Police Power and Civil Liberties

J. L. Clendenning
POLICE POWER AND CIVIL LIBERTIES

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I. Introduction

Any consideration of the practical problems involved in administering criminal law must, of necessity, take into account the conflict between police power on the one hand and maintenance of civil liberties on the other.

The purpose of this paper is not to define the dividing line between these two concepts. I hope it is not a presentation of a subjective, prejudicial point of view. One's past experience will perhaps place limitations on a completely objective expression of opinion: a lawyer will generally regard a problem from a strictly legal viewpoint; a police officer would regard it from a law enforcement angle. As an ex-police officer, and presently a law student, I will attempt to outline some of the problems that present themselves where these two viewpoints are in conflict. Consequently, the conflict between civil liberties and police power occupies the focal point of this article.

The following illustration was chosen from my past experience as a police officer because it embraces many of the problems referred to later in the article. It should be pointed out that this took place approximately fifteen years ago, yet, conversations with police officers have led me to conclude that such a situation is not unrepresentative of contemporary problems.

During the winter months a report was received from a service club that a camp which they operated during the summer had been seriously damaged by vandals. Since the camp was used for the benefit of underprivileged children from across Ontario, considerable publicity was given in the local newspaper to its destruction. This naturally resulted in pressure on the police department to find the guilty parties.

The camp was located in a remote area, perhaps three miles from the nearest resident. The vandalism had occurred approximately two months prior to discovery; thus, any potential evidence, such as tracks of the vandals, had been erased. After a complete and exhaustive examination of the scene, not one shred of evidence was found which might direct our paths to the guilty parties.

Several weeks passed but because of the unfavourable publicity surrounding the offence it was far from forgotten. Virtually all avenues of enquiry had ended with negative results. Then a break came in the investigation. One of the officers in the detachment was

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informed by a youth that he had seen some boys—two of whom he knew by name—hunting in the vicinity at approximately the time of the commission of the offence. The youths were aged seventeen and fifteen.

In company with another officer, I went to the older boy’s home. On our arrival, the youth appeared extremely nervous. This could have been the result of natural apprehension of police in general, or indicative of his guilt. We (and I venture most police officers would), construed this as the latter, or perhaps more fittingly, we chose to regard it so. We then requested the youth to accompany us to the police office, intimating to him that we would like to ask him some questions. There was no indication to him at this point as to the subject of the questions, and he acceded to our request. I must confess that if the youth had refused to go with us, we probably would have taken him anyway.

On arriving at the police office, I subjected the youth to intensive questioning. There is a set pattern in such approach. The questioner adopts a ‘hard line’ towards the suspect; cross-examining him on every inconsistency. Occasionally the suspect will break down and give a statement. More frequently, however, he slowly becomes more and more antagonistic towards the questioner. The suspect’s original story that he had been hunting in the area was repeated time after time. Finally, after approximately one hour of intensive questioning, the youth became so antagonistic that he refused to say anything. During this period, I felt certain, because of the youth’s attitude, that he knew a lot more than he was disclosing. My feelings in this respect were probably based simply on intuition because there was not one single fact that lent credence to his guilt.

During the foregoing period, by prior arrangement, the fifteen-year-old lad had been brought to the office. Also by arrangement, he had been seated on a chair facing the door to the office where the questioning of the seventeen-year-old was proceeding. When the door to that office was opened, both youths would be visible to one another.

At this point, a psychologist could better give the reasons for what was about to transpire. I left the office where the questioning was being conducted, advising the youth I would return in a moment. Actually, I had no intention to return; from this point on the questioning would be conducted by someone else. Who was to be the replacement? The officer in charge of the detachment was the personification of the ‘father image’. His corpulence, prematurely grey hair, clear plastic-rimmed glasses, all added up to a picture of a person sympathetic to one’s cause, particularly a seventeen-year-old who

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1 The writer was informed by police officers interviewed that current criticisms of the police have not slowed down the amount of information provided by informants. Although one segment of the community may become sufficiently alienated from the police for various reasons to stop providing information, they are generally replaced by another segment.
had been subjected to such intensive questioning. This was our choice of a replacement.  

I cannot testify as to what transpired in this particular case, not having been present, but the procedure probably conformed to past experience in similar situations. The questioner attempts to gain the confidence of the suspect. In doing so, he probably denounced the earlier officer as being arrogant, inhuman, a bully, and used any other deprecatory description he felt suited the particular circumstances. It must be kept in mind that the suspect by now was aware of the other youth’s presence in the outer office. In the circumstances, it requires only a few subtle references to another confession, a suggestion that it would be ‘better’ for the suspect to confess (leaving it open to the suspect to place his own interpretation on what ‘better’ means in this context), and a few sympathetic gestures to effect results.

In approximately fifteen minutes, the officer came out of the room and said the youth was willing to give a full statement. Naturally, because my presence would only cause a return of antagonism, I was excluded from the taking of such confession.

Once this statement was obtained, four other boys also confessed to the vandalism. Their ages ranged from thirteen to sixteen. Two weeks later they all appeared in Magistrate’s Court and were placed on suspended sentence for one year. Because most of the families were of low income, none of the boys was represented by counsel at the hearing.

Proponents of civil liberties could attack this procedure on many grounds. The manner in which the boys were picked up could be said to constitute arrest without reasonable and probable grounds. The manner in which the confession was obtained is open to attack because the suspect had no opportunity to avail himself of legal advice. These are only some grounds for attack and are from a strict viewpoint of civil liberties perfectly justified.

On the other hand, many people, and I do not refer only to police, would say that the action taken was perfectly justified even though somewhat colourable tactics were employed to obtain the confession. Their argument in support of this contention would follow the line that without the confession the guilty parties would not have been apprehended. Apprehension in the circumstances was necessary in view of the gravity of the offence. This argument appears to be as acceptable as that put forward on behalf of civil liberties.

2 The selection of the officer who will take over the questioning will depend upon the first officer’s appraisal of which type would most likely elicit response from the accused. In this situation, the officer in charge appeared the most likely to effect the results desired. The only limitation here is the variety of personality types actually available.

3 This procedure could be verified quite simply by considering the number of criminal cases in which a statement is involved. Generally, the arresting officer is not the person taking the statement.
Fifteen years ago, no civil liberties objections were expressed, at least not to my knowledge. If the same factual situation were to present itself today, the reverse would probably hold true. What is the reason for such a change in attitude after a short effluxion of time? The liberty of the citizen has been so curtailed in matters of employment, choice of residence and other aspects of every day living because of social and economic factors that preservation of what freedom actually remains in our democratic society has come to be jealously guarded. The police officer is a constant, visual reminder of restrictions on our freedom; consequently, he frequently receives the brunt of our attack. This, I add, is my own opinion of the reasons underlying our emphasis on civil liberties today.

Assuming that preservation of civil liberties is a justifiable pursuit, to what extent should we pursue this ideal?

The protection of the individual from oppression and abuse is a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems forgotten.4

A balance between the two concepts must be struck. It is with this balance in mind that the practical problems of police administration will be considered. Part II will consider the peculiar status of a police officer. Part III will deal with arrests without a warrant with particular emphasis on a person’s right to refuse to identify himself. Part IV is a consideration of applying in practice the legal concepts outlined in the two preceding Parts. Finally, Part V concludes with opinions as to what changes could be made in this area of the law.

II. Status and Duties of a Police Officer

The peculiar status of a police officer is anachronistic in present day society. Subject to certain qualifications, a person employed by another is considered an agent of the employer. A police officer, however, is not an employee in the traditional sense. This was well illustrated in the recent case R. v. Labour Relations Board, ex parte Fredericton5 which raised the issue whether a police organization could be certified as bargaining agent. Michaud C.J.Q.B. succinctly described their peculiar status:

Under the common law, the position of constables or police officers is that they are holders of office of trust under the Crown, whose primary purpose is to exercise the rights and discharge the duties conferred or imposed upon the holders of that office by the common or statutory law. From this has been established the rule that they are not servants or agents of the appointing municipality for whose wrongful acts the municipality is or may be liable at law; but are officers appointed to perform duties of an executive character in the general administration of justice.6

This status is a product of historical development. Originally it was the responsibility of all citizens to co-operate in the arrest and

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4 In re Fried et al. (1947), 161 F. (2d) 453. The passage and citation were taken from Law Society of Upper Canada Special Lectures, 1963, p. 5.
6 Ibid., at p. 39.
apprehension of criminals. If a criminal was discovered by the inhabitants of a vill or hundred, it was the duty of the citizens to set up a 'hue and cry' and chase him until he was apprehended either in the citizens' own jurisdiction or up to seven miles into the adjoining one.\(^7\) Beyond this point it became the duty of the citizenry of the neighbouring vill to apprehend the criminal. Thirteenth century statutes systematized the police powers of the vill; watchmen were to be kept throughout the night and the assize of arms enforced; in 1252 constables were to be appointed.\(^8\) Not until Sir Robert Peel's Police Improvement Act in 1829, by which the first Metropolitan Police Force was organized, were there any serious attempts to organize police forces along modern lines.\(^9\) Thus, because of this historical development, the maintenance of the public peace has been an obligation on the populace as a whole. In performing his duties, a police officer is simply a citizen, discharging civilian duties. His authority is original, not delegated, and therefore, he is not an agent of the municipality.

Much of the law of agency was developed in an industrial environment after the advent of the Industrial Revolution and the creation of employer-employee relationship. The maintenance of public peace reaches back in time to the very beginnings of our society, and because of this earlier development, has escaped the application of the agency concept.

The main problem created by this historical anomaly is that when an individual officer has engaged in tortious activity, he alone is personally liable for any damages. In Ontario, this rule has recently been altered by statute.\(^10\) The effect of these changes is to make the Chief Constable liable for the torts of the members of the police force under his direction, committed on or after January 1, 1966, and the Municipality shall pay any damages or costs awarded against him in such action.

Are there merits in this provision? The writer feels there are for the following reasons. Police protection is a benefit accruing to the community at large and it is only just that the costs should be borne by the persons receiving the benefits. Secondly, many police

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\(^7\) Stephen's History of the Criminal Law (1883), Vol. 1. Although this duty can be traced as far back as the beginning of the thirteenth century, its counterpart can be discovered in even more recent times. Until 1955, with the amendment of the Criminal Code, a warrant for arrest could be executed wherever the accused was found in the territorial jurisdiction of the justice issuing the warrant, or in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first mentioned jurisdiction. See R.S.C. 1927, c. 36, s. 661.


\(^9\) There had previously been a few isolated attempts at organization such as the Bow Street Runners in 1753.

\(^10\) The Police Act, R.S.O. 1960, c. 298. Section 22 to 24 inclusive were repealed and sections 22 and 23 substituted therefore by S.O. 1965, c. 99, s. 6(1).

\(^11\) Subject to comments which are expressed in the conclusion, infra.
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officers (and this is substantiated in conversations with police themselves) are virtually judgment-proof. If the claimant in a tort action were restricted to the individual as a source of satisfaction, in many instances his claim would be frustrated. Thirdly, the provisions place a responsibility not only on municipalities but also on chief constables, to ensure that members of their forces do not exceed their legal rights and duties.

The latter is perhaps one of the principal benefits of the provision. As in an ordinary agency situation, the principals want to ensure that only those persons best qualified to represent them will be chosen. Perhaps the normal requirements of height, weight and a letter from the candidate’s home town politician will be traversed and selection made strictly on the basis of ability.

Other than this statutory change, the status of a constable remains virtually unaltered; he is no more than a citizen with brass buttons.\(^{12}\)

Throughout this Part, reference has been made to the police officer’s duty of maintenance of the public peace. This terminology is rather vague; however, a fairly comprehensive outline of police duties is set out in The Police Act of Ontario:\(^{13}\)

The members of police forces appointed under Part II are charged with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, and apprehending offenders, and laying informations before the proper tribunal, and prosecuting and aiding in the prosecution of offenders, and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables.

The scope of this paper does not permit a comprehensive analysis of the problem of public relations but a brief comment may suffice to place it in proper perspective. Public estimation of police is directly related to the need for police services; the greater the need, the greater the esteem accorded. It also depends on what side of this ‘cops and robbers’ game you happen to be. If you need their services, you address them as ‘sir’. If you think they will discover you breaking the law, you call them ‘fuzz’. Unfortunately, because of the advent and increasing popularity of the automobile, more and more of the general public are falling within the latter category.

### III. Arrest and Other Related Problems

A police officer’s power to arrest is closely associated with his status. As previously indicated, his rights and duties are co-terminus with those of an ordinary citizen unless expressly altered by statute. The Criminal Code now defines the ordinary citizen’s power to arrest.

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\(^{12}\) Statutory extensions of a police officer’s powers over and above those derived from his status will be considered in the next Part which deals with his power to arrest.

\(^{13}\) R.S.O. 1960, c. 298, s. 47. Police Forces appointed under Part II relate to those appointed by municipalities. The Ontario Provincial Police Powers are set out in s. 3.
Anyone may arrest without a warrant a person whom he finds committing an indictable offence or, whom, on reasonable and probable grounds he believes has committed a criminal offence and is escaping from and freshly pursued by persons who have lawful authority to arrest that person. This power to arrest without a warrant is essentially the common law power to arrest expressed in statutory form, and merely an extension of the mediaeval concept of 'hue and cry'.

The normal power to arrest has been extended in the case of a police officer. The Criminal Code provides:

A peace officer may arrest without a warrant
(a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence or is about to commit suicide, or
(b) a person, whom he finds committing a criminal offence.

The section is drafted so that arrests without a warrant can be effected when a peace officer finds a person committing either an indictable offence or an offence punishable on summary conviction, or, where, on reasonable and probable grounds he believes the person has, or is about to, commit an indictable offence.

Most of the problems in this area arise in determining what are reasonable and probable grounds. To illustrate the problem from a practical viewpoint, suppose a police officer comes upon a person in a lane at the rear of a jewellery store late at night. Several interpretations can be placed on his presence: he is 'about to' break into the store; he is taking a short cut; or perhaps he is simply there because of physical necessity combined with a bashful disposition. Mere suspicion is not enough in the circumstances to warrant an arrest.

In order to justify an arrest on reasonable and probable grounds it is necessary to prove a state of facts which would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person is guilty of an offence.

Suppose the person in the illustration above, begins to walk away without giving any explanation of his presence to the police officer. The officer is faced with the necessity to make an instantaneous decision. If he orders the person to stop and the latter believes the officer is about to arrest him, depending upon the circumstances, this could constitute an arrest. If it were so held, and the suspect had

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14 Criminal Code, S.C. 1953-54, c. 51, s. 434.
15 Ibid., s. 435.
16 Only arrests without a warrant will be considered in this paper. When making an arrest with a warrant, the police officer is acting as an agent of the court in giving effect to the warrant and seldom do problems present themselves, except, perhaps, in the physical execution of such warrant.
17 Supra, footnote 14, s. 435.
18 In Plested v. MacLeod (1910), 15 W.L.R. 533 criminal offence was interpreted to include an offence punishable on summary conviction.
a rational explanation for his presence in the lane, the officer is exposing himself to civil action for false arrest.

This simple illustration points out the difficulties which arise in practice in attempting to define what constitutes 'reasonable and probable grounds' that a person is 'about to' commit an offence. What action the officer would probably take will be discussed *infra.*

Further extensions of the power to arrest without a warrant have been given to police officers by Provincial statutes. Only two of these will be considered here.

Under The Liquor Control Act, any constable or other police officer may, without a warrant, arrest a person whom he finds committing an offence against the Act or Regulations. This is one of the most extensive powers to arrest granted under any Act. In view of the fact that the Act has been subjected to criticism in the press and also by individuals as being unrealistic in relation to modern day drinking habits, and also that many people who so disagree refuse to abide by the provisions, if police officers felt so inclined, a virtual tide of arrests could ensue.

The Highway Traffic Act provides a list of offences for which arrest without a warrant is permitted. There are thirteen offences in all, only three of which are moving violations. These are careless driving, racing, and operating a motor vehicle when the permit has been suspended. The remaining ten offences are mainly concerned with proper permits and licenses for the vehicle and its operation. It should be noted that failure to produce your operator's licence is not an arrestable offence. This point will take on added significance in the discussion which follows.

In conversations with senior officials of the Ontario Provincial Police, my attention was drawn to a directive issued by the Ontario Attorney-General's office. The substance of the directive was that if an operator refused to produce his licence, the only course open to a police officer was to summons him because it was not an offence for which arrest without a warrant was permitted. In order to summons the driver, the officer would then have to obtain his name. If the person simply did not identify himself, the attempt to charge him with the offence was frustrated because such refusal did not constitute obstruction.

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20 Part IV.
21 R.S.O. 1960, c. 217, s. 111.
22 R.S.O. 1960, c. 172, s. 156, ss. 2, as amended by S.O. 1964, c. 38, s. 16.
23 R.S.O. 1960, c. 172, s. 60.
24 Ibid., s. 91.
25 Ibid., s. 26.
26 This directive was also referred to in an article by R. S. MacKay, 5 Crim. Law 294.
27 In 1960, a Toronto newspaper (Toronto Daily Star, June 1, 1960) reported that magistrate Norman Gianelli in Lambton Mills Court had that day dismissed a charge of obstructing a police officer by failing to produce an operator's licence. The case was *R. v. Switzer* but unfortunately I was unable to locate any report of the case, nor does it appear to have been a subject of appeal. With deference to both Magistrate Gianelli and the Attorney-General's office, I would suggest that both the decision and the directive are open to question in light of the law as it presently stands.
At common law it is undisputed there is no duty on a citizen to identify himself to a police officer. The police officer has no more right to demand identification of a person than I have. With this rule the writer is in entire agreement; for it to be otherwise would do violence to a fundamental requirement of our democratic society. Whether this concept would also embrace a situation where the person asked for identification has committed an offence appears open to question.

The directive issued by the Attorney-General's office appears to have been based on the decision of *Koechlin v. Waugh and Hamilton*, the facts of which are relatively simple. Two youths were stopped while walking along the street late at night by the two defendant officers. The officers later gave as their reason for stopping them that one of the youths was wearing rubber soled shoes and because of numerous break-ins in the area, they thought the youths might be associated with the offences. One youth readily identified himself. The other refused to do so and a scuffle ensued. Subsequently the youth was arrested and charged with obstruction. The charge was dismissed. The action here was for false arrest. In short the result was that the officers were found liable for damages in respect of the tort.

In the reasons for judgment, the Ontario Court of Appeal stated that simply wearing rubber soled shoes did not constitute reasonable and probable grounds for belief that an offence had been committed; therefore, arrest was not justified.

As to whether this case is authority for the directive, I cite Laidlaw J.A.:

We do not criticize the police officers in any way for asking the infant plaintiff and his companion to identify themselves, but we are satisfied that when the infant plaintiff, who was entirely innocent of any wrongdoing, refused to do so, the police officer has no right to use force to compel him to identify himself.

It should be noted that Laidlaw J.A. expressly included in his remarks “who was entirely innocent of any wrongdoing”. He did not say, nor can it be read into his reasons, that if the plaintiff had been guilty of a wrong, the officer still could not compel him to give his name.

In *R. v. Semenuik* it was held that refusal to unlock the glove compartment of the accused's automobile to allow the officer to search for liquor was not obstruction.

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28 This was adverted to in MacKay's article, *supra*, footnote 26.
29 118 C.C.C. 24.
30 *Ibid.*, at p. 27.
31 111 C.C.C. 370.
Edwards D.C.J. said:

... The accused should not be convicted of obstruction simply because he had refused to carry out the command of an officer who had no legal right to insist upon it being obeyed.

I have never understood that, in the absence of statutory provisions, there was any legal duty on the part of citizens generally, let alone suspected persons, to assist police officers in discovering the evidence upon which to found a conviction and that by refusing so to do one thereby laid himself open to a charge of obstruction.\textsuperscript{32}

It should be noted that the learned Justice expressly stated there was no requirement to provide evidence on which to found a charge. In this I concur. However, it is one thing to say that, in the absence of statutory provisions compelling a person to do a positive act, refusal to do so is not obstruction and a different matter entirely to say that once an offence has been committed this principle can be invoked to justify refusal to identify oneself.

The classic case\textsuperscript{33} on this point is \textit{R. v. Carroll}\textsuperscript{34}. The headnote from the case adequately reflects the judgment.

The accused, in company with three other men, was proceeding along a highway at an early hour in the morning. The constable heard them whistling and yelling and he advised them to be quiet and go home. Three of the party followed his advice. The accused remained. The constable asked him to produce his identification but accused refused and proceeded on his way. An argument and struggle followed and accused was charged with obstruction.

\textbf{Held: Conviction quashed.}

1) The constable was clearly under a duty to request the four men to disperse and keep quiet since there was reasonable cause for concern that their conduct, including accused's, might result in a disturbance within the meaning of s. 160 of the Criminal Code.

2) After the three had left the scene, the imminence of a disturbance substantially diminished. The ensuing conduct of the accused, who was left alone, could not be considered a disturbance nor likely to cause one. Under these circumstances accused was not under any duty to identify himself when requested to do so by the constable, and the constable had no right to arrest the accused.

The case is not such an authoritative precedent as the number of times it is relied on by writers might suggest. Porter C.J.O. stated:

It is not necessary to consider here whether there might be in other circumstances an obligation upon a citizen to identify himself when requested to do so by a constable.\textsuperscript{35}

\textsuperscript{32} \textit{Ibid.}, at p. 373.

\textsuperscript{33} The case is consistently cited as authority for not having to identify oneself to a police officer.

\textsuperscript{34} 31 C.R. 315.

\textsuperscript{35} \textit{Ibid.}, at p. 318.
These cases taken together indicate that the law in this area is not as clearly defined as the Attorney-General's directive seems to suggest. The writer suggests the whole matter be considered by the Court of Appeal at the earliest possible moment.

Would it be open to the court to arrive at a different conclusion than the directive indicates? The writer suggests it could. To constitute obstruction, two requirements are necessary: the obstruction must be wilful, and the officer must be performing his duty.

Considering the latter aspect first, it is clearly within the officer's duty to lay information before the proper tribunal. In *Hinchliffe v. Sheldon* it was held that obstruction means making it more difficult for the police to carry out their duties. Refusal to give one's name in the circumstances outlined in the directive would constitute obstruction in relation to the officer's duty to lay an information in respect of the offence of failure to produce the operator's license.

Assuming for a moment that the directive issued by the Attorney-General's office is correct, what is the necessary result? It would mean from a practical point of view that enforcement of all by-laws not subject to arrest without a warrant would depend upon the willingness of the person committing an offence to identify himself. If every violator of these provisions refused to identify himself, the police simply could not cope with the problem of identification by other means.

On the other hand, if arrest under the Criminal Code for obstruction is open to the officer in these circumstances, the consequences could be profound. In effect, a person who has broken the law in respect of the most minor violations would be open to a conviction for an indictable offence and liable to a penalty of up to two years imprisonment.

The urgency of the situation is becoming more apparent daily from the point of view of law enforcement. Already the theory of the directive is being used to circumvent jay-walking provisions in the City of Toronto. As one senior police official put it, it is only a matter of time until the public become aware of the fact that all non-arrestable offences under the Provincial statutes and municipal by-laws can be evaded simply by refusing to produce identification.

Unfortunately the law in this area produces peculiar results. Normally, most citizens will provide identification. These are the people who break the law only occasionally and generally through inadvertence and then mainly offences under The Highway Traffic Act. By identifying themselves they leave themselves open to a charge, yet in many instances these are the very people on whose behalf the

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36 Criminal Code, S.C. 1953-54, c. 51, s. 110.
37 *The Police Act*, R.S.O. 1960, c. 298, s. 47, as set out at p. 179 supra.
Police exercise their administrative discretion and simply give a warning.

On the other hand, those who stand on their rights are frequently chronic offenders, but because they have found a means of getting around the law, use it to their advantage. These are the people, particularly in relation to traffic violations, the police feel should be charged. In many instances their driving habits are such that a warning would not be sufficient.

These persons according to police are a minority. If this is so, and they continue to stand on their rights in order to circumvent laws developed for the benefit of the entire populace then perhaps a charge of obstruction would not be too harsh in the circumstances.

Although this Part has essentially dealt with powers to arrest, a closely related problem should be considered: the power to effect a search. This will be accorded only superficial treatment because most searches are effected under a warrant issued by a Justice of the Peace. Consequently, it is similar to arrests with a warrant, the officer being an agent of the court. It might be well to point out that late in 1965 the use of blanket warrants to search\(^3\) was stopped and the warrants then in existence were recalled.

A constable’s power to search is defined by statute. The Criminal Code\(^4\) makes provision for searching a person for firearms. The most extensive power to search is contained in The Liquor Control Act\(^5\). Section 110(1) permits a constable to search without a warrant any conveyance or vehicle in which he believes, on reasonable and probable grounds, liquor is unlawfully kept or had. Buildings may only be searched with a warrant.\(^6\)

Based on my experience, and also conversations with police officers, most officers stay within the powers given to them. Only in rare circumstances will this power be exceeded, primarily because excesses are very easily proven, thus leaving the officer open to attack. In only one situation is this power to search occasionally exceeded and this is when an officer believes that a vehicle contains stolen goods. In these circumstances, rather than obtain a warrant, he will rely on the provisions of The Liquor Control Act in order to justify the search: there is no provision for searching an automobile in relation to theft of goods. An illustration here indicates the problem. Frequently a large theft will take place in which an automobile was

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\(^3\) These were issued by the Attorney-General’s office to the Ontario Provincial Police. Authority for their issuance was contained in The Liquor Control Act, R.S.O. 1960, c. 217, s. 110, ss. 3. This section was repealed by S.O. 1965, c. 58, s. 63, and a new section substituted therefor. The new section does not contain authority for the issuance of such warrants. These were similar to Writs of Assistance used by the R.C.M.P. inasmuch as they were issued under statutory authorities and related to a specific item i.e., liquor.

\(^4\) Criminal Code, S.C. 1953-54, c. 51, s. 96.

\(^5\) R.S.O. 1960, c. 217, s. 110(1), as amended by S.O. 1961-62, c. 72, s. 5 is repealed and s. 110 substituted by S.O. 1963, c. 58, s. 68.

\(^6\) Ibid., ss. 2.
involved, for example, a gold robbery. Normal practice in such circumstances is to set up road blocks to attempt to locate the persons involved. To effect a search of vehicles the officers have to rely on the provisions of The Liquor Control Act to give their action some semblance of legality. This is one area in which the possibility of statutory power to search should be considered.

Suppose in the above illustration gold actually was located. A strong argument could be presented that this evidence was illegally obtained. This would not necessarily hinder a court in allowing such evidence to be introduced and the reasons for the court exercising its discretion in this matter is well set out in the following passage from Wigmore:

> The fact that a piece of evidence was obtained by some violation of law was (until very modern times) never regarded as a ground for excluding it. The judge and jury seek to get at the truth in the case in hand, and all relevant evidence is needed. If any illegality has been done in obtaining it, the remedy and the penalty can be enforced in another proceeding. To obstruct the truth in the present case for the sake of punishing indirectly a person who can readily be punished in a separate proceeding does not seem reasonable or practical.\(^4\)

With this statement the writer has no argument from a strictly legal point of view. Philosophically, however, I feel it detracts from the whole concept of law as we generally regard it. It is placing a police officer in an invidious position. Although he is expected to maintain the law, if he breaks it the court will allow the evidence so acquired to be admitted. Clearly powers to search should be established by statute. Beyond this, illegally obtained evidence should be rejected.

This concludes the consideration of the major areas where problems exist in administration. I have attempted here simply to set out the legal rules; the next Part will consider how they are in fact applied, from a practical point of view.

**IV. Theory v. Practicability**

In the foregoing Parts an attempt has been made to present a brief summary of the law as it presently stands. This Part will be concerned with the realities of applying that law, and, a consideration of whether what should be done is in fact done. To some extent those considerations are based on the past experience of the writer, but chiefly on conversations with police officers actively engaged in enforcing the law.\(^4\)

In the illustration presented in Part I, considered in light of what is actually the law, if no confession had been extracted from the accused youth, the officers could have been subject to an action for

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44 Twelve officers were interviewed, excluding those of official level who are engaged in administrative matters only. The twelve ranged in age from 22 to 47 and ranked from Constable to Detective Sergeant. Length of service averaged approximately 10 years, ranging from a minimum of two to a maximum of twenty-two.
false arrest or imprisonment. Would this same course of action be taken today? All that can be said in answer to such a question is that it might be taken. Police departments have been under such severe criticism for infringement of civil liberties that most officers are aware of the shaky ground they are entering upon in effecting an arrest in such circumstances. It would probably depend on the zeal of the particular officers involved.

The tactics employed to extract the confession are still used today, with variations, depending upon the particular circumstances. Whether it was obtained without fear or favour and thus voluntarily, will not be considered here. It is simply pointed out that in many cases, and this is particularly true when the suspect is not versed in the law, various tactics are used to extract a confession. These tactics would have little effect on professional type criminals because they are well aware of their legal right not to say anything.

As an aside, I should like to dispel a popular misconception of police officers and that is in relation to beatings inflicted on suspects. In my experience I was never present nor was I aware of any assaults committed on a suspect or accused while in police offices or jails. It is not denied that in some instances suspects have been assaulted both in the course of an investigation or while arrests were being effected. Most of these situations can be directly linked with the officer losing his temper. This is aptly illustrated by the following example related by a senior police official.

In the course of an investigation, an officer had occasion to question a suspect whom the officer had previously charged with several traffic violations. The suspect used some very common four and five letter epithets to indicate his sentiments regarding police. This kept up until the officer lost his temper and struck the suspect. Subsequently, when rationality returned, the officer laid a charge against the suspect in order to protect himself from a civil action. The charge was later dismissed. In another situation, an officer was questioning a suspect and was told to get off his (the suspect's) back or he would visit the officer's wife while he was on duty. As in the former situation, the suspect was assaulted.

In neither of these circumstances would a court rule other than that it was assault, for in both cases it was precisely that. In this context it is well to illustrate the difficulty of appreciating other people's problems from a completely objective viewpoint. Lawyers view our system of justice as the adversary system. A police officer would be more inclined to view it as a discourse between two exceedingly restrained gentlemen (opposing counsel). Applying the adversary system as a police officer knows it from day to day experience to the opposing counsel would, I hazard the opinion, reduce many a courtroom into shambles within minutes.

It is not suggested that such assaults are in any way justified, but simply that there is a limit to what anyone can be subjected to.
In the course of a day's work a policeman is frequently subjected to all kinds of frustrations; derogatory remarks, epithets, and on occasion, informed that he will be fired. It is inevitable that at some point in his career these will culminate in an assault on someone. In view of my own experience, it constantly surprises me it does not happen more frequently.

Returning to the confession, it was the only evidence on which a charge could be founded. The confession did not even disclose a source of independent evidence. Any charge laid had to stand or fall on the strength of the confession alone. There was no doubt as to the veracity of the statements obtained from the various youths. All statements, taken separately, were consistent with one another and also with the facts. It was not a case where someone was simply trying to obtain publicity. The question of guilt was thus not in doubt.

This illustration is far from unrepresentative of typical confession situations. The argument for maintaining such tactics is that society is better served by apprehending the vandals and bringing them to justice. The fact that somewhat colourable tactics were used is justified because otherwise there would be no way of effecting such apprehension. Proponents of civil liberties on the other hand could argue that the rights of the suspect were violated. To be more precise, the accused should have had benefit of counsel and they in turn would probably have advised the boys to say nothing. This, then, is the core of the problem, apprehension of criminals, or a strict application of the civil liberties approach and consequent freedom for guilty parties. The problem appears virtually insoluble.

In the foregoing, it was suggested that accused had the right to counsel's advice. This problem was ably canvassed by Patrick Galligan who concluded the right did exist.

It would therefore appear to be clear that an arrested person is entitled to have legal advice without delay and any attempt to prevent it is to be censured by the courts.

This conclusion was arrived at by considering the Bill of Rights, judicial pronouncements in the Kocchlin case, and unreported reasons in a judicial inquiry into the arrest of Robert Wright and Michael Griffin. The last paragraph of Mr. Justice Roach's reasons is here reproduced because it formed a principal point in Mr. Galligan's discussion.

The lawyer is an officer of the court and it is the function of the courts to administer justice according to law. To prevent an officer of the court from conferring with the prisoner who in due course may appear before it, violates a right of the prisoner which is fundamental to our system for the administration of justice.

46 Ibid., at p. 37.
47 Canadian Bill of Rights, S.C. 1960, c. 44, s. 2.
48 Supra, footnote 29.
50 Ibid., at p. 57.
In our illustration, assuming the boy was arrested at his home, when does this right to counsel arise? Is it when the police decide they have a valid basis for a charge? Is it when he was first arrested? If the latter is the proper point in time, then assuming most lawyers would advise their clients to say nothing, no basis for a charge could have been established. If the former is the proper time, the confession would have been obtained by them anyway.

Furthermore, if the lawyer is an officer of the court, and the accused's right to counsel exists as of his arrest, what happens if the accused informs his counsel that he committed the offence? Should counsel follow usual procedure and advise him to say nothing? Would this not place the lawyer in the position of a court officer suppressing evidence? Or should he advise his client to confess? The preceding questions indicate some of the problems which could arise if suspects were entitled to counsel at the investigative level.

With deference to Mr. Justice Roach's reason and Mr. Galligan's statement, I suggest adequate protection is already provided by The Criminal Code. A person who has been arrested with or without a warrant by a peace officer should be brought before a justice within twenty-four hours, if available, and if not available, as soon as possible.

I do not in any way question the right to counsel in the interval between the accused's appearance before a justice and the commencement of trial. In practice, both these may be co-terminus in point of time and in these circumstances, counsel should be permitted to see his client before the actual laying of the charge. The lawyer's function is to ensure his client's interests are best served within the adversary system and that his case is presented fairly and impartially. To do so, it is obvious he must be able to contact his client before trial, for otherwise the lawyer is in an unfavourable position.

Unfortunately, at trial, none of the boys in our illustration had the benefit of counsel. If they had, and the statements had been ruled inadmissible, the charges then would have been dismissed. Here the lawyer would have been fulfilling his proper function, assuring a fair trial within the adversary system. Financial circumstances were the principal reason why none of the boys were represented and in this respect, proposals for legal aid in Ontario are valuable.

The contention that adequate safeguards are built into this area of the law is reinforced by the fact that a person is assumed to know the law. If this is so, then a suspect should know that he does not have to say anything. Unfortunately, although this assumption exists, the only people who are aware that they do not have to say anything are those most aware of the law because of past experience, i.e. rounders.

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51 Criminal Code, s. 438(2)(a) and (b).
52 A term used to indicate, as nearly as the writer can ascertain, persons who derive their income solely from crime.
In a recent decision, the Supreme Court of the United States ruled:

Where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied “the Assistance of Counsel” in violation of the Sixth Amendment to the Constitution as “made obligatory upon the States by the Fourteenth Amendment” and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.53

It should be observed this case was decided on the basis of constitutional guarantees, which grounds, in view of the status of our Canadian Bill of Rights, are not open to our courts. Assuming for the moment that such a ruling was open to our courts, what would be the practical result?

For an answer to the question posed, police officers at both the senior official level and those actively engaged in apprehending criminals were queried as to their reaction. Two very extreme views were presented. One officer stated quite emphatically:

To hell with it! If such a decision were rendered here I would simply take a year round vacation with pay.

His attitude at first glance appears extreme to say the least, but in this context I refer to an article in Life Magazine.54 This article, I was informed by all police officers contacted, was a very accurate reflection of their problem and feelings.

This urge to play it safe, not to get involved, not to enforce the law, has had a long, gradual genesis. In the past few years Supreme Court decisions concerning search, seizure of evidence, arrest, and prisoner interrogation have created an atmosphere of confusion and uncertainty among the police. Not sure what they can legally do, the police have frequently responded by doing nothing.

At the opposite extreme, other officers expressed the opinion that it would not make much difference if such confessions were excluded. One in particular said that a confession was a poor basis for a charge, not only because it may have been given to attract publicity, but also because it might never be admitted. Even if it were admitted usually its value does not equal the time and problems involved. He stated it more precisely in poetic form:

I would rather sit around my house with a cold beer, than spend all day in court in a voir dire.

The officer further stated, that although many statements would be rendered inadmissible if the Escobedo ruling were law, confessions would still have value for police purposes inasmuch as they frequently

provide other evidence on which to found a charge, for example, facts are elicited which were previously unknown. Thus the incentive to extract confessions would still be present.

It would appear therefore that an Escobedo-type ruling probably would not affect police procedure to any great extent. Police would probably continue their present practice, even though a confession resulting from it would not be admissible, in the hope that other evidence could be turned up. Although only the two extremes of opinion were indicated above, the majority of the officers interviewed favoured the latter.

Earlier we considered the situation where a police officer came upon a suspect in a laneway. It is now an appropriate time to consider what action would be taken. Of twelve officers interviewed, twelve said they would in all probability arrest him, depending upon the circumstances. Unfortunately, if the suspect had a plausible answer, these officers would have placed themselves in a difficult position.

Now every officer qualified his answer with the statement ‘depending on the circumstances’. Circumstances in this instance are usually factors that do not constitute evidence as a lawyer considers it. How does one prove the facial expression and mannerisms of a suspect? How do you prove an antagonistic attitude? How do you prove that the officer was told by an informant that the store was going to be ‘made’? These are the circumstances adverted to and on which a police officer will usually make up his mind whether to arrest or not to arrest. His decision must be instantaneous; he does not have the benefit of hindsight which we as lawyers instituting the civil action against the officer have.

Another circumstance that will influence the officer’s decision is the matter of external and internal pressure. By this is meant, pressure from within and without the police department to assure that police action is taken. Frequently, and I can assure you if statistics were available the public would be shocked as to how much, the officer will simply exercise an administrative discretion and forget it when confronted with an offence.

In the illustration of the youths, this probably would have been the course adopted for two reasons. The service club, the complainant, was actively engaged in helping boys of this very nature. It was repugnant to their avowed policy of assistance to want to see youths prosecuted. Secondly, what worthwhile benefit was obtained by registering a conviction in the circumstances? The father of one of the boys was serving a term in Kingston Penitentiary. Two others were from broken homes. Of all the parents, only the mother of the first exhibited any interest. This stemmed from a fear that perhaps her son was following in his father’s footsteps. All these boys required help; none required a conviction to carry with him for years.

This statement applies equally well to eavesdropping or wire tapping techniques.
The boys were brought to court and a conviction was registered. This illustrated to the community that they had an efficient police force. Efficient? It was simply a fortuitous circumstance, viz., contact with an informant, that finally produced results. If one subscribes to the deterrent theory, then a benefit was gained by the community. Whether there is any merit in the concept of deterrence I leave to those more qualified to decide.

Thus by laying charges, the external pressure exerted by the community on the police department to effect an arrest was abated. What about the internal pressure from the department itself?

How many times do you observe a traffic violation while driving your automobile? I sincerely doubt if anyone could answer this question negatively. Consider then if you were specially trained to detect infractions, how many would be observed? Every officer is required to keep a diary of his activities. What would happen if at the end of a month he had recorded no violations of any kind? This would indicate one of two things: either a total disregard for the duties imposed on him, or a complete reformation of society. The latter can be disregarded as being a totally naive approach to the question.

This problem was presented to the officers interviewed and all argued that if no violation were recorded in a month, the officer concerned would be at least reprimanded. Even if his average in relation to others was low, he might still be in trouble. This problem has an escalating effect; introducing a new recruit into the force is analogous to employing a new salesman in a sales force. Once they have gained sufficient experience, their enthusiasm will push up the averages. Slowly, however the new recruit realizes that his exuberance is working against him. He seize a bottle of beer and has to fill out twelve forms in reporting it. If the party charged pleads not guilty, the officer has to appear in court. Slowly he becomes overwhelmed with paper work and court appearances. Then he decides to exercise his administrative discretion and starts handing out warnings. At this point he will try to assess just how many violations are required to keep him in good standing with his superior and will work on this basis.

I am not suggesting, nor am I aware of any requirement that a given number of convictions or prosecutions have to be instituted in a given time period. What I am suggesting is that from a practical point of view it would be illogical if there were not some. This applies not only to traffic and liquor offences. Officers engaged in specialized fields such as 'break and enter' divisions are subject to the same problem. They are the first on the scene of all offences of such nature and records are kept of the ratio of convictions to offences reported.

56 On the Ontario Provincial Police those working night shifts are allowed to accumulate time for court appearances and take it as days off. Some police departments pay overtime for such appearances. I understand this procedure is followed by the Metro Police Force.
Returning once more to the directive issued by the Attorney-General's office, the substance of the directive was described to twelve police officers and they were asked what action they would take in the circumstances. Eleven said they would charge the person with obstruction; one said he would seize the vehicle and arrest the driver because it would be reasonable and probable grounds to believe that the vehicle had been stolen.

In light of the directive, a magistrate's decision and attendant publicity, plus the fact that both the Metro Toronto Police and the Ontario Provincial Police teach recruits that an arrest cannot be made in these circumstances, it would appear from the officers' statements that something is clearly wrong. Either communications between the various levels of police administration are bad, or the officers intend to place their own interpretation on the law. I am inclined to accept the former view and this is based largely on a consideration of the educational facilities of the Ontario Provincial Police.

New recruits are given a three-week orientation course at Sherbourne Street College. The scope of this course is to teach a recruit 'what he must know before he starts work'. As one senior police official put it, the emphasis is on 'must' and covers generally the transition from a civilian to a police officer.

Subsequently he will go to Aylmer for two six-week courses conducted about one year apart. In theory, the first course is to commence six months after the recruit joins the force. In practice, this has been extended to a minimum of eighteen months because of the back-log at the Aylmer school. Following these courses, specialized training is offered in crime detection, finger-printing, etc., as time and availability of competent officers permit.

There was, and still is, a saying in police departments to the effect that 'there are more ex-policemen than policemen'. This is indicative of the high turnover and this is particularly applicable to the early stages of a police officer's career. Thus, in many instances, a police officer has been subjected to only negligible amounts of training. Many, during their entire career as a police officer, in view of the high turnover rate at the initial stage, have had little more than three weeks training. Furthermore, those with longer service records have only infrequently been subjected to advanced training which would familiarize them with changes in the law. Although orders are circulated, which would include items such as the Attorney-General's directive, owing to the pressure of work, these are frequently given only a superficial examination by the individual officers. Thus it is not surprising, in light of these facts, that the officers reacted to the Attorney-General's directive in the manner they did.

The writer was informed that as of March 1, 1966, the Aylmer School should be in a position to adhere to the six month limits. Statistics on this point could not be obtained due to increases in staff in recent years thus distorting averages.
V. Conclusion

From the foregoing Part it would appear the police 'will be damned if they do and damned if they don't'. At the same time, simply because the law is difficult of application is no reason to ride roughshod over the rights of the individual. How then is balance to be achieved between such divergent concepts as law enforcement and civil liberties? The following suggestions are tendered.

First and foremost is more comprehensive police training. Training in this context is given an extended meaning. It would embrace not only the actual application of law but also a broader education of police to the role they are to fulfill in a democratic society. Consequently the police officer should be subjected to University level subjects such as sociology, psychology and political science to name but a few. The reasons for suggesting these are because police officers tend to lose their perspective over a period of time. They begin to regard all of society as either a law breaker or at least a potential one. This is only natural inasmuch as most of a police officer's working day is concerned with this type of individual.

Next, to be considered is comprehensive survey of the whole field regarding the balance between police power and civil liberties. Not only should legislators and lawyers be represented, but the police as well. Only then can a complete purview of the whole problem be made.

Thirdly, the results of such inquiry should be clearly set out in statutory form, binding on police and citizens alike. Once clearly defined, constables should again be personally liable for torts committed outside the scope of their authority. It is one thing to say in court that everyone is assumed to know the law and proving that in fact they do know the law. It has been indicated above that police clearly do not, and there is serious doubt whether their civilian counterparts are even as well informed. This assumption should be disregarded and an active campaign conducted to familiarize everyone with his rights and duties.

Because suggestions must of necessity be general in scope, the urgency of reform should not be underestimated. To point out the urgency, one officer, when asked his opinion concerning the Escobedo decision, said that such a ruling could only result in some murderers ending up in back alleys. Justice at the end of a .38 revolver rather than a court of law! At first glance this appears to be extreme. I assure you it is not. From my own experience, a police officer wanted a prisoner accused of a particularly heinous sex crime involving young girls to escape so he could shoot him for fleeing lawful custody.59 Reasoning by others prevailed and he desisted.

In a recent conversation with a known criminal in Toronto, I asked him to what extent organized crime existed in the area. His

59 Criminal Code, S.C. 1953-54, c. 51, s. 25.
response was that although the Toronto Police might be lax in some matters, in this respect their efficiency was unequalled by any force on the continent. Considering the fact that he has spent much of his adult life in prisons both here and in the United States, he was qualified to express an opinion.

For this we can be proud; for our democratic tradition also we can be proud. The fact that the task appears monumental is no reason for neglecting to introduce much needed reforms in this area of the law, both for the preservation of our democracy, but also the law enforcement necessary to maintain it.

Liberty does not consist in having your house robbed by organized groups of thieves.\textsuperscript{60}

\textsuperscript{60} Sir Robert Peel.