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POLICE AND LAW IN A DEMOCRATIC SOCIETY*

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I

STANDARDS

If we wish to understand and improve police service, we must first recognize that the limitations and abuses in law enforcement which alarm and challenge us are neither novel nor peculiarly American. The ancient Greeks tortured slaves prior to their testifying in court; the Romans added foreigners and, later, they permitted the torture of even Roman citizens in cases of murder and treason.[1] The Middle Ages, steeped in religious spirituality, raised the art of coercing confessions to new heights. In colonial Massachusetts women were executed as witches. And English history is full of brutal mob action against foreigners and religious minorities.

Do not think that this is dead history—a bloody page of uncivilized times. Only a decade ago millions of defenseless human beings were murdered by the German police in a calculated revival of all the diabolical instruments of torture that twisted ingenuity has contrived. Far exceeding even those abominations are the scientific tortures and enslavement of literally millions of human beings by the NKVD in Russia and Siberia, beside which the limitation of civil liberties in democratic states pales into insignificance.

A broad outline of certain aspects of so-called human nature has been sketched above not to minimize the evil of race antagonism, but to encourage persistent realistic dealing with perennial problems. The outline could be filled in with horrible accounts of murder, rape, pillage,

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1. JARDINE, THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND 2 (1837).

riot and robbery—until any decent person would rebel, satiated with disgust at the cruelty, intolerance, violence, and cupidity of self-styled *homo sapiens*. In appraising the police functions, it must be remembered that the first job of a policeman is to protect the citizens' lives and that police officers are ordinary human beings. If we keep these facts in mind, we shall not look for an easy panacea, but we may be able to understand what happens when undisciplined men, as police officers, deal with suspected rapists, murderers, traitors, and helpless foreigners.

What must be added to the outline, however, is far more important, namely, that human beings have also captured visions of truth and goodness and have proved capable even of self-sacrifice. In the United States millions of ordinary persons have achieved something new and infinitely valuable in history—a continental democracy, a working fusion of liberty and order, and the implementation of these and other enduring values in political institutions. My purpose is to inquire how we can help, by a wise exercise of police functions, to preserve our democracy, remove existing strains and tensions, and advance our civilization by sharing its values with the weaker members of the community—those who, of all our citizens, have the strongest claims upon a democracy.

The greatest obstacle to understanding the police problem is the specialization of police functions, and that is also the major handicap in the way of reform. At the same time, it is obvious that there are important advantages in specialized services, certainly in those performed by metropolitan police. Accordingly, in an effort to understand the basic elements of the police problem, specialization of the police service must be placed in a correct perspective.

Our familiar type of city police organization dates from 1829, when Sir Robert Peel finally persuaded a fearful Parliament to enact his Bill for a Metropolitan Police.[2] Merchants and shopkeepers, as well as political leaders, had long opposed the creation of a force which in unscrupulous hands might become the instrument of tyranny.[3] Even the onslaught of unbridled mobs and frenzied riots, destructive of vast amounts of property, including the homes of distinguished judges, met a persistent stand against a strong police force which might damage English liberties. But by 1829 insecurity from riots and organized

2. LEE, A HISTORY OF POLICE IN ENGLAND c. 12 (1901); Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 578-589 (1936).

3. The parliamentary committee which opposed Peel's earlier bill reported, ". . . that forfeiture or curtailment of individual liberty which the creation of an effective police system would bring with it would be too great a sacrifice on behalf of improvements in police or facilities in detection of crime." REITH, BRITISH POLICE AND THE DEMOCRATIC IDEAL 28 (1943).

gangsters exceeded even the fear of tyrannical police, and Peel's bill became law.[4] A new police force, the Bobbies or Peelers, became a fact. Our city police are the heirs of that London organization.

Because we have not understood how recent professional police services are and since even less is known about their antecedents, the misapprehension prevails in this country that the citizen need play no part in police services, that that task belongs exclusively to the publicly employed police officers. Theirs is the job, for which they are paid; theirs is the exclusive obligation. Thus in our common thinking a high wall separates the police from the public. This is the basic American fallacy, the current myth, which must be exposed if progress is to be made. Even among relatively advanced thinkers in this field, insight has carried only to the point of recognizing the dependence of successful police work on the cooperation of the public since there can never be enough police in a democracy to do the job themselves. Important as that insight is, we must push far beyond it if we are to understand the role of the police is a democratic society. We must grasp the fact that in a democracy the obligation to do police work rests on every citizen and that the existence of a professional force does not in the least alter that duty, but only facilitates its skillful discharge. In order to evaluate these assertions it is necessary to understand the police functions prior to the creation of the London metropolitan force.

A glance back a thousand years to Anglo-Saxon England reveals the embryo of a democratic police force in a simple fact—every able-bodied freeman was a policeman. They were divided into groups of ten, the leader being called the "tithingman." Each member of the group was responsible for the peaceful conduct of all the other members and he also participated in the arrest of local offenders. This was the system of frankpledge, collective security. For the efficient discharge of his police duties, every male from 15 to 60 was required to maintain certain arms and equipment according to his wealth. On the "hue and cry" being raised, every man within earshot was required to drop whatever he was doing and join in the pursuit, echoing the cry until the posse closed in around the criminal. Not to join in the search was a serious offense, and there were collective fines imposed upon local communities for failure to perform police functions efficiently. The constable succeeded the tithingman as the chief peace officer but the job continued to be unpaid and was filled in rotation by the parishioners. Later, the justice of the peace became both judge and police official who, even in

4. 10 GEO. 4, c. 44 (1829).

modern times, discharged active police duties, especially in the suppression of riots.[5] Thus we see the origin also of judicial control of the police and the emergence of the police as the instrument of the judiciary.

With the growth of towns, the various local councils employed watchmen for full-time service. But this did not relieve the common citizenry of what had become firmly recognized legal duties to perform police functions. By the seventeenth century this medieval police system was, however, being severely strained. The parish constables, being unremunerated, sought to escape duty. Persons who made no attempt to avoid their obligation to serve as peace officers frequently manipulated the job to further their private interests. Watch and Ward became intolerably inefficient as the towns grew into cities, and in London the need was especially great for skilled forces to deal with the gangsters who, by the first half of the 18th century, had become the terror of both city and countryside.

Sir John Fielding, a Police Magistrate, then organized the Bow Street Runners, a corps of regularly paid officers which amazed London by their capture of notorious gangs of criminals. The effectiveness of this small group of officers—there were only about 50 of them—undoubtedly helped persuade Parliament that there was merit in Peel's bill. However, it is important to remember that the new police force was not the child of Parliament, but developed from ancient institutions, close to the practices and habits of the people.

New York copied Peel's London police plan in 1844, and during the next ten years similar police establishments were set up in Chicago, Philadelphia, and Boston.[6] There was initial opposition by the police to wearing uniforms, and policemen were at first purely political appointees. But by 1870 the essential features of the London Metropolitan Police had taken firm roots in a number of American cities.

The suspicion directed toward a numerous uniformed police by Englishmen apprehensive of their civil liberties happily dissolved in the evidence that the police functions were discharged not only with efficiency but with respect for the legal rights of all classes, including suspected criminals. Thus, in the light of the above history it is not difficult to understand the English saying that a policeman is merely a person who is paid to do what it is his duty as a citizen to do without pay.

Perhaps the strongest evidence supporting this conception is provided in the law on arrest. We have been told by many writers that

5. LEE, *op. cit. supra* note 2, cc. 1, 2, 3.
6. FOSDICK, AMERICAN POLICE SYSTEMS c. 2 (1921).

there was a basic common law difference between the right of a lay citizen to arrest for felony and that of a police officer to do so, namely, that in the former instance the felony must in fact have been committed. But in the 17th century treatise by Dalton, instead of discussing arrest by peace officers, the author speaks of "every private person," "every man," "any man." Then follows *one sentence only* regarding officers: "The Sherife, Bailifes, Constables, and other of the Kings Officers may arrest and imprison offenders, in all cases where a private person may. . . ."[7] This order of topics, the emphasis upon arrest by "every man," and selection of the "private person" as the standard by which the right of officers to arrest is measured, are significant when contrasted to the usual version presented in modern treatises.

Blackstone tells us that ". . . in case of felony *actually* committed, or a dangerous wounding whereby felony is like to ensue, a constable may upon probable suspicion arrest the felon." And on the page immediately following he states: "Upon probable suspicion also a private person may arrest the felon. . . ."[8] Thus, as late as 1765 any difference between the right of laymen and that of police officers was not even hinted at. Indeed, it was not until 1827 that the rule differentiating the legal powers of lay persons from that of peace officers was established. After that a constable could arrest when he had reasonable ground to suspect that a felony had been committed, although none had, in fact, been committed.[9] This enlargement of the officers' powers, however, was not accompanied by any lessening of those of laymen. That, together with the recency of any difference at all, underlines the historic participation of the general population in police service.

In addition to the history of police in England and the lack of distinction in traditional law between the legal powers of police officers and lay citizens until 1827, there is important evidence of civilian discharge of police functions in the numerous private law-enforcing agencies that have existed in England since the eleventh century. Although active police work by lay citizens naturally narrowed as the professionals took over this function, many private protective organizations flourished. By 1839, ten years after the organization of Peel's Metropolitan Police,

7. DALTON, THE COUNTRY JUSTICE 413-416 (6th ed. 1643).

8. 4 BL. COMM.* 292, 293.

9. In *Beckwith v. Philby*, 6 B. & C. 638, 639, 108 Eng. Rep. 585, 586 (K. B. 1827), Lord Tenderden stated: "There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities."

"there were upwards of five hundred voluntary associations for promoting the apprehension and prosecution of felons. . . ."[10] They consisted of three general types: a representative cross-section of the community; merchants and property owners who wished to safeguard their special interests; and self-nominated "thief-catchers."

A much wider participation by laymen—in legislative and judicial functions, as well as in police services—occurred in the early history of our western states. Particularly significant is the California Gold Rush in 1849, which engendered numerous conflicts over land and a wave of criminality consisting chiefly of murder and theft. This situation occasioned the organization of popular tribunals, councils, and vigilance committees—indeed, the general participation of the entire community in the law-enforcement process.[11] These lay organizations have persisted in our present society; indeed many of them have become even more specialized than the police. Hundreds of industries and businesses have their own protective association. Insurance and surety companies play large parts in law enforcement, including crime prevention and the detection, arrest, and conviction of criminals.

We must now take account of another fundamental fact—the universality of police functions. Every society, primitive or advanced, has had and now has its police. The reason is simple and basic—every society depends for its survival upon the maintenance of order in the community. Every society has disruptive, antagonistic, aggressive forces within it which must be controlled, not sporadically but regularly and persistently. That was obviously true in England; and we have noted the spontaneous emergence of police in California immediately after the Gold Rush. Plato's detailed discussion of police would emphasize the point. But for a final, especially significant illustration we may note the typical organization of police societies among the American Indians.

Studies of Indian tribes suggest the origin of both criminal law and police in the need to maintain order in the buffalo hunt, upon the success of which depended the food supply. The buffalo hunt was a community enterprise which required planning, careful strategy, and precise execution. Anyone who was not adequately equipped or was premature in shooting or who otherwise interfered with the plan and method of the hunt was a serious offender. A picked group of men, chosen for their prowess in war and in the hunt, were both soldiers and policemen, for

10. Bowen, *Progress in the Administration of Justice During the Victorian Period* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 554 (1907).

11. For a discussion of lay participation in the law enforcement process, see HALL THEFT, LAW, AND SOCIETY (2d ed. 1952).

effectiveness in war depended in no small degree upon the maintenance of order within the group.[12]

It is very likely that in every society disorder has been a threat to survival, hence a permanent problem, and that organized police forces have functioned everywhere and at all times to maintain order principally by preventing crimes and apprehending offenders. Thus, it is highly probable that the functions of police are permanent universal aspects of social organization.

But if police represent a normal, necessary phase of community living, it does not follow in the least that there is only one kind of police or that police functions are everywhere discharged in the same ways. On the contrary, it is only a small step from the relation of police functions to social organization to the realization that police reflect the general culture of the society they represent, *e. g.*, ". . . the posse is unknown in Germany."[13] This, to be sure, is an oversimplification of a complex matter because there are antinomies and cross-currents in all societies. It is useful for our present purposes, however, because it takes us directly to the current question of police in a democratic society as contrasted with police in a dictatorship.

The description of the English police service, as merely the specialized, skilled, full-time performance of the duties of all citizens, underlines the principal difference. It exhibits self-rule on the police level, self-policing, as opposed to being policed by a force that is entirely free from public control. That is the central insight into the vital differences. But this question must be considered in some detail if the precise differences in police institutions are to be discovered.

At no time in history has it been easier to compare the police of democratic societies with that of dictatorships. The fascist dictatorships of Italy and Germany are fresh in our memory and the Iron Curtain cannot conceal the ugly facts of Communist tyranny. The refugees from these countries, bearing the horrible scars of police violence, are living witnesses of the character of the dictator's police. The concentration

12. Among the Plains Indians, the powers of the police societies included control of the tribal buffalo hunt, the movement of the camp, settlement of personal disputes, maintenance of order during ceremonies, and the conduct of war. For premature attacks on the buffalo, police inflicted corporal punishment, confiscated the game, destroyed the property of the offenders, and in extreme cases they were authorized to kill them. In the discharge of their daily duties, the police societies prevented violations of tribal law, protected property, directed public works construction, and administered punishment. Humphrey, *Police and Tribal Welfare in Plains Indians Cultures,* 33 J. CRIM. L. & CRIMINOLOGY 147 (1942).

13. Wolff, *Criminal Justice in Germany,* 42 MICH. L. REV. 1067, 1083 (1944).

camps operated by the Gestapo achieved systematic proficiency in the degradation of the human spirit.[14] It does not require any eloquence to portray Gestapo and NKVD torture of human beings in a way that would revolt any decent person and persuade him that there is no limit to the depravity to which human nature is capable of descending.

However, it is a startling fact that there is hardly a single physical brutality inflicted by the Gestapo and the NKVD which American policemen have not at some time perpetrated.[15] Certainly the torture of Negroes by the police in some communities rivals the barbarism of the Gestapo and NKVD. It is true that our police are not scientific about torture; their crudeness would incur the contempt of NKVD inquisitors. The inventors of psychological constraint that can drive normal persons to utter despair and persuade even the heroes of the Revolution, the "old Bolsheviks," to confess that they are traitors, must regard American third degrees as uncouth exhibits of a superficial culture. It is, of course, true that the brutality of American police falls short of the calculated barbarism of the secret police of modern dictators, and that it is relatively infrequent. But these are matters of degree. Hence, we are left with the unavoidable question, what essential differences, if any, are there between American police and the Gestapo or NKVD? An easy answer to this question would be that the brutality of American police is exceptional while that of dictatorial police is normal and expected. But such a reply would leave the superficial impression that there is no basic difference between the two police systems. It would also cloud the character of democratic police because sensitive aristocrats also abhor the use of torture. Accordingly, while wholesale torture and democracy obviously cannot co-exist, the essential criteria of the police of democratic society cannot be determined by that single test.

The basic feature of the police of dictator-states is that they are the chief physical instrument of political domination. To an American,

14. The *Tribune* of Lausanne on December 26, 1943, reported: ". . . a Swiss observer declared at the end of 1943: 'One after another priests, clergymen, professors and intellectuals, all men whose education rendered them most capable of keeping alive their national traditions and what is called the European spirit, were systematically eliminated, as well as workers, the bourgeoisie and the peasants. The same harsh methods continually recurred: Mass arrests, the shooting of hostages without trial, the deportation of men and women under conditions of the greatest hardship and even without taking the trouble to prove their guilt. That is what happened to Poles, Czechs, Belgians, the students of Oslo University, and to many others, as well as to professors and students of Strasbourg University, who were attacked suddenly at the end of their lectures without anyone bothering to explain to them the crimes of which they were accused, while they became the objects of brutalities by the police.'" BRAMSTEDT, DICTATORSHIP AND POLITICAL POLICE 155 (1945).

15. HOPKINS, OUR LAWLESS POLICE (1931); *Lawlessness in Law Enforcement,* 11 NAT. COMM. ON LAW OBSER. AND ENFORCEMENT (1931).

"political police" suggests a small detail of officers assigned to the detection of treason and other subversive crimes. That, however, does not begin to characterize such organizations as the Gestapo and NKVD. In a dictatorship, the formula is, "no private life is permitted." Politics include the slightest hint of disagreement—even a remark within the family circle might be the ground for commitment to a concentration or slave camp. Police spies in Russia literally run to the hundreds of thousands. In every factory and business concern in the land, among office workers and in the schools and universities, among the political employees, including the Party members themselves and, not least, in the army and in the police department itself, spies and informers are warp and woof of dictatorial control.[16]

Preventive, anticipatory detention is a wholesale police operation. It does not wait upon overt conduct, even of the most incipient type. It is the job of the political police to discover what transpires in the hearts of men; indeed, use of the provocateur has been a tried technique since the time of Napoleon's Chief of Police. An Italian fascist Chief of Police would organize a gang of thugs, assault an anti-fascist, then donning his police uniform, he would arrest an innocent fascist who, of course, easily proved an alibi. But that was mere battery and mayhem. The ORVA arrested "socially dangerous" persons, tried, exiled, or executed them without any resort to law or courts.

Nor are such tactics confined to persons who on some rational ground are suspected of latent hostility to the regime. To dominate the public absolutely, to engender abject submission, terror is employed as propaganda and as a deliberate instrument of control. Thousands of innocent persons must be sacrificed in order to develop attitudes of fear and awe. And, since every human organization contains the seeds of discontent, the dictator must conduct periodic purges. Thus Hitler ruthlessly liquidated Roehm and other leading Nazis, and Stalin executed most of the original Bolshevik leaders. Gestapo and NKVD were the instruments employed to fabricate the evidence and to make sure that confessions and convictions were duly secured. The NKVD[17] is essential to the maintenance of the Communist regime, just as was the Gestapo

16. See BRAMSTEDT, *op. cit. supra* note 14; FRAENKEL, THE DUAL STATE (1941).

17. The wide functions of the NKVD include supervision of construction of highways and canals, mostly by forced labor of ordinary criminals, Kulaks, political enemies, and various national groups. It checks and purges the Army, arresting high officers, and itself possesses all major armaments. The NKVD also operates many schools, composes the entire government in eastern regions, controls military and engineering projects. It has been described as ". . . the incomparable, majestic, unique monolith resting upon inhumanity, slavery, abomination, and death. . . ." DALLIN, THE REAL SOVIET RUSSIA 244 (1944).

to that of the Nazis, and the OVRA to that of Italian Fascism. The functions and inclusiveness of the police in a dictatorship should convey some notion of what is meant by a "police state."

What must be emphasized is that inclusiveness, systematic scientific torture, anticipatory detention, and purges are not irrational brutalities of political police in a dictatorship. There is a reason for all of them. For example, liquidation of the family of a suspect is not only a weapon of deterrence, but a means of securing confessions, and a dramatic episode in unremitting propaganda. It also underscores the principal task of such police—to perpetrate the control of the dictator. Thus, it is evident that all the far-flung, nefarious activities of the political police in dictatorial states are approved, indeed, they are commanded by the heads of the state.[18]

The important difference between the two types of police can be indicated by noting the treatment of political crimes in dictatorships and in democracies. In a dictatorship a political criminal is the worst of all possible offenders, even if he merely whispers a timid criticism. He is the mortal enemy of the dictator, entitled to no legal right whatever, a veritable outlaw. For him, there is only secret trial, exile, or annihilation. On the other hand, in a democracy there is no legal difference whatever between a political crime and any other crime. The same procedures, rights, privileges, appeals, and treatment after conviction prevail. The rules against entrapment, involuntary confession, and the presumption of innocence apply as fully in trials of political offenders as in any other criminal trials. Nor must one fancy that non-political criminals have legal rights in dictatorial states, *i.e.,* claims that are bound to be respected. The Gestapo could step in anytime and take over, making any case "political" for any reason it saw fit. One of their officials announced in 1937: "Untouchable rights of the person or 'private spheres' cannot be acknowledged whenever they hinder the functioning of the Nation."[19]

In 1933 the Prussian Administrative Court decided that the Secret Police was not subject to judicial control.[20] The same court announced: "There are no longer any aspects of life which are non-political." Thus a woman sympathetic to the Jehovah Witnesses was denied a peddler's license because her mode of thought was ". . . incompatible with the

18. Hermann Goering said: "I declared then, before thousands of my fellow-countrymen, that every bullet fired from the barrel of a police pistol was my bullet. If one calls that murder, then I am a murderer." BRAMSTEDT, *op. cit. supra* note 14, at x.

19. *Id.* at 102.

20. FRAENKEL, *op. cit. supra* note 16, at 26.

heroic attitude characteristic of our nation today."[21] Art, music, the schools and press, churches and organizations—all were police-controlled. Large segments of the population came within their jurisdiction solely because of their race or religion. The NKVD has even greater powers, and there can never be any assurance that ordinary process will not be set aside and ignored. Secret police are not bound by judicial decision, and persons acquitted in the ordinary courts are seized and treated as the police see fit.

While our police are not political in the same ways as the ruthless agents of a police state, it would be erroneous to conclude that they are not political in any sense or in defensible ways. Attention has been directed to the participation of all citizens in police work in England, to various phases of such participation at the present time, and to the many private protective associations. All of these activities have a political significance, namely, that policing in our culture is a public, political function. In a democratic society, the corollary is the dependence of professional police upon the public with regard to detection, evidence, financial support, and in last analysis, the police job itself. Partly in fact and wholly in ideal, the political significance of the police function in a democratic society is epitomized as self-policing, which specialization and the remuneration of a trained force do not alter. Set the self-policing of a democratic community against the intimidation and absolute domination of the entire population by police answerable only to a dictator, and you reach the essential difference between the two systems.

The responsibility of the police of dictatorial states to no one and to nothing except the will of their leader, their unlimited power to arrest, try in secret without any semblance of standardized procedure, their decisions and their enforcement of penalties without recourse to any court—all of these are characteristics of domination by sheer physical force unlimited by law. It is the antithesis of the rule of law, the *Rechtsstaat.* In sharp contrast, the democratic state represents the rule of law. This poses one of the great issues of Western history, extending from ancient Greece to our own times. What does it mean in terms of the police problem?

The sovereignty of law is opposed to the unfettered power of officials. In democracies, it is insisted that law is preferable to the unlimited discretion of even benevolent rulers, because the essence of the democratic creed is self-rule. But, in fact, history has rarely posed the

21. *Id.* at 53.

issue in the context of the kind, wise ruler. Rather the question has been one assuring regularity, certainty, prediction, and equality of treatment in the face of the ruthless domination of power-hungry despots. The blood of countless freedom-loving men has been spilled to win the hard victory institutionalized in the rule of law, especially in that area of conduct where the severe penalties of criminal law are imposed.[22]

A vast literature discusses rule of law in many of its phases and applications. But rule of law on the most important level of all—that of police—has elicited only catch-words such as "lawless police" or "lawless enforcement of the law." The police aspect of rule of law must be carefully examined.

Rules of law are certain standards and commands, expressed in thousands of statutes, decisions, regulations, and in constitutions. It is important to note the interconnectedness of the entire body of legal rules. They are arrangeable in a harmonious order extending from the very general propositions of constitutional law through the middle range of statutes and decisions, down to the very specific concrete applications of them by police officers. The rule concretely exhibited in the arrest of John Doe by a police officer is: If I reasonably think X's home was entered by someone intending to commit a crime there, and I reasonably think John Doe did that, it is my legal duty to arrest him. That is the specific meaning of the rule which in statutes and case law is stated in the following general terms: If a police officer reasonably thinks a felony has been committed, it is his legal duty to arrest anyone whom he reasonably believes committed the felony. And a relevant constitutional provision might be the very broad generalization, "due process." In sum, the policeman who conforms to law is the living embodiment of the law, he is its microcosm on the level of its most specific incidence. He is literally law in action, for in action law must be specific. He is the concrete distillation of the entire mighty, historic corpus juris, representing all of it, including the constitution itself. Thus, the law-enforcing activity of the policeman takes on its great significance not only because it is law in the concrete form in which it is experienced by individual persons, but also because the meaning and value of the entire legal order are expressed in the policeman's specific acts or omissions—so long as he conforms to law.

When that law is the law of a democratic society,[23] the conduct of the policeman becomes the living expression of democratic law with all

22. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW c. 2 (1947).
23. HALL, LIVING LAW OF DEMOCRATIC SOCIETY (1949).

its values, meanings, and potentialities. Whatever disputes there may be regarding law in general or the law of past eras, it is clear that democratic law has at least two important characteristics. Democratic law is ethical law. Democratic law also represents self-rule. That the law of democratic societies embodies the best values is especially manifested in legally enforced constitutions which give effect to freedom of speech, press, and religion, protection from abusive official conduct, fair trial, and other civil liberties. From another perspective, we find in democratic law standards of fairness, reasonableness, and human decency. Democratic law expresses and encourages equality and human dignity. It allows free play for value experience and consequent progress. It disciplines officials who otherwise lack definite standards to apply regularly and consistently.

Democratic law can be viewed not only in this substantive way; it can also be appraised in terms of a method of governing, especially of arriving at important decisions. This includes certain methods of criminal procedure, *e.g.*, the presumption of innocence, notice and opportunity to prepare, specificity of the indictment, right to counsel, unbiased judge, and change of venue. Finally, democratic law can be viewed as the ethical, rational control of power, as the actualization of basic values in political institutions.

This may help one to appreciate the fuller significance of the policeman's functions in a democratic society. On the concrete level of individual experience with the most severe sanctions, he is the living embodiment of democratic law. If he conforms to that law, he becomes the most important official in the entire hierarchy, able to facilitate the progressively greater realization of democratic values.

How serious an obstacle, therefore, is the thoughtless attitude of the American public toward the police! The supercilious condescension of respected classes toward policemen reaps its inevitable crop—low self-esteem, little insight into basic functions, and no appreciation of potential contributions to enrichment of the democratic way of life by superior police service, especially in relation to the weaker members of the community.

Intelligent Americans therefore have a major job to do—first, to understand the meanings of police service in a democratic society; then, by their support and cooperation, they must create a police force that is capable of discharging its duties in a manner that strengthens the democratic way of life. The most important step in this reorientation of a public institution is a change in attitude toward police functions.

We must come to regard the police not as our substitutes for police service, releasing us from any obligation, but as our trained specialized helpers in a type of law enforcement that is compatible with democratic values. The test case for us is the quality of police service in relation to minorities, for here we meet the full challenge to democratic values in its most insistent, dramatic appeal. In sum, the challenge to enlightened police and laymen extends far beyond an appreciation of elementary functions, necessary to biological survival. It transcends the necessity of controlling anti-social conduct. It includes the positive conception of maintaining order in ways that preserve and extend the precious values of a democratic society. For while democratic societies, like all other societies, need order, they need a distinctive kind of order, one that is not imposed by an uncontrolled force, but one that is achieved by police methods that reflect democratic values.

II

Preventive Measures and Arrest

The literature on police, including surveys and studies by various commissions, abounds in adverse criticism.[24] It is based on an implied "bad man" theory, and assumes that by exhortation and scolding, police services can be improved. The difficulty with that approach is not so much that it is unfair to the police, but that it does not investigate the basic causes of police abuse and ineffectiveness. Nor does it articulate a definite policy to guide reform of the police establishment.

Part I, besides dealing with police functions as a fundamental phase of social process, was intended to provide a definite policy to guide the police of a democratic society and to permit evaluation of their work. That policy, in sum, is to maintain order in ways that preserve and advance democratic values. This policy can be expressed in a number of specific standards formulated as relevant questions:

1. Do the police conform to the laws requiring them to protect all persons, including members of minority groups, from aggression?

2. Do the police enforce the law equally against all offenders, regardless of race or economic status?

3. Do the police use legal controls which require and encourage self-policing by the community?

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24. See note 15 *supra.*

4. Are the police held legally responsible for their illegal conduct in the same ways that lay persons must answer for their illegal conduct?

5. Do the police take preventive measures to diminish criminal aggression against minorities and to check the early symptoms of riot?

6. Do the police always function as officers or do they often assume judicial and executive powers?

In order to evaluate the operation of the police establishment, we need to determine what legal controls are available to carry the standards into effect. Suppose we take the standpoint of a thoughtful police official, *e.g.*, a Captain of police who appreciates democratic values and is anxious to preserve and advance them. If he were placed in a potential riot neighborhood, he would realize that mob action, combining, as it does, unreasoning hate and destruction, inflicts the worst possible damage upon democratic values and methods whose essense is rational discussion and friendly interpersonal relations.

The first insight into which legal controls to apply in such serious situations is the perception that there are different kinds of mob disorder. The simpler type is that crystallized in a particular place—*e.g.*, a mob bent on lynching a particular person, or where a particular building is the focal point. This, in fact, is the typical mob of the older common law. The justice of the peace was required to read the Riot Act and demand the dispersal of the mob. Those who failed to leave the mob became felons. The statutes of some states impose this duty on specific officials, including, *e.g.*, ". . . any member of a city police force and any member of the state police . . . in the name of the people . . . to command all the persons so assembled immediately and peaceably to disperse. . . ."[25] And the neglect of officers to suppress a riot is a crime in many states.[26] It is also significant that statutes in many states preserve the common law tradition of empowering peace officers to summon citizens to assist them in law enforcement, and make it a criminal offense to refuse to comply.[27] These laws suggest that prompt action by a single policeman, familiar with his legal powers and duties, might often nip rioting in the bud. He need not read a riot act but he can utilize the psychology of deliberate announcement of the illegality of the mob, thus stimulating thought as well as providing a deterrent.

25. MICH. COMP. LAWS § 750.521 (1948). Also see ALA. CODE tit. 35, § 163 (1940); CAL. PEN. CODE § 726 (1949); ILL. ANN. STAT. c. 37, § 446 (1935); MASS. GEN. LAWS c. 269, § 1 (1932); N. Y. CRIMINAL CODE § 106.

26. See, *e.g.*, CAL. PEN. CODE § 410 (1949); MASS. GEN. LAWS c. 269, § 3 (1932); N. Y. CRIMINAL CODE § 109.

27. See, *e.g.*, CAL. PEN. CODE § 723 (1949); ILL. ANN. STAT. c. 37, § 468 (1935); N. Y. CRIMINAL CODE § 107.

As stated in Part I, the posse comitatus is historic in our culture, and it is still regularly employed in rural areas in this country.[28] A critical situation provides an excellent opportunity to actualize the ideal of self-policing which is the essence of the police function in a democracy. If this is thought to be impractical in a large city, it should be remembered that in the New York Harlem riots several hundred citizens were deputized as peace officers. Over 200,000 citizens were enrolled as Special Constables[29] in the threatened great Chartist riots in England in 1848. In the Detroit riot, there was conspicuous voluntary service by groups of socially-minded white and Negro citizens.[30] Formal authorization and official deliberate use of the relevant legal instruments could have made such voluntary service more effective by enlisting and organizing the services of many other citizens.

The more serious kind of mob disorder is the Detroit type—decentralized rioting over a wide area by small groups who often use the automobile for quick attacks and escape. This is primitive warfare on a large scale and it threatens the elementary bonds of social order. Consequently, it calls for the maximum discipline and the best possible law enforcement.[31] An officer who stands by while a vicious attack is being made is violating the criminal law and should be prosecuted as a criminal. An officer who arrests rioters of one group and closes his eyes to the aggressions of the other, is violating the equality of democratic law and encourages passionate recrimination and the breakdown of democratic institutions. There are many legal sanctions applicable to that sort of misconduct and nonfeasance.

The gravity of mob disorder is shown in the prohibition under criminal penalty of two less serious situations that tend to culminate in riot, namely, unlawful assembly and rout. Three or more persons gathered for an unlawful purpose constituted at common law an unlawful assembly.[32] If and when they began to move toward the consummation of their criminal purpose they constituted a rout;[33] and if they proceeded to the point of putting their criminal intention into effect, they were

28. Larence, *The Constitutionality of the Posse Comitatus Act*, 8 KAN. CITY L. REV. 164, 166 (1940).

29. LEE, *op. cit. supra* note 2, at 314.

30. LEE AND HUMPHREY, RACE RIOT (1943).

31. For extensive bibliographies see, LOHMAN, THE POLICE AND MINORITY GROUPS (1947); U. N. Publication, *The Main Types and Causes of Discrimination* (1949).

32. Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84 (1902); Louisville v. Lougher, 209 Ky. 299, 272 S. W. 748 (1925); New Jersey v. Butterworth, 104 N. J. L. 579, 142 Atl. 57 (1928).

33. Follis v. State, 37 Tex. Crim. Rep. 535, 40 S. W. 277 (1897); People v. Judson, 11 Daly 1 (N. Y. 1849); State v. Summer, 29 S. C. L. (2 Speers 1844).

committing a riot.[34] The statutes of many states preserve these distinctions with minor changes, *e.g.*, as to the number of persons participating.

The distinctions drawn among unlawful assembly, rout, and riot bear a close analogy to preparation and criminal attempt, and it is significant that while preparation to commit a crime is not a crime, that is not true so far as unlawful assembly and rout are concerned. Here, the "volcanic forces" and widespread harm flowing from riots result in prohibition of the most incipient stages of that crime.

But the use of excessive force is illegal, regardless of the gravity of the situation. Our hypothetical Captain would realize that while a riot is the maximum challenge to the efficiency of his force, it is also the greatest opportunity to demonstrate the effectiveness of democratic police methods. Without suggesting that the English police have attained perfection, it is notable that in the great Reform riots in 1868, although 265 policemen out of 1613 were wounded, "and one Superintendent, two inspectors, nine sergeants, and 33 constables were so severely injured as to be incapacitated for life," the *Quarterly Review* reported: "The police behaved with the most admirable moderation and not a single case of unnecessary violence was proved against them."[35]

When a riot occurs, the house is already on fire, and the principal objective is to extinguish the flames by sound methods. One need not be a social scientist to appreciate the fact that riots are the end-results of chronic maladjustment. We cannot here deal with the basic socio-economic and psychological factors that are involved;[36] we must attend to those external manifestations of the underlying causes which are relevant to the use of legal controls by the police. The important factors are those indications of maladjustment and friction which occur every day. Among these, specific symptoms of future serious troubles are insults, threats, batteries and malicious destruction of property. Intelligent law-enforcement in such seemingly petty cases is of the utmost importance in the creation of wholesome law-abiding attitudes. Of necessity the police must be selective in making arrests since it is physically impossible to arrest all offenders, spend the requisite time in court, and still attend to the regular duties of active law-enforcement. The

34. *Ibid.*

35. LEE, *op. cit. supra*, note 2, at 327.

36. The factors emphasized by sociologists as causes or conditions leading to riots, *e.g.*, competition for jobs, housing problems, and ignorance of each other's cultural achievements, do not, of themselves, culminate in riots. It seems more probable that the daily accumulation of aggressions, aggravated by the social conditions noted above, sets off the acute outbursts.

situation therefore demands realistic decisions guided by democratic goals and knowledge of the facts.

The police are familiar with arrest for assault and battery and for disorderly conduct, but they have ignored other available controls and legal measures which can be taken before crimes are committed or before serious aggressions occur. First among these is the peace bond, used in family disputes and in rural areas, but ignored as a control of incipient symptoms of serious disorder. Perhaps the most typical case in the appellate court reports is that of an individual who has threatened another with injury to his person or property. On the affidavit of four persons who feared that a certain individual would do them bodily harm, the judge, in a Louisiana case,[37] ordered the relator to furnish a peace bond. The court acted under authority of a Louisiana constitutional provision to the effect that district judges have jurisdiction to require bonds to keep the peace, and under authority of a statute providing that on refusal to give bond, the judge shall commit the party to the custody of the sheriff, who shall imprison him until he gives the bond.

In a Texas case, the relator, who threatened to kill a certain man, was held in custody and directed to give a $3,000 bond to keep the peace for one year. The Court of Criminal Appeals in affirming the action, rejected the relator's argument that since he could have carried out the threat and did not, the bond was improper. The court said: "The very purpose of [the statute] . . . was to halt such threats prior to an effort at their execution, and we think these articles were properly and timely invoked by the state."[38] Several defendants were indicted in Kentucky for unlawfully confederating together for the purpose of intimidating, alarming, and disturbing certain persons. In the trial of one of the defendants a verdict of not guilty was returned. Thereupon the court, characterizing the defendants as "dangerous, violent men," said: " . . . [I]t appearing to the court that the safety of life and the security of property requires the . . . [defendants] . . . to file bonds to keep the peace in the sum of $5,000, to be of good behaviour towards all persons for the period of one year; and it is further ordered that if they or either of them fail to file said bond that they each be confined in the county jail for a period of three months."[39] The defendants' appeal was dismissed.

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37. *In re* Bordelon, 210 La. 1080, 29 So.2d 162 (1946).

38. *Ex parte* Luehrs, 152 Tex. Cr. 348, 350, 214 S.W.2d 126, 127 (1948).

39. Waggoner v. Commonwealth, 254 Ky. 200, 201, 71 S.W.2d 421, 422 (1934). Also see People *ex rel.* Smith v. Blaylock, 357 Ill. 23, 26, 191 N.E. 206, 208 (1934), where the relator threatened to blow up the powder magazine of a certain company. He was arrested and ordered by a justice to give a recognizance to keep the peace for 12

In many of the cases involving peace bonds favorable references were made to preventive justice. The statutes are broad enough to include the issuance of orders for recognizance against almost any threatened breach of the peace. The constitutionality of these statutes is upheld on the grounds that the procedure is not of a criminal but of a quasi-criminal nature[40] and that, as conservators of the peace, the courts can require bonds "to keep the peace" and "to be of good behavior." The use of the peace bond as a technique to check incipient criminal behavior, especially in areas of tension and friction, should receive careful consideration.

There are other noteworthy legal controls which were designed to check criminal conduct in its incipient stages. At common law a threat, privately made, was not criminal unless it amounted to extortion. But under many statutes a threat uttered publicly in conditions tending toward a breach of the peace is "disorderly conduct," as is insulting, profane language in public.[41] More serious is the common law crime of solicitation or incitement to commit a crime, and incitement to riot is one form of that offense. Conspiracy extends incipient criminal behavior to the conduct of two or more persons; and there are reported cases where convictions of conspiracy to commit a breach of the peace were upheld.[42] As to the relevancy of this device to potential rioting, it may be noted, that with reference to the threatened Washington, D. C., disorders in 1950, the *Washington Post* reported: "Trouble is likely to arise only if, as was the case in 1949, some organized group attempts to foment it."[43] Police assigned to an area where tension and friction are prevalent should be familiar with these legal controls which, if soundly employed, can prevent serious trouble and foster law-abiding conduct.

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months. The order was affirmed on the ground that "[i]t is the intention of the statute to provide a method by which threatened breaches of the peace against persons or property may be prevented. The statute does not make the uttering of a threat or the intent of a person to commit an offense against the person or property of another a criminal offense within the legal meaning of the term 'criminal offense.' A person arrested under the act is not to be fined or committed to jail for the making of such threat or because he may have intended to commit an offense against the person or property of another. If he is held to have made such threat or to have intended to commit such offense, he is merely required, under the statute, to give such reasonable security as will act as a deterrent against the consummation of such supposed threat or intent to violate the law in the respect legislated against."

40. *Ex parte* Wag, 56 Cal. App. 2d 814, 133 P.2d 637 (1943); State *ex rel.* Yost v. Scousyzio, 126 W. Va. 135, 27 S.E.2d 451 (1943).

41. CAL. PEN. CODE § 415 (1949); N.Y. PEN. LAW § 722.

42. See 2 WHARTON, CRIMINAL LAW § 1620 (12th ed. 1932).

43. Quoted in Comment, *Racial Violence and Civil Rights Law Enforcement*, 18 U. OF CHI. L. REV. 769, 775 (1951).

While knowledge of the various preventive legal controls is essential, a more difficult problem concerns the failure to use them. This problem is by no means confined to the omission to use laws which are both pertinent and traditional. Indeed, it is in the overt conduct of the police that abuses occur which raise the most serious problems in a society founded on the sovereignty of law.

Turning from the standards of democratic police service and the implied legal duties to the actual operation of the police force in our society, we find huge gaps in some areas—which means violation of the standards and the laws. Despite the cliche, "police lawlessness," this is not peculiar to the police, for the gaps between the ideals of democratic law and actual conformity run through our entire society, including the decisions of judges. The gaps between police practices and their legal duties raise especially serious problems because, unlike the decisions of the courts, the policeman is the concrete living law as it meets John Q. Citizen every day. The consequent problems have diverse causes; hence, there is no single sweeping solution.

It has been a traditional boast regarding Anglo-American law that officials stand on the same plane as lay persons regarding submission to the rule of law, that officials can be held accountable in the courts for their torts and crimes. Unfortunately, when we turn from the law to the actual practices we discover disturbing facts.

Perhaps the most typical police task is the arrest and imprisonment of persons suspected of criminal behavior. There are many rules of law limiting the power of arrest and imposing duties on police officers with regard to their conduct after arrests are made. Other rules provide legal remedies for illegal arrest and imprisonment. The fact is, however, that there are several million illegal arrests and imprisonments in the United States each year, and that only a handful of damage suits are filed against policemen.

The frequency of illegal arrests also arouses suspicion regarding the relatively high rate of arrests of Negroes. The Uniform Crime Reports from 1935 to 1940 included statistics on the race of arrestees, showing that 6½ times as many Negroes are arrested per 100,000 as are foreign-born whites, and that proportionately 3 times as many Negroes are arrested as are native-born whites.[44] It is possible that those statistics reflect the actual criminal behavior of the three groups represented. But in light of what we know about wholesale illegal arrests, it is not unlikely that some of the statistics are accounted for by the

44. UNIF. CR. REP.

fact that the Negro is also allocated to the impotent, underprivileged classes whose legal rights may be infringed upon with impunity.

Even if we accept the thesis that the crime rate among Negroes is disproportionately high, we cannot discount the frustration and insecurity of Negroes as potent causes. Discriminatory law enforcement, including the failure to protect Negroes from the aggression of other Negroes, aggravates tendencies toward criminal behavior. Equal enforcement of law by the police would have a curative, morale-building effect which would be of the greatest value in critical situations. These facts underline the general point that day-to-day law enforcement is the basic, if not sole, determinant of the quality of law enforcement available in dealing with race conflicts and riots.

Most victims of illegal arrest and imprisonment are vagrants, drunkards, and other maladjusted or economically underprivileged persons. The vast majority of these victims of illegal police practices consult no lawyers or organizations with a view to redressing the legal wrongs done them. They seem to accept the treatment as normal procedure. But among the millions of illegal arrests that occur in this country every year, many of the victims have sufficient self-respect to resent the wrong done them, and enough resources to do something about it. Yet very few of them sue the police for damages, and for good reason—the ill-paid policeman, if he is not judgment-proof, only rarely has sufficient property, reachable by legal process, to encourage action against him personally.

Garnishment is often a useful remedy, but in the vast majority of the states it is impossible to garnishee the salaries of public officials.[45] The policeman is an employee of a corporation, and it is well established that a principal must answer for the torts committed by his servant in the course of employment. Here, however, another special rule meets the injured person—public corporations are not liable for torts committed in the discharge of governmental, as distinguished from proprietary, functions.[46]

A final promising possibility would seem to be suit on the officer's bond. But city police are often not covered and where they are a whole array of technicalities arises to the dismay of the injured claimant who, as a solitary litigant, faces a great surety corporation and its battery of lawyers. The surety's most frequent escape from liability on the bond results from the curious holding that when the police officer

45. 6 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 2681 (2d ed. 1928).
46. See Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 229 (1925).

injures someone in violation of the law, he is not acting *virtute officii,* which is a clever way of saying that although the police were arresting for suspected crimes or were beating a suspect to secure a confession, they were not acting within the scope of their employment. It was, said one court, a "usurpation of power."[47] Thus, where the need for protection is greatest, the illegal conduct is only *colore officii.* The upshot is that where there is legal liability, as in the case of the policeman, the fact of financial irresponsibility is usually a conclusive obstacle to recovery. And where there is financial responsibility, as in the case of the city, there is no legal liability.[48]

More serious than the millions of illegal arrests that occur annually are illegal imprisonments and releases without judicial determination. Again, the rules are clear—detention may be only for the short reasonable time required to produce the arrestee in court; and discharging him is a judicial act. No less clear are the facts of flagrant violation—long imprisonment, no court appearance, and release by the police without court order. This amounts to usurpation of the judicial function and the administration of punishment—the gross violation of basic standards of police service in a democratic society.

In a study made some years ago, it was estimated that there were 3½ million illegal arrests and imprisonments in the United States in 1933.[49] In 1948,[50] 1949,[51] and 1950[52] there were apparently even more illegal arrests and imprisonments in this country. In addition to drunkenness and vagrancy, many of these illegal arrests and imprisonments were made upon suspicion in order to facilitate investigation, or they were made at the request of another state, or they were the result of inadequate facilities to provide a prompt judicial hearing. Many others resulted from the strictness of the common law rule that any restraint on movement, including brief detention for the purpose of questioning, is an imprisonment.

Accordingly, although there is an abundance of law on arrest, imprisonment, and release, inquiry into practice reveals that the rules, as regard to certain classes, are little more than mere pretensions. This is a very serious matter in a democratic society, for it discloses a cell of official lawlessness which can expand in any direction, and the breed-

47. Brooks v. Fidelity & Deposit Co., 147 Md. 1944, 127 Atl. 758 (1925).

48. See Hall, *The Law of Arrest in Relation to Contemporary Social Problems,* 3 U. OF CHI. L. REV. 345 (1936).

49. 4, No. 4, UNIF. CR. REP. 23 (1934).

50. 20, No. 1, UNIF. CR. REP. 61-63 (1949).

51. 21, No. 1, UNIF. CR. REP. 61-63 (1950).

52. 22, No. 1, UNIF. CR. REP. 57-59 (1951).

ing ground of a power which can be more readily used against citizens other than the present victims. Certainly we do not want our police to be a Praetorian Guard available to some would-be Caesar.

One of the standards of the police in a democratic society is the sharp demarcation of the police job from judicial functions, and the restriction of police to the so-called ministerial work. Some scholars, however, have stated that police functions necessarily include judicial functions because the police must decide whether a crime has been committed, whether it is a felony or a misdemeanor, what is an arrest, etc. But this interpretation confuses the fact that *all* persons make legal decisions with the essential nature of judicial decisions. This is an important question and the practical phase of it can be indicated by comparing the English police with the Gestapo or NKVD. It is the dictatorial police who sit as judges, decide cases, and enforce their decisions. The English police take their prisoners before judges who try and decide the cases. Surely there must be important differences in the respective functions. What are they?

In the first place, so long as the police in a democratic society obey the law, they do not decide that an arrestee is guilty of any crime That is not a policeman's job any more than it is the job of the lawyers who prosecute and defend the case. To be guilty of a crime means to have been found guilty beyond any reasonable doubt by a court of law. Indeed, the police are not permitted under law to refrain from arresting until they are convinced to that extent, or they would rarely act. They are bound to arrest when they have only reasonable grounds to believe that the arrestee committed a crime. The question of guilt is a judicial one.

Secondly, the police do not define or declare any general rules of law, as do judges. And finally, whatever the police in our system may think the rules of law mean, their interpretations are not authoritative. They are not, like judicial decisions, binding on everyone. When one perceives that litigation between parties is not essential to the exercise of the judicial function, and since decisions are handed down in non-contested cases, it becomes clear that the essence of judging is the authoritativeness and general significance of the decisions rendered.[53]

If these distinctions between the functions of the judge and that of the policeman are borne in mind, it is easy to recognize the implications. To have police arrest on reasonable grounds and then to provide a prompt, fair trial with all the legal and constitutional safeguards of

53. See GAVIT, INTRODUCTION TO THE STUDY OF LAW, § 62 (1951).

democratic law is one thing. To allow the police to act not only as officers but also as prosecutors, judges, jury, and administrators of penal institutions, substituting crude, sometimes barbaric methods for the rational, fair procedures and treatment symbolized as "due process," is the complete antithesis of democratic law.

Thus, regardless of pragmatic justifications, we face a very serious problem in the fact of wholesale illegal imprisonment of millions of arrested persons each year by police who are legally bound to take these persons promptly to a court which has jurisdiction to decide whether to release them or not. And, obviously, the corporal punishment of arrestees, because they have aroused the ire of policemen who wish to make sure that they will not escape unscathed, is the worst kind of usurpation of power.

From the viewpoint of efficiency, police lawlessness is the worst possible practice. It builds the wall between police and public higher than ever. It stops channels of information and blocks the sources of evidence.[54] Realization that the police are a mere handful, impotent to control by sheer physical force, as is demonstrated when rioting breaks out in a large city, makes it evident that the usurpation by the police of judicial or executive functions comes at a very high price in a democratic community. If the police are educated to understand the rules of law which define their particular job, and if they function impartially within the limits of those laws, they will preserve democratic procedures and win the public support that is essential to police efficiency.

In considering the above problems from the policeman's point of view, it is clear that under present conditions he would feel aggrieved if he were compelled to pay from his personal estate for acts done in the conscientious discharge of his duties. In almost every police department this would be the normal attitude so far as illegal arrest and imprisonment are concerned. And in many departments that attitude would also prevail with regard to coerced confessions, especially in cases that outrage the community's feelings.

Moreover, when we consider that the vast majority of persons subjected to illegal imprisonment are vagrants, drunkards, and derelicts, we realize that the police conduct serves as a crude prophylaxis and as a minor benefit to the arrestees, in providing a night's lodging and time to become sober. In the absence of substantial social reform providing adequate treatment of these classes, the present police practice, crude as it is, can hardly be abandoned. Possible action for the legal harms can

54. Best, *Why the Police Fail,* 166 Harpers 205-206 (1932).

be avoided by requiring waivers to be signed on release from prison; this is done in Massachusetts in drunkenness cases.[55] That procedure is, however, a merely expedient measure and may be abused. A much better measure would be provision for immediate hearing by a police judge who would refer the more promising cases to social agencies and institutions which could give more adequate treatment. The point to be underlined is that police lawlessness in this area may not be vicious or brutal; on the contrary, it may be well motivated and it serves a social need.

It is more difficult to provide effective remedies for illegal arrest and imprisonment in cases which do not fall within the classes requiring corrective treatment. Federal statutes and a few states permit recovery against the government for imprisonment of persons subsequently proved innocent.[56] Those laws are infrequently used, and the job of rendering tort law effective in suits for damages for harms caused by policemen is much more difficult. Nevertheless, if it is agreed that the present situation cannot be permitted to continue, practical solutions must be sought, as in Danish law which provides for financial recovery against the state in certain cases.

If the huge number of illegal arrests and imprisonments were drastically reduced by the provision of agencies to look after the drunkards and derelicts or, pending such basic reform, by the use of waivers on release, the problem would begin to assume manageable proportions. Departmental discipline could move into a position to exercise actual control of personnel, and many wrongly arrested and imprisoned persons would be satisfied with the departmental sanctions. A major question would concern the nature of the policeman's violation—whether he was merely negligent or was vicious and brutal. In the former, the policeman might not be held personally liable. In both situations, public liability, either directly or by elimination of the technicalities of the law of suretyship, should provide effective remedies for injuries and damage caused by police.

Major reforms in the law of arrest, in addition to the indicated social substitute for the present crude prophylaxis in cases of underprivileged classes and the use of waivers, are necessary to render financial responsibility feasible. Our law of arrest arose in the simple conditions

55. MASS. ANN. LAWS c. 272, § 45 (Cum. Supp. 1951). See Doherty v. Shea, 320 Mass. 173, 68 N.E.2d 707 (1946); Horgan v. Boston Elevated R. Co., 208 Mass. 287, 94 N.E. 386 (1911).

56. 52 STAT. 438 (1938), 18 U.S.C. 720 (1946); CAL. PEN. CODE §§ 9400-9406 (1949); N.D. REV. CODE § 12057 (1943); WIS. STAT. § 285.05 (1943). See Notes, 15 U. OF CHI. L. REV. 773 (1948); 57 YALE L.J. 1135 (1948).

of rural England. It was definitely formulated when prisons were wretched dungeons swept by typhus; in 1759, *e.g.*, one-fourth of the inmates died in English prisons. Bail was rarely granted; jailers charged fees for every minor privilege and they received a fixed sum for expenses regardless of the food and facilities they supplied.[57] In those conditions arrest was a calamity. Hence the right to arrest was rigorously restricted and citizens were privileged to resist illegal arrests even to the point of killing the officers. That is substantially the law which we inherited and still have on our books today. But under present conditions, since only a minor inconvenience will be sustained by submission to brief detention, it is indefensible to insist on the right to resist every illegal arrest and thus sanction even the severe injury or killing of officers if the situation can be subsumed under the privilege of self-defense. Legal reform here, enlarging the right of arrest, is not only socially necessary; it would also eliminate vast numbers of presently illegal arrests and detentions.[58]

The law of most states considers any detention, even for the purpose of "frisking," an arrest. But the 4-inch pistol is a new weapon, and it is impossible to determine, prior to frisking, whether one is being carried. Such a search is legally privileged only after a legal arrest, but that is inadequate to police safety and the public needs. Under present law, the only way for an officer to try to remain within the bounds of legality is to make the arrest, search, imprison, and take the arrestee to court—regardless of the fact that the search discovered only a newspaper or a book. It would seem outrageous to the citizen to be imprisoned under those circumstances; the common sense of the police avoids this substantial inconvenience. Similar problems are involved when police arrest without a warrant for misdemeanors not amounting to breaches of the peace committed in their presence, for in many states the common law limitation persists, making such arrests illegal. There are also technical distinctions concerning felony and misdemeanor which render many arrests illegal.

What merits wide recognition with reference to these numerous illegal arrests and imprisonments is that the police in many cases are unable to perform their protective duties without violating their legal duties under the present rules. They come upon persons at night in circumstances which do not amount to reasonable grounds to suspect concealment of a gun, yet instinct and protective duty require frisking and, of course, the detention necessary for that. Or, a number of sus-

57. Warner, *Investigating the Law of Arrest*, 31 J. CRIM. L. & CRIMINOLOGY 111, 113 (1940).

58. *Id.* at 111.

pects are picked up in a rapid move to apprehend an offender, when the only description of a robber is that he is about 21 years old and wore a blue sweater. In an actual case, several persons who were arrested were released at the station after two hours' detention.[59] Under the law of many states such arrests are probably illegal and the detention was certainly illegal, since the suspects were not brought before a magistrate and released by him. Yet few would deny that the police conduct in this case was both justifiable and decent. The legalizing of questioning and of the necessary short detention, qualified by permission to communicate with counsel and warning regarding self-incrimination, as well as the sanctioning of search for weapons before arrest and release by the police in certain situations would bring the lagging law of arrest into focus with present social needs. Other reforms included in the Uniform Arrest Act[60] would also help free police from the present conflict of protective and legal duties.

Finally, it is time that we made full use of the summons in dealing with persons who have a permanent residence. We lag far behind England, Canada, and many other countries in this regard, still arresting hundreds of thousands of citizens in cases where the summons would be wholly adequate to secure their appearance in court. The public resentment against police who make the arrests may be unfounded; but it exists and it can be eliminated by a simple law expanding the scope of the summons and educating the police regarding its use.

The present wholesale violation of the rules by police, condoned by their superior officers, encourages undisciplined behavior and nullification of democratic laws. It therefore has an inevitable impact on the handling of acute situations fomented by tension and aggressiveness. The policeman who regularly plays fast and loose with important rules of law lacks the discipline required for impartial, competent law-enforcement in critical situations. Persons living in tension areas, who are illegally arrested and imprisoned, are suspicious of the police, and that influences their conduct not only in the rare instance of riot, but in their daily activities. The archaic law of arrest encourages policemen to use wide powers, not provided for by law—so that instead of being police officers they must make decisions and discharge functions that are legislative, judicial, and administrative. The evils of such power in the hands of the police are aggravated in times of rioting.

The situation regarding the illegal arrest and imprisonment of millions of persons annually in this country, serious as it is, must be

59. *Id.* at 120.
60. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

placed in the general context of the entire functioning of the police before valid conclusions can be drawn. It is probable that in many situations, *e.g.,* in dealing with known, responsible persons and with professional criminals, the police by and large conform to law. While the standards and rules of democratic law are effective in those areas, there is bound to be a carry-over from habits developed in dealing with the maladjusted classes.

Nor, for the reasons stated in Part I, could one validly assert that the behavior of police toward drunkards, vagrants, and the members of certain minority groups is identical to or equivalent with that of the police of dictatorial states. There remain important differences in the degree and frequency of brutality, its systematic, scientific use, in the purpose of the restraint, and in other regards.

But while such comparisons may help one to rebut superficial criticism of police, it is more important to recognize the harmfulness and dangers of police lawlessness in a democratic society. It represents a cancer in the body politic, a serious threat to democratic society, regardless of the fact that it is presently limited to treatment of the weaker members of the community. It is all the more challenging because, if the police problem can be solved on the level of treatment accorded underprivileged persons, it can be solved everywhere.

The underlying premise of the above discussion has been that sound laws are important. But we are often told that police abuses are simply a reflex of the public attitude and that it is futile to expect illegal arrests, imprisonments, and the third degree tortures to disappear so long as these practices are publicly condoned, indeed, expected.

There are at least three serious fallacies in that thesis. First, it is mere guesswork to think that "the public" presents a unified, irrational, prejudiced viewpoint. In fact, there is no "the public" in a democracy, and the slightest scrutiny reveals that many groups and organizations are always and unalterably opposed to police brutality and other illegality. Certainly it is both shortsighted and an unwarranted disparagement of Americans to hold that police abuses are approved by the majority.

Second, the thesis will not bear scrutiny even with regard to offenses which arouse considerable feeling—a brutal murder or a shocking rape. For it is precisely in such situations that the policy of democratic methods is put to the test. Here, that rational policy, developed in the hard school of experience and the calm reflection of many years, directs police and judges to stand firm against the emotional reactions of the moment. Despite public clamor and the rhetoric of thoughtless newspapers, com-

petent police reveal the discipline of their profession as well as the strength and validity of the democratic policy of police service.

Third, it is unsound to assume that police conduct is merely a necessary effect of public attitudes, and that until the latter change, the former will persist. The fact is that law can be deliberately and intelligently used to modify and create public attitudes. Indeed, the challenge to the conscientious police official is precisely to use legal controls in such ways as to alter unsound, undemocratic attitudes and misdirected emotions. There are many instances where judicial decisions and legislation, vigorously enforced, have changed public opinion and initiated new courses of conduct.[61] This does not imply that that can always be done, especially with regard to petty blue rules whose enforcement is widely opposed among law-abiding persons. But it does mean that in important areas legal controls can initiate corrections in public beliefs and behavior. We must remember, moreover, that law is not concerned with private thoughts and emotions, but with conduct. Even if the police cannot change public opinion they can help educate people to control their emotions.

Our enlightened police Captain, like an artist having many brushes and colors or like an engineer with a large assortment of tools and instruments, has access to many legal controls which, if he employs them skillfully and persistently, can effect enormous changes in conduct in the direction of achieving democratic values. Certainly we must believe that a thorough understanding of the police functions in a democratic society, combined with a knowledge of law and of the facts comprising serious social problems, necessarily operates to improve the quality of police service. What is suggested, in effect, is abandonment of the notion that the police function is purely negative, and the substitution of a creative role designed to increase and expand the democratic values. It is precisely in areas of race conflict and aggression that the challenge to implement this perspective is greatest. By like token, here, too, is the best opportunity for imaginative, disciplined police to make a major contribution by strengthening the democratic way of life.

III

Security and Civil Liberty

The important police function of acquiring evidence to establish guilt requires examination in relation to security and civil liberty. The

61. See Berger, *The New York Law Against Discrimination: Operation and Administration*, 35 Cornell L.Q. 747 (1950).

relevant issues bring to a climax the general thesis that the paramount police function is to maintain order in ways that preserve and enlarge democratic values. The unifying core of this area is speech, which has been touched upon in connection with illegal threats and unlawful assembly. Democratic society rests on the fact that man is a speaking animal and on the rationality reflected in problem-solving by uncontrolled discussion. With reference to ways of obtaining evidence and the relevant privilege against self-incrimination, as well as the incidence of due process, the basic liberty is freedom from coercion to speak. That freedom is the counterpart of freedom to speak; both are necessary phases of freedom of expression. By an analysis of police functions in relation to speech, we may derive some understanding of the wider problem involving the interrelations of security and civil liberty.

This general problem has sometimes been formulated in terms of an *opposition* of values—security *versus* civil liberty. On the surface, at least, it may seem persuasive that if any and all controls and methods of securing evidence are used, order and security can be more effectively preserved. So, too, at first blush it seems almost axiomatic that the exercise of liberty necessarily involves the risk of disorder. But if the inquiry is considered not abstractly, but with reference to our society, opposing security to liberty is irrelevant.[62] Harsh methods of control and democracy are incompatible, so that the question becomes simply the survival of democratic society. Thus, the basic postulate: A democracy, like all other societies, needs order and security; but it also and equally requires civil liberty. This complexity of need creates difficult theoretical and practical problems.

If we limit our inquiry mainly to free speech, excluding from that restricted area everything but cases involving racial and religious tensions, we still confront a tremendously difficult task in determining just what the law is. Most of the important Supreme Court cases have been 6 to 3 or 5 to 4 decisions; thus there is doubt regarding the law and an even greater uncertainty exists with respect to policies underlying the decisions. What should the police do in this difficult, yet vitally important, area where the ultimate values of democracy, enshrined in the Bill

62. Mr. Justice Brandeis, concurring in *Whitney v. California*, 274 U.S. 357, 375 (1927), struck the pertinent note when he said: "Those who won our independence . . . recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form."

of Rights, are involved? The difficulty of the issues met when one descends from airy generalizations to concrete situations is apparent, as a discussion of a few cases in the area of racial and religious conflict reveals.

Cantwell v. Connecticut[63] represents an unsuccessful effort to curb the speech of the Jehovah Witnesses, a minority sect which has abused all organized religion, particularly Catholicism. · Cantwell, a Jehovah Witness, went to a Catholic neighborhood and asked two pedestrians to listen to his phonograph. He then played a record which singled out the Catholic religion for especially offensive criticism. The pedestrians, both of them Catholics, told Cantwell he had better get off the street before something happened to him, and he walked away. His conviction of inciting a breach of the peace was reversed by the United States Supreme Court: "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse." ". . . [T]he petitioner's communication . . . raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."[64]

A similar case arose in Iowa in 1947.[65] The Jehovah Witnesses held open prayer meetings in a public park. After one such meeting, threats of violence and many protests against future meetings were communicated to the mayor, police, and city council. The Council thereupon passed an ordinance requiring its permission to hold meetings in the park or on the public square. In an action to enjoin enforcement of the ordinance, the Circuit Court held it to be unconstitutional as an infringement on the freedom of worship. The Court not only declared that the Witnesses' activities could not be suppressed, but that in addition, they were entitled to protection in the exercise of their religion.[66]

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63. 310 U.S. 296 (1940).

64. *Id.* at 310-311. In addition, the Court held the statute under which the defendant was also convicted, violated the Fourteenth Amendment because it required a certificate for soliciting; this amounted to a prior restraint on the exercise of religion. *Id.* at 303.

65. Sellers v. Johnson, 163 F.2d 877 (1947).

66. Judge Sanborn said: "The theory that a group of individuals may be deprived of their constitutional rights of assembly, speech and worship if they have become so unpopular with, or offensive to, the people of a community that their presence in a public park to deliver a Bible lecture is likely to result in riot and bloodshed, is interesting but somewhat difficult to accept. Under such a doctrine, unpopular political, racial, and religious groups might find themselves virtually inarticulate. Certainly the fundamental rights to assemble, to speak, and to worship cannot be abridged merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised.

". . .

"The only sound way to enforce the law is to arrest and prosecute those who violate the law." *Id.* at 881-883.

In still another Jehovah Witness case,[67] Chaplinsky had been distributing the literature of his sect on the streets of Rochester, N. H. Many complaints were made to the city marshal "that Chaplinsky was denouncing all religion as a 'racket'." The crowd at the busy traffic intersection became restless and the officer on duty, without telling Chaplinsky that he was under arrest, started with him toward the police station. On the way they met the marshal who was hurrying there on information that a riot was under way. It was disputed whether the marshal merely warned Chaplinsky of the threatening crowd or whether, as Chaplinsky testified, the marshal cursed him. In any case, Chaplinsky said to the marshal: "You are a . . . -damned racketeer" and "a damned fascist." He was tried and convicted of a misdemeanor for uttering those words. The Supreme Court upheld the conviction and the constitutionality of the New Hampshire statute.[68] In a unanimous opinion, rare in the civil liberties field, the Court said: "The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee. . . ." It added that the constitutional privilege does not include ". . . the lewd and obscene, the profane, the libelous, the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[69]

Two general guides may be derived from these cases. If speech is the expression of a religious belief the fact that it is very offensive is immaterial. And the fact that rioting is reasonably anticipated is no ground to forbid or terminate a public meeting.

The Supreme Court's formula for speech which is not protected, *i.e.*, words which, in the Court's language, ". . . by their very utterance inflict injury or tend to incite an immediate breach of the peace,"[70] should be kept in mind when considering the *Terminiello* case.[71] Terminiello, speaking in a Chicago auditorium under the auspices of Gerald L. K. Smith, had some very offensive things to say about Jews, some of whom were in the audience. About 800 persons were inside the auditorium

67. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

68. The statute provided that "[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." N.H. REV. LAWS c. 378, § 2 (1942). The Court, relying upon the New Hampshire court's interpretation, assumed without holding, that the latter half of the statute was unconstitutional. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

69. *Id.* at 572-573.

70. *Id.* at 572.

71. Terminiello v Chicago, 337 U.S. 1 (1948).

while 1500 were outside, milling about, howling, and abusing those who sought to enter, in some cases tearing their clothes. All the windows were broken by rocks and stones, and bottles were being thrown into the auditorium. Many tried to break down the doors, and the police were having great difficulty in maintaining order outside the hall. Inside, Terminiello harangued his audience about "atheistic, communistic Jewish or Zionist Jews." He referred to "some of the slimy scum [who] got in by mistake" and to "skunks of Jews." Referring to 15,000,000 persons who were murdered in Russia and to millions more who were raped and sent into slavery, he cried: "That is what they want for you, that howling mob outside." And, he added: "We will not be tolerant of that mob out there. We are not going to be tolerant any longer." There were shouts and exclamations from the audience: One yelled, "[k]ill the Jews;" another said, "Jews, niggers, and Catholics would have to be gotten rid of." Thus you can visualize the situation and the tenor of Terminiello's speech.

His conviction of disorderly conduct, affirmed by both the Appellate and the Supreme Court of Illinois, was set aside by the United States Supreme Court. One who considers only the language of the Chaplinsky and other cases, *i.e.,* that the First Amendment does not protect words "which by their very utterance . . . tend to incite an immediate breach of the peace," may have great difficulty in distinguishing Terminiello's speech from the words used by Chaplinsky.[72] But, whatever was in the minds of the Justices, the ground for reversal was an erroneous instruction by the trial judge to the effect that the ". . . misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." That, held the majority, is much too broad.[73] The curious fact about this decision is that at no time in the proceedings from trial court through three appellate courts, did the defendant raise any objection to

72. "The ways in which mob violence may be worked up are subtle and various. Rarely will a speaker directly urge a crowd to lay hands on a victim or class of victims. An effective and safer way is to incite mob action while pretending to deplore it, after the classic example of Antony. . . ." Mr. Justice Jackson, dissenting *Id.* at 35.

73. Mr. Justice Douglas, for the majority, stated: ". . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminiello v. Chicago, 337 U.S. 1, 4 (1948).

the judge's instruction. Accordingly, one may well be perplexed as to what the *Terminiello* case holds. The Supreme Court split 5-4, and this underlines the doubt—would the same speech have been protected by the First Amendment even if the trial judge had not improperly extended the range of the ordinance in his instruction? And the difficulty of the relevant question of policy may be indicated by noting that the interested minority groups were themselves divided in their attitude toward the *Terminiello* case.[74] In sum, we have at 5-4 decision about whose legal meaning lawyers can very well reach diverse opinions and which raises questions of policy much too difficult to be solved by mere reference to democratic values.

It might be thought, in light of the above decisions, that no limits can be placed on speakers, regardless of how insulting and offensive they are, except as regards face-to-face fighting words and profane language. And support of such an inference might be found in the case of *Kunz v. New York*.[75]

Kunz, an ordained Baptist preacher, had the effrontery, in public talks in Columbus Circle in the heart of New York City, to call the Pope "the anti-Christ," and Catholicism " a religion of the devil." Then, not content with this attack on the religious sensibilities of millions of New Yorkers, he denounced other millions of New Yorkers by calling the Jews "Christ-killers" and saying: "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't." Because of these and similar remarks in past talks, his application for renewal of a permit was refused. Kunz proceeded to talk in an open meeting, and was arrested and convicted of violating an ordinance requiring a permit to hold public worship meetings on the streets. The Supreme Court reversed the conviction, holding the ordinance unconstitutional on the ground that it gave the police power to control in advance the right to speak on religious matters without specific limitations on the exercise of that power. Although a city may regulate the use of public places, it may not forbid their use for legitimate purposes. Mr. Justice Jackson, relying upon the *Chaplinsky* case, dissented. He argued that insulting or fighting words which tend toward an immediate breach of the peace are not protected. In addition, he thought Kunz' previous record of speaking was sufficient ground to refuse him a permit. With regard to the alleged lack of standards in the New York ordinance limiting the police Commissioner's power, Jackson retorted:

74. The American Jewish Congress supported the conviction and the American Civil Liberties Union opposed it.

75. 340 U.S. 290 (1951).

"It seems hypercritical to strike down local laws on their faces for want of standards when we [*i.e.*, the Supreme Court] have no standards."[76]

Kunz' conviction was for speaking without a permit, not for disorderly conduct or for inciting a breach of the peace. We are therefore constrained to limit the decision to the validity of laws which control religious speech in advance. The same toleration accorded Jehovah Witnesses seems to have protected Kunz, too, though on different grounds. With regard to any specific guides to the police, however, we may note Mr. Justice Jackson's comment that, "this Court's prior decisions, as well as its decisions today, will be searched in vain for clear standards by which it does, or lower courts should, distinguish legitimate speaking from that acknowledged to be outside of constitutional protection."[77]

On the same day that the Supreme Court decided the *Kunz* case, the pendulum swung sharply in the direction of restriction of speech, for the Court also rendered its decision in *Feiner v. New York*.[78]

Feiner, a college student, spoke to a mixed white-Negro audience on a street corner in Syracuse, urging attendance at a meeting of the Young Progressives of America, to be addressed by John Rogge. Feiner called the mayor of Syracuse "a bum," applied the same inelegant adjective to President Truman and Mayor O'Dwyer, and he called the American Legion "a Nazi Gestapo." It was found, though not with certainty, that he also said that the Negroes "should rise up in arms and fight for their rights." There was restlessness and some pushing among the crowd, but no disorder. One man in the audience, who had his wife and children with him, said to the police officers: "If you don't get that son of a bitch off, I will go over and get him off there myself." The officers ordered Feiner to stop speaking; when he refused, they arrested him. The conviction of disorderly conduct was affirmed by the Supreme Court 6-3. Mr. Chief Justice Vinson for the majority held that the speaker was inciting a breach of the peace in urging Negroes to rise up in arms and fight for equal rights, and that the arrest was justified in order to prevent a fight.[79] But Mr. Justice Frankfurter, concurring, placed his decision

76. *Id.* at 309.
77. *Id.* at 299.
78. 340 U.S. 315 (1951).
79. ". . . [T]here was no evidence," said the Chief Justice, "which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions.
". . .
"It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here, the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace." *Id.* at 319-21.

on the ground that Feiner was interfering with traffic—since pedestrians were forced to go around the crowd and into the street—hence his vote for conviction does not go to the merits of the free speech issue. Mr. Justice Black, dissenting, argued that the police should have protected the speaker "even to the extent of arresting the man who threatened to interfere."[80] And Mr. Justice Douglas warned: "If the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech."[81]

Finally, in the *Beauharnais* case,[82] such wide restrictions were imposed as to raise very serious questions regarding the preservation of civil liberties. In this case, a conviction for violating a group libel statute[83] was upheld 5-4. Beauharnias passed out leaflets in a Chicago street, purporting to be a petition to the Mayor and City Council, in which statements were made regarding criminal attacks, "invasion, harrassment and encroachment by the Negroes," and that "communism is rife among the Negroes."[84] Mr. Justice Frankfurter, writing the majority opinion, relied on the common law precedent of criminal libel of an individual, saying, ". . . we cannot deny to a State power to punish the same utterance directed at a defined group. . . ." And he recited the formula of the *Cantwell* and *Chaplinsky* cases regarding "the lewd and obscene, the profane, the libelous, and the insulting or fighting words."[85] Recall the words used by Terminiello and Kunz, and you will meet some of the many problems that arise in any effort to use this formula in specific situations or to reconcile the decisions by reference to it.

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80. *Id.* at 321-329.

81. *Id.* at 331.

82. Beauharnais v. Illinois, 72 S. Ct. 725 (1950).

83. The statute made it unlawful ". . . to exhibit in any public place . . . any lithograph, moving picture, play, drama or sketch, which . . . portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion, which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." ILL. REV. STAT. c. 38, § 471 (1951). For a discussion, pro and con, of group libel legislation, see 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATION c. 5 (1947). Also see REP. PRES. COMM. ON CIVIL RIGHTS 52 (1947).

84. The petition contained an application for membership in the White Circle League of America, Inc., and further stated that "[i]f persuasion and the need to prevent the white race from becoming mongrelized by the Negro will not unite us then the aggressions . . . rapes, robberies, knives, guns and marijuana of the Negro surely will." Beauharnais v. Illinois, 72 S. Ct. 725, 740 (1952).

85. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting of 'fighting' words . . . such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighted by the social interest in order and morality." *Id.* at 730-731.

All the dissenting justices in the *Beauharnais* case agreed with the majority that the defendant's conduct was reprehensible. But they nonetheless voted to hold the statute unconstitutional because of its vagueness and the consequent unlimited range for censorship of books, newspapers, and the theater. The possibility of abusive police control on a vast scale was the ground of disagreement, rather than the specific facts in the *Beauharnais* case. For example, Mr. Justice Reed emphasized key words in the Illinois statute—"virtue," "derision," "obloquy"—and the absence of cases precisely defining those terms. He pointed out that philosophers through the ages have debated the meaning of "virtue."[86] Mr. Justice Douglas found in this and other recent decisions abridging speech ". . . . an ominous and alarming trend. The free trade in ideas which the Framers of the Constitution visualized disappears."[87] And Mr. Justice Black was even more emphatic in his dissent. "The statute," he said, "imposes state censorship over the theater, moving pictures, radio, television, leaflets, magazines, books and newspapers. No doubt the statute is broad enough to make criminal the 'publication, sale, presentation or exhibition' of many of the world's great classics, both secular and religious." And he ended his opinion on an ominous note: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.' "[88]

What are we to make of these decisions so far as police service in a democracy is concerned? On one point there should be general agreement: Although the situations involving the First Amendment are infrequent as compared with the everyday work of the police, the issues they raise are of paramount importance. Perhaps there are those who can believe that Supreme Court decisions are immediately reflected in the conduct of officials; but we have only to note that the third degree has long been subjected to the severest judicial condemnation, to perceive the fallacy of such optimism and, thus, to recognize our dependence upon the integrity of the police. Indeed, the correct solution of these crucial issues depends upon the police more than upon any other group in our society.

86. *Id.* at 743.

87. "Tomorrow," he said, "a Negro will be hailed before a court for denouncing lynch law in heated terms. Farm laborers in the west who compete with field hands drifting up from Mexico; whites who feel the pressure of orientals; a minority which finds employment going to members of the dominant religious group—all of these are caught in the mesh of today's decision." *Id.* at 745-746.

88. *Id.* at 740. *Cf.* Frank, *The United States Supreme Court:* 1951-1952, 20 U. OF CHI. L. Rev. 1, 24-29 (1952); also see note, 61 YALE L.J. 252 (1952). The Chicago Tribune on July 19, 1952, § 1, p. 7, col. 8 reported that the police censor board again voted to ban Chicago showings of *The Miracle* "on the ground the film violates a city ordinance providing a film cannot expose citizens of any religion to contempt."

The Supreme Court decisions can provide only a bare outline of the content of civil liberty, as the Justices themselves have repeatedly pointed out. They are practically confined to the enunciation of broad policies. It is the police who, within the vague contours of judicially suggested constitutional privilege, carve out the concrete facts of civil liberty.[89] On the other hand, in some areas, even where the rules are relatively precise, as in the exclusion of coerced confessions, the police can, and often do, nullify the law by ignoring or flouting it. Furthermore, the courts must take the cases as they come to them. The police exercise an important law-making function, not as law-declaring officials, but as suppliers of the fact-situations which form the occasions for, and limit the meaning of, the authoritative declarations of law. Accordingly, whether we reason from the potentialities of general doctrines or realistically appraise the situation in terms of an effective remedy for police transgressions, the analysis leads to one conclusion—the police possess great powers to make civil liberties vital living facts or, contrariwise, to restrict, injure and, perhaps, even destroy these basic values. One may find an escape from this dependence only insofar as democratic standards and the rule of law actually function to control the police.

The question which thoughtful police officials therefore face is this: In this vague, conflicting field of civil liberties, when the Supreme Court is often closely divided and where even members of the minority groups directly concerned take sharply opposed positions, what course of action should be followed? If the theme of this paper makes sense, there can be only one answer to that question, namely, protect society in ways which preserve the values of democracy, among which those embodied in the Bill of Rights are paramount. While this answer cannot provide specific solutions for every police problem, it is not as imprecise as might be imagined.

Among the values of democracy is the sovereignty of law; and one basic principle of our law in that criminal law must be strictly construed, *i.e.*, vagueness and ambiguity must be interpreted so as to exclude doubtful cases from the orbit of penal laws.[90] The political ethic of democratic society also maximizes the value of civil liberty. Accordingly, guided both by law and by democratic ethics, the job of the police is to resolve doubts and difficulties in ways that permit civil liberties to

89. Mr. Justice Frankfurter in *Harris v. United States*, 331 U.S. 145, 173 (1947), said " . . . it is important to remember that police conduct is not often subjected to judicial scrutiny. Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene."

90. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW c. 2 (1947).

flourish.[91] This does not oppose the standard that the police must enforce definite law impartially and regardless of their private opinion of its merits. But what is the law is very often uncertain, especially in the civil liberties field. In those cases the law that must be enforced is the narrow, strict interpretation of the relevant statutes and decisions.

If the police were to follow the general language of Supreme Court decisions which have upheld restrictions on freedom of speech, our democracy would be grievously imperiled. But if the police follow the narrow path of strict construction, they will avoid damage to civil liberty. And they may also succeed in curbing the hate-mongers, who ought to be punished for their vicious harms.

In arriving at a sound interpretation of their duties and functions the police would be well advised to keep their eyes on the facts in the adjudicated cases and either to ignore the broad judicial language as dicta or to give it only that breadth which the facts definitely require. If plainly obscene language is used, if there is a man-to-man insult in terms of common fighting words, or if there is direct incitement immediately to commit a definite crime, the duty to arrest the speaker is clear. But short of such situations unmistakably manifested, the job of the police is to maintain order while the fanatics howl. The presence of a calm officer protecting even such speakers from the attack of hostile listeners—although the policeman's personal opinions and feelings are those of the audience—provides an eloquent lesson in the method of democracy.

With reference to the problems of race tension and violence, it is evident that difficult decisions must be made. If we think solely in terms of a vicious agitator who wishes to arouse mob action against defenseless members of a minority group, there is every reason to curb his offensive speech by whatever means are necessary to do that. Indeed, if we concentrate solely on immediate objectives, even the tamer varieties of obviously false, anti-democratic speech should be forbidden. But the problem is much too complex for such simple solutions, however appealing they may be at the particular moment. Sometimes the mob, itself, is largely composed of members of a minority, as may have been true in the *Terminiello* case. Sometimes a minority may be the aggressor, at least on the level of insult and abuse, *e.g.,* the Jehovah Witnesses. But the major difficulty met in curbing speech results from the impact

91. "They [police administrators] are inclined to look upon the constitutional provisions not as measures protecting the liberties of the citizen, but more as obstacles to confound and obstruct the law enforcement officer in his daily tasks." Kooken, *Postwar Influence Upon Criminal Investigations,* 35 J. CRIM. L. & CRIMINOLOGY 426, 428 (1945).

of the basic values of democracy. Suppressing a hate-monger is only a small aspect of that problem and should not be permitted to obscure the enduring importance of the Bill of Rights, especially for minorities.

The fact that police should lean backwards in toleration of speech does not imply that they must have no opinion about the speech or that they should not distinguish good from evil, vicious talk. The police know who hate-mongers and their gang are. They can be on the lookout for the inevitable occasions when those anti-democratic agitators and their agents take to action or threaten to do so. And they can be ready to arrest them the instant they pass beyond the protected realm of speech and resort to overt conduct that clearly violates the criminal law. What has been proposed regarding racial and religious tensions comes, in a word, to this: As to speech, be tolerant, and arrest a speaker only when it is practically certain that this talk violates a criminal law.

The principles implicit in the above conclusions regarding the police function in certain situations involving freedom of speech should be applied to the entire sphere of civil liberty. Accordingly, only some distinctive aspects of search, seizure, and self-incrimination are pertinent here.

A serious legal problem concerns arrest in a house or business establishment followed by search in the area which is under the arrestee's control.[92] Another seriously disputed point involves the opportunity to obtain a search warrant although the reasonableness of the search following a lawful arrest is admitted. Although a majority of the Supreme Court has recently held that the reasonableness of the search, and not reasonable opportunity to secure a search warrant, is the requirement,[93] it is evident that the police frequently can, if they wish, satisfy the higher standard of the minority justices without loss in efficiency. Here, in the search and seizure area, another definite standard emerges to guide democratic police. If there is opportunity to secure a search warrant, the police should get one. There is certainly no police obligation to satisfy only the minimum legal requirements. They must conform to law but where there are several legal avenues, the police are free to take any of them. That a search is legal if it is reasonable, despite the fact that there was opportunity to obtain a search warrant, does not therefore require the police to omit search warrants in such cases. Instead, the duty of the police in our kind of society requires them to follow that legal course which conforms most to democratic values.

92. Harris v. United States, 331 U.S. 145 (1947).

93. United States v. Rabinowitz, 339 U.S. 56 (1950).

This is confirmed when we realize the importance of the guaranty against illegal search and seizure. "The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society."[94] Long ago, in England, the general warrant collided unsuccessfully with the deeply ingrained attitude that a man's home is his castle. And in this country, the flagrant trespasses of the King's officers were among the major causes of the Revolution.

If we keep that in mind, we will not be confused by the conflict in rules and the sharp differences of opinion regarding the admission of evidence acquired by unlawful search and seizure. The federal courts[95] and 17 states exclude such evidence, while the rest of the states admit it.[96] Those who insist that the illegally acquired evidence should be admitted argue that (1) otherwise, any blundering policeman could destroy the possibility of convicting major criminals, *e.g.,* by illegally seizing the gun from which the fatal bullet was fired; (2) the criminal, not the innocent, benefits because the evidence is found in the former's possession; (3) relevant evidence offered in court should not be barred on the collateral ground that it was illegally obtained; (4) to exclude the evidence means that two criminals—the defendant and the officer—escape, whereas both or, at least, one of them should be punished; and (5) remedies, civil and criminal, against the offending officers are available.

The proponents of the rule of exclusion argue that the occasional escape of a criminal is a small price for safeguarding the sanctity of the home. They also emphasize the impotence of the legal remedies against police officers; the State's Attorney who approved or ordered an illegal search and seizure is not likely to prosecute the policeman who acted with his consent or under his direction. And civil action for damages, as has been shown, is more in the realm of paper law than in that of effective relief. In short, exclusion of the evidence, it is argued, is the only actual deterrent of illegal search and seizure.[97]

To these arguments there may be added another regarding the contention that the admission of illegally obtained evidence is necessary for efficient law-enforcement. That claim, which seems to imply a dependence on official lawlessness, is certainly not supported by the record

94. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

95. Weeks v. United States, 232 U.S. 383 (1914); FED. R. CRIM. P. 41 (e).

96. See Appendix, Wolf v. Colorado, 338 U.S. 25, 33-39 (1949). Also see Note, *Admissibility in State Courts of Evidence Obtained by Unreasonable Searches and Seizures,* 35 MINN. L. REV. 457 (1951).

97. The rationale of the federal rule was discussed by Mr. Justice Murphy in his dissenting opinion in Wolf v. Colorado, 338 U.S. 25, 41 (1949).

of federal prosecutions, which shows an extremely high percentage of convictions. This may perhaps be explained on the ground of superior police service, but it may also be true that such service is stimulated by the federal rule excluding evidence acquired by illegal search and seizure. Nor is it apparent that law enforcement in those states which exclude such evidence lags behind that in the states which admit it. This problem merits careful socio-legal research to determine whether efficiency in law-enforcement is actually sacrificed when the rules exclude evidence secured by illegal search and seizure.[98]

The police officer's problems frequently require a choice to be made between speedy solution of a crime by methods which violate the Constitution (even though in his jurisdiction the courts will admit the evidence), and a delayed solution in order to get the necessary evidence lawfully. These situations are distinguishable from those where search warrants can be secured. If competent methods of detection are patiently pursued, a suspect can often be caught in the act of committing a crime or he can be found in a room working with the instrumentalities and evidence of his criminal vocation, *e.g.,* in gambling, so that an arrest at that time does not require ransacking an entire house to get the evidence. More difficult problems are posed where the police are dealing not with professional criminals but with a person who has committed a single major offense. Here the temptation is great to seize the hidden gun or the stolen property immediately. Even in these situations, however, there is often nothing to prevent one officer from keeping the suspect under surveillance while another goes for the search warrant. Besides, in dealing with a person who has committed a single offense, the training and resourcefulness of the police should more than compensate for the delay in acquiring specific evidence. In sum, if professional criminals, for example, dealers in narcotics, are involved, it is usually possible to secure a search warrant or, if there is patience and skillful detection, to arrest them at a strategic time and place; while in the cases of amateurs, except for those attempting to flee the jurisdiction, the police can normally solve their crimes without resorting to illegal searches and seizures. That, at least, is a fair inference from the enforcement records of states which follow the exclusionary rule.

98. In a recent New York case, Judge Frank Oliver wrote: "The police do not bother about getting warrants. They all know the rules of evidence, so laugh at the Constitution . . . [t]he case at bar is merely a mild example of how the liberties of New Yorkers are destroyed by the police and the courts. The rules of evidence subordinate the courts to a lawlessness of the police. We are supposed to ratify the boldest and most lawless type of rough-house the police engage in." People v. Reilly, 105 N.Y.S.2d 845 (1951).

Finally, the gap between the opposing rules could be narrowed by maintaining discipline in the police departments and by providing effective remedies for the illegal conduct of police. Such discipline and legal controls would be strong deterrents of illegal search and seizure, reducing the present need for the exclusionary rule.[99] This emphasizes again that it is daily discipline, thoughtful conduct, and legal control of the police which are of decisive importance.

Throughout this paper and especially in comparing the police of dictatorships with that of democratic societies, it has been impossible to avoid aspects of the "third degree." The "third degree" is simply a new name for an ancient practice—the torture of suspected offenders. Its use by officers of the law in our society is a paradox which threatens the very foundations of democracy. Accordingly, it is no accident that the third degree involves all the questions which have been discussed—the distinctive characteristics of democratic police, the efficacy of legal remedies for abuses by officials, the disadvantageous position of minorities and underprivileged persons, the dependence of sound action in riots and other crises upon the quality of everyday police conduct, and the heightening of all these issues in the area of civil liberties. The interconnectedness of these problems is revealed in the fact that police who brutalize law-enforcement to the point of torturing suspects are hardly apt to respect civil liberties.

The exclusion of forced confessions from the evidence has been traditionally rested on the untrustworthiness of such statements.[100] It is clear, however, in recent Supreme Court decisions, that an additional reason is the gross violation of personality which offends the sense of democratic justice regardless of the fact that the truth of the confessions is established by further investigation.[101] In short, the exclusionary rule is also a negative application of the value of free speech.[102]

Recent Supreme Court opinions have gone far beyond the exclusion of involuntary confessions to the point of condemning police inter-

99. *Cf.* "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, *if consistently enforced,* would be equally effective." Wolf v. Colorado, 338 U.S. 25, 31 (1949). (emphasis added.)

100. 3 WIGMORE, EVIDENCE § 815 *et seq.* (3rd ed. 1940).

101. See Watts v. Indiana, 338 U.S. 94 (1949); Ashcraft v. United States, 327 U.S. 274 (1946); Lisenba v. California, 314 U.S. 219 (1941).

102. The consistency of admitting real evidence acquired by coerced confessions while excluding evidence secured by illegal search and seizure, as well as other methods that offend a sense of justice, and thus violate due process merits analysis. See Rochin v. California, 342 U.S. 165 (1952), where the forcible use of a stomach pump to extract narcotic capsules was held to violate the due process clause.

rogations conducted "out of the presence of friends and relatives." These cases compel us to face the fact that sometimes judicial decisions, if they do not aggravate present difficulties, do not contribute appreciably to their solution.[103] For example, whatever view one takes of the McNabb rule—that a confession obtained during illegal detention without the slightest coercion, physical or psychological, is inadmissible[104] —the unfortunate fact is that the rule widens the gap between law and police practices. And the dubious efficacy of dealing with serious abuses indirectly, by a rule of evidence, again emphasizes the need of actual remedies for harms committed by officials as well as of discipline and better training of the police.

In considering ways out of the impasse, two facts must be taken as settled. On the one hand, private interrogation of suspects immediately after their arrest is essential in any system of effective detection. And, at the same time, one cannot avoid the duty to subject law-enforcement, including interrogation, to democratic ideals. This is precisely the kind of problem which the common law and democratic institutions have often demonstrated remarkable competence to solve. Even without the aid of relevant factual studies the prevalent confusion created by the *McNabb, Upshaw,* and *Gallegos* cases can certainly be sharply diminished.[105] If there is anything novel about the solution of this problem, which the general thesis of this discussion suggests, it is that a fuller understanding of the third degree depends upon our viewing it persistently in relation to police functions in a democratic society.

Finally, we have but to lift our eyes from that specific configuration of facts and values to encounter the principal issues confronting democratic society all over the world. The maintenance of order requires the use of experts and professionals who, if democracy is to survive, must themselves be subordinated to popular control. Without the experts we cannot solve the difficult problems of aggression in modern society. But unless the experts are subjected to the rule of law and other forms of popular control, they become an insensitive élite. The society is then subjected to so-called scientific, but assuredly not democratic, treatment. The illegal use of physical force by officers of the law is the most dramatic exhibition of what is involved in this vital issue. That is why the theme of this paper, though focused on the relatively narrow ques-

103. Inbau, *The Confession Dilemma in the United States Supreme Court,* 43 ILL. L. REV. 442 (1948).

104. McNabb v. United States, 318 U.S. 332 (1943).

105. Upshaw v. United States, 335 U.S. 410 (1948). *But cf.* Gallegos v. Nebraska, 342 U.S. 55 (1951).

tion of police functions, may have general significance for the paramount problem of our times.

That problem, whose solution is epitomized as the universal sovereignty of law, concerns the maintenance of world order by methods which are compatible with democratic values. It is precisely the police problem of every democratic society, "writ large." For solution of the world problem, we depend upon the experience and skills acquired in the smaller communities. Not many persons can participate directly in international affairs. But every thoughtful person can contribute to the solution of the universal problem, as well as to that of those problems which touch him intimately in his particular locality, by helping to make police service in his neighborhood a truer instrument of the enduring values of democratic society.

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