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The Appropriateness of Deadly Force

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A great debate is simmering as to the propriety of a police officer's shooting a suspect while in the process of bringing him under arrest. There are some outraged citizens who feel that deadly force should not be used under any circumstances to perfect an arrest, and there are others who feel that recourse to such force should be had only as a last resort.

The federal and state law are inconclusive as to when deadly force is proper to subdue a suspect. Many of the courts, state and federal, rely upon the reasonable man test to determine whether and when a killing by a police officer is justified. The implementation of this test is bottomed on the judicial feeling that the security of persons and property would be jeopardized, unless felons were brought immediately under arrest and punished.

And yet there are many citizens, who are less trained in the law, that are not persuaded by this judicial feeling. They feel that human life, in some way, takes precedence over property, that police officers should exercise an unusual amount of restraint when a human life hangs in the balance. In the last analysis they ask: "When is a policeman required to kill a suspect?"

This article attempts to answer this question in the context of suspected felonies and felons. It will explore the law relating to formal arrests and detentions for investigation[1] in an effort to determine how much force a policeman is entitled to use.

ARRESTS

There is considerable law to the effect that an officer who is justified in making an arrest may use whatever force reasonably necessary to apprehend a suspect.[2] If the suspect resists, the officer is entitled to use such force as may be required, even to the extent of taking a life.[3] He can not, however, use force calculated to produce death or serious bodily injury when the felon offers no resistance, nor can he use any force or violence disproportionate to the degree of resistance meted out by the suspect.[4] A homicide committed in attempting to arrest or prevent the escape of a felon is generally justifiable where the arrest cannot be made or the escape otherwise prevented.[5]

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[1] United States v. Vita, 294 F.2d 524, 530 (2d Cir. 1961).

[2] Colorado v. Hutchinson, 9 F.2d 25, 26 (8th Cir. 1925); Vaccaro v. Collier, 38 F.2d 863, 868 (D. Md. 1930). See also 9 Proceedings of The American Law Institute 179 et seq. (1939), in which the members considered a model statute that would authorize killings to effect an arrest in special felony cases only.

[3] Vaccaro v. Collier, 38 F.2d 863 (D. Md. 1930).

[4] Alexander, Law of Arrest, §§ 95, 583 (1949).

[5] Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).

Most killings take place after the fact. Where an arrest without a warrant is made to justify a homicide in a felony situation, the suspect has either committed his crime in the view or presence of the officer making the arrest[6] or the officer has had reasonable cause to believe, and did in good faith believe, that the deceased committed a crime and was trying to escape.[7] A mere suspicion of that fact is not enough.[8] If an officer, under the latter circumstances, mistakenly applies excessive force—to the extent of shooting at a fleeing suspect's automobile[9] or at the suspect himself to enforce an order to stop,[10] and injures or kills him—the officer is criminally liable.[11]

At common law, however, a peace officer was at liberty to kill and was reasonably assured that the killing would be regarded as justifiable if the escaping suspect could not be subdued in any other way.[12] There was a feeling in the law that when an officer with the power of arrest or the right to investigate a crime acted in the execution of his duty, the law placed a peculiar protection around him[13] that legitimatized his use of force. Modern courts, consistent with this notion, are saying to jurors that they must judge the necessity of a police officer's use of deadly force in the light of the circumstances as they reasonably appeared to the officer at the time.[14] Jurors must vicariously relive the police officer's experience

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[6] Stinnett v. Virginia, 55 F.2d 644, 646 (4th Cir. 1932).

[7] See e.g., Lacy v. State, 7 Tex. App. 403, 413 (1879).

[8] Poldo v. United States, 55 F.2d 866, 869 (9th Cir. 1932). Mere suspicion is not enough. There must be circumstances apparent to the officer, through the testimony of his senses, sufficient to justify a good faith belief that a suspect has violated the law. Henry v. United States, 361 U.S. 98, 101 (1959); United States v. Di Re, 332 U.S. 581, 593-595 (1948); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Giordenello v. United States, 357 U.S. 480, 486 (1958). See Hogan, "The McNabb-Mallory Rule: Its Rise, Rationale and Rescue," 47 Geo. L.J. 1, 12 (1958); Fraenkel, "From Suspicion to Accusation," 51 Yale L.J. 748, 754-55 (1942); Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale L.J. 1, 12, 13 (1960).

[9] Castle v. Lewis, 254, F. 917, 925-926 (8th Cir. 1918); United States v. Kaplan, 286 F. 963, 974 (S.D. Ga. 1923); Wiley v. State, 19 Ariz. 346, 354, 170 P. 869, 873 (1918). All of these cases say that a policeman may not act in wanton disregard for the lives of the innocent, be they suspect or not. See citation of cases in 18 A.L.R., Peace Officer, 1368.

[10] People v. McCarthy, 110 N.Y. 309, 18 N.E. 128 (1888); Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902); Abell v. State, 109 Tex. Crim. App. 380, 5 S.W.2d 139 (1928); Taylor v. State, 157 Tenn. 421, 7 S.W.2d 50 (1928).

[11] Alexander, supra note 4 at 1601-02. 1 Wharton, Crim. Law, § 529 (Kerr 11th Ed. 1912).

[12] 2 Bishop, Criminal Law, § 647 (8th Ed. 1892); 1 Russell, Law of Crimes, 666 (3rd Eng Ed. 1843). See People v. Kilvington, 104 Cal. 86, 37 P. 799 (1894). It is an illustration of the type of conduct the court does not consider excessive.

[13] Arwood v. United States, 134 F.2d 1007, 1013 (6th Cir. 1943) (dissenting opinion).

[14] Bell v. United States, 102 U.S. App. D.C. 383, 386, 254 F.2d 82, 85 (D.C. Cir. 1958); Colorado v. Hutchinson, 9 F.2d 275, 278 (8th Cir. 1925).

in order to decide what a reasonable and prudent officer would do under the same or similar circumstances.[15]

It is significant to note that most maimings and deaths occur at the point where an officer attempts to restrain a suspect's actions. Often times the restraint is based on a mistaken suspicion.[16] The question necessarily arises, in what situations is a policeman authorized to detain a person in connection with a suspected crime, and to enforce his detention by the use of deadly force. There is authority for the proposition that a policeman has considerable control over motorists but very little over pedestrians.[17] The former rule is based on the judicial notion that a person who obtains a state driver's license waives any right to object to reasonable police action involving him as a motorist.[18] So, should a motorist be stopped for a routine investigation, his "being stopped" does not constitute an arrest.[19] There is no taking into custody and no purpose other than to check the driver's license or to investigate him or his car.[20] It follows that in those instances in which a policeman cannot lawfully arrest a motorist, he cannot resort to force to detain him.[21]

The law as to the amount of control a policeman has over a pedestrian is laden with uncertainties. Some judicial authorities say that a peace officer may detain a pedestrian, when suspicious circumstances give rise to a plausible inference that a crime has been committed.[22] Others say

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15 There is some discrepancy among authorities as to the appropriate reasonable man standard to be applied to judge a policeman's conduct. Stacy v. Emery, 97 U.S. 642, 645 (1878); Castle v. Lewis, 254 F. 917, 925 says that the standard should be the "ordinary and prudent" man. Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82, 85 (D.C. Cir. 1958), says that the standard is the "reasonable and prudent" police officer. Ellis v. United States, 105 U.S. App. D.C. 86, 88, 264 F.2d 372, 374 (D.C. Cir. 1959).

16 People v. McCarthy, 110 N.Y. 309, 18 N.E. 128 (1888); Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902); Abell v. State, 109 Tex. Crim. App. 380, 5 S.W.2d 139 (1928); Taylor v. State, 157 Tenn. 421, 7 S.W.2d 50 (1928).

17 White v. United States, 106 U.S. App. D.C. 246, 271 F.2d 829 (D.C. Cir. 1959); People v. Tinston, 6 Misc. 2d 485, 490, 163 N.Y.S.2d 554, 560-561 (Magis. Ct. 1957); Commonwealth v. Doe, 109 Pa. Super. 187, 190, 167 A. 241, 242 (1933). Inbau, Cases in Criminal Justice, 513-514 (1964); Donegan and Fisher, Know the Law, 222-238 (1958).

18 Miami v. Aronovitz, 114 So. 2d 784, 787 (Fla. 1959); Thornhill v. Kirkman, 62 So. 2d 740, 742 (Fla. 1953). Inbau, supra, note 16 at 513. As regards the "Motorist Waiver Principle" generally, see Weinstein, "Statutes Compelling Submission to a Chemical Test for Intoxication," 45 J. Crim. L., C.&P.S. 541 (1955).

19 Inbau, supra, note 16 at 513. See also Donegan and Fisher, supra, note 16.

20 Id.

21 Inbau, op. cit.

22 If the act under scrutiny is a detention, reasonable suspicion is a satisfactory basis upon which to hold a person. People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964); People v. Peters, 18 N.Y.2d 238, 243, 219 N.E.2d 595, 599, 273 N.Y.S.2d 217, 222 (1966). If, however, the act under scrutiny is an arrest, probable cause is required. Wisniewski v. United States, 47 F.2d 825, 826

that there needs to be evidence, apparent to the officer's senses, that a particular pedestrian committed or was attempting to commit a crime.[23] Under the second rule, any "evidence" apparent to the officer's sense would warrant his perfecting an arrest and resorting to any force necessary to subdue the suspect. The same result, however, does not necessarily obtain under the former rule. As long as there has been no attempted or actual arrest, no force should be resorted to by a police officer to restrain a pedestrian he has stopped.

The human value jeopardized by questionable police practice is the right of every citizen—motorist and pedestrian—to be secure in his person against unreasonable arrest. Our early history discloses that there have been many movements afoot in rebellion against the practice of arresting citizens on the basis of suspicions.[24] Early American and colonial decisions show that common rumors and reports, suspicions and even strong reasons to suspect were not regarded as adequate to support arrests.[25] To this day, that principle has survived; suspicion, no matter how strong, can never confer upon the police officer a power which would otherwise be lacking.[26] In effect, an arrest by a police officer

(6th Cir. 1931). As a rule the judicial inquiry is focused upon those facts attending the act thought to be unlawful. When a policeman takes the law into his own hands, he must act on some evidence known to him. See Carroll v. United States, 267 U.S. 132, 159 (1925); Brinegar v. United States, 338 U.S. 160, 175-176 (1949); United States v. Murray, 51 F.2d 516, 518-519 (D. Md. 1931).

[23] Green v. District of Columbia, 91 A.2d 712, 714-715 (Mun. Ct. App. 1952); Lawson v. United States, 9 F.2d 746, 748 (7th Cir. 1925); McKnight v. United States, 87 U.S. App. D.C. 151, 152, 183 F.2d 977, 979 (D.C. Cir. 1950); United States v. Lassoff, 147 F. Supp. 944, 953 (E.D. Ky. 1957); Brown v. United States, 4 F.2d 246, 247 (9th Cir. 1925); Worthington v. United States, 166 F.2d 557, 562, 565 (6th Cir. 1948). These cases say that the validity of an arrest, without a warrant, must be determined by evidence known before and not after the arrest. Suspicion, hearsay and opinion are never sufficient to render an arrest valid. Sometimes, however, the federal basis for a lawful arrest is inapplicable. United States v. Di Re, 332 U.S. 581, 589 (1948); Johnson v. United States, 333 U.S. 10, 15 n. 5 (1948). In the absence of an applicable federal statute, the law of the place where the arrest without a warrant takes place determines its validity. "There is no reason to believe that the state law is not an equally appropriate standard by which to test an arrest without a warrant, except in those cases where Congress has enacted a federal rule." United States v. Di Re, supra at 590.

[24] The general warrant, in which the name of the person to be arrested was left blank was declared illegal by the House of Commons in 1766. 16 Hansard, Parl. Hist. Eng., 207 (1813). There were rebellions afoot against the writs of assistance which James Otis inveighed. Quincy's Mass. Rep. 1761-1772, Appendix 467. See also Lasson, "The History and Development of the United States Constitution," Series 55, No. 2. John Hopkins University Studies in Historical and Political Science, 35, 95, 117 and 132 (1937) and the authorities cited therein.

[25] Frisbie v. Butler, Kerby's Rep. 213 (Conn. 1787); Conner v. Commonwealth, 3 Binn. 38 (Pa. 1810); Grummon v. Raymond, 1 Conn. 39 (1814); Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841).

[26] Henry v. United States. 361 U.S. 98, 101 (1959).

can never be justified by suspicion alone or by what a subsequent search discloses.[27] What then may a police officer do to law abiding citizens in the interval between the time when his suspicion is wrongfully aroused and there is sufficient evidence apparent to his senses to warrant an arrest? The officer may do very little. Under our system of laws suspicion is never enough for an officer to lay a hand on a citizen. In a felony situation we should not, indeed we may not, permit a policeman's purely subjective feelings concerning the possibility of danger to himself to replace "probable cause to believe" as the controlling test as to when an individual's constitutional right may be invaded.[28] There is abundant law to the effect that a policeman, in the proper performance of his duty, is authorized to investigate suspicious activity, that is to say, to temporarily stop and question individuals so engaged.[29] Though suspicion may be a sufficient basis to stop and question, it furnishes no basis for an arrest[30] and certainly none for resorting to force.

DETENTIONS: ARRESTS ON SUSPICION

The basic argument in favor of arrests on suspicion is the need for the opportunity to interrogate a person whom the police suspect of criminal activity. The person may be one whom the police suspect but cannot charge with a crime because probable cause is lacking. He may also be a person against whom the police do not have enough evidence to support a charge, but whom they desire to interrogate to check out his explanation or to secure more substantial evidence of guilt.[31] It is argued, on the other hand, that such arrests manifest grave evils and dangers. A person subject to them is torn from his daily routine and held at the mercy of those whose job it is to prosecute him. He is deprived of freedom without a proper judicial tribunal having found him guilty of

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[27] United States v. Hotchkiss, 60 F. Supp. 405, 407 (D. Md. 1945). See also note 23 supra.

[28] Report and Recommendation of the D.C. Commissioners' Committee on Police Arrests for Investigation, 33 (1962); Foote, "The Fourth Amendment: Obstacle or Necessity in the Law of Arrest," 51 J. Crim. L., C.&P.S. 402 (1960).

[29] People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964) and the citations therein; People v. Estrialgo, 19 App. Div. 509, 512, 245 N.Y.S.2d 850, 853 (1964).

[30] Where Congress has enacted a federal rule, arrests must be based upon probable cause. See notes 22 and 23 supra.

[31] Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation 15 (1962). See also, in connection with this argument, Wilson, "Police Arrest Privilege in a Free Society; A Plea for Moderation," 51 J. Crim. L., C.&P.S. 395 (1960). Remington, "The Law Relating to 'On the Street Detentions,'" 51 J. Crim. L., C.&P.S. 386 (1960).

any crime or that there is probable cause to believe that he may be guilty.[32]

But the arguments persist. The most recent struggle took place on the issue of detentions based upon reasonable suspicion.[33] The outcome was a decision that temporary detentions were lawful when the arresting officer could point to specific facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion.[34] It is a mystery how a seizure under these circumstances can be constitutional.[35] It gives more power to a police officer than is exercisable by a magistrate issuing a warrant for a person's arrest.[36] The question is: By what standard shall a policeman's conduct be judged? Although worthwhile reasons are given in support of detentions based on reasonable suspicion, they are never satisfactory explanations for a homicide. When a policeman acts with the intent to kill or inflict grave bodily injury there must be sufficient facts within his personal knowledge to warrant an arrest. Probable cause is the only acceptable standard.

THE PROBLEM

As a general rule, any officer who is about to make an arrest is told that he may use such force as is necessary to effect the arrest but that he may use his gun only as a last resort.[37] Beyond these instructions he is provided with little in the way of objective standards. If he is not fleet of foot, when pursuing one who is evading capture, will he be justified in shooting sooner than his more agile comrade? Or, if he is five foot five, does that give him the right to draw quicker, when he is engaged in an unequal scuffle with a suspect who is six foot four, or, what choices would he have if the altercation ensued while investigating a suspicious activity?

To a policeman faced for the first time with the necessity of making split second decisions, to be judged retrospectively by twelve men, who have time to methodically weigh the pros and cons, must seem unfair.

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[32] Culombe v. Connecticut, 367 U.S. 568, 573-74 (1961).

[33] Terry v. Ohio, 392 U.S. 1 (1968).

[34] Id. at 21. See Beck v. Ohio, 379 U.S. 89, 96-97 (1964); Ker v. California, 374 U.S. 23, 34-37 (1963).

[35] The courts have said over the years that probable cause determines the validity of an arrest without a warrant. Carroll v. United States, 267 U.S. 132, 161-162 (1925); McDonald v. United States, 335 U.S. 451, 455-456 (1948); Wong Sun v. United States, 371 U.S. 471, 479-484 (1963). See, however, note 23. There is no federal common law standard for an arrest without a warrant. United States v. Di Re, 332 U.S. 581, 590 (1948).

[36] Terry v. Ohio, 392 U.S. 1, 36 (1968) (Douglas dissenting). See also Aspen, "Arrest and Arrest Alternatives," U. Ill. Law R. 241, 251, n. 74 (1966).

[37] E.g. Manual of the Metropolitan Police Department, § 29(a)-(c), at 30.

But this is the nature of our legal system and the method by which an officer's conduct is to be judged. When a policeman seeks to use force to effect an arrest, two things must be considered: a) whether the arrest itself was lawful; and b) whether he has used no more force than was necessary.[38] In New York it is enough that an officer reasonably believes that a crime has been committed by someone, though not necessarily by the arrestee, to effect a legal arrest.[39] This is not to say that the probable cause standard is not applicable to New York or any of the other states.[40] It is to suggest, however, that something less than probable cause is often used first to legitimatize arrests. This is a growing practice which is gaining greater and greater legislative sanction.[41]

If force likely to produce death is ever resorted to, it should be lawful only for effecting arrests of a certain type, namely for felonies. At common law a policeman could kill to overcome any resistance to arrest by a felon, including flight.[42] There was a great deal of logic to this rule, because at common law all felonies were punishable by death.[43] But now, where the death sentence has been abolished everywhere for all but a few felonies,[44] it is an anachronism to say that a man who could be sentenced to a few years in prison for an offence, can justifiably be shot by a policeman before there is even proof of his guilt.

Sometimes, however, there is no choice but to use force. It depends entirely upon the nature of the resistance offered. The resistance may

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[38] Newman, Police, the Law and Personal Freedom, 23 (1964). Under the fourth amendment, an arrest was lawful only if the arresting officer had "probable cause" to make the arrest at the time. Williams v. United States, 99 U.S. App. D.C. 161, 237 F.2d 789 (D.C. Cir. 1956); Stephens v. United States, 106 U.S. App. D.C. 249, 271 F.2d 832, 833-834 (D.C. Cir. 1959); Taglavore v. United States, 291 F.2d 262, 266 (9th Cir. 1961). See Henry v. United States, 361 U.S. 98 (1959).

[39] N.Y. Criminal Code and Penal Law, §§ 179, 180(a) (Gilbert Ed. 1968).

[40] Ker v. California, 374 U.S. 23, 34-35 (1963).

[41] D.C. Omnibus Crime Act, 81 Stat. 735 (1967); N.Y. Criminal Code and Penal Laws, § 180(a) (Gilbert Ed. 1968); Sibron v. New York, 392 U.S. 40 (1968); Peters v. New York, 392 U.S. 40 (1968). See in Terry v. Ohio, 392 U.S. 1 (1968), where the Court used the public's interest in the investigation of crime and the need to protect police officers to establish the legality of a street detention and search. Id. at 23-24. In effect something less than, or other than, probable cause was used as the standard of reasonableness by which a subsequent arrest was evaluated. Note, "Stop & Frisk in California," 18 Hastings L.J. 623 (1968); Warner, "The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942). But see Foote, The Fourth Amendment: "Obstacle or Necessity in The Law of Arrest," 51 J. Crim. L., C.&P.S. 402 (1960); Schoenfeld, "The Stop & Frisk Law is Unconstitutional," 17 Syc. L. Rev. 627 (1966).

[42] Bishop, supra note 12.

[43] Bannon v. United States, 156 U.S. 468 (1895); I Russell, Law of Crimes, 42 (3rd Eng. Ed. 1843).

[44] E.g. D.C. Code, Criminal Offenses, §§ 22-401, 22-2201, 22-2401, 22-2801, and 22-2901; N.Y. Criminal Code and Penal Law, §§ 55.05-.10, 125.20-.30, 130.25-.35, 140.20-.30, 150.00-.15, and 160.00-.15 (Gilbert 1968).

be flight or struggle. In the interval between these poles, if the policeman persists in his attempt to arrest, as he is justified in doing, he may find his life in danger. At that point he may be justified in using greater force than heretofore required. But such force should be reasonably necessary under the circumstances.[45] Did the officer make his official character known, particularly when he was not in uniform; did he warn the suspect that he would use force, or fire warning shots, before shooting to kill; did he make a reasonable effort to capture by pursuing? Was the situation such that, with some additional effort on the part of the policeman, the suspect could have been overtaken? Suppose the suspect surrendered, or was helpless from wounds, or the officer was in a position to call upon other officers nearby, or possibly on bystanders for help, was it then necessary to shoot? A negative answer to any or all of these questions vitiates necessity. In weighing a man's life in the balance under the above circumstances the value of his life far exceeds the need to kill.

The Supreme Court has said that the national standard for arrests is probable cause.[46] It requires a policeman to have reasonable grounds to believe that a felony has been committed and that the suspect he arrested committed it.[47] To say, as some legal spokesmen do, that there are risks in the investigatory activity undertaken by a policeman preliminary to an arrest is to state the obvious. It is quite another thing, however, to conclude on this fact that a peace officer should be free to seize every suspicious looking individual and allowed to resort to force (deadly force) on that basis. The fourth amendment guarantees the right of the people to be secure, first of all, in their persons. To what end is security against crime, if a person's liberty is sacrificed in the process or tragic deaths follow? The freedom which the Constitution

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[45] Colorado v. Hutchinson, 9 F.2d 275, 276 (8th Cir. 1925); Vaccaro v. Collier, 38 F.2d 863, 868 (D. Md. 1930). See also 9 Proceedings of The American Law Institute 179 et seq. (1939), in which the members considered a model statute that would authorize killings to effect an arrest in special felony cases only.

[46] Kerr v. California, 374 U.S. 23, 30 (1963); Poldo v. United States, 55 F.2d 866, 869 (9th Cir. 1932). Mere suspicion is not enough. There must be circumstances apparent to the officer, through the testimony of his senses, sufficient to justify a good faith belief that a suspect has violated the law. Henry v. United States, 361 U.S. 98, 101 (1959); United States v. Di Re, 332 U.S. 581, 593-595 (1948); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Giordenella v. United States, 357 U.S. 480, 486 (1958). See Hogan, "The McNabb-Mallory Rule: Its Rise, Rationale and Rescue," 47 Geo. L.J. 1, 12 (1958); Fraenkel, "From Suspicion to Accusation," 51 Yale L.J. 748, 754-55 (1942); Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale L.J. 1, 12, 13 (1960).

[47] Terry v. Ohio, 392 U.S. 135 (1968) (Douglas dissenting); Carroll v. United States, 267 U.S. 132, 156 (1925).

guarantees is assured to the best of men only if it is vouchsafed to the worse, however distasteful the latter may be.[48]

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[48] Henry v. United States, 361 U.S. 98, 104 (1959).