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Jerome Hall

Indiana University School of Law

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LEGAL AND SOCIAL ASPECTS OF ARREST WITHOUT
A WARRANT *

THE law of arrest consists of rules dealing principally with: (1) definitions of arrest; (2) limitations upon the right to arrest, varying with (a) the individual making the arrest (police officer or private person), (b) the time of arrest in relation to the type of offense, (c) whether the arrest is with or without a warrant; (3) the issuance of warrants; (4) duties of the officer or private person after he makes the arrest; and (5) the effects of (a) illegal arrest, and of (b) violation of duties after arrest.

The rules relating to arrest with a warrant prescribe such technical conditions as that the court issuing the warrant must have jurisdiction, and that the warrant must not reveal upon its face any defect so serious as to make it "void". Lack of jurisdiction is rare. And, with the standardization of legal forms, seriously defective warrants have also become infrequent. The usual remedies here lie against the complainant who set the machinery of criminal prosecution into motion rather than against the person making the arrest. Accordingly, it is arrest without a warrant that presents the more acute problems. Such arrest affects obligations and activities of almost all persons, lay and official. It requires the maximum exercise of discretion, and hence represents the maximum grant of right.

The statement of the general rules on arrest without a warrant, found in *Halsbury's Laws of England*,¹ may be condensed thus: For a misdemeanor, neither an officer nor a private person may arrest. For a breach of the peace, an officer or a private person may arrest to prevent or terminate the crime, or immediately after its commission. For treason or felony, an officer may arrest if he has reasonable belief both in the commission of the crime and in the guilt of the arrestee; a private person may arrest if

* For their very kind and valuable assistance, the writer is obliged to Professor Sam B. Warner, Dean Pound, and Dr. Sheldon Glueck.

¹ Volume 9 (2d ed. 1933) 84-98. For a summary, see Wilgus, *Arrest Without a Warrant* (1924) 22 MICH. L. REV. 673-74.

the crime has actually been committed, and if he has reasonable belief in the guilt of the arrestee. Thus only in arrest for felony where no felony has been committed does the right of a private person fall short of that of a police officer. The development of this differentiation between lay and official right is of primary importance in any study of the legal and social aspects of arrest.

HISTORY OF THE LEGAL DOCTRINE

Long and frequent reiteration by commentators, lawyers, and judges of this difference between private and official right as the "common law rule" has tended to obscure its origin. The confusion conceals the social significance of the law of arrest.

Analysis of the professional literature of the English criminal law is illuminating. So informed a scholar as Stephen tells us that "The result of his [Hale's] inquiry may be stated thus: . . . 3. Any constable may arrest any person whom he suspects . . . of having committed any felony, whether in fact any such felony has been committed or not."² No specific reference to Hale is given. Hale, indeed, did remark that "these officers . . . may without any other warrant but from themselves arrest felons, and those that are probably suspected of felonies".³

The meaning of this statement will be clarified by prior examination of Dalton, Hale's most important immediate predecessor.⁴ After defining arrest and discussing the status and rights of the arrestee, Dalton shifts to the rights and duties of the acting party—the one making the arrest.⁵ But instead of discussing peace officers, in the fashion of the modern treatise, he speaks of "every private person", "every man", "any man". Then follows *one sentence only* regarding officers: "The Sherife, Bailifes, Constables, and other the Kings Officers may arrest and imprison offenders, in all cases where a private person may, and without any writ or warrant."⁶ A discussion of warrants, jurisdiction, duties of

² 1 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 193.

³ 2 HALE, PLEAS OF THE CROWN (1st Am. ed. 1847) 84-85.

⁴ The first edition of Dalton's work, THE COUNTRY JUSTICE, appeared in 1618. Hale died in 1676. His works appeared shortly thereafter.

⁵ See THE COUNTRY JUSTICE (6th ed. 1643) Cap. 118, p. 413.

⁶ *Id.* at 416. Similarly, "The Justice of peace may arrest and imprison offenders in all cases where a private person may." *Ibid.*

officers after arrest, and imprisonment concludes Dalton's analysis. This order of topics, in contrast to that of contemporary treatises, this emphasis upon arrest by "every man", this selection of the "private person" as the standard by which the right of officers to arrest without a warrant is measured, are distinctive and significant. Not a word appears in Dalton recognizing any right, lay or official, to arrest without a warrant for felony where none has been committed.⁷ On the contrary, referring to "every private person" — the central figure in his discussion and the standard of right — Dalton states that he may arrest without a warrant one "whom he knoweth or seeth to have committed a . . . felonie. . . . Also when a felony is committed, every man may arrest suspicious persons that be of evil fame. . . . But for the arresting of such suspicious persons, note, that *there must bee some felony committed indeed.*"⁸

Hale's discussion of arrest is much more systematic and complete.⁹ The first chapter (still the order of Dalton) deals with arrest of felons by private persons; the second, with such arrest by officers; the third, with arrest upon hue and cry; and the fourth, with arrest under warrants. Again most conspicuous, because it is completely omitted, is the case of arrest for felony where no felony has been committed — the situation crucial in the contemporary problem.¹⁰ All of the situations Hale discusses (except

⁷ Dalton's discussion is not entirely unambiguous. Thus: "But yet for misdemeanors done against the Kings peace, (as for Treason, felonie, or breaking of the peace, &c.) the offenders as well by the Common Law, as by divers statutes, may be arrested and imprisoned, by the officers of Justice, and sometimes by private persons, (as hereunder followeth) without either Presentment, Processe, Precept, Warrant, or other commandment." *Op. cit. supra* note 5, at 414. The only explanations for this statement, that occur to the writer, are (1) that Dalton was here indicating what the law *ought* to be; or (2) that he had in mind official *practice*, not yet recognized by law.

⁸ *Id.* at 414-15 (italics supplied). Except that "Hue and cry after I. S. for felony, seemeth to be sufficient cause to arrest him, though there be no felony committed." *Id.* at 415. Cf. COKE, *THIRD INSTITUTE* *118. Also, "Nightwalkers, being strangers, or suspected persons, Watchmen may arrest them, and may stay them till the morning, &c. . . . Yea, every man may arrest such Nightwalkers, for it is for the good of the common wealth." DALTON, *op. cit. supra* note 5, at 416; cf. 2 HALE, *PLEAS OF THE CROWN* (1st Am. ed. 1847) 101-02; 2 HAWKINS, *PLEAS OF THE CROWN* (8th ed. 1824) c. 12, § 16.

⁹ 2 *PLEAS OF THE CROWN* (1st Am. ed. 1847) cc. 11-13.

¹⁰ Cf. *id.* at 75, 91-92.

hue and cry, and nightwalkers) presuppose the commission of a felony.

We return to Hale's statement which alone might support Stephen's assertion already quoted.¹¹ This is preceded by allegations that officers "are more eminently trusted. . . . Because they are by law punishable, if they neglect their duty. . . . And therefore it is all the reason that can be, that they should have the greatest protection and encouragement in the due execution of their office".¹² Clearly, official right at that time was greater in some regard than that of private persons. But the difference did not lie in any right to arrest without a warrant where no felony had been committed. As to private persons, we have the significant statement that if there has been no felony, "there can be no ground of suspicion".¹³ And as to officers, in discussing their power to arrest in cases of "suspicion of felony", Hale makes it clear that "there must be a felony in fact done".¹⁴ The difference between private and official right lay rather in the quality of the suspicion regarding the guilt of the arrestee. A private person must have a reasonable suspicion of the arrestee's guilt, originating within himself. An officer might, in addition, draw his suspicion from the statements of other persons.¹⁵ Thus two definite and equally important elements exist: commission of a felony, and reasonable belief that the arrestee is the guilty person. "Suspicion of felony", plainly, referred only to the second element.¹⁶

¹¹ See p. 567, *supra*.

¹² 2 HALE, PLEAS OF THE CROWN (1st Am. ed. 1847) 84.

¹³ 2 *id.* at 78.

¹⁴ Hale's discussion of the following situation regarding arrest by constables, indeed, his very formulation of it, sets the matter definitely at rest: "2. What his power is to arrest in cases of *suspicion* of felony. . . . I come to the *second*, namely what if there be a felony done, (Suppose a robbery upon A.) and A. suspects B. upon probable grounds to be the felon, and acquaints the constable with it, and desires his aid to apprehend him. . . . But there must be a felony in fact done, and the constable must be ascertained of *that*, and aver it in his plea, and it is issuable." *Id.* at 90-92.

¹⁵ ". . . yet such an information may carry over the suspicion even to the constable, *whereby it may become his suspicion as well as the suspicion of A.*" *Id.* at 92 (italics supplied).

¹⁶ The following also illustrates Hale's usage of "suspicion of felony": "Again it seems to me, that if a person thus charged with suspicion of felony upon just grounds of suspicion, *and where a felony is actually committed. . . .*" *Ibid.* (italics supplied).

With Hawkins, writing in 1716, comes greater emphasis upon the status of officers.¹⁷ There is a bare reference to the problem "where no treason or felony at all hath been committed, or dangerous wound given."¹⁸ But he suggests no modification of the rules regarding the right to arrest, and merely notes as exceptions the traditional cases of suspicious persons, notorious cheats, and hue and cry.¹⁹

Blackstone writes that ". . . in case of felony *actually* committed, or a dangerous wounding whereby felony is like to ensue, he [a constable] may upon probable suspicion arrest the felon."²⁰ And on the page immediately following he states: "Upon probable suspicion also a private person may arrest the felon. . . ."²¹ Thus, as late as 1765 the distinction between lay and official right to arrest where no felony has been committed is apparently not even hinted at.

We are able to trace definitely in the cases the origin of the rule which augmented official right. *Samuel v. Payne*²² is the pivot upon which the legal cycle turns. A private individual charged Samuel with having stolen some laces. A warrant to search the latter's house (but none to arrest him) was granted; search was made, but the goods were not found. Nevertheless, the complainant, Constable Payne, and the latter's assistant arrested the plaintiff — on a Saturday. No alderman was sitting and the plaintiff was detained until Monday, when he was examined and discharged. He sued for trespass and false imprisonment. So clearly does the fact that the complainant made a charge form the basis of the decision in favor of the officers that it is difficult to explain the general misinterpretation of the case. And, although subsequent judges and commentators have assumed that no felony had been committed, there was, in fact, no finding one way or the other. Indeed, it seems highly probable that a felony

¹⁷ 2 HAWKINS, PLEAS OF THE CROWN (8th ed. 1824) c. 12, § 20; c. 13, §§ 1, 7.

¹⁸ *Id.* c. 12, § 16, at 119.

¹⁹ See *id.* c. 12, §§ 16, 20. Cf. Hawkins' refutation of an argument made "in old books", that even in hue and cry, arrest for felony is illegal unless a felony has been committed. *Id.* c. 12, § 16, at 119.

²⁰ 4 BL. COMM. *292 (italics supplied).

²¹ *Id.* at *293.

²² 1 Doug. 359 (K. B. 1780).

had been committed. The holding was simply that "the charge was a sufficient justification to the constable and his assistants".²³

The other important departure is the apparent entire abandonment of the requirement of reasonable suspicion, insisted upon by Hale.²⁴ Lord Mansfield held that "it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth [reasonableness] of the charge" — a proposition which apparently gave *carte blanche* to an official to whom a charge had been made.

Ledwith v. Catchpole,²⁵ decided three years later, further extended official right by judicial approval of an apparently existing *practice* of arrest by officers upon information placed before them. Smith, whose merchandise had been stolen, brought to the defendant, a marshalman of London, one Stevens, who said that the plaintiff had twice been at the coach which contained the merchandise. Smith and the defendant officer interrogated the plaintiff, but neither Smith nor any one else charged him with the theft. The defendant arrested the plaintiff without a warrant. Next day the sitting alderman discharged the plaintiff, who then brought trespass and false imprisonment and secured a verdict for £20. On motion for new trial, however, the verdict was set aside.

The clash of judicial views incident to this reveals most interestingly the difference between emphasis upon rules and upon the social problem. Buller, J., insisted that there "must be a reasonable ground of suspicion in his own mind and within his own knowledge, and not merely the information of others".²⁶ To which Lord Mansfield replied (note his eye to the practice): "How are felons in general taken up? From descriptions of them

²³ *Ibid.* Some precedent was afforded by Ward's Case, Clayt. 44, pl. 76 (N. P. 1636), although it was there assumed that a felony had been committed. Even though the constable "himself found no cause of suspicion upon his search", the arrest was held legal "because the party whose goods were gone, did charge the Plaintiff to have taken them, and to have them". But Samuel v. Payne was more fully reported; it was decided by Lord Mansfield; and the date was 1780 — all important factors in determining why it should be cited as authority for subsequent decisions.

²⁴ See p. 569, *supra*. With which compare the early rule that "none can arrest the party suspected by the command of him who hath the suspicion; and with this agrees the book in 2 H. 7. 15, 16". Ashley's Case, 12 Co. *90, *92 (1611).

²⁵ Cald. 291 (K. B. 1783).

²⁶ *Id.* at 293.

circulated in handbills. The defendant here might be induced to suspect from what had been laid before him. . . . It is of great consequence to the police of the country." ²⁷ Willes, J., concurred. It is possible that Buller was unaware of the practice of officers' arresting on information, which had in effect been approved a century before by Hale.²⁸ But it is more likely that he was here unwilling to extend the legal doctrine to include the exercise by peace officers of a function which he regarded as judicial.

Here there was a felony committed, or so it was assumed; and arrest upon information was sanctioned. As to the requirement of reasonable suspicion, the opinions are ambiguous. Lord Mansfield at first applied *bona fides* as the only limitation; later, "probable cause". Willes, J., did not generalize, but stated that there were "strong circumstances of suspicion".

The charge in *Samuel v. Payne*, and the arrest upon information coupled with an actual felony in *Ledwith v. Catchpole*, form the bases for these extensions of official right in 1780 and 1783. In the former case, probable cause was apparently unnecessary; in the latter, the indications point to retention of the requirement. But neither case is representative of the broad rule so long alleged to have been "the common law", namely, that an officer might without a warrant arrest for felony, even though no felony had in fact been committed.²⁹

In the early nineteenth century comes a series of cases which, in the course of 25 years, brought to fruition the doctrines expressed in these two decisions. In *White v. Taylor*,³⁰ the plaintiff hired a coach driven by one Simcoe. Dissatisfied with the driving, he picked up Simcoe's number and got out of the coach in order to report him. Simcoe then charged the plaintiff before Constable Taylor with the theft of his number. The plaintiff was arrested

²⁷ Cald. at 293-95.

²⁸ See p. 569, *supra*.

²⁹ In 1788, in *Williams v. Dawson*, a *nisi prius* case, Buller, J., held: "if a peace officer, of his own head, takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or breach of the peace, there he is to be considered as a mere conduit; and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable." Quoted in *Hobbs v. Branscomb*, 3 Camp. 420, 421 (K. B. 1813).

³⁰ 4 Esp. 80 (K. B. 1801).

by Taylor, but was subsequently discharged. He brought action for trespass and false imprisonment. Le Blanc, J., applied *Samuel v. Payne* to the fullest extent, rejecting Erskine's argument of lack of probable cause as proof of *mala fides* in the officer. "If he pleases", he may use his judgment in the matter. But the rules require only a charge of felony.

In 1810 came *Lawrence v. Hedger*.³¹ The plaintiff, carrying a bundle in London at ten o'clock in the evening, was arrested by the defendant watchman. Next morning the plaintiff was discharged by the sitting alderman, his identity having been established. In directing a verdict for the defendant, Mansfield, C. J., held that "any watchman might detain the plaintiff, and carry him to a constable". Not only ancient statutes but also ancient practices supported such arrests in the night. But the opinion of Chambre, J., is noteworthy as showing that the earlier requirement of a charge of a felony had already been entirely forgotten.³² Yet *Samuel v. Payne* became the standard authority. Upon the assumption that no felony had been committed there, and by disregarding the insistence upon the charge to the officer, it provided the necessary precedent.

In *Hobbs v. Branscomb*,³³ an attorney, who had received certain money for his client, refused to remit, claiming a lien as security for his fee. The irate client promptly secured his arrest by officers. The attorney sued for damages. Verdict was directed for the officers, because they had acted upon a charge. Damages for lawyer and against client were assessed by the jury at one shilling!³⁴

In *Isaacs v. Brand*³⁵ a theft of silk had occurred. Three boys

³¹ 3 Taunt. 13 (C. P.).

³² *Id.* at 16: "The case of *Samuel v. Payne*, Doug. 359, was an arrest even in the day-time, which was much stronger; but in the night, when the town is to be asleep, and it is the especial duty of these watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention."

³³ 3 Camp. 420 (K. B. 1813).

³⁴ In *M'Cloughan v. Clayton*, Holt 478 (N. P. 1816), one Riding "gave the plaintiff in charge for a felony." The jury acquitted the officer upon instruction, and awarded damages of one farthing against Riding. The reporter's note to the above case illustrates the typical distortion of *Samuel v. Payne* in the process of using it to expand legal doctrine. Writing of that case he states: "But there must be a direct charge to the officer, or such a reasonable ground of suspicion before his eyes, as may justify him in the eye of the law." *Id.* at 481-82.

³⁵ 2 Stark. 167 (K. B. 1817).

were taken as suspects. One boy confessed, and claimed to have disposed of the silk to the plaintiff. The defendant, a London marshalman, went with the boy to the house of the plaintiff, who denied the purchase. Later the defendant, without a warrant, arrested him, but he was discharged the next day, apparently because no evidence against him was given. To the plaintiff's suit the defendant pleaded that a felony had been committed and that there had been the charge. But "Lord Ellenborough was of opinion, that the declaration of such an accomplice did not justify the officer in taking the plaintiff into custody upon a charge of receiving the stolen goods without any warrant, and without any evidence, except the assertion of the boy. . . ." ³⁶ Verdict of £5 returned for the plaintiff. On the facts, the requirements of *Ledwith v. Catchpole* were more than fully met, since here there was a charge. But here, and in sharp contrast with the later case of *White v. Taylor*, also there is insistence upon reasonableness of the charge.

Symptomatic of doctrine in process of formation is the continued vacillation of the rule as to reasonable cause. In *Hedges v. Chapman*,³⁷ decided eight years after the *Isaacs* case, Best, C. J., held without qualification that an individual might bring a charge only upon "reasonable ground of suspicion"; but that as to the officer who must arrest upon a charge, "it is his duty to act, and not to deliberate".³⁸ That this rule was deemed to afford insufficient protection against abuse by officials is made clear by *Cowles v. Dunbar*,³⁹ decided two years later. Dunbar's house had been broken into. He saw the plaintiff carrying a chest of drawers, and delivered him into the custody of a constable. Inquiries were made, and the plaintiff was released without being taken before a magistrate. Said Abbott, C. J., in absolving the constable from liability: "The cases of the two defendants are very distinguishable from each other. Callow is a constable, and if a reasonable"⁴⁰

³⁶ 2 Stark. at 169.

³⁷ 2 Bing. 523 (C. P. 1825).

³⁸ *Id.* at 526.

³⁹ 2 C. & P. 565 (K. B. 1827).

⁴⁰ This is the first clear and express limitation directly upon an officer acting on a charge made to him. It will be recalled that there was a similar holding, but without discussion, by Lord Ellenborough in *Isaacs v. Brand*, 2 Stark. 167 (K. B. 1817).

charge of felony is given, he is bound to take the party into custody.”⁴¹

The doctrinal fibres, expressed and implicit in these cases, were gathered together in *Beckwith v. Philby*⁴² in 1827. The plaintiff, a blacksmith, was returning with a bridle and saddle from a market where he had sold a pony. One Gould told Philby, the high constable, that the plaintiff was acting suspiciously. Philby questioned the plaintiff and concluded that a horse had been or was about to be stolen. The plaintiff was placed in the custody of a constable, who took him to a hotel and held him there for the night, handcuffed. Next day a magistrate examined him and, after some investigation, discharged him. The plaintiff's suit was finally decided in favor of the constables. Lord Tenterden, C. J., distinguishing the right of lay persons from that of officers, stated:

“There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities.”⁴³

Here, in 1827, for the first time⁴⁴ was a case closely representing the ultimate doctrine that had been in process of formulation since 1780. Here, upon the facts, no felony had been committed. This element is not found in any other of the cases (save in *Lawrence v. Hedger*, where the ancient nightwalker statutes dominate) in

⁴¹ 2 C. & P. at 568. Despite the court's recommendation of small damages against the defendant, the verdict brought in was for £100. But *cf.* *Isaacs v. Brand*, 2 Stark. 167 (K. B. 1817) (alleged criminal receiver—damages, £5); *Hobbs v. Branscomb*, 3 Camp. 420 (K. B. 1813) (lawyer who refused to remit—damages, one shilling).

⁴² 6 B. & C. 635 (K. B. 1827).

⁴³ *Id.* at 638–39.

⁴⁴ I have latterly found agreement with the position here taken—*Darling, J.*, in *King v. Metropolitan Dist. Ry.*, 99 L. T. R. (N.S.) 278, 280 (K. B. 1908), who said: “So far as I know, the distinction between what a private person may do and what a constable may do was first laid down in the case of *Beckwith v. Philby*”. See, too, COLQUHOUN, *POLICE OF THE METROPOLIS* (1796) 216; FIELDING, *A Short Treatise on the Office of Constable* in *EXTRACTS FROM PENAL LAWS* (1761) 260–61; HALLIFAX, *THE CONSTABLE'S SURE GUIDE* (2d ed. 1791) 16.

conjunction with an officer's arresting without a charge. The opinions in the earlier cases contained language which, clipped from its context, led readily, indeed necessarily, to the confident opinion of Lord Tenterden. But there is now clear limitation upon the officer's rights within the enlarged area of arrest without a warrant: ". . . he must . . . make out a reasonable ground of suspicion."⁴⁵

The special and enlarged right of officers is not questioned after 1827.⁴⁶ No felony need in fact have been committed. No charge

⁴⁵ 6 B. & C. at 638.

⁴⁶ To demonstrate this in brief summary: (a) In *Davis v. Russell*, 5 Bing. 354 (C. P. 1829), an action of trespass was brought against a high constable for illegal arrest and false imprisonment. One *H* falsely accused the plaintiff of theft, and the latter was arrested by the defendant late at night on the 27th of January, 1828. Next day an examination was held before a magistrate. The examination was continued several times until February 16th. Finally the plaintiff was discharged. The officer was held not liable. But again it was said that he could arrest "only upon *reasonable suspicion*". *Id.* at 365 (italics supplied).

(b) In *Hogg v. Ward*, 3 H. & N. 417 (Ex. 1858), the plaintiff was arrested by the defendant, superintendent of police, for having stolen property in his possession. Upon suit for false arrest, the defendant testified that Johnson, the owner of the property, had insisted on his taking the plaintiff into custody, though the latter was not present when the defendant did so. Pollock, C. B., held that ". . . in order to justify an arrest, there must be a reasonable charge." *Id.* at 421. Bramwell, B., was more explicit: "If a person comes to a constable and says of another simpliciter 'I charge this man with felony,' that is a reasonable ground and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but he is responsible for so doing." *Id.* at 422. In the opinion of Watson, B., comes again the formulation of the basic police issue: ". . . it is of the utmost importance that the police throughout the country should be supported in the execution of their duty,—indeed it is absolutely essential for the prevention of crime; on the other hand, it is equally important that persons should not be arrested and brought before magistrates upon frivolous or untenable charges." *Id.* at 423.

(c) Cf. *Neville v. Kelly*, 2 C. B. (N.S.) 740, 747 (1862), where Willes, J., said: "If the decision in *Hogg v. Ward*, 3 Hurlst. & N. 417, be correct, information alone would not be enough; the grounds of suspicion must be such as a reasonable man would act upon. One would have thought it enough if the policeman *bonâ fide* believed the information to be true; but so is the decision in *Hogg v. Ward*."

(d) In *Allen v. London & S. W. Ry.*, 11 Cox C. C. 621 (K. B. 1870), the plaintiff purchased a railway ticket, and became involved in a dispute with the ticket agent as to the change given him. The agent gave the plaintiff into the custody of a policeman, on the charge of attempting to steal money from the till, which charge was later heard and dismissed as without foundation. The plaintiff sued the railway company for illegal arrest and false imprisonment. Said Blackburn, J.: "The police seem to have thought—and I am sorry to say I have seen many cases of the kind where policemen think the same thing—that if a person

of felony is necessary. Limitation upon official behavior took the form of a standard of reasonable conduct: an officer might arrest without a warrant only upon probable suspicion, and the placing of a charge before him did not relieve him of the duty to act reasonably under all the circumstances.⁴⁷

There appears never to have been any doubt, such as we have met in the case of officers, that private persons could arrest only upon reasonable suspicion of guilt. Even Lord Mansfield, who seemed bent on extending the law of arrest in every direction imaginable, took a conservative view at this point. But it was with regard to the requirement that a felony must have been committed that the law of England placed the most important restrictions upon arrests for felony by private persons. It had long been said that *a* felony must have been committed. But was the fact that any felony had been committed sufficient to support an arrest? Or must a lay person prove that *the* felony for which he made the arrest had been committed?

Not until *Walters v. Smith*⁴⁸ do we have a case that both in fact and in opinion disclosed the narrow limits of the rule. The arrestee was undoubtedly guilty of having committed a felony;

comes and says, 'I charge that man with an offence,' that he, the policeman, has no discretion. That is not so. The police have power to arrest provided they have reasonable ground to believe there has been a felony committed, and that the man given into custody is the felon, and I do not deny that, as a general rule, where a respectable person tells him so, the policeman should believe it; but they should exercise a discretion, and see whether it is so or not." *Id.* at 625-26. *Cf.* Le Blanc, J., in *White v. Taylor*, 4 Esp. 80, 88 (K. B. 1801): "... he may, if he pleases, use his own discretion." And Best, C. J., in *Hedges v. Chapman*, 2 Bing. 523, 526 (C. P. 1825): "... it is his duty to act, and not to deliberate."

⁴⁷ Including, apparently, the position and reputation of the complainant. *Cf.* *Cowles v. Dunbar*, 2 C. & P. 565 (K. B. 1827). So, too, *Blackburn, J.*, in *Allen v. London & S. W. Ry.*, 11 Cox C. C. 621 (K. B. 1870).

⁴⁸ [1914] 1 K. B. 595. Without comment, Hawkins had written: "It seems to be certain, that regularly he ought expressly to show that the very same crime for which he made the arrest, was actually committed." 2 PLEAS OF THE CROWN (8th ed. 1824) c. 12, at 120. In 1838 *Tindal, C. J.*, used language of similar import in *Allen v. Wright*, 8 C. & P. 522 (C. P.), and in 1908 *Darling, J.*, discussed the rule with characteristic vigor: "... we must look a little further to see what connection there is between the felony which we must assume to have been committed and the person to be arrested. . . . You must show connection. . . ." *King v. Metropolitan Dist. Ry.*, 99 L. T. R. (N.S.) 278, 280 (K. B. 1908). For an annotation to the above case, discussing the right of a private person to arrest without a warrant, see (1918) 7 BRITISH RULING CASES 679-92.

indeed, guilty of a felony committed against the person who arrested him. Yet the judges assessed substantial damages against the arrester, although he had acted upon reasonable suspicion. The plaintiff had been manager of the defendant's bookstore for nine years. In stock-taking at various times several deficiencies were discovered, showing that money or books or both had been stolen. It was clear that several felonies had been committed. The plaintiff and his wife also operated a news-and-magazine stand of their own. A marked book, "Traffic", previously part of the defendant's stock, was found there. The plaintiff was arrested without a warrant. After his acquittal, he brought suit. The court found that the defendant had reasonable cause to suspect the plaintiff of having stolen money or books other than "Traffic", but that the acquittal as to "Traffic" was final. Accordingly, upon the legally binding premise that the identical felony for which the plaintiff was arrested had not been committed, substantial damages were awarded him.

Thus legal doctrine propelled first in one direction, then in another, with extension here and corresponding contraction there, suggests persistent adaptation of rules to social ends. What were the conditions and problems that underlay this doctrine-spinning, which in isolation seems haphazard and pointless? To give social meaning to the rules and to the techniques of decision, it is necessary to supply the life-like context of human problems, purposes, and institutions within which the rules functioned. A synthesis of this and of the above discussion may reveal the unity and consistency of a whole process.

THE RISE OF PROFESSIONAL POLICE

We shall not tarry over the long and tortuous path marked by many associations and agencies utilized in medieval England to apprehend malefactors. But brevity of treatment must not obscure the fact that these associations and the rules and practices which characterized and governed them during the long centuries from Anglo-Saxon to modern times give meaning to the entire history. For they reveal the solid institution, the deeply ingrained usages and habits of thought. From this long perspective it should be possible to see our police, in certain important aspects, as a

relatively new growth, which, by contrast with the older one, has barely penetrated into the upper soil of traditional behavior.

Paramount is the fact that until quite modern times police duties were the duties of every man.⁴⁹ Systems of universal interguardianship;⁵⁰ hue and cry that obliged all to cease work and join immediately in pursuit of an offender; the liability of the hundred to answer in damages for loss sustained by victims of criminal attack;⁵¹ and numerous lay protective associations⁵²—all of these, and a web of related, interlocking activities and organizations, that enlisted the services of a great majority of the men in the realm, provide the broad background against which the contemporary police force must be placed.⁵³

Of the hundreds of medieval enactments designed to promote order, only one can be described here. The Statute of Winchester, 1285,⁵⁴ is the great legislative landmark which crystallized then current rules and practices. For several centuries it afforded authoritative guidance to courts and writers. It contained provisions, among others, for the liability of the hundreds for robberies committed within them, on failure to apprehend the offenders;⁵⁵ for the appointment of specified numbers of night watchmen for every city and borough, according to population;

⁴⁹ "So that every English man is a sergeant to take the thiefe, and who sheweth negligence therein do not only incurre Evil opinion therefore, but hardly shall escape punishment." From 'The Commonwealth of England,' by Sir Thomas Smith, 1589 edition." Quoted by LEE, A HISTORY OF POLICE IN ENGLAND (1901) 334. And recall Dalton's emphasis upon "every man" as the standard of right.

⁵⁰ Cf. 1 PIKE, HISTORY OF CRIME (1873) 59-60; 1 MAITLAND, COLLECTED PAPERS (1911) 230, 231.

⁵¹ See 2 HAWKINS, PLEAS OF THE CROWN (8th ed. 1824) 116.

⁵² For the writer's discussion of the rôle of lay organizations, see THEFT, LAW AND SOCIETY (1935) 180-90, 195-206, 273-76.

⁵³ There were, to be sure, special functionaries who served as a bond between Crown and people. Thus the early coroner, the justice and the sheriff were conservators of the peace with subordinate constables to assist them. Cf. MORRIS, THE MEDIAEVAL ENGLISH SHERIFF TO 1300 (1927) 228-29. For historical accounts, see COLQUHOUN, A TREATISE ON THE FUNCTIONS AND DUTIES OF A CONSTABLE (1803); FIELDING, *op. cit. supra* note 44. But reliance upon and active participation by the whole population form the essence of the traditional police organization.

⁵⁴ 13 EDW. I, Stat. 2.

⁵⁵ Cf. "... even before the Conquest the practice of fining a district for the offences of its inhabitants obtained at least in one part of England. . . ." *The Criminal Liability of the Hundred* in 1 MAITLAND, COLLECTED PAPERS (1911) 230, 232.

for the arrest and delivery of strangers to the sheriff; for hue and cry which the watchmen must levy and follow "with all the Town, and the Towns near . . . from Town to Town". For the efficient prosecution of the underlying plan "every man . . . from fifteen years and sixty years" must maintain equipment according to his wealth.

By the seventeenth century (where we began, in Dalton, to trace the doctrinal development of arrest) this medieval system was being severely strained. Especially was this the case in all populous centers. In Middlesex there was constant and widespread effort to escape compulsory service as tithingmen and watchmen. Teachers, physicians, the poor and the old were usually excused. The parish constables, being unremunerated, sought to escape duty just as did those nominated for the watch. Persons who made no attempt to avoid or transfer their obligation to serve as peace officers were frequently alehouse keepers who manipulated their public vocation in furtherance of their private interest.⁵⁶ Protests by grand juries became common.⁵⁷ Complaints of bribery and misuse of office by constables nevertheless accumulated. Dismissal from an office which meant work without pay could provide no deterrent; it would have been welcomed.

That watch and ward failed to provide adequate protection became increasingly recognized in the course of the eighteenth century. Finally, in 1753, at the peak of an unusually acute "crime wave", the Duke of Newcastle and Henry Fielding took the first direct approach to professionalization of police. They organized the Bow Street Runners.⁵⁸ The personnel was composed of the best thief-takers of the time—remunerated from private funds. In similar fashion some years later John Fielding, who succeeded Henry, organized the Horse Patrol to guard the roads. Financial

⁵⁶ ". . . such persons were wont to take arrested people to their houses, keep them there till they had spent great sums in eating and drinking and lodging, and then release them without bringing them before a Justice." DOWDELL, *A HUNDRED YEARS OF QUARTER SESSIONS* (1932) 20; see also *MEMOIRS OF JAMES BOLLAND* (1772) 3-4.

⁵⁷ See DOWDELL, *op. cit. supra* note 56, at 20.

⁵⁸ See FIELDING, *AN ACCOUNT OF THE ORIGIN AND EFFECTS OF A POLICE SET ON FOOT BY HIS GRACE THE DUKE OF NEWCASTLE IN THE YEAR 1753, UPON A PLAN PRESENTED TO HIS GRACE BY THE LATE HENRY FIELDING, ESQ.* (1758) 15-16. For an intimate narrative, see FITZGERALD, *CHRONICLES OF BOW STREET POLICE-OFFICE* (1888).

grants, still privately endowed, continued to mount, and after 1773 they were increased to £1000 annually, distributed by the Bow Street Magistrate.⁵⁹

Events move rapidly in the latter part of the eighteenth century. Police reform is in the air; numerous suggestions are made, and by all sorts of persons.⁶⁰ In 1792 Parliament passed the Middlesex Magistrates Bill,⁶¹ which organized the seven offices (three justices at each) into a closer unit. The duties of the justices were more clearly defined; fees were eliminated; fixed and liberal remuneration was provided; power was granted the justices to employ constables.⁶² Improvement was quickly felt.⁶³

In 1796, Colquhoun, one of these magistrates,⁶⁴ published his *Police of the Metropolis*. He offered a plan for the organization and distribution of police through the entire city.⁶⁵ It was more specific, more carefully worked out than preceding ones. He dealt principally with two major defects—personnel and remuneration.⁶⁶ But reform as regards remuneration meant at that time, even to the foremost student of the problem, not regular salaries but special fees, and these contingent upon success.⁶⁷

Investigations of police problems were conducted by parliamentary commissions in 1770, 1793, 1812, 1816, 1818, 1822, and 1828. *The 1816 Report from the Committee on the Police of the Metropolis*, coming at the very center of the legal development described above, is a particularly valuable document. We learn

⁵⁹ The metropolitan magistrates, especially the one at Bow Street, combined judicial, administrative, and executive duties. Perhaps the activity which distinguished them most from our magistrates was their command of the constabulary. They directed investigations; indeed some of the ablest magistrates themselves participated in detective work, sometimes in disguise. They read the Riot Act proclamation in person, conducted raids, supervised the work of their forces and carried on general police activities.

⁶⁰ E.g., BLIZARD, *DESULTORY REFLECTIONS ON POLICE* (1785) 11-12, 57.

⁶¹ 32 GEO. III, c. 53, made permanent, 42 GEO. III, c. 76 (1802).

⁶² Forty-two were employed. See LEE, *op. cit. supra* note 49, at 173.

⁶³ Note the Silk Manufacturers' resolution, quoted by COLQUHOUN, *POLICE OF THE METROPOLIS* (1796) 373n.

⁶⁴ Compare him, Henry Fielding, John Fielding and even the lesser magistrates of Middlesex with the contemporary magistrates in the police courts of our large cities!

⁶⁵ See pp. 226-28.

⁶⁶ See *id.* at 228.

⁶⁷ See *id.* at 228-29.

there that each of the seven metropolitan offices was at that time staffed by a number of paid constables under the supervision of the magistrates. Attached to Union Hall, for example, were eight constables, one of whom served as clerk in the police court. The other seven patrolled a territory not less than "thirty or forty miles" in circumference, with a population, according to the statistical returns in 1811, of 127,312 persons — one constable to 18,187 persons.⁶⁸ Each magistral office was a separate, independent establishment, without knowledge of the others' activities.⁶⁹ There was general recommendation of inter-office coöperation. A similar need prompted insistence upon control of the parish watchmen and constabulary by the magistrates.⁷⁰

It was agreed that the most effective recent improvement was the organization of the Horse Patrol in 1805.⁷¹ Indeed, the testimony showed rapid progress *where there was professional service* — one notable result being that by the end of the eighteenth and the beginning of the nineteenth century, there had been a sharp diminution in crimes of violence.⁷²

Upon the ineptitude, inefficiency, even absurdity of the parish watchmen all witnesses were agreed.⁷³ The watchman was "generally an old man . . . dozing in his watch-box in the interval between crying the hours and when he is moving".⁷⁴ "Offences [were] committed in the streets, close by a watch-box, and . . .

⁶⁸ See Evance, Magistrate at Union Hall, in *THE 1816 REPORT FROM THE COMMITTEE ON THE STATE OF THE POLICE OF THE METROPOLIS*, pp. 82-83.

⁶⁹ ". . . the different Police Officers keep their information to themselves, and do not wish to communicate it to others, that they may have the credit and advantage of detecting offenders." Gifford, Senior Magistrate of Worship-street, in *id.* at 126-27.

⁷⁰ ". . . we have no power for sending for the watchmen, or if we did, we have no power of punishing him; we recommend that the persons complaining shall go to the parish Watch Committee. . . ." Magistrate Raynsford, in *id.* at 77.

⁷¹ See *id.* at 288.

⁷² See *id.* at 212, 316.

⁷³ "It was a popular amusement amongst young men of the town to imprison watchmen by upsetting their watchboxes on top of them as they dozed within; and the young blood who could exhibit to his friends a collection of trophies such as lanterns, staves, and rattles, was much accounted of in smart society. The newspapers were never tired of skits at the expense of the parochial watch". LEE, *op. cit.* *supra* note 49, at 184-85.

⁷⁴ Conant, Chief Magistrate of Bow Street, in *THE 1816 REPORT FROM THE COMMITTEE ON THE POLICE OF THE METROPOLIS*, p. 29.

the watchman was fast asleep, or would give no assistance. . . .”⁷⁵ Fully ninety-five per cent of them were old, poor, harmless fellows employed by householders.⁷⁶ Abominably paid, they were easily bribed.⁷⁷

The police constables, attached to the Official Establishments, received a guinea a week — insufficient even for bare subsistence of themselves and their families.⁷⁸ This small public salary had to be supplemented — and the sources were three: remuneration by the complaining witnesses, public rewards, and bribes.⁷⁹ Payment of fees and expenses by individuals seeking police assistance appears to have been the rule, not the exception.⁸⁰

A few men of experience and imagination were able to free themselves of the traditional pattern of “every man a policeman”, of local service by private individuals. While the judges grappled with the legal problems, they initiated political reforms. Lay protective associations, thief takers, magistrates and special police constables, horse patrols, marshalmen — these marked stages in a slow development toward a general, professional police. Yet watch and ward hung on until 1829.⁸¹ So, too, did the loose string of independent magistracies.

In that year, however, a change occurred of such importance that it has been generally recognized as introducing the contemporary system of professional police. For on April 15, 1829, Peel introduced the Metropolis Police Improvement Bill.⁸² He “was satisfied, that so long as the present night-watch system was persisted in, there would be no efficient police prevention of crime,

⁷⁵ See *id.* at 77.

⁷⁶ See Holdsworth, upper marshal of the City of London, in *id.* at 388.

⁷⁷ See *id.* at 27, 218.

⁷⁸ See *id.* at 72, 109, 134. In addition, there was no provision whatever to compensate officers who became ill or wounded in the course of duty, or for pensions of any sort. See *id.* at 262.

⁷⁹ See *id.* at 72.

⁸⁰ See *id.* at 5-6.

⁸¹ Reliance upon crude measures of self-protection is shown by the use, well into the nineteenth century, of steel man-traps and spring guns. A bill was introduced in 1825 to limit these to dwelling houses. See 12 HANSARD PARL. DEB. (N.S.) 641; not until 1827 was it passed. See 7 & 8 GEO. IV, c. 18.

⁸² As early as 1826 Peel had begun to investigate the police problem intensively. In 1827 (the year of *Beckwith v. Philby*) there was especially strong agitation in the press for police reform. Cf. GLOVER, *THE ENGLISH POLICE* (1934) 57-58.

nor any satisfactory protection for property or the person. . . . The chief requisites of an efficient police were unity of design and responsibility of its agents."⁸³ Each parish was isolated from the others; there were even independent subdivisions within some parishes. Every imaginable arrangement existed. The parish of St. Pancras, for example, had "eighteen different, isolated irresponsible police establishments". In other parishes there was no night watch whatever.

Peel proposed to unite parochial authorities under control of a Board of Police, all to be subject to the direction of the Home Secretary. He would abolish all watch-taxes and substitute a general police-tax. The Horse Patrol, organized in 1805, having a competent personnel and under unitary control, had been very effective. "It was upon such principles that he would propose to establish the patrol contemplated by this bill."⁸⁴ Two months later the Bill passed.⁸⁵ It marked the culmination of the accelerated movement for professional police that began in 1753 when the Bow Street Runners were organized. It initiated the contemporary police in substantially its present form and organization. The "Bobbies" who appeared in 1829 composed a large semi-military force, centrally controlled, disciplined, paid entirely from public funds, wholly uniformed and, in the aggregate, an entirely new organization. Improvements continued to be made.⁸⁶ But they were relatively minor as compared with the sweeping changes Peel effected.

We may terminate the history of the rise of a professional force at this point.⁸⁷ It covers the period principally dealt with in the discussion of the rules of law.⁸⁸ Before integrating the two divisions of discussion thus far essayed, let us inquire briefly into the factors that stimulated the above development of legal doctrine and professional police. If we sought a phrase to epitomize the

⁸³ 21 HANSARD PARL. DEB. (N.S.) 872.

⁸⁴ *Id.* at 878.

⁸⁵ 10 GEO. IV, c. 44 (June 19, 1829). It was entitled, "An Act for improving the Police in and near the Metropolis."

⁸⁶ See FULD, *POLICE ADMINISTRATION* (1909) 22-23.

⁸⁷ For rise of modern police in American cities, *cf.* COSTELLO, *OUR POLICE PROTECTORS—HISTORY OF THE NEW YORK POLICE* (1885) 102; FOLSOM, *OUR POLICE—A HISTORY OF THE BALTIMORE FORCE* (1888) 24; COSTELLO, *HISTORY OF THE POLICE DEPARTMENT OF JERSEY CITY* (1891) 55.

⁸⁸ See pp. 570-78, *supra*.

process characterized by the underlying forces that on the one hand propelled and on the other opposed the expansion of legal doctrine and the rise of a professional force, we might designate it a conflict between Social Need and Political Ideals.

The need for security, protection and order, consequent upon the Industrial Revolution was great and insistent. Mobility of population, urbanization, and the rise of large scale industry, set against the earlier, rooted, rural organization of society, are the salient features of the vast social changes that ushered in a modern England. The consequent appearance of thief-takers, lay protective agencies, the practice of rewards, and organization of small specialized forces mark the earlier, rather spontaneous adaptations to the new situations.

The major problem of security, stimulating such sporadic attempts at solution, is accentuated in the large cities — and, of course, most acutely in London. Over a million and a half inhabitants by the dawn of the nineteenth century! A tangle of many discordant elements; a human hive to be ordered as men seek an equilibrium that will permit survival and growth.

The phenomenon that most dangerously threatens life and property in the metropolis is the Riot; and there were many riots in the eighteenth and early nineteenth centuries.⁸⁹ In 1715 the Riot Act extended the powers of the magistrates, and made the offense a felony without benefit of clergy.⁹⁰ The passage of the legislation showed the need. But it provided no remedy, and indeed, its requirement that the magistrate read the proclamation contained in the Act to the mob impeded prompt counteraction.

The Gordon Riots of 1780 were probably the most serious of all. Their occurrence at the very beginning of the period of rapid growth in the law of arrest makes them especially important. The riots started on June 2, 1780, and lasted six days. The greatest confusion imaginable ensued. Panic set in as the populace fled the mad assault and barricaded itself. While the least disorderly contented themselves with parading, petitioning, and speech-

⁸⁹ *E.g.*, the riot following the passage of the Gin Act of 1736 ("No Gin, No King!"), the rebellion in favor of the Young Pretender in 1745, the journeymen weavers' in 1765, the Wilkes' furor in 1768 ("Wilkes and Liberty!"), the Gordon Riots in 1780, Sir Francis Burdett's disturbance in 1810, and that on the Queen's funeral in 1821.

⁹⁰ 1 GEO. I, Stat. 2, c. 5.

making, at the other extreme the most irresponsible elements, set free always in such emergencies, indulged in arson, burglary, theft, and brutal assaults.⁹¹

Five hundred rioters besieged the Palace. Thousands formed a blockade around Parliament. They burnt the houses of judges and other officials.⁹² They stormed Newgate Prison, burnt it, and released the inmates. So, too, with Fleet Prison and King's Bench Prison. They plundered the Sessions House and the Old Bailey, and tried to force an entry into the Bank of England. Members of Parliament, regarded as directly responsible for the obnoxious legislation that had removed disabilities from Catholics, were subjected to special abuse. While the Upper House was in session the mob clamored at the doors.⁹³

Lord Mansfield left the House to return home, shortly to experience an irreparable and tragic loss. The mob attacked his house. At the last moment he and his wife escaped through a back passage. The mob set fire to the place, and before morning little more remained than the bare walls. Especially unfortunate was the loss of his library, private letters and writings, the labor and collection of many years.⁹⁴

Under the circumstances it is astonishing to note how long the authorities waited before summoning the army to aid the distressed magistrates; and to observe the unwillingness of the military officials to take decisive action except in the last extremity and then only upon "magistral orders".⁹⁵ Despite this restraint, 285 per-

⁹¹ Cf. THE BRISTOL RIOTS, THEIR CAUSES, PROGRESS, AND CONSEQUENCES (1832) 220-22.

⁹² "Black Wednesday was the most horrible night I ever beheld, which for six hours together I expected to end in half the town being reduced to ashes." Walpole, quoted by DE CASTRO, THE GORDON RIOTS (1926) 110. "I remember the Excise and the Gin Act, and the rebels at Derby, and Wilkes's interlude, and the French at Plymouth, or I should have a very bad memory, but I never till last night saw London and Southwark in flames!" *Id.* at 155.

⁹³ "In Lord Thurlow's absence, Lord Mansfield presided in the Upper Chamber, where, said the Duke of Gloucester to Walpole, 'he quivered on the Woolsack like an aspen' in consequence of the ordeal he had experienced." "Lord Mansfield, says Kenyon, was forced to escape by water in a green coat and bob-wig." *Id.* at 37-38.

⁹⁴ See 4 CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND (1899) 303 *et seq.*

⁹⁵ "Shortly after there marched to the Bishop's door the forty soldiers from the church. Markham begged the officer to act forthwith, but the ensign in the absence of a magistrate absolutely refused; the prelate then tried to induce him to act on the authority of a constable then in the house, offering to indemnify him to any

sons were killed by guards and light horse, and 173 others were seriously wounded.⁹⁶

It is worth emphasis that the soldiers were summoned only after orders from the King, who first received the Attorney General's opinion pronouncing the legality of the measure. Subsequently, this ordering out of the army was severely criticized even in the Upper House.⁹⁷ Lord Mansfield rose to the King's defense. One may believe that his remarks were inspired by firm convictions as to policy, if not, indeed, by deep emotion. Delivered two months after *Samuel v. Payne*, and two and one-half years before *Ledwith v. Catchpole*, they will repay examination.⁹⁸

But the immediate effect of the Great Riots, so far as protection was concerned, was growth in lay organization, not in public police. Thus Romilly noted that: "'The inhabitants of almost every parish [were] forming themselves into associations to protect their houses. . . .'"⁹⁹ The urgent need for protection by adequate police was fully understood. The newspapers made vigorous appeals for reform. But despite the recent terror and the ensuing agitation, protection continued to be left in private hands.

Manifestly, there must have been very strong forces in operation to delay reform for half a century. The wave of criticism that met the King for summoning the army even in a crisis brought on by riot and criminality reveals the nature of these causes, namely, deep, uncompromising opposition to the maintenance of a semi-military professional force in civilian life.

Opposition to such an organization in control of the Executive, an opposition deeply ingrained and rooted in associations that grew from an intermittent struggle extending over a long sweep of centuries — that was the force, irrational and misplaced in this

amount, but the officer persisted in his refusal." DE CASTRO, *op. cit. supra* note 92, at 98-99.

⁹⁶ See *id.* at 236.

⁹⁷ ". . . the Duke of Manchester and a few other peers . . . contended that the employment of the military to quell riots by firing on the people could only be justified, if at all, by martial law proclaimed under a special exercise of the royal prerogative." *Id.* at 204.

⁹⁸ Quoted in DE CASTRO, *op. cit. supra* note 92, at 204-07. Gordon was afterwards indicted and tried before Lord Mansfield. It was a tribute to the English judiciary in general, and to Lord Mansfield in particular, that neither he nor his counsel even intimated that a fair trial could not be had before the man who had sustained such serious personal losses. And, indeed, Gordon was acquitted.

⁹⁹ Quoted in DE CASTRO, *op. cit. supra* note 92, at 197.

instance, perhaps, but potent and enduring none the less, that prevented professionalization of police even after the experience of 1780. When in 1792 the Middlesex Justices Bill was before the House, designed, as we have seen, merely to improve the magistracy, not to create any changes in police, Fox, Sheridan, and other doughty representatives of the prevalent revolutionary ideology vehemently opposed the measure.¹⁰⁰ Any attempt to strengthen the Executive was enough to stir the opposition, especially of those who regarded themselves as the champions of individual liberty.

Every advocate of police reform had to face this issue. And it is of the greatest importance to know how the conflict was resolved. What was the necessary solution in the light of such political ideals, woven ineradicably into a long tradition? Let us see how Colquhoun, the earliest and most insistent advocate of improved police, met the issue. The essence of his argument was that protection was necessary in order to preserve "the blessings of true liberty and the undisturbed enjoyment of property."¹⁰¹

In language eloquent of "natural rights", fused with the succeeding ideology of "individual liberty", were formulated the lines of the future solution — security and protection as essential prerequisites to liberty! The dialectics involved are obvious. More to be noted are the very intimate interplay between dominant philosophies and social problems, and the translation of pervasive legal and political ideas and ideals into terms of practical experience — revealing and facilitating an adjustment demanded by the impact of many complex forces.

But such adjustment is slow, as measured by the life of individuals. In this country, at least as regards the problem of police, we have hardly begun to approach it intelligently. In England the

¹⁰⁰ "Was it fit to grant all these powers, and more, to a new description of magistrates appointed by, and receiving salaries from, the crown?" 29 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND (1792) 1464-65; cf. *id.* at 1474.

¹⁰¹ So too: "It cannot be too often or too powerfully inculcated, that Arrangements which have for their object the Security of Innocence and the Prevention of Crimes, ought by no means ever to be considered as an Infringement of the Liberty of the Subject; since the effect of the System is in reality to extend, and by no means to abridge, those Privileges which are secured to every member of the body politic. . . .

"In restraining and preventing the Commission of Crimes, the natural Rights of the Innocent become more extended and protected; the security of the unoffending individual is strengthened, and the general State and Condition of Society is improved." COLQUHOUN, A TREATISE ON THE COMMERCE AND POLICE OF THE RIVER THAMES (1800) xxix.

issues raged back and forth many years before they were clearly understood.¹⁰² When Peel introduced his bill for the improvement of police, he was careful to anticipate the libertarian argument.¹⁰³ But by 1829, with reaction against the French Revolution in the ascendancy, opposition in Parliament had entirely disappeared.

Still the public was by no means reconciled to the new measures even in 1829. Their continued hostility is one aspect of the problem.¹⁰⁴ The other is the method employed to win popular approval. In the initial statement of his plans, Peel was quite conservative — only a few parishes at a time would be taken over by the central force. Upon the adoption of the bill, great care was taken by police officials to avoid friction with the public.¹⁰⁵

But a large section of the press kept up a barrage of invective hurled at Peel — he planned a *coup d'état*, they said; Wellington to be enthroned; tyranny to supplant English liberty; under the pretense of providing protection Peel intended to set up an inquisition — these and other now-seeming absurdities filled their columns.¹⁰⁶ But the unrestrained public protests that accompanied such agitation became increasingly confined to the most irresponsible members of the community. Five years after its organization, an investigating committee highly approved of the new police.

Careful selection of officers, training, patience, restraint even in riots and under conditions of danger and violence, the consummate tact of the commissioners, the calling to account of any officer upon any complaint — these have been the methods used in Eng-

¹⁰² Cf. Francis Burdett's resistance to the soldiers sent to arrest him on the order of Parliament. On his release from the Tower, June 1, 1810, an enormous throng greeted him with unbounded applause as a great hero of the liberties of the people. Everywhere were streamers and banners, bearing the inscriptions, "Magna Carta", "Trial by Jury", "Hold to the Laws", etc. See ARMITAGE, *HISTORY OF THE BOW STREET RUNNERS*, p. 166.

¹⁰³ See 21 HANSARD PARL. DEB. (N.S.) 881.

¹⁰⁴ Cf. TEMPEST, *POLICE!* (1889) 72.

¹⁰⁵ "... 'At the commencement of the new establishment,' say the Commissioners, 'it is the more necessary to take particular care that the constables of the police do not form false notions of their duties and powers.'" LEE, *op. cit.* *supra* note 49, at 241.

¹⁰⁶ In 1830, just prior to the Royal Procession, anonymous placards were broadcast, reading "'Liberty or Death! Englishmen! Britons!! and Honest Men!!! The time has at length arrived. All London meets on Tuesday. Come Armed. We assure you from ocular demonstration that 6000 cutlasses have been removed from the Tower, for the use of Peel's Bloody Gang. Remember the cursed Speech from the Throne!! These damned Police are now to be armed. Englishmen, will you put up with this?'" *Id.* at 251.

land. They provided the technique for resolving the difficulties that inhered in the clash of social need with traditional political ideals. Indeed the "Peeler" or "Bobby" became popular; and if one reflects for but a moment on the initial wide, virulent anathematizing of this creation of social necessity, it becomes clear how well the leaders of police and the formers of opinion have done their tasks.¹⁰⁷

Thus in the study of arrest one encounters many political, philosophical, and social movements. Social values are found inextricably interwoven with the law. Any case, stripped in its report to the very bone of technicality, reflects to some degree — and here more obviously, perhaps, than elsewhere — a whole sweep of ideals, sentiments, and social problems which filter through the specialist's tradition, technique, and language, and give the latter meaning in the whole fabric of the broader suggested context.

The legal and political developments described above may be viewed as attempts to cope with pressing social problems. Judge and political leader sought to achieve necessary adjustments, each by his own methods. New political organization, doctrinal expansion, and a myriad of forces, propelled especially by representatives and members of a class intent upon both protection and *laissez faire* — all were pointed at objectives rather commonly shared, although by no means always deliberately marked out.

Viewed against this historical background, with the salient developments chronologically fixed, the broad assertion that a police officer could without a warrant arrest for felony "at common law" even though no felony had been committed, becomes at best so crude and ambiguous as to be totally misleading. One does not usually think of 1827 as tantamount to "at common law". And the position that "at common law" may mean any rule formulated by courts at any time, while defensible technically, sheds no light upon the social significance of the problem, and indeed tends rather to confusion of the legal problem as well. Without analysis of the cases, one familiar with the social and political history, and, more specifically, with the rise of professional police during the

¹⁰⁷ The problems of course persist, as does the debate. For recent sharp criticism of English police, see WRIGHT, *POLICE AND PUBLIC* (1929). And see the writer's analysis of *The Law of Arrest in Relation to Contemporary Social Problems*, in a forthcoming issue of the UNIVERSITY OF CHICAGO LAW REVIEW.

period 1753 to 1829 as a phenomenon of peculiar importance when set against the traditional system, might with reasonable assurance look for corresponding growth in legal doctrine only after the middle of the eighteenth century. From the origin of the Bow Street Runners to *Samuel v. Payne* was little more than a quarter of a century, and in the decision of that case in 1780 a great judge brought into clearer focus the rudiments of a socially necessary formula which, in the course of half a century, culminated in the now familiar rule of law. During this period, 1780 to 1827, five lines of doctrinal development appear, interlaced, and changing often and reciprocally.¹⁰⁸ They focus upon: rights existing upon the commission of a felony; rights following a charge of felony committed, where none has in fact occurred; the reasonableness of the charge, and of the officer's suspicions when acting without a charge; liability of complainants for charges unreasonably made; and the right of lay persons to arrest for felony.

The courts' varied adaptation of the rules, with a view to maintaining an equilibrium between increased official power and traditional political ideals, is apparent. Elimination of the requirement to prove commission of a felony is accompanied in the first instance (*Samuel v. Payne*, 1780) by insistence upon a charge of felony. But upon such charge being made, the officer need not determine its reasonableness. Arrest upon information but felony in fact committed (*Ledwith v. Catchpole*, 1783) again extends official right — but now emphasis is placed upon reasonable suspicion. There is a brief period of full protection for officers acting in reliance upon any charge, reasonable or not (*White v. Taylor*, 1801; *M'Cloughan v. Clayton*, 1816). The courts believe, apparently, that the requirement of a charge should be gotten rid of; therefore when retaining it, reluctantly, no other limitations should be added. The same feeling out the way to advance the necessary instrumentalities, the same balanced swing to and fro between these goals, continues until 1816 when Lord Ellenborough (*Isaacs v. Brand*) decides, without amplification, that a charge by a juvenile accomplice is not a reasonable one. The type of complainant suggests the initial step, but no generalization whatever is ventured from those facts. And, thus, in 1823 (*Hedges v. Chapman*) with a respectable complainant, despite the *Isaacs* case, the charge need not be a reasonable one. Finally, in 1827 come the two cases

¹⁰⁸ See pp. 570-78, *supra*.

which set the opposing rules in direct juxtaposition, and clarify these formulas. There results elimination of the need for any charge to support arrest without a warrant where no felony was committed, but also, insistence upon the reasonableness of arrest under all circumstances, charge or no charge. (February, 1827, *Cowles v. Dunbar*; Easter, 1827, *Beckwith v. Philby*.)

Throughout the entire period from 1780 to 1827 there is relative certainty in the rules regarding liability of the complainant for an unreasonable charge. And in recent years we have seen (*Walters v. Smith*, 1914) very rigid limitation upon arrest by lay persons: the very felony for which the arrest is made must have been committed.¹⁰⁹ Thus, extension of the rights of officers to arrest has been invariably accompanied by limitation of such rights as regards lay persons. Thus, too, extension of official right has been accompanied by limitation designed to compel reasonable conduct within the area enlarged.

I have tried to trace in rather broad outline the development of the major rules of the law of arrest which form the link between lay and professional behavior; and to indicate some conjunction of the lines of doctrinal development and those representing the growth of a modern professional police force. Underlying these movements, there have only been suggested the social forces which set the basic problems. The issues thus drawn persist. There is revealed the constant, though not always asserted, antagonism between the interest expressed by the Executive's employment of a trained, armed, professional force, and opposing political values, expressed as "individual liberty", or "social interest in the individual life". Finally, we have seen how the English in good measure resolved this conflict—how they met the increased need for security, and how at the same time by intelligent leadership, insistence on restraint, exercise of restraint, and skillful propaganda, their police became recognized, not as the strong arm of the Executive, but rather as the "servant of the people" and able, therefore, to enlist public coöperation.

Jerome Hall.

LOUISIANA STATE UNIVERSITY
SCHOOL OF LAW.

¹⁰⁹ The rule in many American jurisdictions is broader. It is sufficient if a felony has been committed, not necessarily the one for which the arrest was made.