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Jennie Rhine

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CIVIL LIABILITY FOR ILLEGAL ARRESTS AND CONFINEMENTS IN CALIFORNIA

The primary purpose of this note is to explore civil liability in California for false arrests and false imprisonments committed by law enforcement officers. First, however, it is necessary to consider what acts may give rise to liability—i.e. when an arrest or a confinement is illegal. The law of arrest has been written about by many legal authorities, and will, for the most part, be but briefly reviewed. However, two particular aspects of the California law of arrest have been given little attention. The first is a 1957 statute which permits the release, with no appearance before a magistrate, of a person arrested without a warrant; his police record is then to show only that he has been "detained" rather than "arrested." The effect, if any, of this statute on the legality of the arrest will be discussed. The second aspect to be given particular attention is the legally permissible length of confinement between an arrest and the arrestee's release or his appearance before a magistrate.

Assuming that a person has been unlawfully arrested and/or confined, he may have an action for money damages resulting from the false arrest and/or false imprisonment. Traditionally, the offending police officer alone has been liable. However, it appears that under the California Tort Claims Act, adopted in 1963, vicarious liability may attach to the public entity which employs the officer.

Illegal Arrests

The first consideration is the demarcation between legal and illegal arrests. Arrests in California are made by police officers under the authority of Penal Code section 836, which provides that:

A peace officer may make an arrest in obedience to a warrant, or may without a warrant, arrest a person:

1. When he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
2. When a person arrested has committed a felony although not in his presence.
3. Whenever he has reasonable cause to believe that the person

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4 It is impossible to estimate the number of illegal arrests made, since the illegality of a given arrest can be proved only by litigation and since statistics which might reveal possible abuses are scarce. See Barrett, supra note 1, at 27; Foote, supra note 1, at 20-27. However, figures are available to show that a high proportion of people arrested are subsequently released without charges being filed; some of them, by virtue of numbers alone, must have been arrested unlawfully.
to be arrested has committed a felony, whether or not a felony has
in fact been committed.

When an arrest is made pursuant to a warrant, there has been a
judicial determination that the arrest should be made. The police
officer then has a duty to make the arrest.\(^5\) Even though arrests
without warrants are in theory the exceptional case,\(^6\) they in fact
are much more common than arrests with warrants.\(^7\) Because of
this greater frequency and the absence of a prior judicial determina-
tion that probable cause for the arrest exists, arrests without war-
rants are more likely to be made without legal authority. It is clear
that the criteria for making an arrest without a warrant are not
less stringent than those for the warrant arrest,\(^8\) and there is author-
ity for the position that more information is necessary to justify
the nonwarrant arrest.\(^9\)

The California Bureau of Criminal Statistics reports that in 1966, 114,233
adult felony arrests were made; felony complaints were subsequently filed in
only 60,149 or 52.6% of the cases. \textit{Cal. Bureau of Criminal Statistics, 1966
Crime \& Delinquency (Advance) pt. 1, at 10 (Table 2-A), 11 (Table 3-A)}
[hereinafter cited as \textit{1966 Crime in California (Advance)}]. In 1956, the
last year the figures were reported, 264,601 people throughout the country
were released after being arrested without formal charges being filed. \textit{1956
FBI Uniform Crime Reports 64-65}, cited by \textit{Wald, Foreword to Rankin, Pre-
631, 639 n.30 (1964).

There are, of course, reasons that a person might be released which do
not reflect on the basis for making the arrest. For example, proof of guilt
may be technically faulty or complainants may refuse to prosecute. Barrett, \textit{supra} note 1, at 35. See also \textit{1966 Crime in California (Advance) pt. 1, at 5}:
"A certain number of persons arrested on felony charges will, after a review
of the situation by the prosecutor and the police, be released; others will be
turned over to other jurisdictions for prosecution. A substantial number will
finally be prosecuted on misdemeanor charges rather than felonies."


\(^6\) People v. Lathrop, 49 Cal. App. 63, 192 P. 722 (1920) (dictum); Bar-
rett, \textit{supra} note 1, at 18.

\(^7\) Barrett, \textit{supra} note 1, at 26. In its annual report for 1965, the San
Francisco Police Department reported only 4,829 criminal warrants served,
although a total of 50,982 persons were arrested on all charges. \textit{1965 City &
County of San Francisco, Police Dep't Ann. Rep. 30, 35} (no separate tabula-
tion of misdemeanor and felony arrests). A 1960 study of two California
cities shows that one used warrants in 4.3% of its arrests; the other, in 18.5%
of its arrests. Barrett, \textit{supra} note 1, at 38-39. No statistics on whether an
arrest was made with or without a warrant are reported in \textit{1966 Crime in
California (Advance)}.

The proportion of warrant arrests is largely dependent upon the offense,
i.e. warrants will issue in a higher proportion of forgery and check offenses
than most other crimes. \textit{Cf. 1966 Crime in California (Advance) pt. 1, at 6}.


\(^9\) People v. Aguilar, 240 Cal. App. 2d 502, 505, 49 Cal. Rptr. 584, 585
(1966) (dictum). The court draws an analogy from a search warrant, quoting
Johnson v. United States, 333 U.S. 10, 14 (1947): "Any assumption that evi-
dence sufficient to support a magistrate's disinterested determination to issue
a search warrant will justify the officers in making a search without a war-
rant would reduce the [4th] Amendment to a nullity and leave the people's
homes secure only in the discretion of police officers." People v. Aguilar,
An arrest without a warrant is not lawful unless the arrested person has in fact committed a crime or the arresting officer has reasonable cause to so believe. There is no exact formula for determining reasonable cause; each case must be decided on its own facts, as they appear to the arresting officer at the time of the arrest. Generally, reasonable cause exists "when a man of ordinary care and prudence, knowing what the officer knows, would be led to believe or conscientiously entertain a strong suspicion that the arrested person is guilty of a crime, even if there is room for doubt." An arrest without a warrant may not be justified by what is subsequently discovered; the police officer must have reasonable cause for the arrest based on his knowledge at the time of the arrest.

Nor does the subsequent release of the arrested person alter the fact that an arrest has been made. However, it has been suggested that an arrest differs from the "detention" made possible by California Penal Code section 849. A 1957 addition to the section allows any peace officer to release from custody a person arrested without a warrant, without his appearing before a magistrate, if the officer "is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest . . . shall not be deemed an arrest but a detention only." If it were

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10 Cal. Pen. Code § 836. If the crime is a misdemeanor, a further requirement is that the offense be committed in the officer's presence (or that he reasonably believes it has been), in order for the arrest to be lawful. Cal. Pen. Code § 836(1).


15 See Selected 1957 Code Legislation, 32 Cal. St. B.J. 503, 610 (1957), which discusses the effect of the 1957 amendment to the section: "[I]f the person is released his arrest is deemed a detention only. Thus, he may lose any cause of action he might have had for false arrest." See also Cole v. Johnson, 197 Cal. App. 2d 738, 794, 17 Cal. Rptr. 664, 667, where the court said: "Whatever damage they may have suffered by reason of the record of their arrest is mitigated, if not completely repaired, by the provisions of . . . section 849 . . ." (dictum).


"(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

"(1) He is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only.

"(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.

"(3) The person arrested was arrested for a misdemeanor, and has signed an agreement to appear in court or before a magistrate at a place and
true that this "detention" is something other than an arrest, standards for a legal arrest discussed above would not necessarily apply.

However, there seems to be little to distinguish the two in their legal effect. The attempt to differentiate an arrest from a "detention" has been called "a distinction which is without a difference." It is not affected by a subsequent change of name to "detention." As long as there is "even a momentary taking into the custody of the law," there is an arrest. The alteration of labels does nothing more than obscure the fact that an imprisonment has taken place. An unlawful arrest does not become a lawful "detention" because the prisoner is subsequently released by the police.

Thus, a "detention" as that word is used in section 849 is subject to the same requirements as any other arrest made without a warrant. Any nonwarrant arrest is unlawful unless the arresting officer has sufficient information to justify a reasonable belief that the person being arrested has committed a crime, or unless that person has in fact committed the crime. The unlawfulness of an arrest should not be affected by the subsequent release of the arrested person.

Length of Confinement

Even though an arrest is lawful, the subsequent confinement becomes unlawful if there is an unnecessary delay in either bringing the prisoner before a magistrate or releasing him. What constitutes "time designated, as provided in this code."

This portion of section 849 is a departure from prior law under which an arrested person could not be released without having first been brought before a magistrate. See Ex parte Arata, 52 Cal. App. 380, 198 P. 814 (1921); 45 Ops. Cal. Atty Gen. 56, 57 (1965).

One beneficial nonlegal effect of the amendment is to spare the person whose innocence has been established unnecessary detention until a magistrate is available, and the expense and publicity of the preliminary hearing before the magistrate. Another intended effect of the provision allowing the arrest to be recorded as a "detention" is to erase, in part at least, the blot of an arrest record. It allows a person applying for a job to answer "no" to a question asking if he has ever been arrested. 43 Ops. Cal. Atty Gen. 288, 289-90 (1964); see Baum, Wiping Out a Criminal or Juvenile Record, 40 Cal. St. B. J. 816, 825-26 (1965). But employers are usually reluctant to have a person with any kind of police record working for them. See generally 1 Cal. Western L. Rev. 126 (1965). Nothing would prevent an employer from changing his application to read: "Have you ever been arrested or detained?" See, e.g., the form for registration as a law student, required by the Committee of Bar Examiners of the State Bar of California, question number 5: "Have you ever been summoned, arrested, taken into custody, indicted, convicted . . . ?" (emphasis added). It would seem that a student who had been "detained" under section 849 would have to answer affirmatively.

17 ROYAL COMM’N ON POLICE POWERS AND PROCEDURE, REPORT 55, 56 (Cmd. 3297, 1923) quoted in Feote, supra note 1, at 37.
18 CAL. PEN. CODE § 835.
19 W. PROSSER, TORTS § 12, at 58 (3d ed. 1964) [hereinafter cited as PROSSER].
20 See Dragna v. White, 45 Cal. 2d 469, 472, 289 P.2d 428, 430 (1955);
tutes an “unnecessary delay” had been a source of confusion, due, in part, to two seemingly contradictory California statutes. Penal Code section 849 states that “[w]hen an arrest is made without a warrant, ... the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest ... magistrate ....” Penal Code section 825, in the “Warrant of Arrest” chapter of the code, originally read: “The defendant must in all cases be taken before the magistrate without unnecessary delay,” but was amended in 1927 to add: “and, in any event, within two days after his arrest, excluding Sundays and holidays ....” Applying these statutes, courts have considered confinements ranging from 8 hours to 5 days illegal. In contrast, confinements from 10 hours to 7 days have been considered legal.


23 CAL. PEN. CODE § 849 (emphasis added). The basic provision was adopted in 1872 and remained virtually unchanged until the addition, in 1957, of the release provisions.

Since the arrest without a warrant is supposed to be the exceptional situation (see text accompanying note 6 supra), when it occurs (under the common law) the arrested person is to be taken before a judicial officer as quickly as possible, “so that the issue of probable cause may be promptly determined.” Mallory v. United States, 354 U.S. 449, 454 (1957).

“The right to make arrests without warrant is conferred ... in order to prevent the escape of criminals where that is likely to result from delay in procuring a writ for their apprehension; and it was not the purpose to dispense with the necessity of obtaining such writ as soon as the situation will reasonably permit. To afford protection to the officer or person making the arrest, the authority must be strictly pursued; and no unreasonable delay in procuring a proper warrant for the prisoner's detention can be excused or tolerated. Any other rule would leave the power open to great abuse and oppression.” Leger v. Warren, 62 Ohio St. 500, 508-09, 57 N.E. 506, 508 (1900).

24 Cal. Stats. 1927, ch. 616, § 1, at 1044.

25 Saturday has been considered a municipal court “holiday” for the purposes of this section. See, e.g., People v. Mitchell, 209 Cal. App. 2d 312, 320, 26 Cal. Rptr. 89, 93 (1962).


27 Cole v. Johnson, 197 Cal. App. 2d 788, 17 Cal. Rptr. 664 (1961) (10 hours); People v. Lane, 56 Cal. 2d 773, 366 P.2d 57, 16 Cal. Rptr. 801 (1961) (7 days). In People v. Goss, 193 Cal. App. 2d 720, 14 Cal. Rptr. 569 (1961), the court said that defendant’s detention for 27 days between arrest and arraignment was not in violation of CAL. PEN. CODE § 825 because as a parolee he was not “arrested” but merely transferred from constructive to physical custody. Id. at 724-26, 14 Cal. Rptr. at 571-72.

No official statistics are available on the length of time arrested persons are detained before being charged or released. Barrett personally made a survey of two California cities in 1960, and reports these figures: (1) released within 24 hours: City A, 48.3%; City B, 45.4%; (2) released in 24-48 hours: City A, 40.8%; City B, 27.2%; (3) released after 48 hours: City A, 10.9%; City B, 27.3% (3 people out of the total sample). Barrett, supra note 1, at 40.

Release may be delayed in City A by putting a “hold” on the booking sheet of a person arrested for a misdemeanor whom the police want to investigate about a felony. “The effect of the ‘hold’ is to ... require judicial
The cases make no clear distinction between arrests with and without warrants. When the arrest was without a warrant, the court has at times applied section 849 alone; on other occasions reference has been made to the 2-day maximum detention clause in section 825, even though that section would seem to apply only to arrests with warrants since it appears in the "Warrant of Arrest" chapter. At least one decision has intimated that any confinement up to 2 days is lawful, regardless of whether a warrant was obtained, and with no consideration of the circumstances.

Dragna v. White was the first and, apparently, only case in which the California Supreme Court discussed the contention that, because section 825 controlled all arrests including those made without warrants, a prisoner might under any circumstances be held for 2 days. In an action for false arrest and false imprisonment brought against three police officers, the plaintiff alleged that he had been arrested without a warrant and held for 3 days before being re-setting of the bail—thus prolonging the period of time in which in-custody investigation may be carried on." Id. at 38. See also Comment, Some Proposals for Modernizing the Law of Arrest, 39 Calif. L. Rev. 96, 115 (1951).

Williams v. Zelzah Warehouse Co., 126 Cal. App. 2d 14 P.2d 177 (1932) (decided 5 years after the legislature added the 2-day provision to section 825), was a civil action for false imprisonment. The court held that plaintiff's imprisonment for more than 30 hours before any change was made "was manifestly an unnecessary delay." Id. at 31, 14 P.2d at 178. Quoting section 849 but making no mention of section 825, the court said: "The duty of an officer to bring the prisoner, arrested without warrant, before a magistrate . . . is even more imperative than if a warrant had been issued before the arrest." Id. at 30-31, 14 P.2d at 178. In Peckham v. Warner Bros. Pictures, 36 Cal. App. 2d 214, 97 P.2d 472 (1939), another false imprisonment suit, one plaintiff had been held for almost 24 hours and was never taken before a magistrate. (This took place before a prisoner could be released under Cal. Pen. Code § 849 without being taken before a magistrate.) The other plaintiff was held more than 48 hours before a magistrate ordered him released. In holding that the case was properly submitted to the jury for a determination of whether the delay was unreasonable, the court again made no mention of section 825.

People v. Zammora, 66 Cal. App. 2d 166, 152 P.2d 180 (1944), was the first case in which the court took note of the 1927 2-day amendment to section 825. Without distinguishing between arrests with and without warrants, the court said that section 825 defined the term "unnecessary delay" as used in section 849 to mean "in any event, within two days after his arrest, excluding Sundays and holidays." Id. at 220, 152 P.2d at 208 (dictum). Cf. People v. Sewell, 95 Cal. App. 2d 850, 214 P.2d 113 (1950), discussed in note 30 infra.

In People v. Sewell, 95 Cal. App. 2d 850, 214 P.2d 113 (1950), the court stated that the prisoner's detention after an arrest without a warrant was "within the two days maximum time set forth by Penal Code section 825." Id. at 856, 214 P.2d at 117 (dictum). The United States Supreme Court has said that this implied that as long as the time limit was met, the court would not consider whether 2 days was necessary or reasonable. Culombe v. Connecticut, 367 U.S. 568, 584-85 n.26 (1960). But see Hughes v. Oreb, 221 P.2d 327 (1950) (decided 6 months after Sewell), where, without mentioning either section, the court rejected defendant's contention that a 33-hour detention was reasonable as a matter of law. The decision was vacated, but the California Supreme Court affirmed. Hughes v. Oreb, 36 Cal. 2d 854, 228 P.2d 550 (1951).

leased without charges being filed against him. Disregarding the fact that section 825 is in the chapter of the Penal Code dealing with warrant arrests, the Court said that the section does not authorize a two-day detention in all cases but, instead, places a limit upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is in violation of the statute.

Moreover, the duty to bring the prisoner before a magistrate without delay is even more important where, as here, the arrest is made without a warrant.

Although the statements in Dragna concerning section 825 are dicta, since the plaintiff alleged an imprisonment longer than 2 days, it is still the most authoritative statement on the permissible duration of confinement after an arrest. The prisoner must be either released or brought before a magistrate without unnecessary delay, whether arrested for a felony or a misdemeanor, with or without a warrant. The 2-day provision of section 825, if applicable at all to arrests without warrants, at most places a limit upon what may be

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32 The case was decided before CAL. PEN. CODE § 849 allowed the release of a prisoner without his first being taken before a magistrate.

33 45 Cal. 2d at 472-73, 289 P.2d at 430-31 (citations omitted).

Apparently, the 2-day limit imposed by section 825 is subject to being extended in exceptional circumstances. In People v. Lane, 56 Cal. 2d 773, 366 P.2d 57, 16 Cal. Rptr. 801 (1961), defendant was hospitalized for 7 days for treatment of wounds suffered at the time he committed the homicide for which he was convicted. He was charged on the eighth day. Rejecting his claim that his constitutional rights had been violated by the delay, the court said that it would be an unreasonable application of section 825 to require him to be taken before a magistrate until it was possible to do so without jeopardizing his health. Id. at 781, 366 P.2d at 61, 16 Cal. Rptr. at 805.

34 Some criminal cases decided since Dragna have continued to cite section 825 when deciding whether a confinement after a nonwarrant arrest was legal. People v. Hill, 66 A.C. 531, 426 P.2d 908, 58 Cal. Rptr. 340 (1967); People v. Lane, 56 Cal. 2d 773, 366 P.2d 57, 16 Cal. Rptr. 801 (1961); People v. Kendrick, 56 Cal. 2d 71, 363 P.2d 13, 14 Cal. Rptr. 13 (1961); People v. Matlock, 51 Cal. 2d 682, 336 P.2d 505 (1959); Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929 (1955). These cases can be distinguished from Dragna, however, because the issue was not the legality of the confinement, but the admissibility of allegedly coerced confessions, and the nature of the confinement was pertinent only as one of the circumstances to be considered. California has not adopted the principles laid down in McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), which exclude evidence obtained during an illegal detention. For California cases rejecting the rule, see, e.g., Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929 (1955); People v. Van Eyk, 56 Cal. 2d 471, 364 P.2d 326, 15 Cal. Rptr. 150 (1961).

In Gorlack v. Ferrari, 184 Cal. App. 2d 702, 7 Cal. Rptr. 699 (1960), a false imprisonment suit decided after Dragna, the district court of appeal, considering a confinement of less than 48 hours, confined its discussion to section 849.

35 Compare CAL. PEN. CODE § 849, with Dragna v. White, 45 Cal. 2d 469, 472-73, 289 P.2d 428, 430-31 (1955) (quoted in text accompanying note 33 supra). Since Dragna was decided before section 849 was amended to allow for releases, the court did not consider that a prisoner might be released rather than brought before a magistrate. This does not affect the weight which should be given its discussion.
considered a necessary delay.\textsuperscript{36} The duty to bring the prisoner before a magistrate promptly is greater where the arrest is made without a warrant.\textsuperscript{37} Even if the arrest is made pursuant to a warrant, detention for less than 2 days may be unreasonable.\textsuperscript{38}

At common law, confinement for the purposes of investigation is prohibited as constituting unnecessary delay.\textsuperscript{35} It has been suggested that Penal Code section 849, permitting prisoners to be released without being brought before a magistrate, abrogates the common law in this respect.\textsuperscript{40} However, such an interpretation is not required by the statute. Further, it would raise constitutional questions, insofar as confinements for the purpose of investigation permit "a seizure without probable cause, accompanied by most of the significant consequences of a conventional arrest."\textsuperscript{41}

Once the unlawfulness of an arrest or a confinement is determined, the problem is determining where the remedy lies.

**Civil Remedies and Liabilities**

**False Imprisonment and False Arrest**

A person who has been arrested and/or confined unlawfully may have a remedy in a civil action for false arrest and false imprisonment.\textsuperscript{42} The California statutes and decisions generally differentiate between the two actions,\textsuperscript{43} but false arrest is merely a distinct form of false imprisonment. If the restraint of a person’s liberty is based on the assertion, either by a private person or a police officer, of authority to enforce the law, the cause of action is false arrest.\textsuperscript{44} There may be a false imprisonment, generally by a private person, without any assertion of legal authority.\textsuperscript{45} The terms are also used

\textsuperscript{36} Dragna v. White, 45 Cal. 2d 469, 472-73, 289 P.2d 428, 430-31 (1955) (quoted in text accompanying note 33 supra).

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} "It is . . . the law that an officer arresting without a warrant cannot justify himself in holding the prisoner for an unreasonable time . . . upon the ground that such delay was necessary in order to investigate the case." Peckham v. Warner Bros. Pictures, 36 Cal. App. 2d 214, 218, 97 P.2d 472, 474 (1939).


\textsuperscript{41} Foote, Safeguards in the Law of Arrest, 52 NW. U.L. REV. 16, 38 (1957). The author there is discussing statutes which expressly allow detention for defined periods for investigation purposes. Such statutes have been adopted by several states; see, e.g., DEL. CODE ANN. tit. 11, § 1902 (1953); N.H. REV. STAT. ANN. § 594:2 (1956); R.I. GEN. LAWS ANN. § 12-7-1 (1956).


\textsuperscript{43} See, e.g., CAL. PEN. CODE § 847 (quoted at note 54 infra); Dragna v. White, 45 Cal. 2d 469, 289 P.2d 423 (1955); Collins v. County of Los Angeles, 241 Cal. App. 2d 451, 50 Cal. Rptr. 566 (1966). In both cases cited the action was for both false arrest and false imprisonment.

\textsuperscript{44} See Manos, Police Liability for False Arrest or Imprisonment, 16 CLEV.-MAR. L. REV. 415 (1967).

\textsuperscript{45} Id.
to distinguish the cause of action which arises out of the unlawful taking into custody from the cause of action which subsequently arises, irrespective of the legality of the arrest, out of an illegal confinement.\(^{46}\)

If an arrest is made without a warrant, the arrested person states a cause of action for false arrest if he alleges merely that there was an arrest without a warrant, followed by imprisonment and damages.\(^{47}\) Once these are proved, the burden of justifying the arrest is on the defendant.\(^{48}\) The plaintiff has a second cause of action, for false imprisonment, if there was an unnecessary delay before he was released or brought before a magistrate.\(^{49}\) Whether an unreasonable time elapsed is usually a question for the jury.\(^{50}\) Where the arrest is lawful, subsequent unreasonable delay will not affect the legality of the arrest, although it will subject the offending person to liability for false imprisonment for so much of the imprisonment as occurs after the period of necessary or reasonable delay.\(^{51}\)

\(^{46}\) See discussion at notes 49-51 infra, and accompanying text.

Both false arrest and false imprisonment are distinguished from malicious prosecution by "the regularity of the legal process under which the plaintiff's interests have been invaded." Prosser § 113, at 853. If the legal procedure is incorrect—e.g., the arrest is made with a warrant void on its face or is made without a warrant and without "reasonable cause," or the plaintiff is unnecessarily detained—the remedy is false imprisonment (or false arrest). The state of mind of the person causing the arrest is irrelevant in an action for false imprisonment; "Good faith on the part of an officer will not justify an illegal arrest." Manos, supra note 44, at 416. If, on the other hand, the legal procedure is correct but is motivated by "malice," or a primary purpose other than that of bringing an offender to justice," Prosser, § 113, at 853, the remedy is malicious prosecution. The legal proceedings must terminate in his favor before the plaintiff may recover for malicious prosecution, id., but the outcome is irrelevant to the actions for false arrest and false imprisonment. Collins v. County of Los Angeles, 241 Cal. App. 2d 451, 459, 50 Cal. Rptr. 586, 591 (1966). (The writer has found no case where plaintiff recovered damages in a civil suit for false arrest and/or false imprisonment when he had been convicted of a criminal offense.)


If the arrest were lawful, the arresting officer would not be liable for the subsequent false imprisonment, see Kalish v. White, 36 Cal. App. 604, 607, 173 P. 494, 495 (1918); Gisske v. Sanders, 9 Cal. App. 13, 16, 98 P. 43, 44 (1908), but if the original arrest were unlawful the arresting officer would also be liable for the subsequent confinement as a reasonably foreseeable consequence. Cf. Williams v. Zelzah Warehouse Co., 126 Cal. App. 28, 29-30, 14 P.2d 177, 177-78 (1932).
As has been noted, Penal Code section 849 allows the release of an arrested person without his being brought before a magistrate. It has been suggested that one effect of these provisions would be to deny the arrested person any cause of action for false arrest. There have been no cases so holding, and in the absence of any legal distinction between an arrest and a "detention" such a holding seems unlikely.

**Liability of the Public Entity**

Even though a police officer has traditionally been held personally liable for damages for false arrest and false imprisonment, until relatively recently the governmental entity employing him has been immune from liability. It appears, however, that under the Cal-
California Tort Claims Act enacted in 1963, the public employer is liable on respondeat superior principles.

Division 3.6 (sections 810-996.6) of the California Government Code currently regulates the tort liability of public entities. The basic provision of the division is that the government shall not be liable for damages arising out of torts "[e]xcept as otherwise provided by statute." Section 815.2 imposes such liability upon a public entity if a public employee is himself personally liable for a tort and the tort was committed while he was acting within the scope of his employment; in the absence of statute the entity cannot be held liable if the employee himself is immune.

It might appear that police officers are granted immunity from liability for false arrest and false imprisonment by section 820.2 which, in accordance with the common law, confers personal immunity upon a public employee for his discretionary acts. However, the common law did not extend discretionary immunity to actions for false arrest and false imprisonment. Furthermore, personal liability for false

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57 Cal. Gov't Code § 815, which reads as follows:
"Except as otherwise provided by statute:
(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person."
"[T]he practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts. The use of the word 'tort' has been avoided, however, to prevent the imposition of liability by the courts by reclassifying the act causing the injury." Special Rep. of Sen. Comm. on Judiciary on S.B. No. 42, in 4 Cal. Law Revision Comm'n, Reports, Recommendations & Studies, app. II, 227 (1963).
58 Cal. Gov't Code § 815.2 states that:
"(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."
59 Cal. Gov't Code § 820.2 states that:
"Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."
60 See Dragna v. White, 45 Cal. 2d 469, 289 P.2d 428 (1955), where the court did not invoke the immunity rationale as was done by the district court
arrest and false imprisonment is excluded from the general discretionary immunity by section 820.4, which in its entirety states that:

A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section excuses a public employee from liability for false arrest or false imprisonment. 61

The second sentence, while not imposing liability directly, recognizes the common law exception to the discretionary immunity rule. 62 Subject to various statutory limitations, 63 under the terms of section 820.4 a police officer would still be personally liable for false arrest and false imprisonment. 64

Since the police officer is exposed to personal liability, the public employer is likewise liable under section 815.2, provided that the police officer was acting within the scope of his employment. The scope of the officer's employment was not an issue as long as his employer was not subject to liability for its governmental functions. No case has been found in which the court considered the officer's scope of employment in an action for false arrest and false imprisonment. However, when the courts do consider the question, they should apply the usual respondeat superior principles. 65 A private employer has frequently been held liable where a detective or policeman employed by him has procured or instigated a false arrest or imprisonment, the courts readily concluding that the employee's actions fell within the scope of his employment. 66 With respect to police officers, such a determination would seem, if anything, more certain, since the officers have general authority to make arrests to further law enforcement purposes. 67 Any employee acts within the scope of his employment when he acts in furtherance of his employer's purposes, whether or not his acts were specifically authorized. 68

The imposition of liability on public entities for false arrests and imprisonments committed by its police officers is a significant departure from prior law. 69 The change appears to have been intended by the legislature. Such liability was proposed in a study on sovereign immunity prepared at the request of the California Law


62 Governmental Tort Liability § 7.4, at 286. See discussion of legislative intent in text accompanying notes 69–72 infra.


64 Governmental Tort Liability § 7.4, at 286.

65 See generally Governmental Tort Liability § 7.3, at 285, § 7.4, at 286.


68 E.g., Ruppe v. City of Los Angeles, 186 Cal. 400, 402, 199 P. 496 (1921).

69 Governmental Tort Liability § 7.4, at 286-87.
Revision Commission.\textsuperscript{70} The recommendation, while not expressly adopted, was implicitly approved by the Commission when it included the second sentence in proposed Government Code Section 820.4.\textsuperscript{71} This part of section 820.4 was adopted by the legislature as recommended by the Commission.\textsuperscript{72} Thus the original recommendation that liability be imposed is incorporated in the statute passed by the legislature.

Since the adoption of the Tort Claims Act, the problem has apparently been considered in only two reported cases, both under the name of Shakespeare v. City of Pasadena.\textsuperscript{73} Mother and son, the two plaintiffs, each brought an action against a city for damages for false arrest and false imprisonment allegedly committed by its police officers.\textsuperscript{74} According to the complaints, both plaintiffs had been arrested for trespass by a private citizen, and taken into custody by police officers. The following day bail was posted but only the mother was released, the son not being informed that money sufficient for both was available. Six weeks later the mother was again in the vicinity of the initial arrest and was detained by the police for 25 minutes while they determined if any charges were outstanding against her. She was not taken into custody. Both mother and son were tried and acquitted of the trespass charge. The suits against the city were dismissed for failure to state a cause of action, and both plaintiffs appealed.\textsuperscript{75}

In the case of Shakespeare fils, the court found that a cause of

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\item \textsuperscript{70} A Study Relating to Sovereign Immunity, in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 410-11 (1963).
\item \textsuperscript{71} Recommendation Relating to Sovereign Immunity, in 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 801, 843 (1963). The sentence reads as follows: "Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment." CAL. GOV'T CODE § 820.4.
\item \textsuperscript{72} Compare Recommendation Relating to Sovereign Immunity, in 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 211 (1963).
\item \textsuperscript{73} 230 Cal. App. 2d 375, 40 Cal. Rptr. 863 (1964); 230 Cal. App. 2d 387, 40 Cal. Rptr. 871 (1964). In a third case, Collins v. County of Los Angeles, 241 Cal. App. 2d 451, 50 Cal. Rptr. 586 (1966), the complaint was dismissed because the plaintiff had not filed his claim against the city within the period provided by local ordinance.
\item \textsuperscript{74} A third cause of action in each case for malicious prosecution was also dismissed. 230 Cal. App. 2d 375, 382-83, 40 Cal. Rptr. 863, 868 (1964) (Shakespeare fils); 230 Cal. App. 2d 387, 389, 40 Cal. Rptr. 871, 872 (1964) (Shakespeare mère).
\item Although the causes of action for false arrest and false imprisonment arose before the legislature enacted the Tort Claims Act, the court held that the new legislation applied. 230 Cal. App. 2d 375, 382, 40 Cal. Rptr. 863, 867 (1964).
\item \textsuperscript{75} Shakespeare v. City of Pasadena, 230 Cal. App. 2d 375, 376, 40 Cal. Rptr. 863 (1964) (fils); Shakespeare v. City of Pasadena, 230 Cal. App. 2d 387, 388, 40 Cal. Rptr. 871 (1964) (mère).
action for false imprisonment had been stated.\textsuperscript{76} The court reasoned that since a jailor has a mandatory duty to release a prisoner for whom bail has been posted (the pertinent statute states that the prisoner \textit{must} be discharged),\textsuperscript{77} and since false imprisonment is specifically exempted from the immunity granted public employees by Government Code section 820.4, the jailor would be personally liable. Therefore, the city would be vicariously liable by virtue of section 815.2, which imposes liability on the public entity when the public employee is liable.\textsuperscript{78} From this it seems that the court found that section 820.4 applies to mandatory acts, but the same decision could have been reached without that conclusion. Since the jailor had a mandatory duty to release, the city is, as the court noted, independently liable on other grounds.\textsuperscript{79} If, on the other hand, the jailor's acts were discretionary, he would be personally liable because section 820.4 excludes false arrest and false imprisonment from the general immunity for discretionary law enforcement acts, and the city would still be liable under section 815.2.

The court decided that Shakespeare \textit{mère} had failed to state any cause of action.\textsuperscript{80} There was no false imprisonment because there was no unnecessary delay in releasing her.\textsuperscript{81} There was no false arrest when she was taken into custody because the officers had a duty to take her into custody after a private citizen had arrested her.\textsuperscript{82} Her brief detention 6 weeks later to determine if any charges were outstanding was reasonable in view of the past history.\textsuperscript{83} The court went on to note that "[u]nlike the violation of a mandatory duty suggested in her son's case, the actions of the police officers here

\textsuperscript{77} The duty is imposed by CAL. PEN. CODE § 1295, which states that "upon delivering to the officer in whose custody defendant is a certificate of the deposit of [bail], defendant must be discharged from custody." By calling the duty "mandatory," the court appears to be equating it with a "ministerial" act. At common law a public employee was liable for harm resulting from "ministerial" as opposed to "discretionary" acts. See, e.g., Payne v. Baehr, 153 Cal. 441, 444, 95 P. 895, 896 (1908); Mock v. City of Santa Rosa, 126 Cal. 330, 344, 58 P. 826, 830 (1899).
\textsuperscript{79} Id. The independent basis for liability exists under CAL. GOV'T CODE § 815.6, which states:

"Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

\textsuperscript{81} Id.
\textsuperscript{82} Id. CAL. PEN. CODE § 142 makes it a crime for a peace officer to willfully refuse to receive into custody anyone charged with a criminal offense. The son's cause of action for false arrest failed for the same reason. Shakespeare v. City of Pasadena, 230 Cal. App. 2d 375, 382, 40 Cal. Rptr. 863, 867-68 (1964).
were discretionary and exactly the kind of conduct for which the officer (and therefore his employer) are granted immunity by section 820.2 of the Government Code. The court appears to be saying that if there had been a false arrest, neither the police officers nor the city would have been liable. However, the court failed to read section 820.2 with section 820.4 and its exception of false arrest and false imprisonment. The two sections taken together lead to the conclusion that if a false arrest and/or false imprisonment had actually taken place the discretionary immunity would not apply, and the city would be vicariously liable.

Although the court reached the correct decision in both of the Shakespeare cases, it did not recognize that false imprisonment and false arrest were not subject to the discretionary immunity at common law and that they are still excepted by virtue of Government Code section 820.4. If the officer acting within the scope of his employment is personally liable, the entity employing him is also liable.

Not only is the public entity directly liable for the false arrests and imprisonments of its police officers, but where the action is brought against the officer, the employing entity is generally required to pay any judgment, except for punitive damages, or to indemnify the officer. The net effect, with respect to false arrest and false imprisonment, of the 1963 legislation is to almost reverse the common law position: under the common law, the police officer was liable but the entity employing him was not; now the entity is liable and the police officer, although also liable, generally must pay only punitive damages.

Conclusion

Fear of abuse of police authority is the primary reason for the statutes requiring the prompt taking of arrested persons before magistrates. Such statutes are responsive "both to the fear of administrative detention without probable cause and to the known risk of opportunity for third-degree practices which is allowed by delayed judicial examination." These statutes should be interpreted in the way which will allow the maximum protection for the arrested person. This is the purport of the court's decision in Dragna v. White, allowing in no case a detention of longer than 2 days between arrest and formal charge, and requiring that there be "reasonable cause" for any delay.

84 Id. at 390, 40 Cal. Rptr. at 873.
85 See Cal. Gov't Code §§ 825-25.6. The public entity need not pay a judgment against its employee or, if the judgment has been obtained against the entity, it has subrogation rights against its employee, when the employee acted because of "actual fraud, corruption or actual malice." Cal. Gov't Code §§ 825.2, 825.6. The public entity is immune from liability for punitive damages. Cal. Gov't Code § 818; see also Cal. Gov't Code § 825. See generally Governmental Tort Liability § 7.4, at 286, §§ 10.21-26, at 450-55.
87 Id. at 584-85.
89 See discussion at notes 31-38 supra, and accompanying text.
This conclusion need not be affected by the addition to Penal Code section 849 of the provisions allowing a prisoner to be released without being taken before a magistrate. These provisions can and should be construed in a manner consistent with the present interpretation of the statutes requiring a prompt appearance before a magistrate. Thus, the statute affords the arrested person greater protection because it allows his release immediately upon a determination that there was "no ground for making a criminal complaint" against him, but does not increase the discretion of the police in making an arrest. The statute should not be construed to allow "detentions" for the sole purpose of investigation.

One way of reducing any abuse of police authority is by holding the police officer's employer—the municipality, county, state independently liable for any resulting injury. At the same time, if the police officer is protected from suffering personal financial loss, he is encouraged to perform his functions. The present law permits this result in the case of false imprisonment and false arrest if the above analysis is correct. Reducing the abuse of authority while at the same time enhancing law enforcement are two sound reasons for allowing recovery from the public employer for false arrest and imprisonment.

Jennie Rhine*

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90 Discussed at notes 15-21 supra, and accompanying text.
91 CAL. PEN. CODE § 849(b)(1). See note 17 supra for a discussion of some of the beneficial effects of the statute.
92 See discussion at notes 39-41 supra, and accompanying text.
94 Discussed at notes 54-83 supra, and accompanying text.

* Member, Second Year Class.