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CITIZENS' ARRESTS AND THE FOURTH AMENDMENT—A FRESH PERSPECTIVE

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INTRODUCTION

One of the precious personal freedoms provided for by the Constitution of the United States is the protection against government invasion of privacy embodied in the fourth amendment.[1] Under the amendment's first clause, persons are secured the right to be free of "unreasonable searches and seizures";[2] the second clause requires that judicial warrants, issued only upon a showing of probable cause, particularly describe the objects of a proposed search or seizure.[3] Although the Supreme Court of the United States reads the two ostensibly diverse sections as reflecting the framers' preference for a judicial officer's judgment over that of the police officer,[4] it has condoned several types of warrantless intrusions.[5] Nonetheless, it has generally been guided by the overriding precept that "searches conducted outside the judicial process, without prior judicial approval by judge or magistrate, are *per se* unreasonable under the Fourth Amend-

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1. U.S. CONST. amend. IV.

> 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.

Id.

2. *Id.*

3. *Id.*

4. Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

5. *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973) (search incident to arrest); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view); Chambers v. Maroney, 399 U.S. 42 (1970) (automobile searches based on probable cause); Chimel v. California, 395 U.S. 752 (1969) (unreasonable search of house incident to arrest); Carroll v. United States, 267 U.S. 132 (1925) (search of automobile for contraband).

ment—subject only to a few specifically established and well-delineated exceptions."[6]

Among the exceptions to the warrant requirement accepted by the Supreme Court is police warrantless felony arrests of suspects based on officers' independent assessment of probable cause.[7] That ancient[8] common law practice[9] remains firmly entrenched in American jurisprudence. However, a somewhat similar intrusion, the private citizen's arrest, has generally[10] gone unnoticed by the high Court.[11]

Initially, this paper will explore the scope of such private felony arrests at common law as developed in England and this country.[12] Unfortunately, it will be seen, there is a woeful lack of unanimity on common law requisites for citizens' arrests.

In addition to disagreement over the circumstances warranting citizens' arrests, courts remain split over whether that private initiative amounts to governmental action. If the arrest is a purely private endeavor with no governmental overtones it need not comport with the fourth amendment. That amendment acts only as a restriction on the state and its representatives.[13]

In examining the conflicting views, this commentator seriously questions those jurisdictions that equate citizens' arrests with state action and suppress all evidence flowing from unlawful private ar-

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6. Katz v. United States, 389 U.S. 347, 357 (1967).

7. United States v. Watson, 423 U.S. 411 (1976) (discussed in depth *infra* notes 167-80 and accompanying text).

8. The antiquity of that proposition has been questioned by several authorities. *See, e.g.*, Payton v. New York, 445 U.S. 573, 607 (1980) (Prior to 1780, "the validity of *any* arrest on bare suspicion—even one occurring outside the home—was open to question.") (White, J., dissenting) (emphasis in original); Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 590 (1936).

9. *Watson*, 423 U.S. at 418-21 (For a discussion of *Watson*, see *infra* notes 167-80 and accompanying text.).

10. *See infra* notes 17, 18, 24.

11. In *Carroll v. United States*, the Court mentions the rule that officers are empowered to make felony arrests on reasonable cause, but may take such action for misdemeanors only if they constitute a breach of the peace committed in their presence. 267 U.S. 132, 156-57 (1925). While only *dicta*, the Court likewise equates the arrest authority of private citizens for misdemeanors with those of police. *Id.* at 157.

With respect to police officers' common law authority to arrest for misdemeanors, it is not entirely clear whether the right extended to any misdemeanor committed in their view or only those involving a breach of the peace. *Compare* Baltimore & O.R.R. v. Cain, 81 Md. 87, 100, 31 A. 801, 803 (1895) ("right to arrest without a warrant for any crime committed within his view") *with* Robinson v. State, 4 Md. App. 515, 525-26, 243 A.2d 879, 886 (1968) ("only if it amounted to a breach of the peace committed in [his] presence.").

At least one commentator has noted that "common law writings indicated obfuscation on the subject." Kauffman, *The Law of Arrest in Maryland*, 5 MD. L. REV. 125, 155 (1941).

12. *See infra* notes 16-72 and accompanying text.

13. Burdeau v. McDowell, 256 U.S. 465 (1921) (discussed *infra* note 73).

rests.[14] Exclusionary rule concepts, it is urged, are wholly inappropriate in the citizens' arrest context.

Finally, courts favoring a governmental designation for private arrests are criticized for failing to detect a fundamental flaw in their analysis. If in fact the arresting citizen acts as an arm of government, the arrest *per se* is constitutionally suspect.[15] Courts have as yet failed to come to grips with that issue.

I. CITIZENS' ARRESTS AT COMMON LAW

It is generally agreed that at English common law a private person could arrest for a felony committed in his presence.[16] With respect to misdemeanors,[17] such private individuals were permitted to make arrests only if the crime committed in their presence constituted a breach of the peace.[18] Citizens were likewise authorized to arrest on suspicion of a felony so long as a felony had actually been committed and there were reasonable grounds to suspect that the arrestee was the felon.[19] Unfortunately, the precise effect of this latter proposition was never clarified at English common law.[20]

Where the citizen arrestor is the target of a civil suit for false arrest, he must demonstrate his reasonable suspicion that the party arrested had committed a felony as well as the fact that a felony had been committed.[21] If the arrestor is charged criminally with false arrest or false imprisonment, it is not clear whether he will be exonerated only if some felony had actually been committed, or whether

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14. *See infra* text accompanying notes 142-64.

15. *See infra* text accompanying notes 167-202.

16. Baltimore & O.R.R. v. Cain, 81 Md. 87, 100, 31 A. 801, 803 (1895); CODE OF CRIM. PROC. § 22 (1931); M. BASSIOUNI, CITIZEN'S ARREST 9-11 (1977).

17. At common law there was a wide disparity between the penalties that were meted out for felonies and misdemeanors. Conviction of a felony, for example, carried with it "a total forfeiture of the offender's lands, or goods, or both." Kurtz v. Moffitt, 115 U.S. 487, 499 (1885); Wilgus, *Arrest Without A Warrant*, 22 MICH. L. REV. 541, 569 (1924). The distinctions are no longer as significant. *See* Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974). In fact, even the classification of crimes as either felonies or misdemeanors has changed radically in the past two centuries. *See* United States v. Watson, 423 U.S. 411, 434-41 (Marshall, J., dissenting).

18. *Baltimore & O.R.R.*, 81 Md. 87, 31 A. 801; CODE OF CRIM. PROC., *supra* note 16; M. BASSIOUNI, *supra* note 16, at 12-13. Apparently common law allowed such warrantless misdemeanor arrests because it was concerned with the prompt termination of breaches of the peace. Carroll v. United States, 267 U.S. 132, 157 (1925).

19. CODE OF CRIM. PROC., *supra* note 16, at 156-57.

20. Williams, *Arrest for Felony at Common Law*, 1954 CRIM. L. REV. 408, 420-21. *See generally* Hall, *supra* note 8, at 567-78.

21. Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780).

he may avoid prosecution simply by showing probable cause that a felony had taken place.[22]

That uncertainty has been carried over to American jurisprudence as well. While it is generally held that individuals may arrest for felonies and those misdemeanors involving a breach of the peace[23] taking place in their presence or view,[24] there is no unanimity on the extent of citizen arrest authority for felonies transpiring elsewhere.[25] In contrasting the respective powers of arrest granted at common law to peace officers and private parties, one early decision explained "[a]s to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of the actual guilt of the party arrested; and the arrest can only be justified by proving such guilt."[26] By confining warrantless civilian arrests "to cases of the actual guilt of the party arrested,"[27] that court was apparently validating such arrests only if in fact a felony was committed. Probable cause alone would not suffice.[28]

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22. Williams, *supra* note 20, at 421.

23. The precise import of the term "breach of the peace" is fuzzy. It is not clear whether it contemplates that commission of the misdemeanor must necessarily be accompanied by violence of some nature. *See* Wilgus, *supra* note 17, at 573-76.

24. Carroll v. United States, 267 U.S. 132, 157 (1925); John Bad Elk v. United States, 177 U.S. 529, 534 (1900); Kurtz v. Moffitt, 115 U.S. 487, 498-99, 504 (1885); CODE OF CRIM. PROC., *supra* note 16, at 157.

25. Even with respect to misdemeanors constituting breaches of the peace, there remains some doubt as to the validity of citizens' arrests. While the common law appears to condone such arrests, some courts remain reluctant to apply that rule in more modern settings. *See, e.g.*, Commonwealth v. Corley, 316 Pa. Super. 327, 336-37, 462 A.2d 1374, 1378-79 (1983), *aff'd*, 507 Pa. 540, 491 A.2d 829 (1985). *See generally supra* note 11.

26. Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 285 (1851); *see also* Commonwealth v. Carey, 66 Mass. (12 Cush.) 246, 251 (1853) (the distinction between a felony arrest by a private person and a police officer is that the private person must prove that a felony was actually committed by the arrestee); *cf.* Carr v. State, 43 Ark. 99, 105-06 (1884) (private person must prove that a felony was committed by *someone*) (emphasis supplied); Brown v. State, 62 N.J.L. 666, 695, 42 A. 811, 820 (1899) (private person must prove that a felony was committed).

27. Rohan, 59 Mass. (5 Cush.) at 285.

28. Several commentators on common law citizen arrest authority agree. *See* L. HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE, § 67, at 83 (2d ed. 1904). "It is generally held, that any one [police & citizens] may, without a precept, arrest a person whom he reasonably suspects of a felony *that has actually been committed.*" *Id.* (emphasis supplied); Kauffman, *supra* note 11, at 159.

> A peace officer may, *but a private person may not*, make an arrest under these circumstances:
>
> When he has reasonable grounds to believe that a felony has been or is being committed, whether or not in his presence or view, and reasonable grounds to believe the arrestee has committed or is committing it.

Id. (emphasis omitted).

In another century old case, it was claimed that a private party was foreclosed from apprehending without a warrant an escaped felon because the actual break from confinement was merely a misdemeanor.[29] The court responded:

> [t]he reason of the rule allowing private persons in certain cases to make arrests seems at least as applicable to the arrest of a felon who, after sentence upon his plea of guilty, has escaped from confinement, as to the arrest of a person who, though there is reasonable cause to suspect him, has not yet been tried or sentenced. The former has been proved guilty of a felony by his own solemn admission; the latter may turn out to be innocent. The former has beyond all doubt committed true crimes, a felony and a misdemeanor; the latter may not have committed any crime at all.[30]

In that court's view, even if the suspect has not "committed any crime at all"[31] and turns "out to be innocent,"[32] the private action remains effective. Thus, it appears that common law citizens' arrests would be approved on the basis of reasonable suspicion that a felony had been committed.[33]

While the nineteenth century decisions usually involved situations where the arrestor was either civilly sued[34] or criminally charged,[35] more modern cases interpreting common law practice have also been decided in a different context. Where a citizen's arrest for whatever reason constitutes governmental action, common law rules have necessarily been examined so as to determine citizen authority to take that action.[36] If the particular arrest is unauthorized, fruits of that intrusion could well constitute an illegal seizure and be barred as evidence at trial under the fourth and fourteenth amendments.[37]

Frequently the issue arises when law enforcement officers act in pursuance of duty outside defined jurisdictional limits. Under such

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29. State v. Holmes, 48 N.H. 377, 378 (1869).

30. *Id.* at 379. *See also* Holley v. Mix, 3 Wend. 350, 352 (N.Y. 1829); Wakely v. Hart, 6 Binn. 315, 318 (Pa. 1814).

31. *Holmes*, 48 N.H. at 379.

32. *Id.*

33. *See also* Croom v. State, 85 Ga. 718, 723-25, 11 S.E. 1035, 1037 (1890) (here, however, the court's language is not perfectly clear); Commonwealth v. Gullick, 386 Mass. 278, 281-83, 435 N.E.2d 348, 351 (1982) (discussion of common law citizen arrest authority in New Hampshire); O'Connor v. Bucklin, 59 N.H. 589, 591 (1879) (citizen can make arrest for the protection of the community).

34. Rohan v. Sawin, 59 Mass. (5 Cush.) 281 (1851); Holley v. Mix, 3 Wend. 350 (N.Y. 1829); Wakely v. Hart, 6 Binn. 315 (Pa. 1814).

35. Croom v. State, 85 Ga. 718, 11 S.E. 1035 (1890); State v. Holmes, 48 N.H. 377 (1869); *see also* Commonwealth v. Carey, 66 Mass. (12 Cush.) 246 (1853).

36. *See, e.g., infra* notes 39, 40, 43-46, 50.

37. M. BASSIOUNI, *supra* note 16, at 33-34.

circumstances their conduct is not considered equivalent to the exercise of traditional police power. Instead, they are usually[38] treated like ordinary citizens.[39] If a private party under the facts presented could effectuate a valid arrest, similar action by the governmental agent acting in a private capacity is likewise condoned.[40] Otherwise, evidence obtained in the wake of the conduct is excluded at trial.[41] Therefore, of crucial importance is the scope of valid citizens' arrests.[42]

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38. In at least one jurisdiction, the judiciary is apparently still undecided whether law enforcement agents generally pursuing duties outside their particular jurisdictional limits may nonetheless invoke citizen arrest authority. *Cf.* State v. Cohen, 139 N.J. Super. 561, 564, 354 A.2d 677, 678 (1976) (declining to consider the question on jurisdictional grounds), *modified*, 73 N.J. 331, 342 n.6, 375 A.2d 259, 264 n.6 (1977) (leaving the issue open); State v. McCarthy, 123 N.J. Super. 513, 517, 303 A.2d 626, 629 (1972) (answering in the affirmative). Neither *Cohen* nor *McCarthy* reveals the apparent reluctance to address or resolve the question.

39. State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa Ct. App. 1973), *cert. denied*, 417 U.S. 884 (1974); Commonwealth v. Gullick, 386 Mass. 278, 282, 435 N.E.2d 348, 351 (1982); People v. Davis, 133 Mich. App. 707, 715, 350 N.W.2d 796, 800 (1984); Nash v. State, 207 So. 2d 104, 106-07 (Miss. 1968); State v. Slawek, 114 Wis. 2d 332, 335, 338 N.W.2d 120, 121 (Ct. App. 1983).

40. It is clear that "the weight of authority" is that officers outside their respective jurisdictions retain the arrest powers of ordinary citizens. People v. Meyer, 424 Mich. 143, 155 n.14, 379 N.W.2d 59, 65 n.14 (1985).

41. Exclusion is appropriate because governmental authority has been exercised improperly. *See infra* text accompanying notes 144-57. A few courts, however, decline to suppress evidence seized by police as a result of certain extraterritorial arrests. When the arrest is based on adequate probable cause, despite the fact that the officer was acting unlawfully outside of his jurisdiction, the ensuing discoveries are held to be admissible. People v. Wolf, 635 P.2d 213, 217 (Colo. 1981) (en banc); City of Kettering v. Hollen, 64 Ohio St. 2d 232, 235, 416 N.E.2d 598, 600 (1980); State v. Rocheleau, 142 Vt. 61, 66-67, 451 A.2d 1144, 1147-48 (1982). They reason that given viable probable cause, the arrest *per se* does "not offend against constitutional restraints on unreasonable seizures." *Wolf*, 635 P.2d at 217. Since, in their view, there has been no formal fourth amendment violation, those courts find the exclusionary rule inapplicable. *See also* Commonwealth v. Goodman, 347 Pa. Super. 403, 424-30, 500 A.2d 1117, 1128-31 (1985).

42. Some courts have not routinely granted police operating extraterritorialy the arrest powers of private individuals. Where they act "under color of their office," police officers in several cases, it was determined, somehow lost whatever ordinary citizen arrest authority they would otherwise possess. *See, e.g.*, Collins v. State, 143 So. 2d 700, 703 (Dist. Ct. App.), *cert. denied*, 148 So. 2d 280 (Fla. 1962). "Color of office" appears to refer to those situations where the arrestors, outside their jurisdiction, hold themselves out as conventional police by, for example, wearing a uniform or displaying a badge. State v. Shipman, 370 So. 2d 1195, 1196-97 (Dist. Ct. App. 1979), *cert. denied*, 381 So. 2d 769 (Fla. 1980); State v. Filipi, 297 N.W.2d 275, 278 (Minn. 1980). Presumably, police outside their bailiwick would consequently be foreclosed from arresting parties even if openly engaged in criminal activity, but the result is preposterous. *Accord* Commonwealth v. Troutman 223 Pa. Super. 509, 512, 302 A.2d 430, 432 (1973) (court adopted a similar approach). Pennsylvania has, however, since *Troutman*, legislatively afforded police acting outside their jurisdiction additional arrest authority. Commonwealth v. Fiume, 292 Pa. Super. 54, 436 A.2d 1001 (1981).

Some courts understand the common law as approving a felony arrest by private persons only where the arrestor actually knows that a felony has been committed.[43] Thus, a policeman outside his bailiwick, despite probable cause, is precluded from validly arresting a suspect without subjective knowledge of some underlying felony.[44]

In other jurisdictions it appears that common law citizens' arrests are limited to situations where in fact some felony has been committed.[45] While personal knowledge of the crime need not be demonstrated, the arrestor must show that a felony had transpired.[46]

Both of these approaches[47] pose a serious practical difficulty at the pre-trial stage. At conventional suppression hearings involving arrests and seizures by police, the prosecution is required only to show that the officers were prompted by adequate probable cause. Given probable cause, the arrest is legitimate and the case is then tried on

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More recently, the "color of office" doctrine has been interpreted more sensibly. State v. Phoenix, 428 So. 2d 262 (Dist. Ct. App. 1982), *aff'd*, 455 So. 2d 1024 (Fla. 1984). It means only that it is improper to unlawfully assert police power for the purpose of gathering evidence otherwise unobtainable. *Id.* at 266. Police, however, are not stripped of whatever arrest authority is traditionally unavailable to ordinary citizens. *Id.* That conclusion, although eminently reasonable, adds little to the current state of the law. *See also Meyer*, 424 Mich. at 164, 379 N.W.2d at 69 (Levin, J., concurring) (concluding that unlawful activity by officer did only that which a private citizen might do); State v. Slawek, 114 Wis. 2d 332, 336-37 n.1, 338 N.W.2d 120, 122 n.1 (Ct. App. 1983) (concluding that the use of weapons, handcuffs, and ordinary police procedures by an officer during a citizen's arrest did not invalidate the arrest).

43. People v. Aldapa, 17 Cal. App. 3d 184, 94 Cal. Rptr. 579 (1971).

44. *Id.* at 188, 94 Cal. Rptr. at 582; *see also* State v. Phoenix, 428 So. 2d 262, 265 (Fla. Dist. Ct. App. 1982) ("Private persons can arrest (1) for a felony committed in their presence and (2) for a felony that *they know was committed* if they have probable cause to believe and do believe that the person arrested perpetrated the felony.") (emphasis added). *But see* State v. Shipman, 370 So. 2d 1195 (Dist. Ct. App. 1979) (a decision in the same jurisdiction presumably adopting a different position), *cert. denied*, 381 So. 2d 769 (Fla. 1980).

45. State v. Shipman, 370 So. 2d 1195, 1196 (Dist. Ct. App. 1979), *cert. denied*, 381 So. 2d 769 (Fla. 1980); Smith v. State, 258 Ind. 594, 597, 283 N.E.2d 365, 367 (1972); State v. Jones, 263 La. 164, 173-74 n.4, 267 So. 2d 559, 564 n.4 (1972), *cert. denied*, 410 U.S. 946 (1973).

46. United States v. Hillsman, 522 F.2d 454, 460-61 (7th Cir.), *cert. denied*, 423 U.S. 1035 (1975); Brady v. United States, 300 F.2d 540, 543 (6th Cir.), *cert. denied*, 266 U.S. 620 (1924); Collins v. State, 143 So. 2d 700, 703 (Dist. Ct. App.), *cert. denied*, 148 So. 2d 280 (Fla. 1962).

In *Moll v. United States*, a Fifth Circuit panel likewise explained that "[u]nder the common law, when a felony actually has been committed, a private citizen may arrest a person whom he reasonably believes to have committed the felony." 413 F.2d 1233, 1236 (5th Cir. 1969). It further noted that some jurisdictions have relaxed the rule and now allow private arrests on probable cause alone, "rather than requiring that the offense actually have happened." *Id.* at 1236 n.3. That invocation of common law is offered in deciding whether a search incident to arrest was valid rather than on the issue of tort liability for false arrest.

47. *See* Commonwealth v. Corley, 316 Pa. Super. 327, 336 n.13, 462 A.2d 1374, 1378 n.13 (1983) (at least one court that flatly refuses to decide whether the arrestor must have knowledge that a felony was committed), *aff'd*, 507 Pa. 540, 491 A.2d 829 (1985).

its merits. Where a defendant moves preliminarily to suppress evidence seized as the result of a citizen's arrest or its functional equivalent,[48] the state should be obliged to prove either actual knowledge of a felony or at least the commission of a felony. Absent such proof, the private arrest would be unlawful and evidence seized pursuant thereto inadmissible.[49] In effect, guilt or innocence of the defendant is being tried at some incidental preliminary proceedings. At best, the procedure is duplicitous and awkward.

That particular problem is avoided by jurisdictions who read common law as validating citizens' arrests on the basis of probable cause that a felony was committed[50]—the identical criterion governing police officers.[51] In response to an arrestee's motion to suppress, the state need only show the existence of viable probable cause. While the civilian arrestor would be amenable at common law to either civil liability or criminal sanctions unless a felony had taken place, that contingency does not affect the arrest *per se*. It remains perfectly valid so long as probable cause is shown.[52]

That version of common law principles, while avoiding one pitfall, remains rather confusing. If the citizen arrestor acting with probable cause is civilly or criminally liable, for what reason does the common law legalize the arrest itself? Surely those courts are not suggesting that an arrestee was precluded at common law from resisting what would amount to an unjustified arrest.[53] Moreover, it is difficult to fathom what purpose a bare arrest served at common law. In the context of constitutional jurisprudence, the legality of an arrest, despite the potential penalties of the arrestor, is important for the purpose of preserving evidence. Since arrests had no such significance at common law, the artificial dichotomy between arrests *per se* and the possible consequences to private arrestors is wholly illogical.

One fairly recent decision,[54] recognizing the practical and theoretical difficulties inherent in the latter views,[55] has developed a rather

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48. Where, for example, police arrest without formal authority. *See supra* notes 38, 39, 42.

49. *See* Commonwealth v. Harris, 11 Mass. App. Ct. 165, 170-71 n.5, 415 N.E.2d 216, 221 n.5, *cert. denied*, 441 U.S. 1042 (1981).

50. Jack v. Rhay, 366 F.2d 191, 192 (9th Cir. 1966); Stevenson v. State, 287 Md. 504, 520, 413 A.2d 1340, 1349 (1980); Nash v. State, 207 So. 2d 104, 107 (Miss. 1968).

51. *See supra* notes 7, 11.

52. *Stevenson*, 287 Md. at 520, 413 A.2d at 1349.

53. *See, e.g.*, Commonwealth v. Carey, 66 Mass. (12 Cush.) 246, 251 (1853) (holding that a party may lawfully resist an attempt at an impermissible citizen's arrest).

54. Commonwealth v. Harris, 11 Mass. App. Ct. 165, 415 N.E.2d 216, *cert. denied*, 441 U.S. 1042 (1981).

55. *Id.* at 169-70, 415 N.E.2d at 220-21.

unique thesis. It divides citizens' arrests into two separate categories. With respect to arrests by officers outside their jurisdictions, only probable cause is required to validate that action.[56] Despite the fact that such unauthorized arrests outside the prescribed jurisdiction are sanctioned only because they are equivalent to those of ordinary individuals, to insist "on rigid compliance"[57] with the rigid common law limitation that citizens may not act unless a felony has been committed would "frustrate legitimate law enforcement activities."[58] Ordinary citizens, on the other hand, remain bound by the dictates of common law which condone arrests only when in fact a felony was committed.[59]

Although this creative alteration of strict common law doctrine facilitates police operations generally, it leaves the precise ambit of more traditional citizens' arrests undefined. When an arrestee alleges that his civilian arrestor acted illegally, the state, seeking to preserve seized evidence, would presumably be bound to preliminarily show the commission of a felony—the identical crime it hopes to prove by submission of that very evidence. Obviously, since the state cannot perform that impossible feat it would be unable to utilize the fruits of citizens' arrests.

That anomaly may have broader policy implications. Early cases depicted citizens' arrests, along with those of police, as "essential to the welfare of society."[60] In response, for example, to the complaint

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56. *Id.* at 171-72, 415 N.E.2d at 221.

57. *Id.*

58. *Id.* Even with respect to officers, the court hastens to add that it expresses "no opinion on the right of a police officer to make an extraterritorial arrest apart from preventing a felon's possible escape or apart from the existence of a statutory basis to arrest." *Id.* at 171-72 n.6, 415 N.E.2d at 221 n.6. The court further speculates that as a practical matter, police do not ordinarily engage in independent criminal investigations outside of their jurisdiction. *Id. But cf.* State v. Shipman, 370 So. 2d 1195 (Fla. Dist. Ct. App. 1979) (court recognizes need for police to follow suspects out of jurisdiction); Stevenson v. State, 287 Md. 504, 413 A.2d 1340 (1980) (police officers while out of jurisdiction observe fleeing felons and make arrest); State v. Slawek, 114 Wis. 2d 332, 338 N.W.2d 120 (Ct. App. 1983) (police officers followed defendant out of jurisdiction, observed felony and made arrest).

59. *Harris*, 11 Mass. App. Ct. at 171-72 n.6, 415 N.E.2d at 221 n.6.

60. Wakely v. Hart, 6 Binn. 315, 318 (Pa. 1814); *cf.* Rohan v. Sawin, 59 Mass. (5 Cush.) 281, 285 (1851) (the argument in favor of citizens' arrest is a little more subdued).

With respect to police warrantless felony arrests on the basis of probable cause alone, the Supreme Court has opined that "public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant." Carroll v. United States, 267 U.S. 132, 157 (1925). Others suggest that a probable cause standard was held to be sufficient because of the apprehension that felony offenders, in light of the heinous crime committed, might seek to escape. *See* Robinson v. State, 4 Md. App. 515, 525 n.9, 243 A.2d 879, 886 n.9 (1968).

that such private arrest power "is the relic of a barbarous age,"[61] a Pennsylvania court explained: "in a republic . . . the people themselves represent its sovereignty and its security. The felon is an enemy to the sovereignty and security; forfeits his liberty and cannot complain that the hand of his fellow man arrests his flight and returns him to justice."[62]

Viewed in that light, citizens' arrests are a viable and presumably valuable law enforcement measure. Such lay arrest authority, although hopefully ancillary to that of formal police, should therefore be fairly comprehensive in nature so as to effectively involve the private sector in crime detection and prevention. Jurisdictions adopting this theoretical rationale for citizen participation would necessarily encourage private initiative and welcome the results of such arrests.[63]

Given the current plethora of law enforcement agencies,[64] modern cases take a more restrained approach to citizens arrests.[65] Particularly when the arrest is accompanied by force or firearms, the decisions urge limitations on untutored citizenry to guard "against the dangers of uncontrolled vigilantism and anarchistic actions"[66] as well as "the danger of death or injury of innocent persons at the hands of untrained volunteers using firearms."[67]

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61. Brooks v. Commonwealth, 61 Pa. 352, 359 (1869).

62. *Id.*; *see also* Brockway v. Crawford, 48 N.C. (3 Jones) 433, 438-39 (1856).

63. One court approving citizens' arrests for misdemeanors amounting to a breach of the peace committed in their presence offers two reasons for its decision. First, it suggests that "it is desirable that citizens be encouraged to stop breaches of the peace." Commonwealth v. Corley, 316 Pa. Super. 327, 338, 462 A.2d 1374, 1379 (1983), *aff'd*, 507 Pa. 540, 491 A.2d 829 (1985). Second, the rule would protect potential arrestors who can not differentiate between misdemeanors and felonies. *Id.; see also infra* note 68 (maintaining that police are better able to differentiate line between legal and illegal conduct).

64. From an historical perspective, "until quite modern times police duties were the duties of every man," Hall, *supra* note 8, at 579 (footnote omitted), for only in the late eighteenth century were police type units first formed in England. *Id.* at 580-81. In about 1829 a novel professional police system was finally formed in London. *Id.* at 583-84; *see also* Wilgus, *supra* note 17, at 545 (primitive law maintained that every person was dutibound to "hunt down" he who broke the law).

65. *But cf.* Stevenson v. State, 287 Md. 504, 413 A.2d 1340 (1980). Surprisingly, *Stevenson* relies on *Brooks v. Commonwealth* and *Brockway v. Crawford*, cases decided over a century ago, for the notion that "placing greater obstacles in the path of citizens who wish to aid society may, in the end, prove to be detrimental to the maintenance of peace and good order in the community." *Id.* at 520, 413 A.2d at 1349 (relying on Brooks v. Commonwealth, 61 Pa. 352 (1869) and Brockway v. Crawford, 48 N.C. (3 Jones) 433 (1856)).

66. Commonwealth v. Klein, 372 Mass. 823, 829, 363 N.E.2d 1313, 1317 (1977); Commonwealth v. Harris, 11 Mass. App. Ct. 165, 170, 415 N.E.2d 216, 220 (1981).

67. *Klein*, 372 Mass. at 829, 363 N.E.2d at 1317; *see also* Commonwealth v. Chermansky, 430 Pa. 170, 242 A.2d 237 (1968) (private citizen convicted of murder in the second degree where unjustified deadly force was used to prevent a suspect's escape).

Under that more realistic appraisal of civilian arrest authority, courts would be loathe to amplify the role of private persons in the law enforcement process.[68] On the contrary, their concern would be directed at curbing potential private excesses. Such jurisdictions should logically remain unperturbed if fruits of some private crime detection effort are inadmissible against the arrestee.[69] Therefore, even if as a practical matter relevant evidence is unavailable to the prosecution because it can not prove preliminarily the efficacy of a private arrest,[70] that result is satisfactory. It simply reflects that particular court's disapproval of such precipitous private action.

What emerges generally from the foregoing review is that some basic type of citizen's arrest was countenanced under common law.[71]

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68. Crimes committed in a citizen's view may conceivably be distinguished from those occurring elsewhere. In approving warrantless arrests by officers for crimes taking place in their presence, the Supreme Court has explained that the procedure is justified because, since the culprit is transgressing the law in plain view, there is little danger that some innocent party will be unjustly detained. United States v. Watson, 423 U.S. 411, 426-27 n.1 (1976) (Powell, J., concurring); Trupiano v. United States, 334 U.S. 699, 705 (1947), *rev'd in part*, United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (overruling *Trupiano* to the extent that it "requires a search solely upon the basis of the practicability of procuring it rather upon the reasonableness of the search after a lawful arrest . . . ."). Citizens observing crimes in progress should therefore have similar arrest authority. On the other hand, trained police are in a far better position to decide what conduct does in fact constitute criminal action.

69. Provided, of course, that the arrest is equivalent to state action. *See infra* text accompanying notes 73-143.

70. *See supra* text accompanying notes 47-49, 59-60.

71. There is likewise an existing controversy over the scope of searches permitted incident to civilian arrests. Some courts hold that "searches incident to a citizen's arrest are justified by the same rationale underlying searches incident to any other lawful arrest." United States v. Carter, 523 F.2d 476, 478 (8th Cir. 1975); United States v. Unverzagt, 424 F.2d 396, 398-99 (8th Cir. 1970); United States v. Rosse, 418 F.2d 38, 39 (2d Cir. 1969), *cert. denied*, 397 U.S. 998 (1970); *see also* United States v. Chapman, 420 F.2d 925, 926 (5th Cir. 1969) (evidence held in open view during valid citizen's arrest was admissible since "while there was a lawful seizure, there was not a search"); People v. Alvardo, 208 Cal. App. 2d 629, 631, 25 Cal. Rptr. 437, 438 (1962) (where arrest is lawful, search is justified as an incident of the arrest), *cert. denied*, 374 U.S. 840 (1963).

Other authorities flatly forbid searches incident to citizens' arrests. *See, e.g.*, Application of Fried, 68 F. Supp. 961, 964 (S.D.N.Y. 1946); People v. Alberta, 37 Misc. 2d 847, 849, 237 N.Y.S.2d 51, 54 (1962). Yet, several authorities restrict searches incident to citizens' arrests only to weapons and/or items belonging to the arrestee or his principal. *See, e.g.*, People v. Zelinski, 24 Cal. 3d 357, 363, 594 P.2d 1000, 1003, 155 Cal. Rptr. 575, 578 (1979) (discussed at length *infra* notes 95-109); People v. Sandoval, 65 Cal. 2d 303, 311 n.5, 419 P.2d 187, 192 n.5, 54 Cal. Rptr. 123 128 n.5 (1966).

Although those latter two California cases turn on statutory construction, the *Zelinski* court clearly states that "[n]either the statute nor the privilege which it codified purport to give the merchant or his employees the authority to search," because "private citizens are not and should not be permitted to take property from other private citizens." 24 Cal. 3d at 363-64, 594 P.2d at 1003-04, 155 Cal. Rptr. at 578-79 (footnote omitted).

There is no agreement, however, on the form it took at common law, its requisite elements, or its role in modern law enforcement.[72]

II. STATE ACTION

Over six decades ago, the Court announced in *Burdeau v. McDowell*[73] that the fourth amendment's ban on unreasonable searches and seizures "was not intended to be a limitation upon other than governmental agencies . . . ."[74] Where, therefore, a private individual acting independently furnishes law enforcement authorities with

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Noting the implications of *Zelinski*, an appellate court of Alaska specifically declined to address the extent of search incident to private arrests generally because, in that particular factual setting, the arresting security guard merely searched for his employer's merchandise. Thus, it held, he was exercising a legitimate common law privilege to retrieve his own property. Jackson v. State, 657 P.2d 405, 407 (Alaska Ct. App. 1983). More recently it appears to have broadened, in some measure, search authority incident to all citizens' arrests. Cullom v. State, 673 P.2d 904, 905-06 (Alaska Ct. App. 1983); *see also* People v. Horman, 22 N.Y.2d 378, 381, 239 N.E.2d 625, 627, 292 N.Y.S.2d 874, 876 (1968) (store detective's arrest of suspected shoplifter tested by private citizen's standard), *cert. denied*, 393 U.S. 1057 (1969).

The conflict over the permissible scope of search incident to private arrests may hinge on how a particular jurisdiction perceives the nature of citizens' arrests. In *United States v. Robinson*, the high Court was presented with the claim that a formal arrest for traffic violations should, in the interest of personal safety, give the arresting officer only the authority to search for weapons as there could be no further evidence of the crime in question. 414 U.S. 218 (1973). A "Terry-type frisk" (patdown for weapons) would therefore suffice. A majority of the Court disagreed since "a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." *Id.* at 224. "[T]he fact of the lawful arrest . . . establishes the authority to search . . . ." *Id.* at 235.

If citizens' arrests are viewed as synonomous with those effected by law enforcement authorities, *the fact of lawful arrest* should likewise trigger the authority for making a full scale search incident thereto. If, on the other hand, arrests by citizens are classified as being in a separate and distinct category, different and more specialized rules might be more appropriate.

72. Assuming *arguendo* the validity of some common law search authority pursuant to an effective citizen's arrest, the scope and intensity of that search remains unexplored.

Under *Gouled v. United States*, only contraband, fruits, or instrumentalities of crime, as opposed to mere evidence, could be seized without a warrant by police. 225 U.S. 298, 308 (1921). However, *Warden v. Hayden* eliminated the mere evidence prohibition and allowed official seizures of any item which "will aid in a particular apprehension or conviction." 387 U.S. 294, 307 (1967). Yet, courts have not considered whether private searches may be as extensive. In the interests of personal privacy, untutored and inexperienced citizens should at least be foreclosed from removing objects that have no absolutely obvious nexus with criminal activity.

73. Burdeau v. McDowell, 256 U.S. 465 (1921). Correspondence and assorted papers belonging to McDowell had been taken unlawfully by certain company personnel and turned over to federal officials. The latter intended to use the material in a grand jury investigation as well as in a subsequent trial. McDowell then sued for return of his belongings. While the Court agreed that perpetrators of the unlawful seizure could conceivably be civilly liable, the government was not bound to return the items. It found no violation of the fourth amendment since the federal government had not been involved in the initial wrongful seizure. *Id.* at 475-76.

74. *Id.* at 475.

incriminating evidence wrongfully seized, neither the fourth nor the fourteenth amendment mandates the exclusion of such material in subsequent proceedings[75] since the illegal intrusion was not prompted by governmental action.[76] If, however, the private undertaking is initiated by police, the activity may well be governmental in nature and subject to constitutional restrictions.[77] Similarly, citizens' arrests, when considered state action, usually trigger the exclusionary rule rendering evidence seized unlawfully inadmissible.[78] So, for example, a private arrest based on insufficient probable cause would amount to an unconstitutional seizure. Fruits of such an arrest would be illegal seizures and unavailing to the prosecution.

If, however, a citizen's arrest is viewed as a wholly private endeavor, the strictures of the fourth amendment would be inapplicable. Despite the impropriety of a particular arrest, evidence gleaned would be available at trial since it did not flow from impermissible

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75. United States v. Jacobsen, 466 U.S. 109, 112-16 (1984); Walter v. United States, 447 U.S. 649, 656 (1980); *see also* W. LAFAVE, SEARCH AND SEIZURE § 1.8(a), at 177 (2d ed. 1987) ("Virtually all courts continue to follow the *Burdeau* rule.") (footnote omitted).

76. Without even a passing reference to *Burdeau*, the Supreme Court of Montana in *State v. Brecht* decided that illegal private seizures violated the fourth and fourteenth amendments, triggering application of the exclusionary rule. 157 Mont. 264, 485 P.2d 47 (1971). The court offered the rather poor argument that to differentiate between law enforcement authorities and private persons "would lend Court approval to a fictional distinction between classes of citizens: those who are bound to respect the Constitution and those who are not." *Id.* at 271, 485 P.2d at 51.

Three years later, the Montana Supreme Court reaffirmed its view that the exclusionary rule governed private searches as well as state actions. This time, however, realizing the effect of *Burdeau*, the court grounded its decision on a specific provision of the Montana Constitution dealing with its right to privacy. State v. Coburn, 165 Mont. 488, 495, 530 P.2d 442, 446 (1974). In several subsequent cases, the exclusionary rule has been applied, over vigorous dissents, to private persons—the majorities explaining that its particular state constitutional proviso extends even to such parties. State v. Hyem, 630 P.2d 202, 208-09 (Mont. 1981); State v. Helfrich, 183 Mont. 484, 488-89, 600 P.2d 816, 818-19 (1979). Only recently a majority of the Supreme Court of Montana has found its earlier reading of the Montana Constitution to be "unsound." State v. Long, 700 P.2d 153, 156 (Mont. 1985). It, however, declined to discuss whether the exclusionary rule would be applicable to unlawful private action. *Id.* at 157-58.

Louisiana appears to have adopted a similar approach. In *State v. Hutchinson*, the court stated simply that it was unwilling to exclude private searches from the scope of its state constitution. 349 So. 2d 1252, 1254 (La. 1977). No reason was offered. Despite this dictum, the court declared the search valid because there was no expectation of privacy in the area searched. *Id.* at 1254-55. The Louisiana Constitution, as that of Montana, provides protection generally from "invasions of privacy." *Id.* at 1255 (Sanders, C.J., concurring) (citing LA CONST. art. 1, § 5); State v. Nelson, 354 So. 2d 540, 542 (La. 1978). Without a similarly worded state constitutional provision, states would not have the benefit of that particular nonfederal basis for making private searches subject to an exclusionary rule.

77. *Cf.* Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (cooperation with police does not automatically convert a private citizen into an instrument of the state).

78. *See infra* notes 79-82, 95-104 and accompanying text.

governmental conduct. Unfortunately, there is no judicial unanimity on the nature of citizens' arrests generally. In fact, citizens' arrests, for constitutional purposes, have oftentimes been classified into different categories.

Individuals acting at the express insistence of police authorities are usually depicted as instrumentalities of the state.[79] Police pursing current criminal matters outside of their statutory jurisdictions, although authorized only to act as private citizens, are treated as state agents.[80] Evidence seized illegally under those circumstances[81] would be withheld as the product of unlawful governmental conduct. The result is sound, for when an individual acts under direct police auspices or an officer operates extraterritorially,[82] the conduct nonetheless falls within the broad ambit of traditional law enforcement activity.

A somewhat similar, but not as convincing, argument may be made when arrests are undertaken by special police personnel. Special police officers are commissioned by the state[83] after some minimal training to protect the premises of their employers. Inasmuch as their arrest authority is derived from a state license specifically

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79. *See* Alston v. United States, 518 A.2d 439 (D.C. 1986); Moody v. United States, 163 A.2d 337 (D.C. 1960); Thacker v. Commonwealth, 310 Ky. 702, 221 S.W.2d 682 (1949); People v. Esposito, 37 N.Y.2d 156, 332 N.E.2d 863, 371 N.Y.S.2d 681 (1975); *see also infra* note 140.

Older decisions discussing the use of evidence seized unlawfully by state officers in federal prosecutions are germane as well. If State personnel acted at the direction of their federal counterparts, the discoveries prompted by federal action were subject to the exclusionary rules of federal courts. *See, e.g.*, Lustig v. United States, 338 U.S. 74, 78-79 (1949); Gambino v. United States, 275 U.S. 310, 316-19 (1927). Evidence seized by private individuals operating on behalf of police should be similarly treated.

80. People v. Aldapa, 17 Cal. App. 3d 184, 94 Cal. Rptr. 579 (1971); State v. Phoenix, 428 So. 2d 262 (Dist. Ct. App. 1982), *aff'd*, 455 So. 2d 1024 (Fla. 1984); Commonwealth v. Harris, 11 Mass. App. Ct. 165, 415 N.E.2d 216 (1981); State v. Filipi, 297 N.W.2d 275 (Minn. 1980). *See generally* Annotation, *Validity, In State Criminal Trial, Of Arrest Without Warrant By Identified Peace Officer Outside Of Jurisdiction, When Not In Fresh Pursuit*, 34 A.L.R. 4th 328 (1984) (collecting cases where such arrests are either valid or invalid).

81. When police officers on private business outside their jurisdictions fortuitously come upon some criminal enterprise, the ensuing law enforcement activity including arrest may conceivably be private in nature. Stevenson v. Maryland, 43 Md. App. 120, 403 A.2d 812 (Ct. Spec. App. 1979), *aff'd on other grounds*, 287 Md. 504, 413 A.2d 1340 (1980). There, a Maryland intermediate appellate court held that police under such circumstances act only as private individuals. *Id.* at 122-24, 403 A.2d at 815. Presumably, that court views such citizens' arrests as non-governmental.

82. *But see supra* note 41.

83. *See, e.g.*, CAL. PENAL CODE §§ 830.6, 832.6 (West 1985); CONN. GEN. STAT. ANN. § 29-18 (West 1975); GA. CODE ANN. § 35-9-2 (West 1987); MD. ANN. CODE arts. 27A-41, §§ 40-60 (1986).

enumerating that duty, it is not unreasonable to characterize the conduct as a function of governmental law enforcement.[84]

As a practical matter the state has deliberately chosen, in addition to conventional police forces, another medium for crime prevention and detection.[85] It should follow, therefore, that fourth amendment prohibitions would be applicable where such special police operate unlawfully outside their geographic jurisdictions or beyond the scope of their statutory powers.[86] As in the case of ordinary police, the law enforcement authority of the state is being exercised through this

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84. In *Griffin v. Maryland*, defendants were convicted of criminal trespass when they entered a racially segregated amusement park. 378 U.S. 130 (1964). The individual who ordered them to vacate the premises, and eventually arrested them, was an employee of the park deputized as a county sheriff under local law. *Id.* at 132. The convictions were invalidated as violative of the fourteenth amendment's equal protection clause. *Id.* at 136-37.

In finding the park employee's conduct to be state action, the Court made the following observation:

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

Id. at 135.

In a totally different context, a labor relations case, the Court previously discussed the role of special police in law enforcement. Labor Bd. v. Jones & Laughlin Co., 331 U.S. 416 (1947). While deputized guards, it was noted, remain employees of their respective private employers, as opposed to municipal officers, they enjoy a unique status. *Id.* at 429. As the Court explained, "[i]t is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers." *Id.* Nonetheless, it concluded, "when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto." *Id.*; *see also* Williams v. United States, 341 U.S. 97, 99-100 (1951).

85. Thus, it is generally held that the statutory designation "police officer" or "peace officer" includes special policemen. Singleton v. United States, 225 A.2d 315, 317 (D.C. 1967); Huger v. Maryland, 285 Md. 347, 352, 402 A.2d 880, 884 (1979). In light of their formal statutory status, they are treated differently than mere security or private guards. United States v. Lima, 424 A.2d 113, 118-19 (D.C. 1980) (discussed *infra* notes 132-40 and accompanying text); *see also* General Motors Corp. v. Pisko, 281 Md. 627, 635 n.3, 381 A.2d 16, 20-21 n.3 (1977). By contrast, a "wild life agent" with limited arrest powers is not a "peace officer." State v. Longlois, 374 So. 2d 1208, 1209-10 (La. 1979).

Whether an off-duty policeman privately employed as a store guard falls within the "police officer" category remains an unresolved issue. *See* Gortarez v. Smitty's Super Valu, Inc., 140 Ariz. 97, 100-01 n.1, 680 P.2d 807, 810 n.1 (1984).

86. One court expresses uncertainty over whether the status of special police alone is sufficient to render their activity state action. Commonwealth v. Leone, 386 Mass. 329, 335 n.7, 435 N.E.2d 1036, 1040 n.7 (1982).

agency.[87] Fruits of such unlawful behavior should be excluded from

87. A somewhat similar controversy exists with respect to whether citizen arrestees are entitled to the traditional warnings imposed by *Miranda*. Where the questioning is initiated and conducted by private citizens acting in a wholly private capacity, since there is absolutely no governmental involvement, the fifth amendment's proscription on compelled self-incrimination is simply not implicated. Commonwealth v. Mahnke, 368 Mass. 662, 676-77, 335 N.E.2d 660, 669-70 (1975), *cert. denied*, 425 U.S. 959 (1976); State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (1970). Yet, Constitutional protection may be available in other circumstances. *See* People v. Wright, 249 Cal. App. 2d 692, 693, 57 Cal. Rptr. 781, 782 (1967) (affording protection where civilians acted on behalf of a state agency "whose primary mission is to enforce the law."); Pratt v. State, 9 Md. App. 220, 226-27, 263 A.2d 247, 250 (Ct. Spec. App. 1970)(affording protection where interrogators were special deputized police). Similarly, *Miranda* safeguards may be necessary where the custodial interrogation, albeit private, is conducted under some formal police auspices. People v. Jones, 61 A.D.2d 264, 267, 402 N.Y.S.2d 28, 30 (2d Dep't 1978).

Some courts have held that the requirement of *Miranda* warnings applies to an accused arrested by private security guards. *See, e.g.*, Williams v. State, 376 So. 2d 846, 848 (Fla. 1979) (per curiam); Peak v. State, 342 So. 2d 98, 99 (Fla. App. 1979). Yet, most jurisdictions do not impose the *Miranda* requirement on security personnel. *See, e.g.*, United States v. Casteel, 478 F.2d 152, 155 (10th Cir. 1973); United States v. Bolden, 461 F.2d 988 (8th Cir. 1972); United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970); People v. Raitano, 81 Ill. App. 3d 373, 378, 401 N.E.2d 278, 281 (1980) (even where the guard is acting pursuant to a state's Retail Theft Act); State v. Bolan, 27 Ohio St. 2d 15, 18, 271 N.E.2d 839, 842 (1971); City of Grand Rapids v. Impens, 414 Mich. 667, 677-78, 327 N.W.2d 278, 280 (1982).

Although several courts have offered the proposition that *Miranda* is inapposite because the typical security guard is not a "law enforcement official," United States v. Casteel, 476 F.2d 152, 155 (10th Cir. 1973); United States v. Bolden, 461 F.2d 988, 999 (8th Cir. 1972), the result is sound even if security personnel are viewed as government agents in, for example, a fourth amendment context. The interests served by the protections against official unreasonable searches and seizures embodied in the fourth amendment and those promoted by *Miranda* for guaranteeing compliance with the fifth amendment's ban on compelled self-incrimination are substantially different.

Any invasion of one's reasonable expectation of privacy wrought by the State or its representatives constitutes a violation of the Constitution. If, therefore, the perpetrator is some form of government agent—be it policeman or store detective—fourth amendment principles are necessarily implicated. Fifth amendment protection on the other hand, while designed as a restraint on government, insulates the citizen only from being compelled to incriminate himself. *Miranda* warnings safeguard those fifth amendment rights by disspelling the inherent compulsion of police-dominated custodial interrogations. Miranda v. Arizona, 384 U.S. 436, 445, 491-98 (1966). A suspect in custody must be afforded such protection to ensure that he will not be compelled "to speak where he would not otherwise do so freely." *Id.* at 467. Thus, the mere fact that questioning happens to be conducted by government officials, constituting state action, does not in and of itself trigger *Miranda*. Pre-interrogation warnings are required only in those instances where "inherently compelling pressures . . . work to undermine the individual's will to resist . . . ." *Id.*

Thus, where questioning is initiated at an interview by a probation officer, albeit a state employee, for the avowed purpose of extracting a confession from the probationer, *Miranda* warnings are not required. Minnesota v. Murphy, 465 U.S. 420 (1984). Although that exchange in *Murphy* took place in a private setting and the interrogator deliberately sought incriminating statements, the Court decided that the situation amounted to a noncustodial interrogation. *Id.* at 431-33. The suspect was in no way pressured, physically or psychologically, to incriminate himself. *Id.* at 433.

evidence.[88]

A more problematic issue arises when an arrest is made by a citizen having no relationship whatsoever with law enforcement agencies. Assuming that the prerequisites for this private action have not been met, are the results nonetheless admissible for falling outside the pale of the fourth amendment?[89] At least ostensibly, private initiative which is neither instigated nor encouraged by the State should not be equivalent to public action. Where an individual illegally invades another's legitimate expectation of privacy and removes tangible items, since the search is not prompted by police, the discoveries are admissible in evidence.[90] The fact that the object

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Similarly, *Miranda* warnings were held to be inappropriate before questioning motorists after making a routine traffic stop. Berkemer v. McCarty, 468 U.S. 420 (1984). Although it was conceded that the police action in halting and detaining the vehicle and its occupants amounted to a fourth amendment seizure, *Id.* at 437-38 (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)), the Court distinguished, for fifth amendment purposes, between questioning subsequent to traffic stops and those interrogations carried out at stationhouses. *Id.* at 437-38. Traffic stops and incidental questioning take place in a public forum in which one, or possibly two, officers are involved, and are usually fairly short. *Id.* at 437-39. Thus, the traffic stop, although a fourth amendment intrusion, does not exert "upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *Id.* at 437.

Seizures by private security personnel, even if deemed governmental conduct in a fourth amendment vein, are more analogous to the traffic stop than to formal police arrest. Typical arrests by private guards also take place in a public setting reducing the possibility of illicit action to compel confessions. *Id.* at 438. Moreover, as opposed to the roadside encounter, the private arrestee is not confronted by some uniformed official authority. What he perceives is simply a fellow citizen who has detained him. Thus, even those courts that characterize citizens' arrests by security guards as a form of governmental action may properly hold that *Miranda* warnings are not required in the non-coercive atmosphere surrounding such private endeavors. See a somewhat similar observation in Schaumberg v. State, 83 Nev. 372, 374-75, 432 P.2d 500, 501 (1967).

One commentator some thirteen years before *Murphy* or *Berkemer* realized the significant factual distinction between police interrogation and that of private security forces, but nonetheless felt on balance that *Miranda* should be applicable in the private setting. Note, *Private Police Forces: Legal Powers and Limitations*, 38 U. CHI. L. REV. 555, 579-80 (1971). In light of more recent Supreme Court decisions, that view is no longer particularly persuasive.

88. Gray v. Maryland, 38 Md. App. 343, 380 A.2d 1071 (1977); People v. Eastway, 67 Mich. App. 464, 241 N.W.2d 249 (1976); People v. Diaz, 85 Misc. 2d 41, 376 N.Y.S.2d 849 (Crim. Ct. 1975); People v. Smith, 82 Misc. 2d 204, 368 N.Y.S.2d 954 (Crim. Ct. 1975).

89. A majority of the Supreme Court has, to date, merely recognized that there may be a differentiation between formal special police and private security guards. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978). While the decision in *Griffin v. Maryland* governs where the actor exercises the authority of a deputy sheriff, it "sheds no light on the constitutional status of private police forces." *Id.* at 163 n.14. In fact, the *Flagg Brothers* opinion observes that the "[c]ourt has never considered the private exercise of traditional police functions." *Id. But see id.* at 172 n.8 (Stevens, J., dissenting) (delegation of police power to a private party will entail state action) (citing Griffin v. Maryland, 378 U.S. 130 (1964)).

90. *See supra* notes 73-75 and accompanying text.

seized is the arrestee himself should make no difference. In either event the citizen, as opposed to a governmental body, has acted unilaterally.

On the other hand, arrests prompted by the violation of some law obviously promote the state's interest in crime detection and prevention as they are "intended to vindicate society's interest in having its laws obeyed."[91] Any arrest, even a private one, is likewise "the initial stage of a criminal prosecution."[92] As law enforcement necessarily involves the exercise of a portion of governmental sovereignty, by condoning citizens' arrests the state is in effect allowing private parties to fulfill a significant public safety function. Every arrest, therefore, by its very nature, may constitute governmental action since the arrest is countenanced by state law, furthers a state interest, and constitutes an exercise of state authority over its populace.

Inasmuch as private parties do not ordinarily engage in arrest activities,[93] the precise nature of citizens' arrests is usually judicially considered when some employee of a commercial enterprise, bereft of formal authority, arrests a suspicious customer. When the arrest is found to be a valid private seizure, courts routinely admit the evidence seized.[94] If, for any reason, the arrest process is unlawful but some incriminating items are uncovered, courts necessarily look to the status of citizens' arrests to decide whether the discovered evidence is admissible against the offender. Courts remain split on the issue.

In one instance, *People v. Zelinski*,[95] a shopper was arrested by store detectives for stealing merchandise. In the course of an ensuing search heroin was discovered on the arrestee's person and he was charged with possession of narcotics.[96] Under California law the employees involved held the same status as private individuals,[97] whose arrest authority was governed by statute.[98] The California Supreme Court, *en banc*, initially found no statutory authorization for the

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91. Terry v. Ohio, 392 U.S. 1, 26 (1968).

92. *Id.*

93. *But see* United States v. Hillsman, 522 F.2d 454 (7th Cir.), *cert. denied*, 423 U.S. 1035 (1975) (private citizens attempting to make an arrest assaulted a federal officer they believed to be a fleeing felon); Smith v. State, 258 Ind. 594, 283 N.E.2d 356 (1972) (citizens arrested an extraterritorial police officer for possession of marijuana).

94. *Compare supra* notes 40, 50 and accompanying text (admitting the evidence) *with supra* note 41 and accompanying text (excluding the evidence).

95. 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979).

96. *Id.* at 361, 594 P.2d at 1002, 155 Cal. Rptr. at 577.

97. *Id.* at 362, 594 P.2d at 1002, 155 Cal. Rptr. at 577.

98. *Id.* at 362 n.4, 594 P.2d at 1002-03 n.4, 155 Cal. Rptr. at 577-78 n.4.

store detective's search.[89] Nonetheless, the state, invoking *Burdeau*,[100] argued simply that the fruits of illegal private searches and seizures are admissible.[101] The California court, rejecting the proposition, held that "when private security personnel conduct an illegal search or seizure while engaged in a statutorily-authorized citizen's arrest and detention of a person in aid of law enforcement authorities, the constitutional proscriptions of article 1, section 13 [outlawing illegal searches and seizures] are applicable."[102] Although the state constitutional ban on illegal searches and seizures did not encompass "purely private searches,"[103] in this case, the court explained, the search was performed incident to a private arrest sanctioned by local statute. Therefore, the court reasoned:

> Their acts, engaged in pursuant to the statute, were not those of a private citizen acting in a purely private capacity. Although the search exceeded lawful authority, it was nevertheless an integral part of the exercise of sovereignty allowed by the state to private citizens. In arresting the offender, the store employees were utilizing the coercive power of the state to further a state interest. Had the security guards sought only the vindication of the merchant's private interests they would have simply exercised self-help and demanded the return of the stolen merchandise. Upon satisfaction of the merchant's interests, the offender would have been released. By holding defendant for criminal process and searching her, they went beyond their employer's private interests.[104]

While the precise holding in *Zelinski* was that the fruits of an impermissible search in the wake of a lawful arrest were inadmissible, it is clear that it deemed that particular citizen's arrest governmental in nature. Thus, had the store detectives acted, for example, without probable cause, even the products of a lawful search would have been suppressed.

By the same token, the *Zelinski* court was primarily concerned with what it characterized as the threat to privacy posed by the ever burgeoning ranks of private security personnel whose "quasi-law enforcement activities"[105] are comparable to those of formal police. Security guards by the very nature of their employment serve in lieu of

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99. *Id.* at 363-64, 594 P.2d at 1003-04, 155 Cal. Rptr. at 578-79.
100. Burdeau v. McDowell, 256 U.S. 465 (1921).
101. *Zelinski*, 24 Cal. 3d at 364, 594 P.2d at 1004, 155 Cal. Rptr. at 579.
102. *Id.* at 367, 594 P.2d at 1006, 155 Cal. Rptr. at 581.
103. *Id.*
104. *Id.*
105. *Id.* at 366, 594 P.2d at 1005, 155 Cal. Rptr. at 580.

public police[106] for the purpose of fulfilling the identical "public functions in bringing violators of the law to public justice."[107] By contrast, ordinary citizens who happen to engage in the same form of private arrest would presumably not be similarly treated despite the fact that the arrest itself, legitimized specifically by statute, reflects "the coercive power of the state to further a state interest."[108] In the *Zelinski* court's view, the citizen's arrest *per se* would not necessarily amount to state action simply because it constitutes the exercise of a public function by bringing offenders to justice. It rises to the level of governmental action only when the identical activity is undertaken by those who are hired to perform the identical task.[109]

While the conclusion as a practical matter effectively restrains private security forces, it is not particularly convincing. Government, whether by statute or common law, has not distinguished between arrests by ordinary citizens and security personnel. It has not encouraged one type of arrest over another. In either event, the state merely recognizes the validity of the private endeavor. To imply governmental participation on the theory that the private arrest activity has been commercialized is unwarranted.

Without mentioning *Zelinski*,[110] an intermediate appellate court in Pennsylvania also examined the nature of citizens' arrests.[111]

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106. Many commentators, presumably perturbed by the proliferation of private security forces, have advocated the thesis advanced in *Zelinski* that, inasmuch as those operations serve a significant public law enforcement function, their activities should therefore constitute governmental action for fourth amendment purposes. *See, e.g.*, Euller, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649, 657-65 (1980); Note, *Private Searches And Seizures: An Application of the Public Function Theory*, 48 GEO. WASH. L. REV. 433, 449-54 (1980) [hereinafter Note, *Private Searches*]; Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 614-17 (1967). While *Zelinski* is mustered in support of the argument, courts generally, it is conceded, have rejected that approach. Euller, *supra*, at 661; Note, *Private Searches, supra*, at 451. *See generally* W. LAFAVE, *supra* note 75, § 1.8(d), at 198-208.

Assuming that the concern over actual or potential privacy invasions wrought by security personnel is a valid one, invocation of the familiar exclusionary rule—as urged by the latter commentators—is not a proper antidote. It is neither theoretically nor practically appropriate in a private search context. See discussion *infra* text accompanying notes 144-64. A more efficacious response would be comprehensive legislation on the subject of private security forces designed to curb abuses and excesses that threaten legitimate privacy interests. *See also* M. BASSIOUNI, *supra* note 16, at 72-73; Comment, *Private Police in California: A Legislative Proposal*, 5 GOLDEN GATE U.L. REV. 115 (1975).

107. People v. Zelinski, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. at 575 (1979).

108. *Id.* at 367, 594 P.2d at 1006, 155 Cal. Rptr. at 581 (footnotes omitted).

109. It remains the law in California. *See, e.g.*, People v. Carter, 130 Cal. App. 3d 690, 181 Cal. Rptr. 867 (1982).

110. 24 Cal. 3d at 357, 594 P.2d at 1000, 155 Cal. Rptr. at 575.

111. Commonwealth v. Corley, 316 Pa. Super. 327, 462 A.2d 1374 (1983), *aff'd*, 507 Pa. 549, 491 A.2d 829 (1985).

Store personnel arrested a party who, it was later learned, had robbed a store patron at gun point.[112] Although it eventually found the arrest legal,[113] the court held citizens' arrest generally to be governmental action.[114]

Distinguishing the result in *Burdeau*,[115] it explained that "[u]nlike a private searcher who can be acting for his own ends, one making a citizen's arrest is definitionally, acting under the authority of the state."[116] By legitimizing what would otherwise amount to an unprivileged battery or false imprisonment, the state has recognized and sanctioned the private enterprise.[117] Moreover, "by taking the arrestee into custody and by seeking to use any evidence that was the fruit of that arrest,"[118] the state effectively ratifies the propriety of the arrest.[119] In effect, the citizen has "acted as an 'instrument' or agent of the state."[120]

Concomitantly it found that a private arrest satisfies the following test developed by the high Court for determining "color of state law" under 42 U.S.C.A. § 1983:

> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right to be fairly attributable to the state. These cases reflect a two-part approach to the question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the state . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because . . . his conduct is otherwise chargeable to the state.[121]

Therefore, it concluded that "as a matter of federal constitutional law, . . . the fruits of an illegal citizen's arrest are subject to the full action of the Fourth Amendment and to the exclusionary rule."[122] Clearly, as opposed to *Zelinski*,[123] this court finds all civilian arrests by their very nature to constitute the exercise of governmental power.

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112. *Id.* at 331, 462 A.2d at 1376.

113. *Id.* at 338, 462 A.2d at 1379.

114. *Id.* at 335, 462 A.2d at 1378. "[T]he fruits of an illegal citizen's arrest are subject to the full action of the fourth amendment and to the exclusionary rule." *Id.*

115. Burdeau v. McDowell, 256 U.S. 465, 475-76 (1921).

116. *Corley*, 316 Pa. Super. at 333, 462 A.2d at 1377.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 334, 462 A.2d at 1377.

121. *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

122. *Id.* at 335, 462 A.2d at 1378.

123. 24 Cal. 3d 351, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979).

On appeal the judgment was affirmed,[124] but the Supreme Court of Pennsylvania viewed citizens' arrests as purely private action.[125] It remained unconvinced "that the acts of an individual become imbued with the character of 'state action' merely because they are in turn relied upon and used by the state in furtherance of state objectives."[126] If holding the citizen's arrestee for prosecution constitutes state ratification of the deed, the prosecution's use of evidence privately, though unlawfully, seized should likewise amount to ratification.[127] With respect to the dual criteria for state action enunciated in *Lugar*,[128] it conceded "[f]or purposes of argument" that the first requirement was met,[129] but found "no basis on which it might be said that the private party may be said to be a 'state actor' whose conduct is *'otherwise* chargeable to the state.' "[130]

It is noteworthy that although the arrestor in *Corley* was a hired security guard,[131] neither appellate court found that factor to be in any way significant. His authority remained that of a private citizen.

Other courts as well decline to differentiate between security personnel and other lay persons. For example, the District of Columbia Court of Appeals, sitting *en banc* in *United States v. Lima*,[132] reached a similar result. Involved was an allegedly illegal intrusion by a store security guard who, under District of Columbia law, had only the power of arrest granted the ordinary citizen.[133] While the District provided for the licensing of such guards[134] giving them the arrest powers of citizens,[135] the party in question was unlicensed.[136] The court found, however, that licensing did not elevate such individuals to the status of special policemen.[137] Notwithstanding the for-

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124. Commonwealth v. Corley, 507 Pa. 540, 491 A.2d 829 (1985).

125. *Id.* at 551, 491 A.3d at 834.

126. *Id.* at 547, 491 A.2d at 832.

127. *Id.*

128. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

129. 507 Pa. at 548, 491 A.2d at 832.

130. *Id.* at 549, 491 A.2d at 833 (quoting *Lugar*, 457 U.S. at 937) (emphasis in the original).

A somewhat similar argument, viz., that state statutory approval of a private guard's activities makes his conduct actionable under 42 U.S.C. § 1983, was likewise rejected in White v. Scrivner Corp., 594 F.2d 140, 142-43 (5th Cir. 1979).

131. *Corley*, 507 Pa. at 544, 491 A.2d at 830.

132. 424 A.2d 113 (D.C. App. 1980).

133. *Id.* at 119.

134. *Id.* at 118.

135. *Id.* at 119.

136. *Id.* at 118.

137. *Id.* at 119-20; *cf.* Singleton v. United States, 225 A.2d 315, 317 (D.C. 1967) (dealing with a special policeman).

mal codification of authority for citizens' arrest, it further suggested that the private actor was not thereby transformed into "an agent of the state."[138] Although security guards may "perform the same functions in their security-related employment duties"[139] as police officers, the court rejected "the contention that application of the fourth amendment can be resolved by looking at the nature of the activities performed by security employees."[140]

Emerging from the foregoing review is the proposition that while *Burdeau*[141] clearly governs in situations when some independent private search is undertaken, courts remain in disagreement over whether citizens' arrests, either of the wholly private variety or by security guards, are tantamount to state action. If deemed governmental, evidence seized as a result of the improper arrest is summarily suppressed.[142] Inasmuch as the finds are deemed fruits of a

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138. *Id.* at 120. For similar observations, see United States v. Edwards, 602 F.2d 458, 462-64 (1st Cir. 1979); United States v. Pryba, 502 F.2d 391, 398-99 (D.C.Cir. 1974); State v. Edwards, 50 Ohio App. 2d 63, 65, 361 N.E.2d 1083, 1085 (1976).

139. *Lima*, 424 A.2d at 121.

140. *Id. Lima* remains the law in the District of Columbia unless the security officer acts at the direction of commissioned special police personnel. Alston v. United States, 518 A.2d 439, 443 (D.C. App. 1986). In that instance the guard, whose activities are otherwise deemed private in nature, is acting as an instrumentality of the state. 518 A.2d at 442-43.

New York courts appear to have reached a similar conclusion differentiating ordinary security personnel from those operating in close cooperation with formal law enforcement authorities. Store detectives who have "no connection with the police" are treated as private citizens. People v. Horman, 22 N.Y.2d 378, 380, 239 N.E.2d 625, 626, 292 N.Y.S.2d 874, 875 (1968), *cert. denied*, 393 U.S. 1057 (1969). Evidence seized improperly in the course of apprehending customers suspected of shoplifting, including items wholly unrelated to the shoplifting charge itself, was held to be admissible. Despite the finding that the citizen's arrest was unlawful, it concluded that "since the evidence in this case was seized without the participation or knowledge of any governmental official, it is admissible in a criminal prosecution." 22 N.Y.2d at 379-82, 239 N.E.2d at 626-28, 292 N.Y.S.2d at 875-78.

Where, however, security personnel, as well as private parties, act at the direction of police, the conduct must comport with the fourth amendment. People v. Esposito, 37 N.Y.2d 156, 160-61, 332 N.E.2d 863, 866, 371 N.Y.S.2d 681, 685 (1975). Otherwise, evidence seized is inadmissible. *Id.; see also supra* note 79. *But see* United States v. Francoeur, 547 F.2d 891, 893-94 (5th Cir. 1977) (implying that mere security personnel are not considered government agents, in agreement with *Lima*), *cert. denied*, 431 U.S. 932 (1977).

141. Burdeau v. McDowell, 256 U.S. 465 (1921) (discussed in depth *supra* note 73).

142. *See supra* notes 79-82, 95-104 and accompanying text. Courts that view citizens' arrests as a general proposition to be governmental in nature have unwittingly failed to recognize the implications of that holding. Although arrests may be properly validated when the particular jurisdiction's criteria for private arrest have been satisfied, objects discovered and removed in the wake of such seizures should not as a corollary be automatically admissible in evidence. Common law principles may adequately support the arrest *per se*, but whether plenary searches incident to civilian arrest are permissible remains an open question. *See supra* notes 71-72. If, in fact, the private initiative is deemed state action, any ensuing search should likewise logically amount to a further extension of state involvement. In the absence of common law or statutory doctrine condoning such search incident to private arrest, the intrusion of a

fourth amendment violation, the courts automatically invoke the sanction of exclusion as if the arrestor were a formal police agent.[143] The two diverse situations are, however, dissimilar and state action designation should not necessarily be accompanied by the corollary of exclusion.

The exclusionary rule is designed to implement provisions of the fourth and fourteenth amendments[144] which, of course, constitute one of several constitutional restraints on government—federal and state. By suppressing unlawfully seized evidence, the judiciary seeks to foster compliance with those constitutional restrictions.[145] If convictions are not obtained because of some prior wrongdoing in the course of a search or seizure, presumably the state will ensure that such costly errors will not be repeated.[146] Exclusion of relevant evidence serves, therefore, both as a penalty on government and its representatives for failing to abide by constitutional strictures as well as a powerful incentive for future restraint.[147]

When police illegalities frustrate prosecution of criminals, the state, it is hoped, will react through its constituted agency.[148] Procedures to prevent further such occurrences may be initiated.[149] Errant

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search constitutes an impermissible fourth amendment violation. By invoking common law, the citizen's arrest alone may be judicially approved, but those rules have no bearing on the search authority of the civilian arrestor. *See* People v. Horman, 22 N.Y.2d 378, 239 N.E.2d 625, 292 N.Y.S.2d 874 (1968), *cert. denied*, 393 U.S. 1057 (1969). In *Horman*, the Court of Appeals of New York at least tacitly acknowledged the problem. It concluded, however, that the arrest in question was in any event purely private in nature thereby avoiding resolution of the issue. *Id.* at 382, 239 N.E.2d at 628, 292 N.Y.S.2d at 877.

143. *See Horman*, 22 N.Y.2d at 382, 239 N.E.2d at 628, 292 N.Y.S.2d at 877.

144. Terry v. Ohio, 392 U.S. 1, 26 (1968); Mapp v. Ohio, 367 U.S. 643, 655-57 (1961); Weeks v. United States, 232 U.S. 383, 392 (1914).

145. Michigan v. Tucker, 417 U.S. 433, 447 (1974) ("By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the rights of an accused."), *quoted in* United States v. Peltier, 422 U.S. 531, 539 (1975); Mapp v. Ohio, 367 U.S. 643, 657-58 (1961).

146. To have a meaningful deterrent effect, the exclusionary rule must provide the impetus to "alter the behavior of individual law enforcement officers or the policies of their departments." United States v. Leon, 468 U.S. 897, 918 (1984).

147. Elkins v. United States, 364 U.S. 206, 217 (1960). Several decisions view the exclusionary rule, in addition to a deterrent, as an "imperative of judicial integrity." United States v. Peltier, 422 U.S. 531, 536-39 (1975); *Elkins*, 364 U.S. at 222. However, it is clear that the "primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 347 (1974). For similar observations, see United States v. Harding, 475 F.2d 480, 483 (10th Cir. 1973); Harker v. State, 663 P.2d 932, 934 n.2 (Alaska 1983).

148. *See Mapp*, 367 U.S. at 651.

149. *See* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1412-15 (1977).

personnel may be chastised, disciplined or more properly trained; clearer directives may be forthcoming—all for the purpose of assuring continuing compliance with constitutional search and seizure provisions.[150] Thus, the exclusionary rule serves as an effective tool for restraining governmental excesses—the fourth amendment objective.

By contrast, application of the exclusionary rule where wrongdoers have no meaningful relationship with government would not have the same effect.[151] Notwithstanding the legal designation of citizens' arrest conduct as state action, suppression of illegally seized evidence does not foster formal fourth amendment objectives. Neither the state nor its agencies have been involved.[152] Not only is there an absence of active state participation, but it is likewise in no position to either reprimand or reeducate the wrongdoers. Exclusion acts only as a penalty to private parties who have been unable to successfully prosecute the offender. Suppression would not deter official misconduct, for none was involved.[153] In short, so long as fourth amend-

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150. The lasting benefit of an exclusionary rule is to highlight "that our society attaches serious consequences to violation of constitutional rights [by encouraging] those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone*, 428 U.S. at 492; *see, e.g., Leon*, 468 U.S. at 953-56 (Brennan, J., dissenting).

151. Where the private action is initiated by law enforcement authorities, it is clear that the civilian merely is an "agent of the state." Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). It is equally as certain that suppression of illegal discoveries will encourage police from acting improperly on future occasions. See cases cited *supra* note 79.

152. In *State v. Longlois*, the Supreme Court of Louisiana held that agents of the state's Wildlife & Fisheries Commission were not police officers, but could enforce the law only to the extent granted private citizens. 374 So. 2d 1208, 1209 (La. 1979). The agent in question was therefore foreclosed from making an arrest for a misdemeanor under Louisiana law. *Id.* at 1210. Despite the fact that the arrest was of the civilian variety, evidence seized was suppressed because the arrestor was "purporting to act under authority of law." *Id.* at 1211.

That application of the exclusionary rule is a reasonable one, for an employee of a state agency was directly involved. By excluding evidentiary finds, a formal state entity is being deterred from future invasions on personal freedoms. The situation is wholly different when a conventional citizen's arrest takes place.

153. An ostensibly analogous issue has been prompted by *Franks v. Delaware*, which allowed defendants to attack information in affidavits supporting search warrants allegedly based on deliberate falsehoods. 438 U.S. 154, 155-56 (1978). When accompanied by an offer of proof that material statements of fact contained in affidavits were made with reckless disregard for the truth, defendants are entitled to a preliminary hearing on their claims. *Id.* at 171-72. If successful, fruits of the search warrant are excluded from evidence. *Id.* at 156.

On its face, *Franks* dealt only with fabrications deliberately made by governmental agents. *Id.* at 171. There is, however, some language in the opinion intimating that a warrant and its finds might be quashed even if the source of the deliberate perjury were private individuals having no association with formal police authorities. *Id.* at 170; W. LAFAVE, *supra* note 75, § 4.4(b), at 189. Several courts have, therefore, read *Franks* as meaning that evidence obtained through a warrant based on false statements of private affiants must be suppressed. Mason v.

ment values are not implicated, the exclusionary rule should not be employed.

In addition to theoretical distinctions between official police conduct and state action private initiative, there is a more pragmatic basis for limiting exclusionary rule principles to situations where formal law enforcement authorities have erred. Exclusion of probative evidence becomes a necessary deterrent to fourth amendment violations only because it has been determined that other more conventional means of insuring adherence to constitutional guarantees are

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State, 375 So. 2d 1125, 1129 (Dist. Ct. App. 1979), *cert. denied*, 386 So. 2d 639 (Fla. 1980); People v. Born, 113 Ill. App. 3d 449, 453-54, 447 N.E.2d 426, 429 (1983). *But cf.* State v. Moves Camp, 286 N.W.2d 333, 338 (S.D. 1979) (which suggests that a private citizen affiant's statements be subjected to a less rigorous standard regarding veracity than statements of governmental agents). *Id.* at 338. That result which, in effect, penalizes the private sector appears to be incongruous with the theme of the exclusionary rule designed solely to deter official police misconduct.

Although superficially contrary to exclusionary rule principles, application of *Franks* to errant private citizens does not necessarily constitute a marked departure from prevailing judicial thought. One of the principal objections raised in *Franks* was that "the deterrence of deliberate or reckless untruthfulness in a warrant affidavit" by suppressing relevant evidence was an unjustified extension of the exclusionary rule. *Franks*, 438 U.S. at 166, 170-71; *see also id.* at 183 (Rehnquist, J., dissenting). Since suppression is not mandated in tangential judicial proceedings having no bearing on guilt or innocence, *see infra* notes 160-63, it was argued that exclusion in this instance was likewise as inappropriate. *Franks*, 438 U.S. at 165-66.

In rejecting the argument, the Court initially explained that unless a warrant is based on a truthful presentation it will simply not satisfy the fourth amendment. *Id.* at 164-65. Thus, a "flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning." *Id.* at 168. A warrant based on deliberate falsehoods is just not a warrant as contemplated by the Constitution. Exclusion in a *Franks* type context is therefore essential to ensure compliance with the fourth amendment's insistence on effective judicial warrants.

Where a magistrate grants a warrant in reliance on the deliberate fabrications of civilians, that judicial action is likewise a nullity. Truth of the affiants—be they officers or citizens—is an indispensable requisite of every warrant. Evidence gained as a result of knowing falsity is suppressed because the document purporting to be a warrant is constitutionally defective. It makes no difference who has lied to the issuing magistrate. In any event, the resulting warrant is worthless under the fourth amendment.

Exclusion may therefore be proper even if the untruthful affiant is a mere citizen. By removing any possible incentive to engage in such activity, the exclusionary rule, as applied, is guaranteeing the integrity of the fourth amendment's warrant process. Deliberate falsehoods of such private parties amount to a wrong of constitutional dimension because they render any ensuing warrant invalid. Under such circumstances suppression is clearly warranted.

On the other hand, private seizures or searches should not be governed by any exclusionary rule since no constitutional violation is involved. Suppression will serve no constitutional purpose, for non-governmental intrusions on privacy fall wholly outside the fourth amendment. Neither the invasion that has already transpired, nor any future such conduct, adversely affects fourth amendment values—making application of the exclusionary rule inapropos.

hopelessly inadequate.[154] Police officers are rarely punished for their incursions on citizens' privacy rights.[155] Civil litigants suing either the wrongdoers or their governmental employers must overcome legal hurdles such as traditional immunity defenses.[156] An even greater obstacle is public identification with the enforcers of law and order.[157] Hence, exclusion serves as the sole effective deterrent to unlawful police activity.

Private persons, whose conduct may conceivably be governmental in nature, are significantly different. There is no particular popular sympathy with such privately employed personnel and they are more readily amenable to criminal and civil prosecution for violations of individual rights.[158] Moreover, their private employers may be held financially responsible on the familiar basis of respondeat superior.[159] Clearly, therefore, as a practical matter the sanction of exclusion may be superfluous in the private setting.

Assuming, *arguendo*, applicability of judicial suppression in a citizen's arrest context, the Supreme Court has consistently restricted the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served."[160] Thus, for instance, one lacking sufficient standing is precluded from vicariously raising viola-

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154. *Franks*, 439 U.S. at 169; Mapp v. Ohio, 367 U.S. 643, 651-53 (1961); *see also* People v. Randazzo, 220 Cal. App. 2d 768, 774, 34 Cal. Rptr. 65, 69-70 (1963) ("no other practical remedy is available to an innocent victim."), *cert. denied*, 377 U.S. 1000 (1964).

155. Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961); People v. Cahan, 44 Cal. 2d 434, 447-48, 282 P.2d 905, 913 (1955).

156. People v. Randazzo, 220 Cal. App. 2d 768, 776, 34 Cal. Rptr. 65, 70 (1963); People v. Holloway, 82 Mich. App. 629, 633, 267 N.W.2d 454, 456 (1978). *See generally* Note, *Constitutional Law: Evidence Obtained Through a Private Unreasonable Search and Seizure Inadmissible in a Civil Action*, 46 MINN. L. REV. 1119, 1124 (1962).

157. See somewhat of a similar argument in Note, *Evidence Illegally Obtained By the Private Persons Held Admissible in State Civil Action*, 63 COLUM. L. REV. 168, 173-74 (1963).

158. *See* W. LAFAVE, *supra* note 75, § 1.8(a), at 176. In *Sutherland v. Kroger Co.*, for example, an irate customer sued a store for a continuous pattern of unjustly searching around in bags that were brought into the establishment. 144 W. Va. 673, 110 S.E.2d 716 (1950). The court found the conduct actionable and awarded her damages. *Id.* at 684-85, 110 S.E.2d at 723-24.

159. United States v. Francoeur, 547 F.2d 891, 894 (5th Cir. 1977), *cert. denied*, 431 U.S. 932 (1977). An interesting practical application of this theme may be found in *State v. Rocheleau*, 142 Vt. 61, 451 A.2d 1144 (1982). In deciding whether the exclusionary rule should be applied to the unlawful activities of state game wardens, a Vermont appellate court drew a distinction between the class of wardens that could be civilly sued for their improper conduct and those that could invoke the defense of sovereign immunity. *Id.* at 67, 451 A.2d at 1148. With respect to the category of employees that were amenable to suit, it found no pressing need for some exclusionary rule since any wrongs committed could be redressed by private suit. *Id.*

160. United States v. Calandra, 414 U.S. 338, 348 (1974).

tions of another's fourth amendment rights.[161] Illegally seized evidence is readily admissible in grand jury proceedings,[162] and fourth amendment issues may not be litigated in federal habeas corpus hearings.[163] Even if constitutional objectives are somehow incidentally served by suppressing fruits of unlawful private arrests, certainly the primary target of the exclusionary rule is "official misconduct."[164] Impermissible citizens' arrests, even if deemed state action, simply do not amount to official misconduct. Therefore, tangential benefits in terms of constitutional protection do not warrant application of the exclusionary rule.

In any event, courts concluding that arrests effected privately constitute governmental action have suppressed fruits of illegal seizures.[165] When arrests comport with the requisites of the particular jurisdiction, any subsequent discoveries are routinely held to be admissible.[166] No jurisdiction or commentator has, however, considered whether conventional citizens' arrests, albeit legal and sanctioned at common law, may nonetheless come within the exclusionary rule.

By its very nature any arrest, official or private, even when valid under state law, amounts to a warrantless seizure of an individual. Hence, if in fact citizens' arrests are deemed state action, they by definition should fall within the fourth amendment's proscription against warrantless "unreasonable searches and seizures," thus barring use of any evidence seized pursuant thereto. While the Supreme Court in *United States v. Watson*[167] held that lawful warrantless arrests by formal law enforcement authorities are not unconstitutional "seizures,"[168] the high Court's rationale is singularly inapplicable in a private context.

In *Watson*, respondent proffered the argument that, in the absence of some exigency, any arrest without a warrant is necessarily an unreasonable seizure.[169] Police, on the basis of their own assessment of

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161. Alderman v. United States, 394 U.S. 165 (1969); Wong Sun v. United States, 371 U.S. 471 (1963).

162. *Calandra*, 414 U.S. at 348.

163. Stone v. Powell, 428 U.S. 465, 486 (1976); *see also* United States v. Janis, 428 U.S. 433 (1976) (evidence obtained by a state officer illegally, but in good faith, admissible in a federal civil tax proceeding), *reh'g denied*, 429 U.S. 874 (1976).

164. Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971).

165. *Id.* at 488.

166. *Id.* at 481.

167. 423 U.S. 411 (1976).

168. *Id.* at 414-15.

169. *Id.* at 414.

probable cause, are clearly precluded from invading and searching private premises.[170] Such intrusions are valid only when undertaken after formal approval by a detached impartial magistrate.[171] It was argued that warrantless seizures of persons—common arrests—should be at least similarly treated.

Despite the plain meaning of the fourth amendment,[172] the majority disagreed. Initially it looked to a myriad of federal statutes[173] and decisions[174] dating back many decades authorizing arrests by officers on probable cause without a warrant. That precedent, it reasoned, reflects both a legislative and judicial judgment on the federal level that official warrantless felony arrests are not unreasonable privacy invasions under the fourth amendment.[175] In addition, the Court demonstrated that a similar rule existed at common law.[176] In England, as well as in this country, peace officers could arrest for felonies and misdemeanors committed in their presence and for felonies committed elsewhere on the basis of probable cause. Finally, the Court found that "[t]he balance struck by the common law . . . appears in almost all of the States in the form of express statutory authorization."[177] Since, therefore, "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause,"[178] such "seizures" are not violative of the Constitution. While the analogy between impermissible probable cause searches and arrest seizures of persons[179] is appealing, "logic sometimes must defer to history and experience."[180]

A similar tripartite analysis was again employed by the Court in *Payton v. New York*,[181] deciding that before effecting an ordinary non-emergency arrest on one's personal premises, officers must ob-

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170. Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971).

171. *Id.* at 450; Johnson v. United States, 333 U.S. 10, 13-14 (1948).

172. *Watson*, 423 U.S. at 428-29 (Powell, J., concurring); *Id.* at 436-37 (Marshall, J., dissenting). One's possessions, in the absence of exigent circumstances, may not be seized on the basis of probable cause alone—without prior judicial approval. "Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's persons, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches." *Id.* at 428 (Powell, J., concurring).

173. *Id.* at 416.

174. *Id.* at 416-18.

175. *Id.* at 415-16.

176. *Id.* at 418-21.

177. *Id.* at 421-22.

178. *Id.* at 423.

179. *Coolidge*, 403 U.S. at 450; Johnson v. United States, 333 U.S. 10, 13-14 (1948).

180. *Watson*, 423 U.S. at 429 (Powell, J., concurring).

181. 445 U.S. 573 (1980).

tain an arrest warrant. Its study of the common law attitude towards warrantless home felony arrests revealed "a surprising lack of judicial decisions and a deep divergence among scholars."[182] In the absence of uniformity on the subject it found that common law precedent offered insufficient guidance.

Although it could discover no congressional determination on the validity of warrantless entries to make felony arrests,[183] it found that state practices varied.[184] Some jurisdictions authorized such warrantless intrusions, several expressly prohibited non-exigent entries, while a score at least judicially questioned the constitutionality of that police practice.[185] Thus, unlike the consensus with respect to warrantless public arrests condoned in *Watson*,[186] "history and experience"[187] could not be invoked in favor of warrantless entries.

To some extent the analysis of *Watson* and *Payton* was repeated as well in *Steagald v. United States*,[188] where the Court concluded that with respect to a suspect located in the private home of third parties, a search warrant, as opposed to only an arrest warrant, is required before entering.[189]

Suspects apprehended by private arrest are, of course, seized in the same sense as those arrested by law enforcement authorities. If citizens' arrests, for whatever reason, are viewed as state action for fourth and fourteenth amendment purposes, such warrantless arrests must somehow comport with the constitutional ban on unreasonable searches and seizures. Thus, the logical argument rejected in *Watson* with respect to warrantless official felony[190] arrests is equally as ap-

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182. *Id.* at 592.
183. *Id.* at 601.
184. *Id.* at 598-99.
185. *Id.* at 598-600.
186. *Watson*, 423 U.S. at 411.
187. *Id.* at 429 (Powell, J., concurring).
188. 451 U.S. 204 (1981).
189. *Id.* at 217-18.
190. While the Court in *Watson* found warrantless felony arrests, condoned at common law, to be reasonable seizures, it has never squarely dealt with the constitutionality of statutes extending official arrest authority to misdemeanors committed outside an officer's presence—a practice unknown at common law. *See supra* notes 11, 18, 24. Some support may be mustered for invalidating such legislation. *See, e.g.*, Wilgus, *supra*, note 17, at 550-51, 706. A more enlightened reading of the fourth amendment, however, is that although it prohibits arrests generally without probable cause, it does not preclude legislatures from broadening police power with respect to misdemeanors. Street v. Surdyka, 492 F.2d 368, 371-73 (4th Cir. 1974); *see also* John Bad Elk v. United States, 177 U.S. 529, 534-35 (1900).

At least two current members of the high Court have expressly concluded that a warrant is not "constitutionally required to arrest for nonfelony offenses occurring out of the officer's presence." Welsh v. Wisconsin, 466 U.S. 740, 756 (1984) (White, J. dissenting). In fact, there

ropos in assessing the validity of warrantless private arrests, *viz.*, may a private party, acting in effect as an arm of the state, seize another individual without prior judicial authorization?

While authorities generally recognize the propriety of some form of private arrest at common law,[191] there is an appalling lack of unanimity on when such arrests are valid. Some courts require the arrestor to preliminarily know in fact that a felony was committed;[192] while those at the other end of the spectrum are satisfied with private arrests based solely on probable cause.[193] Clearly, the judicial consensus on common law warrantless police arrests cited by the *Watson* Court[194] is unavailable on the issue of citizens' arrests.

In addition to common law precedent, *Watson* likewise examined state practice.[195] Once again, "while the privilege of a citizen to arrest another varies from state to state, the duty and power of peace officers is generally the same in all states."[196] Since state statutes[197] usually represent only a codification of common law,[198] legislative enactments merely reflect the particular jurisdiction's own view of elusive common law principles.[199]

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is no indication that the *Welsh* majority disapproved of that proposition. There, the defendant was arrested in his home, without any warrant, for a vehicular offense committed outside the officers' presence. The majority held only that warrantless entries into a home to arrest a suspect charged with a minor noncriminal infraction was unjustified. *Id.* at 753. It appears to have assumed, however, that the arrest would have been valid if made in a public forum, despite the absence of any police presence during commission of the insignificant crime in question.

191. *See supra* text accompanying notes 16-41.

192. *See supra* notes 43-44.

193. *See supra* note 50.

194. *See supra* notes 175-76. Not only do state courts disagree on what requisite elements must be shown to justify a common law citizen's arrest, but federal courts are likewise in conflict. *Compare* United States v. Hillsman, 522 F.2d 454 (7th Cir.) (felony actually committed), *cert. denied*, 423 U.S. 1035 (1975) *with* Jack v. Rhay, 366 F.2d 191 (9th Cir. 1966) (probable cause that a felony was committed).

195. *See supra* note 177.

196. M. BASSIOUNI, *supra* note 16, at 20. The author explains the disparity thus: "The constitutional requirements of the Fourth and Fourteenth Amendments which are applicable to all public officers provide an element of uniformity which is absent with respect to private citizens who do not fall under its mandate." *Id.*

197. A few statutes validate citizens' arrests made on the basis of probable cause alone, while most require the actual commission of a felony. *See infra* note 211.

198. Gortarez v. Smitty's Super Valu, Inc., 140 Ariz. 97, 102, 680 P.2d 807, 812 (1984); Partin v. Meyer, 277 Ark. 54, 57, 639 S.W.2d 342, 343 (1982); Carr v. State, 43 Ark. 99, 105 (1884); Graham v. State, 143 Ga. 440, 443, 85 S.E. 328, 330 (1915); *see also* McCaslin v. McCord, 116 Tenn. 690, __, 94 S.W. 79, 83 (1906) (statutes "are in some points at variance with the common law").

199. For the divergent state legislative enactments, see M. BASSIOUNI, *supra* note 16, at 22 and Appendix A at 87-95; *see also* Appendix *infra* note 205. Since 1977 (the year of the BASSIOUNI survey), statutes have generally remained unchanged.

Finally, while there are understandably few congressional legislative pronouncements on citizens' arrests, some indication of its attitude towards the practice may be gleaned from the legislative background to a District of Columbia crime bill. As enacted,[200] the bill permits a private arrest when a person has probable cause to believe that another individual is committing either a felony or one of several other enumerated offenses in his presence. That provision, it was acknowledged, was more limited than common law rules which recognized such civilian arrests even when the felony was not committed in the arrestor's presence.[201] Nonetheless, the Congressional Committee concluded that the more circumspect proposed legislation "realistically recognizes that law enforcement should generally be carried out by professionals."[202]

It is abundantly clear, therefore, that the *Watson* analysis of warrantless police arrests would not necessarily be as applicable to warrantless citizens' arrests. By characterizing that conduct in any guise as governmental action thereby triggering the exclusionary rule, courts are unwittingly placing the constitutionality of that very practice in question.

CONCLUSION

Despite the creation and encouragement of some form of citizens' arrest at common law, the precise contours of that authority remain hazy. Particularly with respect to the role of lay persons in the apprehension and search[203] of suspected felons, common law precedent, as developed both in England and in this country, is at best extremely murky. Moreover, slavish reliance on antiquated citizens' arrest principles in a modern society bristling with an array of formal law enforcement agencies is unwarranted.[204]

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200. D.C. CODE ANN. § 23-582(b) (1981) (as enacted in 1973).

201. H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 118 (1970).

202. *Id., quoted in* United States v. Lima, 424 A.2d 113, 120 (D.C. Cir. 1971); *see* United States v. Dorsey, 449 F.2d 1104, 1107 (D.C. Cir. 1971).

203. Courts and scholars, it has been shown, have as a general proposition failed to explore the validity, extent, or justifications for searches by citizens incident to arrests. *See supra* notes 71-72, 142.

204. Courts must take cognizance of the Supreme Court's common sense admonition that the significance of common law arrest authority, even when exercised by officers, should "be kept in perspective." Steagald v. United States, 451 U.S. 204, 217 n.10 (1981). There, the Court, considering the scope of official arrests, made this pertinent observation:

> The common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an

Exacerbating the confusion is the attempt by many tribunals to place private arrests on the same footing as official arrests for fourth amendment purposes. The exclusionary rule is simply an inappropriate mechanism for curbing private excesses having no relationship or involvement with governmental activity. In fact, by equating the private conduct with state action, courts are placing the validity of that practice in jeopardy. The judiciary must seriously reassess its attitude towards the scope and legitimacy of citizens' arrests.

English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.

Id.

APPENDIX[205]

State[206]	Minor Offense[207]						Major Offense					
	Any Misdemeanor	Misdemeanor Amounting to Breach of Peace	Breach of Peace	Committed in Presence or View			Felony		Committed in Presence or View	Reasonable Grounds to Believe a Felony is Being Committed[211]	The Felony Has Been Committed in Fact	
Alabama	X			X			X				X	
Alaska	X			X			X				X	
Arizona		X		X			X				X	
Arkansas							X				X	
California	X			X			X				X	
Colorado	X			X			X		X	X	X	
D.C.	X			X			X		X	X		
Georgia	X			X			X		X	X		
Hawaii	X			X			X		X	X		
Idaho	X			X			X				X	
Illinois	X						X			X		
Indiana		X		X			X		X		X	
Iowa	X			X			X				X	
Kansas	X			X			X			X	X	
Kentucky							X				X	
Louisiana							X				X	
Michigan							X		X		X	
Minnesota	X			X			X				X	
Mississippi[208]	X			X			X				X	
Montana	X			X			X			X	X	

205. These conclusions only represent this author's interpretation of the particular statutory provisions. Conceivably, they could be read differently by the judiciary.

206. Some states, as indicated, have not codified the requisite elements of a citizen's arrest.

207. This grouping usually includes misdemeanors as well as "public offenses" where the particular statute specifically mentions the latter category. However, some states may prohibit citizens' arrests for "ordinance violations," *see, e.g.*, ILL. ANN. STAT. ch. 38, para. 107-3 (Smith-Hurd 1980 & Supp. 1987) or "traffic infractions," *see, e.g.*, KAN. CRIM. PROC. CODE ANN. § 22-2403(2) (Vernon 1987). Other statutes grant arrest authority for ordinance violations, *see, e.g.*, MONT. CODE ANN. § 46-6-502(1) 1986 and accompanying commission comments, or use the term "any crime," *see, e.g.*, OR. REV. STAT. § 133.225 (1985).

208. The Mississippi statute uses the phrase "indictable offense." MISS. CODE ANN. § 99-3-7 (1972 & Supp. 1986).

Nebraska[209]												
Nevada	X			X			X				X	
New York	X			X			X				X	
North Carolina[210]												
North Dakota	X			X			X				X	
Ohio							X				X	
Oklahoma	X			X			X				X	
Oregon	X			X			X		X			
South Carolina							X		X			
South Dakota	X			X			X				X	
Tennessee	X			X			X				X	
Utah	X			X			X				X	
Wyoming	X			X			X		X		X	

209. The governing Nebraska Code provision, NEB. REV. STAT. § 29-742 (1943, rev. 1985), is unclear.

210. Apparently North Carolina prohibits any arrests by citizens unless they are assisting law enforcement authorities. N.C. GEN. STAT. § 15A-405 (1983). The applicable statute provides only for detention, but not arrest. N.C. Gen. Stat. § 15A-404(a) (1983).

211. A handful of jurisdictions appear to condone by statute citizens' arrests on the basis of probable cause that a felony has already been committed. *See, e.g.*, ARK. STAT. ANN. § 43-404 (1947 & Supp. 1983); OHIO REV. CODE ANN. § 2935.04 (1977 & Supp. 1986); S.C. CODE