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THE LAW OF ARREST IN MARYLAND

By DAVID KAUFFMAN*

In the administration of criminal justice, the law of arrest has always loomed large. As the first step in bringing the purported criminal to task, legal significance, both in the adjective and substantive phases, has been attached to the process of arrest. There is much that has been said and written on the law of arrest and these expressions of what the law is and what the law should be have had a surprising stimulus on the legislatures of our country. Thus we find that many of our states possess codifications of one sort or another on the subject. There is no great magic to the word "codification" and many of these codes cannot be deemed to be products of any profound thought. There is however, the merit of discussion, profound or otherwise, of these codes before they are enacted into law. Such discussion necessarily deals with social aspects which the courts, even in their most helpful or most determined use of judicial fiat, cannot be presumed to have examined in full. Still the codifications are replete with caveats and fields left unexplored and the courts must constantly peer into these crevices and interstices.

Maryland, on the other hand, has no statutory law of arrest worthy of the name. Here, as in many other phases

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2 Scattered throughout the Md. Code (1939) are references to peace officers and manner of arrest. There is no topic of arrest as such, and the treatment is purely incidental. Among others, there may be noted the following scattered references to arrest: Md. Const., Art. 4, Sec. 6 (judges as conservators of the peace); Md. Const., Art. 4, Sec. 42 (powers of
of law, reliance is placed on judicial interpretation of the status quo as the occasion, spurred by litigation, arises. In Maryland, therefore, we have the two-fold problem of ascertaining the state of the law and further ascertaining the merits and demerits of this state. In the code states, the first problem is considerably narrowed.

So many of the codes appear to be merely declaratory of the common law that one who believes in the legislative process as a system of considered thought is struck with the sagacity and enterprise of the judicial process; a process which saw the judiciary viewing the problem so intelligently that its outpourings remain as law today. Unfortunately, so to attribute almost divine powers of foresight is to fail to take into account the frailty of the human being, the inertia of the human mind, the speed of the mechanical process and the effect of the "seductive cliches" judicially propounded. In short, an observance of police usage and a reading of cases reveal many defects in the law of arrest, code or otherwise.

There is now being undertaken by Professor Sam Bass Warner of the Harvard Law School an investigation of modern police practices in large cities. Professor Warner was delegated this task by the Interstate Commission on Crime—that Commission being of the opinion that illegal arrests were the rule rather than the exception. Such a

justices and constables); Md. Code (1939) Art. 20, Sec. 4 (constable); Art. 20, Secs. 7, 22-27 (constable); Art. 23, Secs. 337-344 (private police); Art. 27, Sec. 364 (railroad employees); Art. 27, Sec. 458 (institution officials); Art. 33, Secs. 104, 243 (election judges); Art. 39, Secs. 4, 8, 9 (fish conservators); Art. 39A, Secs. 5, 6, 21 (forest wardens); Art. 41, Sec. 84 (parole officer); Art. 48A, Sec. 69 (insurance commissioner); Art. 56, Secs. 6, 27-30 (license violators); Art. 56, Sec. 150 (motorcycle police); Art. 56, Sec. 194 (4B) (smoke screens); Art. 59, Sec. 23 (institution attendants); Art. 72, Secs. 29, 31 (oyster laws); Art. 77, Secs. 216, 217 (school attendance officer); Art. 84, Sec. 5 (master of vessel); Art. 87, Secs. 9, 10 (sheriff's liability); Art. 88B, Secs. 1-50 (State Police); Art. 99, Secs. 4, 6, 8, 11, 13, 73 (game wardens).

Warner, Investigating the Law of Arrest (1940) 26 A. B. A. J. 151. The writer has had the privilege of reading Preliminary Report of Sam Bass Warner to Committee on Arrest of Interstate Commission on Crime, August 5, 1940, and it is sincerely hoped that this report will soon be made available to the public, lay and legal, as it has to the Commission and to the American Civil Liberties Union. Warner was chief draftsman of the model Sabotage Prevention Act. Note his treatment of the arrest aspect of the Act in Warner, The Model Sabotage Prevention Act (1941) 54 Harv. L. Rev. 602, 610, 630.
state of affairs, if true, commands our attention because it reveals that the law—as enunciated either by statute or common law—has not found a common meeting ground for the protagonist of protection and the antagonist of encroachment on personal liberty. Perhaps the Commission was correct in its initial surmise for the roots of the law of arrest lie deep in an age where there were no official police departments and a person claiming to arrest might be a kidnapper; where jails were unbelievably squalid and such pesthouses that "gaol fever", a virulent typhus, caused one out of every four in prison to die there; where bail was most difficult to obtain even for comparatively minor offenses; and where corrupt jailers instituted a system of fees for the slightest action on their part which saw many sold into servitude to pay such fees. But these conditions no longer exist and if there are strangulating restrictions on the law of arrest, born of response to these conditions, they should be removed. The purpose of this paper is to examine in part the scope of the Maryland law of arrest with its strictures—an analysis not entirely free from bias. The reader will be constantly subjected not only to the writer's idea of what the law is, but also his notion as to the glaring defects and shining lights such law possesses.

I

IN GENERAL

All arrests are made in either of two ways—(1) with a warrant, (2) without a warrant. Either arrest may be legal, either arrest may be illegal. These two types of arrest share some similar problems; they have some dissimilar problems. Broadly speaking, arrest without a warrant is the recourse in the more dire and extreme circumstances—arrest with a warrant under more careful scrutiny and tempered observation. Arrest with a warrant smacks of the ritualistic; hence, it is a comparatively simple problem to ascertain if these formalities and rites

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4 Webb, English Prisons Under Local Government (1922); Hall, Legal and Social Aspects of Arrest Without a Warrant (1936) 49 Harv. L. Rev. 566; Warner, supra n. 3, 151, 152.
have met with compliance—arrest without a warrant is a more difficult question because the rules and restraints on its legality are not as readily resolved. The factual issue on which the legality of the arrest turns is ordinarily a matter of record in arrest with the warrant, i. e., the warrant itself; arrest without a warrant often calls for an insight of conduct and manner, i. e., how reasonable was a belief. Each requires a person to do the arresting, a person to be arrested and hereafter these will be called the arrester and arrestee respectively. This is a nomenclature of some favor with courts and writers, if it is not enthusiastically approved by lexicographers.5

Such immunities as exist from criminal arrest may be confined to diplomatic agents and apply in either type of arrest.6

A. Jurisdiction

Jurisdiction must exist in the arrester. In arrest with a warrant, we find that besides jurisdiction in the party executing the warrant, there also must be jurisdiction in the issuing party to send out the warrant.7 Without a warrant, there is no issuer and the arrester's jurisdiction is enough. If the crime was not committed wholly or partly within the state in which arrest is sought, the necessity of jurisdiction is even more troublesome. Wanted men cannot flee with impunity to neighboring states, but the source of authority by which men may arrest those who have fled is rather vague in our jurisdictional concept. Jurisdiction over the person in the sense of having the power to seize him is apparently enough if the arrester

5 E. g., State, ex rel. Wong You, v. District Court, 106 Mont. 347, 351, 78 P. (2d) 353, 354 (1938); Perkins, The Law of Arrest (1940) 25 Iowa L. Rev. 201, a most comprehensive and excellent article cited extensively herein. See also Hall, supra n. 4.

6 United States v. Ortega, 4 Wash. 531, 534 (1825); U. S. C. A. Title 22, Sec. 252; but there is no immunity as to consuls (unless they are also chargé d'affaires). Coppell v. Hall, 74 U. S. 542, 553, 7 Wall, 542, 19 L. Ed. 244 (1886); Voorhees, The Law of Arrest (2d ed. 1915) 211. As stated, arrest in civil cases is not discussed, hence the varying degrees of immunity from such arrest enjoyed by jurors, lawyers, litigants, witnesses, judges, congressmen, and electors are not examined.

7 Re Crawford, 148 Wash. 265, 268 Pac. 871 (1928).
knows or is reasonably suspicious of a crime for which arrest may be made.\(^8\) Some statutes add a hindrance by requiring a charge, formal to some degree, to be made in the state of the commission of the crime before the arrest can be deemed proper.\(^9\) If the crime was committed within the state in which arrest is sought but the arrestee is fleeing that state, jurisdiction to cross borders and state lines is dependent on whether the pursuing arrester's state clings to the notion of territorial limits or has expanded jurisdiction by means of a "Fresh Pursuit" act,\(^10\) permitting the arrester to stalk the fugitive to any distance in a foreign state so long as he acted without unreasonable delay, although the pursuit was not instant. Maryland possesses a Uniform Act on Fresh Pursuit, as do all of the states bordering Maryland. The Uniform Act on Fresh Pursuit applies to either type of arrest. Later sections will deal with some of the aspects of jurisdiction with greater particularity. The jurisdictional phase of arrest is often styled a bailiwick question. The bailiwick for a city or town policeman is the city or town; for the sheriff or constable of the county, it is the county; for the officer of the state, it is the state.\(^11\) We shall find that not only is this concept


\(^{9}\) Of course, this is pertinent only to arrests without warrant as arrest by warrant can have no extra-territorial strength. *Kendall v. Aleshire*, 25 Neb. 707, 45 N. W. 167 (1890); *Stuart v. Mayberry*, 105 Okla. 13, 231 Pac. 491 (1924).

\(^{10}\) *Matter of Strauss*, 197 U. S. 324, 331 (1905); *Ex parte White*, 49 Cal. 433 (1875); *State v. Hufford*, 28 Iowa 391 (1869); *Forbes v. Hicks*, 27 Neb. 111, 42 N. W. 898 (1889).


If a state possesses the Fresh Pursuit Act, can peace officers in fresh pursuit cross lines and arrest outside their own bailiwick but within their own state; e. g., from one county to another? Quaere. See *Ops. Atty. Gen.*, Baltimore Daily Record, Aug. 23, 1940.


broadened by the Uniform Act on Fresh Pursuit, but that arrest with a warrant may also enlarge the bailiwick.\textsuperscript{12}

\textbf{B. Notice.}

In either type of arrest, notice by words or conduct is to be given to the arrestee by the arrester.\textsuperscript{18} Such notice is to include a proclamation or evincement of the authority of the arrester with a concomitant indication of the arrester’s intent or purpose and the reason for the arrest.\textsuperscript{14} Rules for notice vary slightly in the types of arrest as discussion following will reveal. On the whole, it is safe to say that notice may be dispensed with if such notice may be dangerous to the arrester, dangerous to a third person, or a formality which may permit the arrestee to escape.\textsuperscript{15} Nor, in the vast majority of states, need notice be given before the apprehension is made. The arrester may take the arrestee into custody and then give notice.\textsuperscript{16} A requirement of notice preliminary to or concurrent with arrest would undoubtedly increase an arrestee’s chance to elude his arrester.

\textbf{C. Disposing of the Prisoner}

Having taken the arrestee into custody, it behooves the arrester to present him before one vested with the authority to advance the arrestee to a further stage in a prosecution for crime. The arrester must act promptly, hence the nearest or most accessible magistrate would apparently be the logical authority to whom to submit the arrestee. This precept of action of no unreasonable delay is followed in arrests without a warrant,\textsuperscript{17} further extended by per-

\textsuperscript{12} \textit{Infra} circa notes 45-48.
\textsuperscript{18} \textit{Restatement}, \textit{Torts} (1934) Sec. 128.
\textsuperscript{14} A. L. I. Code Crim. Proc., supra n. 1, 248; Presley v. State, 75 Fla. 434, 78 So. 532 (1918).
\textsuperscript{15} \textit{Restatement}, \textit{Torts} (1934) Sec. 128; State v. Gay, 18 Mont. 51, 44 Pac. 411 (1896); Love v. Bass, 145 Tenn. 522, 238 S. W. 94 (1911); Sizemore v. Commonwealth, 279 Ky. 190, 130 S. W. (2d) 31 (1938).
\textsuperscript{18} See also Md. Code Public Local Laws (Flack, 1930) Art. 4, Sec. 760.
mitting a private person making such an arrest to turn the arrestee over to a peace officer. In arrest by a warrant however, there is usually an express command of the authority to whom the arrestee must be taken, substituting the nearest or most accessible magistrate in the event of unavailability of the named authority. Magistrates need not be awakened in the middle of the night so long as an expeditious bringing of the arrestee before the magistrate is made.

D. Arrest Situations—Definitions

The use of the word "arrest" brings to mind the picture of an officer of the law firmly seizing a suspect and informing him that he is under arrest. There are sequences to the picture it is necessary to portray.

When a person is approached by another and questioned as to his actions or identity, he is merely being accosted and not arrested. If a person having been accosted is asked to go down to the police station with the officer, and he complies without feeling that coercion is being asserted to take him to the station, he is merely cooperating in response to a request and is not being arrested. When one is issued a ticket for a traffic violation, one is not being arrested but is merely being served notice that he has committed an offense which may be tried summarily by a magistrate, and the ticket amounts to a summons for such summary trial. If the summons is not obeyed, an arrest will follow. If a person's car or truck

21 State v. Gulczynski, 2 W. W. Harr. (Del.) 120, 120 A. 88 (1922); see Note (1938) 37 Mich. L. Rev. 311, 313. However, flight or evasion may indicate consciousness of guilt which will justify one in reasonably believing the person accosted is a criminal.
23 A. L. I., Code Crim. Proc., supra 217; Long v. Ansell, 63 App. D. C. 68, 69 F. (2d) 386 (1934) brings out the distinction albeit the summons therein is a civil process.
To be more neatly precise, one should differentiate between a ticket and a summons further. A ticket is a command issued by police authority, a summons by court authority. Tickets are by far more common for enforcement of traffic law.
is stopped in order to inspect for Japanese beetles, possible lack of proper equipment, or weight of car or truck, an arrest is not being made. He is being detained in the exercise of the privilege of inspection, and such detention does not constitute an arrest.23 A similar detention in the exercise of privilege of investigation is that which sees material witnesses kept at the scene of the crime for questioning.24 If either of these detentions is unreasonably protracted, an imprisonment has been made.25 The crime of misprision (refusing to testify as to knowledge of a crime) has long since gone from our law, supplanted in large part by the accessory after the fact concept, if any aid has been vouchsafed the principal. However, it is possible to arrest material witnesses if they indicate defiant unwillingness to aid the court in its delving through obfuscated facts.26

This variety of arrest situations indicates the nebulous ground on which any definition of arrest must rest. Any definition must give rise to qualifications, but for present purposes, the definition set forth by the Court in B. & O. R. R. v. Cain27 will suffice. The Court said arrest is the detention of the offender for the purposes of prosecuting him for crime. The elusive word in this definition is "detention". Detention has been interpreted as requiring touching of the arrestee by the arrester. Later cases conceded a broader interpretation, permitting detention to apply where there was no touching but the offender submitted to the arrester upon notice of the arrest. Either

23 Only if they are aware of or suspect the violation in some manner so they may call it a misdemeanor in their presence or view. Otherwise, special statutes are needed. However, peace officers ordinarily have the privilege of inspection without statutory authorization. Head v. State, 131 Tex. Cr. R. 96, 96 S. W. (2d) 981 (1936).
24 The detention in this case is obviously not to subject the detained one to prosecution but to procure assistance and information. See 2 Hale, Pleas of the Crown 281-2.
25 Subject to the rules set out in Restatement, Torts (1934) Secs. 35, 36. Moreover, this imprisonment must necessarily be a false imprisonment if notice of arrest and evincement of authority and reason have not been given.
26 Statutes declaratory of the common law are: Md. Code (1839) Art. 35, Sec. 14; Iowa Code (1935) Sec. 13550. But not if the crime is less than a felony, said the court in N. Y. P. & N. R. R. Co. v. Waldron, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502 (1911)—however, note that a private person was making the arrest.
27 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688 (1895).
touching or submission meets the detention requirement of the arrest today.\textsuperscript{28} We add to our first picture of the suspect being seized, another picture in which the arrester notifies the arrestee and the arrestee submits to the arrest in some manner, words, or conduct.\textsuperscript{29} Note the important hiatus here. An arrester approaches an offending arrestee. Assuming no submission and assuming the arrester does not wish to harm the arrestee, must a game of tag be successfully completed in order to effect an arrest? The answer seems to be in the affirmative. Analytically, the hiatus should not exist, and the fact that the arrester has reached out his hand and touched the arrestee should not be a \textit{sine qua non} of arrest. Detention looks to possession or seizure of the body of the arrestee; intent to possess being assumed, the power to possess as in various phases of property law has been defined as manual seizure or circumstances in which obstacles to manual seizure may be fairly dismissed as negligible.\textsuperscript{30} This would cover the touching, the submission and also the hiatus, where the very slight act of reaching across a small space and touching a person has been omitted. It is only fair to the previous definition to note that any touching, however momentary or fragmentary, is sufficient.\textsuperscript{31}

The police practice of "frisking" deserves scrutiny. This passing of one's hands over the clothing of a suspect in order to determine whether or not concealed weapons are being carried is held to be an arrest in many states.\textsuperscript{32} In many others, it is not an arrest but it is looked on as an


\textsuperscript{29} State v. Beckendorf, 79 Utah 300, 10 P. (2d) 1073 (1932).

\textsuperscript{30} The general phrasedology is universal in defining the power to possess—the words are substantially Prof. E. H. Warren's of Harvard Law School—unpublished lectures in his first year course on Property and in Warren, \textit{Trover and Conversion}, p. 18.

\textsuperscript{31} Whithead v. Keyes, 85 Mass. 495 (1862); State, \textit{ex rel.} Sadler, v. District Court, 70 Mont. 378, 225 P. 1000 (1924).

\textsuperscript{32} Note, (1934) 92 A. L. R. 490; Warner, \textit{supra} n. 3, 158. By far the better view would seem to be that expressed in Gisske v. Sanders, 9 Cal. App. 13, 88 Pac. 43 (1908) in which frisking was condoned. Cogent arguments appear in Insan, \textit{Firearms and Legal Doctrine} (1933) 7 Tul. L. Rev. 529.
illegal search since an arrest has not been made to which the search is incidental. In the latter case, when an officer accosts one suspected of carrying concealed weapons, he is placed in the position of choosing between two alternatives:

(a) He may arrest the suspected offender; thus protecting himself from injury but subjecting himself to a possible action for damages on the false arrest, or

(b) He will not "frisk" him, protecting himself against possible damage suit for false arrest but subjecting himself to a strategic disadvantage in the event the suspect is armed and a dangerous character.

Here is one case where the law is not only obsolete but acts so as to compel the law-enforcement officer to violate the law. There is a definite need for recognition of this intolerable position. Practically, the arrester worries about his safety first, his civil liability after. The inconvenience and humiliation of a frisking is so inconsequential that to term it accosting, without calling it either an arrest or illegal search without arrest, would not seem seriously to offend anyone, and would merely accept as law that which through the expediency of self-defense has become practice.

E. Results of an Illegal Arrest

The making of an illegal arrest is a springboard for actions sounding in trespass. These trespassory suits may be called assault, assault and battery, false arrest, false

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33 People v. Margelis, 217 Mich. 423, 186 N. W. 488 (1922); People v. Marendi, 213 N. Y. 600, 107 N. E. 1068, 1060 (1915); Note (1940) 54 Harv. L. Rev. 127.
34 State v. Fador, 222 Iowa 134, 268 N. W. 625 (1936); Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757 (1903).
35 Roddy v. Finnegan, 43 Md. 490 (1875); Karney v. Boyd, 186 Wis. 594, 203 N. W. 371 (1925); Crosswhite v. Barnes, 139 Va. 441, 447; 124 S. E. 242, 244 (1924).
36 A far from water-tight compartment often invoked by the court as a synonym for the other actions mentioned. See 1 PoE, PLEADING AND PRACTICE (Tiffany ed. 1925) Sec. 239 for a discussion of results of illegal arrest. Wilson Line v. Brown, 164 Md. 698, 166 A. 426 (1933).
imprisonment, or a variety of names. There are too many suits based on illegal arrest to say that a potential arrester is not concerned with the repercussions which may result from an arrest. The arrester may be sued and lose. He may be sued and settle. He may be sued and be pronounced free from liability. Even in the last case, he will be out his attorney's fees and possibly costs. If the offender was guilty and the seizure justified, if not legally sanctioned, any loss on the suit may be merely nominal but this is indeed an airy argument to an arrester subject to the idiosyncrasies and sometimes idiocy of a jury. Aside from the penalties for illegal arrest, such special obsolescence of the machinery of arrest may take the form of contempt of the law by the citizenry. If the arrestee in fact is a proper subject for prosecution, the legality or illegality of the arrest will make no difference. The law will welcome with open arms the chance to prosecute, amending the warrant if necessary, or in arrest without warrant, accepting the gifts placed before it. A warning note should be sounded—out of an abundance of caution perhaps—to call attention to the fact that arrest may be legal and yet the arrestee is innocent, perhaps even entitled to release on a writ of habeas corpus.

II

ARREST WITH A WARRANT

The law of arrest with a warrant possesses a disarming simplicity. Formal requisites for a valid warrant and execution of the warrant have the force of law behind them. The enumeration of these formal requisites is a matter of course but the ratio decidendi is far from a matter of course.

37 Leading false imprisonment case is Pike v. Hanson, 9 N. H. 491 (1838); Filer v. Smith, 96 Mich. 347, 55 N. W. 999 (1893).
A. Valid Warrants

To be valid, a warrant must:

(1) be issued by a proper authority—such proper authority may be a justice of the peace or a magistrate, a court issuing a bench warrant after indictment by a grand jury, a special court on the premise that contempt of the court has been indicated by a failure to heed a summons or a particular subpoena, a coroner after an inquest has been resolved. To be a proper authority, the issuer must have jurisdiction, i.e., he must be the type of person who may issue and the offense must be the type of offense for which he may issue.

(2) be directed to a proper person. Today, a private person is not, in most states, a proper person for direction of a warrant to be executed. Limitations on this direction vary in different states. Maryland seems to incline towards (a) the rule which permits the issuer to direct the warrant to any peace officer in the state but requiring that execution of the warrant either be made in the officer's own county; or, if out of his county, insisting that a written endorsement be made on the warrant by a magistrate of the county in which execution of the warrant is sought. The broadest rule (b) proclaims the right of the issuer to direct the warrant to any peace officer in the state—such warrant to be executed in any county of the state. A narrower rule (c) directs the warrant to any peace officer in the state but restricts such peace of

30 BLACK, LAW DICTIONARY; BOUVIER, LAW DICTIONARY. See Downs v. Swann, 111 Md. 53, 73 A. 653, 23 L. R. A. (N. S.) 739 (1900).
31 State v. Glenn, 54 Md. 572, 597 (1880); VOORHEES, op. cit. supra n. 6, 28.
32 Anderson v. Dunn, 19 U. S. 204 5 L. Ed. 242 (1821). RESTATEMENT, TORTS (1934) Sec. 112, comment c.
34 RESTATEMENT, TORTS (1934) Sec. 124, comment d.
35 See A. L. I., CODE CRIM. PROC. supra n. 1, 188. Compare early common law, 2 HALE P. C. 110.
ficer's execution of the warrant to his own bailiwick. Still another, (d) limits the direction of the warrant to a peace officer of the particular county in which the administration of criminal justice is initiated but allows execution of such warrant by such peace officer in any county in the state. It is true that the rules concerning the jurisdiction of the officer for execution are not pertinent to the validity of the warrant in the direction sense; but, the problem of jurisdiction in the issuer and the problem of jurisdiction in the person to whom the warrant is issued for execution are so intertwined that to state them here, while a deviation from formal requisites of a warrant, is a logical deviation.

(3) be issued only on sworn complaint of one who has information that a crime has been committed and must state that complaint in the warrant. There is an equivocation in the law as to whether or not the magistrate can content himself with such sworn complaint as sufficing to show proper cause of guilt or whether he must seek further facts in order to believe such probable cause exists.

(4) contain a statement of the offense for which the person is being arrested. Substantial statement is enough. One need not allege each element of a crime.

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48 York v. Commonwealth, 82 Ky. 360 (1884).

Oral complaint suffices if under oath: Kelly v. State, 151 Md. 87, 133 A. 899 (1926).
43 Lynchard v. State, 183 Miss. 691, 184 So. 805 (1938). Crichton v. State, 115 Md. 423, 92 A. 36 (1891) agrees that a description of the offense is necessary but refuses to grant a writ of certiorari for lack of such description, since it is possible that the magistrate still has jurisdiction over arrested—by virtue of Chapter 444, Acts of 1906 permitting the presiding official to amend the warrant for the purpose of proceeding with prosecution. This is typical of many other states' attitude.
(5) contain a command that the purported offender shall be brought before the magistrate issuing the warrant or some other magistrate in the event the issuing magistrate shall not be available: such other magistrate being the nearest or most accessible magistrate in the county.  

(6) contain a statement of the date when issued and the place where issued.

(7) contain a distinct identification of the person to be arrested. This identification shall be made by the correct name if possible, if not possible, any name by which the arrestee may be known or a description which will enable ready identification.

(8) be in writing signed by the authority with the title of his office and an indication that the warrant is issued on behalf of the state, commonwealth, or people.

These are the formal requisites of a warrant. Possessed at common law, they are possessed today and have found their way into almost all form books, text books, and treatises. Maryland is no exception.

B. Apparently Valid Warrants

Requisites for validity of a warrant are readily apparent on the face of a warrant. It would tax criminal procedure unduly if the officer were to be held responsible for knowledge as to the existence of probable cause, the propriety of the name or description used in the identifi-

51 Wright v. State, 177 Md. 230, 236, 9 A. (2d) 253 (1939); Blake v. Burke, 42 Md. 45 (1875); Lewin v. Uzuber, 65 Md. 341, 4 A. 285 (1886); Green v. State, 113 Md. 451, 77 A. 677 (1910); Latrobe, Justices Practice, Sec. 1315.

52 1 Chitty, Crim. Law 38.


55 Hochheimer, Criminal Law (2nd ed. 1904) 80. Exemplifying the brushing aside of technicalities and clerical errors are Norwood v. State, 45 Md. 68 (1876); and Smith v. Brown, 119 Md. 236, 86 A. 609 (1912).
cation and many other essentials of the warrant. The escape valve of the officer is that he is free from liability for executing the warrant if the warrant conforms in fact to the enumerated essentials for validity or if the warrant is a reasonable facsimile of a factually valid warrant. The language the court uses is that the officer is immune if the warrant is "fair on its face" or "good on its face". The standard for fair on its face or good on its face is reputedly objective, for our much-maligned friend, the reasonable man, appears, but the standard is lax indeed; the defect of illegality on the warrant must be so palpable to the reasonable man that on glancing at it, he will see that the warrant is null and void on its face. Obviously, the duty of inquiry is little and it must be a poorly drawn warrant indeed to endanger the officer. No doubt, this low standard is designed to alleviate the risk which the officer undertakes in arrest; since it is held that if the warrant is not valid nor fair on its face, he acts at his peril in the execution of the warrant and reasonable circumstances will not excuse him.

C. Execution of the Warrant

If the warrant has validity or the cloak of validity, the arrest is not yet necessarily lawful. The warrant must be properly executed. Although, ordinarily, a warrant may not be directed to any one other than an officer, it is possible for the warrant to be executed by a non-officer. Deputation of a private person is obvious. Moreover,

57 Restatement, Torts (1934) Sec. 124 points out some of the differences between valid warrants and apparently valid warrants.
58 Forms and stock materials have mitigated this problem materially. Typical of such a form is Goldsborough, Forms and Precedents, 569.
60 A formally deputized private person is a peace officer: State v. Seery, 95 Iowa 652, 64 N. W. 631 (1895); Winkler v. State, 32 Ark. 539 (1877).
61 If orally summoned by a sheriff without formal deputization they achieve the neither fish nor fowl status of posse comitatus, says Robinson v. State, 93 Ga. 77, 18 S. E. 1018 (1893).
even though deputization has not taken place, if a private person is called on by an officer to aid him in executing the warrant, arrest by private person is lawful if the two acted in concert. Furthermore, the private person is protected not only by the officer's authority to make arrest but by his apparent authority; hence, even if the warrant is not valid nor "fair on its face", reasonable reliance on the officer's authority exempts the private person.

In the discussion concerning the direction of the warrant by the issuer, the ensuing jurisdiction of the one executing the warrant has been pointed out. Statutes cover the field and Maryland's statute is a reproduction of the common law in confining the officer to his own county unless endorsement is made by a magistrate in another county. This curtailment of jurisdiction might lead to acute distress if the Uniform Act on Fresh Pursuit did not supply much relief. Cognizance should be taken of the retention of authority to arrest without warrant if one has over-stepped his own bounds for arrest with warrant. But, if the officer has lost jurisdiction for arrest with warrant, he is reduced in power to a private person and the private person's habiliments are not overly comfortable, as we shall see later.

Constriction on free execution of a warrant does not halt at jurisdiction. The executing officer is pungently told that he must have possession of the warrant at the time he makes the arrest. If, however, the possessor of the warrant has enlisted another to help him, whether private person or peace officer, and in the execution of that warrant any of those actors in concert has the warrant, the possession of that one is attributable to all.

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61 Cincinnati, N. O. & P. R. Co. v. Cundiff, 166 Ky. 594, 179 S. W. 615 (1915).
62 Md. Code (1939) Art. 52, Sec. 15.
63 McCaslin v. McComb, 116 Tenn. 690, 94 S. W. 79 (1906).
64 Giddens v. State, 154 Ga. 54, 113 S. E. 386 (1922); Hunter v. Laurent, 158 La. 874, 104 So. 747 (1925); Crosswhite v. Barnes, 130 Va. 471, 124 S. E. 242 (1924).
Actions in concert are defined as transactions in which the parties are within the senses of each other.\textsuperscript{66}

A warrant is an indicium of authorization; hence, exhibition of a warrant alleviates the early kidnapping dread. A warrant will apprise the offender of the charge against him and will state the substance of that charge. In short, a warrant acts as notice of a formal type. Confusing the rule with the reason, the law today requires the officer to exhibit the warrant on request.\textsuperscript{67} A reasonable amelioration of the rule excuses failure to exhibit this badge of authority and manifestation of intent, if an emergency is reasonably apparent.\textsuperscript{68} An officer is not expected to defend himself from threatened gun play by waving a piece of paper.

Perhaps the most cloying restriction on the officer’s execution of the warrant and the one which most preys upon his mind is the requirement of securing the person named or described in the warrant.\textsuperscript{69} The officer must have not only the white soul but the gray brain, for actions coupled with the purest of intentions will not excuse him if there is no reasonable mistake of fact generated either by identity of names or identity of descriptions or some other extenuating factor.\textsuperscript{70}

The employment of various types of warrants could relieve this responsibility. But, since \textit{Entick v. Carthington}\textsuperscript{71} first placed the seal of judicial as well as popular disapproval on general warrants for search, general warrants for arrest allowing anyone—without name or description—to be arrested on suspicion of a crime, are not to be tolerated.\textsuperscript{72} Maryland’s Constitution, as those of

\textsuperscript{66} See Robinson v. State, 93 Ga. 77, 18 S. E. 1018 (1893).
\textsuperscript{67} \textit{Restatement, Torts} (1934) Sec. 128.
\textsuperscript{69} West v. Cabell, 133 U. S. 75, 33 L. Ed. 643, 14 S. Ct. 876 (1894); Blocker v. Clark, 126 Ga. 484, 54 S. E. 1022 (1906); Cf. Manning v. Atchison, T. & S. F. R. Co., 42 N. M. 381, 79 P. (2d) 922 (1938) where arrester was acting without warrant.
\textsuperscript{70} O’Neill v. Keeling, 238 N. W. 887, 127 A. L. R. 1050 (Ia. 1939); \textit{Restatement Torts} (1934) Sec. 125.
\textsuperscript{71} \textit{Howell's State Trials} (1765).
\textsuperscript{72} West v. Cabell, \textit{supra} n. 69; Blocker v. Clark, \textit{supra} n. 69.
most states and the United States, specifically prohibits these blanket or general warrants.\(^7\)

Nor are warrants valid which are issued with the space for the name left open to be filled in by the arrester, a clever evasion of the prohibition against general warrants. The flimsy device is seen through and brusquely recanted.\(^4\)

Sometimes, an identifying description of an arrestee is known but the name is not. In filling out the warrant, the issuing authority will put this description in and then, as a matter of form, in order to have some name there, put the name John Doe. This is perfectly proper.\(^7\) When, however, this John Doe is not appended to a description, it is summarily dismissed as illegal—a scheme like general warrants or warrants in blank.\(^7\) The objectionable feature to these purposely vague warrants, in thus clothing each officer with the garment of a competent authority in finding probable cause for issuance, is obvious. The ensuing depredations on personal liberty and comfort have been set forth many times. Since the police powers in arrest without a warrant are large, little harm is occasioned justice.

D. Flaws of Arrest With Warrant

In criticising the law of arrest with warrant, one is necessarily driven to the conclusion that arrest without a warrant will remedy some of the flaws; some, but not all. For arrest without a warrant has also many limitations, not the least of which is the restriction on the type of crime for which an officer or a private person may arrest. Not the least of these is the restriction that neither officer nor private person can arrest for a misdemeanor not committed in his presence or view.\(^7\) For such a crime, a war-

\(^7\) Md. Const., 1867, Dec. of Rights, Sec. 26.

\(^4\) Wright v. State, 177 Md. 230, 237, 9 A. (2d) 253 (1939); Rafferty v. People, 69 Ill. 111 (1873).

\(^7\) Spear v. State, 120 Ala. 351, 25 So. 46 (1898); Wilson v. Lapham, 196 Ia. 745, 195 N. W. 235 (1923).

\(^7\) Commonwealth v. Crotty, 92 Mass. 403 (1895).

\(^7\) Green v. State, 189 So. 763 (Ala. 1939); Morris v. State, 92 P. (2d) 609 (Okla. 1939).
rant is necessary and this is only one of several situations in which a warrant is necessary, as will be later demonstrated. Lest we have an overly cherubic faith in arrest without a warrant, we are bedeviled with a rule existing in some states, which even the kindest interpreter must term an unhappy affliction.

An officer possessing a warrant for a fugitive criminal hunts down the offender and arrests him. In this situation, the officer could have made the arrest with a warrant or without a warrant but at the time he seized the criminal for detention, he proclaimed the arrest by virtue of the warrant. The warrant in fact was neither valid nor fair on its face. Many courts greet this situation with a statement that the arrest must be considered illegal, since he purported to act by virtue of the warrant and the warrant was bad; but, if he had purported to act by his right to arrest without a warrant or with a warrant, the arrest would have been sanctioned.

It is surplusage to add that the states permitting the arrest to be sanctioned on the right of arrest without a warrant, despite the fact that the arrest was proclaimed to be by virtue of the warrant, have a sounder rule. Nevertheless, the rule first stated has a great deal of strength and one cannot pooh-pooh any flaw in the laws of arrest with a warrant by believing that arrests without a warrant will cover any critical situation. It is very doubtful indeed that the officer will proclaim that he is acting not only by virtue of the warrant but by virtue of the right to arrest without a warrant. Any defects the laws of arrest with a warrant possess are indeed important.

A police cruiser car, radio equipped, wanders the streets of a city. Calls come in constantly. Some of these calls are the result of complaints by private persons which have been incorporated into warrants. Is the cruiser car

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78 Holmes v. Byler, 80 Ia. 365, 45 N. W. 756 (1890): Perkins, supra n. 5, 220.
79 RESTATEMENT, TORTS (1934) Sec. 128, Comment c.
to be forced to come back to a central point to get the warrant? Let us suppose the crime is one for which arrest without warrant is inappropriate, since it may be a misdemeanor not committed in his presence or view—such as obtaining money by false pretenses, conspiring to commit crime, various forms of attempts, etc., in some of which swift apprehension is desirable and issuance of thousands of warrants unfeasible.

Yet such arrests are illegal. The warrant must be possessed.

An officer sees a picture in a Rogue's Gallery, knows a warrant has been issued, encounters the embodiment on the street—makes an arrest. Must every officer be possessed of a warrant for every misdemeanor? Consider the heightening of the problem in urban areas. Yet the law refuses to be budged from the possession of warrant requirement.

The American Law Institute's code on arrest recommends the possession requisites be dispensed with so long as a warrant can be shown as soon as practicable. 81 This is indeed sound reasoning but the citations they use to support their statement permit exhibition of the warrant after arrest—not possession of the warrant after arrest. 82 The possession must be concurrent with the arrest.

Moreover, almost any of the requirements may foul the workings of the police. If a warrant must be had, or the officer is aware that the warrant is lacking in some vital respect, obtaining or replacing a warrant may ordinarily be a small problem; but, if time is important, as it is in some cases although far from all, justice may be perverted. We must not falsely postulate that arrests with a warrant can always be leisurely affairs. Often time is of the essence.

It is apparent that there are flaws in arrest with a warrant due to changed conditions and changed concepts. While such matters might properly be left to the judiciary, statutory enactment gives a policeman much greater se-

82 Id. 244.
curity. If forewarned, the officer is forarmed. He need not jump, then litigate.

From the legislative viewpoint, it is helpful to note the constitutional problems to surmount. We speak here of warrants for arrest, not search warrants. Maryland's provision is typical of many others—"That all warrants, without oath or affirmation, to . . . seize any person . . . are grievous and oppressive; and all general warrants . . . to apprehend suspected persons, without naming or describing . . . the person in special, are illegal, and ought not be granted." None of the problems advanced would seem to require constitutional amendment; ordinary legislation would suffice.

III

ARREST WITHOUT A WARRANT

Arrest without a warrant is a horse of a vastly different hue—a very important hue since it is under the color of such arrest that most arrests are made. As in arrest by virtue of a warrant, the arrest, if not in conformity with the law, gives rise to unhappy consequences, not the least of which is civil liability.

Whether or not a particular arrest without a warrant is legal or illegal is a question answerable only with difficulty unless the informant is fully aware of the vagaries and whimsies of the courts of his state on the subject—a status the writer does not pretend to have achieved. Basically, the authority under which such arrests can be made must hurdle the obstacle of a fundamental right, the sanctity of liberty of person—a liberty of which one cannot be deprived unless compliance has been made with due proc-

63 Md. Const. 1867, Dec. of Rights, Sec. 26. The Fourth Amendment is the bulwark in event of Federal jurisdiction. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Treatment accorded such an assertion may be noted in Burroughs v. Eastman, 101 Mich. 419, 59 N. W. 817 (1894).
ess of law. Therefore, the Fifth Amendment in the event jurisdiction exists in the United States,84 the Fourteenth Amendment in the event of state jurisdiction,85 wag admonishing fingers at us. Let the arrest be reasonable, let it be just. Almost every State's Bill of Rights has similar language; and, in Maryland, Article 23 of the Declaration of Rights invokes the magic words "Law of the Land".86

We find some courts attempting to place other obstacles in the path of the law of arrest. Thus in In re Kellam,87 and Ex parte Rhodes,88 the court in each instance talks of the Sixth Amendment—forbidding unreasonable searches and seizures. Nor have these courts and some others ever recognized what would appear to be a most obvious set of facts; namely,

(1) there may be an arrest without a search and seizure,

(2) there may be a search and seizure without an arrest,89

(3) the problem of search and seizure as incidental to a lawful arrest is a two-headed animal and each head must be dissected with different knives.

This paper will not treat search and seizure, and the citations in which that issue comes up are analyzed with view only to whether or not the arrest was lawful—not

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84 Annotation, 1 A. L. R. 585.
86 "That no man ought to be taken or imprisoned . . . or in any manner destroyed or deprived of his life, liberty or property but . . . by the Law of the Land."
88 In re Kellam, 55 Kan. 700, 41 Pac. 960 (1895).
89 Rhodes v. McWilson, 202 Ala. 65, 79 So. 462 (1918); also Orick v. State, 140 Miss. 184, 105 So. 465 (1925).
91 The inapplicability of constitutional prohibition against searches and seizures to arrest situations is further brought out in: United States v. Rembert (D. C. Tex.) 284 F. 996 (1922); Commonwealth v. Phelps, 209 Mass. 396, 95 N. E. 868 (1911); Re Powers, 25 Vt. 261 (1853); See 7 BRITISH RULING CASES 688.
the problem of unreasonable search and seizure with its
inevitable concomitants, immunity against compulsory
self-incrimination and illegally obtained evidence.

The courts in their expostulations on the law of arrest
have made it clear that the objective to be gained is a
maximum of efficiency with a minimum of officiousness.
To reach this middle ground of competent apprehension
without curtailing freedom of movement, the following
factors have been deemed to be of prime significance:

(1) the type of arrester,
(2) the nature of the crime,
(3) the proximity of the arrester to the crime—
    "presence" or "view",
(4) the state of mind of the arrester—reasonable
    suspicion.

The Type of Arrester

With a few unimportant exceptions, arrests without
warrant are made by peace officers, with their acts color-
able as such, or by private persons.

It is only natural to confer the greater power upon the
officer—purportedly trained in the apprehension of crim-
inals and, as such, informed as to what constitutes a crime.
On the other hand, multitudinous cases force the conclu-
sion that it is best for the common weal to give the private
person some powers until that dubiously happy time ar-
rives when an officer is present every time a crime is com-
mittcd.

Incontrovertibly, the police officer's right to make an
arrest without a warrant derogates from the authority
resting on him through his position. That right consti-
tutes a duty. Not only may he act, he must act.90


There were no peace officers at early common law, watchmen and con-
stables being their progenitors. Today, we have regular peace officer
bodies and, as in Maryland, we commission many persons in the name
of the State as peace officers who are usually connected with private
industry. Supra, n. 2: also see Folsom, Our Police—a History of the
Baltimore Force (1888) 24.
The private person on the other hand, when he possesses the right, nurtures it as a privilege. Only in the most extreme instance of a felony committed in his presence or view can it be said that the private person must act.91

By the word "duty", we have imposed on the officer a responsibility of action—action necessarily swift in modern tempo and growing swifter. But the "privilege" which the private person ordinarily has had conferred on him, when weighed in the scales with the fear that he is not acting correctly (incorrect action entailing civil liability) is meant to impart a judiciousness and restraint not to be expected in an efficient officer.

One of the outstanding differences generated by this necessity of swift action on the officer's part is that he is given more protection as to the arrests he makes in haste. Thus, although both are equally protected where a felony has been committed, and arrest is made on reasonable suspicion of the arrestee as the felon, only the officer enjoys immunity where there is reasonable suspicion that a felony has been committed and reasonable suspicion that the arrestee is the felon.92

Whether or not the private person should be so bound is debatable; for, if the crime be serious enough, it might be well indeed to enlist all possible aid upon reasonable appearances. However, the rule does illustrate the workings of the court when each type of arrester stands before the bar.

Let it be noted that a peace officer outside of his own bailiwick or jurisdiction is considered a private person for


Distinguish however the situation where a private person is commanded by a peace officer to assist him in the making of an arrest. Here the private person has a duty to act. State v. Ditmore, 177 N. C. 592, 99 S. E. 368 (1919). Is it merely a moral duty with no legal sanction? Compare Krenger v. State, 171 Wis. 566, 177 N. W. 917 (1920); 1 Bl. Comm. 343.


Discussion, infra circa notes 147-148, reveals this rule is not unopposed. A minority view is gaining strength.
purposes of arrest. A private person is considered a peace officer if helping a peace officer.

The Nature of the Crime

A. Scope of the Crime

Is this crime a felony or a misdemeanor? Oftentimes the answer to this question is the answer to the question of the legality or illegality of the arrest—the right to arrest for felonies encompassing much more territory than the right to arrest for misdemeanors. However, if the misdemeanor amounts to a breach of peace, the distinction may be obviated. The right to arrest for any misdemeanor has been extended to police officers almost universally and more lately, many jurisdictions have passed statutes allowing private persons to arrest for any misdemeanor rather than a misdemeanor amounting to a breach of the peace to which they were formerly restricted. While many argue this broadening of power places a private person in an overbearing position, the fact that he acts at his peril, if the crime has not been committed, will serve to temper his rash action. It would seem that the private person's rights should not be extended to such misdemeanors as violation of ordinances, rules, etc.

There is a further point which deserves discussion. All the papers on this subject have pointed out this difference in felony and misdemeanor and blithely proceeded on their way.

It is natural to assume that members of the legal profession and officers of the law know wherein the distinction between a felony and a misdemeanor lies. It is especially

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94 Harvey v. Bonner Springs, 102 Kan. 9, 169 P. 563 (1917); West Salem v. Industrial Commission, 162 Wis. 57, 155 N. W. 929 (1916).
97 In use in this article is that definition of misdemeanor which contemplates all crimes not treason or felony as misdemeanor. Thus breaches of ordinances and rules constitute misdemeanors. See Graham v. State, 143 Ga. 440, 85 S. E. 328 (1915) forbidding all private persons to arrest for municipal ordinance violations. Also Veneman v. Jones, 118 Ind. 41, 20 N. E. 644 (1889); but cf. State v. Hunter, 106 N. C. 796, 11 S. E. 366 (1889).
natural to assume the truth of this precept if the distinction rests on broad and general principles such as the majority of our states possess, proclaiming as felonies crimes punishable capitally; or by imprisonment for more than one year;\textsuperscript{98} (or, sometimes, any period at hard labor). It is even natural so to assume if the designations as misdemeanors and felonies are arbitrary and the mere product of legislation or judicial fiat without regard to rhyme or reason.\textsuperscript{99} This is the case in Maryland, where assault with intent to rape is a misdemeanor, carrying with it death, life imprisonment or up to twenty years in the penitentiary.\textsuperscript{100} The gravity of the offense makes for no distinction in Maryland.

But, can we reasonably expect private persons to know when and what are misdemeanors? We can at best rely on their instinct. If they sense something serious, they will intervene; otherwise, they will not. Since a system of public education on this matter is highly unlikely, it would seem to be best to restrict the right of private persons to arrest for misdemeanors to misdemeanors equal to a breach of peace with perhaps an extension to cover petit larceny and other misdemeanors in which it seems private persons should act.\textsuperscript{101} This is an arbitrary solution to a problem raised by arbitrary treatment but at least has the merit of keeping private persons in bounds.

\section*{B. Stage of the Crime}

A variety of phrasings covering the various phases of the crime are to be met in the statutes and decisions. We are familiar with the situation where a felony "has been

\textsuperscript{98} \textit{Black, Law Dictionary. E. g. U. S. Crim. Code, Sec. 325; N. Y. Penal Law, Sec. 2; Cahill's Ill. Rev. Stats., Sec. 614, Ch. 38.}

At early common law felony comprised crime entailing forfeitures of goods and land. 4 Bl. Comm. 94.

\textsuperscript{99} In Maryland only those crimes are felonies which were felonies at common law or have been declared felonies by statute. Dutton v. State, 123 Md. 373, 378, 91 A. 417 (1914); Bowser v. State, 136 Md. 342, 345, 110 A. 854 (1920). Common law felonies were murder, manslaughter, robbery, rape, burglary, larceny, arson, sodomy and mayhem. See Note (1938) 2 Md. L. Rev., 234, for an incisive condemnation of the present Maryland system of differentiation.

\textsuperscript{100} Md. Code (1939) Art. 27, Sec. 13; Dutton v. State, 123 Md. 373, 91 A. 417 (1914).

\textsuperscript{101} A. L. I., Code Crim. Proc., \textit{supra} n. 1, 239.
committed.” There is comprehension concerning the action when a crime “is being committed.” Thenceforth, we depart to shadings in language and meaning such as “attempting to commit,” “apparently committing,” “preparing to commit,” “preparing to renew his commission,” “prospective,” “anticipated,” “imminent,” “threatened,” “about to commit.” If mere preparation, so oft-discussed in attempts, is to be condoned, it would indeed be placing power with impunity in our officers, and, a fortiori, our private persons. Such loose-jointed language goes too far. The attempt-preparation distinction, at best a mealy-mouthed and weasel-worded refinement, would nevertheless be of some service here, as our courts have found it of service elsewhere, if with reluctance.

Unless the crime has reached the stage of attempt, arrest for crime should not be permitted. Prevention of crime by warning of susceptibility to arrest will serve to protect citizens. Henceforth, in enunciation of rules herein where “committed” is used, the words “being committed” or “attempted” should be read in where not used.

C. Time of Arrest

In a few states, reverent observance is made to the common law concept, enlarging the right to arrest in the

102 Id.
104 A. L. I. CODE CRIM. PROC., supra n. 1, 238-9; State, ex rel. Sadler, v. District Court, 70 Mont. 378, 225 P. 1000 (1924); Byrd v. Commonwealth, 158 Va. 897, 902, 164 S. E. 400, 402 (1932).
109 Ibid.
110 See Martin v. State, 89 Ala. 115, 8 So. 23 (1890).
113 See the writer’s treatment of the attempt problem in Kaufman, Joinder of Conspiracy and Attempt (1940) 28 Georgetown L. J. 609, 609.
night time. Nor can this concept even today be said to be entirely devoid of pragmatism. On the other hand, this practicality may well be covered by the observance of the courts of taking judicial notice of what time of day the arrest was made, in order to determine if the apprehension was under reasonable suspicion in the peace officer (or private person in his limited right to act where reasonable suspicion exists as to the arrestee being the felon, knowledge certain of the felony's commission). An arrest may be made on Sunday as well as week days.

Proximity of the Arrester to the Crime—"Presence" or "View"

As might be expected in the more serious offense of felony—(although as pointed out supra, in Maryland a felony may or may not be more serious than a misdemeanor)—it makes no difference in the law of arrest whether or not the arrestee was in the arrester's presence or view at the time he committed the crime. This rule might be extended to cover misdemeanors equal to a breach of the peace without being offensive, but it has not been so extended.

With Illinois and Iowa as glaring exceptions, the rule exists that one cannot arrest for a misdemeanor, apparently all misdemeanors, if that misdemeanor did not happen in the arrester's presence or view. Or, as sometimes said, one cannot arrest for a past misdemeanor. Since misdemeanors are ordinarily not serious, chances that the misdemeanant will flee before a warrant is obtained are slim. Furthermore, the public does not exhibit such ardent cooperation in prosecution of misdemeanors, as is found in prosecution of felonies. Feelings simmer and cool down,

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114 Archbold, Criminal Pleading and Practice (7th Ed. 1860) 90. Cf. A. L. I., Code Crim. Proc. supra n. 1, 237. Id, 242, "arrest may be made at any time of day or night."


116 Ill. Rev. Stats. (1937) C. 35, Sec. 657; Iowa Code (1935), Sec. 13468. A few states also allow such arrest in some particular localities, or for some particular crimes. 6 C. J. S. 593.

Saturday night husband and wife scraps are taken with philosophy come Sunday, witnesses vacillate, grumble at the fuss; and, in general, it becomes a difficult case to prove for the policeman, the unhappy goat, who has unsubstantiated hearsay as his evidence, when his complaining witnesses turn blank stares of amazement to the court and repudiate the making of a statement.

If the misdemeanor, although past, is confessed to, it might be well indeed to legalize the arrest. It is pleasing to note that Maryland apparently so holds.¹¹⁸

The words "presence" or "view" are not synonymous.¹¹⁹ One might view the happening of a crime from some distance by aid of powerful field glasses, or view a crime commission in a newsreel without being present.

On the other hand, one may be present at the scene of the crime by the use of any of his senses—hearing,¹²⁰ feeling,¹²¹ tasting,¹²² smelling,¹²³ and, of course, seeing.¹²⁴

State of Mind of Arrester—Reasonable Suspicion

Reasonable suspicion or reasonable grounds for belief is here encountered, and shall be constantly encountered in further promulgation of these rules. This far from unique question meets far from unique handling. "Mere" suspicion will not suffice.¹²⁵ Preferred are the officer's seeing, hearing, feeling, tasting, smelling, encountered in presence or view, but information from others, not thus encountered, if credible, will satisfy reasonable suspicion.¹²⁶

¹¹⁸ Considered infra circa notes 156-159.
¹²⁰ Hawkins v. Lutton, 95 Wis. 492, 70 N. W. 483 (1897); but cf. People v. Johnson, 86 Mich. 175, 48 N. W. 870 (1891).
¹²¹ See Utah Liquor Control Commission v. Wooras, 93 P. (2d) 455, 460 (Utah 1939).
¹²² Id.
Reasonable suspicion includes presence or view but goes much further. Even when the information is from a stranger, it will do, if acquaintance with the stranger reaches the point that credibility may be established.\textsuperscript{127} The usual police sources, disseminating news and descriptions by telegrams, radio car descriptions, newspaper descriptions, mail, folders, are apparently sanctioned.\textsuperscript{128} If an officer sees B fleeing with A running after him yelling "Stop thief," he has reasonable cause.\textsuperscript{129} Or, as it is generally expressed, the suspicion or belief must be generated by grounds sufficient to induce a reasonably prudent man in the situation of the arrester to believe the arrestee guilty of the crime for which the arrest is made or to believe there is probable guilt.\textsuperscript{130}

Anonymous tips, commonly by mail or phone, are not enough in themselves to make one reasonably suspicious although such tips may start the ball of investigation rolling to the point that reasonable grounds shall be revealed.\textsuperscript{131}

\textit{Operation of the Four Factors in Rules for Arrest}

The foregoing factors therefore are bare essentials of a law of arrest discussion. It is only fair to observe that in many states, the law was there and justification was then sought for it; in other states, debate and discussion


\textsuperscript{128} Kratzer v. Matthews, 223 Mich. 452, 206 N. W. 982 (1926); MICH. COMP. LAWS (1929) Mason's 1935 Supp. Sec. 17149, subsection f; People v. Euctice, 371 Ill. 159, 20 N. E. (2d) 83 (1939). This Illinois case must be construed as permitting such information to give birth to reasonable suspicion of the arrestee, not suspicion of the commission of the crime for the 1937 statute has apparently sliced away the ancient common law prerogative to arrest for such suspicion; factual commission of the crime being necessary.

\textsuperscript{129} People v. Kilvington, 104 Cal. 36, 37 P. 799 (1894); \textit{but cf.} cry of "hold up" in People v. Mirbelle, 276 Ill. App. 533 (1934).


propagated the ensuing rules; in still other states, it is difficult to tell if the rules or the reasons came first—but whether the deductive process or the inductive process was used, the following may be said to state the weight of authority in the law of arrest today:

1. A peace officer or a private person may arrest when the arrestee has committed a felony in his presence or view.\(^\text{182}\)

The statutory expression of this principle is merely reiteration of established common law. The desirability of this rule is so obvious that it would be superfluous to indulge in pros and cons.

Maryland's concurrence is a matter of course.\(^\text{183}\)

2. A peace officer or a private person may arrest when the arrestee has committed a felony in or out of his presence or view if the felony, for which the arrest is made, has been committed and the arrestee has committed it.

This rule also possesses the virtue of agreement in both statute and common law.\(^\text{184}\)

3. A peace officer may arrest for any misdemeanor committed in his presence or view by the arrestee but a private person may arrest under these circumstances only if the misdemeanor amounts to a breach of the peace.

The peace officer's right is clear today in almost all states although common law writings indicated obfuscation on the subject.\(^\text{185}\) Expediency commands this majority rule. It would be a sorry state of affairs indeed if speeding motorists, misusing automobiles in such a fashion as to endanger life and property, were immune from arrest until warrants were obtained. In the few states where the law insists the misdemeanor should amount to breach of peace—Blackstone's common law—a change is indicated.


\(^{183}\) Hochheimer, Criminal Law (2nd Ed. 1904) 83; Collier v. Vaccaro (C. C. A. Md.) 51 F. (2d) 17 (1931).


As to the private person's right, the American Law Institute's Code of Criminal Procedure counted noses in 1930 and came up with some twenty states which professed to allow a private person to arrest for any misdemeanor.\textsuperscript{137} Professor Rollin M. Perkins, one of the Institute's later Codifiers, has used this as basis for a statement that most states allow private person to arrest for any public offense committed in his presence or view.\textsuperscript{138} This statement is seriously open to question for a review of the cases indicates that all of the other states either patently or latently subscribe (with some ramifications) to the rule that the misdemeanors must amount to a breach of the peace. Furthermore, the Institute Code incorporates the rule, as set forth in contrasting type, and although the Institute Code expressly denies being a restatement—restatement qualities seem adhesive characteristics.\textsuperscript{139}

This is a more or less mathematical argument and does not deserve the consideration that debate of the wisdom of the rule is entitled to. Hypothetical cases cause us distress no matter which side we prefer.

Let us suppose A, a private person, sees a man sit down beside a girl in a trolley or subway. The man furtively picks up the girl's pocketbook. She, absorbed elsewhere, does not notice. A calls to the man to stop, pursues him and arrests him. If the jurisdiction is one in which the grand larceny-petit larceny distinction exists, A will have made an illegal arrest for a misdemeanor if the bag's content's turn out to be valueless; he is protected—arrest for a felony—if the bag's contents are valuable.\textsuperscript{140} Should A pursue the thief? Would he pursue him if he is aware he

\textsuperscript{137} Ibid, 239.
\textsuperscript{138} Perkins, \textit{supra} n. 5, 230.
\textsuperscript{139} See the pamphlet written by Howland and Goodrich: \textit{The American Law Institute's Code of Criminal Procedure, 7.}
\textsuperscript{140} Grand larceny equalling a felony, petit larceny a misdemeanor in many jurisdictions. In Maryland the cleavage is not too clear. Md Code, (1939) Art. 27, Sec. 388. In many states, larceny from the person, no matter what the amount, is a felony.

There is no brief here for retention of the felony-misdemeanor distinction. See 2 \textit{STEPSHENS, HISTORY OF CRIMINAL LAW OF ENGLAND}, 193-196. But so long as the distinction exists, it should be recognized as a complication with which one must deal.
must first make a shrewd calculation as to the value of the bag's contents—a foolhardy job, becoming ever more foolhardy if a watch, ring, or coat is involved?

On the other hand, suppose B is parked illegally and A, a private person, arrests him. Would the majority of our citizens resent arrest by a private person for violation of parking restrictions? The question is not profound.

Thus we have our dilemma—a bull named the misdemeanor. If we insist on enlarging the scope of arrest to any misdemeanor, we are on his Scylla horn of giving all persons power, which is overlarge and tends to officiousness offensive to all. If we insist on restricting our power to misdemeanors amounting to breach of peace, we shall place on an unbearable position on his Charybdis horn, men who are acting conscientiously, not pompously.

Astute draftsmanship with a high degree of elasticity might solve this problem. It cannot be dismissed by saying recovery would only be nominal if the exertion of arrest was undergone. As previously stated, this is not an appealing argument to a man undergoing the expenses of litigation and the moods of a jury. Nor would a change of the time-hardened narrow definition of breach of peace be likely to meet approval. It will remain a "violent public offense" or offenses likely to cause a public disturbance.\textsuperscript{141}

As for Maryland, she has conferred on her peace officers the right to arrest for any misdemeanor committed in their presence but confined private persons in similar cases to misdemeanors amounting to a breach of the peace. The

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\textsuperscript{141} Head v. State, 131 Tex. Cr. R. 96, 96 S. W. (2d) 981 (1936); Byrd v. Commonwealth, 158 Va. 897, 902-3; 164 S. E. 400 (1932); Hochheimes, Criminal Law (2d ed. 1904) 83. Restatement, Torts (1934), Sec. 116: "A breach of the peace is a public offense done by violence or one causing or likely to cause an immediate disturbance of public order."

Also see Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900 (1940). Note however that the definition in the Cantwell case is not given in connection with arrest where "breach of peace" is usually given a rigid construction. Perkins, supra n. 5, 230. As the Restatement points out, whether or not a misdemeanor amounts to a breach of the peace is not readily resolvable, as the surrounding circumstances play an important part—especially the comparative privacy or public association. Thus, it is possible for any number of crimes to be ordinary misdemeanors under some circumstances, a misdemeanor amounting to breach of peace in another place, e. g. assault, adultery, larceny, etc.
leading case is *B. & O. R. R. Co. v. Cain*, wherein a conductor-private person arrested a rowdy, abusive, profane group of men on his train and delivered them over to a peace officer.

4. *A peace officer or private person may make an arrest when a felony has in fact been committed, whether or not in his presence or view, and he has reasonable ground to believe the arrestee has committed it.*

The common law and statutes, declaratory thereof, unite in stating the peace officer is the possessor of this right.

Private persons do not share this whole-hearted concurrence. The majority of states do make allowance for this mistake of fact but there are some states which demand that the private person acts at his peril and he must face the consequences of any mistake.

As to police officers, the leading cases in Maryland are *Edger v. Burke* and *Brish v. Carter*. In the former, an hysterical girl who had been raped gave a description of her assailant to a deputy sheriff. The officer, knowing the felony of rape had been committed, arrested a man reasonably approximating the description. A false arrest suit by the subsequently vindicated arrestee was dismissed.

*Brish v. Carter* is illustrative of a different aspect of reasonable belief. Here was no description of the felon but a man was found in possession of a stolen horse and when questioned gave a number of contradictory, vague, and fancy-flighted stories, as to how the horse came to be

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142 81 Md. 87, 31 A. 801 (1895); Wilson Line v. Brown, 164 Md. 698, 166 A. 426 (1933).

Officers: Mitchell v. Lemon, 34 Md. 176 (1870); Roddy v. Finnegan, 43 Md. 490 (1876); Turner and Stoddard v. Holtzman, 54 Md. 148 (1880); Kane v. State, 70 Md. 546, 17 A. 557 (1889); Heyward v. State, 161 Md. 685, 158 A. 897 (1931); Callahan v. State, 163 Md. 298, 162 A. 856 (1932); United States v. Chin (D. C. Md.) 24 F. Supp. 14 (1938).

See also Day and Gorsuch v. Day, 4 Md. 262 (1853) wherein the prevailing nationwide rule is asserted that a magistrate has the powers of a peace officer but must identify himself as a magistrate. Compare the rules as to magistrates in A. L. I., Code Crim. Proc. *supra* n. 1, 229.

143 Ibid., 235, 288.

144 Ibid., 240.

146 96 Md. 715, 54 A. 986 (1903).

148 98 Md. 445, 57 A. 210 (1904).
in his possession. These were held to justify the arrest and dismissal of suit for false arrest by the arrestee.

Maryland's law of arrest possesses a caveat insofar as the right of a private person is concerned in the situation; but, since the majority rule has the weight of years, authority, and reason on its side and since the bar of the State, as a whole, has always paid an almost fanatical obeisance to the mandate of Hochheimer on Criminal Law,\(^\text{147}\) the weight of authority rule may probably be safely allotted to Maryland.

5. **A peace officer may, but a private person may not, make an arrest under these circumstances:**

*When he has reasonable ground to believe that a felony has been or is being committed, whether or not in his presence or view, and reasonable ground to believe the arrestee has committed or is committing it.*

Whatever quarrel lies with this rule lies not in the peace officer's authority but the restriction on the private person. Yet surprising enough, this rule in favor of the peace officer is not universal.\(^\text{148}\) Let us hypothesize as follows:

A, a peace officer on a beat, sees B, a total stranger of evil mien, fumbling with the lock of a store or home; the owner X, A knows. On being accosted, B tells A, in an unconvincing manner, that he and X are great chums; X gave him his key, told him to make himself at home, he'd get there later, is en route from Punxatawney. What is A to do, assuming he has no way to check up? Allow B to go in, and if B is lying, prowl to his heart's content? Or put B to the inconvenience and humility of arresting him and taking him down to the station for further questioning—for one cannot force a man to go down for such investigation without arresting him?\(^\text{149}\) There is little doubt

\(^{147}\) Hochheimer, op. cit. supra n. 133, 83.

Sometimes a citizen will consent to being locked up for a time in order to give the authorities time to obtain information which will serve to
which solution the home owner or store owner would prefer and B, if sincere, should not be resentful. The majority position seems well taken.

But let us suppose the arrester is not A, a peace officer, but P, a private person, perhaps a watchman with no police power. Would it be better for him to merely keep B under a casual surveillance, inform police and let it go at that? Perhaps this would be preferable, if police are easily available and there is little chance that the suspected intruder can perform his evil deed and flee ere the arrival of the police. These ideal conditions are far from normal. The happier thought is to relieve the private person from a mistake of fact, which may be the products of appearances which might lead a virtual Solomon to suspect the perpetration of a crime.

Maryland adheres to the majority view, as set forth in the contrasting type.\textsuperscript{150}

Perkins puts the interesting case of the masked ball patron, who forgot his key and was climbing in through a window, to reinforce the idea that a peace officer should be protected for reasonable mistake of fact. There seems no strong reason to deny the private person the same right in these facts, since a felony is involved. A few states look this far.\textsuperscript{151}

6. A peace officer may arrest where a misdemeanor has been committed or is being committed in his presence or view and he reasonably believes the arrestee committed or is committing it.

A spectator at a baseball game claps his hands to a pocket and howls that his wallet has been taken. An alert officer sees behind the complainant one commonly suspected of being a pickpocket. He observes this suspect

\textsuperscript{150} Perkins puts the interesting case of the masked ball patron, who forgot his key and was climbing in through a window, to reinforce the idea that a peace officer should be protected for reasonable mistake of fact. There seems no strong reason to deny the private person the same right in these facts, since a felony is involved. A few states look this far.

\textsuperscript{151} A. L. I., Code Crim. Proc. supra n. 1, 242. See also CAL. PENAL CODE (Deering 1931) Sec. 837. English modern view is the same as U. S. majority: Walters v. Smith (1914) 1 K. B. 595.
surreptitiously slip something in his pocket. He arrests him. The arrest is proper.

It is not at all peculiar that this law should exist but it is peculiar that it has found so little place in the writings on the subject. The American Law Institute found it of so little importance that they did not include it in their code, yet a vast number of arrests are so made.\textsuperscript{152} Perhaps the explanation lies in the fact that the cases are often absorbed in the discussion of presence or view and reasonable belief.

It would require no great temerity to assert that a private person may also so arrest but only if the misdemeanor amounts to a breach of peace. After all, this is no radical departure since the same rule exists in felonies and the inherent distinction between the two crimes is not so great, in this instance, as to justify a different treatment. So little case support is found for the statement however that it is merely advanced and urged.

7. \textit{A peace officer may arrest where he has reasonable cause to believe that a misdemeanor has been or is being committed in his presence or view and reasonably believes the arrestee to be the misdemeanant.}

This is an extension well supported by the cases although it, also, is not set forth in clear fashion in legal writings.\textsuperscript{153}

In \textit{State v. Levin},\textsuperscript{154} a Federal officer, given reliable information of illicit liquor traffic, a misdemeanor, stopped a car and arrested the occupants and searched the car. He found no violation of a federal liquor offense but he did

\textsuperscript{152} Thus we find this rule omitted in the American Law Institute's Code, although the decisions reveal approval of this type of arrest and it is daily routine to officers.


Private persons have no such authority: Bernheimer v. Becker, 102 Md. 250, 62 A. 526 (1905) ; Lindquist v. Friedman’s, Inc., 366 Ill. 232, 6 N. E. (2d) 625 (1937) ; Palmer v. Maine C. R. Co., 92 Me. 399, 42 A. 800 (1896).

\textsuperscript{154} Baltimore Daily Record, March 18, 1940.
find lottery slips for sale purposes—a state offense. The arrest was upheld.

In Silverstein v. State, an arrest was held lawful where an officer investigating the numbers racket, under the prohibition against lotteries, observed a clerk in a suspected store writing in a book, which he hastily concealed when a warning cry was shouted by the proprietor. The proprietor was arrested. The arrest was vindicated.

If this rule is commended, rule No. 6 must necessarily have approbation for it does not go as far.

The foregoing may be stated without trepidation as the status quo of the law of arrest. Whatever is omitted is, in the writer’s opinion, not permissible in the majority of states. One such prohibitive law is the so-called past misdemeanor restriction, i. e., not even a peace officer can arrest for a misdemeanor not committed in his presence or view. For, as the reader has undoubtedly noted, the reasonable suspicion cases in felony read “whether or not in his presence or view” and in misdemeanor read “in his presence or view”.

As previously pointed out, conciliations and vacillations make this a reasonable rule and the two states permitting such arrest, Illinois and Iowa, have stepped out of bounds practically—although probably not constitutionally.

There is one situation which, however, should be made an exception to this rule. In Warner’s article, he describes the case of a radio call which led policemen to a young man held prisoner by some railroad yardmen; the previous arrester, a brakeman, having left with his train. The police arrested him on his admission that he had stolen some fog lamps nearby. Moreover, it is a common practice to arrest for past misdemeanors to which the misdemeanant has confessed.

What is Maryland’s attitude on this vital question?

There is a trilogy of comparatively recent cases which may answer this matter. All of them have to do with the

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154 176 Md. 533, 6 A. (2d) 465 (1939).
156 Warner, supra n. 3, 154.
crime of possessing lottery tickets for resale purposes. In *Heyward v. State*,158 *Blager v. State*,159 and *Sugarman v. State*,160 the arrestee, in each instance, was suspected of having lottery tickets in his possession for sale purposes. In each case, the arrestee eventually admitted the possession for the illegal purpose. Although it is not seriously discussed in either the *Blager* case or *Heyward* case, the arrest could have apparently been held legal under the rule that the arrester, a peace officer, had reasonable suspicion that the arrestee was committing a misdemeanor in his presence or view. Yet, in neither of these cases was this relied upon; and, when it was set forth as a basis for the legality of the arrest in the *Sugarman* case, the suspicion was regarded as "mere" suspicion and not reasonable suspicion. Having thus failed to seize upon this arrest precept, how would the courts justify the arrest in the two cases in which legality of the arrest was upheld?

In the *Heyward* case, the arrest was held legal because the misdemeanor was committed in the presence of the officer. The basis for this statement was the fact that after being arrested, the arrestee had admitted that he did possess for sale purposes these number tickets. But, unhappily for the ruling, there exists a well-known maxim, which states that where the arrest or search is unlawful to begin with, it is not made lawful by that which afterwards takes place.161

The *Blager* case reveals a somewhat different set of facts. Here, the arrestee was apparently accosted first, then made the admission and then the arrest was made. Was the arrest legal? Undoubtedly, and this lack of doubt may be based on either of two grounds:

(1) the admission does reveal a misdemeanor being committed in his presence before the arrest; or

158 161 Md. 685, 158 A. 897 (1931).
159 162 Md. 664, 161 A. 1 (1932).
160 173 Md. 52, 195 A. 324 (1937), (1938) 2 Md. L. Rev. 147; (1940) 4 Md. L. Rev. 303.
161 Morgan v. State, 197 Ind. 374, 380, 151 N. E. 98, 100 (1926). Similarly, in the *Sugarman* case, supra n. 160, the Maryland court held that an officer making an illegal arrest has slipped from his orbit of official duty, and acts in the same transaction find him not a peace officer.
(2) it may well come within the suggestion of an exception to the peace officer's denial of the right to arrest for past misdemeanor, the exceptions being based on confession or admission.

From a reading of the case, one would think that the first ground was the one relied on, as was stated in a note in the *Review*, but, when we come to Judge Urner's dissenting opinion in the *Sugarman* case, we find that he is under the impression that the *Blager* case depends on the exception to the past misdemeanor rule. Assuming the latter is correct, for after all, Judge Urner wrote the *Blager* case opinion, the chronology of events must perforce be important. In spite of the *Heyward* opinion, the following chronology, assuming no reasonable suspicion, gives birth to an illegal arrest:

(a) the ultimate arrestee is accosted,
(b) he is arrested,
(c) he confesses.

The following chronology of events is the time chart for a legal arrest:

(a) the ultimate arrestee is accosted,
(b) he confesses,
(c) he is arrested.

But the contention may be raised: Isn't the arrestee in either chronology committing a misdemeanor in the officer's presence or view? The flaw in this contention is that, as in cases of concealed weapons or transporting liquor illegally, unless the officer is conscious by one of his senses that the misdemeanor is now being committed before him, the misdemeanor is, of course, not being committed in his

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162 173 Md. 52, 61, 195 A. 324, 328 (1937). Note that it may be possible for a person to confess he is committing a misdemeanor and yet not be actually committing a misdemeanor in the officer's presence or view. The confessor may be lying to conceal another, or in a malicious humor, etc.
The cases hypothesize that there is no reasonable suspicion; therefore, also as with concealed weapons and transporting liquor, unless tell-tale bulges or sight of the illicit article indicates the crime, the officer cannot claim a crime committed in his presence or view.

The Sugarman case involves the first chronology. The arrestee was arrested, then confessed; attempted to bribe the officer, then panic-stricken, broke and ran; was pursued and caught and "re-arrested". The question of the legality of the arrest on that chronology is definitely decided as illegal; the real discussion in this case centering upon whether or not the subsequent fleeing after such initial arrest and admission may be said to justify a legal arrest as for a misdemeanor committed in his presence or view. In other words, the second chronology is appended to the first. The court rightly decided that the unlawful arrest was not made lawful by later actions. Between the Heyward and Blager cases and the Sugarman case, we find an enlightening interpretation in an opinion by the then Attorney-General O'Conor.

Reconciling an apparent inconsistency in a former opinion, the opinion sets forth the law as permitting peace officers to arrest without warrant for misdemeanors out of their presence or view, if the misdemeanant confesses upon being accosted. It further assumes a factual setup in which an officer, being notified of drunken driving, accosts a man reeking of liquor in a parked car and obtains from him an admission that he has recently been operating that car under the influence of liquor. In this case, the opinion states, the officer should be and is protected. So, as to Maryland's attitude on the subject, it would seem that although the right to arrest for past misdemeanor...
is denied on liberty-loving grounds, with fear that evidence in a case will dissolve in thin air, against fear of frameups and errors, such arrest will be upheld if a confession is made.

These "weight of authority" rules are, as all weight of authority rules are, handy containers with no great nourishment to jurisprudes. For their sustenance, there must be cans labeled "modern trends." One of the most outstanding of these modern trends is the rule that a peace officer may arrest when the arrestee has committed a felony, although not in the presence or view of the officer. Some seventeen states now have this provision and the loose-jointed context seems to imply that it covers a situation where:

(1) the officer has not been reasonable in his suspicion of the arrestee but has, by the fortune of war, stumbled onto a fleeing felon, or

(2) the officer, in making the arrest, has arrested the proper person for the proper felony but without having had reasonable cause to arrest him in the first place for this felony.

In short, the law ordinarily requires the officer to have reasonable cause to believe that this suspect had committed the felony for which the arrest is made; and, therefore, even though he accidentally stumbled on the proper party for the felony for which arrested or the party had committed other felonies, he was not protected from a suit for false arrest.\footnote{166 A. L. I., Code Crim. Proc. supra n. 1, 234.}

The statutes in these seventeen states are prima facie to be interpreted that these "dumb but lucky" officers are not to be censured. However, the statutes are comparatively new and it is not unlikely that the courts will interpret them on common law principles, narrowing the scope of

\footnote{167 Waite, Public Policy and the Arrest of Felons (1933), 31 Mich. L. Rev. 749, 751. To be sure, the arrest is often not accidental stumbling. It may be the product of follow-up on a tip by an informer, not regarded as giving rise to reasonable suspicion in a particular case.}
arrest until they have been phrased in more solidified form, specifically pointing out the new power.

On this question of statutory enunciation of this problem and codifications, one cannot be over-opprobrious of the hastily drafted and clumsily-phrased statutes. For example: Iowa and Illinois in blissful self-congratulation on their progressive spirit enacted what they believe to be fine code models of the law of arrest. Their beatific smiles vanished when various observers on the subject pointed out that although they had enlarged the rights of private persons and peace officers in some respects, in other respects, they had emasculated a fundamental right belonging to peace officers, i.e., the right to arrest where the offense has not in fact been committed but they have reasonable grounds to believe it has been or is being committed.\(^\text{168}\)

Here, the obvious intention to protect those acting conscientiously in the enforcement of their duties was circumvented by poor draftsmanship.

IV

**Effecting Entrance and Exit to Buildings**

In the pursuit of duty or privilege, the arrester may find himself blocked by the doors and windows of an enclosure, either a dwelling house or some other building, in which the arrestee has sought refuge. This building, even if a home of arrestee or another, is no sanctuary; for, when arrest on behalf of the state is the aim, a man's home is not his castle. "No man can have a castle against the king."\(^\text{169}\)

Assuming the arrest, if made in the open, would be legal, either by an officer with a valid warrant or an officer or private person acting without a warrant but possessing legal justification, does the fact that arrestee has

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obtained the shelter of a building or home offer him any
additional protection?

It is true that the arrester must, before breaking any
doors or windows, demand admittance and explain the rea-
son for the demand.\textsuperscript{170} This is a rule of property protec-
tion as well as a safeguard to the arrestee. It merely calls
for an evincement of authority; and, as in other cases of
arrest with or without a warrant, may be foregone in a
crisis where action, not explanation, is called for.\textsuperscript{171}

A perusal of the authorities indicates that the arrestee
does acquire a partial immunity by reaching a home. One
is not permitted to break doors and windows of a home
in any case in which a lawful arrest might be made, yet
one is so permitted if it is any other type of building\textsuperscript{172}—
the castle idea in play again.

If the building is a home, curtailment of the right to
break doors and windows to arrest is visible. Acting with
a warrant or without a warrant will make no difference
in the majority of states.\textsuperscript{173} The right to break doors and
windows of a home, rather than coinciding with a right to
make an arrest, stops much earlier. Officers may break
doors and windows to arrest:

(1) one who committed a felony in their presence
or view,\textsuperscript{174}

(2) one who committed a felony in or out of their
presence or view and this person is reasonably
suspected.\textsuperscript{175}

\textsuperscript{170}Gray v. Williams, 230 Ala. 14, 160 So. 715 (1934); Commonwealth
v. Reynolds, 120 Mass. 190 (1875).

\textsuperscript{171}Restatement, Torts (1934) Sec. 128. Thus notice was required in
arrest with a warrant, arrest without a warrant, breaking doors and
windows in pursuance of either type of arrest, yet such notice was always
excused where an emergency was extant or notice superfluous.

\textsuperscript{172}Cf. Restatement, Torts (1934) Sec. 129—A civil arrest analogy
which gives a fortiorti credence to the statement above.

\textsuperscript{173}Limit with warrant: State v. Oliver, 2 Houst. 585 (Del. 1863); Commonwealth
Compare 8 C. J. S. 615.

\textsuperscript{174}Smith v. Tate, 143 Tenn. 268, 227 S. W. 1026 (1921): Wharton,
Criminal Procedure (10th ed.) Sec. 51.

\textsuperscript{175}U. S. v. Dean (D. C. Mass.) 50 F. (2d) 905 (1931).
(3) if it is reasonably suspected a felony has been committed and the arrestee is reasonably suspected to be the felon,\textsuperscript{176}

(4) for a misdemeanor in their presence or view amounting to a breach of the peace.\textsuperscript{177}

A private person may break doors and windows if he is pursuing an arrestee:

(1) who has committed a felony in his presence or view,\textsuperscript{178}

(2) who has committed a felony whether or not in his presence or view and he reasonably suspects the arrestee to be the felon.\textsuperscript{179}

Thus, it may be seen that the right to break doors or windows in the course of arrest is considerably narrower than the right to arrest.\textsuperscript{180} Perkins takes issue with the American Law Institute on this point, believing the two rights coincidental; and, that "breaking the close" rules have been enunciated without due regard to the changes in the rules of arrest\textsuperscript{181} but such authority as exists seems to side with the Institute.\textsuperscript{182}

Practically speaking, there seems to be no good reason why the powers should not be equi-distant. The malodorous Maryland distinction between felony and misdemeanor again will be disturbing, with its characterization of aggravated assaults as misdemeanors, but what little can be done should be done. The road permitting arrests for all misdemeanors should be opened to peace officers, even if the private person is restricted to misdemeanors amounting to a breach of the peace.

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\textsuperscript{176} Commonwealth v. Phelps, 209 Mass. 396, 95 N. E. 868 (1911).
\textsuperscript{177} People v. Woodward, 220 Mich. 511, 190 N. W. 721 (1922).
\textsuperscript{178} ARCHBOLD, CRIMINAL PLEADING AND PRACTICE (7th ed. 1860) 113, 115.
\textsuperscript{179} 2 HALE P. C. 82.
\textsuperscript{180} A. L. I., CODE CRIM. PROC. supra n. 1, 253-256. A comparison of the rules of arrest set forth with the rules for breaking doors will indicate the drastic difference.
\textsuperscript{181} Perkins, supra n. 5, 245.
\textsuperscript{182} 6 C. J. S. 615; 4 AM. JUR. 59.
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Police broadcasting further intensifies the problem. Relying on the central station's often vague information—a cry for help—radio car officers should not be forced to pause and consider if the chain of causation started by a scream reasonably leads to a felony or a misdemeanor. The central bureau's information should be solid ground for reasonable suspicion of either type of crime and it is no great deprivation of rights for a citizen to know that his obstinancy in refusing to admit police investigating a crime will be met by forcible entry. If a false alarm, it is slightly troublesome, if not, serious crime may be averted. Warner states that on the one occasion a householder was obdurate on letting police enter, a negro had a white girl in a closet.\footnote{183}

Despite an early Maryland case to the contrary, the universal rule is that one who breaks into buildings is not acting at his peril, if the person sought is not in the building. Reasonable action excuses.\footnote{184}

Where an officer or private person has broken into a building to effectuate an arrest and finds himself involuntarily confined therein, he may free himself by breaking doors or windows.\footnote{185}

Similarly, if one knows of an officer or private person so confined, he may break doors or windows in order to achieve release.\footnote{186}

V

CONCLUSION

This paper has been primarily concerned with the legality or illegality of an arrest. The cicerone has been the power broken down to privilege or duty. The exercise of that power has been discussed to some extent; but for those who possess a hunger for the entire menu of the law of arrest, they will not find their appetites satisfied here.

\footnote{183} Warner, supra n. 3, 153.  
\footnote{184} Commonwealth v. Irwin, 83 Mass. 587 (1861); Commonwealth v. Reynolds, 120 Mass. 190 (1875); compare the language in Hall v. Hall, 6 G. & J. 386, 389 (Md. 1834).  
\footnote{185} 1 BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) Sec. 203.  
\footnote{186} A. L. I. CODE CRIM. PROC., supra n. 1, 256-7.
Space does not permit discussion of such phases of the law of arrest as arrest and subsequent release of innocents, and arrest and subsequent release of those who are guilty of a technical violation but who have been confined more for their own good than anything else, e. g., helpless vagrants and drunks. Nor have we touched the absorbing question of the use of force in arrest with its fascinating problems of killing a fleeing arrestee, killing a resisting arrestee, and the culpability involved in the arrestee killing his arrester. All these are worthy of more than sparing study.

The law of arrest has suffered a fate not uncommon to many other phases of law. The spawn of judicial and social thought, to many it has long been considered mature in its present state. To those more keenly cognizant of the change in the requirements of an administration of criminal justice, the doctrine is not only mature, it is overripe.

Especially would this seem true in Maryland, where the felony-misdemeanor distinction gives a rare embellishment. A codification for the state of Maryland would be a worthwhile achievement; but only if the codification carries within it an insight of the shape of things to come and the things that are, can it be hoped to have accomplished more than the cabalistic monstrosities now thrust on some other states.

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187 It would be an unparalleled boon to peace officers. See Stinnett v. Virginia, 55 F. (2d) 644, 647 (C. C. A. 4th, 1932). This is said in full consciousness of the existence of the recent MARYLAND STATE POLICE DIGEST and THE BALTIMORE CITY POLICE DIGEST. It seems to the writer that the references to arrest in each of these works are hazy and incomplete and although the wording is no doubt purposefully couched in lay language to better secure the understanding of officers, the avowed intention of informing the officer of his fundamental rights and liabilities is defeated by the failure to state with legal precision those principles which will be judged with legal precision.

Nor will the present CODE, the ancient doctrination of HOCHHEIMER'S CRIMINAL LAW, nor the casual references in other Maryland materials help the befogged arrester a great deal. The vast wealth of general material will serve to increase his knowledge and at the same time the very bulk of material will shadow many angles.

Maryland, traditionally common law, has gone Code for other purposes. It would do well to go Code to remove one of many stumbling blocks in the smooth passage which should lead to criminal justice.