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cases or in cases involving the other, as yet, untested "personal use" statutes. While they are not direct authority, *Mugler*, the employment contract cases, and the fluoridation cases all contain some language to the effect that it is a legitimate exercise of the police power to legislate for an individual's well-being. It seems that such individual oriented legislation will frequently be sustained as the majority of motorcycle helmet cases indicate. Therefore, courts need no longer circumvent the issue. They may now accept the power of the state to protect an individual from himself, and explicitly hold that there is a valid relationship between the individual and the public welfare. Whether one agrees with the result in *Davids* or not the case was correct in stating that it stretches a point to say that requiring a motorcyclist to wear a helmet actually protects the public welfare. *Carmichael* apparently recognized this in basing its decision on the interest of the state in "robust, healthy citizens." Nor will forthright acceptance of state power with regard to the individual's welfare open a floodgate of paternalistic legislation, since every exercise of police power is still subject to the fourteenth amendment requirements of being reasonable and of not being arbitrary or capricious.[43]

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THE PRESENCE REQUIREMENT AND THE "POLICE-TEAM" RULE IN ARREST FOR MISDEMEANORS

Under the common law a police officer could arrest, without a warrant, anyone who had committed a misdemeanor in his presence amounting to a breach of the peace.[1] Within the last twenty years, however, most states have discarded the breach-of-the-peace requirement, while retaining the in-the-presence requirement.[2] In those states which have retained this latter requirement it is considered an

[43]Mutual Loan Co. v. Martell, 222 U.S. 225 (1911); Chicago, B. & Q. Ry. v. Illinois, 200 U.S. 561 (1906); Reynolds v. Louisiana Bd. of Alcoholic Beverage Control, 249 La. 127, 185 So. 2d 794 (1965), *cert. denied*, 385 U.S. 946 (1966).

[1]For cases discussing the common law rule see Commonwealth v. Dias, 349 Mass. 583, 211 N.E.2d 224 (1965); Brunson v. State, 168 Tex. Crim. 113, 323 S.W.2d 597 (1959).

[2]*See, e.g.*, State v. Koonce, 89 N.J. Super. 169, 214 A.2d 428 (Super. Ct. 1965); CAL. PENAL CODE § 836 (West Supp. 1967); MICH. STAT. ANN. § 28.874 (1954); N.Y. CODE CRIM. PROC. § 177 (McKinney Supp. 1968); OHIO REV. CODE ANN. § 2935.03 (Baldwin 1964).

essential element in the law or arrest.[3] Recently in *Robinson v. State*,[4] the scope of the presence requirement was significantly broadened in Maryland.

In *Robinson* an officer on routine patrol noticed that a lock on a fence had been cut, and that the door of a storehouse within the fence enclosure had been opened. The officer observed four men within the storehouse who, upon seeing the police officer, fled. When he was unable to apprehend them, the officer radioed a "lookout"[5] for the offense of "storehouse breaking,"[6] and described the clothing worn by two of the suspects. Within minutes another officer observed two hitchhikers who were less than a mile from the storehouse and whose clothing matched the radioed description. He arrested them without obtaining a warrant.[7] The men were subsequently convicted and on appeal Robinson attacked the validity of his arrest contending that a misdemeanor had not been committed "in the presence" of the arresting officer.[8]

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[3]*E.g.*, State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); St. Paul v. Webb, 256 Minn. 210, 97 N.W.2d 638 (1959).

[4]4 Md. App. 515, 243 A.2d 879 (1968).

[5]A "lookout" is a central radio broadcast to all elments of the police force alerting them of the commission of a crime and a description, when possible, of suspects to be apprehended in connection therewith.

[6]The statutory offense of "storehouse breaking" consists of breaking into a storehouse, filling station, garage, trailer, cabin, diner, warehouse, or other outhouse in the day or night with an intent to commit a murder or felony therein or with the intent to steal, take, or carry away the personal goods of another of the value of one hundred dollars or more. MD. ANN. CODE art. 27, § 32 (Supp. 1968). This was originally a misdemeanor. However by virtue of Ch. 628 (1966) Md. Acts this offense now constitutes a felony but not in relation to violations occurring before June 1, 1966. The offense alleged in this case occurred on July 4, 1965.

[7]The rules of arrest without a warrant in Maryland are based solely upon case law. At the time of the offense in question, an arrest without a warrant by a police officer was valid where the officer had probable cause to believe at the time of the arrest that a felony had been committeed and that the person arrested had committed it. However, when the offense was a misdemeanor, such arrest was valid only where he had probable cause to believe that the misdemeanor had been, or was being committed in his presence or view, and that the arrestee was the misdemeanant. 243 A.2d at 884.

[8]Traditionally, a misdemeanor occurs in a policeman's presence if he is made aware of its commission by one or more of his physical senses. Davids v. State, 208 Md. 377, 118 A.2d 636, 637 (1955). He may be alerted by the sight, sound, or smell of the crime. Clay v. United States, 239 F.2d 196 (5th Cir. 1956); People v. Burgess, 170 Cal. App. 2d 36, 338 P.2d 524 (Dist. Ct. App. 1959). The requirement itself represents an early nineteenth-century social balance. The deplorable conditions of jails and the resulting need to protect the individual from mistaken or arbitrary arrest outweighed the harm to society arising from most misdemeanors. Kauffman, *The Law of Arrest in Maryland*, 5 MD. L. REV. 125 (1941).

It is interesting to note that a misdemeanor may never have occurred within

In determining that the arrest was valid the court noted that the felony-misdemeanor distinction, with reference to the law of arrest in Maryland, was obsolete. The court stressed that there is sometimes little correlation between the designation of a crime as either a felony or a misdemeanor and its heinousness or the attendant severity of its punishment.[9] It then noted that prior decisions had held that the presence requirement was complied with when the crime committed was a felony and the arrest without a warrant was predicated upon a police broadcast.[10] Therefore, the court felt justified in extending the "police-team" rule in order to legalize misdemeanor arrests under such circumstances.

The "police-team" rule, as originally promulgated,[11] modified the presence requirement by saying that there was presence when one member of a small investigatory police team sees the alleged misdemeanor occur and another member arrests the misdemeanant shortly thereafter upon the information of the witnessing officer. It was thus addressed to the situation where the non-witnessing officer who effects the arrest is working immediately with the witnessing officer. In *Robinson,* however, the officers were on independent and separate patrols; the arresting officer became aware of the crime only by virtue of the radio alert and not by prior integrated activity. The use of the rule in this situation therefore represents an extension of the original rule.

In 1939 the Interstate Commission on Crime met to re-examine the laws of arrest.[12] It found that most misdemeanor arrests were illegal in their inception because of an inadequacy of the arrest rules—rules antedating both modern police technology and modern social factors.[13] It concluded that police could not effectively protect society under the existing laws of arrest.[14] The Commission suggested a thorough revision of those rules and presented its recommendations for a workable scheme in the *Uniform Arrest Act.*[15] Section six of

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the presence of the first officer. He discovered Robinson in the building, but the "breaking"—the severing of the lock and the opening of the door—did not occur in his presence. The court, without discussion, said that he had reasonable grounds to believe that it had occurred in his presence.

[9]At least the court felt this was true with respect to Maryland law.

[10]The court cited Lamot v. State, 2 Md. App. 378, 234 A.2d 615 (1967) and Farrow v. State, 233 Md. 526, 197 A.2d 434 (1964).

[11]Silverstein v. State, 176 Md. 533, 6 A.2d 465 (1939).

[12]Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315, 315-16, 331-34 (1942).

[13]*Id.* at 315.

[14]*Id.*

[15]*Uniform Arrest Act* (1936) § 6 (1) B, *as cited in* Warner, 28 VA. L. REV. 315, 345 (1942).

the Act dropped the "presence" requirement for misdemeanor arrests:

> An arrest by a peace officer without a warrant for a misdemeanor is lawful whenever: .... (B) He has reasonable grounds to believe that the person to be arrested has committed a misdemeanor out of his presence, either within the state or without the state, if law enforcement officers of the state where the misdemeanor was committed so request, and will not be apprehended unless immediately apprehended.[16]

Although the Act eliminated the presence requirement, it imposed the requirement of reasonableness.

Prior to the Uniform Act only Georgia and Illinois had eliminated by statute the presence requirement.[17] Since the Act nine additional jurisdictions have eliminated the requirement from their codes.[18] The relevant code sections of six of these eleven states eliminate the felony-misdemeanor distinction for purposes of the law of arrest and allow a policeman to arrest when he has reasonable grounds to believe that the person is committing or has committed an "offense."[19] The code provisions of the other two states retain the felony-misdemeanor distinction but allow an arrest absent presence if the officer has reasonable grounds for believing that a misdemeanor has been committed.[20]

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[16]*Id.*

[17]GA. CODE ANN. § 27-207 (1933); ILL. ANN. STAT. ch. 38, §107-2 (Smith-Hurd 1964).

[18]COLO. REV. STAT. ANN. § 39-2-20 (1963); CONN. GEN. STAT. ANN. § 6-49 (Supp. 1968); HAWAII REV. LAWS § 255-5 (1955); IOWA CODE ANN. § 755.4 (1946); LA. CRIM. PRO. CODE ANN. art. 213 (West 1966); MONT. REV. CODES ANN. § 95-608 (1968); N.M. STAT. ANN. § 64-22-8.2 (1967); R.I. GEN. LAWS ANN. § 12-7-3 (1956); WIS. STAT. ANN. § 954.03 (1958). A tenth state, Missouri, has dropped the presence requirement for the police of the city of St Louis. MO. ANN. STAT. § 84.090 (1956). Most states have removed the presence requirement in the instance of traffic volations. *E.g.*, N.D. CENT. CODE § 29-06-15.1 (1960); VA. CODE ANN. § 19.1-100 (1960).

[19]CONN. GEN. STAT. ANN. § 6-49 (Supp. 1968); GA. CODE ANN. § 27-207 (1933); ILL. ANN. STAT. ch. 38, § 107-2 (Smith-Hurd 1964); IOWA CODE ANN. § 755.4 (1946); LA. CRIM. CODE ANN. art. 213 (1967); N.M. STAT. ANN. § 64-22-8.2 (1967).

IOWA CODE ANN. § 755.4 (1946) is typical of this type:

> A peace officer may make an arrest ... without a warrant:
> 1. For a public offense committed or attempted in his presence.
> 2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.
> 3. Where he has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it....

[20]WIS. STAT. ANN. § 954.03 (1958). R.I. GEN. LAWS ANN. § 12-7-3 (1956) provides:

> A peace officer may without a warrant arrest a person for a misdemeanor, whenever:
> (a) The officer has reasonable ground to believe that a misdemeanor has

The remaining states, by either statute or case law, still require that the misdemeanor occur in the officer's presence.[21] Three of these jurisdictions have held that the presence requirement can be complied with by the use of the "police-team" rule.[22] In *Prosser v. Parsons*,[23] ten game wardens posted themselves one evening at intervals along a rural highway. They suspected that illegal night-hunting, a misdemeanor,[24] was being committed frequently. One officer observed Prosser hunting and radioed the information to Parsons, one of the wardens. Parsons intercepted Prosser and arrested him despite the fact that he was not hunting at the time of the actual

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been or is being committed in his presence and that the person to be arrested in fact has committed or is commiting it.

(b) The person to be arrested in fact has committed or is committing a misdemeanor in the presence of the officer, and in such case it shall be immaterial that the officer did not believe him gulity or on unreasonable ground entertained belief in his guilt.

(c) The officer has reasonable ground to believe that the person to be arrested has committed a misdemeanor and either has fled from the scene of the crime or is a non-resident of this state and cannot be arrested later.

See State v. McWeeney, 216 A.2d 357 (R.I. 1966).

[21]Numerous states have by code retained the "presence" requirement: ALA. CODE tit. 15, § 154 (1958); ALASKA STAT. § 12.25.030 (1962); ARIZ. REV. STAT. ANN. § 13-1403 (Supp. 1967); ARK. STAT. ANN. § 43-403 (1964); CAL. PENAL CODE § 836 (West Supp. 1967); DEL. CODE ANN. tit. 11, § 1906 (1953); (FLA. STAT. ANN. § 901.15 (Supp. 1968); IDAHO CODE ANN. § 19-603 (1947); IND. ANN. STAT. § 9-1024 (1956); KAN. STAT. ANN. § 13-623 (1963); ME. REV. STAT. ANN. tit. 15, § 704 (1964); MASS. ANN. LAWS ch. 276, § 28, *et als* (1968); MICH. STAT. ANN. § 28.874 (1954); MINN. STAT. ANN. § 629.34 (1945); MISS. CODE ANN. § 2470 (1956); N.H. REV. STAT. ANN. § 594:10 (1955); N.J. STAT. ANN. § 53:2-1 (1955); N.Y. CODE CRIM. PROC. § 177 (McKinney Supp. 1968); N.C. GEN. STAT. § 1541 (1965); N.D. CENT. CODE § 29-06-15 (Supp. 1967); OHIO REV. CODE ANN. § 2935.03 (Baldwin 1964); OKLA. STAT. ANN. tit. 22, § 196 (1937); ORE. REV. STAT. § 133.310 (1967); S.C. CODE ANN. § 17-253 (1962); TENN. CODE ANN. § 40-803 (1955); TEX. CODE CRIM. PROC. ANN. art. 14.01 (Supp. 1968); UTAH CODE ANN. § 77-13-3 (1953); W. VA. CODE ANN. § 50-18-2 (1966); WYO. STAT. ANN. § 7-155 (1957).

IND. ANN. STAT. § 9-1024 (1956) is representative: "All ... sheriffs ... police officers ... may arrest and detain any person found violating any law of this state, until a legal warrant can be obtained."

Five states whose rules of arrest are n the form of case law only retain "presence" as a necessary element of misdemeanor arrest without a warrant: Robinson v. State, 4 Md. 515, 243 A.2d 879 (1968); State v. Parker, 378 S.W.2d 274, 281 (Mo. Ct. App. 1964); Commonwealth v. Garrick, 210 Pa. Super. 124, 232 A.2d 8 (Super. Ct. 1967); Williams v. Commonwealth, 142 Va. 667, 128 S.E. 572 (1925); (dictum); Kilcup v. McManus, 64 Wash. 2d 771, 943 P.2d 375 (1964). Vermont has not decided the question, but would presumably follow the common law rule. *See* VT. STAT. ANN. tit. 13, § 5507 (1958).

[22]People v. Craig, 152 Ca. 42, 91 P. 997 (1907); Robinson v. State, 4 Md. App. 515, 243 A.2d 879 (1968); Prosser v. Parsons, 245 S.C. 493, 141 S.E.2d 342 (1965).

[23]245 S.C. 493, 141 S.E.2d 342 (1965).

[24]S.C. CODE ANN. § 28-302 (1962).

arrest. Nevertheless, the validity of the arrest was upheld. The court said that "[u]nder these circumstances, an act taking place within the view of one officer was in legal effect within the [presence and] view of the other cooperating officers...."[25]

The "police-team" rule is a fiction to satisfy the presence requirement.[26] It is based upon the theory that a team is one body, such that what is done in the presence of one member is done in the presence of all. The use of the police radio supports this fiction by creating a proximity of awareness, purpose, and reliance between those officers in communication. The ability of an officer to place a fast radio "lookout" for an elusive criminal means that the other alerted policemen are acting merely as the long arm of the original officer in a form of rapid, although constructive, pursuit by that original officer.[27]

The "police-team" rule liberalizes the presence requirement to the extent of eliminating it for the non-witnessing arresting offcer. Thus, like Section 6(1)B of the *Uniform Arrest Act,* the criterion for the legality of the arrest is reasonableness. The fourth amendment of the Constitution forbids an "unreasonable" seizure of the person.[28] The primary question, therefore, is whether a "police-team" arrest is in fact constitutionally "unreasonable," that is, whether presence is an indelible requirement of constitutional reasonableness. The question has not been litigated.

The Supreme Court of the United States has held that in the absence of a preemptive federal statute, the validity of an arrest is determined by the law of the state where the arrest occurs.[29] The state law, however, must comply with the fourth amendment's standard of reasonableness.[30] A reasonable arrest has been held to mean one made upon probable cause.[31] An officer has probable cause to arrest a suspected felon without a warrant if he has reasonable grounds to believe that a felony has been committed and that the person to

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[25]141 S.E.2d at 346; *accord,* People v. Craig, 152 Cal. 42, 91 P. 997 (1907).

[26]*See generally* cases cited note 23 *supra.*

[27]A court might also use the fiction of the continuing nature of several types of crimes to satisfy the presence requirement. It could be argued that the misdemeanor continues as long as the misdemeanant remains a fugitive so that the misdemeanor is actually committed in the presence of the arresting officer.

[28]U.S. CONST. amend. IV, "The right of the people to be secure in their persons... against unreasonable searches and seizures, shall not be violated...."

[29]United States v. Di Re, 332 U.S. 581, 589 (1948).

[30]*Compare* Mapp v. Ohio, 367 U.S. 643 (1961), *with* Katz v. United States, 389 U.S. 347 (1967).

[31]Brinegar v. United States, 338 U.S. 160 (1949).

be arrested committed it.[32] If the felony occurred in the presence of an officer, the probable cause test would be met. Moreover, it has been held[33] that when an officer without a warrant arrests a suspected felon upon the basis of a radio "lookout" it is sufficient that some other member of the force have probable cause.[34] Therefore, when it is found that the felony-misdemeanor distinction in the laws of arrest is obsolete, it is reasonable to say that when an officer without a warrant arrests a suspected midemeanant upon the basis of a radio "lookout," he had probable cause if the crime occurred in the presence of the radioing officer. All of this assumes that "presence" is a necessary element of "probable cause." It is not. The fourth amendment only requires that the arrest be upon reasonable grounds. The presence requirement is a creation of statute or case law; it is not imposed by the constitutional prohibition against "unreasonable seizure." "An arrest by a police officer or a private person for a misdemeanor or offense not committed 'in their presence' violates no constitutional standard, state or federal. Several state statutes authorize such arrests for 'past' misdemeanors."[35] The presence requirement thus appears to be but one method by which "probable cause" can be found.

A different approach to the constitutional inquiry is to view a policeman as the most reliable informant. The Supreme Court has held that when a policeman has received information concerning a felony from a reliable citizen-informer such information has constituted reasonable grounds for arrest without a warrant.[36] Therefore, if the felony-misdemeanor distinction insofar as the law of arrest is concerned is no longer applicable, the information of a "policeman-informant" would provide the necessary reasonable grounds for the making of the arrest.

The "police-team" rule would thus appear to meet constitutional requirements. The rule as extended in *Robinson* does, however, suffer the weakness of a lack of internal limitation as to the size of the co-operating unit. With the means of modern communication systems it would seem that the individuals of a county force, a state force,

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[32]Miller v. United States, 357 U.S. 301 (1958); Draper v. United States, 358 U.S. 307 (1959).

[33]Farrow v. State, 233 Md. 526, 197 A.2d 434 (1964).

[34]The court in Farrow v. State, 233 Md. 526, 197 A.2d 434 (1964), spoke of the police force in terms of a "police team." This is precedent for the extended use of the term in the principal case.

[35]Lurie v. District, 56 Misc. 2d 68, 288 N.Y.S.2d 256, 261 (Sup. Ct. 1968).

[36]McCray v. Illinois, 386 U.S. 300 (1967); Draper v. United States, 358 U.S. 307 (1959).

or the sum of individual officers of all fifty state forces are equally related so that a misdemeanor committed before one officer might qualify any member of any force to arrest the misdemeanant without a warrant. Those jurisdictions which have used the "police-team" rule have not had occasion to arrest, without a warrant, a fugitive from another state. Nor is it likely that they will since the police of the state into which the fugitive has fled are usually made aware of his possible presence by the issuance of an arrest warrant by a sister state. But the applicability of the "police-team" rule in such a situation is an open question. Speculating as to the outcome, the doctrine would probably not be applied. Such factors as state sovereignty and the need for extradition proceedings are in conflict with the theorized unity required by the "police-team" rule. These two considerations would not be applicable to the situation where the officers in a "police-team" arrest were merely from different counties within the same state or where one was a county officer and the other a state policeman of the same state. Thus, although they belong to independent organizations, it would not seem that they are as theoretically separate. The amount of daily contact and coordination between such officers is also greater than with officers of other states. Therefore, it would seem that the "police-team" could well be applied between them.

The rule, especially as applied in *Robinson,* significantly liberalizes the presence requirement, but it is limited in its application. Presently, it stretches the presence requirement only in the case of policemen. One member of the force must himself witness the misdemeanor while another officer, acting pursuant to a police broadcast, must arrest the misdemeanant. *Robinson* made it clear that the requirement will not be met when the first officer is told of the crime by a citizen witness and then places the radio alert.[37] Similarly, the requirement will not be met if a central police broadcast is predicated upon a citizen's call to police headquarters. In no way does the "police-team" rule purport to alter the common law rule[38] that a private citizen can arrest a misdemeanant without a warrant only when the misdemeanor was committed in his presence and amounted to a breach of the peace.

Absent the "police-team" rule, the presence requirement demands that in a misdemeanor arrest without a warrant, the witnessing and the arresting officer be the same person. With the existent speed and

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[37]243 A.2d at 888.

[38]*See* Wilson Line, Inc. v. Brown, 164 Md. 698, 166 A. 426 (1933); Baltimore & O.R.R. v. Cain, 81 Md. 87, 31 A. 801 (1895).

availability of transportation, criminals can quickly leave the scene of the crime. It is often virtually impossible for one officer to chase a suspect for many miles, especially in urban areas, and the immediate cooperation of other police is necessary to prevent his escape. A warrant cannot issue, in most instances, because it must be in the name of a known person or must specifically identify the suspect.[39] Therefore, it is virtually impossible for any other officer to make the arrest. The presence requirement thus shackles police efficiency and the use of modern communications equipment.

In order to alleviate this situation the "police-team" rule was developed. However, when it is necessary to use a fiction in order to arrest persons reasonably suspected of an offense, there is something apparently wrong with the laws of arrest as they exist. The problem, therefore, does not lie with the use of the fiction, but with that element upon which the fiction is predicated. The presence requirement which is what distinguishes felonies and misdemeanors in the law of arrest without a warrant should be eliminated. Only failing this should the "police-team" remedy be used.

The reason for the felony-misdemeanor distinction in the law of arrest no longer exists, and therefore, the reason for the existence of the presence requirement no longer exists. The felony-misdemeanor distinction in arrest was predicated upon a social balance between the needs of the individual and the needs of society in nineteenth-century England.[40] However, considerations which gave rise to this distinction have generally disappeared.[41]

Rather than force a court to employ a fiction to legalize a reasonable arrest, state legislatures should drop the presence requirement and the felony-misdemeanor distinction in the law of arrest. An arrest upon reasonable grounds clearly and directly meets the requirements of the fourth amendment.

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[39]U.S. CONST. amend. IV.

[40]Kauffman, *supra* note 8.

[41]*Id.* at 150. For example, at common law an assault with intent to rob, murder, rape, or have carnal knowledge of a woman amounted to a misdemeanor. Robinson v. State, 4 Md. App. 515, 243 A.2d 879, 884 n.5 (1968). The nature of these crimes is now considered more heinous.