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TO PROPERLY APPRAISE the oft-bruited problem of police brutality, one should first consider how investigatory duties came to devolve upon the police in the United States.

The origin of these police powers is traceable to the period in English history before there existed any police force as such.[1] At this time, law enforcement responsibilities were vested in the justices of the peace, who were empowered to arrest and imprison on the basis of indictment or suspicion. In part, at least, this system was that which was adopted in colonial America.[2] However, in America early development of the offices of the county prosecutor and the sheriff in frontier communities prevented justices of the peace and city magistrates from assuming much prominence in the investigatory aspect of law enforcement; instead they assumed the more judicial role familiar today.[3]

In this early system, the practice was for private citizens to complain of criminal acts to the magistrate, and then for the magistrate to determine whether or not to make an arrest. Obviously the magistrate could not personally attend to all of these arrests; therefore, he resorted to the issuance of warrants and the delegation of the authority to arrest to police. Upon arrest, the suspect would be brought before the magistrate, who would personally interrogate him in order to determine whether or not the suspect should be held for trial.

As the magistrate grew out of his role as investigator and prosecutor and became more confined to his judicial role, it was apparent that someone else had to assume the first functions. Someone had to gather evidence and present it in court at a preliminary hearing. The police had to assume the investigatory role.

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1 Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11 (1962).

2 *Id.* at 17, *citing* Haskins, Law and Authority in Massachusetts, 174-75, 200 (1960).

3 Barrett, *supra* n. 1.

Two questions then arose: Were they to have the same powers as the magistrates had had to arrest persons and to conduct in-custody investigations? Were they to be allowed to interrogate suspects in order to determine whether or not they were to be brought before a magistrate and charged with an offense? These questions, unfortunately, were not faced squarely. While the police clearly had the actual responsibility of securing evidence for presentation to the magistrate, in order to justify holding the defendant for trial, the theory still persisted that "the primary responsibility for determining whether a person shall be taken into custody and whether he shall be held to answer for a public offense is vested in the magistrate." [4] Even a perfunctory consideration of actual practice will reveal that it is far from the theory. Thus, many of our criminal statutes define crimes in which participation is consensual, and in which, therefore, there is contemplated no complainant (e.g., prostitution, sale and use of narcotics, etc.). These crimes cannot follow the old system of depending upon the victimized person to carry forward the criminal prosecution; the responsibility for investigation, and apprehension, have manifestly been shifted to the police.

Responsibility without concomitant, well-defined authority is an onerous thing in any job. Therefore, with this understanding of the position in which the police often find themselves, we may more objectively consider the problem of police brutality.

Brutality at Time of Arrest

Charges of brutality at the time of arrest are many in number. Few arrests are made with the consent of the criminal, and there are many instances in which the criminal resists arrest. To enable police to carry out their function in making arrests, the authority to make an arrest, with or without warrant, of necessity carries with it the privilege to use that reasonable force necessary to effectuate the arrest.[5] Whether or not the force used was reasonable is a question of fact for the jury, to be determined in the light of the peculiar facts of any given case.[6]

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[4] *Id.* at 19.

[5] Prosser on Torts, 111 (2d ed. 1955).

[6] *Ibid.*; and see Clark v. DeWalt, 65 Ohio L. Abs. 193, 114 N. E. 2d 126 (1953); Nicholson v. Malone, 84 Ohio L. Abs. 206, 168 N. E. 2d 155 (1960) involving an off-duty policeman.

Where the prisoner resists the officer's command, the officer may use such force as is reasonably necessary to accomplish the imprisonment.[7] Force, said Judge Skeel in *Schweder v. Baratko et al.*,[8] when used lawfully in making an arrest is in the exercise of a governmental function, and only in cases where excessive force is used can such force be claimed to be an assault and battery by the persons arrested.[9] The law can not, unfortunately, nicely measure the degree of force which may be used. For instance, a police officer's use of a blackjack in protecting himself when attacked may be considered not to be excessive force even though the prisoner dies from a blow therefrom.[10] Of course, this implies that the police officer may assert as a defense, in either a civil or criminal action for assault and battery alleged to have been committed while making an arrest or conducting someone to prison, that it is his duty to keep his prisoner under control and that as long as he uses no more force than necessary under the circumstances, he is not liable.[11]

The "reasonable force" so frequently spoken of is often defined in penal statutes. However, the statutes often define this phrase not in terms of whether or not the force was truly reasonable, but whether or not it was "necessary for the arrest" of the alleged criminal.[12]

Municipal Liability

Regardless of how the reasonableness of the force is defined, it should be noted that, absent any statutory provision imposing liability, or any provision in the municipal charter making mem-

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[7] State v. Yingling, 36 Ohio L. Abs. 436, 44 N. E. 2d 361 (1942); see also, 5 Ohio Jur. 2d, Arrest, Secs. 50, 58.

[8] 103 Ohio App. 399, 143 N. E. 2d 486 (1957). It is interesting to note here that the case held that in an action for assault and battery alleged to have been unlawfully committed upon the person of the plaintiff by defendants, who alleged that at the time they were attempting to arrest plaintiff for careless driving, evidence of plaintiff's conviction for careless driving was not admissible as proof of res gestae or to challenge plaintiff's credibility, but it was admissible to show that there was probable cause for causing arrest of plaintiff.

[9] *Ibid.*

[10] State v. Yingling, *supra* n. 7.

[11] 5 Ohio Jur. 2d, Arrest, Secs. 50, 58; for an interesting discussion of the defense in general see, Justification for the Use of Force in the Criminal Law, 13 Stanford L. Rev. 566 (1961).

[12] See: Ariz. Rev. Stat. Ann., Sec. 13-1401(B) (1956); 4 Idaho Code Ann., Sec. 19-610 (1948); A. L. I. Code of Criminal Procedure, 229 (1930).

bers of the police force agents of the municipality, a city ordinarily is not liable for the employment-acts of its police officers.[13] A city is not liable, in general, for the acts of its officers in attempting to enforce its regulations, even if the regulations themselves are void.[14] Further, police cannot be regarded as servants or agents of the municipality so as to render it liable for their unlawful or negligent acts, even if such acts are done in the discharge of their duties.[15] The appointment of police is vested in the municipalities by legislatures, as an appropriate way of exercising a governmental function; but this usually does not make the municipalities liable for assaults or other tortious acts of the officers done while acting in the performance of their duties.[16]

Statutes or provisions in municipal charters may, as stated above, make police officers agents of the municipality, and thus render the municipality liable under the doctrine of respondeat superior; in which case bonding is required and the legislative enactment may provide for the conditions of liability.[17] In the cases where provision has been made for liability, the question usually turns on whether the acts of the police officer were *virtute officii* or *colore officii.*

Acts *virtute officii* are acts done under the authority vested in the officer, although such acts are done in an improper manner or with abuse of discretion.[18] Acts done *colore officii* are those acts which, although done under color of the office, are not acts of such nature that the office gives any authority for their performance.[19] For an interesting case on this point see

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[13] 63 C. J. S., Municipal Corporations, Sec. 775, *et seq.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.;* see also, Bishton, Municipal Corporations-Immunity-Municipality Liable for Torts of Police Officers under Respondeat Superior, 33 Notre Dame Law. 304 (1958); and see, Prosser on Torts, 775-6 (2d ed. 1955) wherein it is stated that "There is ordinarily no liability for the torts of police officers, even where they commit unjustifiable assault and battery . . .".

[17] See for example: Const. Md., Art. 4, Sec. 45, and Md. Code Ann., Art. 87, Secs. 2, 4 (1957) (Surety on sheriff's official bond liable only for official acts of sheriff in execution of his office arising under common law or statute).

[18] Aldridge v. Wooten, 68 Ga. App. 887, 24 S. E. 2d 700 (1943); State to Use of Brooks v. Fidelity & Deposit Co. of Maryland, 147 Md. 194, 127 A. 758 (1925).

[19] State v. Roy, 41 N. M. 308, 68 P. 2d 162 (1937); State v. Fidelity & Deposit Co., *supra* n. 18.

State to Use of Brooks v. Fidelity & Deposit Co. of Maryland,[20] where the facts were as follows: A prisoner, while in the sheriff's custody and under sentence of death, escaped through the negligence of the sheriff. While the escapee was at large, the sheriff, without warrant, took one Isabella Brooks into custody for a period of thirty days on a charge of aiding the escapee. While Isabella was in jail, the sheriff, in order to force her to disclose information, caused her to be bound about the wrists and suspended from the ceiling without support for her feet. He proceeded to question, torture and mistreat her while she was suspended.

Brutality Subsequent to Arrest

Most cases of alleged brutality are claimed to occur in a "third-degree" interrogation which usually is alleged to have occurred during the period between arrest and preliminary examination. It is generally acceptable to allow police at the initial stages of investigation to question anyone who may be helpful in providing information which will aid them in their crime detection. However, it is naive to assume that when the stage has been reached where suspicion has centered upon some person as the likely perpetrator of the crime, that interrogation will cease. But it is assumed that there will be no coercive attempt to extract or extort a confession from the prisoner, for such confession would surely not be admissible.[21] However, the courts of all States have held it to be permissible to introduce confessions secured by questioning of suspects who were in the custody of crime detection officials.[22]

Actually, in most instances, the courts have not even discussed the basic legality of in-custody interrogation. Instead, they have concentrated on determining the point at which to draw the line where the police have gone too far, and thus rendered any confession inadmissible due to coercion.[23]

Coercion can be as brutal when it involves mental torture as when it involves physical force.[24] The whole atmosphere of the

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[20] *Supra* n. 18.

[21] McCormick on Evidence, Ch. 12, Sec. 111, 231-2 (1954).

[22] Culombe v. Connecticut, 367 U. S. 568, 6 L. Ed. 2d 1037 (1961), citing (at note 38) cases from all states on this point.

[23] See in general, McCormick on Evidence, Ch. 12 (1954), and Maguire, Evidence of Guilt, Ch. 3 (1959).

[24] Watts v. Indiana, 338 U. S. 49, at 52, 93 L. Ed. 1801 (1948).

in-custody interrogation may be suggestive of mental coercion. The prisoner knows that what actually happens to him behind the closed doors at the interrogation is difficult, if not impossible, to prove. If, through misguided zeal or short temper of one of his inquisitors, he is subjected to physical abuse, he knows that he faces the almost insuperable difficulty of proving this without the aid of any friendly witness. His testimony almost surely will stand alone in the face of solemn official denials.[25]

Thus there inevitably is opportunity and temptation for the police to try to force the prisoner to be the unwilling collaborator in establishing his own guilt.[26]

There appears to be general acceptance of the premise that the reasonable examination of a suspect ". . . should be allowed in the interest of public welfare." [27] But it is also generally noted that ". . . such examinations should be kept within bounds, and cruel and brutal methods should never be tolerated." [28] Police officers, it is true, are incessantly confronted by the difficult task of handling prisoners many of whom are hardened and resourceful. Although courts will go far in their support if they have acted in good faith in an effort to protect society, and although the securing of voluntary confessions from guilty prisoners is desirable,[29] still the confession not voluntarily given cannot be accepted in evidence,[30] and the police officer who goes too far cannot be deemed justified in an action against him for assault and battery.[31] It is not within the prov-

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[25] Culombe v. Connecticut, *supra* n. 22, at 573-4.

[26] *Id.* at 575; see also, Steven v. State, 26 Ohio App. 53, 159 N. E. 834 (1927) where in a prosecution for robbery the evidence of mistreatment of the defendant in an effort to extort a confession was excluded when the officers accused of the mistreatment did not testify; the evidence being competent only as reflecting on the testimony of parties guilty of mistreatment.

[27] 6 C.J.S., Assault and Battery, Sec. 97, at 954.

[28] *Ibid.;* also, Bonahoon v. State, 203 Ind. 51, 178 N. E. 570 (1931).

[29] Bonahoon v. State, *supra* n. 28; Flowers v. State, 236 Ind. 151, 139 N. E. 2d 185 (1956).

[30] People v. Joe, 31 Ill. (2d) 220, 201 N. E. 2d 416 (1964); State v. Stewart, 120 Ohio App. 195, 201 N. E. 2d 793 (1963) (U. S. cert. den.); Wallace v. State, 235 Ind. 538, 135 N. E. 2d 512 (1956) where one was held without sleep for 22½ hours, with one meal, and subjected to "unexplained physical harm."

[31] 6 C. J. S., Assault and Battery, Sec. 36 at 842; also Sec. 97 at 954 wherein it is stated that "it is no defense that the assault was committed on a prisoner . . . if the punishment inflicted was excessive."

ince of the police to assume the guilt of a person and to subject him to the third-degree.[32] They could not have assumed

> . . . his guilt, and refused to credit his denials and his protestations . . . until they have extorted from him the . . . confession. Such proceedings are without excuse . . . and to tolerate them or to ignore them without rebuke is to bring reproach upon the law and convert the administration of justice into an engine for the perpetration of rank injustice.[33]

It is the duty of an officer to protect his prisoner from the assaults of others; how much greater then is his duty not to assault the prisoner himself![34]

There is little doubt that most policemen do not generally start questioning with any intention of using force. But the burden which society has placed upon them, coupled with the secrecy in which the police station interrogation is generally carried out, are so conducive to excesses that such cases are not unusual.[35] Since *Brown v. Mississippi*,[36] the courts have held that it is a violation of the Fourteenth Amendment as well as of other law, to allow the body or the mind of an accused to be tortured. Yet relatively little has been done to insure the prevention of these methods.

It appears that it is not even necessary for an accused to be cautioned that he has a right to say nothing,[37] and certainly it appears that the police discourage the appearance of an attorney to assist the accused and inform him of his rights.[38] Since ". . . any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances,"[39] the police do all in their power to avoid al-

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[32] State v. Thomas, 193 Iowa 1004, 188 N. W. 689 (1922).

[33] *Ibid.*

[34] Union Indemnity Co. v. Cunningham, 22 Ala. App. 226, 114 So. 285 (1927).

[35] See: The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1, at 27 (1958).

[36] 297 U. S. 278, 56 S. Ct. 461 (1936). In this case, one of the accused was even hanged to a tree and let down and pulled up again. On the same day that the confessions were extorted, they were arraigned and trial was set for the following morning without an opportunity for them to consult with counsel. (This case began the doctrine of inadmissibility of forced confessions under the Due Process clause.)

[37] People v. Hartgraves, 31 Ill. (2d) 375, 202 N. E. 2d 33 (1964) (U. S. Sup. Ct. appeal pending).

[38] Culombe v. Connecticut, *supra* n. 22.

[39] Watts v. Indiana, *supra* n. 24.

lowing the suspect contact with his attorney during this period. Even under the "allowed-one-call rule" the police generally construe the rule to mean allowed one call after being booked; this sometimes is not until long after interrogation.

Corrective Action

Because of our multitude of autonomous police departments, and because of the manner of development of the authority and responsibility of these police departments, there has been little supervision or control of this problem. In an attempt to fill this vacuum, the courts have attempted to exercise judicial control;[40] however, this cannot be the entire answer. The writer feels that the best approach to solving this dilemma is through intelligent legislation of the type suggested by Professor Barrett as a result of his studies on the subject under a grant from the Walter E. Meyer Research Institute.[41]

The most significant suggestions are that the laws governing detention for investigative purposes should be well defined, and that authorization therefor should be limited to certain circumstances. The types of limitation suggested are the following:

A. Reasonable cause should exist to justify such detention.
B. Detention should be authorized only when reasonably necessary to the completion of an investigation. Detention might be considered necessary under circumstances like the following:
    1. Where evidence of a crime might disappear if the defendant were not detained so that a search could be conducted.
    2. Where the suspect might be likely to flee.
    3. Where identification procedures are necessary to determine if the suspect committed the offense.
    4. Where it is necessary to check records, make laboratory tests, or interview complaining witnesses, etc.
C. The duration of detention should be determined by the standard of reasonable necessity for completion of the investigation, not to exceed say 48 hours (of course with a

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[40] The Supreme Court alone wrote ten opinions dealing with these problems in 1961: Monroe v. Pape, 365 U. S. 167 (1961); Wilson v. Schnettler, 365 U. S. 381 (1961); Silverman v. United States, 365 U. S. 505 (1961); Rogers v. Richmond, 365 U. S. 534 (1961); Chapman v. United States, 365 U. S. 610 (1961); Coppola v. United States, 365 U. S. 762 (1961); Reck v. Pate, 367 U. S. 433 (1961); Culombe v. Connecticut, *supra* n. 22; Mapp v. Ohio, 367 U. S. 643 (1961); Marcus v. Search Warrant, 367 U. S. 717 (1961).

[41] Barrett, *supra* n. 1.

> provision for limited extension by a magistrate upon proper application to him).[42]

These, along with suggestions concerning a method of shifting the detention from the police to an independent agency, and suggestions as to informing the suspect of his rights at the outset, are greatly needed reforms, for the words spoken by Patrick Henry are as true today as they were when he said:

> What has distinguished our ancestors?—That they would not admit of tortures . . . to extort a confession of the crime . . . they will tell you that there is necessity of strengthening the arm of government, that they must . . . extort confessions by torture . . . WE ARE THEN LOST AND UNDONE.[43]

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[42] *Ibid.*

[43] 3 Elliot's Debates (2d ed., 1891).