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Subjective Attitudes of Arrestee and Arrestor as Affecting Occurrence of Arrest

Joseph G. Cook

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I. INTRODUCTION

Recent Supreme Court decisions have made it abundantly clear that the resolution of the constitutionality of a particular set of events in the context of the fourth amendment demands a precise determination of the nature of the confrontation. The reasoning in three companion cases—*Terry v. Ohio*,[1] *Sibron v. New York*,[2] and *Peters v. New York*[3]—is illustrative of the fine analytical distinctions with which courts must concern themselves. In *Terry*, an experienced officer observed three parties acting in such a manner as to lead him to believe they were planning the imminent commission of a robbery. He thereupon (1) confronted the suspects and inquired of their activities, (2) receiving unsatisfactory responses, proceeded to pat down the outer clothing of the suspects, (3) in so doing, felt an object in the petitioner's overcoat pocket that he had reason to believe was a weapon, (4) arrested, at least constructively, the petitioner on probable cause to believe he was carrying a concealed weapon, and (5) carried out a search incident to that arrest, reaching into the overcoat pocket and removing a pistol. Through this step-by-step analysis of events, the Court concluded that the ultimate arrest and incident search were constitutionally reasonable.

The *Sibron* case also began with a set of suspicious circumstances, albeit somewhat weaker than those in *Terry*, suggesting narcotics traffic. The officer confronted the suspect, but instead of employing the intermediate step of the pat-down, he immediately reached into the pocket of the suspect and retrieved a package of narcotics. The Court held, unlike *Terry*, that the officer had carried out a search of the suspect before he had probable cause to arrest, and thus the conduct was constitutionally unreasonable.

In *Peters*, an off-duty officer observed two suspects through the peephole in the door to his apartment engaging in conduct that suggested to the officer an intent to burglarize. He burst into the hallway, whereupon the two suspects fled. The officer gave chase, apprehended one of the suspects some distance away, immediately reached into the suspect's pocket, and recovered a set of burglar's tools. While as in *Sibron* the action of the officer could not be dismissed as frisking, the Court found *Sibron* and *Terry* both distinguishable because at the moment of confrontation the officer had probable cause to arrest, and the search was reasonably incident thereto.

While the judicial evaluation of the facts in these three cases may be

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[1] 392 U.S. 1 (1968).
[2] 392 U.S. 40 (1968).
[3] 392 U.S. 40 (1968).

subject to dispute,[4] the significant point for present purposes is that a crucial issue in each is the nature of the initial confrontation. The Supreme Court has not provided a clear standard for the identification of an arrest,[5] and within limits, the definition has been left a matter of local law.[6] An evanescent factor sometimes considered by courts is the knowledge, belief, and intent of the arrestor and arrestee at the critical moment in time. This article will examine the extent to which courts have considered the state of mind of the parties as relevant in the determination of the occurrence of an arrest and the constitutional pitfalls of such analysis.

II. ATTITUDE OF ARRESTEE

A. *Formal Announcement and Physical Seizure*

As a general rule, the arresting officer need not make a formal announcement of intent to consummate an arrest.[7] When the purpose of the officer is implicit in his conduct, any announcement would be clearly superfluous. For example, in *United States* ex rel. *Walls v. Mancusi*,[8] a truck driver informed officers that he had just been the victim of a holdup and directed their attention to two fleeing men. The officers gave chase, and an additional patrol car was summoned. The second patrol car circled the block and located one suspect crouched behind the seat of a van truck, the door of which was open. The officer ordered him out at gunpoint. The other suspect then stepped out from an adjacent doorway and was also detained by the officer. Both men were thereupon searched and the stolen money recovered. The victim and the other officers soon arrived, and the victim identified the suspects. The relator argued that even though probable cause to arrest may have existed at the moment of confrontation, no arrest was made until after the search when the two were identified by the victim. Thus the search preceded the arrest and was illegal.[9] The court rejected the argument, finding that the arrest oc-

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[4] For example, Mr. Justice Harlan in a concurring opinion in *Peters* submitted that the officer did not have "anything close to probable cause to arrest Peters before he recovered the burglar's tools." 392 U.S. at 74. If the Court was of the opinion that the facts known to the officer were sufficient to establish probable cause, he failed to see why they were unable to reach the same conclusion in *Terry*. He preferred to use the *Terry* reasoning to affirm the conviction of Peters.

[5] *Compare* Henry v. United States, 361 U.S. 98 (1959) *with* Rios v. United States, 364 U.S. 253 (1960).

[6] Ker v. California, 374 U.S. 23 (1963), is frequently, and often misleadingly, cited for this notion. "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." *Id.* at 34.

[7] *See, e.g.*, United States *ex rel.* Walls v. Mancusi, 406 F.2d 505 (2d Cir.), *cert. denied*, 395 U.S. 958 (1969); People v. Smith, 308 N.Y.S.2d 909 (1970).

[8] 406 F.2d 505 (2d Cir.), *cert. denied*, 395 U.S. 958 (1969).

[9] Were it agreed that the relator's analytical appraisal of events was correct, his conclusion—that the search was illegal—would still be unwarranted. Numerous decisions acknowledge that where probable cause to arrest exists, the fact that an incident search may temporally precede the arrest will not render the search invalid. This is implicit in Warden v. Hayden, 387 U.S. 294 (1967), at least under exigent circumstances, where the Court did not bother to determine whether certain seizures occurred prior to or following the arrest. *See also* Sibron v. New York, 392 U.S. 40, 77 (1968) (Harlan, J., concurring); United States v. Skinner, 412 F.2d 98 (8th Cir.), *cert. denied*, 396 U.S. 967 (1969); Buick v. United

curred at the moment the officer ordered the first suspect out of the car at gunpoint, and concluded: "The lack of formal announcement of arrest presents no constitutional infirmity under these circumstances."[10]

One court[11] has suggested that the purpose of announcing an arrest "is not to make the arrest legal but to indicate to the person being arrested that his detention is legal, so that he will not resist."[12] This is a somewhat curious argument. First the court stated that the announcement is to assure the arrestee that the officer's actions are legal. But, by the court's own reasoning, the announcement does not tell the arrestee that the arrest is legal at all; it simply tells him he is being arrested. The legality of the arrest is another matter. Perhaps what the court meant to say is that by the announcement the officer has manifested his intention to take the individual into custody, and if the suspect chooses to do less than cooperate, he will assume the risk of any physical or legal reprisals.

Ideally, an arrest may be accomplished "without any actual touching or show of force."[13] In *People v. Woods*,[14] the defendant had been involved in a barroom affray, during which he had fired a German Luger into the floor and then returned to his home. Police later surrounded the house and demanded that he surrender the gun. When the defendant failed to comply, the officers began to enter the house, whereupon the defendant shot and killed one of them. The court held that before the fatal shot was fired the defendant was under arrest. He was fully aware that the police had surrounded the house and were in pursuit of him. "This was sufficient coercion albeit not manual seizure to constitute lawful arrest."[15]

If the suspect is completely unaware of the activities of the officer, however, it is arguable that an arrest has not occurred.[16] A particularly interesting case involving this possibility is *Yam Sang Kwai v. Immigration and Naturalization Service*.[17] There immigration officers surrounded the petitioner's restaurant for the purpose of interrogating aliens on the premises. No particular suspects were sought by the officers, nor was the identity of any of the occupants known to them. With officers stationed at the entrance and exit to the building, an officer entered, confronted the petitioner, and questioned him regarding the propriety of his presence in the United States. Some difficulty in communica-

States, 396 F.2d 912 (9th Cir. 1968), *cert. denied*, 393 U.S. 1068 (1969); Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967); Henderson v. United States, 405 F.2d 874 (5th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969); United States v. Lucas, 360 F.2d 937 (6th Cir. 1966); Holt v. Simpson, 340 F.2d 853 (7th Cir. 1965); United States v. Boston, 330 F.2d 937 (2d Cir. 1964).

[10] 406 F.2d at 508.

[11] Pullins v. State, 256 N.E.2d 553 (Ind. 1970).

[12] *Id.* at 556.

[13] Clements v. State, 226 Ga. 66, 67, 172 S.E.2d 600, 601 (1970).

[14] 16 Mich. App. 718, 168 N.W.2d 617 (1969).

[15] *Id.* at 618. Although the court's reasoning is helpful for purposes of the present analysis, its actual relevance to the case is questionable. According to the court, the defendant's contention was that the arrest was illegal; it does not appear that he disputed the fact that he was under arrest. The legality of the arrest is not discussed by the court.

[16] "[A] person must be advised that he is being arrested and the reason therefor unless that person either knows or has reason to know that he is being arrested and why." Schindelar v. Michaud, 411 F.2d 80 (10th Cir. 1969).

[17] 411 F.2d 683 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969).

tion arose since the petitioner could only speak Chinese. After an interpreter was secured, the interrogation continued. During the course of the interrogation, the petitioner turned over to the officer certain documents that established probable cause for his arrest. On appeal, the petitioner contended that the arrest had been consummated at the time the restaurant was surrounded and his freedom of movement was constrained. Because there was no probable cause to arrest at this time, he argued, the arrest was illegal, and all subsequently revealed facts were the fruits of that illegal arrest.[18] The court disagreed, citing *Terry v. Ohio*[19] for the notion that not only must the freedom of movement of the individual be limited, but he must also have been "accosted" by the officer:[20]

> [A] seizure must be personal, not general . . . .
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> . . . An arrest, under the fourth amendment, cannot be effected in a vacuum. There must be knowledge of the situation on behalf of both the police and the suspect. There can be no seizure where the suspect is unaware that he is "seized." To hold otherwise would be to give substance to an *ex parte* arrest—a concept we must disregard.[21]

The court declined to consider the possible result had any of the occupants attempted to leave the building, confining itself to the facts of the case.[22]

Worthy of comparision to the *Yam Sang Kwai* case is *Virgin Islands v. Quinones*.[23] There the two defendants were involved in an automobile accident and were taken to a hospital. Defendant Quinones was knocked unconscious; defendant Washington appeared to be in a stupor. An officer directed a physician to take a blood sample from each of the defendants. An analysis of these samples was introduced at trial over the objection of the defendants. A threshold issue considered by the reviewing court was whether the defendants were under arrest at the time the blood samples were taken.[24]

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[18] *See* Wong Sun v. United States, 371 U.S. 471 (1963).

[19] 392 U.S. 1 (1968).

[20] "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16. The *Terry* case dealt with momentary field detentions under circumstances short of probable cause and may not be automatically applicable to arrests. The *Terry* problem contemplates *inquiry* by the officer regarding the conduct of the suspect and thus by definition includes an accosting. An arrest, on the other hand, can certainly occur without any communication between the arrestor and arrestee. To put it differently, in the present case the court would appear to assume that a *Terry*-stop is a "lesser included" practice of the arrest genre; thus, any characteristic of a *Terry*-stop is also a characteristic of an arrest. This is not necessarily true.

[21] 411 F.2d at 686. "Suppose, for example, that word of a gambling operation is received by a police officer and, with the aid of his fellows, he closes off both the entrances and exits to that building housing the operation—can it be argued, as the petitioner argues here, that should that activity be in the basement of this very court house, each member of the judiciary, herein, is under arrest? Yet this is the very point that the petitioner seems to make. He urges that, prior to any personal confrontation and absent any personal awareness on his part of the existence of the respondent's officials, he was under arrest. If this be true perhaps as one sits reading this opinion in the quiet of his office he may be unknowingly under arrest. Such a contention is both chilling in its implication and absurd in its application." *Id.*

[22] Had this occurred, the court would need to say, to be consistent, that the arrest occurred at the time the individual was prevented from leaving. All else being the same, the arrest would be illegal for want of probable cause. *See also* Jenkins v. United States, 161 F.2d 99 (10th Cir. 1947); State v. Hutton, 108 N.H. 279, 235 A.2d 117 (1967).

[23] 301 F. Supp. 246 (D.V.I. 1969).

[24] The time of the arrest was pertinent because of a statute providing that "the Court may admit evidence of the amount of alcohol in the defendant's blood taken within two hours of the time of arrest." 20 V.I.C. § 493 (1970).

The court answered the question affirmatively, notwithstanding that the parties were completely unaware of their status.[25] Here, unlike the *Yam Sang Kwai* case, it was noted that if either defendant "had sufficiently regained his senses to make an attempt to leave, he would have been restrained from so doing."[26]

Although appearing inconsistent at first blush, the two decisions can be reconciled. Generally, an individual is not under arrest if he has no knowledge or reason to know it. However, if the individual is, as in *Quinones,* incapable of knowing his custodial status, he may yet be found under arrest based on an objective appraisal of the relevant facts. To hold otherwise would lead to the result that a party, even if incarcerated in a jail cell, would not be deemed under arrest were he *non compos mentis,* unconscious, or for any other reason unaware of his surroundings.

B. *"Consent" to Accompany the Officer*

Many courts have held that an arrest does not occur if the suspect "consents" to accompany the officer to the police station or another location.[27] Such decisions are based on the notion that an arrest takes place only when the individual is detained against his will,[28] and this coercive aspect is absent if the party chooses to cooperate with the officer. Courts appear more willing to find consent when the suspect inquired whether he was under arrest and received a negative response.[29] In *United States v. Vita,*[30] the court noted that persons guilty of crime frequently elect to talk to officers in the belief they can convince them of their innocence.[31] Having taken this calculated risk, the party should not subsequently be permitted to claim that he was under arrest.[32] Although this problem has not been the subject of inquiry by the United

[25] "[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.

[26] *Id.* The judgments were vacated for noncompliance with a local statute that the court interpreted as requiring that a subject be advised of his right to refuse a blood test and be given the right to consult with his attorney before making a decision. 20 V.I.C. § 493 (1970).

[27] United States v. Scully, 415 F.2d 680 (2d Cir. 1969); Hart v. United States, 316 F.2d 916 (5th Cir. 1963); United States v. Vita, 294 F.2d 524 (2d Cir. 1961); United States v. McCarthy, 297 F.2d 183 (7th Cir. 1961); Williams v. United States, 189 F.2d 693 (D.C. Cir. 1951); Combs v. State, 237 Md. 428, 206 A.2d 718 (1965); Commonwealth v. Slaney, 350 Mass. 400, 215 N.E.2d 177 (1966); Smith v. State, 229 So. 2d 551 (Miss. 1969); State v. Nelson, 139 Mont. 180, 362 P.2d 224 (1961); State v. Woodall, 16 Ohio Misc. 226, 241 N.E.2d 755 (1968); Rezeau v. State, 95 Tex. Crim. 323, 254 S.W. 574 (1923); Huebner v. State, 33 Wis. 2d 505, 147 N.W.2d 646 (1967).

[28] "There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty." Harrer v. Montgomery Ward Co., 124 Mont. 295, 305, 221 P.2d 428, 433 (1950). *See also* Dupree v. United States, 380 F.2d 233 (8th Cir. 1967), *cert. denied,* 392 U.S. 944 (1968). Again, an exception may be recognized when the party is incapable of being conscious of any restraint. *See* Virgin Islands v. Quinones, 301 F. Supp. 246 (D.V.I. 1969), discussed *supra,* notes 23-26 and accompanying text.

[29] United States v. Cortez, 425 F.2d 453 (6th Cir. 1970); United States v. Vita, 294 F.2d 524 (2d Cir. 1961); Williams v. United States, 189 F.2d 693 (D.C. Cir. 1951).

[30] 294 F.2d 524 (2d Cir. 1961).

[31] "The very same naive optimism which spurs the criminal on to commit his illegal act in the belief that it will not be detected often leads him to feel that in a face-to-face encounter with the authorities he will be able to beguile them into exculpating him." *Id.* at 529.

[32] *See* Hart v. United States, 316 F.2d 916 (5th Cir. 1963). *See also* United States v. Scully, 415 F.2d 680 (2d Cir. 1969), where the court found no *Miranda* warnings [Miranda v. Arizona, 384 U.S. 436 (1966)] necessary prior to a consentual interrogation, even though the suspect was questioned for three hours.

States Supreme Court, it may be noted that in *Morales v. New York*[33] the Court avoided the determination of the validity of a confession purportedly obtained during an illegal detention by remanding the case for a determination of whether, *inter alia,* "Morales' confrontation with the police was voluntarily undertaken by him."[34]

The real source of "constitutional jitters"[35] in cases of this nature arises from the difficulty of determining when genuine consent is present, even when the officer tells the individual that he is not under arrest.[36] For example, in *Seals v. United States,*[37] the defendant, a nineteen year old high school student, was approached by F.B.I. agents who said they wanted to talk to him. He responded that he had done nothing and did not mind talking. He was questioned concerning a bank robbery and consented in writing to a search of his apartment. The agents told him they would like to talk to him further at the F.B.I. office, and he "volunteered to go." There they advised him of his rights and told him he was free to leave at any time. The court held that the defendant was under arrest, at least from the time he was brought to the office.[38] Again, in *United States v. Mitchell,*[39] an officer observed the defendant at 5:30 in the morning attempting to hail a taxi while carrying a bag with an electric cord trailing on the ground. In response to the officer's questions, the defendant identified himself and said that he had just left a party. The officer was still suspicious and requested the defendant to accompany him to a call box a block away. The defendant asked if he was being arrested, and the officer responded, "No, you are just being detained." The parties proceeded to the call box where the officer inquired whether any housebreakings had been reported and received a negative response. He was requesting the dispatch of a squad car when, quite fortuitously, one appeared. The defendant fled from the scene, leaving his bag, which contained a stolen phonograph. While acknowledging that the mere questioning of the defendant did not constitute an arrest, the court held that he was under arrest when he accompanied the officer to the call box. As there was at this time no probable cause, the arrest was illegal, and the evidence seized was a fruit of the illegality and therefore inadmissible. The rationale for such decisions is that irrespective of whether

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[33] 396 U.S. 102 (1969).

[34] *Id* at 105.

[35] Commonwealth v. Howell, 213 Pa. Super. 33, 35, 245 A.2d 680, 681 (1968).

[36] Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963); Application of Kiser, 294 F. Supp. 1167 (D.S.D. 1969), *aff'd,* 419 F.2d 1134 (8th Cir. 1969); United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959).

[37] 325 F.2d 1006 (D.C. Cir. 1963), *cert. denied,* 376 U.S. 964 (1964).

[38] "[E]ven without any physical restraint Seals necessarily must have understood that he was in the power and custody of the FBI and that he submitted to questioning in consequence. . . . The fact that Seals was told that he was not under arrest would hardly in the circumstances in which he found himself—never left alone and constantly in the company of FBI agents in their offices (observed by him to be difficult of access and presumably thought to be difficult of exit)—suggest to him, a 19-year-old high school student, that he was in fact free." *Id.* at 1008-09. The time of the arrest was critical here because of the command of FED. R. CRIM. P. 5(a) requiring that an arrestee be taken before a magistrate "without unnecessary delay."

[39] 179 F. Supp. 636 (D.D.C. 1959).

the suspect is told he is not under arrest, the surrounding circumstances may lead him to conclude that he is not free to go.[40]

C. *Belief of Arrestee That Arrest Has Occurred*

It is not to be concluded from the foregoing that the occurrence of an arrest is to be subjectively determined through the eyes of the arrestee. Although an arrest is not normally consummated without the awareness of the arrestee, it does not follow that an individual is under arrest whenever he so believes. As expressed in *United States v. McKethan*:[41] "[T]he test must not be what the defendant himself . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes."[42] In *McKethan,* detectives entered a building occupied by the defendant in order to execute a search warrant for narcotics. The defendant was told he was not under arrest but was directed to stay in the chair in which he had been sleeping while the search was carried out. A detective subsequently permitted the defendant to get a drink of water. Thereafter, he was observed in the kitchen with a capsule appearing to contain traces of heroin near his feet. The defendant was thereupon arrested and his person searched. On appeal, the defendant argued that he was placed under arrest at the moment he was told to stay in his chair, and as there was no probable cause to arrest at this time,[43] the evidence was the fruit of an illegal arrest. The court concluded that although it was true that the detective had restricted the defendant's freedom of movement before beginning the search, this did not constitute an arrest. Confining the suspect to the chair was a reasonable means of preventing the possible destruction of evidence on the premises. Although the detective could have accomplished the same purpose by asking the defendant to leave, this might be considered an even greater infringement of liberty when the defendant was lawfully on the premises. In any event, the belief on the part of the defendant that he had been arrested did not make it so.

A more obvious case is *United States v. Grandi,*[44] where a customs inspector took a seat across the aisle from the defendant on a train for the purpose of maintaining surveillance of the activities of the defendant. He neither interfered with the defendant's freedom of movement nor asserted any authority over his luggage. Nevertheless, the defendant contended that from the time the inspector took his position he considered himself under arrest. Since the surveillance was begun before the train crossed the Canadian border entering the United States, he argued that he had been arrested on an illegal importation charge before the crime had been committed and that the arrest was there-

[40] "An invitation of one claiming police authority does not have the options attendant upon a bid to a ball." Alexander v. United States, 390 F.2d 101, 108 (5th Cir. 1968). *See also* Huebner v. State, 33 Wis. 2d 505, 147 N.W.2d 646 (1967); *cf.* United States v. McCarthy, 297 F.2d 183 (7th Cir. 1961).

[41] 247 F. Supp. 324 (D.D.C. 1965).

[42] *Id.* at 328.

[43] That probable cause for the issuance of a search warrant had been established did not necessarily mean that the detectives had probable cause to arrest any particular individual on the premises. At the time of entry, two other persons were also in the building.

[44] 424 F.2d 399 (2d Cir. 1970).

fore illegal. While conceding that "[t]he impression conveyed to the person claiming to have been detained is of course a relevant factor to consider in determining whether he was in fact in custody,"[45] the court concluded that the totality of facts did not establish the consummation of an arrest.[46]

III. ATTITUDE OF ARRESTOR

A. *Intent to Charge with Crime*

Numerous decisions suggest that a critical factor in determining whether an arrest has occurred is the intent of the officer to take custody of the individual for the purpose of charging him with a crime.[47] Some inferential support for this notion may be gleaned from the ambiguities of *Henry v. United States*[48] and *Rios v. United States.*[49] In *Henry,* officers approached a vehicle with drawn pistols, believing the occupants to be in possession of stolen liquor; later it was discovered they had possession of stolen radios. In *Rios,* officers approached a taxicab in which the suspect was riding when it stopped at a traffic light. The suspect was startled by the appearance of the officers and dropped a recognizable package of narcotics. In neither case was there probable cause to arrest at the moment of the initial confrontation; in both cases probable cause to arrest was subsequently gained. In *Henry,* the Court found an arrest at the moment the officers approached the car, and the fruits of the arrest were inadmissible; in *Rios,* the Court was not convinced that the arrest necessarily occurred when the officers first appeared at the side of the vehicle.[50]

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[45] *Id.* at 401.

[46] "The submissiveness or even fear, engendered in some persons by the mere presence of police officers does not raise a Constitutional issue. That some persons may become nervous or agitated by the approach of a policeman cannot serve as a justification for nullifying reasonable police action." Coates v. United States, 413 F.2d 371, 374 (D.C. Cir. 1969). *See also* United States v. Cortez, 425 F.2d 453 (6th Cir. 1970); Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1967); Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967); Cook v. Sigler, 299 F. Supp. 1338 (D. Neb. 1969); United States v. Clark, 294 F. Supp. 44 (D.D.C.), *modified,* 408 F.2d 1230 (D.C. Cir. 1968).

Cf. the unfortunate language in McChan v. State, 238 Md. 149, 157, 207 A.2d 632, 638 (1965), *cert. denied,* 384 U.S. 1021 (1966): "Where there is no touching, the intention of the arrestor and the understanding of the arrestee are determinative, for in order for there to be an arrest in such case, there must always be an intent on the part of one to arrest the other and intent on the part of the other to submit."

See also Abrams, *Constitutional Limitations on Detention for Investigation,* 52 IOWA L. REV. 1093, 1103-04 (1967): "If the officer's conduct clearly indicates that the individual is restrained, the courts do not inquire into the individual's state of mind. Thus, an officer forcing a car to stop along the side of the road would appear to establish a restraint of freedom. However, if 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 prohibited by the fourth amendment. If he believes he is in custody, then all the legal protections that flow from that consequence should be his."

[47] *See* Jenkins v. United States, 161 F.2d 99 (10th Cir. 1947); United States v. McKendrick, 266 F. Supp. 718 (S.D.N.Y. 1967); People v. Gaines, 265 Cal. App. 2d 730, 71 Cal. Rptr. 468 (1965), *cert. denied,* 394 U.S. 935 (1969); State v. Smolen, 4 Conn. Cir. 385, 232 A.2d 339 (1967), *cert. denied,* 389 U.S. 1044 (1968); Range v. State, 156 So. 2d 534 (Fla. App. 1963); State v. Mackenzie, 161 Me. 123, 210 A.2d 24 (1965); Cornish v. State, 215 Md. 64, 137 A.2d 170 (1957); McChan v. State, 238 Md. 149, 207 A.2d 632 (1965); State v. Hutton, 108 N.H. 279, 235 A.2d 117 (1967); Commonwealth v. Dorsey, 212 Pa. Super. 327, 243 A.2d 176 (1968); State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966), *aff'd,* 392 U.S. 1 (1968); State v. Coles, 20 Ohio Misc. 12, 249 N.E.2d 553 (1969); State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960); Peloquin v. Hibner, 231 Wis. 77, 285 N.W. 380 (1939).

[48] 361 U.S. 98 (1959).

[49] 364 U.S. 253 (1960).

[50] On remand, the arrest was determined to have occurred at a later point in time, and the seizure of the narcotics was reasonably incident thereto. United States v. Rios, 192 F. Supp. 888 (S.D. Cal. 1961).

These decisions can be distinguished by the manner in which the officers approached the suspect. In *Henry,* the drawn pistols reflected an "arresting" state of mind; in *Rios,* the officers were admittedly "fishing"—there was no arguable basis on which probable cause could be asserted. Thus it might be concluded that the Court gave consideration to the respective intents of the officers in reaching the differing results.

In *United States v. Bonanno*[51] the court said: "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."[52] Clearly such language cannot be literally accepted as stating a valid test, for it could conceivably legitimize any detention, no matter how unreasonable, so long as the officer had no intent to charge the individual unless and until he gained probable cause.[53] The issue was peripherally considered in *Clewis v. Texas,*[54] where "the arresting officer testified that he merely asked the petitioner to accompany him to the police station."[55] Apparently, the position of the officer was that he lacked probable cause to make an arrest, and that he therefore did not make one.[56] The Supreme Court opined that, notwithstanding the officer's evaluation of the situation, "petitioner must be considered to have been taken into custody either at the time the officer came to get him, or shortly thereafter when the police, by their conduct, effectively asserted a right to detain him indefinitely at the jail."[57]

B. *"Arrests" for Other Purposes*

In actuality, arrests are made for many purposes other than to charge the individual with a crime, such as the protection of intoxicated persons, and the control of gambling, prostitution, and public homosexuality through means of governmental harassment.[58] It would hardly be credible to suggest that such nonprosecutorial intent modifies the status of an individual who has for a significant period of time been deprived of his freedom of movement.[59] The

[51] 180 F. Supp. 71 (S.D.N.Y. 1960).

[52] *Id.* at 77.

[53] A more acceptable use of "intent" in defining arrest is found in State v. District Court, 70 Mont. 378, 386, 225 P. 1000, 1002 (1924): "An 'arrest' is the taking, seizing, or detaining of the person of another either by touching, or putting hands on him, or by any act which indicates an intention to take him into custody and subject the person arrested to the actual control and will of the person making the arrest." *See also* Price v. United States, 119 A.2d 718, 719 (D.C. App. 1956) ("a restriction of the right of locomotion").

[54] 386 U.S. 707 (1967).

[55] *Id.* at 711 n.7.

[56] The Court did not elucidate any of the circumstances under which the petitioner was taken to the stationhouse.

[57] 386 U.S. at 711 n.7. *See also* Fuller v. United States, 407 F.2d 1199, 1207 (D.C. Cir. 1967) ("Even where the officer denies that he intended to make an arrest his actions may sufficiently manifest an arrest to require compliance with Rule 5(a)."); Cook v. Sigler, 299 F. Supp. 1338, 1343 (D. Neb. 1969) ("Nor does the law of arrest depend upon what the officer thought was the time that it took place.").

[58] *See* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY, chs. 21-25 (1965).

[59] *See* Abrams, *Constitutional Limitations on Detention for Investigation,* 52 IOWA L. REV. 1093, 1105 (1967): "The attempt to differentiate seizure and detention on the basis of the purpose of a restriction would appear to be unsound. The fourth amendment was passed to prohibit arbitrary interference with freedom. From the individual's view, it matters not for what purpose his right to come and go has been curtailed."

matter becomes constitutionally acute when an individual, on circumstances short of probable cause, is taken into custody for purposes of "investigation" by officers who do not "intend" to arrest him but who thereafter gain adequate information constituting probable cause for an arrest.[60] Such reasoning would serve to undermine the fundamental principle that the presence of probable cause cannot be retroactively applied to validate an arrest or search.[61]

IV. CONCLUSION

To a certain extent, the semantic fallacy of the decisions here criticized may be more apparent than real. Arguably, an "arrest" may be defined in terms of the intent of the officer so long as it is understood that the protection of the fourth amendment against unreasonable seizures of the person extends to circumstances other than those technically defined as an "arrest."[62] Yet a failure to employ terminology with clarity can only lead to confusion. Any form of illegal detention is a per se violation of the fourth amendment[63] but is not reversible error if it does not, in and of itself, affect the fairness of the trial of the accused.[64] The legality of the detention becomes an issue because of the fruits of the detention that are introduced against the defendant at his trial—confessions, incidentally seized evidence, fingerprints, etc. The implication of *Terry v. Ohio*,[65] *Davis v. Mississippi*,[66] and *Morales v. New York*[67] appears to be that, except for instances of bona fide consent on the part of the suspect, any time the individual is taken to the stationhouse by officers an arrest has occurred.[68] At a minimum, courts should find it unnecessary in such cases to belabor the purported "intent" of the officer.

Terry further indicates that when field confrontations are judicially evaluated, at least three levels of official apprehension must be delineated: (1) suspicious circumstances justifying an inquiry, (2) suspicious circumstances

[60] *See, e.g.*, Morales v. New York, 396 U.S. 102 (1969). *See also* text accompanying notes 33-34 *supra*.

[61] *See, e.g.*, Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10 (1948); United States v. Di Re, 332 U.S. 581 (1948).

[62] "The danger in the logic which proceeds upon distinction between a 'stop' and an 'arrest,' or 'seizure' of the person, and between a 'frisk' and a 'search' is twofold. It seems to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation." Terry v. Ohio, 392 U.S. 1, 17 (1968).

[63] Henry v. United States, 361 U.S. 98 (1959); Giordenello v. United States, 357 U.S. 480 (1958); Albrecht v. United States, 273 U.S. 1 (1927).

[64] The traditional attitude is expressed in Ker v. Illinois, 119 U.S. 436, 440 (1886): "[F]or mere irregularities in the manner in which he may be brought into custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offense by persons without a warrant, or without a previous complaint, and brought before a proper officer; and this may be, in some sense, said to be 'without due process of law.' But it would hardly be claimed that, after the case has been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.' "

[65] 392 U.S. 1 (1968).

[66] 394 U.S. 721 (1969).

[67] 396 U.S. 102 (1969).

[68] "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." Terry v. Ohio, 392 U.S. 1, 16 (1968).

accompanied by additional facts that would warrant the officer to believe that his personal safety was endangered, thus justifying a frisk,[69] and (3) probable cause to arrest justifying a complete search of the arrestee and the area within his reach.[70] It follows that whenever the admissibility of a particular evidentiary item is in issue, the threshold question is the nature of the detention. A credible constitutional standard can be applied only if the subjective intent of the officer is not a factor included in the judicial appraisal of the conglomerate facts. Likewise, the subjective belief of the detained or suspected person should be considered irrelevant except to the extent that such a belief is measured against a reasonable man standard, untainted by any possible feelings of guilt on the part of the suspect.

[69] "[T]he issue is whether a reasonably prudent man under the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

Cf. Harlan, J., concurring: "Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. . . . There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." *Id.* at 33.

[70] *See* Chimel v. California, 395 U.S. 752 (1969).