A Goal-Oriented Model Code of Pre-Arraignment Procedure for Wisconsin

Cyril D. Robinson
Rosary College

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Criminal Procedure Commons, Legislation Commons, and the State and Local Government Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol2/iss1/2
A GOAL-ORIENTED MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE FOR WISCONSIN

By Cyril D. Robinson*

1. Introduction

In June 1966, the Wisconsin legislature approved

AN ACT to increase the appropriation to the judicial council for the purpose of conducting a study of criminal procedure laws.

The appropriation in section 20.490-(1)(a) of the statutes, as effected by the laws of 1965, is increased by $18,980 for the fiscal year 1966-67 for the purpose of conducting a detailed research study of criminal procedure in this state and rewriting all relevant criminal procedure statutes.¹

Pursuant to this act the judicial council appointed a committee to oversee the revision of the Wisconsin code of criminal procedure and contracted with Marquette University Law School to furnish one of its faculty members as reporter to the committee. For the purpose of conducting necessary research and drafting as reporter to the committee, the author was appointed in July 1966 to the law faculty of Marquette University. The revision project was scheduled to last two years. Before the end of the first year, however, the council in April 1967 voted not to renew its contract with Marquette University. The council refused to accept the more systematic approach to revision which utilizes definitive principles and goals to which the code must conform. The alternate method of revision has been called a "patch-work" approach, seeking to plug with legislative thumbs the various breaches in the dike of criminal justice caused by the passage of time and the recurrent decisions of the United States Supreme Court. The reasoning which led the judicial council in Wisconsin to terminate its effort rather than attempt a rebuilding of the code reaches far beyond criminal procedure and the State of Wisconsin. The decision re-

---

*Assistant Professor of Political Science, Rosary College. LL.B. 1952, Northwestern University.

Reprints of the statute proposed and discussed by Mr. Robinson infra are available from Prospectus.

reflects much of the problem attending a significant revision of any code law.

While the story of its demise is worthy of careful attention, the Wisconsin experience forms only a history out of which this suggested model code of pre-arraignment procedure has developed.

In this article we analyze the arrest chapter of the proposed code as it was substantially completed at the time the project was terminated, although it has been updated to accommodate relevant recent case law. We examine the need for guiding principles in drafting a code, the proper aims and organization of the code, the proposed provisions of the arrest chapter, and the law and practice which recommend both the principles and the provisions.²

A. What is a revision?

The judicial council has never formally set out its conception of the code revision called for by the legislature. However, minutes from one of the meetings which preceded the termination of the project summarize the discussion as follows:

The Committee [supervising the revision of the code] is getting into things over and above those requiring amendment or change. [The reporter] should start with ch. 954 matters [the present arrest chapter] and amend or correct them to comply with new constitutional provisions . . . existing statutes should be amended, omissions supplied, etc.³

This approach is not unique to Wisconsin. Although in recent years codes have become more common in preference to individual legislative acts,

² Code provisions discussed remain substantially as they were presented to the revision committee unless otherwise indicated. The provisions and the commentary thereon are to be attributed solely to the writer who writes not as reporter for the committee but in his individual capacity.

³ Digest of Proceedings of Meeting of Judicial Council, March 17, 1967, Report of the Criminal Rules Committee 4. In a letter to the writer dated June 9, 1967, William A. Platz, assistant attorney general, and one of the members of the supervisory committee for the code revision, wrote:

My understanding of why the judicial council initiated the Criminal Procedure Code revision was because of defects, omissions, conflicts, etc. in the existing Code caused in part by amendments hastily made in connection with the court organization bills of 1961, and by such things as the Wisconsin Supreme Court recognition of motions for leave to withdraw pleas of guilty which are not referred to in the Code.
there are those experienced in comparative law who believe that no penal code or criminal procedure code worthy of the name yet exists in this country. Typically state codes drafted to date have avoided carefully every important and controversial policy decision. This is especially true for pre-arraignment. One finds nothing on standards of arrest and non-arrest, on field interrogation, on in-custody interrogation, or on action to be taken where the police fail to conform to such legislative and judicial standards as do exist.

There is not even agreement on the terms to be used to describe the various approaches to "revision". Professor Remington delineates three methods:

"piecemeal amendment" which involves the repeal of certain sections, the amendment of others, perhaps the enactment of a few new ones. Emphasis is upon the most obvious defects with the least possible disturbance to other criminal statutes. It is the traditional method of revision in the criminal law;

"mechanical redrafting of all existing criminal statutes", the redrafting of the statutes to eliminate inconsistent use of terminology, verbosity, needless distinction, and duplication between sections, and perhaps to reorganize the statutes according to a more sensible classification. The objective is to modernize, simplify, and clarify the language of existing statutes. Change, whether it be the enacting of new statutes, the repeal of old ones, or

---


5 Remington, Reform in State Criminal Procedure 27-28, Edward Douglass White Lecture, Georgetown University Law Center, Nov. 13, 1963; Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J.Crim. L. C. & P.S. 21, 22 (1961). This conclusion is likewise accurate for penal codes. See Molnar, The Proposed Criminal Code of Georgia, 3 Geo. St. Bar J. 145, 152-55 (1966), where the revision committee considered abortion, consensual sexual offenses, capital punishment and the defense of insanity but were unable to agree and therefore "the final solution, if there will ever be a final solution, was left to future legislators." See also Platz, The 1949 Revision of the Wisconsin Code of Criminal Procedure, 1950 Wis. L. Rev. 28, 41. Some reasons for legislative inaction are analyzed in LaFave, Improving Police Performance through the Exclusionary Rule — Part II: Defining the Norms and Training the Police, 30 Mo. L. Rev. 566, 568-579 (1965).
the codification of existing case law in areas untouched by existing statutes, is to be avoided;
“codification”
is the attempt to state enough of the substantive law in statutory form to give a reasonably adequate picture of its scope and the details of its provisions without extended reference to case law.6

An “over-all revision” is sometimes referred to as “reform”.7 The term “systematization” has also been employed.8 But whatever the name of the game, this seems to be the time for revision. A recent survey shows that twenty states are in the process of revising their penal code or procedural code, or both; four others are about to begin revision and thirteen have recently revised one code or the other.9 In addition, a National Commission


7 Remington, supra note 5 at 1, n. 1; Senator McClellan, in a report submitted in connection with the National Commission on Reform of Federal Criminal Laws, stated:

The administration bill (H.R. 13548) would have created a Criminal Law Revision Commission. H.R. 15766 contemplates a Criminal Law Reform Commission, which would not be limited to recodification or revision, merely restating existing laws and limiting disparities, but would itself determine where its attention will best be focused after having had an opportunity to review the entire spectrum of the criminal laws, including also the possible codification of case law where needed to modernize the system.


8 Cohen, supra note 4 at 255, 267, 270; ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE xviii-ix, [hereafter cited as MODEL PRE-ARRAIGNMENT CODE (1966).]

9 According to a countrywide survey made by the writer, as of April 20, 1967, eleven states were revising both their penal code and code of criminal procedure: Colorado, Connecticut, Georgia, Idaho, Iowa, Kansas, Maryland, Michigan, Ohio, South Carolina and Washington; six states were revising their penal code: California, Delaware, Maine, Montana, Pennsylvania and Texas; three states were revising their code of criminal procedure: Missouri, New York and Wisconsin; four states were proposing revision: Indiana, Kentucky and Oregon of the penal code and Hawaii of both codes; thirteen states have revised one or the other code within the last five years: Alaska, Florida, Louisiana, Maine, Montana, Nevada and Texas, the code of criminal procedure; Illinois, Minnesota, New Hampshire, New Mexico and New York, the penal code; and West Virginia, both codes. See Robinson, Revisionists of the States Unite, 5 AMER. CRIM. L.Q. 178, 180 (1967). At the end of 1967, “22 states were engaged in either overall or limited constitutional revision activity.” N.Y. Times, Jan. 31, 1968, §1 at 18, col. 7. Professor Frank B. Baldwin III, of the
for the Reform of Federal Criminal Laws has been formed\textsuperscript{10} and there is some interest in another look at the Uniform Code of Military Justice.\textsuperscript{11}

Moving forces for such a surge of revision must certainly include the American Law Institute’s Model Penal Code and Model Code of Pre-Arraignment Procedure, the American Bar Association subcommittees on minimum standards for criminal justice, and the Report of the President’s Commission on Law Enforcement and Administration of Justice. Another such force must be seen in the ever-increasing number of United States Supreme Court and state court opinions discovering, recognizing or expanding the rights of a defendant, and thereby deciding many of the policy questions with which the legislatures have so far failed to grapple. The increasing incidence of crime and particularly the publicity given court decisions as a relevant factor in the control of crime have also played a part. In addition, many of the codes under revision have passed their hundredth birthday not having been substantially revised since the state entered the Union. Until the adoption of the criminal code of Louisiana twenty-five years ago, there had been almost no “over-all reform of the substantive criminal law” and until the adoption of the Illinois code of criminal procedure in 1963, there was no completely revised procedural code.\textsuperscript{12}

This movement toward revision has paralleled the accumulation of empirical data about the criminal justice system. Notable in this service are the various studies by the American Bar Foundation and the studies being

\textsuperscript{10} See note 7 \textit{supra}; See also 3 \textit{Cr. L.} 2414 (1968).
\textsuperscript{11} \textit{N.Y. Times}, May 18, 1967, §1 at 3, col. 1.
\textsuperscript{12} Remington, \textit{supra} note 5 at 3.

A traditional legislative response to difficult issues has been either to deal with them by an overly generalized statute as is the case with respect to gambling, or not to deal with the issue at all, which has been the case, until recently at least, with respect to stopping and questioning suspects.

\textit{The President’s Commission on Law Enforcement and Administration of Justice. Task Force Report: The Police 18 (1967), [hereafter cited as Police Task Force Report].} This has been true especially of pre-arraignment procedures. What was said over 30 years ago is still true:

[C]ourt procedure deals with a relatively small number of the total criminal cases. The Criminal Justice surveys made in several states disclosed that the chief failure of our machinery of criminal justice occurs at the very beginning. . . . It is rather the matter of administration that needs attention; the personnel, equipment and methods of the police, the prosecuting attorneys and court officials. These matters have largely hitherto escaped attention.

\textit{Lindsey, Legislation on Crime in Twenty-five Years, 24 J. Crim. L., C. & P.S. 109, 116-17 (1933).}
fostered by a growing awareness of mutuality of interest between behavioral scientists in the making and operation of legal controls and law reformers in the behavioral science.\textsuperscript{13}

Though the time is ripe for long strides toward law reform and though there is now a wealth of legal and behavioral material never before available to law revisors, evidently the pattern has changed little from the "horse and buggy" operations of a bar association committee or part-time law teacher responsible for the codes now in existence.\textsuperscript{14} Even where it is recognized that "changes in our code have been made without reference to general principles or to the problem of maintaining a consistent and rational system"\textsuperscript{15} and where a formal decision is made "to identify and consider fundamental policy issues and resolve them by changing existing law,"\textsuperscript{16} the limited perspective of those usually controlling policy considerations frequently makes realization of such objectives illusory.\textsuperscript{17}

\textsuperscript{13}See the President's Commission on Law Enforcement and Administration of Justice, \textit{The Challenge of Crime in a Free Society, A Report}, Appendix B, 313-25 (1967), [hereafter cited as \textit{President's Commission Report}], for the number of social scientists of various disciplines employed in the project. Some of the most interesting work will be found in the field reports filed by social scientists.

\textsuperscript{14}From the information gathered by the survey, \textit{supra} note 9, it appears that nine states have appointed a law professor to draft the code, usually as reporter to a committee of lawyers and judges; in seven instances it is the legislative or judicial council which is directly charged with the task; in four cases it is the bar association and in three a special commission created by the legislature. New York probably has the most elaborate set-up, having appointed a temporary commission with the right to hold public hearings, an annual budget of over $150,000, a staff of two full-time lawyers, a lawyer employed part-time for special research and drafting, and three secretaries. A typical effort includes a round table of judges, lawyers (defense and prosecution), perhaps law enforcement officials and occasionally in a far-out effort, a consulting sociologist. The composition of the committee usually represents an attempt to make it politically palatable, by sprinkling it with a few pro-defense and pro-prosecution people. Although this makes for a good political compromise at the beginning, it makes unlikely a systematic reform at the end. For such a tale with a relatively happy ending, see Platz, \textit{supra} note 6 at 352, 355. For the composition of committees, see Platz, \textit{supra} note 5 at 28 n. 1, Keeton and Reid, \textit{Proposed Revision of the Texas Penal Code}, 45 \textit{TEXAS L. REV.} 399, 408-411 (1967). \textit{Compare with Conway, Making Research Effective in Legislation}, 1967 Wis. L. Rev. 252, 259.

\textsuperscript{15}Keeton and Reid, \textit{supra} note 14 at 402.

\textsuperscript{16}Id. at 406.

\textsuperscript{17}Preparatory to revising the Texas Penal Code, the staff of the State Bar Committee solicited recommendations from interested lawyers, judges and district attorneys.

With few exceptions the recommendations fall into the following categories: 1) Consolidation of certain offenses (theft being the most common); 2) relaxation of certain rules of evidence (\textit{e.g.}, corroboration); 3) imposition of longer terms of imprisonment and measures to assure longer terms actually spent in prison; and 4) the raising of certain offenses from misdemeanors to felonies.
The need for such formalized delineation of principles has been disputed seriously. One may argue that the American legal heritage is one of ongoing supplementation, case by case, brick by brick, giving a dynamic elasticity to our law. Yet to the extent this is so, it does not always result from deliberate legislative choice but rather from legislative inability to agree on such principles, or reluctance even to consider the need for them. Traditionally it has been left to the police to evolve a system of operative criminal justice and to the courts to define the limits of permissible activity. The increasingly legislative role of the United States Supreme Court is attributable largely to the failure of the police, the state courts and particularly the legislature to control their own destiny and that of their state.

So long as revision remains unstructured and limited to amendments to existing law in a perpetual attempt to "keep-up" with the Supreme Court, this situation will persist. Such a legal marathon not only is costly and wasteful of legal talent but also prolongs the unfortunate reversal of roles in which the Court makes the political decisions and the legislature tidies up afterward. While it is the function of a court to evolve the individual


See Remington, supra note 6 at 406.

The Court, of course, is cognizant of this role. Mr. Justice Harlan, concurring in Terry v. Ohio, 36 U.S.L.W. 4578 (June 10, 1968), observed that "what is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land. . . ." For the structure this has taken, see Robinson, Police and Prosecutor Practices and Attitudes Relating to Interrogation As Revealed by Pre and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply, 1968 Duke L.J. 425, 452-474, 471-473 and 493-499. Perhaps the most succinct statement of this Supreme Court-legislative juxtaposition is found in Packer, Policing the Police, Nine Men are not Enough, The New Republic, Sept. 4, 1965, 17, 18-19. The proper place of the legislature has been assigned recently by the Wisconsin legislature itself in its structure of the Executive Branch. The "Declaration of Policy" stated:

The "republican form of government" guaranteed by the U.S. constitution contemplates the separation of powers within state government among the legislative, the executive and the judicial branches of the government. The legislative branch has the broad objective of determining policies and programs and review of program performance for programs previously authorized, the executive branch carries out the programs and policies and the judicial branch has the responsibility for adjudicating any conflicts which might arise from the interpretation or application of the laws.

Wis. Stat. §15.001(1) (1967).
pieces of the legal puzzle, it is for the legislature to bring them together into a coherent whole, to discard the pieces that do not fit, and to construct new pieces where necessary. The most eloquent proof that a modest effort may be more costly than a full-scale revision is found in Wisconsin's limited revision of the criminal procedure code, representing four years of labor but now again in need of revision.  

The kind of changes least likely to work are the kind most likely to be suggested by the socially conscious, nonradical observer — middle range changes, so to speak, designed to achieve special and isolated ends, suggested without recognizing the interrelationships of the various levels of the criminal justice system. Such efforts at isolated change will almost certainly be neutralized, for the system will compensate in such a way as to approximate the quality of justice to which society has become accustomed.

B. Principles Underlying Revision

Allowing that there may be advantages to a code which adheres to predetermined guiding principles in order to attain consistency and rationality, the skeptic may fairly ask not only that those principles be defined but also that the expected benefits from their application in a state such as Wisconsin be specified. This article is an effort to supply answers to these questions.

The guiding principles of the proposed code (hereafter referred to as

20 See Platz, supra note 5 at 29 for the original objectives of the Code.
22 Remington, supra note 6 at 397-98; Remington, A Proposed Code for Wisconsin, 20 U. KAN. CITY L. REV. 221 (1952). The argument for police guidelines is strengthened by the conclusion that judges are thought to require them. Code of Judicial Ethics, 36 Wis.2d 252, 153 N.W.2d 873 (1967). Judge Edwin M. Wilkie, state court administrator, said of the newly enacted code that it represented an important milestone in the administration of justice in Wisconsin. . . . The Code sets forth rules and standards which are helpful to the court administration in reviewing the judicial performance of all of our judges. . . . Without specific rules and standards, it would be difficult for judges to conform their conduct to proper custom and practice.
Milwaukee Journal, Nov. 26, 1967, Accent section at 1, col. 3.
Two preliminary problems were considered by the revision committee: should the Code be drafted in the form of rules of court to be promulgated by the Wisconsin Supreme Court or should it be drafted in statutory form to be submitted to the legislature? Secondly, to what extent, if at all, should a code of criminal procedure be concerned with ordinance violation?

Rules of court may be adopted by and modified by the Wisconsin Supreme Court while statutes must pass through the more politicized legislative process. The chance of a code thus retaining its integrity as a whole is much more likely in the former circumstance than in the latter. The alternative of court rules was rejected for several reasons, however. The enabling authorization for revision issued from the legislature; it was natural to return the product to the legislature for promulgation. It is also questionable whether the state Supreme Court would have authority to regulate direct non-court procedures, such as arrest without a warrant and police custody of the suspect.

Moreover, there is little precedent for such activity on the part of the Wisconsin Supreme Court. Pursuant to Sec. 3, Art. VII of the Wisconsin constitution, a statute, Wis. Stat. §251.18 (1967), authorizes the Supreme Court to modify or suspend, by rule, all statutes relating to "pleading, practice and procedure in judicial proceedings in all courts, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits." In re Constitutionality of Statute Empowering Supreme Court to Promulgate Rules Regulating Pleading, Practice, and Procedure in Judicial Proceedings, 204 Wis. 501, 510, 236 N.W. 717, 720-721 (1931) upholds the statute against the constitutional attack that it was an unlawful delegation by the legislature of its legislative function. To date, in only five instances has the court used its power to promulgate rules relating to criminal procedure: 212 Wis. xi (now Wis. Stat. §957.16); 214 Wis. vii (now Wis. Stat. §955.07); 236 Wis. vi (now Wis. Stat. §957.14); 25 Wis.2d ix (now Wis. Stat. §956.03(3)); most recently, 34 Wis.2d v. (now Wis. Stat. §256.55), a rule that, "with certain exceptions, all testimony in all courts of record in every action . . . shall be reported" beginning January 1, 1968. Another consideration in connection with court rules is the delicate position of a court called upon to defend from constitutional attack rules it has promulgated. In an instance where this occurred, the court was undeterred by false modesty in declaring that the language of the statute, §955.07, "is plain and unambiguous." State v. Selbach, 268 Wis. 538, 540, 68 N.W.2d 37, 38 (1955). [Research aid: Marquette University law student, now attorney, Tod O. Daniel.] A system that would take advantage of both legislative and judicial attributes would involve formulation by the legislature of generalized rules of the type suggested by the proposed Code, which could be detailed and modified by the court in response to changing and local conditions. Chief Judge Lumbard of the Second Circuit Court of Appeals, at a conference of chief justices in August 1967, suggested that state supreme courts be empowered "to draft and promulgate rules of criminal procedure as the Congress has empowered the Supreme Court to do." 1 Cr.L. 2257 (1967). See Sutton, supra note 17 at 1019-20.

If we solve the second preliminary problem of ordinance violations by including them in a code of criminal procedure, there is perhaps some semantic inconsistency. However, it became obvious that their exclusion would leave many questions unanswered, particularly in instances of arrest and custody where the police officer is presented with a factual situation which does not resolve itself easily into facile legal classifications. Ordinance violations involve a lesser culpability, a more moderate penalty and little stigma. It was decided
invited to scan the present Arrest and Examination chapter of the Wisconsin code of criminal procedure (chapter 954). Try to determine from this reading the law governing the actions of the police, the district attorney and the judge on the one hand and the rights of the suspect and his attorney on the other. Attempt to reconstruct the path followed by the accused from his entrance into the criminal process until his initial appearance before a judge.24

The following were accepted as criteria for drafting a table of organization for the Code:

1. Procedures should be set forth logically and rationally so that a procedure is found in the place and order one would expect to find it. Procedures should, as far as consistent with the other listed attributes, follow the course of the criminal process.

2. Extraneous details not directly concerned with the day to day operation of criminal justice administration should be removed from the main part of the

to bring these violations within the code, treating them procedurally as misdemeanors.

Comments by John P. Howard, Chief of Police, city of Wauwatosa, Wisconsin, were especially helpful and illustrate the importance of the participation of law enforcement officials in code revision. He urged that the code include ordinance violations as they are presently included in §954.03. He added:

I believe the time has come to abandon the legal fiction that Ordinance cases are "civil." . . . The same requirements in pre-trial procedures should apply to Ordinance violations as to statutory crimes. A defendant convicted of theft in Municipal Justice Court faces 30 days in the House of Correction on default of payment of $100 fine. . . . If one of the objectives of your proposed draft is to insure due process of law to all persons accused of crimes (in the real meaning, as distinguished from a legalistic definition of "crimes") then the uses of Municipal Courts and Ordinances will have to be taken into account.

Letter from Chief Howard to the writer, February 1, 1967. Prior to 1949, ordinance violations were not covered by the code. In that year, §954.03 was amended to include them. See note 53 infra. THE HIGHWAY SAFETY ACT includes a uniform traffic citation and complaint but no separate arrest provisions. Wis. STAT. §345.11 (1967) and the MODEL PRE-ARRAIGNMENT CODE, supra note 8 at 1, recognize that "Many jurisdictions have special provisions governing arrest, summons and court appearances, in cases involving parking and minor traffic violations," and provide an exclusion clause.

24 See the court's attempt to do this in Pillsbury v. State, 31 Wis.2d 87, 92-93, 142 N.W.2d 187, 190-91 (1966).
Pre-Arraignment Procedure

code. The aim should be a smooth flow, almost descriptive in nature.
3. Matters should be grouped functionally so that, for example, an attorney may be sure that in checking the sections on pleadings he will find all procedures relating to pleading.
4. The obligations and duties of each legal actor at the various stages of the criminal process should be apparent.

These general objectives may be translated into several more specific organizational adjustments to be made in the existing code:

a. All matters properly within a code of criminal procedure should be found in one place. Therefore matters in statutes outside the Code, but appropriate to criminal procedure, should be brought within the confines of the Code.
b. Matters within the present code which are not properly matters of criminal procedure should be deleted.
c. Sections describing special or rarely used procedures should be separated from the main body of the code; for example, provisions concerning forfeiture of bail, Wis. Stat. 954.30-954.33, are to be placed in proposed chapter 974, Special Proceedings.25
d. Areas of the law which are not now statutory should be made statutory where this is appropriate; for example, felony arrest, or discovery procedures making prosecution evidence available to defendant’s attorney.
e. Areas of the law which are partly statutory, such as post-conviction remedies, should be made entirely statutory.

25 The Wisconsin Code of Criminal Procedure presently occupies chapters 954 through 966 of the Wisconsin Statutes. Although the Code was to occupy chapters 967 to 975, and has been so enumerated in the table of organization, most of the discussion to follow will deal with chapter 969, the arrest chapter. In citing the sections of the present and proposed Code in the text, the section number itself will be cited without further elaboration.
f. Statutes which appear ambiguous or incomplete should be amplified and detailed; for example, the arrest to magistrate cycle.

g. New procedures securing constitutional rights should be detailed; for example, provision of counsel to the indigent before trial, or in-custody protections for the suspect.

h. Uniformity of civil and criminal courtroom procedure should be sought where this is feasible.  

The result should be a smooth, chronological movement providing the suspect's attorney, district attorneys, judges and other code "consumers" with a useful tool in their day to day labor. Surprisingly little has been written on criteria for the organization or attributes of a code, perhaps because such commentary is usually prepared afterwards and subordinated to explanation of the reasons for the code provisions themselves. But at the very least one may say that the code's first function is to instruct these actors on how to proceed. The following Table of Organization with detailed provisions relating to custody is presented to suggest the usefulness of this approach:

**TITLE XLVI**

**CRIMINAL PROCEDURE**

**CHAPTER 967 GENERAL PROVISIONS**

967.01 Rules of Construction.
967.10 Application of the Code.
967.20 Terms and Jurisdiction of Court.
967.30 Definitions.

**CHAPTER 968 PRE-CUSTODY PROCEDURES**

968.01 Investigation of Crime.
968.10 Process.
   (a) Warrant.
   (b) Summons.

---


27 Among these other "consumers" may be counted law enforcement officers, "jailhouse" lawyers, law students, and an occasional civilian who may have heard that ignorance of the law is no excuse.

28 Regardless of the ultimate ends of organization listed above, initially the objective of a table of organization is to provide a means for organizing the work of writing the Code and the reader may judge it accordingly.
CHAPTER 969  CUSTODY AND DISPOSITION OF THE PERSON IN CUSTODY

969.01 Authority to Take a Person into Custody.
   (1) Authority to Take into Custody Without a Warrant—Felony.
   (2) Authority to Take into Custody without a Warrant—Misdemeanor or Ordinance Violation.
   (3) Notice to Appear after Taking into Custody.
   (4) Release of Person.

969.03 Authority to Take into Custody a Person Unable to Care for Himself.
   (1) Conditions under which Custody is Permitted.
   (2) Disposition of Incapacitated Persons.

969.05 Notice to Appear in Lieu of or in Connection with Taking into Custody without a Warrant.
   (1) Notice to Appear without Taking into Custody.
   (2) Procedure for Issuing Notice to Appear.
   (3) Notice to Appear in Place other than Court.
   (4) Regulations to Encourage Notices to Appear.

969.07 Circumstances Implying Custody.
   (1) Implied Restriction on Liberty.
   (2) Requests to Appear at Police Station.

969.10 Place of Taking into Custody: Private Premises.

969.15 Procedures on Taking into Custody: Use of Force.

969.20 Procedures on Ordering a Person to Stop: Warning.

969.22 Procedures on Taking a Person into Custody: Warning.

969.24 Prompt Taking to Police Station.

969.30 Preliminary Disposition of Persons in Custody: Warning.
   (1) Appearance before Station Officer.
   (2) Warning.
   (3) Printed Form to be Given.
   (4) Incapacity to Understand Warning.
   (5) Telephoning Rights.
   (6) Information Concerning Location of Persons in Custody.
   (7) Information Concerning Custody Decisions.

969.32 Disposition of Persons Taken into Custody.
   (1) Alternative Dispositions.
   (2) Order for Screening in Certain Cases.
   (3) Duration of Period of Screening.
   (4) Disposition at end of Period of Screening.
   (5) Refusal of Complaint.

969.40 Stationhouse Bail.

969.50 Disposition of Person in Custody — Prompt Production Before a Judicial Officer.

969.55 Perpetuation of Interrogation by Written Records and Sound Recording.
   (1) Obligation to Make Records Relating to Periods of Custody.
   (2) Written Records.
   (3) Sound or Written Recording of Interrogation.
   (4) Access to Records.
969.60 Conditions of Investigation of a Person in Custody.
   (1) Warning at the Outset of Interrogation.
   (2) Deception as to Cooperation.
   (3) Deception as to Facts or Conditions.
969.70 Access to Counsel and Consultation Rights.
   (1) Access to Counsel — Indigents.
   (2) Access to Counsel — Non-Indigents.
   (3) Access of Counsel to Client.
969.75 Records to be Maintained by Station Officer.
969.80 Duty of District Attorney and Attorney General to Issue Regulations.
   (1) District Attorney to Prepare Regulations Implementing Code.
   (2) Attorney General to Aid District Attorneys.
   (3) Public Documents.
969.90 Violations of the Code: Exclusion of Evidence.

CHAPTER 970 PROCEEDINGS BEFORE TRIAL
970.01 Initial Appearance before Judicial Officer of Performance in Custody.
   (1) Filing of Reason for Charging with Court.
   (2) Advising the Person in Custody.
   (3) Printed Form to be Given.
   (4) Further Proceedings to Await Appointment of Counsel.
   (5) Summary Trial of Some Cases.
   (6) Judicial Officer to Decide Release Question Promptly.
   (7) District Attorneys to Promote Release of Persons in Custody.
970.10 Complaint.
970.15 Issuance and Filing of Complaints.
970.20 Initial Appearance before Judicial Officer of Persons not in Custody.
970.25 Preliminary Examination.
970.30 Information.
970.35 Arraignment.
970.40 Guilty Pleas.
970.45 Defenses.
970.50 Pleadings.
970.55 Motions.
970.60 Discovery.
970.65 Aid to the Indigent Accused.

CHAPTER 971 TRIAL
CHAPTER 972 POST-TRIAL PROCEEDINGS
CHAPTER 973 EXTRAORDINARY REMEDIES
CHAPTER 974 SPECIAL PROCEEDINGS
CHAPTER 975 FORMS
CHAPTER 976 MISCELLANEOUS
II. Custody and Disposition

A. Sketch of Custody and Disposition Chapter

The chapter on custody and disposition was drafted to achieve these objectives:

1. to isolate, clarify and rationalize points of decision-making required of the police;
2. to delimit the exercise of police authority over the individual, maintaining only that necessary to attain the desired result;
3. to provide legislative answers to the most crucial policy questions;
4. to provide a flexible framework within which local authorities may work;
5. to provide just enough local and central control to ensure that the Code is properly implemented.

One of the advantages of drafting a code as compared to drafting a section this year and another section another year is that a code should and may have a "rationalizing principle." The "rationalizing principle" which forms the underpinning of this chapter may be stated as follows:

Curtail the liberty of the individual only where it is reasonably necessary and hence rationally related to the accomplishment of some clearly defined purpose of law enforcement which could not otherwise be attained.30

30 Subjects not covered by the draft chapter relating to custody include: pre-custody procedures such as stop and frisk; questions relating to search, warrant, summons, details of bail procedures; definitions of terms such as "law enforcement officer"; and sanctions to require code performance. The sections of the Code set out in the Table of Organization but which are not drafted yet and are not commented on here include: Chapters 967, 968, 971, 972, 973, 974, 975, and 976 and also Sections 969.10, 969.15, 969.40, 969.75, 969.90 and 970.60.

This is suggestive of the German principle of proportion whereby a person may not be taken into custody if to do so would be disproportionate (1) to the significance of the case, (2) to the punishment to be expected, or (3) to the measure of prevention and reform likely to be imposed.

In reading this article and examining the proposed provisions, the reader should understand that the draft is preoccupied with the notion that the American system of criminal justice is almost completely felony-oriented. This means that procedures are organized around the approximate ten per cent of criminal charges called felonies and judged most serious by society. The Code was drafted not only to compensate but also to create a clear bias in the direction of lessening the burdens of the system for the lesser offender.31

Bearing in mind the principle stated above, we should also recognize two practical prerequisites to successful revision: police adherence to code provisions and Supreme Court acceptance of such "state experimentation".32 The following outline offers the best chance of fulfilling the rationalizing principle and meeting practical prerequisites:

1. Limitations on arrests of lesser offenders (969.01, 969.03, 969.05);33 provision of non-criminal procedures for those physically or mentally unable to care for themselves who would otherwise fall within the criminal process (969.03);

be found in American law with particular reference to the prohibition against cruel and unusual punishment of the 8th AMENDMENT to the UNITED STATES CONSTITUTION. See Weems v. United States, 217 U.S. 349, 367, 371 (1910); Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1074 (1964); Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 HARV. L. REV. 635, 640 (1966); Taylor, The Supreme Court, the Individual and the Criminal Process, 1 GA. L. REV. 386, 482-85 (1967); MUELLER AND WISE, INTERNATIONAL CRIMINAL LAW 565 (1965); Beccaria stated it in the following words:

Every punishment, which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. It is upon this then, that the sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpations of individuals; and punishments are just in proportion, as the liberty preserved by the sovereign, is sacred and valuable.

BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 7 (1767).

Preparation for processing offenders in future riots requires that some consideration be given that problem, as a way to reduce the workload as well as for legal or humanitarian reasons. In New York City "Plans call for different procedure for arrests made for different crimes; thus, cases involving serious crimes, such as arson or sniping, will be handled differently from those involving minor offenders such as curfew violators." 3 Cr.L. 2436 (Aug. 21, 1968).


33 The Draft Sections of the Code are discussed sequentially and set out in full beginning with §969.01 and §969.05 at 31-34.
2. Limitation on time that prisoners may be held before being brought before some judicial officer (969.24, 969.32, 969.50);

3. Protections during the time in police custody;
   a) detailed records are kept and are available to suspect and his counsel (969.75, 969.80(3));
   b) a record is made of all interrogation (969.55);
   c) counsel is available, if desired by the prisoner (969.70);
   d) rights of the prisoner to counsel and to remain silent are clearly and repeatedly made known to him in such a way that the choice to make use of these rights is truly his choice (969.20, 969.22, 969.30(2), 969.60(1));

4. More detailed guidelines or regulations for police will become available as experience with the system broadens (969.05(4), 969.80);

5. Information advising the police how to comply with the statutory rules, and means to determine if there is compliance (969.80).

The draft chapter on custody represents a measured delimitation of police power in accordance with the need. It must show through clearly that the Code is not just a formal, negative and thus passive adherence to constitutional imperatives but a studied, systematic attempt to resolve the apparent conflict between individual and law enforcement needs. The conditions in which a penal code is enforced should receive as much consideration as did the penal code which first designated the conduct as criminal and thus now subjects the individual to those conditions.

A prime objective of the Code is to identify and release at the earliest possible stage those persons who need not be taken into or retained in custody. This approach sifts large numbers of persons from the custody phase of the criminal process whose detention serves no purpose even from the police point of view. If a person's liberty is to be restricted whether for minutes or hours, that restriction must have a rational basis, and that basis must be found in a situational need.

Under the Code an officer having reasonable grounds to believe a felony has been committed may take the person into custody or may issue a
notice to appear (969.01(1), 969.05(1)). If the officer has reasonable
grounds to believe a person has committed a misdemeanor or an ordinance
violation, he must give a notice to appear — unless he reasonably believes
that the person will not be apprehended, will cause injury or property
damage if not taken into custody, or that the person cannot supply suffi-
ciently reliable identification. In these circumstances, the suspect may be
taken into custody (969.01(2)(b)). Special treatment is accorded persons
unable to care for themselves: intoxicated persons and those mentally or
physically disabled are to be taken home or to another appropriate facility
(969.03).

These procedures should permit a large proportion of misdemeanants
and ordinance violators to be given notices to appear eliminating the neces-
sity of an appearance at the station. Police will be able to deal with in-
toxicated persons without resort to the present revolving court door cycle.
Custody is applied only to those persons who are to be charged with serious
felonies or who cannot qualify as good risks for release without security
because there are grounds to expect that they will not appear in court.

Within two hours of the person’s arrival at the police station the station
officer must decide as to his disposition. If the station officer concludes
that the person has committed no crime, he is to be released outright
(969.32(1)(a)). For all ordinance violations and for misdemeanors
where the statutory penalty does not exceed six months’ imprisonment, the
station officer must issue a notice to appear or release the person on his
signed promise to appear, unless in the previous three years the person has
defaulted in a court appearance of some consequence (969.32(1)(b)).
For felonies and misdemeanors where the statutory penalty exceeds six
months’ imprisonment, the station officer may require bail in addition. The
choice, however, for these more serious offenses is to be exercised under
the direction of the district attorney and pursuant to regulations issued by
him (969.32(1)(c)). The maximum permissible detention may be ex-
tended to three hours on condition that the station officer reasonably be-
lieves that the additional time is necessary to obtain sufficient informa-
tion to charge the person with one of a series of named serious crimes.

Warnings are required at the time of arrest (969.24), at the time of
arrival at the station (969.30(2)) and at the time of initial questioning
(969.60(1)). Facilities are to be made available so that the arrested per-
son may communicate with the outside world (969.30(5), 969.70(3))
and he is to be informed how long he may be held in custody
(969.30(2)(a), 969.60(1)(a)).

No criteria are provided for determining when a person has “knowingly
and intelligently” waived constitutional rights of silence and of counsel.
Provision is made, however, for preserving any interrogation about the
crime by means of a sound recording or stenographic transcript (969.55
(3)). The record of such interrogation and all other records required to
be kept by these sections are available to the defendant or to his attor-
ney (969.55(4), 969.75). These sections are aimed at reducing the com-
pulsive atmosphere of the police station in accordance with constitutional requirements: first, by providing adequate warnings of rights; second, by recording these steps so that a subsequent determination of compliance may be made without swearing contests; and third, by opening the police process to reasonable inspection.

The conditions under which the law enforcement officer may take a person into custody are general and serve as guidelines rather than restrictions; the details for assuring that, after due warnings, any waiver of rights is the result of intelligent understanding are left open. Many details cannot and should not be minutely set forth in legislation which may be politically difficult to modify. At the same time it is important that police have guidance in matters involving more legal interpretation than police administration. Therefore an obligation is placed on the district attorney to provide regulations or guidelines to implement Code provisions applicable to the police and to modify them in accordance with changing statutory and case law (969.80(1)). In order to encourage uniformity of procedure throughout the state the attorney general is to issue guidelines which may be utilized by the local district attorney (969.80(2)).

The attorney general may suggest that certain statistical information be collected by local district attorneys and law enforcement officials, which is then made available to the office of the attorney general for compilation and distribution. The attorney general is to make recommendations to the executive and to the legislature for the improvement of criminal justice (969.80(2)).

Although no provisions have been drafted to sanction violations of the Code, it is conceived that parties injured by failure of police to conform to statutory provisions may, among other possibilities, obtain injunctive relief to require mandatory adherence (969.90).

**B. Taking Persons into Custody**

In attempting to define its objectives carefully the Code is perhaps unique, but there is little in its provisions which may be called "revolutionary." The proposed chapter on custody and disposition has borrowed generously from both the 1966 and 1968 drafts of the American Law Institute Model Code of Pre-Arraignment Procedure and the American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Pretrial Release and Providing Defense Services. That considerable changes were necessitated by Wisconsin conditions well illustrates the interplay between model codes and state legislation. A special effort was made to follow established Wisconsin law and practice.

---

34 Space limitations make impossible a full exposition of each Code Section. Therefore, those Sections have been selected for full discussion which are essential for an understanding of the integrated nature of the Code. Sections not considered in the article appear in the Appendix and are followed by brief explanatory notes.

35 See Remington, supra note 5 at 7-10.
Nonetheless, within the revision committee there was considerable opposition to these provisions. It was argued that the chapter restricted the police too much; basically they should be permitted to run their own affairs. The chapter was an attempt, it was said, to write a "police manual." If there is any single point which caused the project to founder, it was the Code's proposed approach to custody and disposition.

Contrary to the argument that the detailed nature of the custody provisions would be objectionable to law enforcement officials, there is ample complaint by police commentators not that the present law of arrest gives them too much direction, but that it gives too little. If police are to conform to applicable legal rules, the rules must be precise, clear and realistic.

1. Wisconsin Law and Practice

The Wisconsin law of arrest in case of misdemeanor or ordinance violation is singular in restricting custody to situations where detention seems required by circumstances at the scene or by the characteristics of the person to be taken into custody. According to present Section 954.03, an "arrest" without a warrant is

---

36 For a discussion of this point of view, see Robinson, supra note 19, at 499-506.
37 In submitting the Code to several police officials, not only did they not raise the question of too much detail, but the comment was uniformly favorable. On the ambiguity of the laws of arrest, see Remington, supra note 5 at 12. The same is true of British laws of arrest from which ours derive. Police testified before a Select Commission . . . that "they did not want alteration of the laws in order to secure increase of power for the police, but they showed the necessity of altering laws in order to regulate and define police powers and to secure them from criticism.

REITH, BRITISH POLICE AND THE DEMOCRATIC IDEAL 160 (1943). Ironically, this policy void is unfilled due "largely to the real doubts possessed by the police as to the propriety of their assuming a policy-making role that so closely parallels the legislative function." Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 Mich. L. Rev. 1123, 1127, 1129, 1133 (1967), citing the Police Task Force Report, supra note 12, Chapter 2. New York Police Commissioner Howard R. Leary recently proposed that "the State Legislature draw up guidelines on what behavior should be tolerated in protest demonstrations and what should result in arrests and prosecution on criminal charges. The Commissioner said that specific definitions would 'help both citizens and the police' in situations of violence, pilfering and destruction of property." N.Y. Times, July 31, 1968, at 24, col. 2.

38 In fact the statute has been selected as a model by the "model" codes. See MODEL PRE-ARRAIGNMENT CODE, supra note 8 at 107, 224, where the Wisconsin section is taken almost verbatim, Section 3.01 at 12; and American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, Section 2.1 at 11 and Section 3.3 at 13 (1968), [hereafter referred to as Pretrial Release Standards], and DISTRICT OF COLUMBIA CRIME LAW, P.L. 90-226, Section 397(b). 1 U.S. CODE CONG. & ADMIN. NEWS 818 (1967).
lawful whenever the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor or has violated an ordinance and will not be apprehended unless immediately arrested or that personal or property damage may likely be done unless immediately arrested.\textsuperscript{39}

The Section sets forth the conditions under which "arrest" is "lawful", thereby implying that arrest under other conditions is "unlawful". Yet the officer is given no indication what procedure he is to follow when he does or does not take a person into custody.\textsuperscript{40} Nor do we know exactly what the Section seeks to accomplish, although one may infer that the aim is to reduce the number taken into custody by reference to circumstances such as danger of escape from prosecution or danger to public security. To clarify this ambiguity it will be helpful to consider the history of arrest briefly and then the Wisconsin practice in light of that history.

Common law arrests without warrant for misdemeanors were allowed only where a breach of the peace was committed or was about to be committed in the presence of an officer or when the offender was attempting to escape.\textsuperscript{41} Requiring that arrest take place when the officer has per-

\textsuperscript{39} The Section continues:

This subsection is supplemental to §62.09(13) and shall not in any way limit any powers to arrest granted by that section.

The sentence was added after Allen v. State, 183 Wis. 323, 197 N.W. 808 (1924) which stated that §62.09(13) merely restated the common law of arrest without a warrant so that "found ... violating any law of the state or ordinance of such city continued to mean that the act, leading to the arrest, must be committed in the presence of the officer. Thus, to the extent that the common law power of arrest was greater than that given by the statute, the officer has this additional power." In most instances the statute permits more extensive power to arrest than does the common law. Cf. Mich. Comp. Laws §780.51 (1948) which combines felonies, misdemeanors, and ordinance violations for purposes of allowing police to take a suspect into custody without a warrant. Additionally, it does not include the Wisconsin requirement of likelihood that the suspect will not be apprehended unless immediately arrested or that property damage will occur.

\textsuperscript{40} Thus, there is no authorization for the officer to issue a citation. The present code does not even contain a direction that the suspect arrested without a warrant be brought before a magistrate. Such direction is found in various other places in the statutes. See note 139 infra, §954.47 and Pillsbury v. State, 31 Wis.2d 87, 92-94, 142 N.W.2d 19-91 (1966).

\textsuperscript{41} Halsbury, Laws of England 345 (3rd ed. 1955); Allen v. State, 183 Wis. 323, 332-33, 197 N.W. 808, 811 (1924); Bohlen and Shulman, Arrest With and Without a Warrant, 75 U. Pa. L. Rev. 485-90 (1927), Hall, Police and Law in Democratic Society, 28 Ind. L. Rev. 133 (1953). Compare §62.09(13)(a), where the police officer shall arrest with or without process ... every person found in the city in a state of intoxica-
sonal knowledge of the offense meant that a person would be taken into custody only when his guilt was evident. Limiting an arrest to situations where acts are committed in the officer's presence also meant that there was nothing to "arrest" if all criminal action had ceased by the time of the officer's arrival.

Under ancient European law, where a person is caught in flagrante delicto committing a serious felony or an offense involving violence or damage to persons or property he could be physically removed. This was done not as a jurisdictional step in a process but as a necessity called for by the particular circumstances. In the case of misdemeanors the appar-

\[\text{42 Remington, The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General in Police Power and Individual Freedom 18 (1962). Section 70.30 of the Proposed New York Criminal Procedure Law (1967) makes the notice to appear mandatory for "petty offenses" where they occur in the officer's "presence." This is the same as the prior law. See staff comment, Id. at 102. It is there stated:}\]

The "in the presence" requirement is, however, retained for petty offenses. It does not seem advisable to authorize police arrests for very minor offenses on hearsay, and a summons is undoubtedly a more appropriate method of requiring the defendant to answer such a charge when the offense was not committed in the officer's presence. Even when such an offense is committed in the officer's presence, it is hoped that service of an appearance ticket rather than arrest would be the usual procedure. [Emphasis supplied]

\[\text{43 The original meaning of "arrest" is "to stop" the person, "to stay," L. restare — from re, back, and stare, to stand. SKEAT, A CONCISE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 26 (1965). In other words, it is to hold him in place in order to obtain the information necessary to make a further decision of what to do with him. See Robinson, supra note 30 at 229-31, 238. In Stittgen v. Rundle, 99 Wis. 78, 74. N.W. 536, 537 (1898), a Milwaukee policeman was informed that plaintiff had committed a breach of the peace. The Court, in upholding the plaintiff's verdict for false imprisonment, stated:}\]

There is no pretense or claim that respondent, at the time of his arrest, was doing any act that would justify his being taken into custody. The act complained of had been committed some 20 or 30 minutes previous to the arrest, and not in the presence of the officer who made the arrest.

\[\text{44 Allen v. State, supra note 39. In the statute governing powers and duties of sheriffs, §59.24, there is mentioned "the apprehending or securing any person for felony or breach of the peace." Such language is taken directly from the common law. See also §964.30(5) where the Uniform Act in Close Pursuit limits pursuit by peace officers across state lines to persons suspected of having committed a felony.}\]

\[\text{45 As the police power to arrest has evolved from the common law right to arrest in}\]
ent guilt of the offender gave the officer the right to intercede but not the
right to take the person into custody unless there was a specific need for
such action. The right to stop the person and the right to take the person
into custody were separate actions and whether the matter should be pur-
sued criminally was a separate decision left to the prosecutor or magis-
trate. At the scene the officer would obtain sufficient identifying infor-
mation concerning the accused so that he could seek either a warrant or
a summons or report the information to the prosecutor or magistrate for
decision as to prosecution.

This system is still substantially followed on the Continent. But in the
United States for the most part such a functional use of custody virtually
disappeared with the trend from arrests by warrant to arrests without war-
rant. In Wisconsin, on the contrary, this functional use has been re-
tained in principle. The concept was enunciated in Gunderson v. Strue-
bing, and followed in Allen v. State:

It is the general rule of the common
law that no arrest can be made without a
warrant except in cases where the ends
of justice would be defeated without it.
For public reasons, therefore, in some
cases, the personal security of the citizen
is subjected to the liability of being ar-
rested without warrant, but the right thus
to arrest must be confined to cases of
strict public necessity. In Stittgen v. Run-

46 See LAFAVE, supra note 45 at 5-6. The decision that the officer is called on to make
here is not whether the individual should be prosecuted. His choice is between
custody and issuing the suspect a notice to appear. For a discussion of authority
for the officer to withhold prosecution, see LAFAVE, supra note 45 at 72, 493,
508. For the district attorney’s discretion to prosecute, see Id. at 23-26.
47 Robinson, supra note 30 at 229-40, 251-58.
48 See note 45 supra. The vast majority of arrests in the United States are now made
without warrant. WALD AND FREED, BAIL IN THE UNITED STATES: 1964, 71 n. 5
(1964); Remington supra note 42 at 13; LAFAVE, supra note 45 at 169. LaFave
comments:
The [statute] which defines when a peace officer
can make an arrest has developed with almost
no concern with whether the taking of imme-
diate custody is necessary.
49 125 Wis. 173, 179-80, 104 N.W. 149, 151 (1905).
50 See note 39 supra.
An arrest without a warrant has never been lawful except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in the presence of the officer.

The court has declared recently that "as a matter of policy" the authority of a private person to arrest for a misdemeanor "should be limited to instances where the public security requires it, that is, to acts which involve, threaten or incite violence."51 This should limit an officer's arrest authority as well.

The case law was codified in 1943:

An arrest by a peace officer without a warrant for a misdemeanor is lawful whenever the officer has reasonable grounds to believe that the person to be arrested has committed a misdemeanor and will not be apprehended unless immediately arrested or that further personal and property damage may likely be done unless immediately arrested.52

The Section was expanded to its present form in 1948.53 Wisconsin's statute substantially follows the common law practice of taking a person into custody only when the specific circumstances of the event call for such action. In some other jurisdictions it has been observed that even where the legislature has permitted an alternative of nonarrest, it has not been utilized.54 The law revisor, therefore, should be interested in learning how

---

51 See Stittgen v. Rundle, supra note 43 and Radloff v. National Food Stores, Inc., 20 Wis. 2d 224, 123 N.W. 2d 570, 571 (1963) for the rule of misdemeanor arrest by a person not a law enforcement officer.

52 Wis. Stat. §361.44 (1943).

53 Wis. Stat. §354.03 (1949). The most important changes involved the authorization to arrest for ordinance violations and the change in wording from "further personal and property damage" to "personal or property damage," thus permitting arrest even though no damage had occurred yet and where either personal or property damage was threatened. [Research aid: Marquette University law student, now attorney, David Werth.]

54 This is as true in Wisconsin as in other states. Wis. Stat. §954.02(4) authorizes the issuance of summons. The comment of the Advisory Committee for the 1949 Code revision states:
This section is based upon the Federal Criminal Rules Nos. 3 and 4. The use of a summons is also recommended by the American Law Institute. . . . This practice has been used in a
law enforcement officials have implemented Section 954.03, perhaps more particularly because the legislature provided neither a statement of clear intent nor instruction in operation.

Available resources did not permit a detailed survey of Wisconsin police procedures. Nevertheless, it was possible to interview a number of Milwaukee police officers and to examine the Milwaukee police department training guide as it treats arrest.\(^5\) Of course, the extent to which Milwaukee practice is representative of other cities or of the state as a whole is unknown.\(^6\) The purpose, however, is not to determine the exact practice but to examine police interpretation of present law in order to focus on problems posed in drafting a rational system which can be applied in the operative criminal process. The Milwaukee manual recognizes that the statutory law (Section 954.03) would authorize arrest for misdemeanors and ordinance violations not committed in the officer's presence, but it nevertheless recommends that the officer follow the "prevailing common number of other states, and is recommended as a desirable alternative to requiring an arrest to be made in every case.

Wis. Stat. §954.02. But a comprehensive field survey of the Milwaukee County criminal justice system from February 1, 1956, to the end of April 1956, as part of the American Bar Foundation's study, The Administration of Criminal Justice in the United States, Pilot Project Report Vol. V. at II-5, [hereafter cited as Pilot Project Report], observes that summons is "used infrequently, if at all, in Milwaukee County." See also Parnas, The Police Response to the Domestic Disturbance, 1967 Wis. L. Rev. 914, 942-943. But see note 60 infra. Statutory authorization for use of the notice to appear has been rare. LaFave, supra note 45 at 204 n.133 lists such statutes. The failure of legislatures to take a strong stand in favor of usage has contributed to, if it has not been principally responsible for, the paucity of the use of the notice to appear. Thus, the D.C. Crime Law, supra note 38, Title VII, Section 701 (i), is regressive. Although it authorizes citations in misdemeanors, at the same time it tells the officer to use this discretion with caution.

No citation may be issued... unless the person authorized to issue the citation has reason to believe that the arrested person will not cause injury to persons or damage to property and that he will make an appearance in answer to the citation.

Professor LaFave forcefully makes this point when he asks, "What kind of presumption do you start with?" Bail and Summons: 1965, 132 (1966). See text infra at 41-42. In California, an officer must give a citation in some vehicle misdemeanors and can arrest only if there is a refusal to sign the citation. Cal. Vehicle Code, Sections 40303, 40504 (West 1967).

As far as it could be determined, this guide represents an accurate description of Milwaukee police practice.

There are substantially fewer arrests in rural areas than in the cities. The American Bar Foundation study, supra note 54, initially intended a survey of rural arrest procedure but abandoned the attempt because arrests were found to be so rare. Of 37,097 "major crimes" committed in 1966, 24,354 were committed in metropolitan areas where about 50% of the Wisconsin population lives. Milwaukee Journal, Feb. 14, 1968, pt. 2, at 1. See also the Presidents' Commission Report, supra note 13, at 119.
law view”: arrest without a warrant only for a “breach of the peace committed in his presence.” The manual further instructs:

57 The manual nicely illustrates the police definition of arrest powers:

Arrest without Warrant in Misdemeanor Cases

1. As a general rule an officer should not arrest without a warrant for a misdemeanor violation unless it constitutes a breach of the peace.

2. As a general rule, an officer should not make an arrest for a misdemeanor or violation not committed in his presence.

3. Breach of the peace violations in the officer’s presence
   a. If an affray . . . the officer may arrest persons who he reasonably believes to have been participants — even though they were not so in fact.
   b. Violence is not necessary
      (1) The use of force — or threat of an immediate use of force (in a criminal manner) — is a breach of the peace.
      (2) Threats or uncomplimentary names directed at another may amount to a breach of the peace.

Other acts which the manual lists as breach of the peace are drunkenness in public, operating an auto while under the influence of intoxicating liquor, carrying a concealed weapon, prostitution, keeping a disorderly house, disturbing others as at a religious worship, forcibly tearing down public signs, agreeing to fight “even where no fight takes place,” noises amounting to a disturbance of the peace.

The next section describes §954.03 as permitting arrest “not in the officer’s presence” for misdemeanor violations. The manual continues:

4(b) Although state statute permits this type of arrest, the officer should attempt to follow the prevailing common law view, which is that an officer can arrest without a warrant only for:
   (1) Breach of the peace committed in his presence
   (2) Or, possibly where he has reasonable belief that a breach of the peace will be committed in his presence.

5. Arrest without a warrant for a misdemeanor must be promptly made or the officer thereafter can arrest only by procuring a warrant . . . .

Pilot Project Report, supra note 54 at 1-34 n. 73, observed:

The assumption which the police make in Milwaukee is that an arrest for a misdemeanor committed in the presence of the officer is valid apart from the consideration whether reasonable grounds exist to believe that escape or further damage will be done if arrest is not made immediately.

Milwaukee police also arrest “when the offender is a non-resident of the area within the jurisdiction of the officer on the scene,” LAFAVE supra note 45 at 22,
apparently because of the possibility of escape. See Pilot Project Report, supra note 54 at II-7. Compare Directive No. 124, issued June 4, 1968, by the Wauwatosa police department with the Milwaukee police manual:

SUBJECT: USE OF SUMMONS OR NOTICE TO APPEAR IN CERTAIN NON-TRAFFIC CITY ORDINANCE VIOLATION CASES

1. PERSONS OVER THE AGE OF 18 WHO ARE TO BE CHARGED WITH ANY NON-TRAFFIC CITY ORDINANCE VIOLATION SHOULD BE GIVEN SUMMONS TO APPEAR IN COURT OR TO REPORT TO THE DETECTIVES IN LIEU OF PHYSICAL ARREST WHEN THE FOLLOWING CONDITIONS EXIST:

A. THERE IS NO QUESTION ABOUT THE SUBJECT'S IDENTITY
B. SUBJECT IS A RESIDENT OF OR EMPLOYED IN THE METROPOLITAN AREA SO THAT HE CAN READILY BE LOCATED IF HE FAILS TO RESPOND TO SUMMONS
C. SUBJECT INDICATES A WILLINGNESS TO ANSWER THE SUMMONS OR REQUEST TO APPEAR
D. THERE IS NO LIKELIHOOD THAT THE SUBJECT WILL INJURE PERSONS OR PROPERTY IF NOT IMMEDIATELY TAKEN INTO CUSTODY
E. THERE IS NO INDICATION THAT SUBJECT IS UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, OR IS MENTALLY DISTURBED
F. ROUTINE CHECK SHOWS SUBJECT IS NOT WANTED ON OTHER CHARGES

* * *


* * *

7. THIS PROCEDURE IS NOT TO BE USED AS A SUBSTITUTE FOR POLICE WORK ON THE STREET. ITS PURPOSE IS TO
6. When the officer feels that an arrest without a warrant is not justified, he should advise the complainant to go to the office of the District Attorney or City Attorney and apply for a warrant.

7. When the violation does not involve a breach of the peace, the officer should not make a summary (immediate) arrest.
   a. Obtain information from the violator — name and address, etc.
   b. Instruct (order) him, the complainant, and necessary witnesses, to appear at your district or bureau for review by Commanding Officer.
   c. Following review, officer and persons involved go to city or district attorney and issuing magistrate if so ordered by Commanding Officer.

MINIMIZE THE TIME SPENT BY PATROL OFFICERS ON THEIR REGULAR SHIFTS FOR QUESTIONING AND PROCESSING ORDINANCE VIOLATORS AT THE STATION DURING OUR BUSIEST HOURS. SINCE NO FINGERPRINTING OR "MUG SHOT" IS PRACTICABLE UNDER THIS PROCEDURE, IT SHOULD NOT BE USED IN CASES WHERE SUBJECT IS BELIEVED TO BE INVOLVED IN FELONIES AND FINGERPRINTS AND/OR PHOTOGRAPHS COULD CONNECT HIM THEREWITH.

58 In practice, the "order in" apparently works at some variance with the scheme in the manual. A letter dated July 8, 1968, from Victor Manian, First Assistant District Attorney, Milwaukee County, stated:

"Order in" slips are used most often in misdemeanor cases which the officer did not witness. . . battery, disorderly conduct, indecent exposure, family trouble, etc. The suspect is usually ordered in directly to the office where the officer intends to take further action. In vice cases such as adultery, incest, lewd and lascivious conduct, the suspect and witnesses are given order in slips to the vice squad; in neglect, truancy, contributing charges, the suspect is ordered to the Youth Aid Bureau; traffic cases to the Traffic Bureau, etc.

Many order ins are to the First District Station, merely as a convenient meeting place because it is in the same building as the court and the city and district attorney offices. The "order in" itself is a white slip, about two and one-half inches by three and one-half inches in length, entitled: Milwaukee Po-
One police officer who was interviewed estimated:

Most patrolmen spend about 90 per cent of their time on traffic cases so custody isn't necessary. I'd say 10 percent of misdemeanors not committed in my presence and 25 per cent of those that are committed in my presence wind up taking the offender into custody.59

The police have thus filled the void left by the legislature; given that the legislature defined neither policy nor practice, they have done an excellent job.60 One might argue that this example of initiative supports the view

lice Department Referral Memo. The only direction is: "Report to as checked below" followed by a series of named bureaus and addresses, with a box next to each which may be checked. There are spaces for date, time and reason for appearance.

59 If the officer's estimate is accurate, the percentage of on-the-street release compares very favorably with the new release program in New York City, see note 196 infra. In connection with research for the Code, a number of Milwaukee police officers were interviewed during spring 1967, while they waited for their cases to be called in the office of the Milwaukee District Attorney. [Research aid: Marquette University law student, now attorney, Tom Bailey.] The Pilot Project Report, supra note 54 at 1-18, indicates that "offenses which occur in the presence of the officer are most likely to be minor ones, the commonest being traffic offenses and being drunk in public." Recent field research has divided police street patrol into "on-view" and "dispatched" situations and has found that the characteristics of these encounters are essentially different. Reiss and Black, Interrogation and the Criminal Process, 374 ANNALS 47 (1967).

60 Even though the Pilot Project Report, supra note 54, observed that the Wisconsin statutory authorization for summons was used infrequently, it was also found that the Milwaukee sheriff's department employed various devices to avoid taking a person into custody where it appeared unnecessary. One such means was to leave the officer's card at the residence with instructions that the wanted person report to headquarters at an appointed time. Id. at II 5-6. LAFAVE, supra note 45 at 171 n. 10, remarks:

[A] captain of one of the state traffic patrol districts sent out a bulletin stating: "physical arrest should only be made when the violator is unable to care for his own safety or the safety of others as in [drunken driving] cases, or when the arresting officer has reason to believe that the person arrested will flee the jurisdiction of the court." This would appear to be a fair statement of the general practice of all observed police agencies in Wisconsin with respect to traffic violators.

Nevertheless, the Milwaukee manual indicates that the concern is to act within the limits of the law rather than in furtherance of a policy of nonarrest. See Robinson, supra note 19 at 493-503. This is an eminent example of the limitation of police capacity without legislative direction. The emphasis on the presence requirement, a relic of the common law, is irrelevant to the question whether a person need to be taken into custody. In fact, as recent observations
that the police should be left to their own devices. Such an argument, however, does not consider that the police structure for the "order in" is without legal foundation. In fact, the two statutes which govern most arrests are in conflict: Section 954.03 authorizes the police to arrest only under defined circumstances, while the statute governing the officer in the city requires him to arrest "every person . . . violating any law of the state or ordinance of such city . . . ".61 Under present law, a law enforcement officer has neither authority to give an "order in" nor authority to release if he finds after investigation that no offense has been committed. There is no authority to order a person to appear at the police station for review by the commanding officer. Once the person is there, that officer has no authority to order him to go to the office of the city or district attorney. If the person attempts to escape during the interim between his appearance at the police station and his appearance before the court, the officer has no statutory authority to hold him. Moreover, it is irrational to provide detailed, printed instructions on tickets for the most insignificant traffic violation and at the same time to permit the oral "order in" for misdemeanants.62

have shown, and as is logically obvious, in the case of "on-the-view" arrests, the officer is usually in possession of enough evidence to charge because of what he has seen. Reiss and Black, supra note 59 at 53. Therefore, to the extent that investigation for charging purposes is one reason for custody, where the officer sees the offense committed, there is less reason for custody. The importance of the custody requirement to the police probably is explained by a desire to protect the officer (and the suspect) from unfounded complaints. Therefore, he uses his full authority only when personally he is sure an offense has been committed.

In the interviews, other reasons given for taking a person into custody were that he was on probation; that he had a criminal record; or that it was "for his own good," as for an intoxicated person. Such a reason was also applied to one charged with indecent behavior because he "might have offended some people and we take him into custody for his own protection." In an offense such as lewd and lascivious conduct, custody is used to prevent its continuance because "it takes two to tango." In cases of malicious damage to property or concealed weapons, persons may be taken in for investigation. Under the proposed section, determinations such as the above should be regulated by guidelines issued by the local district attorney, in consultation with the police (§969.05(4)).

62 Until recently, even though the police used a citation procedure for traffic offenses there was no statutory authority for it. The Highway Safety Act, Wis. Stat. §345.11 (1967) has created a "uniform traffic citation and complaint" which "shall in the case of moving violations and may in the case of parking violations be used" by all state and local officers. One apparent statutory authorization for nonarrest is found in the Fish and Game Laws, Wis. Stat. §29.66(1):

A person arrested without a warrant . . . who is not released at the time of arrest or without necessary delay brought before a magistrate or court, shall be allowed to make a deposit of money . . . by going in the custody of the
The police procedure outlined represents the end of a period of evolution—beginning with common law tradition, proceeding through interpretive case law to legislation vaguely formulating a policy, and now culminating with the operative implementation of that policy by the police. Today is the moment for legislative intervention to enunciate clearly, on the basis of this evolutionary experience, a policy which will formalize and legitimize that which we wish to conserve and reject that which does not conform. Legislation consistent with former policy and practice, modifying it only by rationalizing and legitimating it, is unlikely to be seen by the police as an imposition. On the contrary, it should be accepted as a proper, and even hoped for, exercise of the legislative function.

Those problems of policy and conception which have remained unresolved by case law, statutes and prior practice must be analyzed by the legislature and the conclusions implemented. The policy of the custody and disposition chapter is to minimize the taking of suspects into custody, the legislation setting forth the circumstances in which such custody is required.

2. Implementation of Reducing Number in Custody

969.01 AUTHORITY TO TAKE A PERSON INTO CUSTODY

(1) AUTHORITY TO TAKE INTO CUSTODY WITHOUT A WARRANT — FELONY.

A law enforcement officer (to be defined) acting without a warrant may take a person into custody if the officer has reasonable grounds to believe that the person is committing or has committed a felony.

arresting officer and making such deposit. [Emphasis added.]

63 It has been suggested that the “growth of law” often pursues the following course:

... initial decision by the courts; followed by legislative intervention; and finally, the choice of a solution which required creation of administrative agencies and continuing efforts of courts, legislatures, administrative agencies, and executive agencies in manifold interrelationships.


64 Goldstein, supra note 37.
(2) AUTHORITY TO TAKE INTO CUSTODY WITHOUT A WARRANT — MISDEMEANOR AND ORDINANCE VIOLATION.

(a) A law enforcement officer, acting without a warrant and having reasonable grounds to believe that a person is committing or has committed a misdemeanor or an ordinance violation, may stop the person and require him to remain in the officer's presence so that the officer can determine whether to issue a notice to appear, to take the person into custody, or to release the person pursuant to sub. (4).

(b) The law enforcement officer shall issue a notice to appear unless the officer has reasonable grounds to believe that the person

1. Will not be apprehended unless immediately taken into custody, or
2. May be likely to cause person or property damage unless immediately taken into custody, or
3. Is unable to or has refused to give sufficiently reliable information of identity. The officer shall make a reasonable attempt to ascertain the person's identity before taking him into custody.

(c) If the person does not qualify for a notice to appear because he comes within the exceptions listed in sub. (2), the officer may take the person into custody.

Ref. Wis. Stat. 954.03; ALI Model Code of Pre-Arraignment Procedure (1966), hereafter referred to as ALI (1966), s. 2.02 and 3.01; Proposed Minimum Standards for Criminal Justice, Pretrial Re-

65 All statutes cited are in current compilations unless otherwise noted.
lease, hereafter referred to as Release Standards, s. 2.2(c).

(3) NOTICE TO APPEAR AFTER TAKING INTO CUSTODY.
A law enforcement officer acting without a warrant who has taken a person into custody may, subject to sub. (2)(b), issue to the person a notice to appear in lieu of taking him to a police station (to be defined); or the officer or a superior officer at the police station may issue to the person a notice to appear.
Ref. ALI (1966) s. 3.02.

(4) RELEASE OF PERSON.
A law enforcement officer who stops a person and requires him to remain in the officer's presence pursuant to sub. (1) or (2) or who takes a person into custody shall release the person as soon as it appears that he no longer has reasonable grounds to believe that the person has committed a crime or violated an ordinance.

969.05 NOTICE TO APPEAR IN LIEU OF OR IN CONNECTION WITH TAKING INTO CUSTODY WITHOUT A WARRANT.

(1) NOTICE TO APPEAR WITHOUT TAKING INTO CUSTODY.
A law enforcement officer, acting without a warrant who has reasonable grounds to believe a person has committed or is committing an offense, may in the case of a felony, and shall, in the case of a misdemeanor or an ordinance violation, subject to the conditions of s. 969.01 (2)(b), issue to the person a notice to appear in lieu of taking him into custody.

(2) PROCEDURE FOR ISSUING NOTICE TO APPEAR.
In issuing a notice to appear the officer shall
(a) Prepare a written notice to appear, containing the name and address of
the person and the offense charged, and stating when the person shall appear in court. The time specified in the notice to appear shall be at least ____ days after the issuance of the notice to appear.

(b) Deliver to the person one copy of the notice to appear.

(c) Send to the district attorney, as soon as practicable, one copy of the notice to appear. Where the person is noticed to appear in court, a copy of the notice shall be sent to the court specified therein.

(3) NOTICE TO APPEAR IN PLACE OTHER THAN COURT.
In any instance where the officer may issue a notice to the person to appear in court, he may issue a notice to the person to appear at a police station or in the office of the district attorney for the purpose of a hearing pursuant to s.______.

(4) REGULATIONS TO ENCOURAGE NOTICES TO APPEAR.
The regulations (guidelines) issued pursuant to s. 969.90 shall include regulations (guidelines) concerning the circumstances in which officers shall issue notices to appear. Such regulations (guidelines) shall be designed to provide the maximum use of notices to appear, so that persons believed to have committed offenses will be taken into custody only when necessary in the public interest.

Ref. ALI (1966) s. 3.02; Calif. Penal Code, s. 853, 6-8 (from which the ALI section is derived); Ill. Rev. Stat. Chap. 38, 107-12.

The legal framework provided by the Draft Sections regulates practice according to the policy of minimizing the number of persons taken into custody. This requires a notice to appear ("order in") (969.01(3)) and details for its issuance (969.05). It also requires elaboration of the alternative decisions the officer may make after stopping a person for the commission of an offense: he may issue a notice to appear at the time the person is stopped (969.01(3)), he may release the person if it is found
after further investigation that he has not committed an offense (969.01 (4)), or he may take him into custody if one of the conditions permitting custody is fulfilled (969.01(b)).

Although drafting such a framework is relatively simple, the problems are more complex conceptually. The baggage of accumulated case and statutory law has confused the meaning and function of “arrest”. It has blurred the distinction between the decision to stop a person found committing a criminal offense and the decision to take a person in custody in order to conduct him to a police station. It has tied the concept of “arrest” unhappily to that of the search for evidence incident to the arrest.

“Arrest”, as a word to describe a particular act, is no longer serviceable. “Arrest” may mean any restriction of liberty by a law enforcement officer, whether authorized or not; or taking the person into custody to be conveyed to a police station, whether for the purpose of investigation or for criminal prosecution; or detaining of a person by word or action in custody so as to subject his liberty to the actual control and will of the person making the arrest.66

Thus, arrest has become a confused concept, confused as to whether and as to when it had taken place. One reason for this muddle is that “arrest” is used to refer to several distinct situations in which police actions are not delimited adequately by legislation.67 The first of these is the “stop and frisk” where the officer knows of no crime having been committed but stops a person who he believes has committed or may be about to commit a crime. The Committee made no attempt to draft legislation to cover this situation because

---

66 Huebner v. State, 33 Wis. 2d 505, 516, 147 N.W.2d 646, 651 (1967). That this is more than a semantic quibble has been evidenced recently by Terry v. Ohio, supra note 19, where the Court for the first time dealt with the problem of phraseology which by this time had reached constitutional proportions. “It is 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,” at 4581. See especially the last paragraph of note 15. At 4584, the Court stated: “An arrest is the initial stage of a criminal prosecution.” Though helpful in selecting one out of a number of possibilities, such statements retain the confusion of the term. Has a person been “arrested” who has been given an order in? This is the first stage of the prosecution but it did not “eventuate in a trip to the station house,” at least not that day. Cf. Peters v. New York, 36 U.S.L.W. 4589 (1968). “When the policeman grabbed Peters by the collar, he abruptly 'seized' [arrested] him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity.” Mr. Justice Harlan properly criticizes this attempt to place the time of arrest. Terry v. Ohio, supra at 4586.

67 Remington, supra note 42 at 12; LAFAVE supra note 45 at 3-4; Oaks and Lehman, supra note 21 at 19, 23; Taylor, The Supreme Court, the Individual and the Criminal Process, 1 GA. L. REV. 386, 424 (1967).
at the time the United States Supreme Court had not yet handed down its decision concerning the constitutionality of the practice.\textsuperscript{68} The second situation involves a person, either drunk or otherwise physically or mentally unable to care for himself, who is found in a public place. This is treated under Draft Section 969.03 of the custody chapter.\textsuperscript{69} The third concerns a crime already committed and known to the officer, but there is insufficient evidence against the suspect to accuse him of the crime. Nevertheless, the police desire to question him.\textsuperscript{70} This is treated in Draft Section 969.07 of the chapter.\textsuperscript{71} Finally, the situation where there is enough evidence to believe that a particular person has committed an offense is treated under Draft Section 969.01 of the chapter. We usually think of this situation in connection with “arrest” legislation. Yet even considering “arrest” in this limited sense, we are not dealing with a single action. First there is the action or decision of the officer to stop a person who he reasonably believes has committed a misdemeanor or ordinance violation; and second there is the determination whether it is necessary to take that person into custody.\textsuperscript{72} Section 969.01(2)(a) of the Code, therefore, replaces the term “arrest” with words describing the action.\textsuperscript{73} The first de-

\textsuperscript{68} The resulting decision, Terry v. Ohio, \textit{supra} note 19, is discussed \textit{infra} at 38-40.

\textsuperscript{69} Draft Section 969.03 is set out in full and discussed \textit{infra} beginning at 49.


\textsuperscript{71} Draft Section 969.07 is to be redrafted and is noted in the Appendix.

\textsuperscript{72} An alternative has been suggested: “the officer on the street could immediately communicate the essential facts of the individual case back to the station, where a superior officer trained to make these kinds of decisions would then say, ‘Arrest,’ or ‘Give a notice to appear.’ ” Professor LaFave in BAIL AND SUMMONS, \textit{supra} note 54 at 133.

\textsuperscript{73} This, of course, solves neither the problem of the quantum of evidence required by the Fourth Amendment to the United States Constitution before an officer may restrict the liberty of a person, nor that of the extent to which it may be restricted. But it makes the intention of the provision precise in terms of what action by the police it means to cover. Chief Justice Schaefer of the Illinois Supreme Court has stated in another regard:

\begin{quote}
I see nothing in the language of the Fourth Amendment, which prohibits unreasonable seizures of the person, that requires it to operate as a blunt instrument. It seems to me more relevant to ask whether there is probable cause for restraining a suspect than to ask whether there is probable cause for believing in the suspect’s guilt.
\end{quote}

Schaefer, \textit{The Suspect and Society} 25 (1967). The Court in Terry v. Ohio, \textit{supra} note 19, has taken a similar stance. \textit{Compare} Section 2.02 of the MODEL PRE-ARRAIGNMENT CODE (1966), \textit{supra} note 8 at 10, which permits “stopping of persons having knowledge of crime:”

\begin{quote}
Detention under this section is not called an arrest, since in the draft “arrest” is used in the conventional sense to authorize the far more onerous interference of removal of a police station and eventually to court.
\end{quote}
cision of the officer is to "stop the person and require him to remain in the officer's presence so that the officer can determine whether to issue a notice to appear." The second decision is to determine whether "to take the person into custody."\(^7\)\(^4\)

The draft section represents the step by step actions of the officer in

---

The conceptual and semantic problems in using "arrest" are easily illustrated by Wis. Stat. §954.03 where the word, "arrest," only makes sense if it is translated as "taking the person into custody." This is so because the statute concerns itself only with the conditions under which a person may be taken into custody and gives the officer no authority to "arrest" in the sense of stopping initially in order to make the determination whether the conditions are satisfied. Reasoning thus, there is no "arrest" statute in Wisconsin if the meaning of arrest is to stop, supra note 43. Putting it another way, you cannot arrest (take into custody) one already arrested (originally restrained). Compare Wis. Stat. §175.05(3) (1967):

> Any peace officer . . . may stop any person found on any premises to which entry without permission is forbidden by said subsection and may detain and demand of him his name, address and business in such place. If such peace officer . . . has reason to believe from the answers of the person so interrogated that such person has no right to be in such place, such peace officer . . . shall forthwith release or arrest such person without a warrant on a charge of violating the provisions of sub. (2).

The section makes a distinction between a "stop" and an "arrest." If we assume that in order to stop, the peace officer would have to have reasonable grounds to believe that a crime had been committed, then the section is parallel to the draft section. Otherwise, it is authority for detention on less than probable cause. In either case, the use of the word "arrest" does not aid in the interpretation of the section. See also Wis. Stat. §110.075(2) (1967) where the "operator of any motor vehicle shall stop and submit such motor vehicle to an inspection . . . ." for mechanical defects. The District of Columbia Crime Law, supra note 38 at §397(a), compounds the confusion, stating: "An officer may arrest without a warrant and take into custody any person . . . ." [Emphasis supplied] The term "arrest" is so unwieldy in practice that the police must use additional descriptive words to tell what it means. The Milwaukee police call it "summary (immediate) arrest," supra text at 31, and apparently the state police call it "physical arrest," supra note 60. The same term, "formal arrest" is used in Terry v. Ohio, supra note 19 at 4580 as is the term, "technical arrest" at 4582.

74 Neither this terminology nor this concept is foreign to Wisconsin law. Wis. Stat. §48.28 TAKING CHILD INTO CUSTODY provides that "No child may be taken into immediate custody" except under certain conditions. Paragraph (2) of the same section provides: "Taking into custody under this section shall not be considered an arrest." Such provision is obviously an attempt to reduce the noxious effects of an arrest record, permitting the child to reply in the negative to employment forms asking if he had been arrested. This question would be meaningless under the Code because the word has been eliminated. Although a change in phraseology may be unable to change the concern of employers, it may nevertheless aid in de-emphasizing the seriousness of mere contact with the police. In order to strengthen this outlook, the notice to appear might be defined as not constituting an "arrest" for the purpose of such inquiries.
making the "arrest": first noticing the violation; then stopping the offender; then holding him while making the further determination whether the statutory conditions for custody are satisfied. This procedure follows closely the practice of the Milwaukee police department. In addition, however, it authorizes some actions now taken without authority, and it provides the suspect with a statement detailing the "charge" against him and the time he must appear to answer the charge.

3. Search and the Law of Arrest

Until Terry v. Ohio, Peters v. New York and Sibron v. New York, the legal history of arrest had been no more than a study of the legal consequences of arrest on the right to search for evidence of crime. The attorney for the defendant attempted to suppress the evidence found in the search and the court then determined whether there was probable cause for the arrest. If there was probable cause, the evidence could be introduced as procured "incident to a lawful arrest." In order to attain a desired result, the courts moved the time of arrest back and forth like an abacus and in this context the effort to define "arrest" rather obscured the meaning of the term.

It is apparent that this connection of search with the law of arrest may cause considerable conflict with the principle of promoting a policy of non-arrest. If "arrest" for the purposes of search is accomplished only when the person is taken into custody, the tendency will be for the police to

---

76 In practice it will be evident often that the person and circumstances satisfy the statutory condition for custody, making further inquiry unnecessary. Recent empirical studies show that for most field detentions the time taken to decide whether the suspect should be "formally arrested or released" is remarkably short.

About one-half of the suspects were detained for less than ten minutes and three-fourths for less than twenty minutes. . . . Over nine-tenths of the suspects were detained less than forty minutes . . . about 5 per cent were detained an hour or more before the police made a decision to book or release.

Reiss and Black, supra note 59 at 52.

77 LAFAVE, supra note 45 at 28: "[M]ore than 90 per cent of all searches coming to [the attention of judges and prosecutors] are incident to arrests." TIFFANY, MCINTYRE AND ROTENBERG, DETECTION OF CRIME 122 (1967).

78 For example, Chicago Police Department Training Bulletin, Feb. 3, 1964, Vol. V., No. 5 at 3 reads:

Now the notice to appear can be issued by the officer for any offense. Its use, of course, is practicable only in cases where it reasonably appears that actual arrest does not serve some valid purpose, such as insuring the availability of a person who otherwise might not appear or
Pre-Arraignment Procedure

take the person into custody each time a search is desired. This again points up the necessity to separate the term "arrest" into its components. To stop and restrain a person under Section 969.01, the officer must have reasonable grounds to believe the suspect has committed an offense. To take the person into custody in order to conduct him to the police station, the officer must have reasonable grounds to believe the person will cause damage or will flee. Search is relevant to the decision to stop the person, but not to the decision to take him into custody. Once the officer believes that an offense has been committed and retains the person under his control for the purpose of making a custody decision, the person's liberty is restricted. If the search incident to arrest is to attach at all logically it should attach at this point, regardless of the later decision to take the person to the police station.

Nevertheless, it seems essential to draft a statute on search incident to Section 969.01 situations in order to avoid the problem. Even before Terry, case law had taken two approaches which were encouraging departures from the traditional law of search. One approach had rejected the traditional automatic recognition of the right to search where the arrest was a pretext in order to conduct a search. The other approach did not require the formalities of arrest where there were grounds for arrest. Instead these courts had turned to the plain language of the Fourth Amendment which asks only that the search be reasonable without mentioning arrest.

conducting a search of the offender for necessary evidence.

There is authority which denies the right of search when a notice to appear is given on the ground that there has been no arrest. LaFave, supra note 45 at 187, 230, 495-96. See also Tiffany et al., supra note 77 at 122; Note, Search and Seizure — Search Incident to Arrest for Traffic Violation, 1959 Wis. L. Rev. 347, 352; LaFave, supra note 72 at 134. Another approach treats the stopping in order to give a citation as an "arrest" thereby permitting a search but the reasoning is confused. People v. Valdez, 239 Cal. App. 2d 459 at 461, 48 Cal.Rptr. 840, 842 (1966).

LaFave supra note 45 at 187; League, The Fourth Amendment and the Law of Arrest, 54 J. CRIM. L., C. & P.S. 393, 407 (1963); Barnes v. State, 25 Wis.2d 116, 126, 130 N.W.2d 264, 268 (1964); State v. Dodd, 28 Wis.2d 643, 648, 137 N.W.2d 465, 468 (1965). The Milwaukee police department was found frequently to have used such "subterfuges for conducting a legal search." Pilot Project Report, supra note 54 at I-50. This is especially true in searches of automobiles. Id. at 38-49. One such incident caused the city of Milwaukee a $6,000 false arrest suit verdict. A Negro man was stopped for a minor traffic violation, allegedly having wooden boards extending too far beyond the tail gate of a truck he was driving. The police testified that they arrested him and then followed him into his own home, when [they said] they thought the truck was being used for a burglary, and that the plaintiff was trying to escape. The jury, a later interview revealed, could not understand why the police would arrest for such a minor violation. Milwaukee Journal, Feb. 2, 1968, pt. 1 at 1, col. 2 and Feb. 4, 1968, pt. 2, p. 1, col. 2.

Hoch v. State, 199 Wis. 63, 65, 225 N.W. 191, 192 (1929), permitted the sheriff to search and seize bottles of intoxicating liquor on the premises where the
The United States Supreme Court has made it clear that ritualistic adherence to the formula of incidence to arrest will not satisfy constitutional rationality. The precise holdings of *Terry*, *Peters* and *Sibron* have only limited meaning here. *Terry* dealt with a situation where there was less than probable cause to arrest. Both *Peters* and *Sibron* concerned the quantum of evidence necessary to establish the reasonableness of police action. It is the Court's movement away from the term "probable cause" toward that of "reasonableness" which should interest the law revisor in this area. On the basis of these decisions it is predictable that it will not be enough to contend that a search was made incident to a valid arrest. The officer must have reasonable grounds to believe that the person had committed a criminal offense, which is substantially the requirement of Section 969.01. If he does the officer may search the person provided: a) the offense is of such a nature that it is reasonable to believe that a search would reveal evidence of the suspected crime; or b) there is reason to believe that the person has instrumentalities with which to effect an escape or injure the officers. Thus, the time, the place and the extent of the search will be circumscribed by the purpose for which the person was stopped under Section 969.01. Under such a search provision, the argu-

---


82 See note 81 *supra*.


A law enforcement officer who has stopped or ordered any person to remain in his presence . . . may, if he reasonably believes that his safety so requires, search such person and his immediate surroundings, but only to the extent necessary to discover any dangerous weapons which may on that occasion be used against the officer.

See Commentary, *Id.* at 10, 101.04.

84 Scope is very much one of the precepts of *Terry*, *Peters* and *Sibron*; being an ingredient of reasonableness, it has constitutional perimeters. In State v. Dodd, the Wisconsin court's view is indistinguishable:

The reasonableness of the search, to be valid . . . is limited not only in time and place but also by the purpose of the arrest. A search which might be reasonable as incidental to an arrest for one crime may be entirely unreasonable as an incident to an arrest for another crime.

State v. Dodd, 28 Wis.2d 643, 648, 137 N.W.2d 465, 468 (1965). See also State v. Phillips, 262 Wis. 303, 55 N.W.2d 384 (1952); State v. Cox, 238 Wis.
ment as to admissibility of evidence would not be concerned with the formality of when "arrest" occurred. Although no section was drafted during the life of the revision project, a provision on search incident to the custody procedures of Section 969.01 should make explicit these standards governing the validity of a search. If we look at the facts underlying Wisconsin Supreme Court decisions in search cases, rather than at the language used, we find that such a provision would do no more than clarify and codify the law as it stands today in Wisconsin.

4. Objections to the Mandatory Use of Notice to Appear

The crucial decision with respect to the custody provisions has been well articulated by Professor LaFave:

One problem faced in drafting any kind of legislation arises when you are trying to set up a release versus custody decision. The question is, where do you start? What kind of presumption do you start with? Do you start with a presumption of custody or a presumption of release?

That is, should we say that a person arrested for a certain offense is entitled to release unless certain special circumstances are shown to be present, or should we say that he is to be held in custody unless specific circumstances are present?

162, 45 N.W.2d 100 (1950); State v. Campbell, 97 N.J. Super. 435, 235 A.2d 235 (1967). It is not evident, as is noted supra note 81, that the reasoning of the Wisconsin court is applicable equally where the grounds for the arrest are present but the ritual has not taken place, or where we consider the stop under §969.01 as the "arrest" the court discusses. See Alston v. State, 30 Wis.2d 88, 95-96, 140 N.W.2d 286, 288-90 (1966) where the officers lifted the lid of a car trunk after stopping and interrogating the defendant but before arresting him. The search was upheld because of the "exceptional circumstances" that "there was a great risk that the contraband [automobile tires] and the suspects themselves would leave the area if the police were to seek a warrant. 30 Wis.2d at 96, 140 N.W.2d at 290. Since almost all on-the-street arrests involve the same circumstances of risk, this set of circumstances is unexceptional.

Such a statute, of course, does not resolve all of the problems of search although it presents a working principle. For a statement of the various uses to which search is put in police work, see Tiffany et. al., supra note 77 at 141-43; Pretrial Release Standards, supra note 38, Section 2.4 at 38 tries to resolve the problem of search after issuing a citation:

Nothing in these standards should be construed to affect a law enforcement officer's authority to conduct an otherwise lawful search even though a citation is issued.

It is unclear, however, how this will help if search depends on arrest.

86 Bail and Summons: 1965, 132 (1966). Professor LaFave continues:

It was interesting to note this kind of distinc-
Where the presumption of release is selected, objections may be anticipated to the mandatory requirement that only those misdemeanants and ordinance violators who fall into the statutorily defined categories may be taken into custody:

1. Release will permit persons to escape who, though arrested for a minor offense, are later revealed to have committed a more serious offense.

Every police officer probably has a story of the arrest he once made for a minor offense, where subsequently it developed that the suspect was wanted for a major crime. In fact, the statutory categories under Section 969.01 are broad enough that the officer will still be able to take into custody those whom he realizes it is not safe to release. Even on the street, technological advances today place the officer in constant touch with almost limitless computerized information. While there remains some risk that a person released on the street may be wanted for another more serious offense, instantaneous communications now reduce this number to insignificance. Such speculative gains as would accrue from eliminating the risk entirely must not be allowed to outweigh the general advantages of early release embodied in the principle of reducing the number of those taken into custody.

2. The number of persons defaulting will increase.

The Code effectively formalizes the system presently used in Milwaukee to reduce the number taken into custody: the “order-in”. No statistics are available to the author showing the percentage of defaults in Milwaukee, but since the system of “order-in” has long continued unchanged, nonappearance has apparently not been a serious problem. Ample documented evidence is available demonstrating that with proper supervision pre-trial release programs not only do not increase defaults, but have the effect of reducing them. Moreover, it is well to keep in mind that the

87 It has been proposed that Milwaukee use computers which “could provide policeman with data needed for identification and similar purposes in a matter of seconds.” An effort would be made “to connect the Milwaukee police department with a nationwide computer network set up by the F.B.I.” Milwaukee Journal, Nov. 2, 1967, pt. 1 at 20, col. 2.

88 See BAIL & SIMMONS: 1965 page inset at 9 (1966) summarizing the findings of release projects across the country and showing the “jump” problem to be
persons to be given notice to appear would be the least dangerous offenders. If the person is at the time considered likely to commit further violence to persons or to property, he is explicitly eliminated from consideration for immediate release.

3. *There are groups such as gamblers, prostitutes and other social undesirables who are frequently punished lightly or not at all by the courts and “arrest” provides a lever for some control.*

Arrest as a lever of police control has been extensively described in the American Bar Foundation studies. Where there is no intention to prosecute and the arrest itself is the punishment, arrest is so obviously illegal that it is unlikely that this objection would be voiced openly. If such practices are a response to a real need then the proper forum for clarification is the legislature which defines the substantive criminal laws or the courts which construe and enforce them.

4. *Instances occur where the officer needs to detain the person for purposes of investigation.*

The need for post-arrest investigation could include, for example, interrogation, identification by the victim, or fingerprinting. Recent studies, however, have tended to show that even for serious offenses interrogation as well as the need for additional investigation both at the scene and in custody have been overrated. This must be even more true for the insignificant. In New York City, only 400 of 25,000 or 1.6% defaulted. *Id.* at 15. This is considerably lower than the ratio of defendants who jump bail. *Id.* The D.C. Bail Project included serious felonies but still had a 1.9% loss during two years of operation. *Id.* at 80. *See also id.* at 94-95, 111-12. For the experience of New York City’s stationhouse release program, *see id.* at 135-40, and *infra* text accompanying note 196. Other programs, including a Denver order-in project are discussed, *Id.* at 141-65. The Milwaukee District Attorney is reported to have had an informal procedure in which letters were sent requesting persons suspected of passing bad checks to come to the office, warning that failure to appear would result in a warrant. It was said to have been 99% effective. *Pilot Project Report, supra* note 54 at III-41.

90 Nevertheless, such is undoubtedly an important underlying consideration, not only as to laws affecting "social undesirables," but for any legislation seeking to reduce custody at the arrest stage. One member of the revision committee probably voiced the belief of many in the legal community when he said it would do "them" good to spend a little time in jail. *See* *LaFave, Alternatives to the Present Bail System, 1965 U.Ill. L.F.* 8, 13.

91 *See* text *infra* accompanying notes 175-176 and *Reiss and Black, supra* note 75. Although it is possible to object that recent studies are inconclusive, there seems to be increasing evidence that the profile of the criminal justice system which shows about 90% pleading guilty at the trial level descends without change to the arrest stage. *See* note 101 *infra*. *Reiss and Black, supra* note 59 at 56. A look at in custody interrogation developed similar conclusions:

Taking all assumptions and reservations into account, it appears that interrogations may be
demeanor and ordinance violation. Nevertheless, the code principle that restrictions of personal liberty may be allowed where they serve a rational police need cuts both ways: the revision committee should be receptive to a police case supported by empirical evidence which demonstrates that a statutory exception should be added allowing custody for purposes of investigation. If such an exception is added, the statute should require the authorities in each instance to state in writing the specific facts which support this necessity.

5. Civil actions may be brought against officers by persons who believe that the officer acted unreasonably in taking them into custody.

An action for false imprisonment or unlawful detention would be available to a person taken into custody when under Draft Section 969.01 he should have been issued a notice to appear. In the past, however, such even less necessary than our figures indicate. In almost every case last summer the police had adequate evidence to convict the suspect without any interrogation. Interrogation usually just cemented a cold case or served to identify accomplices.

Interrogations in New Haven: The Impact of Miranda, 76 YALE L. J. 1519, 1588 (1967). The study further concluded that, “questioning was necessary to solve a crime in less than ten percent of the felony cases in which an arrest was made…” Id. at 1523. Also, see note 101 infra.

See text accompanying note 175 infra.

See text accompanying notes 167-177 infra, for discussion of in-custody investigative needs. Pretrial Release Standards, supra note 38, Section 2.2(d) at 34, requires that, “when an officer makes an arrest pursuant to a section setting forth reasons to arrest, he should be required to indicate his reasons in writing.” Such a provision was also included in the Code but the revision committee believed it would be ineffective and administratively cumbersome. The writer feels it to be useful because it compels the officer to put himself on the line and permits later review of his action. In any case, it is a detail best left to regulations. §969.05(4). The Standards, in stating the “policy favoring issuance of citations,” list the “need to carry out legitimate investigative functions,” but this need is not included in the condition listed in Section 2.2(c), the provision giving arrest authority.

The false imprisonment action is not based upon the want of probable cause for the arrest but upon the violation of the law or the exceeding of its authority.

Note, Criminal-Law—Torts False Imprisonment—the Shoplifting Problem in Wisconsin, 1964 Wis.L.Rev. 478, 482 n. 23; Wallner v. Fidelity and Deposit Co., 253 Wis. 66, 70, 33 N.W.2d 215, 216-17 (1948). But see Lane v. Collins, 29 Wis.2d 66, 69, 138 N.W.2d 264, 266 (1965) where the court stated what appears to be a non sequitur:

If the arrest of plaintiff by defendant was lawful it would necessarily follow that the ensuing holding of plaintiff in custody for an hour and a half until he could provide bail was not an unlawful restraint.
actions have been rare and usually unsuccessful, although it is the re-

What was meant by the court was that such detention for one and one-half hours, under the conditions there prevailing, was reasonable. While arrest without proper grounds makes any resulting detention illegal, a good arrest cannot sustain the legality of an improperly prolonged detention. Each step in the process has its own measure of reasonableness. This was the holding of the court in Phillips v. State, 29 Wis.2d 521, 533-34, 139 N.W.2d 41, 46 (1966), citing with approval the RESTATEMENT OF TORTS, Section 136, which makes it "misconduct, . . . If the actor, having obtained the custody of another by a privileged arrest . . . (c) fails to use due diligence to take the other promptly before a proper court. . . ." Compare Schoerre v. Drake, infra note 119. See Manos, Police Liability for False Arrest or Imprisonment, 16 CLEV-MAR. L. REV. 415 (1967); Holliday, How Much Detention Constitutes False Imprisonment?, 15 CLEVE-MAR. L. REV. 75 (1966); CALIF. L. REVIS. COMM. 404-54 (1953).

The problems of such suits are discussed in Foote, Tort Remedies for Police Violations of Individual Rights, 39 MINN. L. REV. 493 (1955), and LAFAVE, supra note 45 at 169 n. 2. LaFave points out that in Odinetz v. Budds, 315 Mich. 512, 24 N.W.2d 193 (1946), the court was critical of the arrest of a restaurant owner for the misdemeanor of operating a restaurant without a license. The court remarked that a summons would have sufficed to produce the defendant, a resident of the locality for 20 years. Nevertheless, the court decided that no liability resulted from failure to issue a summons.

No official records of false arrest suits are kept by the Milwaukee office of the city attorney but a check of the files of that office as of February 1968 reveals that in the last five years:

- a) twenty false arrest suits have been commenced against the city of Milwaukee and its employees. Of this number five remain open. Of the 15 closed, three were settled by the city for a total of $11,621. The remainder were concluded favorably for the city;
- b) there were four false imprisonment cases. One case remains open. One case was dismissed upon payment by the city of $4,500; and the remaining cases were dismissed in favor of the city;
- c) six assault and battery cases were commenced against the city and its employees. Two cases remain open. Four cases have been closed, one of which was settled by payment of the city.


Only in a minority of cases alleging an abuse of police powers will evidence clearly support the fact that the officer did exceed his authority. In the vast majority of such cases, the actions of the officer, though they may have harshly disrupted freedom or privacy, are legally justified and clearly within the scope of his police powers. What is really at issue is the propriety of his action (a) in terms of simple courtesy and good public relations and (b) in deciding...
sponsibility of the officer to ascertain the facts before acting. Recent state and United States Supreme Court decisions allow a substantial margin to police discretion in such matters; and even if they are found responsible, indemnification statutes save them from personal loss where their actions are in the line of duty and executed in "good faith."  

5. Constitutional, Practical and Social Problems Noted

Although the claim has apparently not been advanced that unnecessary custody or incarceration regardless of circumstances is unconstitutional,

whether he should do what he clearly had power to do. [Emphasis in original.]


Wis. Stat. §270.58(1) (1967) reads:

Where the defendant in any action... is a public officer, and is proceeded against in his official capacity and the jury or the court finds that he acted in good faith the judgment as to damages and costs entered against the officer shall be paid by the [agency] of which he is an officer.

Wis. Stat. §59.22 (1967) covers "defaults or misconduct in office" of a sheriff, his deputies or jailers. See special memorandum No. 6 of the Wisconsin attorney general, Personal Liability for Acts of Officers, July 15, 1965. Wallner v. Fidelity & Deposit Co., supra note 94, covers the problem posed by the Code section nicely:

where an authority given by law is exceeded, the officer loses the benefit of his justification, and the law holds him a trespasser ab initio although to a certain extent he acted under the authority given. It is reasonable that when from all the circumstances of the case it appears reasonably clear that an officer has not acted in good faith or has been a too ready instrument in the perpetration of a grievous wrong by arresting the wrong person, he cannot be given the justification a writ of probable cause would otherwise afford. ... The officer is liable if he fails to take proper precaution to ascertain the right person, or refuses information offered that would have disclosed his mistake, or if he detains the person an undue length of time without taking proper steps to establish his identity.

Likewise, Pierson v. Ray, supra note 96, finds that "part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." In Quinnette v. Garland, supra note 96, a claim was denied against a deputy sheriff who in good faith executed a 12-year-old warrant. Compare also the statutory definition of, "reasonably believes," Wis. Stat. §939.22(32) (1967) which "means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous."
the Supreme Court might be receptive to a case where state power has been exercised to restrict personal liberty beyond the point necessary to accomplish its object of law enforcement. There are strong reasons other than the constitutional ones for a presumption of release.

Taking a person into custody where it would otherwise be possible to release the person on notice to appear complicates the problem of criminal justice administration and creates undesirable consequences both for the police officer and the citizen. Our trial-oriented judicial structure is already badly askew in that most cases are disposed of either by a deci-

---

98 See note 30 supra. Indeed, if Terry, Peters and Sibron mean anything, it is that any action subject to the Fourth Amendment search and seizure provisions may be "judged against an objective standard: would the facts available to the officer at the point of seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, supra note 19, at 3155.

99 Where the power to arrest is seen as a direction to arrest it creates a double problem for the officer. He often does not arrest in order to spare the minor offender the punishment of arrest or conversely uses arrest as a punishment, thus merging the decision to "arrest" with that to prosecute. The latter decision, whether or not a police function, should not and cannot be permitted without direction. Reiss and Black, supra note 59 at 53, 57; Remington and Rosenblum, The Criminal Law and the Legislative Process, 1960 U. ILL. L.F. 481. The notice to appear has been suggested even for use in riot situations to prevent overcrowded jail conditions and to decrease tensions. Report of the National Advisory Commission on Civil Disorders 347, 350-51 (Bantam ed. 1968).

100 As to the effect of the arrest on a citizen, see Robinson, Alternatives to Arrest of Lesser Offenders, 11 CRIME & DEL. 8, 11-12 (1965). The commentary of the Model Pre-Arraignment Code (1966), supra note 8, at 107-108, well states the effect: "Being arrested and held by the police, even if for a few hours, is, for most persons, awesome and frightening." See also the Police Task Force Report, supra note 12 at 178-180, 187; Wilson, Police Administration 194 (2d ed. 1965); Cray, The Big Blue Line 192-93 (1967). Arrest presents a stylized confrontation of force. Shellow, Reinforcing Police Neutrality in Civil Rights Demonstrations, 1 J. APP. BEH. SCI. 243, 248-49 (1966). Arrest places the police officer in a position of danger.

Statistically, if a policeman is going to be killed, it will almost of a certainty be during his attempt to make an arrest. Vallow, Police Arrest & Search 3 (1962). It would require careful study of the complex of circumstances under which an arrest is made in order to determine whether the suspect attacks the officer because he fears custody or prosecution. If the second, the proposed section would not ameliorate the situation. Compare Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. CRIM. L., C. & P.S. 93 (1963) and Robin, Justifiable Homicide by Police Officers, 54 J. CRIM. L., C. & P.S. 225, 230-31 (1963) concerning danger to police officers. Such considerations were consequential to the Court in deciding Terry v. Ohio, supra note 19, at 4584 n. 21, referring to the number of police officers killed by guns and knives. See also Skolnick, Justice Without Trial 42-48 (1966); Police Task Force Report, supra note 12 at 189. The necessity to compile an impressive arrest record also has a deleterious effect on police work. Niederhoffer, Behind the Shield 70-72 (1967).
sion not to charge or by a plea of guilty.\footnote{101} Of those presently taken into custody, there is evidence that the police interrogate or perform other functions which require the suspect’s presence in only the most serious cases.\footnote{102} A further factor increasingly obvious is that the police already have an informal non-arrest and non-prosecution policy for adjusting minor disputes, particularly those involving domestic disturbances.\footnote{103} Perhaps most significant today is the undeniably deleterious effect of arrests on police-community relations, particularly where the arrest is seen as “unnecessary” in the community and where there is a minority group involved.\footnote{104} Yet unfortunately today arrests for minor crimes such as:

\footnote{101}{In many communities between one-third and one-half of the cases begun by arrest are disposed of by some form of dismissal by police, prosecutor, or judge. When a decision is made to prosecute, it is estimated that in many courts as many as 90 percent of all convictions are obtained by guilty pleas.}

\footnote{102}{See note 91 supra and Yale Project, supra note 91, at 1587 n. 179.}

\footnote{103}{Parnas, supra note 54 at 929-54. The Milwaukee method to avoid filing a complaint in domestic matters is described at 947-48. Other aspects of non-arrest are found in Goldstein, Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice, 69 YALE L. J. 543 (1960); LaFave, The Police and Nonenforcement of the Law — Parts I and II, 1962. WIS. L. REV. 104, 179. These drop-outs at various points along the criminal justice assembly line are referred to as the “sieve effect” in Blumberg, supra note 101 at 51-52. One of the first things that a neophyte officer learns is not to use all of his arrest power. Goldstein, supra note 95 at 163.}

\footnote{104}{There is evidence that such arrests create great antagonism against police officers in slum communities. For example, many complaints filed with the review board in Philadelphia involve such ordinances and not a single complaint has involved an incident during commission of a felony. The reason for hostility resulting from minor crimes is probably that while most offenders know when they have committed major crimes and expect that they will be arrested for them, the issue as to most alleged minor crimes is not as clear and the offender does not usually believe, whether or not he has acted illegally, that he has done anything sufficiently wrong to justify arrest.}

\footnote{103}President’s Commission on Law Enforcement and Administration of Justice: Task Force Report: The Courts 4 (1967). It does not follow, of course, that when a case is dismissed the defendant should never have been arrested, but it does emphasize the importance of that decision. A tally might show that more time is spent in jail as a result of police custody decisions than as a result of court sentences. Blumberg, Criminal xiii-iv (1967) argues that what we have is not an adversary system but that it has “an administrative, non-adversary character of ‘bureaucratic due process.’” \textit{Id.} at 29.

\footnote{104}{Police Task Force Report, supra note 12, at 187. This point is underscored in the \textit{Report of the National Advisory Commission on Civil Disorders} 206 (1968): “all the major outbursts of recent years . . . were precipitated by routine arrests of Negroes for minor offenses by white police.” See also Kamisar,
vagrancy, disorderly conduct, use of obscene language, loitering, failure to move on, blocking the street or sidewalk, drunkenness, drinking in public, and curfew violations constitute almost one-half of all arrests made each year in the United States.105

C. Persons Unable to Care for Themselves

969.03 AUTHORITY TO TAKE INTO CUSTODY A PERSON UNABLE TO CARE FOR HIMSELF.

(1) CONDITIONS UNDER WHICH CUSTODY IS PERMITTED.
A law enforcement officer may provisionally take a person into custody for the purpose of transporting him to a safe place if the officer has reasonable grounds to believe that the person is so intoxicated, or is so physically or mentally incapacitated that he is unable to care for his own safety, and he is found in a public place in such condition.

Ref. Wis. Stat. 947.03(1):
A person is so intoxicated that he is unable to care for his own safety and is found in a public place in such condition . . . (to be repealed).

(2) DISPOSITION OF INCAPACITATED PERSONS.
Any such person shall be conveyed to his home or to a facility which is appropriate to care for the person. The person shall not be taken to a jail or other law enforcement detention facility unless there is no other appropriate facility in the community which is able or willing to accept him. If the person is taken to jail, he shall be released as soon as he is able


A large part of the dreary picture of minor offense arrests is accounted for by the offense of public drunkenness.

In the year 1965 the police in 2,647 cities of over 2,500 population made 1,337,321 arrests for drunkenness. This . . . is just short of one-third of all the arrests made by the police in these communities. And this does not fully describe the situation, as many habitual drunks are taken into custody on charges of disorderly conduct (which is the second largest category of arrests) and vagrancy.\textsuperscript{106} Statistics for Milwaukee county show that in 1966, 10,837 persons appeared in court on the misdemeanor of being drunk in a public place (\textit{Wis. Stat.} \$947.03). Another 7,500 were charged under the municipal ordinance banning public drunkenness.\textsuperscript{107} Wisconsin joins the rest of the country in treating drunkenness as part of the criminal process, thereby creating what has been called the "revolving door" cycle: the same person frequently and recurrently goes through the same process.\textsuperscript{108}

The burden of processing so great a mass of minor offenders falls upon the police and the administration of criminal justice (if we may use this term for it). The legal tools placed in the hands of the police for this

\textsuperscript{106} \textsc{LaFave}, \textit{Penal Code Revision: Considering the Problems and Practices of the Police}, 45 \textsc{Texas L. Rev.} 434, 450 (1967). For a general discussion of the problem with recommendations for its amelioration, see \textit{President's Commission Report}, supra note 13 at 233-37.

\textsuperscript{107} Milwaukee Journal, June 14, 1967 at 4, col. 1. This may be compared with 1954 figures when "6817 persons were convicted in court for drunkenness, while 7632 stipulations of guilt were entered." \textsc{LaFave}, supra note 45 at 442 n. 16. [Most of the information about the process was gathered by two Marquette University law students, now attorneys, Dennis Costello and Tod O. Daniel.]

\textsuperscript{108} It has been estimated that "there were at least 33,800 alcoholics in Milwaukee county but . . . this figure might be low." Milwaukee Journal, Mar. 18, 1967 at 11. There are at least 127,000 "alcoholics" in Wisconsin. Milwaukee Journal, Sept. 22, 1967, pt. 1 at 23, col. 2. \textit{The President's Commission Report}, supra note 13 at 233, found:

A review of chronic offender cases reveals that a large number of persons have, in short installments, spent many years of their lives in jail. In 1957 the Committee on Prisons, Probation and Parole in the District of Columbia studied six chronic offenders and found that they had been arrested for drunkenness a total of 1,409 times and had served a total of 125 years in penal institutions.
purpose include a state misdemeanor statute;\textsuperscript{109} state authority to commit the "inebriate" under the Mental Health Act;\textsuperscript{110} and municipal implementation of a state authorized public drunkenness act.\textsuperscript{111} Facilities for treating alcoholics being practically non-existent, the Mental Health Act is a dead-letter in this connection.\textsuperscript{112}

\textsuperscript{109} Section 947.03 reads:

(1) A person who is so intoxicated that he is unable to care for his own safety and is found in a public place in such condition may be fined not more than $50 or imprisoned not more than 30 days.

(2) A person who is an habitual drunkard who is so intoxicated that he is unable to care for his own safety and is found in a public place in such a condition may be fined not more than $100 or imprisoned not more than 6 months.

\textsuperscript{110} Section 51.09(2) reads:

The commitment of an inebriate or a drug addict shall be for such period of time as in the judgment of the superintendent of the institution may be necessary to enable him to take care of himself. He shall be released upon the certificate of the superintendent that he has so recovered. When he has been confined 6 months and has been refused such a certificate he may obtain a hearing upon the question of his recovery in the manner and with the effect provided for a re-examination under section 51.11.

\textsuperscript{111} Section 66.12(1)(b) provides:

Local ordinances may contain a provision for stipulation of guilt or nolo contendere of any or all violations under such ordinances, and may designate the manner in which such stipulation is to be made and fix the penalty to be paid.

Milwaukee ordinance 106-2 provides:

(a) Any person who shall be found intoxicated in the city of Milwaukee . . . shall forfeit a penalty of not less than one dollar nor more than one hundred dollars ($100).

(b) Any person arrested under Section 106-2(a) for being intoxicated may stipulate his guilt to that offense and be released from confinement upon payment of a penalty of ten dollars ($10) to the city of Milwaukee. No such stipulation shall be permitted unless the officer authorized to accept the stipulation is satisfied that the person arrested has regained his sobriety.

\textsuperscript{112} A survey of Milwaukee county facilities for the treatment of alcoholism taken in 1966 revealed:

of the 21 public and private hospitals and rehabilitation centers questioned: None has a program of information. Only one has a program . . . to train members in detecting alcoholism. There are practically no out-patient facilities. . . . Only five agencies have a 24 hour admitting service, even for acute cases of
The corruption of the judicial process is illustrated by comparing statistics of disposition with those of court appearances: of the 10,837 appearing, 10,121 pleaded guilty and 716 pleaded not guilty.\footnote{113}

The Milwaukee police officer may take an intoxicated person either to the station or to the person’s residence if he has one. If he is involved in some rehabilitation program, the police may take him to the appropriate institution. Whether he will be taken home will depend on factors such as his appearance, his reputation as a known derelict, his present or past attitude towards the officer, and his social class. One police officer stated: “Most of the time the drunk is taken in for his own protection.”\footnote{114}

If the person brought to the station is charged under the city ordinance, alcoholism. . . . Only seven have facilities for treating alcoholics after they are released from the institution where they received original treatment.

\begin{quote}
Milwaukee Journal, Jan. 13, 1967, pt. 2 at 13. One of these, the De Paul Rehabilitation hospital devoted to treatment of alcoholics, has a capacity of 104 patients and a treatment program of three and one-half weeks. Outpatient care which may properly last several years is not included. Milwaukee Journal, Oct. 6, 1967, pt. 2 at 11, col. 1. A program “seeking treatment for at least 10%” of the estimated 33,800 alcoholics in the county was proposed. Milwaukee Journal, Mar. 18, 1967, at 11.
\end{quote}

\footnote{113}In New York City where drunks are arrested usually on disorderly conduct charges, the chief judge issued an order, effective Jan. 1, 1966, ordering the appointment of legal aid attorneys to defend these defendants. Thereafter, the conviction rate fell from a rate of 99% to less than 2%. In response, the Police Department in May of 1966 ordered the discontinuance of daily mass “roundups” of derelicts in the Bowery area.

\begin{quote}
Memorandum on the Manhattan Bowery Project, by the Vera Institute of Justice (1967). Would it not be likely that the same would occur if these defendants were represented?
\end{quote}

\footnote{114}Although a substantial number of those persons found intoxicated in public are not arrested, it is routine practice to take custody of those drunks who might be harmed if not incarcerated. Typically the subject of such an arrest is a habitué of skid row who must be arrested for his own safety because he has fallen and injured himself, because he needs protection from the cold, or because he is likely to become the victim of a jackroller.

The true purpose of these arrests is reflected in different ways in major cities across the country: The Chicago officer may enter “drunk-safekeeping” or “Drunk & Down” on his arrest slip, a Philadelphia policeman may make a notation that the defendant was arrested “for his own protection”; while the Detroit officer uses the revealing term “golden rule drunk” to describe such a person.

\begin{quote}
LAFAVE, supra note 106 at 448; See also LAFAVE supra note 45 at 440; Pilot Project Report, supra note 54 at II-10.
\end{quote}
he is usually held for four hours or until he is sober. As provided by the ordinance he may stipulate his guilt, pay ten dollars which is forfeited and be released without having to appear in court. If charged under the state statute, he is held overnight in the “drunk tank” and appears in misdemeanor court the next morning. The police determine whether it will be a state or city charge. Observation in misdemeanor court indicates generally that only the disheveled derelict is processed on a state charge, although occasionally a college student is so charged to impress him with the seriousness of his conduct.\textsuperscript{115}

The court runs through the “drunk tank” as its first order of business, disposing of thirty to forty cases a day. Sentence may be either to the city jail or to the House of Correction. The latter is preferred perhaps because it maintains a care center for alcoholics, although a more important consideration may be which one has space available on the day of sentencing. Almost invariably defendants plead guilty and the standard sentence is ten dollars or ten days.\textsuperscript{116} If the defendant has an extensive record or there are other extenuating circumstances, the sentence may be

\textsuperscript{115} LAFAVE, \textit{supra} note 45 at 442 states of Milwaukee:

Not all drunks are allowed to stipulate guilt. 

\ldots A directive from the chief of police indicates that this alternative is to be used only with nonhabitual drunks who do not have any outstanding warrants or cases pending against them.

The \textit{Pilot Project Report, supra} note 54, at II-50 states:

Common drunks ordinarily are charged as ordinance violators. Prior to appearance in \ldots court they are interviewed and have their records checked by a Milwaukee police department sergeant, who selects a few for recharging on a state warrant in order to insure a period of incarceration. This occurs in those cases in which (1) the defendant requires a term of imprisonment; (2) he has been in daily for several days; (3) he has fines outstanding that he has failed to pay; or (4) other aggravating circumstances exist.

\star \star \star

In contrast to the procedures followed by the Milwaukee police department, the sheriff’s department has little choice in bringing their charges. All their cases must be taken to the office of the district attorney, and it is left to him whether the charge should be a violation of the state statute or the county ordinance. In practice the county ordinances are rarely used, but on occasion they are resorted to as a compromise between a more serious state charge and a decision not to charge at all.

\textsuperscript{116} Thus, whether the charge is state or city, the monetary penalty is the same. But the stigma of a state charge is much greater than that of a city charge and as indicated in the text, this is used as a means of punishment. \textit{See} text accompanying notes 206-209 \textit{infra}.
increased or reduced. Representatives of various private service organizations will be in court and on their request certain defendants will have their cases dismissed or held open so that they may be referred to the agency. A sentence may be suspended if a defendant agrees to participate in one of the programs.

All this is very costly:

A welfare department survey showed that in one year the county spent more than five million dollars merely to shelter alcoholics in county institutions.\(^{117}\)

Yet little has been expended on understanding causes and thereby reducing the fiscal or human waste that this repetitive process represents.\(^{118}\)

The task of the police is clear: according to explicit state and city law, public drunkenness is unlawful and the police are charged with performing the combined transportation and sanitation service to carry out this policy. To the extent that the police act rationally and humanely in taking some persons to their homes, they act outside their legal authority.\(^{119}\)

Within recent years, this irrationality has attracted the attention of commentators, interested attorneys and the courts.\(^{120}\) Several state and federal courts had held conviction under public drunkenness statutes invalid;\(^{121}\) and the Wisconsin Supreme Court without citing any of these

\(^{117}\) Milwaukee Journal, Jan. 6, 1967, Accent section at 1. Present costs in maintenance of prisoners are approximately $3.40 per day in the House of Correction. \textit{Id.} Costs for maintaining a prisoner in the Milwaukee County Jail depend on whether calculations are based on “out-of-pocket costs,” that is, “food, food preparation, and medical services,” in which case the cost in 1968 is $1.73 per day per prisoner; or on the “total cost of maintaining the prisoner,” which “includes the out-of-pocket expenses, plus salaries of Deputies assigned to the jail, light, heat, maintenance, and all other operating costs.” Letter from Sheriff Edwin T. Purcell to the author, June 25, 1968.


\(^{119}\) In Schoette v. Drake, 139 Wis. 18, 120 N.W. 393 (1909), an officer failed to bring a person arrested on a drunk charge before a magistrate until the morning after the arrest. The court decided that “the lower court erred in deciding as a matter of law that there had been no unreasonable delay, as the local court had been open immediately after arrest” for disposition of the case or for release on bail.

\(^{120}\) Logan, \textit{May a Man be Punished Because He is Ill?}, 52 A.B.A. J. 932 (1966); Rubington, \textit{The “Revolving Door” Game}, 12 CRIME & DEL. 332-338 (1966); Szasz, \textit{Alcoholism: A Socio-Ethical Perspective}, and Slovenko, \textit{Alcoholism and the Criminal Law}, 6 WASHBURN L. REV. 255, 269 (1967). The theoretical basis for court decisions before the \textit{Terry} case is analyzed in Starrs, \textit{The Disease Concept of Alcoholism and Traditional Criminal Law Theory}, 19 S.C. L.REV. 349 (1967) and see generally the symposium in this same issue, \textit{Id.} at 303. \textit{See also Drunkenness Report, supra} note 113.

cases concluded that "it is generally now believed by the medical profession that alcoholism is a disease." Unfortunately, the case accepted by the United States Supreme Court to determine the right of a state to make public drunkenness a crime, *Powell v. Texas*, could hardly have been more ill-chosen. The opinion of Mr. Justice Marshall, representing four justices, reads like a memorandum recommending that the appeal be denied for failure to present properly a federal question rather than a statement of the reasons that a state has a constitutional right to treat alcoholics as they do.

We are unable to conclude, on the state of the record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.

---


122 State v. Freiberg, 35 Wis.2d 480, 151 N.W.2d 1 (1967).


124 We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.

*Id.* at 521-522.

125 Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease."

*Id.* at 522.

126 Defendant had testified on cross-examination that before coming to court on the trial date he had taken only one drink because he was afraid if he took more he might not make it to court. *Id.* at 519.

127 The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving
Mr. Justice White, concurring only in the result based on the facts of the case, but thereby permitting the five to four majority, went further:

The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronic have homes many others do not. For practical purposes the public streets may be homes for these unfortunates, not because their disease compels them to be there but because drunk or sober, they have no place else to go and no place else to be when they are drinking. As applied to them this statute is in effect a law which bars a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

If Mr. Justice White and the four dissenters do indeed believe that the public drunkenness law is unconstitutional as applied to those "chronics" who are homeless or that the case as decided does not purport to consider the homeless drunk, then Powell is inapplicable in a large proportion of cases involving this offense.

--

Id. at 536.

Although Powell had been arrested for public drunkenness more than 100 times, the chronic alcoholic with a home (Powell) or financial resources is as capable as the non-chronic drinker of doing his drinking in private, of removing himself from public places, and since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place.

Id. at 550.

Id.

Skid-row alcoholics compose the largest portion of the 2 million public drunkenness arrests made annually in the United States. A large number of these are the repeated arrests of the same men. These chronic drunks are arrested, convicted, sentenced, jailed, and released — only to be rearrested, often within hours or days.
Moreover, in evaluating Powell for the purposes of Draft Section 969.03 it is essential to recognize that unlike the Court we are not concerned with the substantive offense, but with the procedural problem of the police officer encountering the orderly drunk found in the public way. The Court proceeded on the assumption that it had only two choices: either to continue the "criminal process" of arrest and conviction or to opt for a "medical" solution in which "we run the grave risk that nothing will be accomplished beyond the hanging of a new sign — reading 'hospital' over one wing of the jail house."131

In the opinion this discussion is allied with that of whether the criminal penalty deters further public drunkenness.132 Such an inquiry indicates a misconception of the current function of public drunkenness statutes. Whatever their purpose might have been in the past, their raison d'être today is not to deter. These statutes now serve to legitimize a police activity that most law enforcement officials defend on humanitarian grounds: to take the drunk off the streets "for his own good."133

The purpose of Draft Section 969.03 is to recognize and legitimize this process, while eliminating the necessity for court appearance and conviction. In so doing the provision carries out the original intention of present Section 947.03: to aid persons "unable to care for [their] own safety" in a public place.134 But Section 947.03 designates this condition as criminal and authorizes court appearance and conviction in order to provide the police with authority for accomplishing the humanitarian object. In contrast, the effect of Section 969.03 is to remove public drunkenness from the criminal code where it is the sole manifestation of "anti-social behavior."135

They are the men from skid-row for whom the door of the jail is truly a "revolving door."

Drunkenness Report, supra note 113, at 11. See also Id. at 60.

131 392 U.S. at 529.
132 Id. at 531. See Cohen, Reflections on the Revision of the Texas Penal Code, 45 Texas L. Rev. 413, 427-428 (1967). For empirical evidence to support these reflections, see Chambliss, Types of Deviances and the Effectiveness of Legal Sanctions, 1967 Wis. L. Rev. 703, 714-716.
133 See note 114 supra.
134 LaFave, supra note 45, at 184 notes that "The draftsman's comments [to Section 947.03, supra note 109] state that 'the police, as a matter of policy, should be permitted to take him [the helpless drunk] into custody, if for no other reason than that he needs protection,'" citing 5 Wis. Legis. Council, Jud. Com. Rep. on Crim. Code 45 (1953). LaFave further noted, however, that this is "inconsistent with the notion that there is a right to prompt release on bail set only to insure appearance."
135 The President's Commission Report, supra note 13, at 236, recommends:

Drunkenness should not in itself be a criminal offense. Disorderly or other criminal conduct accompanied by drunkenness should remain punishable as separate crimes. The implementation of this recommendation requires the development of adequate civil detoxification procedures.
At the same time the Draft Section provides for handling a similar problem: the person “who is so physically or mentally incapacitated that he is unable to care for his own safety.” Presently there is no authority to take such persons into custody even though they are in personal danger.\textsuperscript{136}

Custody in such cases is designated as “provisional” because the officer is authorized to take the drunk, or the physically or mentally incapacitated, into custody only “for the purpose of transporting him to a safe place.” Subsection (2) provides that the person is to be taken to his home or to a “facility which is appropriate to care for the person.” He is to be taken to jail only when “no other appropriate facility in the community . . . is able or willing to accept him”; he is not to be taken there to commence a criminal prosecution. The “community” is left undefined, but should be within a reasonable distance of the place where the person is found.

Although this approach is sound procedurally, it merely highlights the tragic spectacle of men strewn like refuse in skid-rows in all our great cities. Nevertheless, Draft Section 969.03 does fit into the scheme of reducing the number of persons taken into custody for prosecution and rationalizing the process of criminal justice administration.\textsuperscript{137}

\textsuperscript{136} If the proposed section were made law, of course, \$947.03 would be repealed. The proposed change is also in accord with \textsc{Model Penal Code} Section 250.11 (Tent. Draft No. 13, 1961). Statutes permitting release of drunks are collected in LaFave, \textit{supra} note 45, at 448 n. 41.

\textsuperscript{137} A review of the right at common law of detention of a mentally deranged person is found in Manos, \textit{Police Liability for False Arrest or Imprisonment}, 16 \textsc{Clev.-Mar. L. Rev.} 421, 425 (1967).

A modest but successful effort is the Vera Institute of Justice Manhattan Bowery Project begun in November 1967. In the first two months, it ministered to 180 off the street alcoholics. Its function is divided into 1) a street rescue team, 2) medical evaluation and alcohol detoxification for an average five day stay and 3) placement in an aftercare agency.

The rescue team is composed of a civilian medical aid and a plainclothes policeman. The team cruises the Bowery area in an unmarked station wagon, driven by the policeman. They approach an inebriated, derelict man, offer him a cigarette, and talk with him. They tell him that if he is willing, they will take him to a nearby infirmary, where he will receive medical care. . . . Eighty-five percent of men so approached have agreed to come in on a voluntary basis. Most of the others were helped to their lodging houses; the remainder refused help and were left alone, except for a few cases in which an ambulance was called for a medical emergency.


Maryland recently has instituted 24-hour detoxification centers, right of commitment for five days under controlled criteria and a Division of Alcoholism Control which is to advise the governor on the “most effective methods of coordinating the efforts of all public agencies within the state to deal with the
D. To the Station

969.24 PROMPT TAKING TO POLICE STATION.
Any person taken into custody, if not released pursuant to subs. 969.01(3) or (4) shall be brought promptly to a police station.
Ref. ALI (1966) s. 3.09.

969.30 PRELIMINARY DISPOSITION OF PERSONS IN CUSTODY: WARNING.

(1) APPEARANCE BEFORE STATION OFFICER. Any person brought to a police station in custody shall be presented forthwith before the station officer [to be defined] prior to his being booked or interrogated. The station officer shall make a record of the time when the person is brought before him.
Ref. Study Draft (1968) A4.01(1).

(2) WARNING.138 The station officer shall immediately inform the person in plain and understandable language:
(a) of the crime for which he is held;
(b) of the time limits of his detention and the probable method of his disposition pursuant to s. 969.32(1), as it applies to his case and in accordance with the facts then known;
(c) that he is not obligated to say anything or to answer any questions, and that anything that he may say may be used in evidence against him;
(d) that he may promptly communicate by telephone, letter or telegram with counsel, relatives or friends and that, if necessary, funds or facilities will be provided to enable him to do so;
(e) that counsel, relatives or friends may have access to him as provided in s. 969.70(3).

138 This subsection has been substantially revised since the project termination.
(f) that he will not be questioned against his wishes and that he may consult a lawyer before being questioned and may have a lawyer present during any questioning; and
(g) that if he wishes to consult a lawyer or to have a lawyer present during questioning, but is unable to afford or obtain one, he will not be questioned until a lawyer has been provided for him, and if he does not know of a lawyer or cannot afford one, he will be given a telephone number to call where he may immediately speak to one, who will advise him of his rights either by phone or in person.


(3) PRINTED FORM TO BE GIVEN. The person shall forthwith be given a printed form which in plain and understandable language contains the substance of the matters listed in sub. 2.

Ref. Study Draft (1968) A4.01(2).

(4) INCAPACITY TO UNDERSTAND WARNING. In any case where a person in custody is in such condition, on account of illness, injury, drink, or drugs, that he is incapable of understanding the warning, the warning shall be given as soon as such person is able to understand it. Interrogation concerning any crime shall not proceed until the person has sufficiently recovered from the condition to understand the warning.

Ref. Study Draft (1968) A4.03(3).

(5) TELEPHONING RIGHTS. Promptly after the warning the station officer shall afford the person an opportunity, including if necessary funds in a reasonable amount, to use a telephone. In instances where the person is incapacitated so that he cannot himself make a tele-
phone call, the station officer shall telephone to a designated attorney, friend or relative. If he is unable to reach the person on the first try the person may call another party or he may continue from time to time to try to reach the first party until he meets with success. If the person reached is a lawyer, the person must be given an opportunity to speak to him in private. If the person reached is a friend or relative, an officer may monitor the call if there are reasonable grounds to believe the person in custody will be charged with one of the crimes listed in s. 969.32(2)(a), and that he may obtain or disclose some information which will interfere with the investigation of the matter or matters for which the person is being held. The person shall be informed that the call is to be monitored and the reason therefore.


(6) INFORMATION CONCERNING LOCATION OF PERSONS IN CUSTODY. Upon the arrival of the person in custody at a police station, information concerning his location shall be promptly made available to a relative, attorney or friend upon a single inquiry at a centralized location.

Ref. AL! (1966) 4.01(6).

(7) INFORMATION CONCERNING CUSTODY DECISION. The station officer shall promptly set in motion the means of obtaining any additional information he may need to make a decision to issue to the person in custody a notice to appear, to release the person on his own promise to appear, or to admit him to bail.

As with many other aspects of Wisconsin criminal procedure, there is no code provision which informs the policeman what to do with the person once he has taken him into custody. The Wisconsin Supreme Court has instructed the officer to “take the person arrested before a magistrate
without unreasonable delay, but any officer who followed the advice literally would receive astounded stares from court personnel. Such language preserves the image of eighteenth century law enforcement before the organization of police forces, when the constable brought the alleged offender directly from the street to the magistrate. Draft Section 969.24 reflects present practice in directing the officer to take the person in custody “promptly” to the police station.

The person brought to the station is to be taken “forthwith” before the station officer who is responsible for seeing that these statutory procedures are carried out (969.30(1)). His duties, although not yet fully defined, will include responsibility for keeping the requisite records of custody.

This officer shall give warnings based on Miranda though these may have been given by the arresting officer (969.22); the warnings will include fully informing the person of his rights of communication and of the time

---

139 Schoette v. Drake, 139 Wis. 18, 21, 120 N.W. 393, 395 (1909); Peloquin v. Hibner, 231 Wis. 77, 86-87, 285 N.W. 380, 385 (1939); LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. L.Q. 331, 332-334. Law and practice in Wisconsin is discussed in Pilot Project Report, supra note 54 at II 32-40. Diverse sections throughout the Wis. Stat. command a like duty: §26.14 Forest fires, law enforcement, “to take such person before any court in the country”; §46.05 Bonds of Employees, “take the offender before a magistrate”; §61.28 Marshall, “take before the justice of the peace”; §62.09(13)(a) City Police, “take before the Police justice or other proper court”; §74.11(2) Tax Collection, “take him before such nearest justice”; §196.16 Gaming, Railroad Cars, “bring him before any court of competent jurisdiction”; §192.47 Railroad Police, “take each offender before some magistrate having jurisdiction; §945.47 Car Conductor, “bring the offender before a magistrate of the city where the crime was committed.” State prompt arraignment statutes are collected in MODEL PRE-ARRAIGNMENT CODE (1966), supra note 8 at 230. If arrested upon a warrant, the person “shall be taken before the magistrate before whom it is returnable . . . .” Wis. Stat. §954.04.

140 The MODEL PRE-ARRAIGNMENT CODE, supra note 8 at 23 in its note to the analogous section states:

The section, in using the term “promptly,” does not intend to preclude a delay when this is necessitated by an emergency, such as a call to the arresting officer to rescue some person in the vicinity from danger or to proceed to the scene of another crime in the vicinity.

For the time this normally may take, see text accompanying note 164, infra.

141 The station officer is a creation of the MODEL PRE-ARRAIGNMENT CODE, supra note 8, Section 1.04 at 3, where he is defined as follows:

The chief officer of each law enforcement agency shall assure that at all times there will be one or more officers in each police station specifically designated as station officers. The station officer shall be the most senior and responsible officer who reasonably can be made available for the purpose.

For suggested record-keeping see Id. at 40-41. As with the MODEL PRE-ARRAIGNMENT CODE, the proposed Code leaves the designation of what records are to be maintained to the local district attorney who will issue guidelines or regulations pursuant to §969.80(1).
limits he may be legally held (969.30(2)). The station officer is mandated to "promptly set in motion" means for obtaining enough information to determine the charge, if any, and whether the person is to be admitted to stationhouse bail, released on his signed promise to appear, given a notice to appear or taken before a magistrate.

E. Disposition

969.32 DISPOSITION OF PERSONS TAKEN INTO CUSTODY.

(1) ALTERNATIVE DISPOSITIONS. Unless an order is entered under sub. (2), not later than two hours after a person in custody arrives at the police station the station officer shall make one of the following dispositions:

(a) If the station officer has concluded that the person has committed no crime, the station officer shall order his release forthwith.


(b) If the station officer has reasonable grounds to believe that the person has committed an ordinance violation or a misdemeanor in which the maximum sentence for the offense charged does not exceed six months imprisonment, he shall issue to him a notice to appear or release him on his signed promise to appear in court or in the office of the district attorney or city attorney at a time and place specified, unless the defendant in the past three years has defaulted in a court appearance for an offense other than a minor one such as a parking violation, in which case he may admit him to bail.

142 An extreme case of fears that may be engendered in a prisoner through misinformation or misrepresentation is found in Gosczinski v. Carlson, 157 Wis. 551, 147 N.W. 10, 18 (1914). Plaintiff was arrested on a civil warrant and was informed by the defendant officer that he would either have to post bond or remain in jail several months. Hearing this, the plaintiff tried to escape and was wounded seriously by the officer.

143 The exact apparatus for obtaining this information will be subject to regulations issued by the attorney general and the local district attorney (§969.90). Models conceived by the Vera Institute of Justice would be appropriate. But see text accompanying note 199, infra. Present practice in Milwaukee approximates the Code prescribed procedure of review. See text accompanying notes 56-59, supra and Pilot Project Report, supra note 54 at II-23, quoted infra note 177.
(c) If the station officer has reasonable grounds to believe that the person has committed a crime not included in sub. (b), he shall, on direction or in accordance with regulations issued by the district attorney, issue to the person a notice to appear, release him on his signed promise to appear in court or in the office of the district attorney at a time and place specified, or admit him to bail, pursuant to the provisions of 969.40 [stationhouse bail — to be drafted].


(d) In lieu of requiring bail, such person may be released to his attorney, spouse, relative or other responsible adult.


(e) Bail shall be required only where it appears necessary to secure the availability of the person for prosecution and the regulations promulgated by the district attorney pursuant to sub. (c) shall promote this policy. In each instance in which the station officer determines that the person may not be released without bail, he shall state in written form the factual basis of his determination.

Ref. ALI (1966) 4.04(4); Standards 1.2(c).

(f) If the person in custody does not furnish bail, or if the crime to be charged is not bailable by the police, further disposition shall be in accordance with s. 969.50.

Ref. ALI (1966) 4.04(4).

(2) ORDER FOR SCREENING IN CERTAIN CASES. The station officer may, in lieu of making one of the dispositions authorized by sub. (1), order that the person be detained for a period of screening, but only if
(a) he has reasonable grounds to believe that the person has committed one of the following crimes
   (i) murder or manslaughter
   (ii) kidnapping
   (iii) armed robbery

(b) the investigation is reasonably necessary to determine if there is sufficient evidence to charge such person with a crime.


(3) DURATION OF THE PERIOD OF SCREENING. The period of screening authorized by sub. (2) shall not exceed the time actually necessary to charge such person with the crime for which he is being investigated.

Ref. Study Draft (1968) A4.03(3).

(4) DISPOSITION AT END OF PERIOD OF SCREENING. If an order is entered under sub. (2), at the end of the period of screening, the station officer shall make one of the dispositions authorized by paragraphs (a) - (c) of sub. (1).


(5) REFUSAL OF COMPLAINT. Notwithstanding any other provision of this section, if at any time the district attorney determines not to issue a complaint charging the person with a crime, the station officer shall order the person released forthwith.


1. In General

Originally this Draft Section closely followed the Model Code of Pre-Arraignment Procedure, published in 1966, but changes necessitated by the Miranda decision were made. The Model Pre-Arraignment Code authorized a four hour detention period for preliminary screening of all persons taken into custody (Section 4.04(1)), with the possibility of extending detention time from eight to twenty-two hours in the case of certain serious felonies (Section 4.05(1). Draft Section 969.32 maintains the distinction between misdemeanants and felons, permitting detention of the former for two hours and detention of the latter for a period sufficient to obtain
“enough evidence to charge such person.” In April 1968, the American Law Institute released *Study Draft* No. 1 which substantially revises the screening procedure of the Model Pre-Arraignment Code. The reporters produced four “models;” Model A, with modifications, seems most appropriate for Wisconsin and has been adapted as Draft Section 969.32.

Except as noted below, Model A requires that within one hour after the suspect arrives at the station, the station officer must release him outright if he finds there is no reason to believe that the person has committed a crime (A4.03(1)(a)). If he finds that there is reasonable cause, he releases the person either on citation (notice to appear) (A4.03(1)(b)), or on his recognizance or on bail (A4.03(1)(c)). Each alternative disposition is made dependent on the district attorney’s decision to issue a complaint. If the district attorney does not issue a complaint within the time period, the person must be released on notice to appear. Only if the complaint is issued within the hour may the officer require bail or release on recognizance (A4.03(1)(c)).

The one hour limitation may be extended if the charge is “a crime” or one of a list of crimes, the choice being left to the revisor. Extension to three hours is suggested by the three hour limit recently permitted the District of Columbia police, provided that the “investigation permitted during the period of screening is reasonably necessary” to accomplish stated purposes (A4.03(2)(b)), and the period of detention “shall not exceed the time actually necessary” to carry out that purpose (A4.03(3)).

---

144 This followed Phillips v. State, 29 Wis.2d 521, 534-535, 139 N.W.2d 41, 47 (1966), discussed infra at 68.
145 ALI, *MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE*, Study Draft No. 1 (1968), hereafter referred to as *Study Draft*.
146 Model A, described in the text, is similar in structure to the former draft. Model B is close to A but introduces a “custody magistrate” into the police locale who takes on the warning and supervisory responsibilities of the station officer. Models C and D, as do most state statutes, provide for prompt production before a judge. Model C permits no pre-appearance interrogation without the presence or consent of counsel and Model D permits such questioning, subject to the limitations of *Miranda*. Both models allow post-judicial appearance, remand for a line-up and interrogation with the person’s consent. *Study Draft, supra* note 145 at xvi-xviii. Another important change eliminates the distinction in procedure between the person taken into custody with and without a warrant. *Id.* at 10.
147 The provision permits an arrested person to “be questioned with respect to any matter for a period not to exceed three hours immediately following his arrest.” *D.C. Crime Law, supra* note 38. The *Study Draft* is, however, more restrictive in that it allows a total of three hours, including interrogation.
148 These are: to determine whether a complaint should be issued; to determine the nature of the crime to be charged; to obtain information to prevent harm to person, or property “of substantial value”; to obtain information to discover accomplices “or in preventing the loss of evidence relating to such crime.” §A4.03(2)(b).
Study Draft No. 1 is more tightly constructed than the 1966 draft in that it has incorporated responsibility and means of control by the district attorney in addition to specific standards and limitations to guide the police officer in extending the time limit for detention beyond the normal one hour. Unfortunately, the Study Draft did not indicate how the reporters arrived at the one hour limit. But Professor Vorenberg, one of the code reporters, states that this period was selected "on the basis of observation and consultation with people working in the field."149

The district attorney's control of disposition by the police is exercised through his issuance or non-issuance of a complaint.150 Although there may be advantages to this type of control, the present district attorney hearing151 which occurs after police disposition but prior to the initial appearance before a magistrate seems such an advantageous type of review that a change should be carefully weighed. An informed judgment may be precluded by requiring the district attorney to make a decision to file a complaint based entirely on police information available at the stage of determining whether to extend time limits for detention. Moreover, such a procedure would tie the decision to file a complaint to that requiring bail. While guarantees to assure appearance may be desirable from the district attorney's view at this time, a formal charge may not be. He may, of course, always withdraw a complaint; but once he has taken an official position, withdrawal may be unlikely. Certainly the informality and the options available at the district attorney hearing will be affected. Therefore, in Draft Section 969.32 the station officer's decision to release is independent of the issuance of a complaint by the district attorney. The one exception is that the district attorney may determine during the period of detention that no complaint will issue in a particular case, in which case the person shall be released (969.32(5)). Nevertheless, as we shall see, the district attorney plays an important role under the proposal.152

The Code adopts the major premise of the Study Draft that within a stated time of the person's arrival at the police station the station officer must make a decision as to his disposition. The time of permissible detention in the Draft Section is raised, however, from one to two hours. If the station officer concludes that the person has committed no crime, he is to be released outright (969.32(1)(a)). For all ordinance violations and for misdemeanors where the statutory penalty does not exceed six months imprisonment, the station officer must issue a notice to appear or release on the person's signed promise to appear unless in the past three years the

150 The Study Draft is strangely silent about this result. The Model Pre-Arraignment Code, Section 6.02(1), supra note 8, at 54, provides that "a complaint charging a person with an offense shall be issued only by a prosecuting attorney . . . and shall be filed only with his approval."
151 This is described in the text accompanying notes 213-214, infra.
152 See text accompanying notes 182-183, infra.
person has defaulted in a court appearance of some importance (969.32-(1)(b)). For felonies and for misdemeanors where the statutory penalty exceeds six months imprisonment, the station officer may require bail, but the choice must be exercised under the direction of the district attorney and pursuant to regulations issued by him (969.32(1)(c)). As an alternative to bail, the station officer may release on notice to appear, or on the person's signed promise to appear (969.32(1)(c)), or to the person's attorney or another responsible adult (969.32(1)(d)). If bail is required, the station officer must state "the factual basis for this determination." Bail is to be demanded "only where it appears necessary to secure the availability of the person for prosecution" and the regulations to be issued by the district attorney "shall promote this policy" (969.32(1)(e)).

The period of two hours detention may be extended to three hours on the condition that the station officer reasonably believes the additional time is necessary to obtain sufficient information to charge the person with one of a series of named crimes such as murder and armed robbery (969.32(2)). The period of extended detention "shall not exceed the time actually necessary to charge such person with a crime." (969.32(3)).

In discussing the Draft Section we should consider: 1) its relation to Wisconsin law; 2) the feasibility of limiting detention either in purpose or in time; 3) the mandatory requirement that most misdemeanants and all ordinance violators be released without bond; and 4) the intervention of the district attorney in the disposition process.

2. Wisconsin Law on Detention Time

Even though the Wisconsin Supreme Court has not been called upon directly to decide whether detention for the investigative considerations listed by the Study Draft is permissible, the Court in deciding on the length of time the person can be detained for interrogation seems to have limited its purpose as well. In Phillips v. State the Court held that detention of five hours made an otherwise voluntary confession involuntary.

A detention for a period longer than is reasonably necessary for such limited purpose ["to make a formal complaint"] violates due process and renders inadmissible any confession obtained during the unreasonable period of the detention . . . .

While one may be detained by the police and interrogated to secure sufficient evidence to either charge him with a crime or to release him, the police cannot con-

153 See the forms of investigation, other than for charging, which are listed supra note 148.
154 29 Wis.2d 521, 534-535, 139 N.W.2d 41, 47 (1966).
continue to detain an arrested person "to sew up" the case by obtaining or extracting a confession or culpable statements to support the arrest or the guilt. [Emphasis added]155

Phillips merely refined the decision of Peloquin v. Hibner,156 a false imprisonment action. Rejecting any particular time limit on detention, the Peloquin court stated that "the reasonableness or unreasonableness of the period of detention must be determined from the facts and circumstances in each case."157 Wisconsin law thus places no time limit on detention as long as the detention is necessary to obtain sufficient information to file a formal complaint158 or to release the suspect. Once that information

156 231 Wis. 77, 86-87, 285 N.W. 380, 385 (1939).
157 The quotation from the text continues:

There is no suggestion that Sheriff and District Attorney . . . did not expedite their investigation on Monday night with due diligence and dispatch. The [Sheriff] and the District Attorney were entitled to a reasonable time on Tuesday . . . as a matter of law, to determine whether to make a formal complaint against the plaintiff or release her from custody.

Id. See also State ex rel. Van Enden v. Burke, 30 Wis.2d 324, 338, 140 N.W.2d 737, 744 (1966). Peloquin also disposed of the more basic assertion that detention by the police for any reason was impermissible. Peloquin v. Hibner, supra note 156, at 85, 285 N.W. at 384, and Study Draft, supra note 145, at 36. Where the period of interrogation, and hence custody, is short enough, the police seem to make a prima facie case for reasonableness:

Since the defendant was only detained for interrogation for an hour and a half, on its face the defendant's detention was not for an unreasonable length of time under Reimers (three hours) [See note 159 infra] and Phillips (five hours).

State v. Carter, 33 Wis.2d 80, 96-97, 146 N.W.2d 466, 475 (1966).

158 The term "formal complaint," used by the court, is troublesome. Undefined, it is unclear whether it requires a more onerous or different standard than that proposed by the Code language "sufficient evidence to charge." Wis. STAT. §954.02 defines a complaint as a "written statement of the essential facts constituting the offense charged and may be upon information and belief." This is substantially the definition of complaint found in the Model Pre-Arraignment Code, Section 6.01, supra note 8, at 54, and both are based on Rule 3 of the Federal Rules of Criminal Procedure. That the court juxtaposes "formal complaint" and "release" at one point and further on writes of the police interrogating "to either charge him with a crime or to release him" would lead one to believe that the court did not mean "formal complaint" in its "formal" sense. See LaFave, supra note 45, at 330, who assumes this interpretation of Peloquin. The distinction is important because the quantum of evidence needed by the police to decide between charge and release is or may be substantially less than the "essential facts" required by the prosecutor at a later stage of the process. If the police may retain a person in custody until they have enough
is available, it follows that there is no further right to custody.\textsuperscript{159}

3. Feasibility of Limits on Detention as to Purpose and Time

If the Draft Section defines what is "reasonably necessary" as two to three hours does it not neglect investigative needs other than charging? Does it leave enough time to carry out the charging function in all cases, including the most serious crimes and complex fact situations? From the decision in \textit{State v. Carter}\textsuperscript{160} it may be argued that since the total period of custody allowable to police for \textit{any} purpose is limited, that custody is prima facie reasonable, as is questioning for any rational law enforcement objective authorized by the Code and connected with the reason for which the person was taken into custody. Straining a bit more, one may reason that the \textit{Phillips} doctrine is restricted to detention for interrogation. While the police cannot continue to detain in order to interrogate further, custody may be retained for other valid purposes, even to determine whether the victim wishes to prosecute.\textsuperscript{161} It does not take excessive imagination to reinterpret these as investigative devices necessary in the particular case to determine the charge decision.

In considering whether to incorporate this provision in the Code, a thorough empirical investigation would be useful, if not essential, to evaluate the importance to the police of interrogation for reasons other than formal charging.\textsuperscript{162} The Draft Section, after all, is offered in the same
evidence for the prosecutor's complaint, then the detention in many cases will need to be lengthy. See \textit{Peloquin}, supra note 156, which is apparently explained by this circumstance.

\textsuperscript{159} Thus, in Reimers v. State, 31 Wis.2d 457, 470-71, 143 N.W.2d 525, 532 (1965), a delay no longer than that in \textit{Peloquin} was unacceptable because it was unexplained except by the "unavailability" of the magistrate. (Dictum.)

\textsuperscript{160} Note 157, supra.

\textsuperscript{161} See \textit{LAFAVE}, supra note 45, at 311, 366-67 and 377.

\textsuperscript{162} The Discussion portion of the Study Draft, supra note 145, at 103, states:

One of the important issues not adequately explored is the value of questioning for purposes other than establishing whether a suspect committed the crime for which he was arrested. The Yale study indicates that questioning may be significant in identifying accomplices and solving other crimes. Thus, that study found interrogation necessary or important to solve the crime for which the arrest was made in 12 of 90 cases and, for identifying or convicting accomplices in 16 of 36 cases. In three of the 8 cases where detectives questioned suspects about other crimes the Yale writers indicate that questioning appeared important.

In a nationwide questionnaire survey by the writer taken just before \textit{Miranda} in April and May 1966, respondent detectives in cities of 100,000 population and over reported that interrogation of suspects was valuable to them to obtain a confession (46%); to aid in clearing suspect of unfounded complaint (26%); to clear up other offenses committed by the suspect (7%); to obtain leads to
Pre-Arraignment Procedure

December 1968]

spirit as the *Study Draft*; and one reason given by the reporters for proposing a "Study Draft" is that they believe it may be helpful in providing a focus for comment and analysis by those concerned with problems in this area and for the development of empirical data needed as a basis for future decisions.\(^{163}\)

There appear to be no published data clocking the time taken by various police operations — booking, identification, record and warrant checks — which constitute routine administrative processing. The Vera Institute of Justice, however, did conduct an unpublished Arrest-Arraignment Time Study in a large metropolitan police department establishing the approximate time taken by each step in processing.\(^{164}\) It was found that the time from arrest to arrival at the station ranged from ten to sixty-one minutes and averaged about twenty-three minutes; the most frequent ranges were ten to twenty-five and thirty to forty minutes.\(^{165}\) Our main concern here is the time between the arrival at the precinct station and charging. The *Time Study* was statistically divided into fingerprintable (FP) and non-fingerprintable (NFP) offenses, a distinction which approximates the Code categorization between lesser and more serious offenses. For the FP offenses, average time between arrival at the station and booking (charging) varied from fifty-one to one hundred and eighty-three minutes.\(^{166}\) Seventy-four percent of the average times fell within the limits of

---

\(^{163}\) *Study Draft*, supra note 145, at xix.

\(^{164}\) The *Time Study*, as it is hereafter referred to, dated June 1967, took in the period, May 12 to May 22, 1967. Each arresting officer appearing in the "arraignment court" was required by the department to prepare a time study report on which he recorded at each stage the time it took him to pass with his prisoner through that step. The times recorded for each stage were totaled separately and averaged so that the resulting numbers represented the average time in minutes recorded for each step that day. Averaging has the disadvantage of being skewed one way or the other by the recorded extremes. To reduce this bias, the writer obtained modal figures by taking the daily averages for the stage involved and regrouping them according to frequency of occurrence within certain time spans.

\(^{165}\) *Id.* This, of course, would vary according to the distance of the arrest from the precinct, the number of prisoners, and the availability of transportation.

\(^{166}\) All FP offenses are brought to the detective squad office, usually on the second floor of the precinct station, for fingerprinting, identification and other investigation including interrogation. The fingerprinting and identification procedure itself takes about one hour. This appears to be irreducible since a manual search through the files is required. If done by computer, this part of the processing could be reduced to minutes. When the detectives are finished with the investi-
sixty and one hundred and five minutes, and most of the rest required one hundred and thirty minutes or less. The NFP or lesser offenses ranged from eleven to seventy-seven minutes for the charging process, most lasting from thirty to fifty minutes.

This survey tends to show that certain operations ordinarily associated with serious offenses take at least one hour to process and most take less than two hours with a small number exceeding that time. The vast majority of minor offenders, if not all, may be processed within the two hour Code provision, and probably even within the one hour period proposed by the Study Draft.

No special study of appellate cases was conducted to compare detention and interrogation times, but in the cases discussed above interrogation varied from one and one-half to five hours. A recent study observing in-custody interrogation found that in eighty-three percent of the cases involving persons suspected of more serious crimes the questioning lasted from one-half to two and one-half hours. In only eleven percent did the interrogation continue beyond that time.167

One must also take into account investigative activity which, though not involving interrogation, takes time: for example, verification of alibis, tests on physical evidence, interviewing of complainants and witnesses. The time of arrest may make a difference with respect to time required for these activities. During non-business hours records and even persons may be unavailable.168 In some cases precinct police may wish to have the suspect interrogated by specialized bureaus such as narcotics, sex or robbery; this may require transporting the suspect from the precinct to the bureau in another part of the city and back again.169

Observation studies taken together with the operative practices described seem to raise serious doubts about the feasibility of the hour limitation proposed in the Study Draft. Nevertheless, there are other facts which indicate that time in detention can be reduced without sacrificing police needs. For instance, "in Milwaukee statements either are written out in longhand by the arrested person or are taken in shorthand by a stenographer. . . .";170 and the same observer found that "[i]n practically all the interrogations observed, more than one officer participated and sometimes as many as a dozen were involved."171 The same rather cumbersome "horse and buggy" operation was reported by the Yale Study:

---

167 Yale Study, supra note 91, at 1541 n. 63.
168 In the MODEL PRE-ARRAIGNMENT CODE, supra note 8, at 34, 159, Section 4.05 provided different allowable detention times, depending on the time of day or night the person was arrested.
169 LAFAVÉ, supra note 45, at 304.
170 Id. at 304-305.
171 Id. at 305.
Pre-Arraignment Procedure

Most suspects spent more than an hour, often two hours or more, in the station-house before they were released on bail or locked up, although this time was seldom devoted to intensive questioning. Some time elapsed as the suspect waited at the desks in the main room while the detectives familiarized themselves with the case. Photographing and fingerprinting after questioning usually took about 30 minutes. Often interruptions and breaks in the questioning for one reason or another took most of the time the suspect spent in the interrogation room.172

Discovering the amount of "wasted" time in an interrogation, the researchers then recorded the time actually employed by the detectives to interrogate. This was found to be less than fifteen minutes in thirty-five percent of the cases and less than one hour in eighty-five percent of the cases.173 Although these sketchy data do not prove that detention time can be reduced to the limits of the Study Draft or the Code proposal, they do suggest that the objective is not absurd. Particularly with respect to minor offenders, processing should be re-examined with such a goal in mind.174

With reference to these minor offenders, recent evidence makes apparent that by the time the person in custody arrives at the station, the charge has been determined and all that remains is the processing. With almost no exception, the evidence is available either because the offense was committed in the presence of the arresting officer, or the person has admitted it, or the officer has found physical evidence of it, or there is a complainant who has seen it.175 In order to test this conclusion and particu-

172 "Yale Study, supra note 91, at 1541. An attorney friend reported that in attempting to obtain the release from police custody of an important client, he had to wait while he watched the officer slowly peck out the complaint on a typewriter. Finally exasperated, he offered to and did type the form himself."

173 Id. at 1542.

174 It may be objected that even though the processing of any single charge may be attained within the time limitation, from time to time, as in any organization, there will be administrative overloading such as occurs at certain times of the day, during a shortage of personnel, multiple arrests, particularly where there has been a riot or mass demonstration. A partial answer may be found in the suggestions for contingency planning, Report on Civil Disorders, supra note 104, at 348-57, and text accompanying note 197 infra. An alternative possibility would be that under emergency conditions the district attorney could suspend the rule for a stated limited period, the criterion then being the time necessary to charge.

175 Reiss and Black, supra note 59, at n. 56, 67 and 87, and Yale Study, supra note 91, The Pilot Project Report, supra note 54, at II 23-24 that "Misdemeanor
larly to find out if local police could live with a two hour limitation on
detention of those to be charged with ordinance violations and all mis-
demeanors, students interviewed officers from the city of Wauwatosa (a
suburb of Milwaukee), the Milwaukee sheriff's office, the Milwaukee police
department and three Chicago precinct stations.

In Wauwatosa persons who are brought to the station to be charged with
such offenses are given an identity, criminal record and warrant check;
their version of what happened is verified. Normally a driver's license,
identity card with a photograph, a draft card or even a social security card
is acceptable proof of identity. Record checks are made at the Wauwatosa
detective bureau and the Milwaukee police department, and it was observed
that a central file would simplify the process. This procedure is supervised
by the shift commander who decides whether to release or to charge on
the basis of respective versions of the incident told by the arresting officer
and the suspect, together with the information gathered by the various
inquiries. In the event that the review ends in a city charge, the officer
himself may set bail; if it is a state charge, bail must be set through the
county clerk in Milwaukee. The officer instead may take the person to the
office of the district attorney in Milwaukee that day or the following morn-
ing depending on when the arrest was made. There is also a procedure
for releasing the person on his own recognizance, although there is no
statutory authority for this.176 Under ideal conditions, this procedure takes
from one-half to one hour. Complications may be caused by the arrival of
several suspects at once, uncooperative suspects, confused or conflicting
stories or the involvement of station personnel in other matters.

In Chicago the system is basically the same, but with a central com-
puterized file system, record checks may be made in a matter of minutes.
The system in Milwaukee is essentially similar, as is that of the depart-
ment involved in the Vera Institute study.177 A different time factor may
be encountered in cases where the person is to be questioned by detectives
and the only detectives are in the Safety Building downtown. However,
this can generally be made up at the other end because the detective
bureau is the same building as the court.

arrests invariably are made for a specific charge and the booking card so
indicates."  
176 But see text accompanying note 155 for case authorization.
177 The Pilot Project Report, supra note 54, at II 23-24 describes the Milwaukee
police procedure as follows:

In most misdemeanor cases, the prisoner is
usually booked at the local district station. In
crimes where followup investigation by the de-
tective division is necessary, the offender is
booked at the district station if the arrest has
been made by a patrolman, or taken directly
to the detective division, if the arrest had been
made by detectives. In the former instance, the
station commander determines whether the off-
fense is sufficiently serious to be brought to
4. Mandatory Release for Misdemeanants

The arguments noted in relation to Draft Section 969.01 and mandatory use of the notice to appear are *a fortiori* applicable to this later stage of the process when the charge has been made and checks on the identity and reliability of the person in custody have been concluded. We raise a false note if we imply from the term "mandatory" that a system has been "imposed" on the police officer. In fact the Draft Section provides him with precise guidelines which make his overall work easier.\(^1\) The best argument for the "mandatory" nature of the provisions is their viability in practice. If the Draft Section were not feasible in this respect, then it would be foolish to make it mandatory. At the same time our experience has shown that if a viable and desirable requirement is not mandatory and precise in the direction which it gives to police, it is often hardly worth placing on the statute books.

Wisconsin police in the past have been quite sensitive to a specific statutory time limitation on detention, preferring the more elastic "reasonable" formula of the Wisconsin courts. State law enforcement officers opposed an attempt to promote the Uniform Arrest Act, which allows an additional twenty-four and forty-eight hours of detention upon judicial approval, and it failed of adoption, assertedly for that reason.\(^1\) During the American Bar Foundation study in Milwaukee, police "usually indicated that the authorized detention is for a reasonable time up to seventy-two hours."\(^1\) Such extended periods of custody for continuing an investigation have apparently been recognized by courts in Wisconsin. "[J]udges at habeas corpus hearings will continue the hearing for twenty-four or forty-eight hours and return the suspect to police custody when the police make some showing that they are presently engaged in an in-custody investigation."\(^1\) Problems such as these can only be resolved through a better understanding of police operations.

---

the attention of the detective division and the arresting officer then transports the prisoner to police headquarters where he is interviewed by the detective supervisor and is sent to the identification bureau for fingerprinting and mugging.

Administrative procedures used in identification checks and fingerprinting for the Milwaukee police and sheriff's department are found *Id.* at II 25-26. (Research aid: Marquette University law students, now attorneys, Dennis H. Wicht and Peter J. Wick.)

\(^{178}\) *See* Goldstein, *supra* note 37.

\(^{179}\) *LAFAVE*, *supra* note 45, at 331.

\(^{180}\) *Id.* at 333.

\(^{181}\) *Id.* at 307 and 336-337. Another "investigative device" was noted by the American Bar Foundation study as being in use in Milwaukee. Called the "ten day vag check," the person was arrested on suspicion of vagrancy in matters where he was suspected of having committed a serious crime but the police had insufficient evidence for a charge. With the cooperation of the district attorney
5. Intervention of the District Attorney in the Practical Release Process

Although the Code leaves basic pretrial release decisions to the station officer, he is enjoined to act in cases of more serious offenses "on direction or in accordance with regulations issued by the district attorney" (969.32(1) (c)). The district attorney ultimately controls the custody of any person in that the station officer is directed to release the person if the district attorney decides not to issue a complaint (969.32(5)). In practice, however, this "control" is likely to be very mild, consisting entirely of the regulations or guidelines which the district attorney is to issue detailing the standards to be used for release in the serious cases.

This duty of the district attorney is consistent with the overall obligation of the attorney general and district attorney to issue guidelines "necessary to implement the provisions of this Code applicable to the operation of law enforcement agencies . . ." (969.90). Although the part played by the district attorney under the Code is substantially less than that in the Study Draft, it is still a recognition that this official is best able both to determine what procedures are legally within the Code and to bear responsibility for seeing that police adhere to legal limitations.

6. Alternative Means of Release

The present hodge-podge of statutes, ordinances, case law and practice which governs release approximates the Code provisions. From the viewpoint of a revisor or presumably of a practitioner the present disorganization is a nightmare. If the system effectively performed a function of pretrial release, it could be defended chaotic though it is. The little evidence

182 See text accompanying note 150 infra.
183 LaFave, Improving Police Performance Through the Exclusionary Rule — Part II: Defining the Norms and Training the Police, 30 Mo. L. Rev. 566, 604 (1965), states:

Local prosecutors have sometimes given assistance [to police], but typically the demands made on the prosecutor in conducting the business of his office leaves little time for such efforts. Most prosecutors do not conceive of their job as including a continuing responsibility to elevate the quality of police performance through training. And even the largest police departments are usually without competent legally-trained personnel on their staffs.

This problem has been alleviated somewhat in some departments by the addition of police legal advisors, Id. at 608, but this does not solve the problem of the need for legal supervision by one who stands responsible for police action.
available, however, indicates that a great many who are charged are detained for no purpose.

A 1962 national survey by the American Bar Foundation showed that of a sample of one hundred and ten persons charged with felony in Milwaukee county, thirty-nine per cent were released on bail, and sixty-nine per cent of those made bail on the day of arrest. This means that sixty-one percent were not released on bail and that of the original number arrested only twenty-seven per cent were released on bail the day of their arrest. At present in Milwaukee county between two hundred and two hundred and fifty men are in jail awaiting trial at any one time. It has been estimated that "the average time between arrest and trial would be three to four months in felony matters; misdemeanor violations are ordinarily handled within a matter of one or two weeks."

In June 1964, students at the University of Wisconsin Law School instituted a pretrial release study modeled on that of the Vera Institute of Justice. Their pertinent findings follow:

Of the 1,088 defendants considered, 436 were eligible for and had bail set. [Six hundred fifty-two defendants entered pleas of guilty.] Seventy-four of these 436 (16.97 per cent) could not make bail at all, and an additional twenty-nine (6.65 per cent) spent some time in jail before furnishing bail. This total of 103 defendants spent an average of 23.91 days in detention . . . before they either furnished bail or their case was disposed of.

Another project, employing the same criteria as the Vera Institute project, was completed by two researchers from the University of Wisconsin School of Social Work who evaluated the release potential for men in detention awaiting trial in Chicago's Cook County Jail:

184 Strangely enough, Milwaukee was found to be one of the counties in which detention was of shortest duration. Silverstein, *Bail in the State Courts - A Field Study and Report*, 50 MINN. L. REV. 621, 638 (1966). It was also found that compared with other counties surveyed, Milwaukee had one of the lowest original bail settings, less than $3,000 in 70 per cent of the sample. But, of course, this liberality must be measured against the defendant's ability to make bail in the sum set. See note 195 *supra*.

185 This survey, of course, tells us nothing about misdemeanants and ordinance violators.

186 Letter of May 28, 1968 from Sheriff Edwin T. Purtell, Milwaukee County, to the author.


188 Id. at 165.
Information about persons detained... was collected on three occasions between 1964 and 1967. The percentage of men who met ROR criteria ranged from 57% in 1965 to 46% in 1967.189

Such detention is not simply a matter of more equitable treatment of accused persons, important as this is. Over the years detention increasingly has become a costly burden for those who are charged with custody of prisoners awaiting trial.190

Locally the bail problem has been somewhat alleviated by the Milwaukee Plan Legal Services-Bail Services Project begun in September 1966, and modeled on the Vera Institute's verification process.191 The program itself is able to aid only a minority of those affected.192

189 O'REILLY AND FLANAGAN, MEN IN DETENTION 10 (1967).
190 See LaFollette, Bail Bond Law Administration, History, Criticism; Release on Recognizance, 27 MIL. BAR. ASSOC. GAVEL 12, 16 (1967). Milwaukee county Sheriff Edwin T. Purtell stated that "overcrowding of prisoners in the county jail makes supervision difficult and creates tension among the inmates . . ." and "makes it easier . . . to hide contraband and weapons." The annual number of jail prisoners have increased from 8,806 in 1956 to 11,831 in 1966, a large percentage of these being persons awaiting trial. Milwaukee Journal, Jan. 18, 1968, pt. 1 at 15, col. 2. County Executive Doyne and the county supervisors criticized court policies which result in the jailing of defendants on minor charges when they cannot pay fines or raise small bail amounts. Supervisor Thomas J. Duffy suggested that the county or some organization interested in the plight of indigents provide bail in such cases.

* * *

Pointing out that 29 prisoners were in jail because they were unable to raise bail of less than $500, he suggested that their cases be reviewed by judges with a view to "cleaning some of them out."


It costs an average of $3.12 a day to keep a man in the Jail. When this figure is related to the days men are held before bail or trial it is possible to arrive at an approximation of the yearly cost of detention for ROR qualified persons. Based upon figures obtained from the 500 men interviewed during the summer of 1967, the yearly cost of detaining those who meet the criteria for ROR is about $372,452 a year.

192 Program results are summarized in a letter from Mrs. Margadette M. Demet, deputy director of Milwaukee Legal Services, to the author, May 2, 1968, quoted in part:
The Code requires bail only in cases where a felony is charged, or a misdemeanor carrying a statutory penalty of more than six months' imprisonment is charged provided that it "appears necessary to secure the availability of the person for prosecution" (969.32(1)(e)). This criterion is already statutory in Wisconsin. Moreover, recent case law has affirmed the single purpose of bail: "to assure the appearance of the accused when it is his duty to appear to answer the criminal prosecution." At the same time this case law provides material from which the district attorney may draw his guidelines.

Since the beginning of the project the Bail Services staff has interviewed 3,085 accused offenders. Of these 493 have been recommended for release without bail and 147 have been recommended for lower bail. In the other 2,445 cases, negative recommendations have been made or the cases were matters in which the client was going to be tried on the same day as the interviews. Of the 640 positive recommendations made, the judges have accepted the recommendation in 595 cases. Only one person did not return who was let go on his own recognizance and that person died before the date set for his return.

We may ask whether this last statistic attests to the success or failure of the program.

Another response to this bail problem in Wisconsin has been the development of a rather unusual procedure to release persons on bail who are in custody for either felonies or misdemeanors, where the arrest is without a warrant. The police have authority to set what is referred to as an "appearance bond." Wis. Stat. §345.13 (1967).

This appearance bond is posted with the police district which has effected the arrest and serves to insure the prisoner's appearance at the police station at the designated time — usually the next A.M. Upon the prisoner's appearance, all of the appearance bond is returned to the prisoner. At the police station he is then retaken into physical custody. In felony or serious misdemeanor cases, traditionally the commander of the detective bureau determines the amount of the appearance bond.

[Emphasis in original.] Letter to author of June 8, 1968 from Victor Manian, First Assistant District Attorney, Milwaukee County.

193 Wis. Stat. §954.15(1) (1967) "... The bail bond shall be sufficient to secure the appearance of the defendant for trial"; and Wis. Stat. §954.36(1) (1967) "... A defendant's bail for his appearance in the trial court shall be conditioned for his appearance at the current term. . . ."

194 Whitty v. State, 34 Wis.2d 278, 286, 149 N.W.2d 557, 560 (1967), the court's first exposition on the subject.

195 Id. The conditions for setting bail were to include the ability of the accused to give bail, the nature and gravity of the offense and the potential penalty the accused faces, the character and reputation of the accused, his health, the character and strength of the evidence, whether
Probably the program most like that conceived by the Code is the New York City precinct summons project pioneered by the Vera Institute. Persons in custody who pass a screening process are released from the station-house on a summons. After about one and one-half years of operation by the Institute the project was taken over by the city police department on July 1, 1967, and made citywide. The report issued at the end of six months operation touches on many of the problems of such a program:

During the six month reporting period a total of 22,916 persons were arrested for offenses which, theoretically, were eligible for the summons process. Of those, 13,725 or 60% were waived by desk officers for various reasons, such as admitted narcotic addicts, intoxicated persons and female and female impersonators charged with disorderly conduct and loitering. Release of the latter on a summons would permit such persons to return to the streets to pursue their disorderly behavior. The remainder of cases waived by desk officers include instances where large groups of demonstrators and protestors are arrested, as was the case in Harlem during July and August. In these cases the time required to conduct summons investigations may have prejudiced the rights of the defendants by delaying their arraignment. During December a number of arrests were waived when large groups of persons were arrested for disorderly conduct in connection with picketing during “Stop the Draft Week.” Those persons were centrally booked and immediately arraigned at the Manhattan Criminal Court, which is in close proximity to where the demonstrations took place.196

Of 9,191 persons determined eligible for interview, which comprised 40% of persons arrested for summonsable offenses, 5,575 or 60.66% were released on sum-

---

196 See text accompanying note 232, infra.
monses. . . . This figure, taken in relation to the total number of persons arrested for summonsable arrest actions, means that 25%, or one of every four such persons was released on a summons.

Of those determined eligible, 1,186 or 12.9% failed to qualify after the summons investigation was conducted. Those persons were unable to attain the minimum 5 points required on the investigation, which attempt to determine the defendant's roots in the community.

* * *

Of the 5,575 persons summoned under this program 351 failed to appear on return date which reflects a "jump" rate of 6.3%. . . . Further analysis of jumpers revealed that 3.5% of the persons who failed to appear on return date were involved in cross complaints against each other. . . . Some of those persons, when contacted by telephone, were under the impression that since neither wished to pursue the case further they were not obligated to report to court on the return date.

* * *

The increased use of the summons process results in a concomitant increase in police man-hour savings, a reduction in transportation and detention of defendants and an overall improvement in police-community relations.

With the elimination of the verification process, except where absolutely necessary, the average time expended in cases which result in a summons is approximately one hour. Where two or more arrests are effected in connection with the same incident the summoning officer is assisted by officers on duty in the stationhouse or his radio car partner.

* * *

Taking into consideration custodial personnel, transportation of the defendant to court and related court appearances, a conservative estimate of man-hour savings is approximately five hours per arrest. This is based on the fact that a person
released on a summons is usually prepared for trial, has secured counsel, etc., on the return date, and the officer's presence in court is confined to one appearance as such cases are usually disposed of at the time. This can be contrasted to arrest situations where the officer's initial appearance at arraignment, usually results in an adjournment requiring the officer's presence at least a second time. Subsequent appearances by the officer are related to whether defendant was released on bail or confined pending trial without opportunity to prepare his case. [Emphasis added] 197

Although the New York City summons project has included encouraging developments in "screening," most of these programs have an important flaw: the exclusion of many persons who do not have sufficient "roots in the community" to score the required point total. 198 Although these projects obtain impressive appearance records because they include only the best risks, the purpose of the program to release as many persons as possible is sacrificed to the unfounded assumption that those without "roots" will not show up for trial. In addition the fact that such a "rootless" person would be released if he could find money for bail contributes to serious questioning of such a "screening" system. 199 Most "rootless" persons are relatively minor offenders who offer no threat to society even if they do not appear, and most are repetitive offenders (drunkenness, vagrancy, petty assault) so that any "jumpers" are most likely to be picked up again. If the fear of being punished for non-appearance should deter from further crime, this is so much the better. Taken together with the more serious questions about "screening", these facts have prompted the elimination of screening as a prerequisite for release in minor offenses under the Code (969.32(1)(b).

So far we have discussed the needs of the police — how long they need to retain the person in custody in order to accomplish police business. The purpose of Section 969.32 is to shorten this period as much as possible and, when the need has terminated, to provide pretrial release alternatives assuring the release of most persons. There will always be some, however, who remain in custody. For these persons, the question then

198 The scoring procedure used is described in Ares, Rankin and Sturz, supra note 191.
199 See Robinson, Alternatives to Arrest of Lesser Offenders, 11 CRIME & DEL. 8, 11, 18-21 (1965).
Pre-Arraignment Procedure

becomes how much longer they must be detained before their detention may be reviewed before a judge. We shall see that the length of continued detention is more related to administrative delay than to police needs.

F. Prompt Appearance Before a Magistrate

969.50 DISPOSITION OF PERSON IN CUSTODY—PROMPT PRODUCTION BEFORE A JUDICIAL OFFICER.

In any case where a station officer makes or has enough evidence to make a decision to seek to have a person in custody charged, the person, unless he has been issued a notice to appear, released on his promise to appear or on bail, shall be brought before a judicial officer for initial appearance at the earliest time that such officer is available. In the event a judicial officer is not then available, and the person has not been released or cannot furnish bail in accordance with s. 969.40, no further interrogation shall occur until he is presented before a judicial officer. Ref. ALI (1966) 4.06(1).

The ancient admonition to the arresting officer to produce the person in custody before the magistrate “without unreasonable delay” ignores not only the trip to the police station but also the realities of the trip from the station to the magistrate. The instructions of the Milwaukee police department200 provide that a person in custody is to be conducted before the “Commanding Officer” of the district station for “review” of the charge.201 If after review it is decided that a charge is to be lodged and there is neither “order in” by the commanding officer nor release on bail, the

---

200 See text accompanying notes 57-59, supra.
201 The Pilot Project Report, supra note 54 at II-23 indicates that this has been the practice in Milwaukee for a long time:

After an officer has made an arrest, he is required to bring his prisoner to the nearest district station where a supervisory officer reviews the facts, interrogates the subject, and decides whether the arrest was made properly and lawfully. The subject may be released without charge if the supervisory officer is of the opinion that there is insufficient basis to proceed with prosecution, or he may be brought to the detective division for further investigation by the detective lieutenant on duty.

The description in the text is simplified. See the description of the operation in the letter of Mr. Manian, supra note 58.
prisoner either may be taken to the city jail or may spend the night at the
district station. The choice will depend on the availability of transport and
of quarters in one place or the other, and in the case of serious misde-
meanors (such as carrying a concealed weapon) and felonies, the prisoner
will be sent downtown to the detective bureau. Each Milwaukee dis-

If the person arrives downtown at night, he will be questioned by de-
tectives and will then spend the night in jail. In the early morning he will
be interrogated again and placed in a lineup to be viewed in connection
with other crimes detectives may be investigating. There may be further
questioning at this time. He is then picked up by the original arresting
officer and brought to the office of either the city or the district attorney,
both situated in the same building as the jail. A person to be charged
with a state offense is brought to the office of the district attorney; one
to be charged with a city offense is taken to the office of the city attor-
ney. No regulations determine whether a case is to be treated as a state
or city offense, although a fairly rational division of labor has been worked
out over the years between the two offices.

Whether the person is charged by the city or the district attorney is,
of course, consequential. City ordinance violations are by statute civil
offenses and the trial procedure is civil, meaning that guilt need only be proved by a preponderance of the evidence and that conviction does not leave a criminal record. As a result it is not thought necessary to accord the same constitutional safeguards as would be provided in a criminal matter. There is a serious gap, however, in the failure to furnish an attorney for an indigent even though refusal or inability to pay fines will result in imprisonment.

Although the police initially decide to which office the case should be sent, the city or district attorney determines whether it remains there. In Milwaukee a police investigator, assigned to the district attorney and stationed at the entrance to his office, screens these cases. If in his judgment it is not a case for that office he sends it to another office, usually that of the city attorney:

The kind of cases brought by the police to the city attorney include assault and battery cases, drunks, disorderly conduct, and operating an automobile while intoxicated. Of these, the drunk charges are most numerous.

Serious cases including those where an assault results in hospitalization, or where a weapon is used, or where there are threats of serious bodily harm are taken by the district attorney. There are other factors which may influence the police to bring the person to the district attorney or the district attorney to accept a case: the past criminal record of the suspect; his cooperation with the police; belief that a criminal charge will act as a deterrent to future criminal conduct; the relationship of the parties (violence between husband and wife or between relatives is more likely to be referred to the city attorney).
The city or district attorney holds a hearing to determine what charge, if any, is to be recommended.\(^{213}\) If it is decided to charge, the person is conducted to the county court by the original arresting officer. Here there will be a trial in the case of ordinance violations and misdemeanors and an initial appearance in the case of felonies.\(^{214}\) Although the hearing before the city or district attorney is extremely valuable from the point of view of both the defendant and the law enforcement authorities, it is burdensome for a man who remains in custody. In a proper case such a detention and hearing may be challengeable as illegal.\(^{215}\) There is no statutory provision for obtaining counsel until the person in custody appears in court. Since the city or district attorney hearing may ordinarily occur only during business hours, this means that a person arrested in the afternoon must wait until the following morning to appear before the city or district attorney\(^{216}\) and even later to appear before a judicial officer.

---

\(^{213}\) *Pilot Project Report, supra* note 54, at III 4-6, 44-46. The district attorney, who normally handles more serious cases, for that reason, holds a more thorough hearing than does the city attorney.

\(^{214}\) Prior to State *ex rel.* White v. Simpson, 28 Wis.2d 590, 137 N.W.2d 391 (1965), the district attorney was authorized to issue warrants, Wis. Stat. §954.02(3) (1965), although in practice, at least in Milwaukee, he drew up the complaint and left the warrant to be issued by the clerk of court. As a reaction to the *White* case, two magistrates were appointed to hold warrant hearings. Even though the Wisconsin Supreme Court has held that there is no need to “rearrest” one already in custody, Pillsbury v. State, 31 Wis.2d 87, 92-94, 142 N.W.2d 187, 190-91 (1966), the practice has continued. *See also* Rigney v. Hendrick, 355 F.2d 710, 713 (3rd Cir. 1965), *cert. denied*, 384 U.S. 975 (1966). This situation has been clarified recently by Wis. Stat. §954.02(4m) 1967:

If the defendant has previously been validly arrested without warrant and is still in custody, no summons or warrant is required and the defendant may be brought before a judge of the county court with a complaint subscribed and sworn to before either the district attorney or a magistrate.

Present procedure involves taking the accused directly to court on a complaint where the person has been arrested “validly”. This procedure has been contested in trial court twice and upheld. Letter, *supra* note 203.

\(^{215}\) This deviation from the police-magistrate route has been upheld in the circumstance where “the district attorney had not made up his mind to prosecute at the time he sent for the defendant,” State v. Francisco, 257 Wis. 247, 252, 43 N.W.2d 38, 40-41 (1950). *See also* Commonwealth v. Brines, 29 Pa. Dist. 1091 (1920). The court rejected the reasoning of McNabb v. United States, 318 U.S. 332 (1943). In a case where the hearing resulted in prejudice for the defendant, for example, a confession during the hearing, the court might see the matter differently. *See* Schoette v. Drake, 139 Wis. 18, 21, 120 N.W. 393, 395 (1909), *infra* note 220 and United States v. Glover, 372 F.2d 43, 47 (2nd Cir. 1967).

\(^{216}\) At the time of writing, no district attorney personnel are on duty during non-business hours except at the time of a three-day holiday. *See* note 219 *infra.*
for his initial hearing. This problem is aggravated for an indigent desiring appointment of counsel where, by special provision for Milwaukee, only the circuit court is permitted by statute to appoint counsel. Consequently, the county court judge at the initial hearing must transfer the case to the circuit court for this purpose. Even though this usually takes place the same afternoon, an attorney notified of his appointment may not be able to interview and appear for his client until thirty-six to forty-eight hours after the person is taken into custody.

This review of the routine processing makes apparent that whether the person has committed a serious or a minor offense may have little effect on the time it takes him to travel from his arrest to his appearance before a judge. In fact, interviewers discovered that in the aftermath of decisions such as Reimers v. State, a serious felony offender may move through the process more quickly because of concern that delay might interfere with his conviction. The real villain from the standpoint of a person in custody is not so much lengthy interrogation as the long period of perhaps unnecessary delay between the time the police have completed charging and the time he appears before a magistrate and is placed in contact with an attorney to represent him.

On the last day of that holiday an assistant district attorney and magistrate are available. Two assistant district attorneys are on "24 hour" call but these are to give information or advice to the police. A district attorney is on call, however, for bail hearings. See note 223 infra.

The classic case of delay due to "unavailability" of a magistrate is Reimers v. State, 31 Wis.2d 457, 470-471, 143 N.W.2d 525, 532 (1965) where the court said:

Upon its face, a detention from midnight Saturday until 10 a.m. Tuesday, without satisfactory explanation is "unreasonable." The "explanation" that the magistrate was unavailable on either Sunday or Monday (a legal holiday) was rejected.

Wis. Stat. §957.26(2) (1967).

See note 217 supra.

This is apparently a long-standing problem. In Schoette v. Drake, 139 Wis. 18, 21, 120 N.W. 393, 395 (1909), the following sequence is recounted:

The plaintiff was arrested between 5 and 6 o'clock in the afternoon and put in the lockup and left there until the forenoon of the following day. There is evidence that in the evening, shortly after he was confined, an effort was made to bring him before the court for the disposition of his case or for release on bail and that the municipal court was open for that purpose; that although defendant Drake was in the city and requested to take plaintiff before the court, he neglected to do so, but suffered plaintiff to remain in jail all night and until about 9 or 10 o'clock in the forenoon of the following day. . . . The law . . . is well settled . . . that where an officer makes an arrest without a warrant . . . it is his duty to take the
III. Pre-Trial Proceedings

A. The Initial Hearing

970.01 INITIAL APPEARANCE BEFORE JUDICIAL OFFICER OF PERSONS IN CUSTODY.

(1) FILING OF REASON FOR CHARGING WITH COURT. At or before the time the person in custody is brought before the judicial officer, the station officer shall cause to be filed with the court a statement setting forth the charge to be sought against the person, and briefly stating the facts upon which the charge is based, except that if the district attorney has already filed a complaint against the person, the statement of the station officer is unnecessary. In every case in which either the station officer or the district attorney shall oppose the person's release on his promise to appear, one or both shall file with the judicial officer three copies of a statement of facts upon which he relies to oppose the person's release on his own promise to appear.

(2) ADVISING THE PERSON IN CUSTODY. Upon the initial appearance of the person in custody, the judicial officer shall:

(a) Inform him of the charge, or the charge sought against him, and provide him with a copy of the statement setting forth the charge, filed pursuant to sub.(1);

(b) Advise him that he is not required to person arrested before a magistrate without unreasonable delay.

The assistant district attorney, supra note 203, writes:

Every person in custody in the city jail is always taken before a magistrate or district attorney or city attorney the next session of court. No person is ever kept in confinement past the next session of court after his arrest.

[Emphasis in the original.]

Taking this as correct, the "next session of court" may easily be twenty-four hours after his arrest. For example, one arrested at 10:00 or 11:00 a.m., depending on the time required for processing, may not be ready for a District Attorney hearing until that afternoon, too late for a court hearing that day.
say anything and that anything he says may be used against him;
(c) Advise him of his right to communi-
cate with counsel, his family or, where he desires, his friends and that, if necessary, facilities will be provided to enable him to do so;
(d) Advise that counsel, relatives or friends may have access to him as provided in s.
(e) If he is as yet unrepresented, advise him of his right to be represented by counsel, and if he is financially unable to afford counsel, unless counsel is waived, forthwith appoint counsel to represent him;
(f) If bail has been required, or there are objections to his release on his promise to appear, give to him a copy of such objections;
(g) Where applicable, advise him that he may appear at the hearing of the district attorney to determine if a complaint is to issue against him, and his right to a pre-
liminary examination;
(h) Advise him of the nature and approx-
imate schedule of all further proceedings to be taken against him.
(3) PRINTED FORM TO BE GIVEN. The person shall forthwith be given a printed form which in plain and under-
standable language contains the substance of the matters listed in subs. (b) - (h).
(4) FURTHER PROCEEDINGS TO AWAIT APPOINTMENT OF COUN-
SEL. Except for any proceedings necessary to determine the person's release from custody, or as to proceedings disposed of pursuant to sub. (5), no further steps in the proceedings shall be taken until the person and his counsel have had an opportunity to confer unless the person has waived the right to be represented by counsel. Waiver of counsel shall be discouraged and shall be accepted only if the judicial officer is completely satisfied
that the waiver is intelligently made with full knowledge of the consequences.

(5) SUMMARY TRIAL OF SOME CASES. With the consent of the person in custody, the judicial officer shall have jurisdiction to summarily adjudicate any ordinance violation in which it is agreed by the court and the city attorney that if the person is found guilty a fine of no more than one hundred dollars will be incurred and that he shall have at least thirty days to pay the fine and any misdemeanor in which it is agreed by the court and the district attorney that if the person is found guilty a sentence of no more than five days will be incurred or a fine of one hundred dollars and that he shall have at least thirty days to pay the fine.

(6) JUDICIAL OFFICER TO DECIDE RELEASE QUESTION PROMPTLY. In every case not summarily disposed of, and except in those cases in which the city or district attorney has stipulated that the person may be released on his promise to appear, the judicial officer shall decide promptly in accordance with the standards set forth in s. —— [to be drafted], the question of the person's release pending further proceedings. If the person has not been released, the judicial officer shall commit him to the custody of the sheriff until later release or trial.

(7) DISTRICT ATTORNEYS TO PROMOTE RELEASE OF PERSONS IN CUSTODY. District and city attorneys shall encourage, whenever possible, the release of persons in custody upon their promise to appear.

Ref. Standards 4.1-4.3. For conditions to be placed on release in lieu of bail, see 5.2, and for standards on which bail should be set, see 5.3.

Clearly the person remaining in custody will not be helped by an effort to hurry him through the charging procedure if he must wait in jail an-
other fifteen or twenty hours before being brought to a judge. This problem involves two subsidiary questions: (1) How can a judicial officer be made available for an initial hearing as soon as practicable after the period of police detention is terminated? and (2) What should be the nature of that initial hearing? Because the type of hearing to be held will affect the speed with which we may wish to hold it, the second question will be discussed first.

The purpose of the initial hearing in Wisconsin has recently been explained by the State Supreme Court:

The chief purpose is to bring the accused without delay before a magistrate with the power to commit a person charged with the offense. The functions of the magistrate at that hearing are limited to formally charging the defendant with the offense for which he has been arrested, informing him of his right to counsel and of the right to have a preliminary examination and setting bail. It is also suggested that the magistrate advise the defendant that he is not obliged to make any statement whatsoever and that any statement made can be used against him. Moreover, the magistrate shall not ask for nor accept any plea. . . . [W]e suggest that the interests of justice will be served if the lawyers, judges and laymen clearly understand that the term, "arraignment," refers not to the initial appearance before a magistrate, but only to the appearance for the purpose of reading and filing, and pleading to, the information in a court having jurisdiction to accept such a plea and to impose sentence. [Emphasis added]221

It has been said that the "principal function of the initial appearance is to provide for the defendant's release on bail, pending later steps in the proceeding."222 Yet present procedures frustrate these aims by promoting rather than preventing delay. The sole effective accomplishment of the

---

222 Miller and Remington, Procedures Before Trial, 339 ANNALS 111, 121 (1962); Note, 1966 Wis. L. Rev. 430, 440; LeFave, supra note 139, at 342-43. The further function of the initial hearing should not be forgotten: "bringing a person before the magistrate promptly after arrest in order to enable the judicial officer to decide whether there was probable cause for the arrest and detention." LaFave and Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987, 988 (1965).
initial hearing at this late stage in the process is to assure the "formal charging" of the person in custody.

Here as elsewhere in the system, the response to such inadequacy has been improvisation. Zealous attorneys have reduced this delay somewhat by utilizing the writ of habeas corpus to obtain earlier pretrial release. In order to handle this approach and to relieve jail overcrowding which is due in part to pretrial detention, Milwaukee judges have assigned two of their number to conduct habeas corpus hearings.

Although this concept of the initial hearing may be accurate as a statement of Wisconsin law, it actually confounds two separate and independent functions: the court's duty to see that the person is formally charged with a crime and its duty to accord "without delay" the full measure of legal rights set out by the Wisconsin Supreme Court. While the district attorney should have as much time as needed to "formally charge" the person, rights such as pretrial release and counsel become more valuable the earlier they are available. A requirement that the district attorney file a complaint before he may be ready to do so is not only unreasonable but may well be against the interests of the person in custody. At the same time, however, a requirement that persons in custody remain in jail until a determination is made the following morning whether a formal complaint is to be issued against them is not only unconscionable, but worse it is unnecessary.

Draft Section 970.01 provides for an initial appearance of persons in custody before a judicial officer in such a sequence that in most instances no complaint will have been filed yet. The station officer is to cause

---

223 Following an arrest for a curfew violation during a period of racial rioting in Milwaukee, the defendant's attorney challenged the arrest contending that the Mayor's curfew order was without authority. The defense attorney countered the assistant city attorney's complaint that the hour 1:30 a.m. was an unreasonable time to argue such a point with the statement that it was more unreasonable to hold the defendant overnight. The court commissioner ordered the defendant released without bail. Milwaukee Journal, Aug. 31, 1967, pt. 1 at 9, Col. 4. In another matter, a circuit court judge was called to court at midnight to hear a writ of habeas corpus for reduction of bail. Milwaukee Journal, Mar. 4, 1967, at 18.

224 See note 190 supra.

225 Most such hearings deal with matters other than pretrial release, and of those that deal with pretrial release, the majority are conducted after bail is set by the court and are in the nature of an appeal from that decision to a circuit court judge.

226 For an extreme case of delay in advising of the right to counsel, see Jones v. State, 37 Wis.2d 56, 154 N.W.2d 278, 284-85 (1967), and cases cited therein.

227 This is not to say that the district attorney is "unconscionable," but the administrative arrangement that permits such an abuse is.

228 The Code eliminates the district attorney hearing before the initial appearance. But since the district attorney has not filed his complaint by then, there should be a strong inducement for the defendant or his attorney to attend the hearing voluntarily in order to obtain release or reduction of the charge. There
to be filed a statement setting forth both the charge and a brief statement of the facts upon which it is based. In every case where either the district attorney or the station officer opposes release on the person's promise to appear, one or both are to file three copies of a statement setting forth the facts on which they base their opposition (970.01(1)). The judicial officer is to inform the person of the charge being sought against him and provide him with a copy of the charge filed pursuant to Draft Subsection (1). He is to be advised of his rights under Miranda in language substantially the same as that previously given by the station officer (969.30(1); if indigent and without counsel, counsel shall be appointed for him at once. Where applicable, he is to be advised that he may appear at the hearing of the district attorney to determine if a complaint is to issue and that he is entitled to a preliminary examination. He is also to be informed of the nature and the approximate schedule of all further proceedings to be taken against him (970.01(2)) and is to be given a form which recites this information in plain and understandable language (970.01(3)).

No further proceedings are to be taken, other than the decision on custody, until the person has had an opportunity to confer with his counsel (970.01(4)). A summary trial, however, is permitted in minor cases where the defendant agrees to trial and the penalty will be limited (970.01(5)). In all cases not tried, the judicial officer is to decide the custody question promptly in accordance with standards to be drafted (970.01(6)).

B. Judicial Availability

A "24-hour arraignment" system has been tried in both New York City and Philadelphia as a means of shortening the delay between arrest and initial hearing. These systems are substantially similar except that the Philadelphia plan is established by statute, while the New York City plan is operated through administrative fiat. The person is taken before the Philadelphia court only with his consent. Under the New York plan is nothing which prevents the district attorney from holding the hearing in the absence of the defendant and with the complainant, the police officer and witnesses.

Section 976.01, Duties of the Clerk, will require the clerk to retain one copy in the defendant's file and maintain a separate file of this and like copies for all other defendants so that they may be tabulated at such time and manner as the attorney general may direct (969.90(1)). The third copy is to be given to the defendant (970.01(3)).

Pretrial Release Standards, Section 5.3(a), supra note 38, at 18, prescribes: "Money bail shall be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court." See also section 5.3(d) which lists considerations the judge should take into account when setting bail.

all interested parties, the arresting officer, the defendant, and witnesses are brought directly to a central location. Here the defendant is booked; a complaint is drawn up by the officer aided by a district attorney on duty in the court for that purpose. If the person in custody does not have an attorney, a public defender is present to advise him. The person is then taken before a judge where bail is set or he may be released on his own recognizance.\(^2\) If the defendant is agreeable and the matter is within the court’s jurisdiction, he may be tried forthwith.

A recent study of the system shows that in one city the time lapse from the arrest to arrival at court was three and one-half to four hours for felonies and the more serious misdemeanors and one and one-half to two and one-half hours for less serious offenses. Court procedure required about two or three hours regardless of the serious or minor nature of the offense. The total time from arrest through court processing or trial was from six to seven hours in serious offenses and from three to six hours in lesser offenses.\(^3\)

Two elements are evidently essential if we are substantially to reduce the delay between the time when the police have terminated their need for custody and the time when the person remaining in custody reaches a judicial officer. First, there must be some means promptly to obtain the services of a judicial officer day or night. Second, the function of custodial adjudication must be separated and emphasized as distinct from ordinary court proceedings. Although the Draft Section does delineate this function in detail,\(^4\) its companion Section 969.50 does not propose how to make such a judicial officer available on more than a “business hour” basis. The Section merely requires that the person remaining in custody “shall be brought before a judicial officer for initial appearance at the earliest time that such officer is available.” To propose a precise plan on “availability”\(^2\)
without sufficient information would be futile. In seeking a solution we must first determine the need on the basis of which the judicial work must be distributed. It may be that a single magistrate and clerk working the hours of the present New York City night court could handle the load in Milwaukee. In some areas of the state where non-business hour arrests are infrequent, judges could be available to decide custody questions on the telephone. Modern telephone conference arrangements even allow for a "telephone court." A recently suggested answer calls for a "system of appointed 'temporary judges' who would serve as volunteers for a month at a time to help meet rising caseloads and shortages of judicial manpower."

IV. Guidelines Supplementing the Code

969.80 DUTY OF DISTRICT ATTORNEY AND ATTORNEY GENERAL TO ISSUE REGULATIONS [GUIDELINES].

(1) DISTRICT ATTORNEY TO PREPARE REGULATIONS IMPLEMENTING CODE. The district attorney of each county shall issue regulations [guidelines] necessary to implement the provisions of this Code applicable to the operation of law enforcement agencies in the county and shall convey the regulations [guidelines] to these agencies. The regulations [guidelines] shall be amended and augmented from time to time in accordance with the district attorney's evaluation of the constitutional, statutory and case law requirements.

Answers to the following questions would be useful: What is the distribution in time, numbers and nature of charge, of persons still in custody issuing from police stations? What would be the problem for the police in delivering such persons to some central place for the custody hearing? What problems of verification are presented when a custody hearing is held at 2 a.m.? In sum, if there was a magistrate available immediately to review custody questions, would this have any substantial effect on the number of those released? What will be the expected collateral benefits and disadvantages provoked in the rest of the system by such changes? Will it be necessary to hire additional personnel or could the present number of judges, magistrates or commissioners, district attorneys and clerks man the additional load? What would be the dollar cost of one plan as against another?

See supra note 233.

Mayor John Lindsay of New York City made the suggestion to an American Bar Association conference adding:

a local bar association of a city could establish
a screening committee to recommend distin-
(2) ATTORNEY GENERAL TO AID DISTRICT ATTORNEYS. (a) The attorney general shall issue and distribute regulations [guidelines] to local district attorneys implementing the provisions of this Code applicable to law enforcement agencies with a view to aiding district attorneys in the promulgation of regulations [guidelines] and for the establishment, where appropriate, of uniformity of criminal enforcement procedure throughout the state.

(b) The attorney general shall request each district attorney to collect and to cause the law enforcement agencies in his county to collect specified statistical or other information which will aid him in evaluating the effective operation of Code provisions relating to law enforcement and in fulfilling his duties pursuant to sub. (2)(a).

(c) Statistical and other information collected by each district attorney shall be sent periodically as requested to the attorney general who shall make a compilation from which he shall prepare an annual report describing the operation of the Code. This report shall be forwarded to the governor of the state and to the legislature with such recommendations for executive and legislative action as the attorney general believes appropriate.

(3) PUBLIC DOCUMENTS. Regulations [guidelines] issued and statistical information collected under this section shall be public documents.

Ref. ALI (1966) 1.03; Model Department of Justice Act generally, and Sec. 10, National Conference Dist. lawyers with at least 10 years experience to the Mayor for appointment as temporary judges.

Pre-Arraignment Procedure

on Commissioners on Uniform State Laws.

A code of criminal procedure is basically a regulatory code. Yet if it attempted to supervise every detail of law enforcement operations it would stifle the structure it was meant to supervise. The Code is intended to guide by establishing limits and direction. An essential part of this direction must be to provide means by which some of the gaps and ambiguities necessarily left by a code may be filled in by the law enforcement agencies themselves.

Draft Section 969.80 stems in part from the 1952 Model Department of Justice Act drafted by the American Bar Association Committee on Organized Crime and approved by the National Conference of Commissioners on Uniform State Laws. Whereas that proposal leaves "ultimate accountability to a single coordinating official," however, the Code in almost all of its sections relies on inducements to cooperative effort.

To a great extent the Draft Section merely formalizes and structures the loosely functioning law enforcement hierarchy which now exists in Wisconsin. For the past few years the attorney general has communicated regularly to law enforcement personnel through conferences and bulletins his interpretations of the latest legislative enactments and court decisions in order to disseminate current information about important changes or difficult problems in the law. Locally, police find themselves calling on their district attorney more often as the legal requirements so basic to their work become more complex. It has been reported that the Milwaukee district attorney's office "frequently requests the attorney

238 The relevant objectives of the Act are:

- to restore what has been lacking in local criminal prosecution in this country for a long time, namely, ultimate accountability to a single coordinating official and some measure of administrative responsibility for acts of discretion.

- Even in states with more than one type of prosecuting official, there is no organic connection between the different layers of authority. Each office operates as a separate and unrelated entity, independent of the other and free from any centralized control or supervision.


239 Beginning May 1, 1965, the attorney general issued on a biweekly basis memoranda on such subjects as "Confessions," "Release of Information in Criminal cases," "Entrapment" and "Personal Liability for Acts of Officers."

240 During the race riots in Milwaukee, the district attorney and an assistant rode with the police "advising them on legal implications of investigation, search and arrest." The then District Attorney O'Connell commented that "there is a tacit understanding that we are part of the law enforcement team here." Milwaukee Journal, Aug. 3, 1967, pt. 1 at 6. It was also reported that two assistant district attorneys went with the police on a major narcotics raid to "advise them
general's office to settle issues on which the law is vague."

Within the state structure itself the office of the attorney general has been organized lately into a Department of Justice as part of a restructuring of the executive branch, and law enforcement officers from different counties have been empowered to give each other aid in emergencies.

In order to encourage such trends, Draft Subsection (1) requires the local district attorney to issue guidelines from time to time to implement the provisions of the Code. There is no obligation on the part of the police to follow such guidelines or regulations. Since courts probably will use them as behavioral yardsticks for determining compliance with the Code in suits brought to redress violations, the guidelines may be expected to be taken seriously. There is no attempt to emphasize a formal structure of superior and subordinate as between the district attorney and the police. The Subsection rather recognizes the natural relationship of the district attorney to other law enforcement authorities: that of lawyer to client. A working relationship between the district attorney and the police is sought in which the district attorney is the legal aid and guiding hand for the police.

Draft Subsection (2)(a) places such local legal aid within a framework on how to conduct the raids. Id., Sept. 20, 1967, pt. 1 at 5, col. 3. For the detailed aid given by the Los Angeles district attorney to police, see Younger, Crime in the Space Age, 3 GA. BAR J. 277, 280-281 (1967); for the California attorney general's program of state-wide law enforcement assistance, see Lynch, Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona, 35 FORD. L. REV. 169, 222, 224 (1966), and 3 R. L. 2356-2357 (1968).

For special policy emphasis, other Code sections specifically require the issuance of guidelines: §969.05(4), "concerning the circumstances in which officers shall issue notices to appear," and §969.32(1)(e) to promote a liberal policy of release from stationhouse custody without bail. But there are many provisions which require more precision: §969.32, disposition of the person in custody; §969.40, stationhouse bail; §969.50, prompt production before a judicial officer.

Either designation may be used in the Code. Guidelines carry the connotation of being broad, suggestive and sanctionless, while regulations are thought of as more precise, detailed and carrying sanctions for their violation. Functionally, the Code provision conceives of something in between. For the present, "guidelines" is probably the better descriptive title.

See discussion at 114-16 infra of Draft Section 969.90, yet to be drafted.
of state-wide coordination by requiring the attorney general to issue guidelines. A local district attorney may use, modify or discard these guidelines according to his estimate of their local applicability. If he discards them, however, he still will be obligated under Subsection (1) to issue his own. A major goal of such a provision is to extend the talents and facilities of the attorney general's office to all parts of the state. Collaterally, uniformity of law enforcement procedures is promoted where it is most appropriate.

Subsection (2)(c) requires the attorney general to send to the governor and to the legislature an annual report describing the operations of the Code relating to law enforcement, together “with such recommendations for executive and legislative action” as he believes appropriate. To aid in gathering information he is to “request” each district attorney to collect data from his own office and to cause the law enforcement agencies of the county to provide statistical or other information useful in evaluating the effective operation of Code provisions.

The discretion accorded law enforcement agencies in accepting these guidelines recognizes that they are frequently jealous of interference with their methods of operation. Yet the initiative of the attorney general in providing them with informative bulletins and in arranging conferences has been well received in the past. It may be expected, therefore, that guidelines which are not legally imposed will be seen as less of a threat and will be accepted more readily. By their very nature guidelines should increase the cooperation and understanding among the attorney general, the district attorneys and the police: as a matter of practicality they will require police participation in formulation. Finally, guidelines may be expected to make for a less traumatic introductory period for the new Code.

Draft Section (3) opens to public inspection any guidelines issued or statistics and other information collected. Although Wisconsin law permits the argument that even without this provision such records would be accessible to the public, the Section makes explicit the public interest.

249 Compare Wis. Stat. §110.99(3) (1967) requiring the Governor's council on traffic law enforcement to “report to the governor any proposals for changes in the law which it believes will bring about a better over-all enforcement effort

250 Present statutes which require officials to collect information concerning crime include: Wis. Stat. §68.15 (1965) Pauperism and Crime, “Each . . . city clerk shall make to the county clerk . . . at such time as such department may require, reports concerning pauperism and crime in his town, village or city”; Wis. Stat. §110.99(3) (1967), Governor's council on traffic law enforcement “may inspect or examine the records of any law enforcement and may call upon any enforcement officer or supervisor of any officer or group of enforcement officers for advice or information”; Wis. Stat. §345.11(7) (1967), “Each law enforcement agency issuing uniform traffic citations and complaints shall . . . prepare and submit such records and reports relating to the uniform traffic citations and complaints in the manner and at the time prescribed by the commissioner.”

251 This was the criterion in Beckon v. Emery, 36 Wis.2d 510, 153 N.W.2d 501
Even though considerable care has been taken to reduce possible objections of law enforcement authorities to this provision, there is evidence that such opposition may be expected. A bill to form a law enforcement commission "to develop and promulgate guidelines for law enforcement officers" and to institute "legal assistance programs" by providing grants covering up to ninety percent of local costs for such projects was defeated in the 1967 legislature. This was due in part at least to opposition from local law enforcement officials. In New York opposition to formation of a similar department on a state level was raised by district attorneys who "objected to giving supervisory powers to the proposed department on the ground that the new unit could interfere with local law enforcement officials and prosecutors." Although the guidelines are only suggestive,

(1967) involving a request to inspect over a year period all traffic citations issued by the officer who cited the defendant. Such a request may be rejected by a governmental authority

only in the unusual or exceptional case, where the harm to the public interest that would be done by divulging matters of record would be more damaging than the harm that is done to public policy by maintaining secrecy, that the inspection should be denied.

Id. at 516, 153 N.W.2d at 501. The court founded its decision on WIS. STAT. §18.01 (1957):

(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1) [all property and things received from his predecessor . . . and required by law to be filed . . . or which are in the lawful possession or control of himself or his deputies . . . ]

Assembly bill 610, an act to create §§14.44 and 20.180(2)(a) of the statutes. A representative of the Milwaukee police department objected before the Milwaukee common council judiciary committee that "the measure was in conflict with the statutory powers of the fire and police commission and the powers of the police chief. . . . [It] would interfere with the prerogative of the chief to set up a training program." Milwaukee Journal, May 1, 1967, pt. 2 at 12. Its estimated cost of $396,000 may also have been a stumbling block, although this covered two years of operation. Id., Nov. 21, 1967, pt. 1 at 1, col. 1. Originally proposed as part of the executive branch, it was changed to a board and moved to the local offices and development department. It was to provide up to fifty percent training aid as an inducement for local departments to meet minimum standards. One charge against it was that "the training program could lead to state control of local police forces." Id. Dec. 6, 1967, pt. 1 at 26, col. 2. It is also reported that although Wisconsin is only one of four states lacking a central identification file, "what has blocked the idea repeatedly is the fear of some local law enforcement men that such a central file would be a 'foot in the door' for a state investigative agency, which then would swoop into local police jurisdiction unbidden." Id., Feb. 18, 1968, pt. 1 at 1, col. 1.

The proposal was a constitutional provision creating a department of justice "to assist, coordinate and supervise local law enforcement and prosecution efforts."
fear of a “foot in the door” is an apprehension not without substance. What local officials do not see is that their control will be more secure if the “intruder” is invited to enter the door rather than forced to break down the door as he inevitably would do. This reflects in miniature the confrontation between the state criminal justice system as a whole and the federal courts: the problem is not whether there will be a change but whether and to what extent local law enforcement will have an effective voice in controlling that change and retaining the best aspects of local control. The President’s Commission on Law Enforcement has pointed out the “fragmented, complicated and frequently overlapping” nature of law enforcement machinery in this country. This description is accurate for Wisconsin and for other states as well. Whether such primitive approaches to law en-

The legislature would implement this. One judge contended that removal of this supervisory power would make the agency, “a paper tiger, a cardboard department of criminal justice.” N.Y. Times, Aug. 10, 1967 at 27, col. 1. The introduction to the MODEL DEPARTMENT OF JUSTICE ACT, supra note 238, at 6, explains the evolution of this problem:

The autonomy of the local prosecuting attorney and his relative freedom from supervision and control by any state official is a peculiar characteristic of American law enforcement. He achieved this independence in the early part of the 19th century. Prior to that time, the key figure in the enforcement of the criminal law and the prosecution of crime was the Attorney General. The Attorney General was endowed with all the powers in the prosecution of criminal cases, which had been exercised by his English counterpart. He could intervene in any criminal prosecution in which the State had an interest. He could take over criminal prosecutions initiated by others, either himself or through deputies. When the various courts required local prosecutors to assist them in disposing of criminal cases, these local prosecutors were deputies or assistants of the Attorney General. The Attorney General was unquestionably the chief prosecutor of the state. This system of criminal prosecution is still in force and effect in Rhode Island and Delaware, where local prosecutors are still the deputies and assistants of the Attorney General. But in other states the twin forces of Jacksonian democracy and local home rule have given us the locally elected prosecuting attorney, largely independent of any centralized direction, accountability or control.


President's Commission Report, supra note 13, at 119.
enforcement will be corrected by local law enforcement agencies will in large part depend on the reception given to proposals such as Section 969.80.

V. Sanctions for Violations of Procedure

What means are available to assure that the desired goals and procedures outlined above are maintained? As one critical observer has demanded, "If the police break the rules, what should the consequences be? . . . In today's crisis in confidence [in the police] the question of sanctions is the central question." [Emphasis in original] 255

There has been little imaginative response to this question. No legislature has attempted to cope with the problem. Available literature either lists the inadequacies of present "remedies" such as private suits for false arrest or illegal detention 256 or urges additional "remedies" including internal controls by the police department, 257 external controls such as the civilian review board, 258 a sharpening of the exclusionary rule, 259 and more effective police training. 260

The most convincing proof of the inadequate resolution of this significant problem is that the exclusionary rule, despite all of its recognized deficiencies, constitutes the frail reed on which the Model Pre-Arraignment Code "puts its principal reliance . . . as a means of enforcing its pro-

255 Packer, Policing the Police, Nine Men are Not Enough, THE NEW REPUBLIC, Sept. 4, 1965, at 21. Continuing, the author says:

The main source of hostility to the police among minority groups is the helpless frustration, engendered by the certain knowledge that, whatever the police do, there is no way in which they can be called to account for it.

256 See note 95 supra.


258 Inbau, Democratic Restraints Upon the Police, 57 J. CRIM. L., C., & P.S. 265 (1966); Beral and Sisk, The Administration of Complaints by Citizens Against the Police, 77 HARV. L. REV. 499 (1964). See also Burger, Who Will Watch the Watchman?, 14 AM.U. L. REV. 1, 16-20 (1964) where a review board of legal and police specialists is proposed to meet objections of police to being judged by those who know nothing about their work. GELLHORN, WHEN AMERICANS COMPLAIN 171-195 (1966) criticizes the idea of the review board as not being able to reach the major problem of "making police heads unremittingly responsible for what all their subordinates do." Id. at 193. Instead he proposes an ombudsman who "does not single out the police department for special treatment as though it were an especially despicable enemy. It does not remove from police hands the power to direct, judge and discipline the staff members whose actions are challenged . . .." Id.


260 Id. Part II: Defining the Norms and Training the Police at 593-609.
visions." In *Terry v. Ohio* the United States Supreme Court relied on the same slight reed in validating the police stop and frisk "as a principal mode of discouraging lawless police conduct." In that decision the Court said of the exclusionary rule:

> [I]ts major thrust is a deterrent one... and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The rule also serves another vital function — "the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.

* * *

The exclusionary rule has its limitations, however, as a tool of judicial control. . . . Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police

---

261 *Model Pre-Arraignment Code, supra* note 8, at xxv; Article 9.10-9.12, at 63-82, 206-221.

262 *Terry v. Ohio*, *supra* note 19, at 4580. The classic defense of the exclusionary rule in derogation of other remedies is Mr. Justice Murphy's dissent in *Wolf v. Colorado*, 338 U.S. 25, 42-46 (1949), where the majority, at that time, refused to make the rule applicable to the states. Wisconsin previously had followed *Weeks v. United States*, 232 U.S. 383 (1914) in excluding evidence unlawfully seized: *see Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923). As part of his argument, Mr. Justice Murphy pointed to Milwaukee where "a stout volume on the law of search and seizure is made the basis of extended instruction." *Id.* at 45. At this point, note 8 states:

Chief of Police John W. Polcyn notes, in a Foreword to the book, that officers often were not properly informed with respect to searches and seizures before thoroughgoing instruction was undertaken. One of their fears was that of "losing their cases in court, only because they neglected to do what they might have done with full legal sanction at the time of the arrest, or did what they had no legal right to do at such time."
either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

* * *

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.263

The Court says, in effect and almost as a confession of helplessness, that though the rule is the best we have, it serves its purpose only where conviction is desired by the police. A major part of their operation involves cases in which a conviction is not necessarily sought.264 In these circumstances a rule which excludes prosecution evidence in court has scarcely any leverage.

The functioning of such a rule depends on three variables which are absent from the police scene today:

(a) that the requirements of the law on arrest, search and seizure and in-custody investigation be developed in some detail and in a manner sufficiently responsive to both the practical needs of enforcement and the individual right of privacy; (b) that these requirements be fashioned in a

263 Id. at 4580-4581.
264 LaFave, supra note 259, at 448, states:

As the chances of conviction diminish these other consequences take on added importance, and finally they become the primary objectives within certain avenues of enforcement. Police come to view arrest without conviction as a means of imposing some sanctions upon offenders, getting weapons out of circulation, recovering stolen property, and "keeping the lid on" in high-crime areas of the community.

See also Robinson, supra note 19, at text accompanying n. 159-169.
manner understandable by the frontline lower-echelon police officer and that they be effectively communicated to him; and (c) that the police desire to obtain convictions be sufficiently great to induce them to comply with these requirements.\textsuperscript{265}

In the absence of these variables trial court rulings are inadequate to sanction violations of procedure. Often they are not communicated to the police. But even if they are communicated, the decisions of different judges are often so diverse within the same court that the police officer "may conclude that if the judges cannot agree then it is futile for him to try to determine and abide by any set standards."\textsuperscript{266}

The rule also ignores the distinction between those complaints against the police concerning the conduct of individual officers and those touching on agency policy. Professor Herman Goldstein with years of experience as a police administrator has pointed out this problem nicely:

\begin{quote}
a complaint that cites such illegal conduct [illegal use of police authority] on the part of an officer does not really raise questions regarding individual conduct, but rather questions the informal policies of the agency. Existing control mechanisms, designed as they are to control individual behavior, cannot adequately perform the quite different and more complex task of exposing and reviewing enforcement policies and practices. This is especially true with regard to the internal disciplinary machinery of a police agency. However strongly committed an agency may be to disciplining the conduct of its employees, it is not likely to criticize the actions of an officer which, though of questionable legality, are in accord with a practice knowingly and consciously engaged in by the agency. This suggests that department-
\end{quote}

\textsuperscript{265} LaFave, \textit{supra} note 259, at 395-396.
\textsuperscript{266} \textit{Id.} at 404, 401.

[\textit{L}ocal judges are time and again called upon to evaluate questioned police conduct without an adequate development of the facts, without a sufficient presentation of existing authority, and without the necessary understanding of the law enforcement context within which the practice in question occurs.]

\textit{Id.} This seems to be the principal difficulty the Court found with the rule. \textit{See} its comment in Terry v. Ohio, \textit{supra} note 19, text accompanying note 263 \textit{supra}. 
wide policies, as distinct from the individual conduct of police officers, can be adequately controlled only from outside a police department. [Emphasis added]267

Accepting Professor Goldstein’s conclusion that it is necessary to go outside a police department268 in order to change any conduct worth changing, it becomes apparent that we must search for more systematic approaches than the exclusionary rule as applied by the courts. Proposals for civilian review boards are more symptomatic of a need than serious as a response.269

We may analogize the police function to that of an administrative agency and subject police action to judicial review like the action of other agencies.270

Perhaps [the court’s] responsibility can better be discharged if the judge is not viewed as a direct participant in the making of law enforcement decisions, but instead is seen as the person responsible for review of the policies, as is generally the court’s relationship with other administra-

268 I have argued elsewhere that because the police are structured along military lines, because they are in a “service” relationship to society, and because police goals developed out of this role are conceived narrowly to promote police “craftsmanship,” the police are unaccustomed to make, and it is unrealistic to expect them to make, broad policy decisions outside the scope of their restricted world-view. This reasoning applies equally to expectations of the creation of effective internal controls. One cannot anticipate internal management to require conformity to goals with which they are not in accord. This is not simply because of obstinacy. Worse, one cannot conform to goals which are not even understood. See Robinson, supra note 19, at 497-506.
269 See note 258 supra, and Robinson, supra note 19, at n. 192.
270 The Court in Terry v. Ohio, supra note 19, while referring to some of the problems of the rule also reaffirmed its faith in a judicial remedy:

Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaking on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary to curtail abuses for which that sanction may prove inappropriate.

[Emphasis added.] Id. at 4581.
Pre-Arraignment Procedure

tive agencies. This might provide a more significant judicial control over law enforcement decisions particularly if courts were systematically to require police to articulate their enforcement policy and practice relevant to the issue in the individual case. Both courts and police would then be forced to consider the propriety of the general policies applicable in a particular case, instead of merely considering individual situations on an *ad hoc* basis. [Emphasis added]²⁷¹

The desirability of such a development evidently has been so apparent that it already has occurred. Although almost unnoticed by those most concerned with the problem, both mandamus and injunction suits are being utilized

²⁷¹ LaFave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 Mich. L. Rev. 987, 1011 (1965). For other references to the police as an administrative agency see LAFAVE, ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY 65-68 (1965) and K. DAVIS, ADMINISTRATIVE LAW 9, 79 (1965). The acceptance of the police as just another “administrative agency,” though a fascinating idea, provides no solutions but does permit a new perspective. DAVIS at 79 states:

> Are ordinary policemen administrative officers? Analytically, the answer must be yes, and the French have always said yes, but in an American law school curriculum the unstudied habit is to commit them to the course in criminal law and procedure and not to the administrative law course. Do the police have practical power to set aside whatever criminal law the legislature enacts? Are the limits of what is criminal fixed, not by the legislature, but by the police within the limits fixed by the legislature?

Though these are provocative questions, it seems more fundamental to ask whether the police as presently constituted really resemble the kind of agency we are visualizing. It might also be asked if the police may be considered functionally an appendage of a full agency — the enforcement branch. If we consider the prosecutor and the police as “one,” would this alter the picture? *Id.* at 51.

If police departments are really administrative agencies, it is fair to ask why the judicial review feature has been “overlooked.” It is suggested that in part this is because the police “became” what we now recognize as an administrative agency while most such agencies were created whole by the legislature at a time when they were seen as a serious threat to the area being regulated. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 324-327 (1965) and JAFFEE, note 272 *infra*. Police are not alone in having features of such an agency without the checks controlling “true” administrative agencies. In schools, prisons, and welfare programs recent changes in attitudes stimulated by court decisions have brought about some change. One common characteristic of each of these agencies applicable equally to the police is that those who are the “objects” of the process constitute the parts of our population weakest in political power.
with increasing frequency to obtain judicial review of unauthorized police action. Technical limitations inherent in the use of mandamus makes it less attractive as a code enforcing mechanism and the frequency of its use has declined in favor of actions to enjoin objectionable police behavior. Decisions in these actions foretell the increasing significance of the injunction as a new regulatory force, even if such a device is not refashioned in legislative form.

See for example, LAFAVE, supra note 271, at 160 and GELLHORN, supra note 258, at 55. The evolution of this process has been abstracted by Professor Jaffee:

Until the era of modern social legislation it was not usually considered necessary to make specific provision for judicial control of administrative action. Administrative activity prior to the present era consisted mostly of the summary action of licensing, health, or tax authorities, often taken without hearing, though there were a few bodies exercising authority in a more formal fashion. The courts controlled these activities by the prerogative writs—certiorari, mandamus, etc.—or permitting common law actions against officers alleged to have exceeded their authority. In later days injunction became available for alleged irreparable injury in situations where no legal remedy existed. All of these remedies are still available, particularly in the states, both for control of traditional administrative activity and the more recent regulatory action.

JAFFEE, supra note 271, at 155.

In Rex v. Barker, 3 Burr 1265, 97 Eng. Rep. 823, 824 (K.B. 1762), Lord Mansfield gave the writ an expansive interpretation:

The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

[Emphasis in original.] Id. at 1267, 97 Eng. Rep. 824-825. See Comment, The Writ of Mandamus in Wisconsin, 1961 Wis. L. REV. 636. It was reduced finally to “an order by a court to a delinquent official to comply with some positive duty required by law.” Id. This duty to act must be clear and there must be no other legal remedy available. Id. at 657; 64 A.L.R. 975-976 (1929); JAFFEE, supra note 271, at 176-193, 330-332, and DAVIS, supra note 271, at 445-448. A recent pertinent case is State ex rel. Youmans v. Owens, 32 Wis.2d 11, 144 N.W. 2d 793 (1966). Mandamus was allowed to compel the defendant mayor to permit inspection of “police reports, statements of police officers and other persons, and those transcripts of the interrogation of police officers and other persons in an inquiry conducted by the city attorney of Waukesha on the subject of police brutality.” The most famous use of the writ, of course, is in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Using the mandamus as a model for legislative regulation of police action would be unwise because the remedy is focused on a specific, nondiscretionary act rather than on a course of behavior.
Most of such injunctions have issued from federal courts pursuant to statutory authorizations of injunction, special civil rights legislation, and the federal court tradition of policing state incursion on civil rights and civil liberties. State courts in contrast have generally been hesitant to use their equitable powers to "interfere to prevent the enforcement of the criminal law."

A few early state decisions relied on the inherent equitable powers of the court for relief without asserting any clearer theory of jurisdiction than the duty to enjoin governmental interference with a citizen's rightful activities. Later federal cases were based on the authority of the federal

---

274 Fed. R. Crim. P. 65 and see note 275 infra.
275 Most of the described actions are brought under the following sections:

28 U.S.C. 1343 (1962) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.

42 U.S.C. 1983 (1964) Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

276 From a functional point of view, far from being a policing force for the police, state courts have seen themselves frequently as protectors of the police, legitimizing police action, as a part of the enforcement arm rather than as an independent review board. In Wisconsin, until McKinley v. State, 37 Wis.2d 26, 154 N.W.2d 344 (1967), the state supreme court had never thrown out a confession due to police misbehavior, although its exclusionary rule was adopted in 1923, supra note 262. Cf. Greenwald v. State, 35 Wis.2d 146, 150 N.W.2d 507 (1967), rev'd., 390 U.S. 519 (1968).

277 The citation is from Delany v. Flood, 183 N.Y. 323, 76 N.E. 209 (1906), and see cases collected in Comment, Federal Injunctive Relief from Illegal Search, 1967 Wash. U.L.Q. 104, 108-109. This reserve undoubtedly also is due to the history of equity as a protector of property rather than personal rights. See Sedler, Injunctive Relief and Personal Integrity, 9 St. Louis L.U.L.J. 147 (1964).

278 In Itzkovitz v. Whitaker, 117 La. 708, 42 So. 228 (1906), it was alleged that the complainant was a citizen, a property owner, who paid taxes; that he, "has conducted himself in a proper and becoming manner," and that he had not then been convicted of the offense for which he was arrested. He successfully asked the court to enjoin the police from placing his photo in the rogue's gallery and sending copies throughout the United States. The police defended that they could not be "lawfully controlled by an injunction from a civil district court." Other state cases are collected in Sedler, supra note 277, at 174-177; Moscowitz, Civil Liberties and Injunctive Protection, 39 Ill. L. Rev. 144, 154 n. 63 (1944); Comment, Federal Injunctive Relief from Illegal Search, 1967 Wash. U.L.Q. 104, 108-109.
court to enjoin state action contravening rights under the United States Constitution. Almost all recent cases are class actions brought under the Civil Rights Act by civil rights, civil liberties or legal services organizations seeking various degrees of regulation of police activity. Progressively these cases have demanded (1) that the court enjoin illegal acts aimed at a single individual or organization; (2) that the court enjoin future actions based on a proven past of illegal conduct; and (3) that the court utilize the opportunity to bring about a substantial change in the structure and policy of police procedures.

A typical case of the first category is *Rafoule v. Ellis*. Police suspected that the plaintiff had murdered his wife, but they did not have sufficient evidence to arrest him. Instead on four occasions they took him into custody and questioned him for prolonged periods, ignoring his requests to see counsel and friends. His suit for an injunction under the Civil Rights Act alleged a denial of due process of law and requested that the conduct complained of be enjoined and that a confession obtained from him relating to another crime be suppressed. The first request was granted, but the second was disallowed on the ground that he had an adequate remedy at law. The rationale, the extent of the relief given, and the circumspection of the court in giving it are illustrated in this statement:

This [injunction] does not violate the general principle that equity does not ordinarily interfere with the administration of criminal laws. Plaintiff seeks to enjoin not the administration of criminal laws by the State of Georgia, but the illegal manner of administration by defendants as agencies of the State.

Defendants do not deny the detentions and questionings above described and have failed to express any intention to cease the

---

279 In *Hague v. C.I.O.*, 307 U.S. 496 (1939), police were alleged to have prevented petitioners from conducting meetings and assembling or distributing literature by unlawful searches and seizures in violation of their constitutional rights. The Supreme Court directed that the police be restrained from "exercising personal restraint over them without warrant or confining them without lawful arrest and production of them for prompt judicial hearing ...." *Id.* at 517. See also *Gomez v. Layton*, 394 F.2d 764 (D.C. Cir. 1968); *Sellers v. Johnson*, 163 F.2d 877 (8th. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948) and *American Steel Wire Co. v. Davis*, 261 Fed. 800 (N.D. Ohio 1919); Comment, *Federal Injunctive Relief from Illegal Search*, 1967 WASH. U.L.Q. 104, 107. *Bell v. Hood*, 327 U.S. 678, 684 (1946) is a key case expressing the widespread relief available where state officials do "what the 14th amendment forbids the state to do."

280 See note 275 supra, 42 U.S.C. 1983 (1964), [hereafter referred to as the Civil Rights Act.]

commission of such acts in the future, but on the other hand, have strongly insisted that they were within their rights in doing what they have done and in continuing to do so in the future if they find it desirable to do so.

\textit{In view of this attitude}, it seems that a preliminary injunction is demanded to protect plaintiff from infringements of his rights under the Constitution and Civil Rights Statute.

A preliminary injunction will issue enjoining the exercise of personal restraint over plaintiff by defendants without a warrant or confinement without lawful arrest and from further questioning plaintiff without his consent after being afforded an opportunity of consulting with his counsel.\textsuperscript{282}

The next step in the progression dealt with a practice antedating the particular incident complained of and resulted in a decree with a more general sweep. \textit{Lankford v. Gelston}\textsuperscript{283} involved police searches of more than three hundred buildings in nineteen days, most of which were private homes in a Negro section of Baltimore. Police had arrest warrants for two Negro men suspected of armed robbery and attempted murder of a police lieutenant. Most searches were in response to anonymous telephone calls placing these persons in or near the places searched. Searches were made at all hours of the day and night by a squad equipped with machine guns, tear gas apparatus and bullet-proof vests. Relief was sought in a class action against the police commissioner under the authority of the Civil Rights Act and the Fourteenth Amendment, as it makes applicable to the states the search and seizure provisions of the Fourth Amendment to the United States Constitution. The district court denied the petition on grounds that the injunction would be "difficult to frame," "difficult to enforce and its enforcement would place severe burdens on the police and on this Court," that the action complained of had ceased, and that the police would make

\textsuperscript{282} Id. at 343. The following cases also restrict their relief to the complainants: Itzkovitz v. Whitaker, \textit{supra} note 278; Hague v. C.I.O. and Sellers v. Johnson (Jehovah's Witnesses entitled to police protection from mob opposed to their holding a public meeting), \textit{supra} note 279; Local 309, United Furniture Workers v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) (Police enjoined from attending union meetings); Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964) (police enjoined from requiring petitioner who was awaiting trial and could not make bail attend lineup), \textit{but see} Rigney v. Hendrick, 355 F.2d 710, 715 (3rd Cir. 1965), \textit{cert. denied}, 384 U.S. 975 (1966).

\textsuperscript{283} 364 F.2d 197 (4th Cir. 1966).
a bona fide effort to observe the rules of law stated by the court. According to trial testimony the use of anonymous, unverified tips to authorize searches was standard procedure for the department. During the trial the police commissioner promulgated a general order directing police officers to arrest a person upon a warrant only if there is probable cause to believe he is on the premises. The Court of Appeals rejected this attempt to moot the issue, stating:

   The grave character of the department's conduct places a strong obligation on the court to make sure that similar conduct will not recur. Police protestations of repentance and reform timed to anticipate or to blunt the force of a lawsuit offer insufficient assurance that similar raids will not ensue when another aggravated crime occurs. . . . In fact, it is perhaps more reasonable to view the cessation of the raids and the promulgation of General Order 10388 not as belated acts of repentance but as the recognition of the futility of continuing the searches when it had become manifest that the Venys had made their escape. [Emphasis added.]

The Lankford court demonstrated none of the caution and need for self-supporting rationalization expressed by the decision in Rafoule:

   After so vast a demonstration of disregard of private rights, the complainants are entitled to a clear response. While the immediate pressure of wholesale raids has been withdrawn, the practice of indiscriminate searches of homes has been renounced only obliquely, if at all, and the danger of repetition has not been removed. The sense of impending crisis in police-community relations persists, and nothing would so directly ameliorate it as a judicial decree forbidding the practices complained of.

   * * *

   [The decree granted should enjoin] . . . the Police Department from conducting a

---

285 364 F.2d at 203.
search of any private house to affect the arrest of any person not known to reside therein, whether with or without an arrest warrant, where the belief that the person is on the premises is based only on an anonymous tip and hence without probable cause.\textsuperscript{286}

Such a decree is neither the declaration of a new point of law nor a broadly sweeping revision of police practices. On the contrary, the point is obvious and the injunction narrowly drawn.\textsuperscript{287} The notable portent of the decree is rather that the court legislated a specific rule of future conduct for the police for all like situations, permitting in the event of infractions later access to the court through its power to defend its own injunctive decrees: the contempt power.\textsuperscript{288}

The third and most audacious action, \textit{Kidd v. Addonizio et al.},\textsuperscript{289} was also based on the Civil Rights Act and was provoked by the suppression of Negro riots in Newark, New Jersey, in the summer of 1967. Plaintiffs, a class composed “of all residents of the City of Newark, New Jersey, who are of the Negro race,” sought injunctive relief. The defendants (the

\textsuperscript{286} Id. at 204, 206. Reliance of the court on the community relations effect of its decree has been criticized. Note, 1967 WASH. U.L.Q. 104, 111.

\textsuperscript{287} Plaintiffs had asked that the police be required to obtain search warrants except in exceptional circumstances. \textit{Id.} at 205-206.

\textsuperscript{288} Cases are all recent where relief demanded is similar in extent to that given in \textit{Lankford}, and most are still in litigation. All actions have been filed by civil liberty, civil rights or legal services organizations and are class actions jurisdictionally based on the \textit{Civil Rights Act}. In Burmeister v. Leary, 275 F. Supp. 690 (S.D.N.Y. 1967), an injunction was requested to enjoin unlawful invasion of premises and arrests of plaintiffs by police for alleged narcotics violations. Injunction was denied because plaintiffs did not assert that they were assembled lawfully and no such lack of probable cause was shown as entitled plaintiffs to equitable relief. In Aronson v. Giarrusso, Civil No. 66-281, E.D. La., a declaratory judgment was requested and also an injunction against police photography or investigating persons attending public meetings except where necessary for apprehension of persons to be charged with a crime. In Press v. Leary, Civil No. 67-2402, S.D.N.Y., an injunction was requested to order discontinuance of alleged police practice of issuing summons and arresting those distributing anti-war leaflets and to take necessary measures to insure that all members of the department were advised of the court order. Another federal court suit filed by the New York Civil Liberties Union on behalf of three photographers sought to enjoin the police department “from continuing alleged harassment of free lance photographers and others who peacefully attempt to record ‘the facts of police actions’ at large demonstrations . . . with the purpose of protecting individual policemen from discipline, criticism or legal action for these acts.” N.Y. Times, July 8, 1968 at 19, col. 1. \textit{See also} Note, 81 HARV. L. REV. 625, 631 (1968); Note, 45 N.C.L. REV. 518 (1967) and Note, 1967 WASH. U.L.Q. 104. Research aid: Marquette University law student, now attorney, Joan Kessler.

\textsuperscript{289} Civil No. 67-899 (D.C.N.J. July, 1967). [This case, filed during the Newark disorders, never reached the point of formal disposition by the court. \textit{Ed. note}.]
mayor, the director of public safety and the chief of police of Newark) were alleged to be responsible for a "systematic pattern of conduct" consisting of "a large number of individual acts of violence, intimidation and humiliation visited upon members of plaintiff's class solely on account of race, by members of the Newark Police Department." The plaintiffs requested that a preliminary injunction be issued enjoining the defendants from engaging in such conduct and in addition:

That pursuant to the Equity power of this Court, an order issue ordering and directing that a special Master be appointed receiver of the Police Department of the City of Newark, with full power to direct and control all affairs of that department and its members in order that law enforcement in Newark not further deteriorate until such time as that department can be so reorganized so as to protect the lives and property of all citizens of Newark equally and impartially without regard to race.²⁹⁰

In Lankford the court accepted a role as conciliator of police-community relations; but that role is necessarily limited to the facts of the particular case. The attempt in Kidd to make the police department a ward of the court represented a response to the void left by failure of the legislature to articulate rules against which a court may measure police behavior. The roles which these courts were asked to play in control of police misconduct are destined to be either ineffective as long term instruments or intolerably overreaching in relation to the legislative branch.

The Code is intended not only to fill the void demonstrated in Kidd, but also to provide through Draft Section 969.90 a realistic role for injunctive relief as the best means yet available for successful enforcement of Code provisions. Since work on the revision project terminated before the completion of the Custody Chapter, this Section has not been drafted yet. However, examining the catalogue of errors into which the exclusionary rule has fallen, we may identify the features any new rule or court proceeding must satisfy:

1. It must systematically aid in the development of the law of arrest, search and in-custody investigation, with such detail as to be a comprehensive ref-

²⁹⁰ The complaint also requested that the master be directed to hold public hearings at which the public could "present plans for the rehabilitation of the Police Department, under the supervision of this Court."
Pre-Arraignment Procedure

2. If it is to be a court process, decisions must be made under circumstances other than individual adversary proceedings brought to the court's attention on a random basis. Presentation of the facts surrounding the police conduct must be adequate to determine whether the actions complained of are isolated instances of an errant officer or a pervasive policy of the department. If the complaint involves department policy, there must be room for inquiry into the considerations involved in such conduct and the context in which it took place.

3. Decisions must be systematically communicated to the policy-making machinery of law enforcement agencies.

4. Means must be provided a) to secure voluntary compliance, b) to require compliance where it is not forthcoming voluntarily and c) to maintain jurisdiction so as to monitor compliance and to modify findings and directions as needed. The proceedings should be unconcerned with discipline or punishment of individual officers except where such is necessary to require conformity to court orders.

With these points in mind the general outlines of Draft Section 969.90 may be suggested. Any person or organization should be able to bring an action to seek enforcement of the Code and the regulations or guidelines issued pursuant thereto, or to seek the issuance of additional

---

292 If the prosecutor may be called on later to defend the police against non-observance of regulations he drafts, query, will he not, as would any good lawyer, prepare them with this in mind? Of course he will and should. But his counsel and protection of the police, as with any lawyer, is bound by the law and by the litigious qualities of the adversary. Moreover, it is hoped at least that the forced working together of the police, prosecutor, courts and complainants will
Suit should be allowed without any special showing of injury or clean hands on the part of the complainant; the Section is concerned with the enforcement of the Code provision and any person who brings such an action in alleging non-enforcement is rendering a public service. He must stand on his allegations rather than on the purity of his motive or on evidence of personal injury. Costs and attorney fees should be available to the good faith litigant for the same reason, regardless of final outcome of the suit.

Elaborate discovery proceedings, during which police officials testify as to policy and procedure surrounding the actions complained of, should be encouraged. Means to ease this task for both the police and the complainant should be developed. Matters relating to police conformity to statutes and supplementary regulations are by their nature a public concern: police attempts to maintain their operations as a state secret are inconsistent with the concept of the police as an administrative agency, although occasionally there may be specific information which a court finds is not in the public interest to disclose. One result of the raising of the blue curtain exposing the mechanics of police policy formation should be increased police interest in the way those decisions are arrived at. Moreover, it should be noted that none of the suits filed have been concerned with internal police management except as it impinged on complainants. State courts have been generous in their understanding of police problems and there is no reason to think that this provision will make them any less receptive to reasonable police arguments.

The provision should encourage voluntary compliance by use of the pre-trial conference, where the court may often act as a mediating force. With increasing expertise, the court may be able to provide an overview which focuses on the common thread of public concern which runs through the adversary interests of the police, the prosecutor and the complainants. Once a decree is entered the court should have full

result in a more long-range view of the police function on the part of all participants.

293 See note 288 supra.

294 See note 251 supra.

295 The court noted one of the by-products of such a suit in Lankford v. Schmidt, 240 F. Supp. 550, 556 n. 4 (D. Md. 1965):

The evidence does show what has been common knowledge in Baltimore—that the relations between the Negro community and the police have deteriorated seriously. The court is grateful to the amici curiae, who with the approval and cooperation of counsel for both sides were instrumental in the organization of a bi-racial committee which has begun its efforts to establish better communications between the Negro community and the police, and thereby to improve the relations between them.
equity powers for its extension, modification or continuation.\textsuperscript{296} Returning to the question asked at the beginning of this section by Professor Packer, "If the police break the rules, what should the consequences be?," we now have an answer: the suggested court review, together with the exclusionary rule which will remain,\textsuperscript{297} offers a means of measuring the seriousness of the breach and of repairing it.

\textit{VI. Conclusions}

What has been suggested here is a goal-oriented code revision: the objectives are the minimization of the number of minor offenders taken into custody; the replacement of confusing terms and concepts with words that describe actions to be taken; and the incorporation of controls on those called upon to carry out code directives. Such notions are neither radical nor impractical; nor do they go beyond the demands of current decisions of the Wisconsin or the United States Supreme Courts. With more reason the Code could be attacked as being too conservative, too overcautious, too unimaginative and inadequate to deal with many of the substantial social and legal problems which fall within the ambit of such a code.

In drafting a new code, one is restricted. Past law actually constitutes the least of these, for the very assumption on which the revision is based is that such law was deficient. Neither are the institutions themselves inherently impenetrable: that the police and the courts in many cases are ready to undergo relatively substantial changes has been demonstrated amply through the various Vera Institute projects described above.\textsuperscript{298} What then \textit{are} the real sources of this resistance?

The resistance comes from the people who must agree on goals. The people who draft codes today come from law schools, important law firms, district attorney offices and judges' chambers. In one way or another most of these men are administrators, businessmen of the law concerned with the proper running of a system — their system. The system works if it works for them; it does not work if cases are often overturned, or if new procedures are constantly imposed from above, or if there is too much work to be done. Law revision is provoked by such administrative

\textsuperscript{296}See Note, 78 \textit{Harv. L. Rev.} 973, 1086-1092 (1965). In Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965), \textit{cert. denied}, 384 U.S. 929 (1966), a prior injunction enjoined various organizations and defendants "and any other persons to whom notice or knowledge of this order may come" from interfering with the right of Negroes to seek housing accommodations. Shortly after its issuance, appellant engaged in activities contrary to the injunction. The district court ordered him to resign his position but the court of appeals modified the order permitting the deputy to continue in the position if he could satisfy the district court of his future compliance. \textit{See} Note, 65 \textit{Mich. L. Rev.} 556 (1967).

\textsuperscript{297}The Code provisions might follow those set forth in the \textit{Model Pre-Arraignment Code}, \textit{supra} note 261.

\textsuperscript{298}These illustrations of the possibility of change seem to me to be a more valuable lesson than even the sum of these largely successful projects.
squeakings. If consideration of the lowly defendant enters into this picture, it is because he has “constitutional rights”; that is, he has something which, if not paid appropriate attention, may result in convictions overturned, new procedures imposed, and so on. These are corporate goals, shared by the administrators of welfare systems, urban renewal programs, criminal correction houses, educational institutions. These goals seem to be characteristic of systems where the persons who are “served” have no standing to participate in the way they are served.

Lawyers are concerned with what the actors in the system can or must do, not what they should do. Their goals consciously or unconsciously tend to become oriented to the past and to “discovered” rights and responsibilities. By their tradition, by their class, by their associates, lawyers act as instruments of the past and as the mechanics, carpenters and plumbers of the system, rather than as the architects. Codes prepared by the lawyers in our legislatures, in our bar associations, and even in our law schools are frightening in their lack of imaginative attempts to grapple with social problems in social terms and to tell us how the proposal contributes to the solution. People do best what they are trained to do. Therefore, it is not surprising that legislators “solve” social problems by passing laws against them; nor that they sometimes react in the opposite way by avoiding the formulation of laws when the lawyers feel politically uncomfortable in acting or ill-equipped to do so. This is particularly true where the legislators believe that another group in whom they have confidence, such as the police, can do the job better. The Wisconsin experience is an example of this phenomenon.

The Code chapter on custody and disposition, largely as it is described here, was presented as the work of a reporter. This Code is directed to that committee of people who ultimately must make all the political decisions and compromises in preparation of a code to be presented to the legislature. In Wisconsin this Code was rejected by that committee as an attempt to write a police manual. Revision continues, however, as a committee of lawyers are now adapting the Federal Rules of Criminal Procedure to Wisconsin’s needs.

Lawyers are thus writing rules for lawyers — a perfectly sensible procedure. The revision committee was acting only with fitting modesty in rejecting the Code and restricting its goals. But such action only emphasizes the seriousness and breadth of the problem of revision itself. We must begin asking basic questions: What should be the goals of penal law and criminal procedure revision? Is it feasible to bring “social reality to the criminal law?” What can and should be done by criminal sanction; what alternatives are available? What is the interplay between substantive

299 See Goldstein, supra note 95.
and procedural law as it affects unlawful police activity? What role will local communities play, or be forced to play, in the making of law and its enforcement? What is the role of the lawyer where we deal largely in terms of behavioral prediction? Perhaps the final question is which of these are really questions for the law revisor and which are "non-questions" that provide no leads for revision even when answered. Only by pursuing such inquiries can we provide future revision efforts with meaningful goals for effective and rational code revision.

Appendix

969.07 CIRCUMSTANCES IMPLYING CUSTODY. (1) IMPLIED RESTRICTION ON LIBERTY. (2) REQUESTS TO APPEAR AT POLICE STATION.

COMMENT: This Section concerns the ambiguous circumstances in which the officer does not have enough evidence to act under Section 969.01 but he nevertheless wishes (1) to stop the suspect in order to question him or (2) to ask him to come to or stay in a certain place. There is no code draft included under this Section because Terry v. Ohio raises questions about the adequacy of the original draft.

The purpose of this Section is to require the officer to inform the person to be stopped of the nature of the "detention" — that is, that he is "free to go." If the officer fails to so inform the person, that person thereafter has all the rights of one in custody including the right to be warned of his right to silence and to counsel. Failure to so warn the person of his right to go would lead to exclusion of any incriminating statements he might make while subject to the policeman's authority.

The standard and the language used by the Wisconsin Supreme Court to determine when an officer must give a warning to the suspect and the warnings to be given closely follow closely the American Law Institute Model Code of Pre-Arraignment Procedure, section 3.05.

969.20 PROCEDURES ON ORDERING A PERSON TO STOP: WARNING.

A law enforcement officer acting without a warrant who stops a person to determine whether to issue a notice to appear or to take the person into custody shall (1) Identify himself as such unless his identity is otherwise apparent; and (2) As promptly as is reasonable under the circumstances, inform the person of the reason he has been stopped, unless the reason appears to be evident.

969.22 PROCEDURES ON TAKING A PERSON INTO CUSTODY: WARNING.

Upon taking a person into custody, as promptly as is reasonable under the circum-

302 Id.
stances, and in any event before engaging in any questioning about the crime, a law enforcement officer shall

(1) Identify himself as such unless his identity is otherwise apparent;
(2) Inform the person that he is being taken to the police station;
(3) Inform the person of the reason he was stopped, unless the reason appears to be evident;
(4) warn such person that he is not required to say anything or to answer any questions, that anything that he may say may be used in evidence against him in a court of law, that upon arrival at a police station he will be permitted to communicate by telephone with counsel, relatives, or friends and that if necessary, funds will be provided to enable him to do so; and
(5) Inform such person that he has a right to the presence of an attorney at the police station to advise him and to be present during any interrogation; that if he cannot afford an attorney one will be provided for him, if he desires, prior to any questioning about the crime.

Ref. ALI (1966) s. 3.08: Study Draft No. 1 (1968) s. A4.01(2).

COMMENT: Section 969.20 concerns the warning to be given to a person stopped by a law enforcement officer because he is reasonably believed to have committed a crime under Section 969.01 but before the officer determines whether the person must be taken into custody. The officer must identify himself as a law enforcement officer and inform the person of the reason he has been stopped as promptly as is reasonable under the circumstances unless the reason appears to be evident.

Once the officer has decided to take a person into custody (969.22), he must inform the person that he is being taken to the police station or other place of detention and give him the Miranda warnings. The person must be ad-

304 U.S. 436, 444 (1966):

By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.


In State v. Shoffner, 31 Wis.2d 412, 432-33, 143 N.W.2d 458, 468 (1966), an officer arrested a person fleeing after his automobile struck a safety island. In telephoning for assistance, he learned that there had been a robbery of a nearby restaurant. He asked the suspect: "Do you know what else you are under arrest for?" The incriminating reply was excluded for failure to warn. See also State v. LaFernier, 37 Wis.2d 365, 155 N.W.2d 93 (1967), where the suspect agreed to a polygraph test the day before and "spontaneously" confessed orally when he appeared to take it.

the main problem is ... whether "custodial interrogation" had begun — thus necessitating the warnings — at the time the oral confession was made . . . . the defendant was "interviewed"
vised that at the place of detention he will be permitted access to counsel, relatives and friends, and that if he is indigent, he may telephone at police expense.

Although Section 969.20 does not require a warning because the purpose of the detention is primarily to determine if custody is necessary, the possibility of a disclosure of incriminating information suggests that police should warn at this point.

969.60 CONDITIONS OF INVESTIGATION OF A PERSON IN CUSTODY.

(1) WARNING AT THE OUTSET OF INTERROGATION. Immediately before a person is questioned about a crime or an ordinance violation the person shall be informed of the matters listed in s. 969.30(2)(c) — (g), unless this is made unnecessary because arrangements already have been made to obtain for him the services of a lawyer.

(2) DECEPTION AS TO COOPERATION. No law enforcement officer shall attempt to induce a person in custody to make a statement or otherwise cooperate by indicating that the person is legally obligated to do so, if no such legal obligation exists.


(3) DECEPTION AS TO FACTS OR CONDITIONS. No law enforcement officer shall knowingly make untrue statements to a person in custody with the intent to induce that person to confess to a crime.

COMMENT: While these Sections are obviously important to the Code, this Article emphasizes the means for reducing the time a person must be retained in custody. Moreover, a considerable amount of space in publications has already been devoted to in-custody investigation and access to counsel (969.70, infra).

Section 969.60(1) requires substantially the same warnings as given in 969.30(2) “before a person is questioned. . . .”

Section 969.30(3) precludes a law enforcement officer from attempting to secure a confession by knowingly making untrue statements to a person in custody. This may be required by Miranda which requires a waiver “knowingly and intelligently” given. This may only be done if the suspect acts on truthful representations.

969.70 ACCESS TO COUNSEL AND CONSULTATION RIGHTS.

(1) ACCESS TO COUNSEL — INDIGENTS. A person in custody who states that he wants a lawyer, and who is financially unable to employ counsel, shall be pro-

the day before he confessed and was asked if he wanted to take a lie detector test. We think this is sufficient custodial interrogation to require the warnings to be given at that time.

155 N.W.2d at 99.

Wisconsin attorney general's special memorandum No. 37, In-Custody Interrogation: When Miranda Warnings are Not Required, 4 (Nov. 1, 1966), advised: “If the officer is in doubt, the warnings should be given if the suspect's statements are to be preserved for use at trial.”
vided with counsel pursuant to s........ in any case where the station officer has reasonable grounds to believe that the person has committed a crime in which the maximum sentence exceeds six months' imprisonment, or the police wish to interrogate the person about a crime, or where such is required by the United States or Wisconsin constitutions.

(2) ACCESS TO COUNSEL — NON-INDIGENTS. A person in custody who states that he wants a lawyer, and who is financially able to employ counsel but does not know of one, shall be permitted immediately to telephone the lawyer or person or agency designated by the county by the circuit court pursuant to s. ........

(3) ACCESS OF COUNSEL TO CLIENT. (a) Counsel for the person in custody, whether designated pursuant to subs. (1) or (2) or otherwise retained by or for the suspect, shall be permitted to interview his client in person or by telephone in private at the place of detention for a reasonable period of time at any hour of the day or night. Counsel shall be allowed access to the person in custody whenever the person in custody requests his presence. If no counsel for the person is present, similar visitation privileges must be accorded to a relative or friend of the person subject to the restriction of s. 969.30(5).

(b) A person in custody shall be given reasonable opportunity from time to time during his detention to consult in private with counsel or any relative or friend present in lieu of counsel, and, upon request, to use the telephone, subject to the restriction of s. 969.30(5).

COMMENT: Subsection (1) is a compromise between providing counsel to all persons in custody who may desire a lawyer but may be unable to afford one and the present situation in which there is no provision for offering counsel before the first court appearance. It gives state-provided counsel to all persons who are being investigated for a charge carrying a penalty of imprisonment in excess of six months. This criterion is related to Section 969.32(1) which requires that persons who are charged with offenses where the statutory penalty does not exceed six months' imprisonment must be released within a two-hour period on notice to appear or their promise to appear. Neither the penalty likely to be incurred nor the time of detention seems sufficient to cause substantial prejudice to the person who fails to have an attorney during this short period. In the case of those to be charged with more serious crimes, even though they would be released within the same time limit, the seriousness of the charge and the desire for an attorney recommends that the state provide counsel. This need not mean that the lawyer must come to the stationhouse. No Section has been drafted specifying the system selected, but it would leave a certain discretion to each circuit court to select from among several choices.

The Subsection also requires that counsel be provided whenever "the police wish to interrogate the person about a crime." This is to prevent the anomalous situation in which the police have to warn the suspect that he is entitled to a lawyer before answering any ques-
tions but are unable to produce one if requested in response to the offer.

Subsection (2) concerns the person who is financially able to pay for an attorney but who does not know one. It has been the custom for the police to hand the suspect a telephone book from which he may select an attorney of his "choice." Such a "system" is a self-administered insult to the legal profession because it is the profession which has permitted the condition to develop.