor vehicle to be an arrest should not have been analyzed as presenting arrest issues, but as presenting seizure issues. *E.g.*, State v. Kretchmar, 201 Neb. 308, 267 N.W.2d 740 (1978), *on remand*, 203 Neb. 663, 280 N.W.2d 46 (1979); State v. Holmberg, 194 Neb. 337, 231 N.W.2d 672 (1975); Note, *"Random" Spot Checks and the Fourth Amendment*, 55 NEB. L. REV. 316 (1976).

273. *See* NEB. REV. STAT. § 29-427 (Reissue 1975).

274. *Id.* § 29-424 (Cum. Supp. 1978).

275. *Id.* § 29-427 (Reissue 1975).

276. Dunaway v. New York, 442 U.S. 200 (1979).

appear without incurring the risk of a potential escape prosecution,[277] and likely subjection to physical restraint.

Perhaps the key to the issue should be the scope of the intrusion. A traditional, custodial arrest is an extreme intrusion upon the individual's privacy. A brief citation stop, lasting no longer than is reasonably necessary, is substantially less intrusive. Analyzing the citation stop in this light focuses attention on the real competing interests at stake; individual privacy versus the needs of law enforcement. The procedural function of a citation loses importance in comparison with these interests.

The issue is an important one. If a citation stop is an arrest, then there is an unquestionable right to search incident to the stop and any interrogation which occurs must be deemed custodial. If it is not an arrest, then the search powers of the citing officer are unclear[278] and any interrogation which occurs should be deemed non-custodial.

While the issues raised by the citation procedure have not yet been resolved in Nebraska, if extensively used in more than the

277. NEB. REV. STAT. § 28-912 (Cum. Supp. 1978). While the applicability of the escape statute to such a situation is presently unsettled, the filing of such a charge is justifiable due to the broad definition of "official detention" for purposes of the new escape statute. *Id.* § 28-912(1).

While the escape statute appears to be the only applicable charge for a premature departure from citation situations by persons not operating motor vehicles nor accused of traffic infractions, it is clear that persons prematurely departing the scene of a traffic infraction citation stop are open to charges of operation of a motor vehicle to avoid citation, *id.* § 28-905, and possibly, refusal to sign a citation. *Id.* § 39-6,105 (Reissue 1978).

278. Search incident to a citation, a topic beyond the scope of this article, has received considerable attention elsewhere. *See* Agata, *Searches and Seizures Incident to Traffic Violations—A Reply to Professor Simeone*, 7 ST. LOUIS U. L.J. 1 (1962); Kirkpatrick, *supra* note 249, at 150-52; Simeone, *Search and Seizure Incident to Traffic Violations*, 6 ST. LOUIS U. L.J. 506 (1961).

Kirkpatrick states, in seeking a constitutional basis for a search incident to a citation for an offense for which there could be no concealed or destroyed physical evidence:

> The possible physical danger inherent in the arrest process is not present; the 'extended exposure' of the police officer to the accused will not take place. . . . [T]here is probably some danger to the police officer after he issues a citation to an incensed citizen, although admittedly not at the level of the danger inherent in the arrest process. . . .

Kirkpatrick, *supra* note 249, at 151-52. While the level of danger inherent in the arrest process may not be sustained for as long a period in the citation process, the time required to inflict serious or fatal injury is very short. One need only assist an officer in stopping a car with several occupants on a country road late at night to appreciate the risks involved, even in a brief encounter, as well as the feelings of the officer at such a moment. *See also* People v. Bannan, 372 Mich. 292, 125 N.W.2d 875 (1964); People v. Troiano, 35 N.Y.2d 476, 323 N.E.2d 183 (1974).

area of traffic enforcement, the citation procedure will have an effect on the Nebraska law of arrest. At this time, it is clear the citation procedure provides a practical, sensitive alternative to formal arrest procedure and its extensive use should be encouraged.

V. CONCLUSION

In determining whether an arrest has occurred in any factual context, the policy of the fourth amendment must be recognized. That policy is the protection of the individual's reasonable expectations of privacy and freedom from governmental intrusions. To this end, while the arrestor's intent must continue to be one of the most important of the traditional elements of arrest, it should not invariably be the controlling element. More emphasis must be placed upon the attitude of the arrestee. Where the arrestor's intent is clear from an objective assessment of his actions and conduct, and a reasonable arrestee in a similar situation would have understood his status, there should be no difficulty. However, where the arrestor creates an ambiguous situation with respect to the arrestee's status, then the arrestee's reasonable assessment of his status should control.

There is a need for the adoption of a clear, principled definition in Nebraska's law of arrest. The case-by-case approach is totally inadequate. Further, no rational reason exists for any distinction between the meaning of arrest in civil and criminal cases. The same values are at stake in either context. The *Restatement of Torts* definition of arrest is an appropriate one: "An arrest is the taking of another into the custody of the actor for the actual or purported purpose of bringing the other before a court, or of otherwise securing the administration of the law."[279] The Restatement definition focuses attention on the critical aspect of custody for the purpose of securing the administration of the law. The courts, under this definition, would be free to analyze detention/arrest situations by assessing the degree of intrusion involved in any seizure of the person, custody being the key. The result would be an analysis of objective facts, not controlled by the subjective intention of either the arrestor or the arrestee. The adoption of the Restatement definition would allow for greater recognition of the policy of the fourth amendment in the law of arrest.

Finally, as a matter of policy, law enforcement agencies should be encouraged to use the citation in lieu of arrest to the maximum

279. RESTATEMENT (SECOND) OF TORTS § 112 (1965). Were the RESTATEMENT definition adopted, it would be necessary to reconsider the use of the word "custody" in NEB. REV. STAT. § 29-424 (Cum. Supp. 1978), in order to resolve the question of whether a citation stop is an arrest. *See* text accompanying notes 267-78 *supra*.

extent possible. Use of the arrest procedure should be restricted to cases of necessity. The citation procedure serves all the needs of law enforcement in most cases and gives away nothing of value to it. Arrest, on the other hand, takes away a great deal from the person arrested.