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LEGAL SUBJECTS

COURSE CONTENT INFORMATION

LESSON PLAN OUTLINES

177

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LAW ENFORCEMENT OFFICERS
TRAINING COUNCIL

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LEGAL SECTION

LESSON PLANS

A Report to
The
Michigan Law Enforcement Officers Training Council
In Accordance with
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by

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CONSTITUTIONAL LAW

I. Historical Overview of the United States Constitution - 1787 - A "Living" Document.

A. Overcome the defects in the Articles of Confederation which had:

1. No judicial branch.

2. No executive branch.

3. Unicameral legislature - one house.

B. Adapted from Magna Charta of 13th Century:

1. Bill of Rights - first ten amendments.

2. The designers of the Constitution feared a strong central government.

3. Liberty from government more emphasized than other individual liberties.

4. The document was negative in nature - individualism prevailed.

C. Our Constitution has survived eras of dynamic change.

1. The United States has changed from agricultural to an industrial nation.

2. The roles of the individual states have changed.

3. Most inhabitants live in urban communities.

4. The mode and speed of transportation have changed.

5. The method and speed of communications have changed.

6. Immigration and emigration have kept the country in flux.

7. The Civil War divided the country and reconstruction united it again.

8. World War I saw an end to isolationist policy.

9. World War II saw the development of nuclear fission.

10. The public developed an attitude toward federal funding of the following programs:

    a. Social Security program.

    b. Workmen's Compensation program.

    c. Health and medical programs.

    d. Poverty programs.

    e. Highway development program.

D. The United States Constitution has certain ambiguities and vagaries.

1. The ambiguities and vagaries are considered an asset in some ways.

2. The role of the United States Constitution is interpreted by:

    a. The President of the United States.

    b. The Congress of the United States.

    c. The United States Supreme Court.

        1) Supreme Court does not have the last say in interpretation.

        2) But Supreme Court decisions are most significant in interpreting the Constitution.

E. The powers of the Constitution.

1. The Constitution establishes our form of government.

2. The Constitution delegates powers to the government.

3. The Constitution protects individual rights against governmental agencies and officers.

4. The United States Constitution as a document grants and limits the powers of our government.

F. Definition of constitutional law.

1. It is a body of rules.

2. The rules are established and maintained by judicial interpretation through case decisions.

3. Where government actions of such instruments (constitutions) have been questioned by appellants in court action.

G. Constitutional law and Bill of Rights.

1. Change of constitutional law and Bill of Rights through the court's perception of their meaning.

2. The executive branch will have influence on constitutional interpretations as well as the legislative and judicial bodies.

3. Strengths of interpretations vary from time to time as during the Roosevelt era and presently with the Warren Court.

II. The Federal Government as Created by the United States Constitution.

A. The United States Constitution enumerates the powers of the federal government.

1. The first seven articles of the United States Constitution provide the basis for our national government.

2. The first three articles of the United States Constitution provide for the separation of powers of the three branches of government: Legislative, Executive, and Judicial.

a. The legislative branch of the federal government.

1) Article I, Section 1 of the United States Constitution provides that all legislative powers herein granted shall be vested in a

Congress of the United States, which shall consist of a Senate and House of Representatives.

2) Article I empowers Congress to make laws.

3) Congress administers police powers through the enactment of laws under Article I.

4) If Congress passes laws, the law must conform to the restrictions of the Constitution.

5) Section 9 states that the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.

a) No bill of attainder or ex post facto law shall be passed.

b) Ex post facto laws are found in Section 10 in that "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit; make anything but gold and silver coin a Tender in Payment of debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

i) Ex post facto applies to criminal laws.

ii) Classification of ex post facto laws are as follows:

(a) Ex post facto applies to every law that makes an act done innocently before the passing of the law.

(b) Ex post facto applies to every law that aggravates a crime or makes it greater than it was when committed.

(c) Ex post facto applies to every law that inflicts a greater punishment than that prescribed when the crime was committed.

(d) Ex post facto applies to every law that alters the rules of evidence and permeates less evidence to convict than required at the time of the commission of the offense.

b. The executive branch of the federal government.

1) Article II of the United States Constitution provides that the executive power shall be vested in a President of the United States of America.

2) Article II provides that through delegation of his powers, the executive enforces the laws.

3) The President as an executive puts laws into effect.

4) Law enforcement officers are part of this branch of government since they do not make or interpret laws; they only enforce them.

c. The judicial branch of the federal government.

1) Article III of the United States Constitution provides that:

a) "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

b) "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

2) The judicial branch interprets the laws which are passed by the legislature and enforced by the executive branches.

3) At the federal level, the United States Supreme Court decides United States constitutional questions.

4) A long series of appeals is necessary to obtain a review of such questions and Supreme Court reviews only those they wish to accept, which must involve a substantial federal constitutional question.

5) The method by which the Supreme Court reaches the decisions.

a) The Supreme Court initially decides if it will receive or decide a case.

i) Necessary to handle only those cases "timely" or requiring constitutional interpretation.

ii) Discretion must be stringent.

b) The United States Supreme Court reviews about 1,500 petitions filed each term.

i) Law clerks assist the Supreme Court in selecting the petitions.

ii) The Supreme Court justices vary on which cases are vital or involve a substantial federal constitutional question.

iii) Often the debate ensues over which cases are to be selected.

c) The choice of cases is reviewed in the weekly conference.

v) The Supreme Court then has a conference discussion of cases heard.

(a) The Supreme Court votes on the case.

(b) The majority opinion is written by a writer appointed by Senior Justice or Chief Justice if he is in majority.

(c) Any justice of the Supreme Court may write concurring or dissenting opinion.

(d) Opinions may take months to be handed down.

(e) Opinions of the Supreme Court are delivered on Mondays.

B. Survey of the remaining articles of the United States as applicable herein.

1. Article IV of the United States Constitution states that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and that, "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

a. A person must have been in the demanding state at the time of the crime.

1) It is only necessary he left the state at a later time.

2) The motive of why the person left the state is not important.

b. There is no federal power to force the governor to rend up the accused.

1) The governor may demand certain proofs from the requesting state.

2) The information requested may be substantial if so desired.

c) Abduction without extradition of an individual.

1) Abduction without extradition is no bar to prosecution.

2) There is no bar to prosecution even if he surrenders by fraud.

2. Article V of the United States Constitution states that, "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress."

3. Article VI of the United States Constitution states that "This constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

C. The separation of powers in the federal government.

1. The powers of the legislative, executive, and judicial branches.

a. Legislative: power to make the laws, change laws and repeal existing laws.

b. Executive: administer and enforce the laws by carrying them into practical operation.

c. Judicial: apply laws; interpret and construe them.

2. Separation of powers at state level.

a. There is nothing to compel states to divide powers.

b. Most states do provide for the separation of powers at the state level.

c. The separation of powers prohibits exercise by one branch of powers granted to another branch.

1) The Congress may not pardon as this is an executive power.

2) The President cannot levy a tax as this is a congressional power.

3) The courts cannot make laws except regulating practice of lower courts through superintending control.

3. Checks and balances in the balances of power.

a. The President has the veto power over acts of Congress, and the governor has the veto power over the acts of the legislature.

b. The Congress, by its action, may impeach the President.

D. The relationship of the state and local governments to the federal government.

1. Generally, state and local governments have branches of government somewhat similar to that of the federal government.

a. The State of Michigan is organizationally established with:

1) The legislature is bicameral and composed of:

a) State Senate.

b) State House of Representatives.

2) Executive officer of the governor.

3) The judicial branch is the State Supreme Court and appelate courts.

b. The local level: county, city, township, and villages usually established with:

1) The legislative branch: board of supervisors; city council; township board; village council - elected or appointed.

2) The executive branch: mayor, city manager, or township officials - elected or appointed.

3) The judicial branch: municipal courts, justice of the peace, or circuit courts - elected.

c. The state and local branches of government have general separation of powers similar to the federal system.

E. The establishment of three levels of government.

1. Thus the citizen has dual citizenship in the United States; they are:

a. Citizens of the United States.

b. Citizens of the state in which the citizen resides.

2. The citizen is subject to three levels of laws.

a. Federal laws.

b. State laws.

c. Local laws.

d. Items b and c more frequently affect him than item a.

3. State officers: include local law enforcement officers.

a. State officers enforce state as well as local laws most of the time.

b. Local officers infrequently enforce state as well as local laws most of the time.

4. The "dual citizenship" concept described above has been brought into greater focus through decisions of the United States Supreme Court.

a. Previous to 1961, federal rules pertained only to federal courts as to search and seizure.

b. Mapp vs. Ohio, 1961, modified these concepts by imposing federal standards upon the states.

c. Subsequent decisions have emphasized the control the United States Supreme Court will exercise over local or state law enforcement agents, particularly in the following cases:

1) Escobedo vs. Illinois, 1964.

2) Miranda vs. Arizona, 1965.

III. The Bill of Rights - The First Ten Amendments of the United States Constitution.

A. Introduction to the Bill of Rights.

1. The first ten amendments of the Constitution are the "Rights of the People" against the government.

2. Four of the ten amendments are of more importance to local law enforcement officers than the others.

3. They are Amendments I, IV, V, and VI.

B. These ten amendments are:

1. Amendment I of the United States Constitution states that "Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government or a redress of grievances."

2. Amendment II of the United States Constitution states that "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

3. Amendment III of the United States Constitution states that "No Soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

4. Amendment IV of the United States Constitution states that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. Amendment V of the United States Constitution states that "No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

6. Amendment VI of the United States Constitution states that "In all criminal prosecutions, the accused shall enjoy the right to district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

7. Amendment VII of the United States Constitution states that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

8. Amendment VIII of the United States Constitution states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

9. Amendment IX of the United States Constitution states that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

10. Amendment X of the United States Constitution states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

C. Specific implications of particularly applicable amendments.

1. Amendment I guarantees freedom of speech. This has become a more difficult type of guarantee to protect with demonstrations on Vietnam, civil rights, and other issues. The law enforcement officer is expected to remain neutral and assure each citizen has a right to speak, etc.

2. Amendment IV guarantees house and person will be free from unreasonable search and seizure. While it gives no penalty for unlawful searches, the courts have decided to exclude evidence obtained through such methods.

3. Amendment V guarantees no citizen shall be a witness against himself and he shall not be held in double jeopardy (tried twice for the same crime).

4. Amendment VI guarantees each person the right to counsel - courts have extended this to the right to counsel paid for by the state if the accused cannot afford same.

D. The Constitution and Bill of Rights are inseparable from the government and law enforcement.

1. Other public employees do not necessarily have to know about the Bill of Rights as law enforcement officers must because of police responsibilities.

a. Law enforcement officers work with human beings.

b. Liberty depends upon the job done by law enforcement officers at all levels of government.

c. It is determined by the way a police officer carries out his lawful obligations.

E. The state constitutions.

1. Most states - including Michigan - have restrictions in their constitutions similar to the Bill of Rights.

2. Revisions of state constitutions generally are more easily obtained.

a. The Michigan Constitution was changed comprehensively in 1963.

b. There was a Constitutional Convention and acceptance by voters of the new constitution.

3. The Constitution of the State of Michigan begins with a section titled Declaration of Rights, covering the following rights of the people or citizens of Michigan: (effective January 1, 1964).

a. Political power.

b. Equal protection; discrimination.

c. Assembly, consultation, instruction, petition.

d. Freedom of worship and religious belief, appropriations.

e. Freedom of speech and press.

f. Bearing of arms.

g. Military power subordinate to civil power.

h. Quartering of soldiers.

i. Slavery and involuntary servitude.

j. Attainder; ex post facto laws, impairment of contracts.

k. Searches and seizures.

l. Habeas corpus.

m. Conduct of suits in person or by counsel.

n. Jury trials.

o. Double jeopardy, bailable offenses.

p. Bail, fines, punishments, detention of witnesses.

q. Self-incrimination, due process of law and fair treatment at investigations.

r. Witnesses, competency, and religious beliefs.

s. Libels, accused, rights in criminal prosecutions.

t. Imprisonment for debt.

u. Enumeration of rights not to deny others.

F. A discussion of the Bill of Rights.

1. The first amendment of the Bill of Rights.

a. There were two types of guarantees under the first amendment, one restricted the government and the other guaranteed certain rights.

1) The first amendment restrained the government in restricting speech, freedom of the press, and the right to assembly.

2) It guaranteed the freedom of writing, thinking, peaceful assembly, and speech without interference.

b. Examples of the guarantees set down by the first amendment.

1) The American Nazi Party under their leader George Lincoln Rockwell had many confrontations with the court system.

2) The courts have indicated that no matter what the speaker did yesterday or may do today, prohibiting him to be speaker is in violation of the first amendment.

3) They went further and said that they frown upon prohibition because of disagreement with the views of the speaker and should only be stopped from speaking when it is criminal.

c. Instances where acts or speeches go beyond individual rights.

1) Where members of a crowd threaten violence.

2) Where the speaker incites a riot.

3) Where there is a clear and present danger of disorder, interference with traffic, or other threats to public safety, peace or order.

2. Another amendment of the Bill of Rights important for the police officer to know and understand is the fourth amendment.

a. The fourth amendment forbids unreasonable search and seizure.

b. This amendment originally was only applicable to federal officers.

3. Out of the fourth amendment came the exclusionary rule of evidence which excluded all evidence seized illegally. Many cases have come out of the courts that have been responsible for the present ruling on the exclusionary rule.

a. In Boyd vs. U.S. the courts distinguished between contraband and evidential material and said that the seizure of private papers without a warrant is a violation of the fourth amendment.

b. In Weeks vs. U. S. (1914) they excluded from trial all evidence secured by unreasonable search or seizure. This ruling at the time only applied to federal officers.

c. In Wolf vs. Colorado (1949) the courts reemphasized the Weeks decision.

d. In Mapp vs. Ohio (1961), a truly landmark decision, the courts extended the exclusionary rule to all state courts.

4. The fifth amendment which bars self-incrimination, is an important amendment for all police officers.

a. It originally was only in federal proceedings; however, some states had the same privilege clauses.

b. Supreme Court decisions have now made the fifth amendment binding on all states.

5. Self-incrimination is the heart of the fifth amendment.

a. Defendant's privileges under the fifth amendment:

1) A defendant cannot be called by the state to testify in a matter detrimental to his interests.

2) No comment can be made by the prosecutor of the defendant's failure to take the stand and includes any questions that might be asked.

b. The witness' privilege in some cases does not follow the dictates of the amendment.

1) In civil cases.

2) In criminal cases (only the type covered by fifth amendment).

3) In legislative hearings.

c. As the accused or suspect in a criminal prosecution.

1) When a person becomes "suspect" as to his involvement in a crime.

2) During custodial interrogation proceedings by the police.

d. A definition of the word incriminating.

1) Standards established in Hoffman vs. U. S. (1951).

a) It may be evident from implications of questions.

b) It may be the setting in which it was asked.

c) It may be the answer or reason for not answering.

d) It may be dangerous because injurious disclosure could result.

2) Anything which might furnish a link in a chain of evidence needed to prosecute.

e. Laws at state and local level cannot dismiss employees for failure to respond to "incriminating questions."

6. Double jeopardy provisions - "nor shall any person be subject for the same offense to be twice out in jeopardy - of life and limb..."

a. Michigan Constitution and Statute relating to double jeopardy. "No person shall be subject for the same offense to be twice put in jeopardy" - const. 1963 Art. I, Section 14.

b. "No person shall be held to answer on a second charge or indictment for any offense for which he has been acquitted upon the facts and merits of the former trial but such acquittal may be pleaded or given in evidence by him in bar to any subsequent prosecution for the same offense."

c. Second jeopardy includes identical act or crime.

d. Double jeopardy protection prevents harassment of individual.

e. Double jeopardy provision precludes multiple sentences and multiple punishments.

f. Double jeopardy prevents second trial for same crime except where defendant appeals a conviction.

g. Double jeopardy includes felonies and misdemeanors but does not include civil cases.

h. Double jeopardy precludes and excludes as former jeopardy the following instances:

1) Civil service hearings.

2) Contempt hearings.

3) Grand jury indictments or legal jeopardy.

4) Habeas corpus proceedings or defective warrant.

5) Disagreement by jury on facts or merits and dismissal.

i. Jeopardy attaches in the following circumstances:

1) When the jury is impaneled.

2) Also in a court having jurisdiction.

7. The sixth amendment and the right to trial.

a. A defendant has a right to trial in all criminal cases and has the right to have the case decided on the basis of evidence produced in court.

b. The right to trial excludes the right of legislature to convict through "Bill of Attainder" prohibition in Constitution.

c. The right to trial includes civil suits but not necessarily minor cases.

d. Everyone has the right to face accusor in court and the right to cross-examine. Informers must be produced if called.

e. A defendant has the right to secure witnesses with the same rights given to the state.

f. The defendant has the right to a speedy and public trial.

g. A trial by jury is each person's right.

1) Defendant's right to insist on a jury trial.

2) Defendant may also have the right to waive.

3) The job of the jury is to decide guilt or innocence.

4) Twelve jurors are needed for a trial.

5) The verdict of the trial must be unanimous, returned in open court and the defendant has a right to "poll" the jury.

6) The prosecution and defense must be impartial when questioning prospective jurors.

a) To determine the qualifications of the jury.

b) It is the method of selection of jurors.

c) Negroes are not to be systematically disbarred from those citizens who are impaneled for jury duty.

h. The right to counsel is also provided under the sixth amendment.

1) The right to a counsel is needed by the defendant because of the technicalities of the law and because the prosecution is handled by an attorney.

2) The purpose of the guarantee of the right to counsel is to protect ignorant accused from own innocence and protect his legal rights.

3) An example of this is the case of Gideon vs. Wainwright 373 U. S. 335 (1965) involving the following facts and court holdings:

   a) Gideon was accused of breaking and entering (felony).

   b) Gideon was indigent; financially unable to provide for a defense counsel.

   c) Gideon represented himself in his own defense.

   d) Gideon was convicted.

   e) Gideon appealed to the U. S. Supreme Court.

   f) The court appointed an attorney for Gideon's appeal.

   g) The United States Supreme Court reversed the conviction and ruled he should have had counsel provided if he could not afford it.

   h) Michigan did this for felonies previous to Gideon vs. Wainwright.

   i) Gideon with a new trial and an attorney, was acquitted.

   j) The holding of the court was extended to misdemeanor cases recently.

EIGHT SUPREME COURT RULINGS THAT LIMIT POLICE

From: U. S. NEWS & WORLD REPORT

Law enforcement officials say these key court decisions have made it harder for police to combat crime:

1957 — A suspect must be taken before a magistrate quickly after his arrest. Any "unnecessary delay" will invalidate a confession obtained from the accused person prior to his appearance before a magistrate. (Mallory vs. U. S.)

1961 — Evidence cannot be used in any court, state or federal, if collected in a search and seizure that is "unreasonable" under the Supreme Court's interpretation of the Fourth Amendment to the U. S. Constitution. (Mapp vs. Ohio)

1963 — Any indigent person brought to court on a felony charge has the right to have counsel appointed for him by the court. (Gideon vs. Wainwright)

1964 — Any confession is inadmissable as evidence if the police have questioned the suspect without letting him see a lawyer and warning him that he has a right to remain silent.

Incriminating statements obtained by Federal agents from a person after he has been indicted and in the absence of his lawyer cannot be used against him in Federal Courts. (Massiah vs. U. S.)

The bar to self-incrimination, set out in the Fifth Amendment to the U. S. Constituiton, applies to state courts as well as Federal. (Mallory vs. Hogan)

1966 — Police must follow certain procedures if a suspect's confession is to be acceptable as evidence. The suspect, when in custody and before any questioning, must be told he has a right to remain silent, that anything he says may be used against him, that he has the right to the presence of an attorney - court appointed if he cannot afford one. If a suspect confesses, the police must be able to prove they complied with these rules and that the suspect knowingly and intelligently waived his rights. (Miranda vs. Arizona)

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CRIMINAL LAW

I. An Introduction to the Criminal Law.

A. In the early years of civilization there were very few laws. Common sense and good judgment prevailed.

1. As social customs developed, definite procedures and punishment for crimes such as murder and rape were formulated and used by most societies. The punishment varied from tribe to tribe.

2. Those procedures which were effective were continually used and were modified through time and experience.

3. These methods of criminal justice soon became the unwritten or the common law.

B. The law of crimes as known today is one of the oldest branches of the common law. The majority of the criminal law in the United States is the basic English common law.

1. The English common law was brought to this country by the English in the 17th century. It included the common law of England as well as those laws modified by the settlers.

2. Some of the English common law was modified by general consent.

3. These unwritten laws are the basis of our legal jurisprudence. They furnish the rules by which public and private rights have been established.

a. Without the unwritten law the written law would be weak and ineffective. It still uses rules and principles from the common law for decisions in court.

b. Judges will quote the common law at length in arriving at their decisions.

c. The unwritten law is the common law and is found historically in the Magna Charta, Ten Commandments, the Codes of Babylonia, and other writings.

4. Where statutory law has been established to abolish the common law (Michigan is one of several states to do this) the statutes have a common background with the common law for terms such as burglary, larceny, rape and murder.

   a. Even today, judges refer to the English common law to find the definitions of words such as steal, value, intent and night time.

   b. Common law thusly is still important to the modern criminal law.

C. Michigan statutes as an example of common law.

1. Michigan has enclosed the common law into statutory law by the following statute: "Any person who shall commit an indictable offense at the common law for the punishment of which no provision is expressly made by any statute shall be guilty of a felony punishable by imprisonment for not more than five years or a fine of not more than ten thousand dollars or both at the discretion of the court." (M.S.A. 28.773)

2. In the absence of a statute in Michigan the common law prevails in lieu of the statute defining what constitutes forgery or conspiracy.

3. Murder in the first degree in Michigan is defined by the statute and includes the common law definition.

4. The legislature will provide the punishment for common law offenses.

D. Statutory law is written law as opposed to the unwritten common law. Statutory law seeks to regulate human conduct in the area of health, welfare, morals, and the protection of members of society.

1. Statute law tends to be responsive to the whims of the public and legislative mood.

2. Statute law tends to change with the times and have less "common sense" than the common law.

3. The purpose of statute law was to protect the individual from bodily harm such as rape, assault, or homicide.

   a. They were also written to enjoin from interference from freedom of movement such as kidnapping or imprisonment.

   b. The statute law helps insure domestic tranquility through laws forbidding adultery and other immoral behavior.

   c. Statute law protects the state from treason and bribery.

4. Statute law is in fact the police powers of the state.

   a. It is intended to protect the health, convenience and comfort of the people.

   b. It prevents and punishes offenders and seeks to provide self-preservation and protects life and property.

   c. Generally police powers are liberally construed and the reasonable restraints do not violate guarantees of life, liberty, and property.

   d. Statute law permits legislative power to create a criminal statute which was never a criminal offense previously.

5. Michigan retains original rights of sovereignty except those delegated to the United States by the Constitution. The limitations of statute law specify that:

   a. Michigan only enforces the Michigan laws, which are those acts that are criminal in Michigan.

      1) Acts illegal in this state might be legal acts in other states.

      2) Acts legal in Michigan might be illegal in other states.

b. Michigan can only prosecute for criminal violations of Michigan statutes.

1) A criminal committing a crime in Michigan must be tried in Michigan.

2) This is accomplished through extradition if a suspect leaves the state. Extradition is a legal procedure to return a suspect to a complaining state for trial.

E. Another type of law that is used other than the common law and the statute law is that which is called precedent law.

1. Precedent law is court decisions that, in fact, have become law through judicial interpretation.

2. United States Supreme Court decisions of this decade have resulted in new interpretations of what is criminal and what elements or proofs are necessary.

3. Court decisions are important for the officer to study because it will tell what the officer can and cannot do. This is especially true in laws of arrest, search and seizure, and confessions. Some cases that are landmark decisions are Mapp vs. Ohio, Miranda vs. Arizona, and Escobedo vs. Illinois.

4. Courts will interpret the criminal statutes. "Statutes are not to be judicially examined as exercises in etymological or philological refinements, but the courts will apply the rule of ordinary usage and common sense." (People vs. Mankel, 373 Mich 509)

II. The Classification of Crimes.

A. A crime is any act or omission prohibited by law for the protection of the public where violation of such law is prosecuted by the state in a judicial proceeding in its own name.

B. Crimes are classified as felonies, misdemeanors, or treason.

1. A felony is a common law term used to denote offenses which occasioned forfeiture of the lands and goods of the offender to which capital or other punishment might also be added.

   a. The common law felonies included murder, manslaughter, rape, sodomy, robbery, larceny, arson, and burglary.

   b. A felony in Michigan is a crime punishable by a state prison sentence.

2. A misdemeanor is an offense not classified as a felony. Also included are local ordinances, simple assaults, drunk, loitering and many others.

   a. There are two types of misdemeanors one being a circuit court misdemeanor, the other being the regular or state misdemeanor. Punishment in a circuit court misdemeanor is more severe, such as possible sentencing to a state prison.

   b. A state or regular misdemeanor's penalty does not exceed 90 days or $100 fine.

3. Treason is a crime that is defined as "against the state and shall consist only in levying war against it or adhering to its enemies giving them aid or comfort." (Act 328 of Public Acts of Michigan, 1931)

4. The terms Mala in Se and Mala Prohibita are sometimes used in classifying crimes.

   a. Mala in se means that which is wrong in itself. All common law crimes are mala in se because the common law punished no act that was not wrong in itself.

   b. Mala prohibita means crimes which are wrong merely because they are prohibited and punished by statute. Traffic offenses are good examples.

c. Statutory crimes may be either mala in se or mala prohibita.

III. The Elements of Crime.

A. The corpus delicti is an element of a crime and is commonly referred to as the "body of the crime." It is, in fact, the basic element of any crime which must be proven by the state to show that a crime has been committed.

1. The corpus delicti is composed of two elements one being that a certain fact exists, and secondly, it exists as a result of a criminal agency.

2. In burglary, it is that there was a breaking and entering for the intent of committing a felony or larceny therein.

3. In homicide, it is the fact a death exists and it exists as a result of a criminal act such as shooting, knifing, or poisoning.

4. In arson, it is the fact that there is a fire and the fire was intentionally set with malice to cause property damage.

5. The identity of the accused is not part of the corpus delicti. After the essential elements of the crime have been proven, the admission or confession of the defendent can be introduced. The confession cannot be used to prove the corpus delicti.

6. The corpus delicti need only be established and not necessarily beyond a reasonable doubt.

a. A prima facie showing is usually sufficient to establish the corpus delicti.

b. Prima facie means "at first sight" or "on the face of it." Prima facie case is present when the accused must answer it.

7. Admissions or confessions cannot in themselves establish the corpus delicti nor can a defendant be convicted on his confession alone.

B. Every crime has three essential parts.

1. A specific injury or loss is incurred, such as in a larceny where property was stolen, or in an assault where someone was struck.

2. Someone must have committed the criminal act so that the injury or loss resulted.

3. The accused is identified.

C. Two other elements of a criminal act are those of motive and intent.

1. Motive is not an element of crime but is generally believed to be a part of most crimes and discussed here because of this.

a. Motive is the reason or purpose for committing a crime, or sometimes an inducement for doing the act.

b. The motive is usually admissible to show the element of intent.

c. Sometimes the motive for doing something is good, but a crime might still exist. A mercy killing is an example.

2. Intent is the mental attitude shown by what a person does. It is divided into two classes.

a. General criminal intent may be presumed from the act. Part of this presumption is that everyone is presumed to know or intended the consequences of his act.

b. This presumption may be rebutted through evidence that the accused could not understand the consequences of his act such as the lack of mental faculties or, in some cases, drunkenness.

3. In some instances prosecution may commence even though there is a lack of general intent or, in other words, if no intent is present.

   a. An example is a felony murder where the rapist who kills victim without intending to do so may be charged with murder.

   b. Inflicting an assault and battery and the victim hits his head on the pavement and dies might sustain a charge of manslaughter.

   c. These types of intent are identified as either transferred or constructive intent.

D. Another element present in criminal acts is that element called malice. "Malice is defined as a wicked intent to do an injury and it is not necessary that it be directed against a particular person as it may be adduced from an intent generally to injure." (People vs. Tessmer, 171 Mich 522)

1. Malice, in another definition, is a wrongful act done intentionally without legal justification or excuse.

2. The real test is: Was there adequate cause or provocation?

3. Acts of malice are usually admissible to show motive.

4. Malice is identified very closely with specific intent. Some acts require specific intent and the absence of proof will lead to dismissal against the accused.

   a. An example is in Breaking and Entering; it is necessary to show the intent to commit a larceny or felony.

   b. Another example would be in the crime of robbery; it is necessary to prove an intent to deprive the owner of his property.

   c. An accidental fire will not sustain an arson charge.

d. Specific intent may be shown by circumstantial evidence.

5. Voluntary intoxication is a defense to show lack of intent but is no defense if the accused became drunk after certain events took place.

a. Generally, voluntary intoxication is no excuse for a criminal act.

b. Where specific intent is an element, it is usually a jury question as to whether the defendant was or was not able to form a criminal intent.

c. Voluntary drunkenness constitutes no defense to the commission of crimes in which no specific intent is an element of the offense.

E. In addition to an intent there must be a criminal act. There is no crime with only the intent without a step toward the act itself.

1. An example is "X" intends to steal "Y's" car but takes his own by mistake. There is no crime even though the intent was there.

2. An act is an effect produced through conscious exertion of will and includes someone exercising a wrongful act or failure to act as legally required.

3. There must be a prohibition or legal duty to act. No crime unless the particular act has been committed or omitted.

4. A proximate cause is necessary. Remote or indirect causes are not chargeable to the defendant.

F. The failure to perform a certain act when under some legal duty commonly referred to as an omission can create criminal liability.

1. By doing nothing when there is a legal duty to act may be just as much a manifestation of the person's will as an affirmative act.

a. Parents are under a legal duty for the care, custody, and control of their children.

b. Some states require a citizen to assist a police officer in making an arrest when requested.

2. A few offenses require neither an affirmative or negative act. The mere possession of certain articles or contraband is in itself a criminal offense. Possession of narcotics, burglar tools or counterfeit money are all examples.

G. Criminal liability may also result from negligence or recklessness.

1. Negligence in the performance of a duty may result in physical or economic harm and could create criminal liability.

2. It is generally the duty of everyone to act so that no one will be injured.

a. The greater the danger, the more necessity to be careful.

b. Firing a revolver into a crowd with wanton and willful negligence will create criminal liability.

3. When acts tend to cause death, the law presumes that the accused intends the consequences. This presumption can be rebutted.

4. Acts which are naturally and inherently dangerous to life or limb, intentionally and willfully done with reckless disregard of the consequences constitutes liability.

a. Involuntary manslaughter is the "killing of another without malice and unintentional but the willful doing of some unlawful act not amounting to a felony, tending to cause death or great bodily harm, or in negligently doing some act lawful in itself." (Stats. Ann. 28.984)

b. Careless driving causing death is another example. Carelessness must be gross, more than speed but the total of all acts, including omission to avert threatened danger and failing to perform a legal duty.

IV. Crimes Against the Person.

A. "An assault is an attempt or offer, with force and violence to do corporal hurt to another, with an apparent means of carrying out the attempt." (People vs. Lilley 43 Mich 521)

1. An assault involves intent or purpose to inflict corporal hurt.

2. There must be actual violence offered.

3. Within the distance that harm may follow if assailant does not desist.

4. Putting the force in motion, fully or partly so that he creates a reasonable apprehension of immediate personal injury to another even if without contact, constitutes an assault.

5. Mere threats do not constitute an assault.

6. No assault if accidental and under usual circumstances is criminal in itself.

B. A battery is an aggravation of an assault and battery and occurs when there is an injury done to another in an angry, revengeful, rude or insolent manner.

1. An assault and battery results from a successful assault with physical injury.

2. Assault and assault and battery are included offenses in all felonious assaults. Higher degrees of assaults such as felonious assault may be reduced to the simple assault or assault and battery.

C. Assaults of serious nature.

1. "Assault and infliction of serious injury without a weapon and inflicting serious or

aggravating injury without the intent to murder and without the intent to do great bodily harm less than murder is a circuit court misdemeanor punishable by one year in the county jail or state prison and/or a fine of $500." (Stats. Ann.28.276)

2. An assault with the intent to commit murder is that "where any person who shall assault another with murderous intent shall be guilty of a felony punishable in the state prison." (Stat. Ann.28.278)

   a. This crime of assault is the highest degree of assault.

   b. "This is an assault that, under such circumstances, had it caused the death of the person assaulted, the assaulter would have been guilty of murder." (Maher vs. People 10 Mich 212)

3. "Assault with intent to do great bodily harm less than the crime of murder is punishable in state prison for not more than ten years or by a fine of note more than $5,000." (Stats. Ann. 28.279)

   a. The harm or injury must be a serious and aggravated nature.

   b. To constitute the offense, the defendant must intend to do great harm with the natural means employed and in the manner employed.

4. Felonious assault is that where any person shall assault another with a gun, revolver, pistol, knife, iron, club, bar, or other dangerous weapon but without intending to commit the crime of murder and without the intent to inflict great bodily harm less than the crime of murder, shall be guilty of a felony. (Stats. Ann.28.277)

   a. The elements of a felonious assault are an assault with a dangerous weapon without the intent to commit murder.

   b. A dangerous weapon is that which can produce death or serious injury from the manner it was used.

c. "An automobile may be an instrument in causing a felonious assault." (People vs. Goolsby 284 Mich 375)

5. The assault with the intent to commit rape is a felony punishable by imprisonment in the state prison not more than ten years or a fine of not more than $5,000.

a. An assault may be committed without actually touching the person where an assault is threatened, coupled with an unlawful conditon that she have intercourse.

b. It does not matter that the defendant did not accomplish his purpose of having sexual intercourse with the female.

6. "An assault with intent to commit any felony not otherwise punished is a felony offense punishable by state prison not more than ten years or by a fine of not more than $10,000."

a. The term felony means any offense that is punishable by death or imprisonment in the state prison.

b. "A charge of assault with the intent to commit adultery is within the scope of this statute." (People vs. Lipski 328 Mich 194)

7. "Assault with the intent to maim is an offense where a person assaults another with the intent to maim or disfigure his person by cutting out or maiming his tongue, putting out or destroying an eye, cutting, or tearing off an ear, cutting or slitting or mutilating the nose, lips, or cutting off or disabling a limb, organ, or member shall be guilty of a felony punishable by imprisonment in the state prison for not more than ten years or a fine of not more than $5,000." (Stats. Ann. 28.281)

a. To disfigure is to do some external injury which may detract from a man's personal appearance.

b. To disable is to do something which creates a permanent disability.

8. "Sexual intercourse under the pretext of medical treatment is an assault and is punishable under the statutes." (Stats. Ann 28.285)

a. One element of the offense is the undertaking, by the defendant, to medically treat any female.

b. A second element is that the defendant has indicated to the female that it will be beneficial to her health to have sexual intercourse.

c. A third element is that the female was induced to have sexual intercourse.

d. The offense is punishable by imprisonment in the state prison not more than ten years.

D. The crime of homicide is the killing of one human being by another human and is divided into three types.

1. Criminal homicides are killings that result from accidents. They also include killings that result from a reasonable mistake of fact.

2. Excusable homicides are killings that result from accidents. They also include killings that result from a reasonable mistake of fact.

3. Justifiable homicides are killings commanded or authorized by law. This includes the taking of life by a police officer in the performance of his duty, self defense and defense of others, and killings by court executioners.

E. The crime of murder is a criminal homicide and because of the amount of information necessary to understand the criminal offense, it is treated separately.

1. "Murder is the unlawful, neither justified or excused, killing of a human being by another human being with malice aforethought." (Stats. Ann. 28.548)

a. Malice aforethought means that the purpose was deliberately formed and preceded and induced the act, such as lying in wait or placing poison in a drinking cup.

b. Malice aforethought does not require any ill will or hatred of the victim.

2. A felony murder is an unlawful killing which was proximately caused by an act in the perpetration or attempted perpetration of any arson, rape, robbery or burglary and is punishable as murder in the first degree.

a. An example of the felony murder rule is where "A" sets fire to a house and, as a result of the act of arson, and occupant sleeping in the house dies, "A" is guilty of murder in the first degree.

b. Another example which would not be chargeable as a felony murder is where "A" strikes "B" with his fist; "B" falls down and is impaled on a stake in the ground and dies from this injury. "A" is not guilty of murder because an assault and battery is not a felony.

3. "Murder in the second degree is all other kinds of murder and shall be punished by imprisonment for life, the same as first degree, or only in the case of second degree murder, any number of years." (Stats. Ann. 28.549)

a. To constitute murder in the second degree, there must be an unlawful killing and a purpose to kill, formed suddenly, preceding and without deliberation and premeditation.

b. There is malice in second degree but it arrises suddenly previously to the killing.

4. "Manslaughter is the unlawful killing of another without malice, express or implied and is punishable by imprisonment in state prison for not more than fifteen years or by a fine of $7,500 or both." (Stat. Ann. 28.553)

a. Manslaughter when voluntary arises from a sudden heat of passion,

b. If in doing an act which would have been a misdemeanor, the person causes the death of another, he is guilty of manslaughter. (See example under E. 2. b. above)

5. "Negligent homicide is any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not willfully or wantonly, shall cause the death of another shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two years or by a fine of not more than $2,000 or both." (Stats. Ann. 28.556)

a. This is an example of a mala prohibita crime whereas in the common law there was not a criminal act as defined here.

b. "The law was passed to curb reckless, careless and negligent driving which caused death in cases where the negligence was less than gross." (People vs. Campbell 237 Mich 424)

F. "Rape is another crime against the person and is defined as the carnal knowledge of a female either under the full age of sixteen or if the female is more than sixteen and the act was accomplished by force and against her will, is guilty of a felony and the crime is punishable by state prison for life or for any term of years." (Stats. Ann. 28.788)

1. Statutory rape is the unlawful carnal knowledge of a female under sixteen. Consent cannot be given and force is not an element.

2. Force or against her will must be proven for conviction if the female is sixteen years or older.

3. Penetration must be shown, no matter how slight.

G. "Abortion is a crime against a person and is the administration of some medicine, drug or substance upon a pregnant woman with the intent to produce

a miscarriage and when it was not necessary to preserve the life of the woman." (Stats. Ann. 28.204)

1. If death results, it is manslaughter.

2. Criminal responsibility extends to anyone that aids or abets in the commission of the offense.

3. It is immaterial whether the woman was pregnant or not, although the accused must have believed her to be pregnant.

V. Crimes Against Property.

A. Arson consists of the willful and malicious burning of any property, real or personal, and the punishment varies with the type of property burned.

1. Arson of a dwelling house includes more than an occupied dwelling and means any house intended to be occupied as a residence.

a. Burn is defined as set fire to, doing any act which results in a fire starting, or aiding, counseling, inducing, persuading or procuring another to do such acts.

b. It excludes the owner setting fire to a worthless building.

2. Burning of real property is a felony punishable by imprisonment for not more than ten years and includes any building or other real property or the contents when done with malice and willful conduct.

3. "Any person who willfully and maliciously burns any personal property other than that specified in the other sections of arson, owned by himself or another shall, if the value of the personal property is less than $50, is guilty of a misdemeanor, if more than $50 such person is guilty of a felony." (Stats. Ann. 28.269)

4. "The burning of insured property is any person who shall willfully burn any building or personal property which shall be at the time insured against loss or damage by fire with intent to injure and defraud the insurer, whether such person is the owner of the

property or not, shall be guilty of a felony punishable by imprisonment in the state prison not more than ten years." (Stats. Ann. 28.270)

a. This shall apply to a married woman who burns any property that may belong partly or wholly to her husband.

b. It shall also apply to a man under reverse circumstances.

c. It is necessary to show that there was a valid and subsisting policy of insurance.

d. The careless throwing of a match on the floor is not sufficient to justify a finding that the defendant willfully set fire to the premises. (People vs. McCarty 303 Mich 629)

5. "Setting fire in a hotel, rooming house, lodging house or other places of public abode in a reckless or negligent manner or to any bedding, curtains, drapes or other furnishings shall be guilty of a misdemeanor. (Stats. Ann. 28.764)

6. The corpus delicti of any arson is not merely the burning, but that it was burned by the willful act of some person criminally responsible for his acts and not through natural or accidental causes.

B. Breaking and entering is a crime against property. It is commonly identified as burglary, a common law term. Breaking and entering makes no distinction between crimes committed in the nighttime and the daytime. It is a felony to break and enter or to enter without breaking dwelling house, tent, hotel, office, store, etc., with the intent to commit a felony or larceny therein. "The punishment for breaking and entering is imprisonment for not more than ten years and, in the case of an occupied dwelling, not more than fifteen years." (Stats. Ann. 28.305 and 28.306)

1. The elements that must be proven are that there was a break (except in entering without breaking), that there was an entry, and

a felony or larceny was either attempted or committed.

2. The slightest entry by all or any part of the body is sufficient entry.

3. The breaking must be against the will of the occupier of the premises.

4. It does not matter if the felony or larceny intent was carried to a successful conclusion.

5. Burglary with explosives is a separate statute offense and is defined as any person who enters any building for the purpose of committing any crime therein, uses or attempts to use nitroglycerin, dynamite, gunpowder or other explosive is guilty of a felony. (Stats. Ann. 28.307)

6. "Opening or attempting to open a coin box with the aid of a key, instrument, device, or explosive is a misdemeanor offense." (Stat. Ann. 28.308)

7. "Breaking and entering or entering without breaking without permission without the intent to commit a felony or larceny is a misdemeanor offense." (Stat. Ann. 28.310)

C. Larceny is one of the more common crimes against property. It is defined as "the felonious taking and carrying away by any person of the goods or personal property of another with the felonious intent of converting them to his own use and making them his own property without the consent of the owner." (Stats. Ann. 28.588, People vs. Johnson 81 Mich 480)

1. According to all definitions, to constitute larceny, there must be the following elements:

   a. An actual or constructive taking of goods or property.

   b. A carrying away.

   c. The taking or carrying away must be with a felonious intent.

d. It must be the goods or personal property of another.

e. The taking must be without the consent and against the will of the owner.

2. It is sometimes difficult to determine in a given case whether the offense is larceny, embezzlement or obtaining property by false pretenses.

a. The rule is this: In larceny the owner of the property has no intention to part with his property therein, while in false pretenses the owner does intend to part with his property therein, while in false pretenses the owner does intend to part with his property but does so under false contrivance.

b. "The distinction between embezzlement and larceny is in larceny, there must be a felonious taking and in embezzlement there is an unlawful appropriation of that which has come to the possession rightfully." (People vs. Bergman, 246 Mich 68)

3. The word "property" is used in its general sense and would cover all property which can be the subject of larceny.

a. A dog may be the subject of larceny.

b. Money and promissory notes may be the subject of larceny.

4. Lost property may be the subject of larceny.

a. It is the duty of the finder of lost goods to hold them for the true owner and give notice of his find.

b. If the finder of the lost goods fails to give notice and converts the goods to his own use, with the intent to deprive the owner permanently, he is guilty of larceny.

5. The value of the property is important because

in many instances, the value of the property determines the seriousness of the crime.

a. If the property stolen exceeds the value of $100, it is a misdemeanor.

b. The value of the property is determined by its present market value.

6. "Larceny from a person is any person who shall commit the offense of larceny by stealing from the person of another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than ten years." (Stat. Ann. 28.589)

7. "Larceny at a fire is defined as any person who shall commit the offense of larceny by stealing in any building that is on fire, or by stealing any property removed in consequence of alarm caused by fire shall be guilty of a felony, punishable by state prison not more than five years or a fine of not more than $2,500." (Stats. Ann. 28.590)

8. The most common larceny statute used is that which refers to larceny from a dwelling, store, building, shop, etc. "There is no value attached and regardless of the value or amount of goods stolen, the offense is a felony." (Stats. Ann. 28.592)

a. The offense of shoplifting, always a felony, comes under this statute.

b. Larceny from chainstores or supermarkets are chargeable under this statute.

9. "Larceny by conversion consists of any person to whom any money, goods or other property, which may be the subject of larceny, shall have been delivered, who shall embezzle or fraudulently convert to his own use, or shall secrete with the intent to embezzle, or fraud-use such goods, money, or other property shall be deemed by so doing to have committed the crime of larceny." (Stat. Ann. 28.594)

a. The crime has two elements; the delivery

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of property and its embezzlement, fraudulent conversion, or concealment.

b. "The gist of the offense is the conversion." (People vs. Franz 321 Mich 379)

10. Larceny from a motor vehicle, house trailer, semi-trailer, and like conveyances is enumerated in the statute under several categories defining the elements necessary for proof.

a. "Any person who shall commit the offense of larceny by stealing or unlawfully removing or taking any wheel, tire, radio, heater, or clock in or on any motor vehicle, etc., shall be guilty of a felony." (Stat. Ann. 28.588)

b. "Any person who shall enter or break into any motor vehicle, house trailer, etc., for the purpose of stealing any goods or property of the value of not less than $5.00, or who shall break or enter into any motcr vehicle, house trailer, etc., for the purpose of stealing and regardless of value, cuts, breaks, tears, or otherwise damages any part of the conveyance shall be guilty of a felony." (Stats. Ann. 28.588)

D. Robbery, a crime against property, was a common law felony and now statute law, is the taking and carrying away of the personal property of another, from his person or in his presence, by violence or fear, and intending to deprive the owner permanently of his property.

1. Robbery is different from larceny in that robbery is committing the larceny through the use of fear or force and the theft occurs in the presence of the person or owner.

a. Any force is sufficient to sustain the charge if the accused used any degree of violence or force other than that necessary to carry out the taking and carrying away.

b. The element of fear is satisfied if the taking and carrying away was accomplished by threats or action which put the

property owner in fear of injury to his person or property.

2. The crime of robbery under Michigan statute is divided into two offenses, one in which the offense is committed by an assault and robbery from a person, the officer being armed with a dangerous weapon, the other in which the offender is unarmed when the offense was committed.

   a. The essential elements of robbery armed are: "An assault by the defendant upon the complainant and a felonious taking of property from his person or presence and the defendant was armed with a weapon as defined in the statute." (Stat. Ann. 28.797)

   b. The essential elements of unarmed robbery are: that the defendant by force and violence, assault or putting in fear, took any property from the person or in his presence and the defendant was not armed with a dangerous weapon.

   c. The dangerous weapon need not actually be a dangerous weapon; "it includes any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon." (People vs. Kotek 306 Mich 408)

   d. "It is sufficient if the defendant was armed with a toy pistol which was fashioned to resemble a dangerous weapon." (People vs. Kotek 306 Mich 408)

E. The crime of forgery is the false making or material altercation with intent to defraud, or any writing, which if genuine, might be of legal efficacy. The crime of forgery is more often committed by either the altering or raising of figures on a check, forging and endorsement, falsely making negotiable and attempting to pass the forged instrument.

   1. Signing another's name without authority on a negotiable or purporting to be negotiable is forgery.

2. Signing a fictitious or assumed name if it is done with the intent to defraud is forgery.

3. Raising the amount of a check, changing the date of a deed, etc., are examples of material altercations; anything which significantly alters the effect of the instrument as drawn will be forgery of an instrument.

4. Uttering a check is a violation of the forgery statutes. Uttering means to present a check for payment, knowing it to be forged and with the intent to defraud.

F. Fraudulent offenses where money is obtained through false means are found in many parts of the criminal statutes. In fraudulent check cases, the most popular and least understood by the police officer is that of no-account checks and insufficient fund checks.

1. "No-account checks are defined as those checks that any person who with intention to defraud shall make or utter any check, draft or order for the payment of money to apply on an account or otherwise upon any bank or other depository who at the time of making, drawing or uttering or delivering such check, draft, or order has no account in or credit with such bank or depository for the payment of such check, draft or order upon presentation shall be guilty of a felony." (Stat. Ann. 28.326)

2. The criminal statutes that defines the offense of drawing checks without sufficient funds divides the offense between a misdemeanor or a felony is that "issuing a check of $50 or under is a misdemeanor and it is a felony if it is over $50 or three of any amount are issued in a ten-day period." (Stats. Ann. 28.326; 28.327)

   a. In a charge of drawing a check without sufficient funds, the maker of the check must be notified of the insufficiency and given five days to pay the drawee the full amount and all costs and protest fees. This is to be able to prove the evidence of intent to defraud.

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b. The attorney general has ruled that where a person issued three checks within a ten-day period within three different counties, he might be prosecuted in any one of them. (Op. Atty. Gen. 1945-46 p. 175)

c. Post-dated checks generally are held to imply the extending of credit to the writer by the recipient and are, therefore, actionable only in a civil proceeding.

3. One of the more contemporary methods of obtaining money or goods by fraud is that of using credit cards. It is new law and is important for the police officer to know.

a. "Any person, who steals, knowingly takes or knowingly removes a credit card from a person or possession of a cardholder or who knowingly retains or knowingly secretes a credit card without the consent of the cardholder shall be guilty of a felony." (Public Act 1967 No. 255)

b. "Any person who has in his possession or under his control, or who receives from another person a credit card with the intent to circulate or sell the same shall be guilty of a felony." (Public Act 1967 No. 255)

d. There are many other sections of Public Acts 1967 No. 255 and it is recommended that the student, when he has the responsibility of this type of investigation, read the act in its entirety.

VI. Crimes Against the Public Order. Those crimes that are offensive and are usually against the peace and tranquility of the community. Examples are breach of peace, riots, malicious mischief, libel and slander and disorderly person.

A. One of the crimes against the public order is identified in the criminal statutes under the title of Disorderly Person and covers a multitude of offenses, mostly misdemeanors, and all against the public order.

1. Any person of sufficient ability who shall neglect or refuse to support his family, commonly identified as non-support.

2. A common prostitute is a disorderly person.

3. Window peepers are disorderly.

4. Anyone who engages in an illegal occupation.

5. Any person found drunk in a public place.

6. There are many other including jostling, begging, obscene conduct, loitering, etc.

B. Criminal libel means to intentionally publish any writing, picture, sign or other representation which tends to defame a living person and expose him to "ridicule, hatred or contempt."

1. Slander which is oral defamation in the presence of a person other than the complainant which tends to blacken or injure one's character or reputation.

2. Both libel and slander are punishable under the same statutes; the definitions of both are included in the same law. (Stat. Ann. 28.602; 28.603)

C. Breach of Peace violations are misdemeanors and cover disturbance of religious meetings, disturbance of lawful meetings, and other offenses such as discharging a firearm in the streets at night, swearing, shouting and fighting.

1. "A general charge of breach of peace with nothing more cannot be sustained." (Robison vs. Miner, 68 Mich 549)

2. The breach of peace must be spelled out in terms of what the offense consisted of such as mentioned in "C" above.

3. Officers should remember that this is Michigan statute law; city ordinances in several areas have a specific charge of breach of the peace.

D. Other crimes against the public order would include riots, affrays, and unlawful assemblies are discussed in the training outlines under those specific topics.

VII. Limitations of Prosecutions. There is a limitation of time within which one committing most criminal offenses must be charged therewith.

A. This is called the Statute of Limitations which is a mandatory time limit set by statute.

1. The statute begins to run with the commission of an offense and is stopped whether by the limitation of time specified or the issuance and delivery to a peace officer an arrest warrant.

2. The statute only runs during the time party charged is usually and publicly resident within the state.

B. For some crimes there are specific limitations.

1. There is no limitation of time for murder.

2. Assault with intent to commit murder is ten years.

3. Conspiracy to commit murder is ten years.

4. Kidnapping is ten years.

5. Extortion limitation is ten years.

6. Most other felonies are six years.

7. Adultery is one year.

8. The limitation on seduction is one year.

VIII. The concept of former jeopardy. An instrument that prohibits anyone being tried for the same offense a second time.

A. The United States Constitution in the Fifth Amendment states ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb."

1. The Michigan Constitution of 1963 repeats this in somewhat different language.

2. Michigan Compiled Laws of 1948 repeats the jeopardy safeguard.

B. The former jeopardy rule <u>does not</u> apply in certain circumstances.

1. If a case is dismissed upon preliminary examination.

2. A person is acquitted upon an insufficiency or irregularity in the form of the indictment or because of a variance between the indictment or information and proofs.

3. A person is on trial for a misdemeanor where evidence shows the commission of a felony and the court before which the trial is had discharges the jury from giving any verdict on the trial and others that the accused be indicted for a felony.

C. The former jeopardy rule <u>does</u> apply in other circumstances.

1. The offense upon which action in this state would be based has already been punished in another state.

2. A person is charged with, and tried for a misdemeanor, where the evidence shows that a felony was committed. If the person is actually tried for the misdemeanor, then he may not later be charged with the felony based upon the same facts and set of circumstances.

3. A person is convicted or acquitted of a crime having various degrees, where an attempt is made to charge the person with another degree of the same crime.

D. "Jeopardy attacks when a respondent is on trial and the jury has been impaneled and sworn." (People vs. Gunsell 331 Mich 105)

IX. There are two other limitations placed on prosecutions; they are jurisdiction and venue.

A. <u>Jurisdiction</u> is where a court may hear and determine a criminal offense only where it has jurisdiction of the offense and the accused.

1. Jurisdiction is established by law. It cannot be created by consent of the parties.

2. Lack of jurisdiction over the offense cannot be waived by the accused.

3. Jurisdiction of the person may be obtained by the consent of the accused.

4. An illegal arrest does not affect the court's jurisdiction.

B. Michigan Justice Courts may only try offenses where the punishment prescribed does not exceed $100 fine and/or 90 days in jail. It tries offenses occurring in the county where the court sits.

C. Michigan Circuit Courts try cases not cognizable by a Justice Court which includes all felony and circuit court misdemeanor cases.

1. It tries offenses occurring in the circuit where the court sits.

2. It must sit in the county where the offense was committed.

D. Venue is the place where a cause may be heard and determined by a court having jurisdiction.

1. Normally, the accused has a right to be tried in the county in which the offense occurred.

2. The accused also has the right to change of venue where a fair trial in the county where the crime occurred is impossible.

X. Where and How to Find the Law. Police officers interested in pursuing the criminal law further to better understand the law should become acquainted with the resource material that is available to them.

A. Michigan Statutes Annotated quoted throughout this outline contains the Michigan Statutes with commentaries.

B. Michigan Criminal Law and Procedure by Glenn C. Gillespie is not a "law" book in the sense that the Michigan Statutes Annoted book is, but is an excellent reference book.

C. The Compiled Laws of 1948 and the yearly Public Acts contain the Michigan Statutes.

D. The Michigan Constitution of 1963 will provide a valuable reference. Most of the provisions of The Constitution are contained in the publications in A, B, and C.

E. The suggested method of finding and making a determination of what is the law is as follows:

1. Check the index (Vol. 5) of the Compiled Laws of 1948 for the crime. Here you will find the correct section number.

2. Check the section number in the appropriate volume of the Compiled Laws.

3. Check the back folder of the latest Public Act book for the section number of the law you are interested in. If found it will indicate the law has been changed. It will tell you what year of the Public Acts to look in and what page.

4. Additional comments and amendments are also found in the pocket supplements of the Michigan Criminal Law and Procedure volumes.

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RULES OF EVIDENCE

I. There are Two General Purposes for Studying and Mastering the Rules of Evidence.

   A. The solution of crimes is dependent upon the ability of law enforcement officers to recognize and collect evidence.

      1. The officer must recognize the pitfalls that will prevent the court from allowing the introduction of a vital item to prove or disprove an alleged fact.

      2. If all the evidence which exists could be properly presented, the judge and jury would be able to determine correctly the guilt or innocence of the accused.

   B. Failure to recognize what constitutes valid evidence or failure to properly handle, mark or preserve evidence may lead to inferences which are not necessarily correct.

II. Rules of evidence were adopted by courts through case law, rule-making authority or legislative acts by the legislature. It should be pointed out that the rules of evidence are established so that, in keeping with constitutional guarantees, the judge and/or jury may know the truth regarding the face in question.

   A. A historical review indicates that most of our rules of evidence are Anglo-Saxon in nature. They are the result of centuries of development.

      1. Trial by ordeal or combat.

      2. Use of compurgation.

         a. High value of "oath".

         b. Neighbor hesitant to swear to anything not truth.

      3. Testimony by some witnesses tended to be more valuable than others.

4. Rules developed to assure clean picture of issue would be presented to allow jurors to decide innocence or guilt.

B. The need for rules. Without rules anything anyone said would be permitted - whether valuable or pertinent to issue in question. Rules make it possible to eliminate unnecessary or non-pertinent things from trial.

1. Gives prosecution and defense an idea of what they may do or expect to have presented.

2. Can help police officer develop a better criminal case if he knows and follows rules of evidence.

III. Evidence defined is anything from which an inference may be logically drawn regarding the existence of a fact. The evidence may or may not be admissible in a court of law. It is the vehicle which we use to arrive at the truth. It can be a matter of fact from which another matter of fact may be inferred. Historically we have broken evidence down into classifications and types. Unfortunately they are not independent of one another as we frequently tend to assume.

A. Direct evidence is any evidence which directly indicates the facts in a case. Direct evidence is the result of anything a witness has knowledge of by use of one or more of his or her five senses. Generally, direct evidence is less available than some other classification.

B. Indirect evidence is that type or class of evidence which is not a result of direct knowledge of the fact in question. Frequently these are broken down into:

1. Circumstantial evidence: The proof of facts from which other facts may be logically inferred. It may be subdivided into certain and uncertain facts.

a. Certain facts are those which are known.

b. Uncertain facts are those which may be inferred from known events.

2. Physical, real or demonstrative evidence. That evidence which speaks for itself, tells the story or explains self. It is physical in nature. It is acquired by self-observation. Example: Knives, pencils, guns, bottles, spent shells. It can be sensed with the five senses.

3. Cumulative evidence - generally speaking this type of evidence is unnecessary and of little value in establishing facts in court. An example of such evidence is a second person testifying to exactly the same thing as the preceding witness.

   a. A ridiculous situation could occur if fourteen people testified to the same thing.

   b. This does not prevent two persons from testifying to approximately or nearly the same things. In fact this tends to strengthen a case and obviously is desirable.

4. Corroborative evidence - sometimes one piece of evidence tends to strengthen another item of evidence.

   a. It adds weight or substance to the previous evidence.

   b. Such evidence does not duplicate previously introduced evidence - it merely makes it more plausible or likely to be considered as factual. Such evidence is called corroborative.

   c. It differs from cumulative evidence since it is not evidence previously given.

5. Testimony - declarations or statements made to establish a fact, especially by a witness under oath in court. Oral statements or testimony are frequently referred to as parol evidence.

a. Opinion evidence as a form of testimony.

1) In general - Court or Jury should draw conclusions and not the witness. If the jury can make such inferences or deductions it is improper to have the witness make them. This is not always possible, however, and this necessitates opinion evidence. Sometimes such evidence is admitted when:

a) The jury lacks the skill or science to deduct from facts given or couldn't interpret.

b) The jury can't arrive at a conclusion in lieu of such opinion evidence.

2) Ordinary opinions as a form of testimony.

a) Light or dark.

b) Speech.

c) Relative strength.

d) Identity.

e) Insanity.

f) Color.

g) Weight.

h) Speed of autos.

i) Smell cf alcohol.

3) Expert opinion as a form of testimony. The many technical facts which come before juries today make it not only permissible but advisable to have highly qualified witnesses assist the court in

understanding evidence. The expert comes to the court without his qualifications being known, he must be qualified by the party seeking to introduce his opinion. Some of the proper subjects of expert opinion are:

a) Handwriting.

b) Typewriter comparisons.

c) Fingerprints.

d) Possibility of sexual relations.

e) Cause of death.

f) Blood - human or animal.

g) Documents.

h) Polygraph.

6. Documentary evidence - as a general rule of law of evidence any written instrument sought to be introduced is documentary. At one time inability to produce an original document was fatal to the case in that without the original document no proof could be shown as to the contents of the original document. This rule at law was called primary or best evidence rule.

   a. Primary or best evidence: parol or oral testimony is not admissible unless there is a satisfactory explanation that the original document is not available, i.e., destroyed, stolen or otherwise unavailable. But this loss must be satisfactorily explained. The extent of search which must be conducted for missing documents is not clear.

   b. Secondary evidence - there are occasions when documents can be established as not in existence or not available. Under such circumstances the courts have the right to allow the introduction of parol

evidence. For example a lost paper may contain hundreds or even thousands of words but he could still state what he recalls from the letter. Other documents may be applied to the rule:

1) Photographs.

2) Sketches.

3) Motion pictures.

4) Memoranda.

5) Weather records.

6) Records of judicial proceedings.

7. Hearsay Evidence. The courts exclude evidence, generally, not founded on the witnesses' own knowledge. They do so for three reasons:

a. It was not communicated to the witness under oath.

b. No opportunity for defendant to cross-examine the person giving the information.

c. Likelihood of error of transmission by receiver and witness.

1) There are certain exceptions to the hearsay rule -

a) Dying declarations may be taken from a person under the following conditions:

i) The person must be the victim of a homicide.

ii) The person must have no hope of recovering.

iii) The person must be rational.

iv) The statement must be concerned with the fatal injury.

v) The person must be a competent witness who could have testified.

vi) The person must die for the dying declaration to be admitted into court.

b) Written memoranda or entries in books.

c) Admissions or voluntary statements made by the defendant before or after he committed the crime or was arrested. Admissions may be made by innocent parties. Confusions are considered an acknowledgment of guilt. Guilt may be inferred from an admission.

d) In confessions - the defendant makes a voluntary statement or declaration as to guilty actions regarding an alleged crime, in which the individual was involved.

e) Res Gestae Statements - Res Gestae means "things done". Spontaneous utterances as a result of a startling event, which could produce an involuntary utterance or reaction which causes certain statements or declarations which can be considered to be truthful since no chance to deliberate or think intervened between the act and utterance. They are instinctive utterances which are more likely to be the truth than reflected statements.

2) Rules governing the hearsay rule are enforced by the court.

8. Prima Facie Evidence - evidence which by itself tends to prove or appears to prove the fact alleged, if unexplained or uncontradicted.

IV. The Admissibility of Evidence.

A. Some evidence is prohibited from use in court on the basis it may serve no useful purpose, it might cloud the issue or it might not afford the defendant his constitutional guarantees. The rules of evidence assure, as closely as possible, the litigants (prosecutor and defense) the opportunity to scrutinize evidence and object where there is the right to object to use of questionable evidence. To be admissible evidence must pass the test of competency, relevancy and materiality.

1. Probative value or weight. Evidence is not precluded from trials because it has little value. The rules of evidence do not allocate a particular weight value and say that evidence must meet those standards or not be admitted. It is for the jury to decide how much it attaches to certain evidence, and how little to other.

2. Relevency of evidence is one test of the admissibility of evidence or that it has a close relationship with and importance to the issue in question in court. Generally speaking, relevant evidence is required to have some tendency to prove or disprove the issue in question. A person's motivations, opportunities, and ability or inability to do something is generally relevant to an issue and admissible as long as it is material.

3. Materiality of evidence must have sufficient bearing on a case to be admitted. If it were not so the court record would be cluttered with facts or alleged facts not worthy of review by the trier of the case.

4. Competency of evidence refers to the form of evidence as compared to relevancy or materiality. Competent evidence has the quality and form which makes it possible to be admitted to prove a fact in question.

a. Husband or wife testifying in court against the other - restricted.

b. Age - only if it is doubtful to court the witness understands "truth," "lie" or "honest."

c. Mental - must convince judge of ability to understand right from wrong.

B. Proof is the result of evidence. It is the conclusion drawn from evidence presented.

1. Judicial notice - frequently it is unnecessary to present evidence to provide proof of a fact which the court knows or can readily acquire knowledge thereof. For example:

a. Existence of state of war.

b. Time needed to travel.

c. Dangerous attributes of fire.

d. Corporate names.

e. Excessive use of alcohol leads to intoxication.

2. The burden of proof - indicates who is responsible to prove certain things. As an example - the prosecution must always prove the defendant guilty beyond a "reasonable doubt."

C. Presumptions are defined as a conclusion or inference which a judge or jury may or must make by reason of law. While not, technically speaking, truly evidence it is frequently described in the term presumptive evidence.

1. A presumption of fact may be made as a result of proof of certain fact(s) which logically are associated with the fact in question.

2. A presumption of law is one which the statutes require to be drawn regardless of other evidence or in lieu of other evidence.

3. Conclusive presumptions are those which cannot be rebutted or overturned. For example

a child under seven is presumed to be incapable of committing a crime because he is not old enough to know the law.

4. Rebuttable presumptions are assumptions that can be disputed successfully with adequate proof. As an example:

   a. Every man is presumed to know consequences of his act.

   b. Sanity.

   c. There must be capacity to have sexual intercourse in rape case.

D. Privileged as confidential communications. The law protects information derived from another by reason of certain relationships existing between the parties. It prohibits disclosure or testimony by the receiver of such evidence if such information would destroy the confidentiality of such relations. Some examples of privileged communications:

1. Communication between husband and wife.
2. Communication between an attorney and client.
3. Communication between the clergy and penitent.
4. Communication between a physician and patient.

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THE ARREST PROCESS

I. The Definition of Arrest.

A. An arrest is the taking, seizing or detaining of the person of another either by touching or putting hands on him, or by any act which indicates an intention to take him into custody, and subjects the person arrested to the actual control and will of the person making the arrest and must be so understood by the person arrested.

1. The intent to effect an arrest is essential.

2. It must be so understood by the party arrested.

3. An arrest has been considered as such when merely made for questioning.

4. There must be authority to effect an arrest.

B. Persons exempt from arrest under the law.

1. The Constitution of the United States provides that Senators and Representatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.

2. Under our State Constitution, all Senators and Representatives are privileged from civil arrest and civil process during session of the Legislature and for five days next before the commencement and after the termination thereof.

3. All officers, warrant officers and enlisted men who may be in the actual service of this state or the United States, in all cases, except for treason, felony or breach of the peace, shall be privileged from arrest.

4. "No officer of any of the several Courts of Record, including jurors, shall be arrested on any civil process while going to, attending, or returning from any actual sitting of the court of which he is an officer. In other

cases these officers are liable to arrest and may be held to bail in the same manner as other persons." CL 1948, 600.1821; Stats. Ann. 27A1821.

5. Where reciprocal laws have been enacted:

a. Statute provides that any person who enters this State pursuant to a subpoena issued to compel his attendance in any criminal proceeding, shall be exempt from arrest or detention upon any criminal charge committed prior to such entry into this State, during the time such person is in attendance and for a period of 10 days thereafter, or, for a longer period if detained by unavoidable casualty or serious illness.

b. Any person who passes through this State while going to another State in obedience to a summons.

C. The arrest process. Who may arrest.

1. Any Peace Officer may arrest persons under Michigan Statutes. "Peace Officers" include:

a. Sheriffs and their deputies.

b. Constables.

c. Marshals.

d. Members of municipal police forces.

e. Members of State Police.

f. Other officers whose duties are to enforce and preserve the public peace.

2. Authority of private person to make arrests.

A private person who has made an arrest without a warrant must, without unnecessary delay, take the person arrested before the most convenient magistrate in the County in which the offense was committed, or deliver him to a peace officer, who must without

unnecessary delay take him before such magistrate. The peace officer or private person must lay before the magistrate a complaint stating the offense for which the person was arrested. What amounts to due diligence in presenting a prisoner before the court depends upon the peculiar facts of each case, but any unnecessary or undue delay in bringing the arrested party before the court constitutes a breach of duty, whether the arrest was made with or without a warrant.

a. For a felony committed in his presence.

b. When the person to be arrested has committed a felony, although not in his presence.

c. When summoned by any peace officer to assist said officer in making an arrest.

d. Private citizen has less immunity than an officer.

e. A citizen while making an arrest for a felony must know that the person to be arrested has, in fact, committed a felony.

f. A citizen only in the rarest of situations will have a warrant to make an arrest on.

g. A private person may make an arrest without a warrant on suspicion of a felony, but he must be prepared to show in justification that a felony actually had been committed.

   1) And that any reasonable person

   2) Acting without passion or prejudice, would have fairly suspected that the person had committed it.

h. A private person making an arrest should inform the person arrested:

   1) Of his intentions to arrest him.

2) The cause of the arrest.

3) Except when he is engaged in the commission of a criminal offense.

4) Or if he flees.

5) Or forcibly resists arrest before such person has opportunity to inform him.

D. When arrests may be made.

1. Arrest, otherwise legal, for a felony or a breach of the peace may be made at any time.

2. When arrests may be made.

a. An arrest may be made on any day and at any time of the day or night.

b. The statute does not prohibit the arrest of offenders on Sunday.

c. Night arrests and arrests on Sunday are oppressive and unjustifiable, except in cases of pressing necessity.

3. For other offenses, that is, for misdemeanors, not including breach of the peace, arrest may not be made "at an unreasonable time."

a. Time of arrest is "unreasonable" if it would produce an undue hardship.

b. Exceptions to the "unreasonable" time rule.

1) The chance of escape by the offender.

2) The chance of further harm being done by the offender.

4. In determining what is reasonable, the circumstances to be considered are:

a. The gravity of the offense for which the arrest is being made.

b. All of the facts surrounding the arrest which are at the officers disposal or within his knowledge.

E. Where arrests may be made.

1. Officers of the state have authority to make arrests with or without a warrant on board ship, whether in territorial waters of, at anchor in a harbor, in or tied to a dock, in Michigan.

2. The place in which a police officer may make arrest depends upon whether the arrest is made with or without a warrant, and also upon the other circumstances of arrest.

3. Without warrant - The territory in which a "peace officer," as such, may make arrest without warrant, is ordinarily limited to the jurisdiction of the governmental body which appointed him.

a. A public officer appointed as a conservator of the peace for a particular county or municipality as a general rule has no official power to apprehend offenders beyond the boundaries of the county or district for which he has been appointed. If appointed to act only within a limited district he has no greater privilege outside of such district than a private citizen.

b. Arrests outside officer's bailiwick, the authority of peace officers to make arrests outside their own bailiwicks is controlled by the statute which provides: "Any peace officer of any county, city or village of this state may exercise authority and powers outside his own county, city or village, when he shall be enforcing the laws of the State of Michigan in conjunction with the Michigan State Police, or in conjunction with any peace officer of the county, city or village in which he may be, the same as if he were in his own county, city or village." CL 1948, 764.2a; Stats. Ann. 28.861 (1).

4. Arrest powers of private citizen, and of officer as such include right to arrest one who has in fact committed the felony for which he is arrested; also to make arrest on reasonable suspicion of felony provided the felony has in fact been committed.

5. With warrant - the territory within which a peace officer may make arrest under warrant is generally fixed by statute and more extensive than that for arrest without a warrant.

6. Federal Lands - strictly speaking, power of State and local police officers to make arrest on land owned by the United States government depends on the legal title of the particular land involved.

   a. As a general rule, however, such police officers to have power to make arrest on "Federal Lands".

7. Fresh pursuit - a peace officer's power of arrest, both with and without warrant may be extended beyond the territory to which it is ordinarily limited, provided the arrest is made in "fresh pursuit", and under certain circumstances.

   a. "Fresh Pursuit" means pursuit of a fleeing criminal "endeavoring to avoid immediate capture"; and involves "pursuit without unreasonable delay".

      1) The statute does not necessarily imply instant pursuit. It means "a pursuit promptly begun and continuously maintained".

      2) In "fresh pursuit", officer should continue to maintain pursuit without unreasonable interruption.

   b. In 1937 the state enacted a uniform law on fresh pursuit. It provides that:

      1) "If a member of a duly organized

State, County or Municipal peace unit of another State enters this State in fresh pursuit, and continues within this State in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other State."

2) "Such an officer shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized State, County or Municipal peace unit of this State, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in the State."

c. Where a "fresh pursuit" arrest is made.

1) The person arrested must be taken (without unnecessary delay) before a magistrate of the county in which the arrest was made.

2) The magistrate will conduct a hearing as to the lawfulness of the arrest.

a) If the magistrate determines that the arrest was lawful he is required to commit the person arrested for a reasonable time to await the issuance of an extradition warrant.

b) If the magistrate determines the arrest was unlawful then the prisoner is entitled to his discharge.

d. The term "fresh pursuit" is deemed to include the term as defined by the common law, and also the pursuit of a person who has committed a felony, or, who is reasonably suspected of having committed a felony. It includes the pursuit of a person suspected of having committed a supposed felony.

8. Entry of land and non-dwellings to effect arrests.

   a. Right to make arrest carries with it the right to reasonably enter any land and any building which are not dwellings.

      1) This right to enter carries with it the privilege to break and enter ... a building other than a dwelling or a fence or other enclosure "if necessary" or if the officer "reasonably believes it to be necessary."

      2) It also includes the privilege to peaceably enter a dwelling.

   b. If the officer "reasonably believes" the person to be arrested is on such land, he may enter to make even though, "for reasons beyond his control," he does not make the arrest.

      1) An officer's right to be on the land in the reasonable belief that the person sought to be arrested in thereon, continues only so long as the officer has such a belief.

      2) If the officer knows that the person he is seeking is not on the land, he may not remain there in the hope that the person sought may return. The officer's entry must be in good faith, for the purpose of making the arrest.

9. Entry of dwellings to effect legal arrests.

   a. The right of police to enter dwellings in making an arrest is strictly limited. It is a fundamental rule of common law that "man's house is his castle." The distinction between "breaking" (that is, forcible entry) of non-dwellings and of dwellings is important.

   b. A police officer has the right to "break and enter (and search) a dwelling or use force to the person to enter the

dwelling", in order to make lawful arrest under the following circumstances.

1) If the arrest is made under a warrant or to prevent commission of a serious crime or to effect recapture on fresh pursuit of one who had been arrested, although the person sought is not in the dwelling, provided the officer reasonably believes him to be there.

2) If the person sought to be taken into custody is (actually) in the dwelling.

3) If someone in possession of the dwelling has led the officer reasonably to believe that the person to be arrested is therein: in other words, where there is misleading of the officer by the possessor of the land.

10. Procedures prior to entry of dwelling.

a. Under ordinary circumstances, before using force to enter a dwelling, an officer should first make explanation of his errand and demand for admittance. Explanation and demand need not be made if the officer reasonably believes such to be impracticable or useless.

b. In making arrest without warrant an officer should be slow to break and enter a dwelling. Forcible entry should not be made unless it is impracticable to first obtain a warrant or the serious circumstances of the crime and character of the criminal require such action on the part of the officer.

c. In making arrest under warrant, an officer may forcibly break and enter a dwelling at any time, even though it is during the night time.

F. Who is arrested.

1. Suspects for questioning.

a. The right to stop a suspect for questioning probably depends upon the right to arrest.

1) Compulsory stopping and questioning may be considered an arrest and requires justification as such.

2) This limits police powers of field questioning.

b. An officer may, without compulsion, question a citizen and request him to go to the police station for further questioning.

]) "Where no force or violence is actually used", there is an arrest only if there is "reasonable apprehension that force will be used if there be no submission to the restrain under it."

2) This is now questionable and probably will be ruled illegal by the United States Supreme Court.

2. Material witnesses.

a. A person cannot be arrested merely as a aterial itness until after the court or examining magistrate has required him, while in court to give bail and he has failed to do so, or under a specific warrant for arrest as a aterial itness.

3. Persons who have violated federal, state and/or local laws.

a. Felonies.

b. Misdemeanors.

G. General legal procedure of an arrest.

1. Inform the person of the facts or offense for which he is arrested.

a. Where the person submits and goes with the officer or a private person, there is an arrest.

b. To constitute an arrest, it must appear that the person was taken into custody or his action was influenced by restraint.

c. An arrest is not made where officer merely informs person to be arrested of his business, and neither takes him into custody nor deprives him of his freedom of action.

d. The subject arrested must understand the officer's intent, though manual seizure is not necessary.

e. The issuance of a summons by a State Police officer for alleged violation of the Motor Vehicle Code, does not constitute an arrest.

f. Touching as part of arrest is not absolutely essential.

1) It is desirable, if practicable, because it provides evidence of fact the arrest was made.

2) No application of force necessary.

3) No physical restraint necessary and it is sufficient if the party understands and submits.

4) When there is no touching.

a) Intentions of parties involved is important.

b) Intent on part of officer to arrest.

c) Intent on part of other party to submit, under belief submission was necessary.

5) Officer (with authority) lays hands on prisoner, however slightly, intent is shown to make arrest, even if unsuccessful in stopping or holding him.

g. Notice of authority.

1) In general, person must be informed of authority and cause of arrest.

2) Authority to effect the arrest:

a) Is generally indicated by uniform and badge.

b) Display of badge by non-uniform officer is wise.

c) Good practice for detectives to show badge.

d) Detective should announce he is a police officer.

e) This is true in traffic cases. The officer should avoid instilling fear or claim of fear by driver.

h. Notice of cause ordinarily is not necessary to announce before arrest.

1) Announcement should be made as soon as practicable after an arrest. Information should come after submission or under control.

II. Kinds of Arrests.

A. Arrests without warrant.

1. Definition: "Any peace officer may, without a warrant, arrest a person:

a. For the commission of any felony or misdemeanor committed in his presence.

b. When such person has committed a felony although not in the presence of the officer.

c. When a felony has been committed and he has reasonable cause to believe that such person has committed it.

d. When he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it.

2. Felonies.

a. Felonies are crimes which are declared to be so by statute or common law.

b. Felonies by virtue of statute are principally those crimes punishable by imprisonment in the state prison.

3. Meaning of "reasonable belief."

a. The "reasonable belief" to justify arrest by an officer is quite broad in scope.

1) It does not mean that an officer must "believe" that the arrested person is guilty of a felony.

2) An officer may "reasonably believe" the other to be guilty of the offense involved, even though he does not "believe" him guilty (this seems to be questionable recently).

b. It is enough that the circumstances that the officer knows or reasonably believes to exist are such as to create a reasonable belief that there is a likelihood that the other has committed a felony.

4. Felony arrests without a warrant.

a. Information received from persons who

the officer has reason to believe are telling the truth and upon which information he would act in his ordinary private life.

b. Information received from other officers.

c. Police radio broadcasts.

d. Descriptions given by the victim or witness to a felony.

e. Information that a warrant has been issued - though not in the officer's hands.

f. Wanted notices from other police departments or the F.B.I. A peace officer may arrest without a warrant, upon reasonable information that the person arrested stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested, the accused must be taken before judge or magistrate with all practicable speed, and a complaint must be made against him under oath setting forth grounds of arrest as provided in the Uniform Criminal Extradition Act.

g. Descriptions on the daily police bulletins.

h. Inability or refusal to give a satisfactory account of himself.

5. Reasonable cause arrests.

a. Where the officer's grounds to believe are based on information obtained while trespassing in the "defendant's dwelling," such belief may not serve as basis for arrest.

b. Reasonable belief on trespass of property other than defendant's home does not invalidate a resulting arrest.

1) Defendant's land or non-residence buildings may be proper basis for arrests on suspicion of a felony.

2) Trespass on property not owned by the defendant may be legal basis for arrest on reasonable belief of a felony.

3) An officer's "suspicion" (view and knowledge) which results from his own felonious breaking and entering of a building cannot be basis for arrest - excepting, probably, for the more serious crimes.

4) Reasonable grounds for an arrest may be defined as any facts which would induce any fair minded person of average intelligence and judgment to believe that the suspected person had committed a felony. The grounds upon which such belief is based must clearly appear, and must be present at the moment of arrest.

5) Although reasonable suspicion may be based on trespass, it cannot be based on unreasonable search.

6. Attempt to commit felony arrests.

a. When a police officer sees a person attempting to commit a felony, he has the right to make arrest. Such attempt to commit a crime is itself a crime - even though the attempt fails.

1) Arrests for attempt to commit felony should be made "at once" or steps should be promptly taken to apprehend the person.

2) If the person flees, the police officer may arrest him "at any time during the pursuit, promptly begun and continuously maintained."

b. Arrest for attempt to commit a felony may be made not only while the attempt is being made but also after the attempt has failed.

c. "The authority of a police officer does not await the commission of a crime." It is as much his duty to prevent the commission of a crime as to arrest after the event.

7. Federal offenses.

a. State police officers may make arrest, without warrant, for federal offenses, committed in their presence, on suspicion for felony committed in violation of federal law.

1) Deserters from military service.

2) Escaped military prisoners.

b. State police officers may not arrest for suspicion of misdemeanor.

8. Arrests without warrant - Breach of the Peace; other misdemeanors.

a. In general - where the offense is not a felony, officers should make arrests without warrant only for acts of violence, or when there is no other method of apprehending the criminal. Such arrests are proper in the following situations:

b. Breach of Peace - "A public offense done by violence or one causing or likely to cause an immediate disturbance of public order."

1) "Violence is not a necessary element of breach of the peace."

a) It may be the use of force or without threat of immediate use of force.

b) Or it may be threats or epithets directed to another.

2) "Breach of the Peace" includes the following:

a) Intoxication in a public place to such an extent as to disturb others.

b) Disturbing a congregation when at a religious worship.

c) Noise amounting to a disturbance of the peace.

d) A riot.

e) Unlawful assembly.

c. Definition of "in presence of officer"

1) A breach of peace is in the presence of the officer when by the use of his senses, he knows of its commission by the person about to be arrested.

2) While words may constitute breach of the peace so as to justify arrest, it is otherwise when such words are provoked by the officer's own words or conduct. Under such circumstances arrest may not be justified.

3) Police officers must guard their actions and language toward the public. They should not go out of course of duty and speak abusively of a citizen in his presence as to elicit language in reply which is no more disorderly either in substance or in manner than the officer provoking it. If the officer provokes the remark from the citizen, he is not justified in arresting the citizen for disorderly conduct.

d. Definition of "affray in officer's presence"

1) An "affray" involved two or more persons engaged in mutual combat or in an attack upon a third person. The place must be public and the manner in which the participants conduct themselves must be such as to create or threaten a serious disturbance to those in the vicinity or otherwise to terrorize them. It is "a particularly dangerous type of breach of the peace, and there is an immediate necessity for the officer to intervene."

2) Where an affray or equally serious breach of peace has been committed in the presence of the officer, the officer may arrest persons whom he reasonably suspects to have been participants, even though they were not so in fact.

   a) Where a breach of the peace is committed in the presence of the officer. (at common law it is clearly settled that peace officers are empowered to make arrests without warrant for breach of peace committed in their presence.)

   b) Where a breach of peace amounting to an affray was committed in the officer's presence, he may arrest the one whom he "reasonably suspects" was a participant.

   c) For breaches of the peace out of the officer's presence he has no authority to arrest; for other misdemeanors generally, arrest should be made only when the crime is serious and the facts are clear or where arrest is vital in apprehending the criminal or preventing personal injury or property damage.

d) An officer has no right to arrest without a warrant, for a misdemeanor, or breach of the peace not committed in his presence. The common law never allowed the arrest, without a warrant, of a person either guilty of or suspected of having committed a misdemeanor, except in actual cases of breach of the peace committed in the presence of the officer, where the person was taken in the act or immediately after its commission. This exception was made, not to bring the offender to justice, but in order to preserve the peace, which, by the common law, was regarded as of the utmost consequence.

e) An officer cannot arrest for vagrancy without a warrant. A peace officer may arrest, without a warrant, for breaches of the peace committed in his presence. A breach of the peace committed 150 feet away from an officer, or within his sight and hearing, although at night, is sufficiently within his presence to justify an arrest without a warrant. An officer has a right to arrest, without a warrant, a person whom he discovers in an intoxicated condition in a public place.

e. The Attorney General has held that the authority of an officer to arrest for a misdemeanor without a warrant is the same for violation of the motor vehicle law as for any other misdemeanor.

f. In all other non-felony cases.

1) The person involved should not be arrested except on issuance of a warrant.

2) Officer obtains information, such as the name, address, and other pertinent facts.

g. Breach of the peace.

1) As stated above the right of an officer to arrest without warrant for offenses other than felonies involves principally breach of peace.

2) Arrests for breach of the peace in the officer's presence should be made "promptly", - either at the time of the offense or as soon as circumstances permit.

3) In order to justify a delay there should be a continued attempt on the part of the officer to make the arrest, he cannot delay for any purpose which is foreign to the accomplishment of the arrest.

4) When a policeman after hearing, or seeing, a breach of peace committed; departs on other business or for other purposes afterwards and later returns he cannot, without a warrant, make an arrest for that offense.

h. Misdemeanors other than breach of peace.

1) The only other misdemeanor situation where arrest should be made without warrant is: Where the offense is serious, where it is reasonably certain both that the misdemeanor has been committed and that the arrested person committed it, and where immediate arrest is necessary to apprehension, or the prevention of injury or damage. Power of arrest for misdemeanor (other than

breach of peace) should be exercised with caution.

2) Arrests for violation of ordinances.

a) There is authority for making summary arrest for violation of ordinances; i.e., for violation in officer's presence.

b) When the breach of ordinance does not involve a breach of the peace, summary arrest should not be made unless the offender refuses to identify himself, then the officer may have "reasonable grounds to believe" that such person will not be apprehended unless immediately arrested.

B. Arrests with warrants.

1. Definitions.

a. A warrant for arrest is a "written order directing the arrest of a person or persons, issued by a court, body or official, having authority to issue warrants."

b. Issuance of warrant imposes upon the police officer a duty to make arrest. That duty is not affected by the officer's belief in the guilt of the person being arrested.

2. Purposes of arrest warrant.

a. The United States Supreme Court has taken cognizance of the arrest warrant procedure.

1) Insures the citizen of an impartial judgment by judicial officer.

2) The magistrate will determine weight and credibility of information supplied by police officer.

3) Such information must not be vague or untested and a judge will guard the public and private citizens from subversion on the fundamental policy of sufficient probable cause (Wong Sun v. U.S. 1962).

b. Michigan Constitution recognizes importance of arrest warrants.

3. Description of a warrant.

a. Legal requirements.

1) A warrant valid or fair on its face must show certain facts as required by statute or common law, and when some required fact is not stated, the warrant lacks a "formal requirement".

a) A warrant should state the substance of the complaint.

b) A warrant ordinarily does state that written complaint under oath has been made.

2) A warrant cannot be made good by alteration after its issuance. "Any material alteration of the warrant after its issuance and before service invalidates it."

b. Who issues it:

1) Issuance by authorized court or tribunal.

a) Validity of a criminal warrant depends upon the general authority of the court or tribunal issuing it.

b) Generally criminal warrants can be issued only by criminal courts.

2) Thus it must be a sworn judicial official.

c. Who serves it and how.

1) In making arrest under warrant, ordinarily the officer should inform the arrested person of his intention to arrest him, of his possession of the warrant, (if he has it) and of the offense or conduct charged therein.

a) It is not necessary that the officer use any particular form of words in giving such notice to the arrested persons.

b) Any words or conduct are sufficient if they fairly apprise the other of the officer's intention to arrest him and indicate the officer's possession of the warrant and its contents.

2) In giving reason for making arrest, ordinarily the officer must state the "actual" grounds for such arrest.

a) If the arrest is made under a warrant, the officer is not privileged if the officer informs the other that the arrest is being made for a crime other than that charged in the warrant. Stating an additional, - though improper, reason for the arrest does not defeat an officer's right to make the arrest.

b) If an officer, in uniform or displaying badge, arrests another under a warrant, he is not required prior to or at the time of making the arrest to exhibit the warrant or to read it to the other, but upon the other's request he must state that he

is in possession of a warrant and is making the arrest pursuance thereof, and after the arrest has been made, must upon the other's request exhibit or read the warrant to him. If the arrested person makes such request, etc., warrant should be exhibited "as soon as possible."

c) As in the case of arrest without warrant, the officer may delay giving information as to the fact and grounds of arrest, if he reasonably believes that it would "likely" imperil making of the arrest, or "would be useless or unnecessary."

d. What it contains:

1) Direction to officer.

a) A warrant should contain direction that service be made by particular officer or officers. Only the person to whom the warrant is directed is privileged to serve it. A warrant may be directed to peace officers generally or to a particular class of peace officers in which case any person within the designated class may execute the warrant.

b) The persons to whom the warrant is directed "have no power to delegate their authority."

2) Description of accused.

a) The person to be arrested must be "sufficiently named or otherwise described" in the warrant for arrest. The person

to be arrested must be described by name unless his name is unknown. It is not necessary that the name be spelled correctly. If a person is known by more than one name, he may be sufficiently described by any one or more of such names.

b) Where the name of the person to be arrested is unknown, the fact that it is unknown is to be stated in the warrant.

c) Where a warrant refers to the person to be arrested by description otherwise than by name, the officer must necessarily exercise some discretion in determining whether the description is meant to identify the person whom he arrests.

d) An officer must make certain or take all reasonable precautions to be certain that the person arrested is the one named or described in the warrant.

3) Description of nature of criminal conduct.

a) The conduct for which the warrant is issued must be described "thoroughly".

b) It is held sufficient that the general nature of the act charged is stated.

4) Description of place and time of criminal conduct.

a) It is not necessary that the offense or conduct be described with particularity.

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5) Direction as to disposition of prisoner. The warrant must direct that the one arrested be brought before a court or other tribunal.

4. How and when arrest with warrant is made.

a. Aside from statute, arrest under warrant may be made only in the territory within which the court or other body issuing the warrant has authority to order arrest, that is, within its jurisdiction. Forthwith is hard to define as a time element.

b. After issuance of warrant, arrest is to be made "forthwith."

1) A warrant should be executed "promptly," within a reasonable time, and "without delay."

2) Arrest cannot be made under any warrant "which had expired by lapse of time" or which has been returned.

c. As to warrant for misdemeanors not involving a breach of the peace, there is a further restriction that arrest cannot be made, "at an unreasonable time."

1) If it would create an undue hardship upon the person arrested.

2) An arrest on Saturday evening for a parking violation, there being no opportunity of a hearing or bail until Monday, is not desirable unless there is a substantial probability that the offender will permanently leave the jurisdiction.

5. Disposition of arrested person.

a. After service of the warrant (i.e., arrest), the arrested person (if not bailed) should be taken "forthwith" before the magistrate before whom the

warrant is returnable, or if he is unable to attend, before another magistrate of the same court. Bail may then be fixed by such magistrate.

b. Bail may be taken by the arresting officer himself where the amount of bail has been endorsed on the warrant by the person issuing the warrant. If such bail be so taken, the officer certifies such fact on the warrant and "forthwith" delivers the warrant with the bail bond or deposit to the magistrate named in the warrant.

c. Where arrest for felony is made under warrant in a county other than that from which the warrant was issued, the officer making the arrest shall convey the prisoner to the county where the warrant was issued.

1) Where such arrest for misdemeanor is made in some other county, on the prisoner's request he shall be taken before a magistrate of the county in which arrested for purpose of giving bail bond.

2) If admitted to bail, the magistrate so certifies on the warrant, and the officer delivers such warrant and bond to the magistrate before whom defendant is bound to appear.

6. Return of warrant.

a. As soon as practicable after arrest, the officer should make and annex to the warrent a so-called "return," that is, an affidavit or certification by the officer, reciting that, pursuant to the warrant, he has made the arrest on a certain date.

1) Where the arrest is made under a warrant for robbery or larceny, the officer should, "if possible," secure the property alleged to have

been stolen, and annex a schedule thereof to the return of the warrant.

b. The return is made to the magistrate before whom the defendant is brought.

III. The Officer's Role in Arresting Procedure.

A. Use of force in making arrest and maintaining custody.

1. An officer may use such force as seems to him to be necessary in forcibly arresting an offender, or in preventing his escape after an arrest. Both officers and private persons seeking to prevent a felony escape must exercise reasonable care to prevent his escape without doing personal violence, and it is only when killing is necessary to prevent his escape that the killing is justified. If an officer, under such circumstances, needlessly kills, he may be guilty either of manslaughter or murder.

2. If crime can readily be prevented, without injuring the criminal, every wanton injury is a trespass, and may become a crime. Neither law nor morality can tolerate the use of needless violence, even upon the worst criminals.

3. No one can be justified in threatening or taking life in attempting to arrest on suspicion only, without incurring serious responsibilities. Where the life of a felon is taken, by one who does not know or believe in his guilt, such slaying involves a criminal liability.

4. It is the officer's duty after he has arrested a person charged with a felony to take such precautions as seem necessary under the circumstances to prevent his escape. An officer is justified in the exercise of his sound discretion in placing handcuffs or leg irons on the prisoner, or to otherwise confine him to prevent his escape while being conveyed to a safe place of confinement to

be brought before the court in pursuance of the directions in the warrant. In an early civil case it was said that it was the officer's duty to take and safely keep a person arrested and to bring him before the magistrate without delay. The officer cannot stop when making an arrest for a felony, at the moment of arrest, when the person arrested is unknown to him, to inquire into the character of the person, or his intentions to escape. In order to justify an officer in handcuffing a prisoner arrested for a felony, it is not necessary that he be unruly or attempt to escape, or do anything indicating a necessity for such restraint.

5. If the officer discharges his duty without malice, it is not for a jury to later find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the person arrested, and to punish the officer for doing what honestly appeared to him at the time to be reasonable and right.

6. An officer armed with a warrant for the arrest of another, or who has reasonable grounds for making an arrest, or who has a prisoner in custody is justified in using reasonable force in the performance of his duty; the officer is not required to retreat or retire but must stand his ground and perform his duty.

7. The extent of force which an officer may use depends on various circumstances. The nature of such force is of two kinds.

   a. Deadly force - that is, use of means intended or likely to cause death.

   b. Less than deadly force - that is, use of means which is not likely to cause death.

8. When force is used.

   a. Deadly force: serious crimes.

1) In making lawful arrest, an officer is privileged to use "means intended or likely to cause death," provided that the arrest is for a felony which normally causes or threatens death or serious bodily harm, or which involves the breaking and entry of a dwelling place, and further provided the officer reasonably believes that the arrest cannot otherwise be effected.

   a) Under this rule, deadly force can be used in connection with arrest for so called serious crimes, that is, for felonies which normally cause death or threaten serious danger thereof. It is immaterial that the particular felony, if of this sort, is committed or believed to be committed under such circumstances as not to threaten any such danger.

2) In order to justify the use of deadly force, not only must the crime be a serious one, but the officer must also "reasonably believe that the arrest" cannot be otherwise "effected," that is, that it "cannot be accomplished by less harmful means."

   a) The use of deadly force is "privileged only as a last resort," when it reasonably appears to the officer that "there is no other alternative except abandoning his attempts to make the arrest."

   b) An officer is not justified in killing a person whose arrest for a felony he seeks to make if it is possible to

arrest the offender by calling on others for aid.

c) If use of deadly force is authorized: It can be used in preventing flight. Overcoming resistance may necessitate its use. It is used to maintain confinement of a prisoner. The officer can threaten use of such force.

d) Force intended or likely to cause death may be used. By arresting officer to effect arrest. To prevent flight of escaping dangerous felon. By an officer to overcome resistance.

e) Force may be threatened to prevent flight to effect an arrest or overcome resistance.

B. Deadly force: lesser crimes.

1. Deadly force may not ordinarily be used in making (or attempting to make) arrest for lesser crimes; that is, for crimes which do not normally cause or threaten death or serious bodily harm, and which do not involve the breaking and entry of a dwelling place. Deadly force may not ordinarily be used to prevent escape from arrest (maintain custody) for such lesser crimes.

2. In necessary self-defense, an officer may use deadly force even in arrest for lesser crimes. If an officer attempts to make a lawful arrest, and the other resists by using deadly force, the officer is privileged to use "similar force" in self-defense.

3. An officer attempting to make a lawful arrest for a misdemeanor is under no obligation to retreat or retire to avoid the necessity of using extreme measures to prevent receiving great bodily injury.

a. It is his duty to press forward to the accomplishment of his purpose.

b. The amount of force which may be used by an officer in self-defense is limited to that which the officer "correctly or reasonably believes to be necessary for his protection."

4. To overcome flight from arrest for lesser crimes, deadly force may not be used. The theory of the law is that it is better that a misdemeanant escape than have a human life be taken.

5. When crime is a felony.

a. Not normally threatening death or bodily harm or breaking and entering then deadly force should not be used.

b. Such as executing a warrant for larceny or U.D.A.A.

C. Less than deadly force: amount.

1. In effecting any lawful arrest, a police officer may use lesser force - less than that intended or likely to cause death, which he "reasonably believes to be necessary." An officer may use only such amount of force as he reasonably believes necessary to effect the arrest or prevent escape.

2. Nature of offense; known character of the other; chance of escape all taken into consideration on "reasonable necessary" force. Force used.

a. Preventing escape may be greater or less than effecting arrest.

b. No violence when arrested doesn't guarantee lack of violence to escape.

3. Right to handcuff.

a. Depends on officer's beliefs of dangers of <u>not</u> handcuffing.

b. Depends on circumstances involved in the particular arrest.

4. Use of club has been held necessary but it has also been held unnecessary at times.

5. Force can be used without calling for help.

D. Force affecting third persons.

1. In making arrest, an officer may use force which he reasonably believes necessary, even though it affects a third person.

a. If an officer is privileged to shoot an escaping felon, he is not liable to a third person harmed by a stray bullet.

b. If when he shot there was little or no probability that any person other than the felon would be hit.

2. In lawfully entering land of another to make arrest, an officer may use force reasonably believed necessary, against persons of that land.

a. In such entry upon land an officer may use force "to break and enter" a fence.

b. He may also use force to enter other enclosure or dwelling or other building.

E. Use of force to prevent crime.

1. A police officer has the general duty to prevent the commission of crime. The authority of a police officer does not await the commission of a crime.

a. It is as much his duty to prevent the commission of a crime as to arrest after the event.

b. The privilege to use force to prevent the commission is usually related to the privilege to make an arrest without a warrant.

2. Amount of force to prevent crime.

   a. The amount of force which may be used to prevent a crime is ordinarily similar to that in making arrest for such crime.

   b. Deadly force may be used to prevent a crime "threatening death or serious bodily harm or involving the breaking and entry of a dwelling place."

   c. Deadly force may be used in preventing a riot "which threatens death or serious bodily harm where such riot is actually in progress."

   d. The amount of force to be used to prevent crime generally should be only such force as is necessary to prevent the commission of that particular crime.

3. Protection of private property.

   a. Somewhat similar to an officer's right to use force to prevent crime, is his right to use force to protect private right. While the protection of private rights, as such, may justify the intervention by a police officer, his use of force may well be governed by the above rules applicable to prevention of crime.

F. Summoning aid.

   1. "The Sheriff, his deputies, and any coroner or constable having the power to perform such duty may require suitable aid in:

      a. Serving process in civil or criminal cases.

      b. Preserving the peace.

      c. Apprehending or securing any person for felony or breach of peace. CL 1948, 600.584; Stats. Ann. 27A.584.

2. The commissioner of the Michigan State Police has authority, upon order of the Governor, to call upon the sheriff or other police officers of any county, city, township or village, within the limits of their respective jurisdictions, for aid and assistance, and the refusal or neglect to comply with any such request is deemed misfeasance in office.

3. The Mayor of any city, and the President of any village, have authority to command the assistance of all able-bodied citizens to aid in the enforcement of any city or village ordinance, or to suppress riot or disorderly conduct.

4. Where a warrant is issued and delivered to a sheriff, he is authorized to take such assistance with him in making the arrest as he deems necessary.

5. "To make an arrest, a private person, if the offense be a felony committed in his presence, or a peace officer with a warrant or in cases of felony when authorized without a warrant, may break open an inner or outer door of any building, in which the person to be arrested is or is reasonably believed to be if, after he has announced his purpose, he is refused admittance." CL 1948, 764.21; Stats. Ann. 28.880.

6. "A peace officer or private person who has lawfully entered a building for the purpose of making an arrest, may break open a door or window of the building if detained therein, when necessary for the purpose of liberating himself, and an officer may also do the same when necessary for the purpose of liberating a person who lawfully entered the building for the purpose of making an arrest and is detained therein." CL 1948, 764.22; Stats. Ann. 28.881. (Sec.222)

   a. Right to make arrest - officers have right to call for aid.

      1) This type assist should be used only in necessity or in important and urgent cases.

2) It may be used to preserve the peace.

b. Right to summon aid in:

1) "Unlawful assembly cases."

2) Where dispersal fails it is the duty of the officer to command assistance.

c. Request by officer.

1) There is no requirement to address it to particular person.

2) No particular form of formality need be followed.

3) The request may be made through others.

4) If a person agrees he need not be sworn in.

5) A citizen is obligated to assist unless there is doubt.

6) A private person not required to read the warrant prior to assisting the officer.

d. Privileges of summoned bystanders may be greater than that of officer since it includes right to force and enter land.

e. Bystander privilege may exist to arrest even if person arrested doesn't have the privilege.

1) If citizen is convinced officer has the right to arrest.

2) The bystander is protected by officer's determination of facts.

f. If bystander injured they are entitled to compensation, even though they are not sworn in.

G. Entrapment.

1. If the officer induces person to perform an unlawful act this will constitute defense to prosecution.

2. No entrapment is involved where intent originates in mind of accused.

   a. In other words an officer may present opportunity to one intending or willing to commit crime.

   b. Officer can use "artifice and stratagem."

      1) He can employ decoys.

      2) Where a person does every act essential to the completion of the offense the officer may wait.

3. Gist of the law is that government officer shouldn't use private citizens to induce crime.

4. Officers cannot solicit, suggest commission of a crime. Nor can they prompt, urge, lead, or originate offenses.

5. Suspicion of illegal business or practice.

   a. When accused is continuously engaged in prescribed conduct, it is permissible to provoke him to a particular violation. An example is that habitual offenders (narcotics) can be solicited.

   b. Where the accused has done every act essential to completion of offense, conduct of defendant not solicitor is considered.

6. Entrapment as removing necessary elements of crime.

a. Owner's consent in larceny removes element.

1) A trap is proper if merely in possession of the property.

2) Owner may remain silent, permit matters to go on.

3) However, if owner "delivers" the property - no larceny is established.

b. Robbery elements.

1) Entrapment may eliminate an important element.

2) No robbery conviction is possible without fear or intimidation.

c. Entrapment constitutes defense if:

1) The person is misled by someone.

2) A criminal intent is lacking.

d. The prosecution must prove:

1) That the accused would have committed the crime.

2) The opportunity afforded doesn't negate the offense.

e. If accused is suspected of illegal business:

1) Officers should act as ordinary business customers.

2) Function of police is to detect crime not cause it.

SEARCH AND SEIZURE

I. Search and Seizure

A. History - Federal law on search and seizure.

1. Writs of Assistance preceded present search and seizure chronologically.

a. They are arbitrarily issued by the Crown, with little restraint.

b. Authorized searches to be made on suspicion.

c. No showing of probable cause was required.

2. The common law rule on search and seizure. The common law relative to search and seizure is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained.

3. The Exclusionary Rule replaces common law rule.

a. Supreme Court rejected common law rule and substituted the "exclusionary rule" which established that evidence obtained by unreasonable search and seizure must be excluded from court.

b. 1914 - Weeks vs. U. S.

1) Applied to Federal Officers and Federal Court only.

2) Not applicable to officers and courts of the state.

3) Evidence obtained through unreasonable search and seizure by State Officers admissible in Federal Court.

c. 1920 - Silverthorne Lumber Co. - 251 - U.S. 385. The Supreme Court ruled in this case that knowledge acquired in illegally seized documents cannot be used in anyway, since this information amounted to ". . . a fruit of the poisonous tree. . .".

d. 1949 - Wolf vs. Colorado. The Supreme Court decided that states determine admissibility of evidence obtained in violation of Federal constitutional standards.

b. There is no certainty that it will stand up in court.

c. Such a search must be free of any instigation and/or participation by a law enforcement officer.

2. Searches unreasonable as to third persons when the defendant is the 3rd person whose rights have not been violated.

a. If the defendant's rights have not been violated, he may not complain of the unreasonable search and seizure.

b. Nor can he prevent thereof the fruits of the search from being introduced against him.

c. Supreme Court is liberal, however, in granting standing to complaint of an unreasonable search and seizure. The defendant's motion to suppress would be granted where he could show that any right of his own had been invaded.

3. Impeaching the defendant's guilt is important, though of little value to you as a law enforcement officer.

a. Rule does permit the prosecution to produce that evidence the defendant has in his possession (things seized illegally).

b. This is provided the defendant has taken the witness stand and denied that he possessed same.

C. Effect of exclusionary rule on states.

1. Effect in general.

a. Procedure as to time during which the search may be executed and time for bringing motion to suppress probably will be left to the states.

b. The definition of what is an "unreasonable" search will probably be decided by the Federal Courts.

c. State court decisions on search and seizure will be appealed to the Federal Courts more often than in the past.

d. Possible increase in number of civil suits filed in the Federal Courts against law enforcement officers for violations of constitutional rights guaranteed [illegible] unreasonable search and seizure.

2. State Court decisions: It appears the State courts may interpret the Mapp decision in [illegible] and/or erroneous ways. This will undoubtedly lead to appeals, [illegible] orders suppressing the evidence [illegible] being more widely allowed.

Effects on the law enforcement officer's approach.

a. Evidently the ability and [illegible] will be [illegible] to make a lawful arrest.

b. They will become more "search [illegible] minded."

1) [illegible] federal search warrant [illegible] law enforcement officer [illegible] that are [illegible] by Federal constitutional standards.

2) [illegible] protection against adverse action such as court [illegible] civil suits.

D. Search and seizure in general.

1. U. S. Constitutional Amendment IV:

a. When the Constitution was formed, there was added to it the Fourth Amendment guaranty against searches like those carried out under the notorious writs of assistance.

b. The amendment neither defined an "unreasonable search" and seizure, nor did it prescribe any penalty for such action.

c. Whether the federal law continued to be, that evidence obtained by unreasonable search and seizure was nevertheless admissible in court, is uncertain. Some sources do indicate this was the case.

2. Michigan Constitution: Art II - Sec. 10. "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause supported by oath or affirmation; provided, however, that the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any firearm, rifle, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, black jack, slug shot, billy, metallic knuckles, gas ejecting device or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state."

3. Michigan Statute on Search Warrants (Sec. 17.492 Cl '29; Sec. 28.1259 Stat. Ann.). "When complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases, that personal property has been stolen or embezzled, or obtained by false tokens or pretenses, and that the complainant believes that it is concealed in any particular house or place, such magistrate, if he be satisfied that there is reasonable cause for such belief, shall issue a warrant to search for such property."

4. Search warrant may issue where there is reasonable cause: (Sec. 17.493 Cl '29; Sec. 12.60 Stat. Ann.).

   a. "To search for and seize any counterfeit or spurious coin, forged bank notes or other forges instruments, or any tools, machines or materials prepared or provided for making either of them.

b. "To search for and seize any books, pamphlets, ballads, codes, printed papers or other things containing obscene language or obscene prints, pictures, figures or descriptions, manifestly tending to corrupt the morals of youth and intended to be sold, loaned, circulated or distributed, or to be introduced into any family, school or place of education.

c. "To search for and seize lottery tickets, or materials for lottery, unlawfully made, provided or procured for the purpose of drawing a lottery.

d. "To search for and seize any gaming apparatus or implements used or kept and provided to be used in unlawful gaming, or any gaming house, or in any building, apartment or place restored to for the purpose of unlawful gaming.

e. "In all cases in which a magistrate or court may issue search warrants under any other law of this state providing for the same."

f. "Other conditions for which search warrants may issue:"

1) To search for animals which may have been tortured.

2) Containers bearing a registered mark.

3) Children who have been abused.

4) Gaming implements.

5) Game and fish.

6) Gunpowder.

7) Intoxicating liquors.

8) Narcotic drugs.

9) Obscene books.

10) Official books and papers unlawfully witheld.

11) Property unlawfully pawned without the owner's consent.

12) Pistols or other weapons unlawfully possessed.

5. Search and seizure with a warrant.

a. Search warrants originally issued only for stolen goods.

1) Expanded to improve law enforcement.

2) To assist in securing evidence.

3) Question of unreasonable search is judicial; all facts surrounding case will help decide.

4) As time has passed it becomes apparent the search warrant is vital.

a) It is almost infallible.

b) Leaves much to be desired regarding length of time required to obtain.

b. The issuing of warrants.

1) Search warrants are issued on probable cause only.

a) By facts known by affiant.

b) No inferences can be used.

2) Affidavit must be sworn before a magistrate.

3) The issuance of more than one affidavit is possible.

4) Invalid search warrant will result in inadmissible evidence.

5) The affidavit should contain address, description of house, etc., though this is not necessary in rural areas, where "Jones place on River Road" would be sufficient.

c. Time, method of execution and return of search warrant.

1) Execution is permissible day or night.

2) Up to 24 hours may pass under certain conditions from issuance to execution.

3) Privilege to break doors, if necessary, exists.

a) Same privilege as with an arrest warrant.

b) Such action does not invalidate search.

4) Place and thing limited by warrant.

a) Generally restricted to those things named.

b) Recent Appellate Court Case somewhat liberalized this general rule.

5) After search: (Sec. 17.495 Cl '29 Sec. 28.1262 Stat. Ann.). "When any officer in the execution of a search warrant shall find any stolen or embezzled property or shall seize any of the other things for which a search warrant is allowed by the provisions of this chapter, all the property and things so seized shall be safely kept by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced or used as evidence on any trial; and as soon as may be afterwards all such stolen or embezzled property shall be restored to the owner thereof, and all the other things seized by virtue

2) Fruits so acquired will not be admissible.

b. Probable cause defined:

1) "Probable cause exists if the facts and circumstances known to the officer would warrant a prudent man in believing that the offense had been committed."

2) "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicans act. (Brinegar vs. U. S.)"

3) It is more than mere suspicion, which is highly uncertain. But is is less than sufficient evidence to prove guilt.

F. The current Federal Law on search and seizure standard of reasonableness.

1. In general. The only searches and seizures made illegal by the Fourth Amendment are those which are unreasonable.

a. The constitution does not define the word unreasonable.

b. There is no fixed formula for use in all situations.

c. Reasonableness depends upon the fact and circumstances of the total atmosphere of the case.

2. Factors to be considered regarding the extensiveness of the search.

a. Extent of search depends on various factors.

1) The gravity of the situation or offense.

2) A kidnapping case may permit more incursion than a liquor case, for example.

b. Another factor might be type of premises invaded. Action found reasonable enough in the search of a business might be considered unreasonable in a private dwelling.

c. A third factor is the size of the thing sought. The same meticulous investigation which would be appropriate for narcotics would not be reasonable seeking a stolen auto or illegal still.

d. Another factor is the nature of thing sought. Search may be made for an instrument of crime, a fruit of the crime, but any search made for things purely evidentiary or exploratory is unreasonable.

e. Particularly important are searches incidental to arrest.

1) The extent to which the arrested person exercises control of the premises is a factor.

2) It is only those premises which are under his control which may be searched.

f. Nature of the search made by the officers.

1) All general or exploratory searches in which the officers are looking for nothing in particular.

2) For whatever might fortuitously turn up, are unreasonable.

3. Perplexities and uncertainties regarding search and seizure.

a. What is a reasonable search and seizure and what is not is a subject "replete with perplexities."

b. It is considered a matter of great "uncertainty and an intellectual quagmire."

c. Even the actual decisions handed down by the Supreme Court on what is reasonable search incidental to lawful arrest cannot always be satisfactorily reconciled.

d. Reasonable is often a question of degree.

e. When you realize you are dealing with a matter of degree, you must realize that reasonable men may differ widely as to the place where the line should fall.

f. More bluntly stated, different judges will reach different conclusions on the same facts.

G. Premises protected by the Fourth Amendment.

1. Houses. The only places specifically protected by the Fourth Amendment are "houses"... almost broadly interpreted this includes: dwelling, mansion, ordinary house, apartment, room in hotel or boarding house.

a. "Houses" also include places of business and offices.

b. Dwelling doesn't lose it's character if temporarily unoccupied (summer, weekend): it does when vacated; i.e., checking out of hotel room.

c. The significance of determining what is a dwelling is that when a dwelling is searched without warrant, the courts may be inclined to examine the proceeding with greater care than in place of business.

d. We should not place too much reliance on this view... observe requirements of reasonable search and seizure.

2. Definition and examples of curtilage. The open space situated within a common enclosure belonging to the dwelling house.

a. Farmer's barn, 70-80 yards from house, separated by private driveway, surrounded by fence with gap allowing entrance into barnyard from private drive in front of house.

b. "Partly constructed" residence without doors, but lived in by owner, although he was absent at time.

c. The enclosed back yard of a residence.

d. Finish bathhouse adjacent to the dwelling house on a small farm.

e. Garage under a two-story dwelling, with the defendant living in upper story of dwelling.

f. The yard around a farmhouse.

g. A smokehouse associated with the dwelling house and located inside the yard fence.

h. Yard immediately outside a residence.

i. Trash can under the stone porch or stoop of a house.

j. Locked cupboard in common hallway of an apartment building in which the defendant reached by going through the hallway is part of the defendant's dwelling.

3. Federal courts have held the following places to be <u>not</u> within the curtilage.

a. A cave, in a plowed field, across the road from house, located about 125 yards from it.

b. A small concrete outbuilding 150-180 feet from the residence and separated from it by a fence and gate.

c. Chicken house 150 feet from house and separated by two fences.

d. The land around a house or shack in a city.

Enclosed or unenclosed grounds or open fields around their houses are not included in their prohibition of the Fourth Amendment.

e. Barn on an unoccupied farm.

f. A detached garage separated 3 or 4 feet from a residence and unconnected therewith.

g. A shack in the woods, 230 feet from the defendant's residence.

h. A cave in an open field.

i. The top of a foundation block of a business building on which marijuana was concealed.

j. Garage in rear of a residence.

k. The unfenced yard immediately surrounding a house.

4. Miscellaneous items also protected by the Fourth Amendment include one's person, papers, and effects, including such things as vehicles, safe deposit boxes and mail.

5. Premises not protected by the Fourth Amendment are "open fields."

H. What is not seizure.

1. In general, when an officer, in place where he is lawfully entitled to be, sees instrumentalities, fruits or contraband in open view, without making a search, he may take them and use them as evidence.

2. Abandoned property.

a. This includes things thrown in vacated hotel room's wastebasket.

b. Articles thrown out of a vehicle by persons in flight. This abandonment must be obvious or clearly shown in

order for rule to apply. If alleged abandonment was preceded by some unlawful act of officers, "abandoned material" cannot be used.

3. Surrendered property.

4. Contraband, instrumentalities or fruits in plain view.

I. What is not a search.

1. In general, it is not a search for an officer to see what is open and visible to the eye, when seen from any place where the officer is lawfully entitled to be. Lawfully seeing what is in open view includes what is seen by looking through an open door or window. This also applies to senses other than sight. He lawfully may smell what may be smelled and hear what may be heard. Use of binoculars is not forbidden. The use of a dictaphone is not illegal if installation does not involve trespassing.

2. In open fields.

3. In public places, these include parks, roads, streets, alleys, and private premises open to the general public, such as a store, tavern, etc., or the lobby or hallway of a hotel open to the public.

J. Search and seizure - kinds and procedures.

1. Search of the person.

a. In general it must conform to Federal Constitutional standards.

b. Search by search warrants is seldom used. A search warrant is seldom used. A search warrant for search of the person without arrest is possible but hightly improbable.

c. Majority of searches of person are made under the category of search incidental to arrest.

d. Right to search. English and American law always has recognized the officer's right to search a person who has been legally arrested. The right to search applies to arrest for misdemeanors. Generally speaking, there must be a physical arrest, and an arrest for failing to stop for a stop sign and the issuance of a summons for that violation does not justify a search of the driver's person. Where the officer does ordinarily arrest; i.e., drunk driving, reckless driving, etc., would constitute traffic violation arrest in which a search would be lawful.

e. Legal basis of right to search. Law gives right to the officer to search, for three reasons:

1) Protect officer against harm.

2) Deprive prisoner of potential means of escape.

3) Prevent destruction of evidence by arrested persons.

f. The arrest must be lawful. If the arrest of a person is unlawful, any subsequent search made incidental to the unlawful arrest is illegal.

g. The arrest must be bona fide. If used by officers as a pretext to search a person, the search is unreasonable.

h. The search - who may search. The search of the person, incidental to arrest should be made by one of the arresting officers. It has been held that where the arrest made by one officer and and search by another, search was unlawful even though the searching officer was an official supervisor.

i. Time and place of search - search must <u>follow</u> the arrest, <u>not precede</u> it. The search must be contemporaneous with the

arrest - - it must follow so closely upon the arrest as to be a part of one continuous transaction. This will seldom present a problem.

j. Extent of search.

1) In general, "person" includes both the physical person and physical surroundings which may be deemed an extension of the person... articles under his immediate physical control, all that is on the person, or that which the body can immediately control.

2) Packages, suitcases, etc.

3) Body cavities (including anal canal).

a) Probable cause to believe contraband is concealed in the body cavity.

b) Actual search made by a doctor with acceptable methods.

c) Physical force was only that necessary to make him assume position for search.

d) Search made in a brutal and offensive manner, violates due process and is unreasonable.

4) Blood samples - it has been upheld that a blood sample taken from defendant when he is unconscious was not a violation of the Fourteenth Amendment.

k. Extent of seizure from the person.

1) In general, officer is not limited to "Fruits of crime, instrumentalitites of crime, weapons of escape and contraband".

a) Anything found, including documents purely evidentiary in

nature may be taken, retained and used as evidence so far as relevant.

b) This is an exception to the general rule that those things which are purely evidentiary may not be searched for and seized at all with even a search warrant.

2) Specific articles: Some things held to be lawfully taken during search of a person and properly admitted in evidence; letters, stolen letters and telegrams; prescription blanks; paper money, identified by number as used in crime; telephone number of prospective employee in illicit business; lottery materials; contraband found on an arrested parole violator, even though the contraband was unrelated to the parole violation. Clothing seized from defendant's person.

3) Unknown articles: Arresting officer is free to take hold of unknown articles he sees the accused trying to hide... dangers of weapon.

4) Instrumentalities, Fruits, or contraband outside officer's jurisdiction.

5) Abandoned property.

6) Person property - taken for safekeeping of prisoner...custodial duty.

l. Search by consent - searches of the person are rarely by consent. Burden of showing that such a consent was obtained is upon the prosecutor.

K. Search of premises by search warrant.

l. In general:

a. Notice of authority and purpose before effecting a forcible entry.

b. Trivial defects in the warrant or search do not call for suppression of the evidence.

2. Obtaining the search warrant:

   a. Affidavit...who may sign, etc.

   b. Probable cause...(same thing as reasonable grounds)...where facts and circumstances within the officer's knowledge exist and of which he has reasonable trustworthy knowledge of information are sufficient in themselves to warrant a belief that a crime has been or is being committed. The information must warrant a reasonable belief that fruits of crime, instrumentalities, or contraband are in place to be searched. Probable cause requires more than mere suspicion. Does not require same quantity or quality of evidence needed to prove guilt at a trial. Information must indicate a current probable cause. Hearsay evidence may be used as the basis for a search warrant, providing the officer can show information of his own which gives a substantial basis for crediting the hearsay information. Hearsay evidence of a confidential and reliable informant alone is not sufficient for probable cause for a search warrant. Evidence may be "pooled" to establish probable cause for a search warrant. Information cannot be the result of an illegal search and seizure.

   c. Identifying data.

      1) Of property to be searched for and seized...the description of gambling equipment need not be so precise as stolen goods.

      2) To whom issued.

      3) By whom issued.

L. Search of premises - incidental to arrest.

   1. In general:

      a. Recognized exception to rule of search and seizure.

b. Without a warrant, many judgments are necessary on the part of the officer whereas the warrant answers the question initially.

2. Basic requirements of arrest and search.

a. Arrest must be lawful.

b. Arrest must be bonafide.

1) Sham cannot be used, even if arrest is lawful.

2) If officers entered premises to conduct a genuine interview, what is seen can be seized.

3) If officers interviewed as a pretext to see what was present, seizure is illegal.

c. Arrest must precede search.

d. Probable cause for search of premises.

1) While arrest of person given automatic right to search person, it does not give right to search premises.

2) Must have reasonable cause to believe instrumentalities, fruits, contraband - subject to the crime, in particular, susceptible of being hidden on these premises.

3) If there is no reason to believe that one or more things subject to seizure in the case for which the arrest was made are present, then search is exploratory and unreasonable.

e. Exploratory search is made for nothing in particular, but for anything which can be turned up. Rule forbidding exploratory searches does not prevent the officer from taking something in open view, which is evidence or contraband.

f. Search must be contemporaneous with arrest.

1) Search must follow, not precede it.

2) Length of time for searching is governed by what is sought.

g. Search must be for things subject to search and seizure. Examples: Instrumentalities, weapons, contraband, etc.

h. Presence of defendant. Good practice to keep person arrested present during the search.

3. Arrest outside premises.

a. General rule.

1) Generally means premises cannot be searched.

2) This does not rule out consent.

b. Exceptions of general rule.

1) Cases where defendant's jumped out of a building on approach of officers and was taken back.

2) Where a defendant emerged from a one-room apartment was arrested, possessed narcotics and key to apartment, was taken to apartment, which was searched.

c. Deliberate delay of arrest in order to avoid outside arrest is improper if convenient arrest could be made outside, but may be justified if reason is security of arrest, prevent possible escape.

d. Fraud to avoid arrest. Unreasonable if fraud, deceit or misrepresentation used to lure person to be arrested inside.

4. Arrest inside the premises. In general:

a. It must not be an exploratory nature.

b. Area must not exceed limits of the arrested persons control over the premises.

c. Must be for instrumentalities, fruits, etc., for crime person is arrested for.

d. Search only as intensive and extensive as would be appropriate to discovery of things sought.

M. Search of premises by consent.

1. In general, consent searches often difficult to prove to the satisfaction of the courts, since they must be shown conclusively to have been voluntary.

2. Burden of proof of this voluntariness results upon prosecution: Some even suggest consent in writing, with constitutional right to object on the paper. Waivers are more difficult to prove where defendant is a foreigner, illiterate, or of low intelligence.

3. Elements of a voluntary consent.

a. Specific consent to search.

1) Consent to enter doesn't imply permission to search.

2) Consent to search must specify what permises can be searched.

3) Voluntary confession strengthens the consent proofs.

4) Denying guilt rules out chances of showing consent to a large degree.

5) Other courts indicate a consent might be voluntary gambling on materials not being found.

b. Unequivocal language of suspect must show unmistakable intent to waive the constitutional right to refuse search.

c. Absence of fraud. Consent will be void if obtained by subterfuge or misrepresentation.

4. Extent of search and seizure.

   a. Governed by latitude given in the consent.

   b. Revocation by defendant during search ends consent.

   c. Voluntary consent given is valid for crime under investigation and other crimes.

5. Capacity to consent.

   a. Question usually arises when consent involves third party other than the suspect. General rule is that valid consent can only be given by person who has immediate and present right to posses those premises.

   b. Owner or landlord - rooms rented, etc.

   c. Tenant, subtenant, or roomer - premises which he has use, rights, etc.

   d. Joint tenants - common occupants. "A" can consent to search of apartment which "B" lives in also.

   e. Partners - either may give consent to search, evidence can be used against other or both.

   f. Spouse.

      1) Lower federal courts have upheld searches consented to by one spouse.

      2) General things reserved for one spouse's use can't be consented to by other spouse; i.e., desk, locker, suitcase.

      3) If spouse refuses consent, consent by other spouse is not valid.

      4) If partnership is involved among spouses, valid consent may arise.

   g. Agent. A person left in complete charge of the premises as general agent can

consent to search validly. This does not mean merely an employee.

h. Employee - generally cannot consent to a search of anything other than his own equipment or supplies furnished.

i. Custodian of personal property belonging to another.

1) If permanent storage is on premises not occupied by defendant, then the custodian probably can grant permission.

2) If storage is temporary, then no.

3) If container is locked, or notice that it is not to be disturbed has been given the custodian by the owner, then no.

4) If the materials are merely hidden, then yes.

j. Parents, relatives, children.

1) Parents can authorize consent search against a minor child.

2) Child can authorize a search as to himself but not as to his parents, however.

k. Guest or visitor.

1) A mere guest cannot give consent to search against the premises' possessor.

2) Householder may give consent to a search of his dwelling, that is valid against a visitor or a temporary non-paying guest. Includes residence of ten days. Permanent guests paying do not retain possessory rights.

N. Search of vehicles.

1. In General.

a. Officers authority generally wider than in the case of searches of persons and places - (Carroll vs. U.S.).

b. Vehicles may be searched:

1) On probable cause to believe it contains that which offends or is against the law.

2) By search warrant.

3) Incidental to lawful arrest.

4) By consent of the owner or driver.

5) After lawful impoundment.

2. What is not a search. It is not considered a search to merely see what is open to view or visible to the eye or on the vehicle, or by artificial light.

a. Not a search to shine flashlight into vehicle at night.

b. Opening door of car not necessarily a "search."

3. What is not a seizure.

a. Abandoned property.

b. Surrendered property.

4. Search of a vehicle on probable cause alone.

a. In general.

1) On probable cause to believe it contains something subject to seizure and destruction.

2) Where probable cause exists, a vehicle in mobile condition may be searched without a search warrant, an arrest or consent.

3) General federal law is unique - practical response to fact that if searches were not allowed, vehicles could be used to flout the law. Mobility eliminates search warrant likelihood.

4) Probable cause applies to misdemeanor as well as felony.

5) Right to search a vehicle on probable cause alone does not include right to search an occupant. If occupant is to be searched, he must first be arrested or give his consent or be subject of search warrant.

b. Definition of probable cause.

1) Probable cause exists where facts and circumstances within the knowledge of the officers, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Same thing as reasonable grounds.

2) Does not mean that every traveler may be searched at the officer's whim, caprice or mere suspicion.

3) Does not mean that the officer must have sufficient evidence to prove criminal guilt at a trial.

4) Essential requirement that all information on which officer's actions are based were in his possession prior to search. Not legalized by successful location of instrumentalities, fruits, etc. As a minimum, officers should have facts or information that would authorize the issuance of a search warrant had one been applied for.

5) Generally, if probable cause exists to search a motor vehicle, it exists for search of occupants.

c. How is probable cause determined?

1) In part from fellow officers, other persons, telephone, radio, etc.

2) Usually informant's facts will require added information to establish.

3) Flight by auto might be an element.

d. Elements of probable cause.

1) Flight from a marked police cruiser.

2) Admissions by driver might be an element.

3) Prior knowledge of habitual violators may be an element, but alone would not be enough.

4) Contraband in plain view.

5) Throwing an article from the vehicle, in an apparent attempt to dispose of it.

6) Sensory perception may provide an element; i.e., nose, ears, etc.

e. Summary: Usually one single element of probable cause not sufficient to justify a search or an arrest.

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ADMISSIONS AND CONFESSIONS

INTRODUCTION:

The Miranda vs. Arizona decision in June 1966 has received considerable publicity and controversy. Many of the experts have interpreted the case in a different manner than other experts. It does seem fairly well certain that, at this writing, most of the techniques of interrogation are still being utilized by most police agencies. In fact, studies indicate that up to fifty percent of those suspects advised of their rights regarding self-incrimination and counsel agree to discuss their situation with the police officer. Interrogation has not been completely eliminated by the Supreme Court. It has been limited by that court and many cases which might otherwise be solved are unsolvable.

Right or wrong we, as police officers, must accept the rule of law as it stands, today and hope for improved conditions. We must also prepare ourselves to utilize those circumstances which are conducive to fair, just treatment of those who waive their rights to counsel through civilized and humane questioning. We must also be prepared to use those techniques which will elicit the truth from a suspect. This can best be accomplished through the development of techniques and skills as police officers in all ranks.

The ability to interview witnesses has become even more paramount as a result of the Court rulings of this decade. The patrolman or deputy must be able to draw out every bit of information available. The skills and techniques necessary for this important phase of police work are interrelated to that of interrogation but are also distinct in other ways.

I. The Dilemma

A. Many criminal cases, even when investigated by the most qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.

1. For example, a man is hit on the head while walking home late at night. He did not see his assailant, nor did anyone else. A careful and thorough search of the crime scene reveals no physical clues.

2. Or consider the case wherein the bodies of three women vacationing in a wooded resort area are found along side a foot trail, the result of physical violence, and no physical clues are present.

3. In cases of this kind---and they both typify the difficult investigation problem police frequently encounter--how else can they be solved, if at all, except by means of the interrogation of suspects or others who may possess significant information.

B. Criminal offenders, excepting those caught in commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy, and for a period of several hours.

1. Self-condemnation and self-destruction not being normal human behavior characteristics, people will not ordinarily utter unsolicited, spontaneous confessions.

2. It is impractical to expect any but a very few confessions to result from a guilty conscience unprovoked by an interrogation.

3. It is impractical to expect admissions and confessions to be obtained under circumstances other than privacy.

a. Recourse to everyday experience will support the basic validity of this statement.

1) In asking a personal friend to

divulge a secret, or embarrassing information, one carefully avoids making the request in the presence of others.

2) Same psychological factors are present in the police interrogation.

b. This practical psychological requirement to privacy during a police interrogation calls for a consideration of the accused's constitutional right to counsel.

1) Does the right to counsel come into being at the time of arrest, or only when the judicial process begins?

2) If the right is considered to exist immediately upon arrest, does the opportunity for interrogation still exist as a practical matter?

C. In dealing with criminal offenders and consequently also with criminal suspects who may be actually innocent, the interrogator must of necessity emply less refined methods than are appropriate for the transaction of everyday affairs by and between law abiding citizens.

1. In dealing with most criminal offenders, it is impractical and futile merely to give them a pencil and paper and trust that their conscience will impel them to confess.

2. By and large their crimes are the result of some motive and that same self-interest is not easily removed.

3. Police officers untrained and ill-equiped to conduct proper and effective interrogations are inclined to resort to physical abuse, threats, and promises to obtain their objectives. Such methods are to be condemned, and more refined interrogation techniques used in their stead.

II. Brief History of Admissions and Confessions.

A. Historically, the inquisitors could not inflict any punishment for heresy.

1. The mission of the Inquisition was to save souls, not to maltreat bodies.

2. Its only vested power was to assign the proper penance for those who sought redemption and absolution for their sins.

3. The inquisitors reasoned and held that any sentences imposed were not penalties such as those dealt out by secular judges, but were wholly for the good of the soul and to cleanse it of sin.

4. It was a distinction without a difference that probably did not appeal greatly to the condemned heretic.

5. Nevertheless, the inquisitors were most meticulous in obeying the mandates of the Church in not staining their hands with blood, in not causing the loss of life or injury to body or limb by their words or acts.

   a. When subject to burning, the poor heretic was not condemned to death, but merely had the "protection of the Church" withdrawn from him.

   b. Even when a person was condemned to lifelong imprisonment, he was merely told to take himself to the prison and to confine himself there, performing penance on bread and water.

6. Thus in the days of the Inquisition it was an established and universal belief that the soul could be cleansed of any sin by agony of the flesh.

III. The Method Utilized by Police in the Early 1900's as Reported by the Wickersham Commission.

A. The term "third degree" as defined and used in this report.

1. Defined. "The employment of methods which inflict suffering, physical or mental, upon a person, in order to obtain from that person information about a crime."

2. The practice of the third degree method is reported to involve the violation of such fundamental rights as those of:

   a. Personal liberty.

   b. Bail.

   c. Protection from personal assault and battery.

   d. The presumption of innocence until conviction of guilt by due process of law.

   e. The right to employ counsel who shall have access tohim at reasonable hours.

3. Theses rights are reported to be violated as follows:

   a. Protracted questioning of prisoners.

   b. Threats and methods of intimidation, adjusted to age or mentality or in combination with other practices.

   c. Physical brutality such as the rubber hose beatings, the water cure, teeth being knocked out or loosened.

   d. Holding of prisoners "incommunicado" unable to get in touch with family, friends, or counsel.

   e. Brutality in making an arrest.

B. Variety of forms the third degree took.

   1. May roughly be divided into two kinds accordingly as physical or mental suffering was inflicted.

   2. They considered mental types to be more prominent, but reported that many instances wherein force or threats were used.

   3. The following are reported to have been among the instruments and methods used in various parts of the country.

a. Threats with weapons.

b. Beatings with fists.

c. Constant awakening at night.

d. Deprivation of food and sleep.

e. Beatings with rubber hose, telephone book, etc.

4. While in some cities the administration of the third degree appeared to be a disorganized affair, in others it was a more controlled process.

IV. Criminal Interrogation as Practiced Prior to the Escobedo and Miranda Court Decisions.

A. The methods of questioning those suspected of crimes have changed immeasurably from those utilized during the Inquisition or during the early 1900's.

1. No longer are such devices of torture even thought of.

2. It is accepted by all law enforcement officers everywhere in the United States that the third degree methods as described are no longer tolerated either by the court or the public.

3. Leading writers in the legal field and law enforcement field clearly state that none of the methods of interrogation utilized by progressive law enforcement agencies are apt to induce an innocent person to confess to a crime he did not commit.

a. Some methods must be conceded to be "unfair" to the person under interrogation.

b. However, these do serve the valuable purpose of bringing criminal offenders to the bar of justice and end their criminal careers.

B. The modern police interrogator relies on intelligence and psychological factors to induce an admission or confession rather than physical maltreatment.

1. He is aware of what external factors which may influence the suspect or witness.

   a. The perception by the witness by means of one or more of the physical senses.

   b. Motivating influences which cause persons to give information.

2. He is aware of the obstructions to interviewing witnesses.

   a. An anti-police attitude.

   b. Fears retaliation by the culprit or associates.

   c. Fears for the safety of his family or friends.

   d. The problem of semantics.

3. He is aware of certain types of suspects and witnesses and what approaches have been more successful with these.

   a. With the fearful suspect, find out why he is afraid.

   b. With the distrustful suspect, gain his confidence.

4. He enters the interview or interrogation with all the available facts.

   a. About the case.

   b. About the subject.

C. The modern police interrogator is cognizant of the psychological factors that supplement and lead to a successful interrogation.

   1. The necessity of privacy for interrogations is still recognized as a principle factor.

      a. The Degnan murder case in Chicago stresses its importance. The accused intended to confess but refused when confronted with doing so before a large group of law enforcement officers.

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b. Everyday experience illustrates the desirability of privacy.

c. The best arrangement is one interrogator with one subject.

d. If there are two subjects to be questioned they are to be kept separated.

2. Place of interrogation is important to privacy.

a. The most ideal place is at headquarters in a quiet room with few or none of the usual police surroundings.

b. The interrogation room should contain as few distractions as possible.

c. No barrier is allowed to separate the interrogator and the subject.

3. Time is made to appear limitless as far as the interrogator is concerned.

4. A preliminary period of casual conversation is attempted by the interrogator to establish communication with the subject and to determine his "truth-telling style."

a. Generally consists of irrelevant questions.

b. Puts the subject at ease and helps build rapport.

c. Some common ground for discussion is sought.

d. Subject's intelligence and sense of values and standards are also determined.

D. The methods used in the interrogation of suspects.

1. Emotional suspects whose guilt is definite or reasonably certain.

a. Typical subjects are those who have committed crimes while in the heat of passion, anger, or revenge; first offenders in many cases; also accidental offenders.

b. An air of confidence in the subject's guilt is displayed.

   1) Not a bullying attitude.

   2) But one which leaves the impression the interrogator is sure of himself and that he means business.

c. The circumstantial evidence indicative of guilt is pointed out to the suspect.

d. Attention is called to the subjects physiological and psychological "symptoms" of guilt.

   1) Dryness of the mouth.

   2) Excessive bodily movements, etc.

e. Subject is sympathized with by being told anyone else under similar circumstances might have committed a similar offense.

f. A subject's guilt is often reduced by the moral seriousness of the offense being minimized.

g. The subject is sympathized with also by:

   1) Condemning the victim.

   2) Condemning the accomplice.

   3) Condemning anyone else upon whom some degree of responsibility might conceiveably be placed for the act.

h. Friendship is often expressed by the interrogator in urging the subject to tell the truth.

   1) Friendly gestures like a pat on the shoulder or knee (male, male only).

   2) Urging the subject to tell the truth for the sake of his own conscience, mental relief, as well as for the sake of everybody concerned.

3) The friend and enemy act wherein one interrogator pretends to be very displeased with the subject and his continued denial of guilt, while another interrogator sympathizes with the subject and is constantly friendly and reassuring throughout the interrogation while the other persists in his attitude.

i. Rather than seeking a general admission of guilt at first, some detail pertaining to the offense is usually asked.

1) Were you trying to scare him when the gun went off?

2) Were is your gun now?

2. Non-emotional offenders whose guilt is definite or reasonably certain.

a. Used with those who experience little or no feeling of remorse, mental anguish, or compunction as a result of their criminal act.

1) Who for this reason, are only partially reponsive to a sympathic approach.

2) Their realistic mental attitude demands as a prerequisite to any admission or confession, a showing that their guilt can or is established by other more tangible means.

b. Typical subjects are those persons who have committed crimes for mercenary gain (robbery, burglary) and particularly those offenders who are repeaters.

c. With such subjects, the futility of their resistance is pointed out.

d. The subject's pride is appealed to by well-selected flattery or by a challenge to his honor.

1) How did an intelligent person like you get mixed up in an affair like this?

2) You're not yellow, are you? Can it be you're afraid of the other fellows?

e. The grave consequences and futility of a continuation of his offensive behavior is pointed out.

f. Often when unsuccessful in obtaining a confession regarding the offense in question, an admission about some other minor offense is sought to be used as a wedge with the more serious crime.

g. When co-offenders are being questioned and the previous techniques have been ineffective, one suspect is usually played against the other.

3. Interrogation of suspects whose guilt is doubtful or uncertian.

a. Three courses or approaches are available:

1) From the very outset of the interrogation the subject may be treated as though he were actually guilty of the offense in question.

2) The subject may be treated as though he were considered innocent of the offense.

3) The interrogator may assume a neutral position and refrain from making any implications until such time as the subject discloses some information or indications of either his guilt or innocence.

b. In order to allow the interrogator some basis for judgment of the relative innocence or guilt of the suspect the following techniques have been used and recommended.

1) The subject is asked if he knows why he was brought in for questioning.

2) Detailed information is sought by the interrogator about the suspect's activities before, at the time of, and after the offense in question.

3) The subject's alibi is tested by such methods as:

a) Best means is by actual investigation.

b) Consider the alibi in light of subject's account of his activities prior to and since the offense.

c) Any alibi couched in general terms should be questioned in detail.

d) Ask the subject if he observed a supposed occurrence at the time and place he mentioned.

e) Have the alibi reduced to writing at one period and then done again at a later time and then compare the two.

4) The suspect is asked to relate all he knows about the occurance, the victim and the other possible suspects.

5) When certain facts suggestive of the subject's guilt are known, he is asked about these in a casual manner as though the correct answers were already known.

6) At various intervals the subject is also asked certain pertinent questions in a manner as though the correct answers are already known.

E. General suggestions regarding the interrogation of suspects and offenders.

1. Patience and persistance are demanded.

2. Think in terms of what you might do or say, or how you would react, if you were the subject under interrogation.

3. Make no promises when asked, "What will happen to me if I tell you the truth?"

4. Detailed notes regarding the conditions and circumstances under which the confession was made should be kept.

5. Remember that a confession is not the end of the investigation.

   a. Many investigators have had the impression that once a confession has been obtained the investigation is ended.

   b. A confession that is unsubstantiated by other evidence is far less effective at trail than one that has been investigated and subjected to verification or supporting evidence.

F. The lie-detector technique utilizing the polygraph machine for questioning those linked to a crime.

   1. It is a demonstrated fact that such instruments are capable of producing a record of physiological phenomena that may be used as a basis for the application of a reliable technique of diagnosing deception.

   2. Polygraph instruments used for lie-detection purposes are essentially pneumatically operated mechanical recorders of changes in blood pressure, pulse, and respiration, supplemented with a unit for recording the G.S.R.--(psychogalvanic skin reflex). An additional unit in the Reid polygraph permits a recording of certain muscular activity, particularly muscular pressure exerted by the subject's forearms, thighs, or feet. The bloodpressure-pulse, respiration, and G.S.R. are recorded simultaneously and continuously on the surface of moving graph paper driven by a small electric motor.

3. The test procedure briefly described.

   a. Lie-detector tests are to be conducted in a quiet, private room.

   b. As part of the preliminary preparation, the examiner obtains from the interested investigators in the case, all the available facts and circumstances forming the basis of the accusation or suspicion directed against the persons to be examined. This information is essential so the examiner can ascertain how to properly conduct the interview and which questions should be asked of the subject during the test.

   c. Before beginning the test, the subject is informed of the purpose of the examination and the questions which will be asked. This interview will provide the examiner an opportunity to observe and make notes of such characteristics which the subject might exhibit during the actual test that could interfere with it, and would be useful to help the examiner make proper evaluation of such interfering factors.

   d. Regarding the questions to be asked, they should be unambiguous, unequivocal and thoroughly understandable to the subject. Also, they should be couched in terms and words customarily used and understood by the subject.

   e. A control question test is the first one administered to a subject usually. An example of such a control question is: "Did you ever steal anything in your life?" The purpose of the questions of this type is not to get the full truth about the "control" situation, but rather to have available a question which the subject will actually lie. This will supply a reaction for comparison with the reactions to questions regarding the principal offense itself. In addition to control questions relevant to the crime under investigation, are totally irrelevant questions which deal with a definitely known fact. All three types of questions are so interspersed that a pattern can be readily identified if deception is attempted by the suspect.

f. Following the first test, a second test is usually administered involving several variously numbered cards. The subject is instructed to choose one card and then replace it face down with the others. He is then to answer no to each question concerning the card he selected. In other words, his answer to one of the questions will be a lie. The purpose is to establish within the subject's mind the validity of the lie-detector technique as the examiner identifies the card selected by the subjected.

g. The third test administered is conducted in much the same manner as the first, with the same questions being asked again and usually in the same order.

h. It may be simply stated that if the control question response is greater than the responses to the questions about the principal offense under investigation, the subject may be considered as telling the truth about the principal offense, particularly when there is positive evidence that his answer to the control question was a lie.

On the other hand, if the responses on the principal test questions are greater than on the control question, this fact is suggestive of deception regarding the principal offense.

i. Although the psychological effect of the mere presence or use of a lie-detector is sometimes sufficient to induce a confession from a guilty subject, a period of skillful interrogation after the completion of the tests is usually required before a confession is forthcoming. The interrogation tactics and techniques previously discussed, although primarily used by the interrogator who does not have the assistance of a lie-detector, are well suited for interrogations conducted by a lie-detector examiner.

4. Practical utility of lie-detector tests.

a. Lie-detector tests--with instruments recording such physiological phenomena as changes in blood-pressure, pulse, respiration, psychogalvanic skin reflex, and muscular

activity--are of great practical utility in both criminal and personal investigations, provided the examinations are conducted by competent and experienced examiners.

b. With the aid of the lie-detector technique, it is possible to detect deception with much greater accuracy than is otherwise possible.

   1) According to the staff of John E. Reid and Associates, the lie-detector technique, when applied under the most favorable conditions, is capable of an accuracy of 95% with a 4% margin of indefinite determinations and a one percent margin of possible error.

c. The instrument, the tests, and the accompanying procedures have a decided psychological effect in inducing confessions from guilty persons.

   1) On occasion suspects have confessed their guilt while waiting in the laboratory to be tested.

   2) There are also instances when suspects have confessed immediately after the examiner has adjusted the instrument preparatory to making the test.

   3) It is also effective to display to the suspect the records of the test and point out the deception criteria while reminding him these records are of his physiological changes and not something placed there by the examiner. Such a display can have a shocking effect on the person who has maintained considerable poise and outward composure.

d. By means of this technique innocent persons are readily eliminated as suspects, thus sparing them any further fear, embarrassment, or inconvenience, and at the same time expediting the search for the guilty offender.

   1) Valuable time can be saved when a large number of suspects exist to a crime.

3. How this methods application has been modified by the court is next to be discussed.

V. The Law Concerning Criminal Admissions and Confessions.

A. The legal distinction between an admission and a confession.

1. An admission is merely an acknowledgement of a fact or circumstance from which guilt can only be inferred and it requires proof of other facts which are not admitted. It is a statement made without any intention of actually confessing guilt.

2. A confession is a direct acknowledgement of the truth of the guilty fact charged, or of some essential part of it. A confession implies that the matter confessed constitutes a crime.

B. Development of the current doctrine regarding admissions and confessions.

1. The Supreme Court derives, as interpreter of the Constitution, its authority to determine what constitutes due process insofar as the states operations in the ciminal procedure arena are concerned through the Fourteenth Amendment.

a. Basically, the 14th Amendment provides no state shall deprive any person of life, liberty, or property without due process of law.

b. Although the 14th Amendment was passed shortly after the Civil War, it was not until many years later the Court began to examine the basic operation of state criminal procedure.

2. Brown vs. Mississippi, 297 United States 278 (1936), was the first case involving police interrogation on a constitutional level so far as the states were conderned.

a. In Brown, it was alleged the defendant's confession to murder was obtained by what amounted to physical torture.

b. The court reversed this conviction on the ground that the confession, because it had

been obtained by torture, was not necessarily trustworthy, so that Brown had been deprived of a fair trial when his conviction was based upon untrustworthy evidence.

3. Between the decision in Brown in 1936 and the decision in Miranda in 1966, there was a steady stream of cases that manifested a process of gradual development of doctrines.

   a. In Ashcraft vs. Tennessee, 322 United States 143 (1944) the court laid down the rule that instead of requiring that confession be voluntary or trustworth, as previously required, the court insisted that they should be free of any "inherent coercion". In its consideration of the Ashcraft case, the majority of the court made what appears to be an abstract psychological appraisal of a 36 hour interrogation and decided then an interrogation of that duration was "inherently coercive," for which reason the confession was held inadmissable regardless of the police practices upon the particular defendant and regardless of the otherwise trustworthiness of the confession.

   b. In the decision of Haley vs. Ohio, 332 United States 596 (1948), the majority stated that in any case where the undisputed evidence suggested that coercion was used, the conviction would be reversed "even though without the confession, there might have been sufficient evidence for submission to the jury.

   c. In three 1949 cases of Watts vs. Indiana, 338 United States 49, Turner vs. Penn., 338 United States 62, and Harris vs. S. Carolina, 338 United States 68, where each of the defendants had been subjected to extensive interrogation over a period of several days and by relays of police officers, the Supreme Court reversed the convictions. In each case, four members of the majority found fault not only with the length of the interrogation and the relay method of questioning, but also with:

      1) The failure to take the defendants before a committing magistrate for a preliminary hearing.

2) The absence of "friendly or professional aid" at the time of their interrogation.

3) The neglect to advise the defendants of their constitutional rights.

Justice Douglas even went so far as to favor the outlawing of any confession, however freely given, if it was obtained during a period of custody between arrest and arraignment. (338 U.S. at p. 57).

d. In the case of Spano vs. New York, 360 United States 315 (1959), the court clearly stated that the key to the exclusion of confessions was no longer the issue of the trustworthiness of the confessions. In reversing the conviction based on the confession, the court stressed that its opinion was based not on the lack of trustworthiness of the confession, but was instead tied to the impropriety of the police action in putting pressure upon an individual to make him testify against his will. In concurring opinions, the majority reiterated the principle announced in Powell vs. Alabama, 287 United States 45, that the right of counsel extends to the preparation for trial as well as to the trial itself.

e. With this point well established, the Supreme Court in a series of cases over the succeeding five years, in one instance after another, have held the use of various techniques constitutes undue pressure resulting in "involuntary confessions."

f. In Gideon vs. Wainwright, 372 United States 335, the court reaffirmed Powell vs. Alabama and ruled that in all criminal prosecutions the indigent accused shall enjoy the right to have the assistance of counsel for his defense. The court specifically held that the principles encompassed in the Sixth Amendment were all fundamental without exception and therefore completely applicable to the states under the Fourteenth Amendment due process clause.

g. In Escobedo vs. Illinois, 378 United States 478 (1964) the Supreme Court did not rely

on the "undue pressure" rationale of coerced confessions to reverse Escobedo's conviction, but instead approached the area of police interrogation along a new path opened up by the Gideon decision--- the right to counsel.

1) Escobedo, who had been arrested on suspicion of homicide, was denied his request to see his lawyer. When the lawyer actually came to the station-house to see Escobedo, the lawyer's request to see his client was also denied. After 4 hours of interrogation, Escobedo confessed. The court ruled that this denial of access to counsel by the suspect or counsel to the suspect was unlawful, and thus would require the exclusion of Escobedo's statement as being obtained in violation of his Sixth Amendment right to counsel.

2) This holding, however, was limited to the specific facts of the Escobedo case. The court specifically noted this was a case where:

   a) The investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect.

   b) The suspect had been taken into custody.

   c) The police had carried out a process of interrogation that lent itself to eliciting incriminating statements.

   d) The suspect had requested and had been denied an oportunity to consult with his lawyer.

   e) The police had not specifically warned him of his <u>absolute constitutional</u> right to remain silent.

All this, the court noted, added up to a denial of the assistance of counsel in violation of the Sixth Amendment as made "obligatory upon the states by the Fourteenth Amendment" which in turn required the exclusion of any statements elicited during the interrogation.

3) During the two years following Escobedo the state and lower federal courts placed varying interpretations on the holding.

   a) A number of state courts ruled that Escobedo did not apply unless counsel was trying to get into the interrogation room or unless counsel had instructed the police to stop questioning his client. (See State vs. Howard, 383 S.W. 2d. 701, 1964. People vs. Gunner, 15 N.Y. 2d. 226.)

   b) A larger number of state courts have held that the Escobedo rationale did not come into play unless the suspect had specifically requested counsel--- even though it did not appear he was either advised of his right to counsel or his right to remain silent.

   c) In People vs. Dorado, 42 Cal. Rptr. 169 (1965), a more lenient interpretation of Escobedo was rendered when that court ruled that court ruled that the constitutional right does not arise from the request for counsel but from the advent of the accusatory itself.

Thus, some courts narrowly restricted the holdings reached in

Escobedo to its facts while others read it broadly applicable even if the specific circumstances mentioned in Escobedo itself were not present.

C. Miranda vs. Arizona--384 United States 436 (1966)--- was viewed even before it was decided as the vehicle by which the court would clarify the Escobedo decision. However, the decision reached in Miranda, while going in the same direction as the Escobedo case, turned out to be more than a mere clarification or modification, but cut a new paty with new signposts.

1. Departures from Escobedo.

a. Miranda rests on the Fifth Amendment privilege against self-incrimination as applied to the states under the Fourteenth Amendment, rather than upon the Sixth Amendment right to counsel. It should be mentioned however, that the Escobedo case did mention the Fifth Amendment even though it was not based upon it.

b. The Miranda case speaks in terms of the presence of counsel during interrogation in order to protect the self-incrimination privilege, whereas Escobedo is couched basically in terms of the right to consult with counsel prior to interrogation. Also while Escobedo was in terms of consultation with one's own lawyer, Miranda is in terms of the right of the person interrogated to the presence of his own counsel of, if he cannot afford counsel, of counsel appointed by the state.

c. Escobedo turned on the focus of the inquiry upon the accused as well as on the fact that the accused in that case had been in custody. The Miranda case rests strictly on the fact of custodial interrogation which the court definded as encompassing any situation in which an individual is taken in custody or "otherwise deprived of his freedom of action in any significant way."

1) In offering this definition, the court appends as a footnote that this is what it had referred to when in Escobedo it spoke of an investigation which had focused on an accused.

2) In any event, it is evident that the concept of a custodial interrogation might encompass far fewer situations than those within the concept of "focus on the accused."

d. Miranda purports to recognize some legislative power to provide other devices to protect against self-incrimination. While it denominates the standards it imposes as constitutionally required, it notes that these are required in order to protect the basic privilege against self-incrimination; the states may well find other means to further that protection. The Escobedo case, in contrast, made no suggestion that there was any leeway in the specific requirements on interrogation that it imposed.

2. The opinion discussed in detail.

a. Part one in which the court deals with the nature of the interrogation process.

1) Notes that all person questioned by police are generally questioned in a room cut off from the outside world.

2) It is evident that in this section the court speaks in terms of police stationhouse, in-custody interrogation yet its eventual definition of "custodial interrogation" appears to be much broader than stationhouse interrogation.

3) The court concludes that this type of police interrogation is "inherently compulsive", relying on several police manuals and the techniques of interrogation described therein.

4) The court concludes that the techniques, as described in an earlier section of this report, inevitably lead to intimidation that in many cases trades on the weakness of the individual.

b. Having established police interrogation is inherently compulsive, the court considers next whether this compulsion violates the privilege against self-incrimination.

1) Primary issue is whether the privilege applies to police interrogation.

2) It was argued it did not because there was no legal compulsion to testify.

3) It was argued that the Fifth Amendment privilege was not fundamental and thus not applicable to the state through the Fourteenth Amendment.

4) The court rejected both arguments on the basis of various precedents, and concluded that the logic behind the Fifth Amendment privilege of self-incrimination was meant to apply to informal compulsion like that imposed through police interrogation.

c. Regulations or safeguards deemed necessary by the court to protect the privilege against self-incrimination.

1) First must come the warning that the individual has a privilege against self-incrimination, more precisely, he has the right to remain silent. It is emphasized by the court that warning must be given in "clear and unequivocal terms." The reasons given for requiring this warning are:

a) Some defendants may be unaware of the privilege.

b) Even if they are aware, it may be too difficult to determine on a case-by-case basis who was not aware of his privilege.

c) The mere fact that the warning is given will help indicate to the suspect an absence of pressure. This in turn tends to overcome the inherent pressure in the police interrogation process by showing that the police recognize the existance of the defendant's privilege and indicate their willingness to abide by his exercise of privilege.

2) The second required warning is that anything the individual says can and will be used against him. The reasons for it being required are:

a) Reinforces the warning that the individual has a privilege against self-incrimination.

b) Makes the individual more aware of the consequences of foregoing his privilege to remain silent.

c. Serves to make individuals more aware they are faced "with a phase of the adversary system--- that he is not in the presence of persons acting solely in his interest."

3) Thirdly, the individual must be told that he has the right to have counsel present during any questioning and to consult with counsel. With this warning the court goes beyond Escobedo in that the individual need not make the pre-interrogation request for a lawyer, but that the offer must be made by the police first. Reasons given for requiring this warning are:

a) The warning of privilege may not in itself be sufficient because the pressure inherent in the interrogation process may overcome the effect of the warning.

b) Even preliminary discussions with counsel prior to interrogation may not be enough, as evidenced by the Escobedo case in which defendant had actually talked with his counsel before he was picked up for interrogation.

c) If the individual does decide to make a statement, counsel according to the court can insure an accurate statement.

d) Though not stressed by the court, it is also clear that counsel will also serve as a witness, an outside third party, and therefore destroy the secrecy surrounding the interrogation process.

4) In order to insure the indigent defendant will have the same opportunity as the rich, he must be told that he can have counsel appointed without cost, and that no questioning will be done until the counsel is appointed and is present.

a) However, if the police decide they will not question the person, the court does not require them at this early stage in the proceeding to obtain the appointment of counsel for the indigent.

d. What must be done after the four warnings have been given.

1) If the defendant indicated "in any manner, at any time prior or during questioning", that he wishes to invoke his privilege to remain silent, then the interrogation must cease.

2) If the individual states he wants a lawyer, then the interrogation must be allowed to consult with his lawyer and to have him present during any subsequent questioning.

3) If the individual indicates he cannot obtain a lawyer, yet wants one before talking to the police, then the police must respect his decision to remain silent.

4) If a lawyer is present, however, and the defendant asks not to make a statement, the court indicates that possibly some questioning may still be done. (Noted in footnote 44 of 384 U.S. 474.)

e. The issue of waiver of these constitutional rights.

1) Term waiver defined: A waiver is ordinarily an intentional relinquishment or abandoment of a known right or privilege. (Johnson vs. Zerbst, 304 U.S. 485, 1930)

2) A heavy burden rests on the prosecution to prove the defendant "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

3) A valid waiver will not be presumed from the silence of the accused after the warnings are given or from the fact that a confession was eventually obtained, but it must be express.

4) The fact that a person gives some information on his own initiative does not waive the privilege if he invokes his right to remain silent afterward.

5) Whatever the testimony of the authorities as to waiver of rights by an accused may be, protracted interrogation before a statement is made, or even "incommunicado incarceration" is strong evidence that the accused did not validly waive his rights.

6) Any evidence that the accused was tricked, threatened, or cajoled into giving a waiver will, of course, show that there was no voluntary waiver. A police

officer cannot, for instance, advise a suspect after telling him of his rights that a lawyer cannot really help him and would be useless, and that therefore he ought to respond to questions, or assert that silence or refusal to answer questions will be evidence of guilt.

f. Consequence of a statement obtained after an involuntary waiver, or resulting from a failure to give the required warnings or to respect the defendant's request to remain silent or to have his lawyer present.

1) Court stresses that any statement obtained in violation of the defendant's rights must be excluded from evidence.

2) This applies to any statement, whether it be a confession or an admission and whether inculpatory.

3) There are limits to this exclusionary rule, however.

a) Applies only to statements obtained as a result of custodial interrogation. For example, if a person should voluntarily enter a police station and state that he wishes to give a confession, the confession would be admissible because voluntary.

b) Statements may be admissible if they were the result of a general inquiry when the person was not under restraint.

c) The court emphasizes that general on-the-scene questioning about facts surrounding the crime is permissible also. (384 U.S. at 477).

4) Some indication of the extent of the burden in showing a waiver is indicated in Westover vs. United States, one of the cases disposed of in the Miranda decision.

In Westover the defendant was held for about 14 hours by local police and interrogated at the time of his arrest late in the evening and again during the next morning. At noon he was turned over to F.B.I. officers who gave him full warning of both his right to remain silent and his right to remain silent and his right to an attorney. At the end of 2 or 2½ hours of questioning, Westover had signed two confessions which had been prepared during the interrogation. The Supreme Court reversed the conviction because these statements had been introduced in evidence. The court said that in "obtaining a confession from Westover, the Federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation." In those circumstances the giving of the warnings alone was not sufficient to protect the privilege. (384 U.S. at 496)

g. Who decided the admissibility of a statement.

1) Under the New York rule the trial judge excluded a confession only if it was clearly involuntary. The matter was left to the jury if the evidence presented a fair question as to the confession being voluntary. In 1964, the Supreme Court in Jackson vs. Denno, 378 U.S. 368, overruled its prior decisions and found this New York rule unconstitutional.

2) The Massachusetts rule requires a specific finding by the trial judge that the confession is voluntary but the jury may make its own determination of the question and ignore the confession entirely if it finds it to be involuntary. Although different in theory from the unconstitutional New York rule, there is little practical difference in the operation of these two rules.

3) Under the third, or orthodox rule, the judge's finding on voluntariness is final. The confession then goes to the jury which considers the circumstances only on the questions of credibility and weight.

According to Justice Edward E. Pringle of the Colorado Supreme Court, the test of admissibility is no longer voluntariness in the test of admissibility is no longer voluntariness in the traditional terminology, but with the Miranda decision, it has become rather the effective advisement of rights and knowledgeable waiver when custodial interrogation results in a statement. He suggests that the problems posed in utilizing the Massachusetts rule are almost insurmountable in light of Miranda. (215--Escobedo - the 2nd Round)

D. Miranda and the applicability of the exclusionary file for derivative evidence.

1. According to the doctrine of the fruit of the poison tree, the products of illegally-obtained evidence are inadmissible in a criminal trial.

2. Evidence of this nature may be obtained through, an unlawful search and seizure, an illegal wiretap, or an improperly obtained confession or admission.

3. There are two or three exceptions or modifications of the doctrine.

a. Facts improperly obtained do not become inadmissible if knowledge of them is gained from an independent source. (Nardone vs. U.S., 302 U.S. at 379, 1937).

1) Some courts carry this concept of "independent source" further and set forth a rule that evidence is not the fruit of a coerced confession if the police would have discovered the same evidence from information

"already in their possession or independently acquired." (Wayne vs. U. S., 318 F. 3d 205, 1963).

2) This standard is somewhat artificial, and its application in certain cases may ignore the realities of the limitation of crime detection.

b. The taint disappears if there is sufficient attenuation between the illegal police tactics and the discovery of the evidence sought to be introduced. (Nardone vs. U. S.)

c. Otherwise inadmissible evidence is admissible if introduced in rebuttal to impeach a defendant's testimony. (Walder vs. U. S. 62, 1953).

4. The form which derivative evidence bears, along with its proximity to the unlawful police tactics is often determinative of its admissibility.

a. Form may be real evidence or intangible evidence, such as confessions or admissions which identify witnesses or accessories to the crime.

b. With regard to certain types of intangible evidence, real evidence and intangible evidence are treated identically for purposes of the exclusionary rule.

1) For instance, a confession given after there has been a police violation is admissible only if the taint has been dissipated.

2) In the United States vs. Bayer, 331 U. S. 532, 1946, the Supreme Court said that the obtaining of a confession by improper methods will not perpetually disable the suspect from giving a confession which can be used against him.

c. Also, in regard to the form of evidence, the court in Smith vs. United States, 324 F. 2d. 879 held that the testimony of an eyewitness to the crime was admissible even though his identity was learned by the police during an illegal detention of the accused. The majority stressed that a witness' freedom of will interesects to determine what testimony he will give and that this human process distinguishes testimony from the evidentiary character of inanimate objects which "speak for themselves."

d. However, in the case of live witnesses there is authority the other way. In a recent District of Columbia case, Smith vs. United States, 344 F. 2d 545, 1965, the testimony of witnesses was excluded because they had been secured by "exploitation" of an illegal seizure of stolen property.

5. The information gained illegally must not lead directly or indirectly to the discovery of evidence sought to be introduced at trial (U.S. vs. Coplon, 185 F. 2d. 636, 1950).

6. The evidence must not be discovered by the exploitation of an illegal investigatory act (Wong Sun vs. United States, 371 U. S. 471, 478).

7. Under Miranda, the interest protected, the psychological security of the accused, is in legal theory no different from the interest protected by the earlier cases, the physical security of the defendant. In either case the purpose of the exclusionary rule is to prevent police intimidation of a criminal suspect, and to guarantee that a confession given while a person is in custody will be free and voluntary product of the exercise of the confessor's will and that derivative evidence obtained therefrom will not suffer the taint of a police intrusion upon the will of the accused.

   a. According to Justice H. B. Cohen, "logic and good sense dictate that the same rule governing admissibility of derivative evidence be applied in a case involving a confession obtained by psychological overbearing as is applied to a confession obtained by physical coercion."

   b. "The result," Judge Cohen states, "is identical in that the information gleamed is tainted evidence and the rule of admissibility should be identical also." (142--Escobedo - the Second Round).

8. In the text of the majority opinion of the Miranda case, however, only one sentence seems to relate to derivative evidence. At the close of Part III, Chief Justice Warren states, "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against (the defendant)" (384 U.S. at 479).

   a. Out of context and on its face, this statement is unclear as to whether or not secondary evidence obtained during an unlawful interrogation may be used against the accused.

b. In favor of a restricted interpretation, one could argue that prior to 1966, no derivative evidence rule had actually been invoked in the confessions area by any federal or state court, even though the motivation to control police interrogation practices through exclusion of confessions was increasingly evident in decisions culminating in Escobedo.

c. In arguing that Miranda does decide the derivative matters, the following statement of Yale Kamisar is significant: "If Miranda is to make any sense, if Miranda is to be taken seriously, if Miranda is to be afforded a real chance of deterring objectionable and impermissible police interrogation practices, then physical evidence obtained as a result of these inadmissible statements must be thrown out." (150, Escobedo-the Second Round).

d. Actually, the choice one makes on the point rests on his personal predilection. One "proof-texts" from the opinions, majority and dissenting, to support his view as to whether the opinion as a whole marks the threshold of a new "era in law enforcement" or the beginning of a decline into chaos. Thus, the local judges in all sections of the country will determine to a large extent the strictness with which the derivative evidence rule with regard to confessions and admissions will be applied in cases which come before them.

E. Unresolved problems resulting from the Miranda decision.

1. What is the nature of custodial interrogation emphasized by the court?

a. The court talks in terms of one who is deprived of his freedom of action in any significant way.

b. Would this apply to the person stopped on the street?

c. Would it apply to a person questioned at his own home?

d. In other words, in what situations removed from custodial interrogation would the warnings be necessary?

e. Exactly what is left of the "focus upon the individual suspect" concept of the Escobedo case?

2. Another question of utmost importance concerns the determination of waiver. What if a person refuses to sign a waiver? Are there also some persons who, because of their peculiar background or low intelligence, would need the presence of a lawyer to waive their rights?

3. Concerning the right to counsel, what will be the means by which a lawyer will be obtained for the indigent?

a. What of the delay involved in getting a lawyer?

b. Will that have a bearing on the duty of prompt arraignment?

4. A fourth question concerns what remains of the right to counsel concept of Escobedo? Does Escobedo continue to have independent validity?

a. This is an area which is somewhat confused now as a result of a recent Supreme Court decision in Wade in which the court ruled a defendant has a right to consult with counsel before appearing in a police line-up.

VI. The Current Police Approach to Questioning of Suspects in Light of the Miranda Decision and the Trend Operating within the Supreme Court.

A. On-the-street questioning.

1. Upon arriving at the scene of a crime and suspect if found, the first question of an officer is usually, "What Happened?"

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