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Wayne R. LaFave
University of Illinois

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ARTICLES

CONTROLLING DISCRETION BY ADMINISTRATIVE REGULATIONS: THE USE, MISUSE, AND NONUSE OF POLICE RULES AND POLICIES IN FOURTH AMENDMENT ADJUDICATION

Wayne R. LaFave*

In assaying fourth amendment jurisprudence, it is useful to take into account available knowledge regarding the actual search and seizure practices of the police. Especially helpful is the perspective afforded by the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States,¹ which ranks as the pre-eminent empirical study of law enforcement procedures in this country. Despite the fact — or, more likely, because of the fact — that the ABF Survey was published over twenty years ago, certain insights from that study highlight some recent and significant changes in this *corpus juris inconstans*.

Clearly "the most important single finding of the Survey" was "how hard it is to make accurate straightforward statements about criminal law administration" because of the previously unperceived "complexity" of that process.² That complexity, the Survey established, attends activities of the police that implicate the fourth amendment. In deciding whether to make an arrest or other seizure of a person and whether to search for or seize property, the police are in

* David C. Baum Professor of Law and Center for Advanced Study Professor of Law, University of Illinois. B.S. 1957, LL.B. 1959, S.J.D. 1965, University of Wisconsin. — Ed. I have benefited greatly from the comments of Herman Goldstein, Lloyd Ohlin, Frank Remington, and Victor Rosenblum. An abridged version of this article will later appear as a chapter in a book-length retrospective on the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States.

1. The results of the Survey were published in five volumes. In chronological order by subject matter, they are: L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT (F. Remington ed. 1967); W. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (F. Remington ed. 1965); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (F. Remington ed. 1969); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (F. Remington ed. 1966); R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE (F. Remington ed. 1969).

2. *Epilogue to the Survey*, in F. MILLER, *supra* note 1, at 351, 351-52.

actuality called upon to make decisions which are quite varied in their character and effect and which are influenced by a vast range of factors and considerations.³

Because courts in the pre-Survey days did not perceive this complexity, the fourth amendment jurisprudence of that era was decidedly one-dimensional. What Frank Allen has called "the process of 'factualization' in search and seizure cases"⁴ had barely begun, and consequently the Supreme Court's decisions during that period treated the fourth amendment "as a monolith: whenever it restricts police activities at all, it subjects them to the same . . . restrictions."⁵ Illustrative is *Henry v. United States*,⁶ where FBI agents investigating a theft from an interstate shipment kept suspect Pierotti and his companion Henry under surveillance and saw them on two occasions loading cartons from a private residence. The agents then stopped the vehicle in which the two were riding and overheard Henry instruct Pierotti to tell the agents that he (Pierotti) had "just picked me up." Over the objection of the two dissenters that "this Court is not bound by the Government's mistakes,"⁷ the *Henry* majority accepted the prosecution's inexplicable concession that the stopping of the car constituted an "arrest," for which probable cause was lacking. That characterization made irrelevant "what transpired at or after the time the car was stopped."⁸

Henry stands in sharp contrast to the post-Survey decision in *Terry v. Ohio*,⁹ which expressly rejected the contention "that there is not — and cannot be — a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest."¹⁰ Significantly, the *Terry* majority drew upon the findings of the ABF Survey regarding the complexity of the stop-and-frisk activities of the police to support an important conclusion regarding the application of the exclusionary rule to such conduct. Emphasizing that "street encounters between citizens and police officers are incredibly rich in diversity" and "are initiated by the police for a wide variety

3. See generally W. LAFAVE, *supra* note 1; L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 1.

4. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 4 (1950).

5. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974).

6. 361 U.S. 98 (1959).

7. 361 U.S. at 105 (Clark, J., and the Chief Justice, dissenting).

8. 361 U.S. at 104.

9. 392 U.S. 1 (1968).

10. 392 U.S. at 11.

of purposes, some of which are wholly unrelated to a desire to prosecute for crime," the Supreme Court concluded that not all such activity is

responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.¹¹

The *Terry* decision is admittedly somewhat unique, as not *all* the Supreme Court's post-Survey fourth amendment decisions manifest a comparable understanding of the complexity of the search and seizure activities of the police. It is nonetheless a fair generalization that the Court now has a much greater appreciation of this complexity than it did at the time of *Henry*. Whether by examination of the now-available empirical data (as in *Terry*) or simply by virtue of the steady diet of fourth amendment cases which followed in the wake of *Mapp v. Ohio*,¹² allowing the Supreme Court to "see in the round rather than the flat"¹³ the fourth amendment conduct of the police, the Court now understands how rich and varied this activity is in real life. Allen's "process of 'factualization'" has moved forward in fourth amendment jurisprudence; the Supreme Court is now much more willing to judge discrete search or seizure activity on its own terms.¹⁴

Yet another recurring theme in the ABF Criminal Justice Survey concerns "the relatively wide discretion¹⁵ that officials have in enforcing the criminal law."¹⁶ Of particular interest here is that discretion in the criminal process which prior to the Survey¹⁷ had been least visible: that exercised by police in determining when and how to enforce the

11. 392 U.S. at 13-14 (footnote omitted).

12. 367 U.S. 643 (1961).

13. K. LLEWELLYN, *THE COMMON LAW TRADITION* 263 (1960).

14. For further discussion of this development, see LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases,"* 85 MICH. L. REV. 427 (1986).

15. See K. DAVIS, *DISCRETIONARY JUSTICE* 4 (1969) ("A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.").

16. *Epilogue to the Survey*, *supra* note 2, at 352.

17. In the years since the Survey, however, the matter of police discretion has been the subject of intense scrutiny in the literature. See, e.g., *Discretion in Law Enforcement*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 1. For a most useful selective bibliography on police discretion, listing approximately 150 reports, books, and articles, see Center, *Police Discretion: A Selected Bibliography*, *Discretion in Law Enforcement*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 303.

law.¹⁸ Much of that discretion has to do with determining how to invoke the criminal process and when to use a variety of investigative techniques, and thus falls within the realm of fourth amendment activity. Included here are such decisions as whether to undertake a custodial arrest,¹⁹ whether to persist in that attempt by using force,²⁰ whether to stop a suspect for investigation,²¹ and whether to conduct a search.²²

In the pre-Survey search and seizure decisions of the Supreme Court, the Court was largely oblivious to the discretionary practices of the police and the risks they posed to fourth amendment interests. Illustrative is *Harris v. United States*,²³ holding that FBI agents lawfully searched defendant's entire apartment "incident to" his arrest there. The *Harris* majority reassured that this was not "a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search."²⁴ That comment, of course, overlooks the fact that police routinely exercise discretion whether to arrest perpetrators at their home or elsewhere. Further, the choice in a particular case to arrest at home, because it is readily explainable in terms of the arrest purpose, could easily be legitimated even if primarily motivated by the opportunity to "piggyback" onto the arrest another, far greater fourth amendment intrusion — a full but warrantless search of the dwelling.²⁵ The post-Survey decisions of the Supreme Court are not consistently of a better sort; true, *Harris* has been overruled,²⁶ but other decisions with the vice of *Harris* can be found.²⁷ But at least the term "police discretion" has now entered the Supreme Court's lexicon,²⁸ and in recent years (as I discuss later in this article) the Court has sometimes expressly recognized that limits upon that discretion are essential to the protection of fourth amendment values.

Given the complex and discretionary character of police search and seizure decisions, some limitations on this power are essential.

18. See generally W. LAFAYE, *supra* note 1; L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 1.

19. W. LAFAYE, *supra* note 1, at 168-207.

20. *Id.* at 208-26.

21. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 1, at 5-94.

22. *Id.* at 95-205.

23. 331 U.S. 145 (1947).

24. 331 U.S. at 153.

25. See generally W. LAFAYE, *supra* note 1, at 41-43.

26. *Chimel v. California*, 395 U.S. 752, 768 (1969).

27. *E.g.*, *New York v. Belton*, 453 U.S. 454 (1981).

28. See, *e.g.*, *Colorado v. Bertine*, 479 U.S. 367, 375 (1987).

The issue, however, is not discretion versus no discretion, but rather how this discretion should be confined, structured and checked. As Professor Kenneth Davis once put it: "Half the problem is to cut back *unnecessary* discretionary power. The other half is to find effective ways to control *necessary* discretionary power."²⁹ One important conclusion of the ABF Survey is that this bipartite challenge cannot be completely and successfully met by the legislative and judicial branches alone; the police themselves are perceived to have an important role to play. As the ABF Survey concludes, "police ought to acknowledge their exercise of discretion and reduce their enforcement policies to writing and subject them to a continuing process of critical re-evaluation."³⁰

Over the twenty-five intervening years, this has occurred to an immeasurable but noticeable degree.³¹ As one recent assessment put it: "Historically, law enforcement investigative practices were informal and seldom, if ever, reduced to writing. In the past few years this has changed and now, increasingly, enforcement agencies record enforcement practices in written form, usually referring to the written statements as 'guidelines.'"³² This accounts for yet another distinction between pre-Survey and post-Survey fourth amendment jurisprudence: only in the more recent era have courts sometimes considered police regulations in ruling upon search and seizure issues.

For the reasons detailed in the next section, police rulemaking regarding their fourth amendment activities is a highly desirable undertaking. This being so, it is appropriate to consider whether or not the

29. K. DAVIS, *supra* note 15, at 51 (emphasis in original).

30. W. LAFAVE, *supra* note 1, at 513.

31. See H. GOLDSTEIN, *POLICING A FREE SOCIETY* 117 (1977) (noting "a number of police agencies — most notably those in Washington, D.C., Dayton, Ohio, Madison, Wisconsin, and Boston, Massachusetts — have embarked upon ambitious efforts to develop guidelines for their personnel"); Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 *LAW & CONTEMP. PROBS.*, Autumn 1971, at 500, 502 (on the District of Columbia's orders governing eyewitness identification of suspects and automobile searches); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 *GEO. L.J.* 365, 399-400 (1981) (on the District of Columbia's regulations on traffic stops); Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights*, 52 *J. URB. L.* 25, 26-27 n.9 (1974) (noting developments in D.C., San Diego, Dayton, Los Angeles, Memphis, and San Antonio).

The rulemaking movement was advanced by the publication in 1974 of a series of pamphlets containing Model Rules for Law Enforcement on a variety of topics. The pamphlet titles are: *Search Warrant Execution*; *Stop and Frisk*; *Warrantless Searches of Persons and Places*; *Searches, Seizures and Inventories of Motor Vehicles*; *Release of Arrest and Conviction Records*; and *Eyewitness Identification*. The Project's Advisory Board consisted of representatives of the police departments of Cincinnati; Dade County, Fla.; Dallas; Dayton; District of Columbia; Kansas City, Mo.; Oakland; Phoenix; San Antonio; San Diego; and San Jose.

32. F. REMINGTON, D. NEWMAN, E. KIMBALL, H. GOLDSTEIN & W. DICKEY, *CRIMINAL JUSTICE ADMINISTRATION* 153 (rev. ed. 1982).

judicial branch has a part to play in that enterprise. The answer, quite obviously, is yes: courts "have a role in stimulating this administrative process and reviewing its products."³³ It is the performance to date of this role by the courts (especially the Supreme Court) which constitutes the focus of this article. More specifically, I consider: To what extent have the courts performed the "stimulating" function by mandating or encouraging police policymaking? To what extent have the courts performed the "reviewing" function to ensure that law enforcement regulations accomplish the hoped for benefits of rulemaking? And, more generally, precisely how has the existence or nonexistence of police rules influenced the quality and character of fourth amendment jurisprudence?

I. POLICE RULEMAKING AND THE FOURTH AMENDMENT

"The police," Kenneth Davis once commented, "are among the most important policy-makers of our entire society. And they make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second."³⁴ As the pervasiveness of this police discretion became more widely known, there arose in many quarters the understandable concern that this vast discretion must be limited and controlled. To accomplish this, many have concluded, a system of rulemaking by law enforcement agencies themselves is imperative. The case for rulemaking has been made by many thoughtful commentators, including Judge Carl McGowan³⁵ and Professors Anthony Amsterdam,³⁶ Herman Goldstein,³⁷ and Kenneth Davis.³⁸ Rulemaking has been advocated in such law reform efforts as the ALI's Pre-Arrest Code³⁹ and the ABA's Criminal Justice Standards,⁴⁰ and in such influential studies as those by the President's Commission on Law Enforcement and Administration of

33. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 813 (1970).

34. K. DAVIS, *supra* note 15, at 222 (footnote omitted).

35. McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

36. Amsterdam, *supra* note 5, at 409-39; Amsterdam, *supra* note 33, at 810-15.

37. H. GOLDSTEIN, *supra* note 31, at 106-26; Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967); Goldstein, *Trial Judges and the Police*, 14 CRIME & DELINQ. 14, 22-25 (1968).

38. K. DAVIS, *supra* note 15, at 52-161; K. DAVIS, POLICE DISCRETION 98-138 (1975).

39. AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARREST PROCEDURE § 10.3 (1975).

40. 1 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 1-4.3 (2d ed. supp. 1986).

Justice⁴¹ and the National Advisory Commission on Criminal Justice Standards and Goals.⁴² Consequently, this article need not establish the need for development of guidelines by police agencies; it will suffice to summarize the case already made.

In some of this writing (especially that of Kenneth Davis), the emphasis is upon that police discretion related to the substantive criminal law — that is, law enforcement decisions *not* to invoke the criminal process against certain individuals who have apparently violated some provision in the penal code. This is police discretion of the lowest possible visibility, and it is a form of police discretion that traditionally has not been a subject of judicial oversight and that, by its nature, does not readily lend itself to such supervision. Given these circumstances, it is difficult to quarrel with the proposition that meaningful reform makes necessary resort to a regime of police rulemaking.⁴³ It may be less apparent that the development of guidelines by the police themselves is essential with respect to their fourth amendment activities. After all, at least since *Mapp v. Ohio*⁴⁴ the courts, through the mechanism of the exclusionary rule, have had the responsibility for defining the fourth amendment limits of police power and for imposing the suppression sanction when those limits have been exceeded. The exclusionary rule “assures a great deal of judicial attention”⁴⁵ to such police practices and thus has resulted in considerable judicial elaboration of fourth amendment requirements,⁴⁶ culminating in an “enormous increase in police training and education about constitutional rights.”⁴⁷ Thus, police rulemaking might appear superfluous at best.

That is not the case, however. To appreciate this, it is helpful to begin with an understanding that this traditional, virtually exclusive reliance upon the judiciary for the formulation of fourth amendment standards cannot be taken as an apodictic manifestation that courts

41. THE PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 18-21 (1967) [hereinafter TASK FORCE REPORT].

42. NATIONAL ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, POLICE 21-28 (1973).

43. For the advantages of rulemaking in that context, see K. DAVIS, *supra* note 15, at 90-91.

44. 367 U.S. 643 (1961).

45. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255, 260 (1961).

46. Regarding the California experience, see Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 323; for the Illinois experience, see LaFave, *Improving Police Performance Through the Exclusionary Rule — Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 580-81 n.63 (1965).

47. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 CRIM. JUST. ETHICS 28, 31 (1982).

possess singular omniscience on these matters. To the contrary, as Amsterdam has pointed out, this judicial activism

has been the almost inevitable consequence of the failure of other agencies of law to assume responsibility for regulating police practices. In most areas of constitutional law the Supreme Court of the United States plays a back-stopping role, reviewing the ultimate permissibility of dispositions and policies guided in the first instance by legislative enactments, administrative rules or local common-law traditions. In the area of controls upon the police, a vast abnegation of responsibility at the level of each of these ordinary sources of legal rulemaking has forced the Court to construct *all* the law regulating the everyday functioning of the police.⁴⁸

In the face of this phenomenon, there is no reason to doubt the contention that a "new allocation of responsibilities is required" and that the role of the Supreme Court (and courts generally) "is better adapted to review than to initiation."⁴⁹ Indeed, that contention — which presumes a process of administrative regulation at the police level — makes especially good sense in the fourth amendment area.

The fourth amendment, whether viewed in terms of its preconstitutional history or its current interpretation by the Supreme Court, is concerned with indiscriminate searches and seizures of two types: (i) "*unjustified* searches and seizures," that is, those where "an adequate justification" for such intrusion has not been shown; and (ii) "*arbitrary* searches and seizures," that is, those "conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize."⁵⁰ The first of these concerns is reflected in the explicit and familiar fourth amendment requirement of "probable cause," while the second is manifested by the amendment's interpretation "as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment."⁵¹ Protection against arbitrary searches and seizures lies in controlling police discretion, which requires a determination that the police action taken against a particular individual corresponds to that which occurs with respect to other persons similarly situated. Judicial assessment of just what the category is (that is, who else really is "similarly situated") and whether or not like cases in fact receive the same disposition will be more meaningful and reliable if the record in the case reveals a preexisting police regulation on the subject.

48. Amsterdam, *supra* note 33, at 790.

49. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 542.

50. Amsterdam, *supra* note 5, at 411.

51. J. ELY, *DEMOCRACY AND DISTRUST* 97 (1980).

A second characteristic of the fourth amendment is that the experience and expertise of the police, when adequately established in court, is properly taken into account in determining the legality of the challenged police conduct.⁵² A process of police rulemaking makes it possible for the experience and expertise of the entire department to be focused upon the matter at issue and more effectively communicated to the reviewing court. As Goldstein has noted, if police policy has been made through a process of administrative rulemaking, then

in the review of police practices initiated by a motion to suppress evidence, a judge could promote a dialogue with the police by affording the law-enforcement agency an opportunity to justify and explain the practice at issue, thereby focusing judicial review upon the legality and propriety of department policies rather than the actions of an individual officer. This would give the police an opportunity to articulate the experience and expertise influential in formulating their policies — factors to be considered in weighing the propriety of their actions. A judge fully informed on all of the circumstances related to a given police practice is obviously in a better position to pass judgment upon its legality and propriety than one whose knowledge of the procedure is limited to what is revealed in the typical hearing on a motion to suppress evidence.⁵³

Yet another characteristic of the fourth amendment (or, more precisely, of its exclusionary rule) is that only certain types of police search and seizure activity regularly come to the attention of the courts. Because the exclusionary rule ordinarily may be invoked only by a defendant in a criminal case, those police searches and seizures which are undertaken for purposes other than prosecution or which do not result in the discovery of evidence do not receive judicial scrutiny. As acknowledged in *Terry v. Ohio*,⁵⁴ the exclusionary rule “is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal,” a not uncommon occurrence.⁵⁵ With respect to these practices, police

52. *E.g.*, *United States v. Ortiz*, 422 U.S. 891, 897 (1975) (“officers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience with aliens and smugglers”).

53. Goldstein, *Trial Judges and the Police*, *supra* note 37, at 24 (footnote omitted).

54. 392 U.S. 1, 14 (1968).

55. Illustrative are

arrest or confiscation as a punitive sanction (common in gambling and liquor law violations), arrest for the purpose of controlling prostitutes and transvestites, arrest of an intoxicated person for his own safety, search for the purpose of recovering stolen property, arrest and search and seizure for the purpose of “keeping the lid on” in a high crime area or of satisfying public outcry for visible enforcement, search for the purpose of removing weapons or contraband such as narcotics from circulation, and search for weapons that might be used against the searching officer.

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 721-22 (1970).

rulemaking is needed not so much as an aid to judicial oversight but rather (as with police nonenforcement decisions) because no other meaningful restraint on the activity of individual officers exists. The mere absence of routine judicial review of such activities does not mean that any police regulations adopted would merely approve the established practice. As Amsterdam warns, it is

a grave mistake . . . to assume that all of the things that policemen do in a state of rulelessness would continue to be done under a regime of rules. Many practices now tolerated in individual cases . . . would not be approved or authorized by the police command structure itself if it were required to assume responsibility for determining the propriety of those practices as a general mode of departmental operation.⁵⁶

Departmental policymaking regarding the fourth amendment activities of police is desirable because it "improves police performance" in four major ways: (1) "Rulemaking enhances the quality of police decisions" because it focuses attention on the fact that policy is being made, promotes the placing of decisionmaking authority in responsible and capable hands, increases the seriousness with which police confront the implications of their practices for the efficiency of law enforcement and the liberty of citizens, promotes decisionmaking efficiency, and enhances police prestige and morale. (2) "Rulemaking tends to ensure the fair and equal treatment of citizens" because rules reduce the influence of bias, provide uniform standards for use in the training of personnel, and serve both to guide and to control police behavior. (3) "Rulemaking increases the visibility of police policy decisions" because the rulemaking process requires the departmental command structure to learn what officers in the field are doing, and informs other governmental agencies and the public about what the police are doing. (4) "Rulemaking offers the best hope we have for getting policemen consistently to obey and enforce constitutional norms that guarantee the liberty of the citizen" because rules made by the police are most likely to be obeyed by the police and, when not obeyed, are most likely to be effectively enforced by the department.⁵⁷

II. IMPOUNDMENTS AND INVENTORIES: THE *BERTINE* "STANDARDIZED PROCEDURE" REQUIREMENT

In a series of cases culminating in *Colorado v. Bertine*,⁵⁸ the Supreme Court has evaluated the reasonableness under the fourth amendment of various police activities related to the impoundment or

56. Amsterdam, *supra* note 5, at 421.

57. *Id.* at 423-28.

58. 479 U.S. 367 (1987).

inventory of effects. In the first case, the Court declined to rely upon a police regulation that did exist;⁵⁹ in the second, the Court relied upon a regulation that actually did not exist;⁶⁰ but finally, in *South Dakota v. Opperman*,⁶¹ the Court appeared to rely somewhat upon a regulation that did exist. Defendant's car was towed to a city impound lot after it received two overtime parking tickets while parked at the same location over seven hours. An officer then inventoried the contents of the car, discovering marijuana in the unlocked glove compartment. The Court found the police conduct constitutional. Citing the two earlier cases in support of the proposition that "this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents,"⁶² the Court in *Opperman* upheld the inventory as such a reasonable intrusion. But the Court intimated that the existence of appropriate police regulations on the subject might be a *sine qua non*. The *Opperman* plurality opinion put forward the proposition "that inventories pursuant to standard police procedures are reasonable,"⁶³ and Justice Powell, concurring separately, stressed that the inventory "was conducted strictly in accord with the regulations of the Vermillion Police Department."⁶⁴

59. At issue in *Harris v. United States*, 390 U.S. 234 (1968), was the admissibility of the robbery victim's vehicle registration card, found while an officer was securing defendant's impounded car after it had been inventoried pursuant to a regulation of the D.C. police department. By relying upon the district judge's findings "that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody," 390 U.S. at 236, the Court managed to avoid expressing any judgment about the police regulation or its bearing on the legality of police action pursuant to the regulation.

60. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), after defendant crashed his vehicle into a bridge abutment, police in that small Wisconsin community had the disabled car towed to a private garage and then took defendant, who was drunk and incoherent, to a hospital. The local police, believing that the defendant, a Chicago policeman, was required to carry his service revolver at all times, then went to the garage and searched the car parked outside for the weapon and found evidence of a homicide. The Supreme Court, in rejecting the court of appeals' conclusion that it was an unreasonable search, emphasized both the searching officer's "specific motivation and the fact that the procedure he followed was 'standard.'" 413 U.S. at 443. The motivation, "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands," was deemed by the Court "as immediate and constitutionally reasonable as" that in *Harris*. 413 U.S. at 443, 447. The Court repeatedly stressed the officer's suppression hearing testimony that the effort to find the revolver was "'standard procedure in our department,'" 413 U.S. at 437, but it was never explained precisely how this entered into the fourth amendment equation. Nor was the standard procedure ever specifically stated or any actual police regulation ever identified. The Court simply "assumed that the small Wisconsin police department had an administrative policy on vehicle inventorying. In fact, no such policy existed." F. REMINGTON, D. NEWMAN, E. KIMBALL, H. GOLDSTEIN & W. DICKEY, *supra* note 32, at 152.

61. 428 U.S. 364 (1976).

62. 428 U.S. at 373.

63. 428 U.S. at 372.

64. 428 U.S. at 380 (Powell, J., concurring). In footnote 6, Justice Powell elaborated that

Opperman was relied upon in *Illinois v. Lafayette*,⁶⁵ where the Court upheld a stationhouse inventory of defendant's effects following his arrest for disorderly conduct. Emphasizing an officer had testified "it was standard procedure to inventory 'everything' in the possession of an arrested person," the Court held "that it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."⁶⁶ Significantly, *Lafayette* suggests that rulemaking at the police level is better suited for dealing with certain fourth amendment activities of law enforcement officers. The Court cautioned that "it is not our function to write a manual on administering routine, neutral procedures of the station house," and that the Justices were "hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the station house."⁶⁷ These comments responded to the lower court's assertion that a less intrusive policy (for example, placing defendant's bag in a sealed locker) would suffice.

Then came *Bertine* where, after defendant's arrest for driving under the influence, his van was inventoried prior to being towed to an impoundment lot, resulting in the discovery of drugs in a backpack found lying behind the back seat. The Court emphasized that in the present case, "as in *Opperman* and *Lafayette*, . . . the police . . . were following standardized procedures,"⁶⁸ and then proceeded to declare, much more clearly than had the Court's earlier decisions, the central place of police rulemaking in the constitutional scheme: "We conclude that . . . reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."⁶⁹ In rejecting the state court's conclusion that *Bertine*'s fourth amendment rights had been violated, the Court noted that both the impoundment of *Bertine*'s car and the opening of containers found in the car during the inventory conformed with Boulder Police Department regulations.

To the extent that *Bertine* either encourages or compels police de-

under these regulations *all* impounded vehicles are inventoried and the inventories *always* extend to the glove compartment.

65. 462 U.S. 640 (1983).

66. 462 U.S. at 642, 648.

67. 462 U.S. at 647, 648.

68. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

69. 479 U.S. at 374.

partments to engage in the promulgation of guidelines on the subjects of impoundment and inventory of vehicles and other effects, it should be applauded. Especially because (as *Bertine* notes) "an inventory search may be 'reasonable' under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause,"⁷⁰ some significant protection in lieu of the two traditional fourth amendment safeguards of probable cause and warrant is essential. As Justice Powell emphasized in his *Opperman* concurrence, to protect against "arbitrary invasions by government officials" it is essential that "no significant discretion is placed in the hands of the individual officer" concerning "the subject of the search or its scope."⁷¹ Thus, it is not sufficient that the challenged impoundment or inventory is of the kind undertaken by police departments generally,⁷² nor is it sufficient that it conforms to the particular officer's standard practice.⁷³ What is necessary, says *Bertine*, is that this officer was "following standardized procedures," which certainly can be most convincingly proved by showing that the officer's actions conform to "the established policy or procedures of the particular law enforcement agency."⁷⁴

Police rulemaking on this subject also permits more meaningful input of police expertise. Given that what is at issue here is a "routine practice"⁷⁵ which, as *Bertine* says, serves "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger,"⁷⁶ it is appropriate to expect the police agency in the first instance to make a judgment about exactly what kind of routine is needed to

70. 479 U.S. at 371.

71. *South Dakota v. Opperman*, 428 U.S. 364, 377, 384 (1976) (Powell, J., concurring).

72. As stated in *United States v. Hellman*, 556 F.2d 442, 444 (9th Cir. 1977):

The fact that other police departments routinely follow such a practice may give support to the proposition that such a practice, if locally followed, is reasonable. It does not, however, render reasonable a search where the inventorying practice is not locally followed and the search, thus, is a departure from local practice. A locally followed practice gives some assurance that a particular car was not singled out for special searching attention.

73. As stated in *People v. Long*, 419 Mich. 636, 647, 359 N.W.2d 194, 199 (1984) (footnote omitted) (quoting *People v. Long*, 413 Mich. 461, 467, 320 N.W.2d 866, 875 (1982) (Moody, J., concurring)):

Although the officer testified as to his personal "standard" procedure, this procedure does not meet the requirements of reasonableness as suggested in *Opperman*. A standard departmental practice gives some assurance that the particular vehicle or part of the vehicle was not singled out for a search based upon an improper motive. Without a departmental policy, too much discretion is placed in the hands of a police officer. His decision to search may be an arbitrary one.

74. *State v. Atkinson*, 298 Or. 1, 10, 688 P.2d 832, 837 (1984).

75. *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976).

76. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

serve those governmental interests in that particular locality. The result is not state-wide uniformity (as likely would be the case if the matter were left entirely to the courts), but this is all to the good; "different procedures might be appropriate for various circumstances in different communities throughout the state."⁷⁷ Moreover, if the process begins with policymaking by law enforcement agencies, then the courts can perform a more appropriate role. As one state supreme court put it:

It is not our function to decide as a matter of policy how, and for what purpose, automobiles or other private property that come into official custody should be examined. That is a matter for politically accountable officials to decide by laws, ordinances, or delegations of rulemaking authority. Our role . . . is to assure that such policies and procedures as are adopted do not violate constitutional guarantees.⁷⁸

In the years prior to *Bertine*, lower courts took varied positions concerning the existence or nonexistence of police department regulations on the subject of impoundment and inventory. At one extreme was the view that "the fact such a search is made pursuant to a police regulation should have no bearing in determining whether the search is reasonable";⁷⁹ at the other was the notion that to be lawful an inventory "must be made pursuant to established police regulations."⁸⁰ Between these extremes were cases in which regulations were not mandated but, because they did exist and were placed in evidence, were used to determine the lawfulness of the police conduct. That is, the legality of the challenged impoundment or inventory was determined by whether the police conformed with⁸¹ or deviated from⁸² those regulations. *Bertine* certainly rejects the first extreme, and rightly so, but it is by no means apparent that the Supreme Court has opted for the second extreme, which would require that "standardized procedures" be established *only* by policies set out in writing in a police manual or standard operating procedure. In the recent case of *United States v. Frank*,⁸³ the Third Circuit upheld an inventory that

77. *Atkinson*, 298 Or. at 6-7, 688 P.2d at 835, noting that state-wide uniformity imposed by appellate courts might well be grounded in some mistaken assumptions. "For instance, a requirement that police attempt to contact the owner of each impounded vehicle before undertaking an inventory might presuppose that all law enforcement agencies have a uniform capability that may or may not exist." 298 Or. at 7, 688 P.2d at 835.

78. *Atkinson*, 298 Or. at 6, 688 P.2d at 835.

79. *United States v. Lawson*, 487 F.2d 468, 476 (8th Cir. 1973).

80. *State v. Ruffino*, 94 N.M. 500, 502, 612 P.2d 1311, 1313 (1980).

81. *E.g.*, *United States v. Bosby*, 675 F.2d 1174 (11th Cir. 1982); *People v. Trusty*, 183 Colo. 291, 516 P.2d 423 (1973).

82. *E.g.*, *State v. Vernon*, 45 N.C. App. 486, 263 S.E.2d 340 (1980); *State v. Hygh*, 711 P.2d 264 (Utah 1985).

83. 864 F.2d 992 (3d Cir. 1989).

conformed to "unwritten standard procedures" testified to by a police lieutenant, though the department in question "had no written procedures governing inventory searches."⁸⁴ The *Frank* court declared: "No Supreme Court case has ever held an inventory search invalid because of the absence of formalized pre-existing standards."⁸⁵

This latter statement is unquestionably true,⁸⁶ and in defense of *Frank* it might be asserted that *Bertine* does not even contain specific dictum suggesting that if the procedures there had not been in writing the result might be different. But, while *Frank* may in that sense be "correct," it is doubtful that the conclusion reached there is a desirable one. In support of *Frank*, it might be argued that an inventory should be upheld when, as in *Madison v. United States*,⁸⁷ although the police department did "not have written guidelines for such searches, the officer testified that he had been trained by his supervisors to perform inventory searches in this manner and he did so in accordance with standard operating procedures."⁸⁸ But once it is accepted that the *Bertine* "standardized procedures" can be established by police testimony about current practices rather than by proof of preexisting written policies, there are dangers aplenty. As *United States v. Lyons*⁸⁹ said of such a situation: "It is far from clear that this sort of vague, customary departmental 'policy' would satisfy the concerns expressed by the Court in *Opperman*."⁹⁰ A primary concern, of course, is the possibility of undetected arbitrariness, a risk which takes on much greater proportions when the supposed "standardized procedures" are established only by the self-serving and perhaps inaccurate oral statements of a police officer, and are not memorialized in the department's previous written instructions to its officers. Another concern, as reflected by the *Lyons* use of the word "customary," is that what is represented as department policy may constitute nothing more than a custom, hardly deserving the deference which an actual policy

84. 864 F.2d at 1002.

85. 864 F.2d at 1003.

86. It is still true after *Florida v. Wells*, 110 S. Ct. 1632, 1635 (1990), for the Supreme Court there held inventory of a suitcase found in a DWI arrestee's impounded car violated the fourth amendment, given the state court's finding "that the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search."

87. 512 A.2d 279 (D.C. 1986).

88. 512 A.2d at 281.

89. 706 F.2d 321 (D.C. Cir. 1983).

90. 706 F.2d at 334 n.22; see also *People v. Dandrea*, 736 P.2d 1211, 1212 n.3, 1218 n.14 (Colo. 1987) (where three officers testified about a certain department policy but "[n]o actual police department manuals or directives were introduced into evidence," court need not decide what "weight might be accorded such policy," as "no such policy was established in this case").

receives pursuant to *Bertine*. One might hope, therefore, that other courts will come to emulate the Massachusetts Supreme Judicial Court, which recently held that the state constitution "requires the exclusion of evidence seized during an inventory search not conducted pursuant to standard police procedures, which procedures, from now on, must be in writing."⁹¹

Although *Bertine* itself does not explicitly go this far, the Supreme Court's opinion strongly encourages departments to adopt written policies. Given that *Bertine* does require "standardized procedures," a matter on which the prosecution bears the burden of proof,⁹² it benefits the police to have these procedures actually set out in a manual or similar directive. This seems particularly apparent when one considers another aspect of *Bertine* not yet mentioned: as lower courts have rather consistently concluded,⁹³ a majority of the Supreme Court deems it "permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle."⁹⁴ Establishing this kind of absolute, nondiscretionary policy is likely to be especially difficult absent evidence in the form of written policies.⁹⁵

The positive side of *Bertine*, then, is this encouragement of police rulemaking concerning what the Court has sometimes called the

91. *Commonwealth v. Bishop*, 402 Mass. 449, 451, 523 N.E.2d 779, 780 (1988).

92. *United States v. Judge*, 846 F.2d 274 (5th Cir. 1988).

93. See, e.g., *Johnson v. State*, 764 P.2d 530, 533 (Okla. Crim. App. 1988); *Harmon v. State*, 748 P.2d 992, 994 (Okla. Crim. App. 1988); *State v. Shamblin*, 763 P.2d 425, 426 (Utah App. 1988).

94. *Colorado v. Bertine*, 479 U.S. 367, 376-77 (1987). This language is from the three-Justice concurrence. The two dissenters surely would settle for nothing less. The position of the remaining four members of the Court is unclear, although they joined the opinion of the Court in which some emphasis was placed upon the fact that "the Police Department's procedures mandated the opening of closed containers and the listing of their contents." 479 U.S. 374 n.6.

In the post-*Bertine* case of *Florida v. Wells*, 110 S. Ct. 1632, 1635 (1990), there appears this contrary statement: "A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." But this language is only dictum; the Court in *Wells* held that the challenged container inventory violated the fourth amendment because the inventorying police agency "had no policy whatever with respect to the opening of closed containers encountered during an inventory search." 110 S. Ct. at 1635. The language first quoted was strongly objected to by four members of the Court. Justices Brennan and Marshall, concurring, interpreted *Bertine* as "premised on the city's inventory policy that left no discretion to individual officers as to the opening of containers," 110 S. Ct. at 1639; Justice Blackmun, whose opinion Justice Stevens agreed with, noted there was "no reason for the Court to say anything about precisely *how much, if any*, discretion an individual policeman constitutionally may exercise," 110 S. Ct. at 1639 (emphasis in original).

95. See *Johnson*, 764 P.2d at 533, and *Harmon*, 748 P.2d at 992, where such proof was presented. Cf. *State v. Shamblin*, 763 P.2d 425, 427 (Utah App. 1988) (though search of closed containers is consistent with the purposes of inventory, such search held invalid here because Utah Highway Patrol order "is silent on whether closed containers should be opened").

"community caretaking functions" of the police,⁹⁶ an area in which both the availability of law enforcement expertise and the need to restrict discretion makes such administrative action especially appropriate. But *Bertine* has a negative side as well, and it concerns judicial evaluation of relevant police regulations. While these regulations are entitled to some deference from the courts, there are limits. "Obviously, a policy of deferring to administrative regulations could have undesirable consequences, if the deference were carried too far: constitutional protections would be at the mercy of the most intrusively imaginative police chief or jail administrator."⁹⁷ And that is why the Court cautiously stated in *Bertine* that it was only "reasonable" police regulations which satisfied the fourth amendment.

In *Bertine*, the defendant argued "that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place."⁹⁸ Before noting and assessing the Court's response to that contention, it is important first to emphasize the significance of the issue raised. The defendant focused attention upon the police rule regarding *impoundment* rather than inventory, but this lessens not one iota the necessary judicial concern, as a fourth amendment matter, with the reasonableness of the challenged regulation. The essential point is that the "legal validity of the inventory depends upon the lawfulness of the underlying impoundment"⁹⁹ or other form of police custody.¹⁰⁰ "Obviously, there is no need to perform the caretaking function of an inventory when the vehicle is not in the care, custody, and control of the police."¹⁰¹ And this means there is an equivalent need for a discretion-limiting rule applicable to both police decisions — whether to take custody of the vehicle, and then whether to inventory it (or, in fourth amendment terms, whether to "seize" and whether to "search"). A regime that has very specific rules governing when an impounded vehicle may be

96. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

97. *State v. Ridderbush*, 71 Or. App. 418, 425, 692 P.2d 667, 672 (1984).

98. *Colorado v. Bertine*, 479 U.S. 367, 375 (1987).

99. *State v. Kuster*, 353 N.W.2d 428, 431 (Iowa 1984) (citing many cases from other jurisdictions).

100. Noting that in *South Dakota v. Opperman* the Supreme Court discussed the lawfulness of inventory of "automobiles impounded or otherwise in lawful police custody," 428 U.S. 364, 373 (1976), the court in *State v. Stalder*, 231 Neb. 896, 899-900, 438 N.W.2d 498, 501 (1989), decided that a formal impoundment was not an inevitable prerequisite to inventory.

101. *Caplan v. State*, 531 So. 2d 88, 90 (Fla. 1988) (holding, consequently, that there was no police right of inventory when the defendant merely asked the assistance of the police in summoning a tow truck for his disabled vehicle, for the car was not "impounded or otherwise placed in police control").

inventoried but permits officers substantial discretion concerning whether to impound in the first place is just as threatening to fourth amendment values as a regime that carefully circumscribes the impoundment decision but leaves the police broad latitude regarding which impounded cars will be inventoried.

In response to the defendant's contention in *Bertine*, the opinion of the Court states:

Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.¹⁰²

This is a most inadequate response which, unfortunately, fails to recognize the precise function that reviewing courts must perform in a system which relies upon police rulemaking to contribute meaningfully to the protection of fourth amendment rights.

For one thing, the passage quoted above fails even to recognize why police regulations providing "standardized procedures" are important in such areas of fourth amendment activity as impoundment and inventory. Their purpose in the fourth amendment scheme of things, as Justice Powell succinctly put it in his *Opperman* concurrence, is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."¹⁰³ "Arbitrary" action is that "depending on choice or discretion" and "arising from unrestrained exercise of the will, caprice, or personal preference,"¹⁰⁴ and thus is hardly limited to those situations where (in the language of *Bertine*) the police acted on "suspicion of evidence of criminal activity." That is simply a matter of motivation, but it is the fact of deviation from established practice or the erratic action due to the nonexistence of an established practice that is an appropriate object of fourth amendment concern. If my car is impounded when others' are merely parked, if my car is inventoried when others' are merely secured, or if the containers in my car are opened in inventorying when others' are not, then — absent good reason for singling me out — my privacy and security have been improperly intruded upon whether it is suspicion of criminal activity or any of a myriad of other reasons which accounts for my different treatment.

102. 479 U.S. at 375-76 (footnote omitted).

103. 428 U.S. at 377.

104. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 110 (1981).

Moreover, the *Bertine* palliative that there "was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity" likewise misrepresents the function of police rulemaking. It makes *Bertine* appear as a case in which the issue was simply whether the defendant had proved he had been the victim of a pretext or subterfuge search — one purported to be for one reason but in fact motivated by another. But, as I explain later,¹⁰⁵ proving police motivation is a most difficult and seldom successful undertaking, and consequently it is a rather precarious device upon which to hang fourth amendment rights. Although arbitrariness can occur for a variety of reasons, the nature of police responsibilities makes especially acute both the risk that supposedly routine noninvestigative activities will be commenced only because of an investigative purpose and the risk that this motivation will never be exposed to the light of day. That is *precisely* why discretion-limiting police regulations are needed regarding impoundment and inventory: to restrict severely the opportunities for undetected (and perhaps undetectable) subterfuge to influence search and seizure decisions. Thus, the Court in *Bertine* should not have said, in effect, that the defendant's failure to prove an investigative purpose made unnecessary any assessment of the breadth and precision of the applicable police regulations. Rather, the Court should have asked whether those regulations sufficiently confined police discretion so as to provide reasonable assurance against seizures and searches undertaken for reasons unknown to the victims of these intrusions and unknowable to the courts.¹⁰⁶ Only the dissenters in *Bertine* appreciated this point.¹⁰⁷

105. See *infra* note 258 and accompanying text.

106. As one court applying *Bertine* noted, judicial efforts to discern police motivations are bound to fail, as "our human limitations do not allow us to peer into a police officer's 'heart of hearts.'" *United States v. Judge*, 864 F.2d 1144, 1147 n.5 (5th Cir. 1989).

107. Justice Marshall, joined by Justice Brennan, cogently noted:

In both *Opperman* and *Lafayette*, the Court relied on the absence of police discretion in determining that the inventory searches in question were reasonable. . . . In assessing the reasonableness of searches conducted in limited situations such as these, where we do not require probable cause or a warrant, we have consistently emphasized the need for such set procedures: "standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." . . .

Inventory searches are not subject to the warrant requirement because they are conducted by the government as part of "community caretaking" function, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Standardized procedures are necessary to ensure that this narrow exception is not improperly used to justify, after the fact, a warrantless investigative foray. Accordingly, to invalidate a search that is conducted without established procedures, it is not necessary to establish that the police actually acted in bad faith, or that the inventory was in fact a "pretext." By allowing the police unfettered discretion, Boulder's discretionary scheme, like the random spot checks in *Delaware v. Prouse*, is unreasonable because of the "grave danger" of abuse of discretion.

Colorado v. Bertine, 479 U.S. 367, 377-78, 381 (Marshall and Brennan, JJ., dissenting) (quoting

Given the Court's erroneous frame of reference in *Bertine*, it is by no means surprising that the challenged Boulder police regulation which passed muster in that case falls significantly short of performing its fourth amendment function of limiting police discretion. As the two dissenters point out, this police directive (never quoted by the majority) states the police may turn the car over to a third party, park it in a nearby public parking lot and merely lock it, or impound and inventory. And, as the dissenters further emphasized, the officer in this case testified that decisions regarding these alternatives "were left to the discretion of the officer on the scene."¹⁰⁸ To this, the *Bertine* majority lamely responds that the regulations "establish[] several conditions that must be met before an officer may pursue the park and lock alternative,"¹⁰⁹ thus ignoring that the limitations so stated confine *not at all* the individual officer's power to opt for the impoundment-inventory alternative.

It is possible, and certainly most desirable, to give deference to police regulations — as in *Bertine*, to acknowledge that such a regulation is not unreasonable merely because "courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure"¹¹⁰ — yet also to require that those regulations impose realistic limits on police discretion. The point is not that the regulations must totally eliminate discretion, for that is impossible. "[A]s a practical matter, the exercise of some discretion by agents, even if only interpretive, is inevitable since no manual can reasonably be expected to spell out in detail the correct action in light of the almost infinite array of objects an agent may encounter."¹¹¹ Thus, even under the *Bertine* concurrence's rule that "it is permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle,"¹¹² a carefully drawn police regulation will inevitably require officers sometimes to decide, for example, "whether an object constitutes a 'container.'"¹¹³

Delaware v. Prouse, 440 U.S. 648, 661 (1979); Cady v. Dombrowski, 413 U.S. 433, 441 (1973)) (citations omitted). Delaware v. Prouse, 440 U.S. 648 (1979), is discussed *infra* in the text accompanying note 163.

108. 479 U.S. at 381 (Marshall and Brennan, JJ., dissenting).

109. 479 U.S. at 376 n.7.

110. 479 U.S. at 374.

111. United States v. Judge, 864 F.2d 1144, 1145 (5th Cir. 1989).

112. 479 U.S. at 376-77.

113. United States v. Judge, 864 F.2d 1144, 1145 (5th Cir. 1989), where the court also commented:

The determination of what constitutes a container is inherently discretionary. Suppose, for instance, that an agent finds a shaving kit inside a car. If the agent concludes that the

Rather, the question is whether or not the challenged police regulations impose realistic limits on discretion. As the *Bertine* Court highlighted by reaffirming *Lafayette's* refusal to adopt an "alternative 'less intrusive' means" test, one way to limit discretion is by not even trying to draw lines which, in practice, might be misinterpreted; instead, discretion could be limited by requiring the same police response to a broad category of cases. This is exactly the focus of the *Bertine* concurrence: it might be possible to draft and defend a more selective rule than that of requiring police to open all closed containers in all impounded vehicles,¹¹⁴ but the virtue of the broader policy is that it "promotes a certain equality of treatment. With a standardized, mandatory procedure, the minister's picnic basket and grandma's knitting bag are opened and inventoried right along with the biker's tool box and the gypsy's satchel."¹¹⁵ Also, a rule of this broader type may often by its very nature provide us with some assurance that the policymaking police officials carefully balanced the competing interests. As "the cost of law enforcement is more widely distributed, . . . there is less reason to fear that the governmental decisions to trade off privacy for law enforcement are being made without considering everyone's interests equally."¹¹⁶ And thus we are more likely to accept the police conclusion that the various objectives of the inventory process can be achieved only by looking inside closed containers when we find that they even intend to look in "the minister's picnic basket and grandma's knitting bag."

It thus appears that an impoundment rule of the broader type, ig-

shaving kit is a container, he is bound to open it and inventory its contents. However, if the agent determines for some reason that the kit is not a container, he may not open it, and must list it on the inventory sheet as merely a "shaving kit." Suppose, though, that our hypothetical DEA agent decided that the kit was a container and proceeded to open it, discovering inside among other articles a can of shaving cream and a tube of toothpaste. Is the can of shaving cream a container subject to being opened for an inventory? What about the tube of toothpaste? It all depends on the meaning the DEA agent accords to the word "container," which involves an exercise of discretion.

114. Especially if the somewhat narrower rule did not confer unnecessary discretion. In the *Wells* case, discussed in *supra* note 94, Justice Blackmun opined that under *Bertine* a state could, for example, "adopt a policy which requires the opening of all containers that are not locked," see, e.g., *Johnson v. State*, 764 P.2d 530 (Okla. Crim. App. 1988); *Harmon v. State*, 748 P.2d 992 (Okla. Crim. App. 1988), but yet strongly criticized the majority's "language, unnecessary on the facts of this case, concerning the extent to which a policeman, under the Fourth Amendment, may be given discretion in conducting an inventory search." *Florida v. Wells*, 110 S. Ct. 1632, 1638-39 (1990).

115. *State v. Shamblin*, 763 P.2d 425, 428 (Utah Ct. App. 1988).

116. Wasserstrom & Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 95 (1988). As Justice Jackson, concurring in *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949), put it, "nothing opens the door to arbitrary action so effectively as to allow [municipal] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

noring the turn-over-to-friend and park-at-scene alternatives, is a permissible police regulation. This is not to suggest, however, that a police rule cannot be unreasonable because of excessive breadth. Certainly "a general policy that at any time when there is a felony arrest the vehicle was to be seized," even when the arrestee was not in or by the vehicle and even when "the vehicle was parked at the defendant's residence, at a motel or restaurant parking lot, or at some other place indicating little need for impoundment for safekeeping purposes,"¹¹⁷ is vulnerable. Nor does this suggest that responsible policymaking at the police level will not sometimes result in the drafting of narrower rules or those requiring decisionmaking by officers on the scene. An impoundment rule might well deal with the turn-over-to-friend and park-at-scene alternatives. As recent cases discussing and upholding such provisions make apparent,¹¹⁸ rules can be drafted so that — unlike the Boulder regulation in *Bertine* — police are advised about those circumstances in which they must forgo resort to the impoundment alternative.

Of course, even if the regulation sufficiently reduces the need for discretion in the field, the rule must draw sensible distinctions. One would expect courts to be more likely to second-guess the police rulemakers when it appears, for example, that the impoundment alternative is mandated for a group less likely to be able to influence politically the making or revision of rules. This explains *State v. Crosby*,¹¹⁹ invalidating a regulation permitting only family members to take possession of arrestees' vehicles. The court explained:

In a university community, particularly where an arrest is made near the university, such a policy is certainly suspect in that it imposes a burden on out of town students who have no family members available. Thus the suspicion is raised that the policy is intended only as subterfuge for a warrantless search without probable cause.¹²⁰

III. INSPECTIONS: THE *CAMARA* "REASONABLE . . . ADMINISTRATIVE STANDARDS" REQUIREMENT

In *Camara v. Municipal Court*,¹²¹ the Court held that city officials ordinarily must obtain a search warrant to conduct an unconsented housing inspection. In reaching this conclusion, the majority empha-

117. *State v. Kuster*, 353 N.W.2d 428, 432 (Iowa 1984).

118. *E.g.*, *Johnson v. State*, 764 P.2d 530 (Okla. Crim. App. 1988); *Harmon v. State*, 748 P.2d 992 (Okla. Crim. App. 1988).

119. 403 So. 2d 1217 (La. 1981).

120. 403 So. 2d at 1220.

121. 387 U.S. 523 (1967).

sized that the fourth amendment interests involved were more than "peripheral," that the protections of the warrant process would ensure that householders were not left "subject to the discretion of the official in the field," and that there was no basis for concluding that "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."¹²² But, while *Camara* required that absent a genuine emergency a search warrant be obtained for a housing inspection, this turned out to be a very special kind of warrant.

Camara marks the origin of a most important fourth amendment doctrine — the so-called balancing test under which certain discrete investigative and enforcement practices constituting "searches" or "seizures" are permitted upon less than the traditional quantum of probable cause. By "balancing the need to search against the invasion which the search entails,"¹²³ the Court in *Camara* held that housing inspection warrants did not require probable cause in the sense in which that phrase previously had been used in the fourth amendment lexicon. Rejecting the appellant's claim that an inspection is constitutionally permissible only "when the inspector possesses probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced,"¹²⁴ the Court held that reasonable standards based upon such factors as the passage of time, the nature of the building, and the condition of the entire area would suffice. Thus, concluded the Court, probable cause for a warrant exists in this special context "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."¹²⁵

The business inspection counterpart of *Camara* is *Marshall v. Barlow's, Inc.*,¹²⁶ which involved the constitutionality of a broad warrantless inspection provision of the Occupational Safety and Health Act.¹²⁷ Because the Court was "unconvinced . . . that requiring war-

122. 387 U.S. at 530, 532, 533.

123. 387 U.S. at 537.

124. 387 U.S. at 534.

125. 387 U.S. at 538.

126. 436 U.S. 307 (1978).

127. This provision permitted inspectors, without a warrant,

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

29 U.S.C. § 657(a) (1990).

rants to inspect will impose serious burdens on the inspection system or the courts,"¹²⁸ it held the warrantless inspection provision violated the fourth amendment. As for the grounds to obtain the requisite business inspection warrant, the majority in *Barlow's* followed the *Camara* approach:

A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.¹²⁹

It may appear at first blush that all this is only remotely relevant to the more particularized focus of this article, *police* rules and policies. After all, *Camara* and *Barlow's* were concerned with inspections not by police but by housing and OSHA inspectors, respectively. But, as the Supreme Court more recently held in *New York v. Burger*,¹³⁰ the special body of fourth amendment law that has developed on the subject of inspections applies even when police are called upon to do the inspecting and when more traditional law enforcement concerns account in part for the inspection program.¹³¹

Camara and *Barlow's* are striking examples of the Supreme Court's recognition of how a regime of administrative plus judicial decision-making, drawing upon the special advantages of each, can contribute to both the protection of fourth amendment rights and the advancement of legitimate government interests. As a closer look at the *Camara-Barlow's* warrant scheme demonstrates, the Court's system of promulgation of "administrative standards" and judicial review of contemplated application of those standards, permits the full use of expertise at the enforcement level. It also affords considerable assurance against abuse of discretion by those planning and conducting inspections.

Housing inspection programs have traditionally involved adminis-

128. 436 U.S. at 316.

129. 436 U.S. at 321.

130. 482 U.S. 691 (1987).

131. *Burger* involved a statutory inspection scheme for automobile dismantlers. The state court had decided that the "fundamental defect in the statutes before us is that they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme." *People v. Burger*, 67 N.Y.2d 338, 344, 493 N.E.2d 926, 929, 502 N.Y.S.2d 702, 705 (1986). The Supreme Court disagreed, reasoning "that a State can address a major social problem [e.g., auto theft] both by way of an administrative scheme and through penal sanctions." *New York v. Burger*, 482 U.S. 691, 712 (1987). As for the fact that police were used to conduct the inspections, the court held this did not make any difference either, as "many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency." 482 U.S. at 717.

trative decisionmaking. Administrators have selected properties for inspection when there are insufficient personnel to conduct a periodic inspection of all designated buildings, and have adjusted the period between inspections according to different rates of neighborhood deterioration.¹³² *Camara* obviously recognizes the need for such discretion in the first instance in a sensibly administered inspection system. But, are these decisions now to be reviewed by the magistrate? Is he to determine the wisdom of once-a-year inspections throughout the community? Is the magistrate to pass upon the soundness of a particular neighborhood inspection plan? Although it frequently has been asserted that a judicial officer is not in a position to perform such a function,¹³³ the responsibilities of the magistrate here are not made absolutely clear in *Camara*. In the branch of the opinion dealing with the grounds for an inspection warrant, the Court says that the special type of probable cause needed for inspections exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."¹³⁴ This strongly suggests that the judicial officer has two responsibilities: (1) a general determination of the reasonableness of the inspection program; and (2) a specific determination of whether the particular inspection requested fits within that program. Yet, in the part of *Camara* imposing the search warrant requirement, the Court seems to assume that judicial review of the grounds for inspection will occur "without any reassessment of the basic agency decision to canvass an area."¹³⁵ Post-*Camara* appellate litigation about housing inspections is sufficiently rare that no statement can be made about how courts generally believe this ambiguity in *Camara* should be resolved, although at least some authority supports the conclusion that the magistrate should determine whether the administrative program is itself "reasonable."¹³⁶

The *Camara* requirement that the warrant-issuing judicial officer must determine that the requested inspection falls within existing legislative or administrative standards is intended as a check upon arbitrary searches. It responds to the *Camara* majority's stated concern that a warrantless inspection system would "leave the occupant subject to the discretion of the official in the field"¹³⁷—that, as some of

132. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 807 (1965).

133. Comment, *Administrative Inspections and the Fourth Amendment — A Rationale*, 65 COLUM. L. REV. 288, 291 (1965); Recent Cases, 108 U. PA. L. REV. 265, 276 (1959).

134. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

135. 387 U.S. at 532.

136. *City of Seattle v. Leach*, 29 Wash. App. 81, 627 P.2d 159 (1981).

137. 387 U.S. at 532.

the justices put it earlier, inspections may otherwise be "based on caprice or on personal or political spite"¹³⁸ or be conducted "only [as] a front for the police"¹³⁹ Once again the scarcity of post-*Camara* appellate litigation does not permit a general statement as to precisely how or how effectively this has worked out. It does seem clear, however, as at least one court has insisted, that for this function of the warrant process to be performed the magistrate must be given details about the nature of the inspection program under which the warrant is being sought, for only then can the magistrate determine whether "the desired inspection fits within that program."¹⁴⁰ Had the *Camara* majority made that point more clearly, they would have blunted the dissenters' objection that the majority's scheme contemplated nothing more than "warrants issued by the rubber stamp of a willing magistrate."¹⁴¹

Barlow's, the business inspection case, seems to clarify that the warrant-issuing magistrate is to perform the two functions mentioned above. The *Barlow's* holding, again, was that a

warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.¹⁴²

Such a warrant, the Court added, "would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria."¹⁴³ The determination of "neutral criteria" requires some review of the plan itself, while the "pursuant to" limitation requires a judicial determination that the contemplated inspection falls within that plan.

If the benefits of the *Barlow's* warrant system are to be realized, there must exist a fairly specific legislative or administrative plan against which to judge the individual inspection contemplated. The point is illustrated by *State ex rel. Accident Prevention Division of*

138. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 271 (1960).

139. *Abel v. United States*, 362 U.S. 217, 242 (1960) (Douglas, J., dissenting).

140. *City of Seattle v. Leach*, 29 Wash. App. 81, 84, 627 P.2d 159, 162 (1981) (quoting *In re Northwest Airlines, Inc.*, 587 F.2d 12, 14-15 (7th Cir. 1978)); see also 29 Wash. App. at 85, 627 P.2d at 162 (holding insufficient a warrant issued on the basis of an affidavit which merely asserted that the intended inspection was part of "a regular building inspection which is conducted for all buildings").

141. See *v. City of Seattle*, 387 U.S. 541, 548 (Clark, J., dissenting).

142. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978).

143. 436 U.S. at 323.

Workmen's Compensation Board v. Foster,¹⁴⁴ where a warrant was issued upon a showing that the inspection was "routine" and that the premises in question had not been inspected for a certain period of time. The applicable statute said that "cause shall be deemed to exist if reasonable legislative or administrative standards for conducting a routine, periodic or area inspection are satisfied with respect to the particular place of employment." The court found the statute unobjectionable but nonetheless held the warrant invalid because no standards had been promulgated indicating "the manner of selection of the premises to be searched."¹⁴⁵ Unfortunately, not all appellate courts are true to the spirit of *Barlow's* in this respect.¹⁴⁶

Even more unfortunate is that in practice, the potential for protecting the fourth amendment rights of businesses through a process of judicially reviewed administrative regulation has been largely unrealized because of another development and its curious ramifications. The development concerns the question of when a business inspection is constitutional absent a warrant. In this area, as in other branches of fourth amendment law, truly exigent circumstances arise in which it would make no sense to insist that a warrant be obtained prior to the search. But in the business inspection field there has been a tendency to overstate what circumstances are in fact "exigent." *Donovan v. Dewey*¹⁴⁷ is illustrative. Starting with the congressional finding that safety hazards in mines can be concealed easily, the Court took this to mean that "unannounced, even frequent, inspections" were necessary, which in turn led the Court to the conclusion that therefore a warrant requirement would "frustrate inspection."¹⁴⁸ But if, as the Court earlier noted in *Barlow's*, a need for frequent inspections does not mean frequent search warrant applications, because most businessmen will cooperate and permit the inspection when the inspector first appears sans warrant, then it is still not apparent that a warrant requirement, limited to the few cases in which the inspector is turned away, would "frustrate" the program. And as for those few, the asserted need for "unannounced" inspections cannot be taken seriously given that the legislative scheme builds delay and notice requirements into the in-

144. 31 Or. App. 291, 570 P.2d 398 (1977).

145. 31 Or. App. at 298, 570 P.2d at 401.

146. See, e.g., *United States v. Voorhies*, 663 F.2d 30 (6th Cir. 1981) (although legislation itself did not provide specific guidelines and defined probable cause only as "a valid public interest in the effective enforcement of this subchapter," and despite no showing of an administrative plan as to how to proceed, warrant application deemed sufficient because it said the particular premises had not been searched before).

147. 452 U.S. 594 (1981).

148. 452 U.S. at 603.

spection process.¹⁴⁹ Cases such as *Dewey* are troublesome because it appears that the actual feasibility of obtaining a warrant has little or nothing to do with whether a fourth amendment warrant requirement is recognized.

As exemplified by other areas of fourth amendment law,¹⁵⁰ the grounds-for-search requirement ought not somehow vanish simultaneously with the warrant requirement. Thus the absence of a business inspection warrant requirement does not diminish the need for a grounds-for-search standard, for it is still important that the inspector have a basis for assessing what it is the inspector may do, and that a magistrate in a suppression hearing have a basis on which to judge the lawfulness of the inspection. But this logical proposition finds little support in the Supreme Court's warrantless inspection cases. Although the Court in *Dewey* does not expressly state that the fact "unannounced, even frequent, inspections are essential" also forecloses inquiry into why the inspector chose this business on this occasion, the implication is that it does, for the Court insists it is not dealing with an inspection scheme that (as in *Barlow's*) confers "almost unbridled discretion"¹⁵¹ upon the inspectors. But in fact, the statutory scheme upheld in *Dewey* does not impose any limits on mine inspectors regarding when or how often any particular mine will be inspected,¹⁵² and thus there remains a need for an administrative plan. This is equally true of *Burger*, holding warrantless inspections conducted by police lawful because the "statute informs the operator of a vehicle dismantling business that inspections will be made on a regular

149. The Act forbids use of force when entry is refused and instead requires that the Secretary of Labor in such instance go to court and seek an injunction against future refusal. Thus, in *Dewey* the legislative determination of "the notorious ease with which many safety or health hazards may be concealed," S. REP. NO. 181, 95th Cong., 1st Sess. 27 (1977), reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 3401, 3427, cannot be taken to mean that Congress decided that any delay or advance notice of inspections would undercut the Act's objectives, as the Act itself requires delay and notice (i.e., resort to injunction proceedings) whenever a mine owner turns the inspector away. That is, the factor relied upon in *Barlow's* to support the conclusion that there was no need for unconsented warrantless inspections is now relied upon in *Dewey* as a reason for upholding a warrantless inspection scheme.

150. Illustrative is the doctrine of *California v. Carney*, 471 U.S. 386 (1985), which generally permits the search of vehicles without a search warrant, but changes not at all the requirement that such searches for evidence of crime be made upon the traditional quantum of probable cause.

151. 452 U.S. at 601, 603.

152. The statute, 30 U.S.C. § 813(a) (1988), requires inspection of all surface mines at least twice annually, and all underground mines at least four times annually. It can hardly be said, as the Court claims in *Dewey*, that "the Act . . . specifically defines the frequency of inspection," 452 U.S. at 603-04, as it merely sets a lower limit, and in practice the frequency might substantially exceed the minimum. See, e.g., *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 47 (S.D. Ohio 1973) (three mines visited on 465 of 715 work days during two-year period).

basis.”¹⁵³ The truth of the matter, however, as the three dissenters pointed out, is this:

Neither the statute, nor any regulations, nor any regulatory body, provides limits or guidance on the selection of vehicle dismantlers for inspection. In fact the State could not explain why Burger's operation was selected for inspection. . . . This is precisely what was objectionable about the inspection scheme [in *Barlow's*]: It failed to “provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search.”¹⁵⁴

Because the no-warrant holding has typically been grounded in the need for “unannounced, even frequent, inspections,” perhaps the majority in cases like *Dewey* and *Burger* assume that in such circumstances the *Barlow's* neutral plan approach simply does not apply. So the argument might go, if the inspection scheme requires “frequent” inspections at the businesses covered, then there is already such a pervasive degree of scrutiny and control that it is unnecessary to impose a limitation intended merely as a check against arbitrary selection or concentration. But surely this is not so. For example, even accepting the correctness of the holding in *Dewey* that no warrant is ever required for a mine safety inspection, it hardly follows that a particular mine operator may be subjected to, say, ten times as many inspections as his competitors without the government at any point being required to justify this degree of attention. The Supreme Court needs to say so and, in the process, to restore law enforcement policymaking to its rightful place in federal, state and local inspection activities.

IV. STOPS: BY “PLAN” OR BY “PROFILE”

Among the landmarks in fourth amendment jurisprudence is the “stop-and-frisk” case of *Terry v. Ohio*.¹⁵⁵ Prior to *Terry*, courts were inclined to take a monolithic view of the fourth amendment, classifying and treating all seizures of the person in exactly the same way. Such acts were “arrests,” and consequently could be made only upon the traditional quantum of probable cause. But in *Terry* the Court utilized the *Camara* balancing test to support the conclusion that a brief detention on the street for investigation is much less intrusive than a full-fledged stationhouse arrest and consequently is sometimes permissible even absent grounds to make an arrest. From *Terry* emerged the new issue of what facts and circumstances would justify a

153. *New York v. Burger*, 482 U.S. 691, 711 (1987).

154. 482 U.S. at 723 (Brennan, J., dissenting) (quoting *Donovan v. Dewey*, 452 U.S. 594, 601 (1981)).

155. 392 U.S. 1 (1968).

brief detention on the street. *Terry* also recognized that what it called "street encounters" constituted a low visibility activity utilized for a variety of purposes and readily subject to abuse, including "wholesale harassment [of minorities] by certain elements of the police community"¹⁵⁶ The case therefore gave rise to special "concern over the need to structure the officer's exercise of discretion,"¹⁵⁷ which quite naturally leads to the question of whether courts have perceived police guidelines as being essential or useful to the task of determining when a *Terry* stop is permissible.

Terry itself contains no hints about the apposition of police rules and policies to the just-emerging doctrine; indeed, the Court said very little about the standard governing brief street detentions other than that their "limitations will have to be developed in the concrete factual circumstances of individual cases."¹⁵⁸ But in later cases, the Court recognized that such a stop might be found lawful on either of two different bases: (1) an individualized suspicion basis, as reflected in the Court's declaration in *United States v. Cortez*¹⁵⁹ that an "assessment . . . based upon all the circumstances, . . . seen and weighed . . . as understood by those versed in the field of law enforcement . . . , must raise a suspicion that the particular individual being stopped is engaged in wrongdoing";¹⁶⁰ and (2) a standardized procedures basis, as reflected in the assertion of a unanimous Court in *Brown v. Texas*¹⁶¹ that a brief detention for investigation could "be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."¹⁶² This "plan" alternative is reminiscent of the "standard procedures" and "administrative standards" approaches previously discussed, and consequently I will examine it first.

Although the Court in *Brown* did not elaborate on its dictum, an insight into what the Court apparently was alluding to is revealed by the earlier decision in *Delaware v. Prouse*.¹⁶³ The Court there was concerned with a so-called "routine" stopping of a vehicle to check its registration and the operator's driver's license, done without a reasonable suspicion the car was being operated in violation of law and not "pursuant to any standards, guidelines, or procedures pertaining to

156. 392 U.S. at 14.

157. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REF. 551, 594 (1984).

158. 392 U.S. at 29.

159. 449 U.S. 411 (1981).

160. 449 U.S. at 418.

161. 443 U.S. 47 (1979).

162. 443 U.S. at 51.

163. 440 U.S. 648 (1979).

document spot checks"¹⁶⁴ Rejecting the State's argument that its "interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the persons detained," the Court held that individual stops were permissible only upon individualized reasonable suspicion, that is, if "there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered"¹⁶⁵ But of relevance here is the Court's final comment:

This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.¹⁶⁶

This statement provoked a "sarcastic rejoinder"¹⁶⁷ from Justice Rehnquist, the lone dissenter. He objected that the Court, in finding that "motorists, apparently like sheep, are much less likely to be 'frightened' or 'annoyed' when stopped en masse," had "elevate[d] the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence."¹⁶⁸ But the majority in *Prouse* is correct. For one thing, under the *Camara* balancing-of-interests formula, there is a genuine difference in degree-of-intrusion terms between an individual stop and a roadblock stop. As the Court recognized in another case upholding checkpoint operations conducted to discover illegal aliens: "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion."¹⁶⁹ For another, random stops without reasonable suspicion are different as a constitutional matter precisely because they do not safeguard citizens against "indiscriminate official interference."¹⁷⁰ Finally, the distinction drawn by the *Prouse* majority makes sense in terms of representative reinforcement, which "[i]n the context of the fourth

164. 440 U.S. at 650.

165. 440 U.S. at 655, 663.

166. 440 U.S. at 663. Two concurring Justices "assume[ed] that the Court's reservation also includes other not purely random stops (such as every tenth car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop." 440 U.S. at 664 (Blackmun and Powell, JJ., concurring).

167. Mertens, *supra* note 157, at 556.

168. 440 U.S. at 664.

169. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (quoting *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975)).

170. *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975).

amendment [means] that the tradeoff between privacy and law enforcement produced by our political institutions should stand, provided that everyone's interests are equally represented in the making of these political decisions."¹⁷¹ If it is thus true that the police can be afforded greater leeway "when the privacy costs of law enforcement are spread more widely, and there is a reduced risk that the politically less powerful are being forced to bear disproportionate privacy losses,"¹⁷² then we have

a plausible rationale for the Court's decision [in *Prouse*]. We should be worried that the police on patrol will disproportionately stop the young, the black, and the poor for suspicionless license checks. Those with more political clout will be spared the indignity and inconvenience of these checks. By requiring that the police use full roadblocks, the cost of law enforcement is more widely distributed, and there is less reason to fear that the governmental decisions to trade off privacy for law enforcement are being made without considering everyone's interests equally.¹⁷³

These reasons supporting the *Prouse* roadblock thesis also lend support to the notion that police regulations concerning roadblocks should be encouraged if not mandated by the courts. Law enforcement guidelines regarding when, where and how roadblocks are to be conducted can serve to ensure that the roadblocks are as unthreatening as possible, that unnecessary discretion has not been left to officers on the scene, and that a considered judgment was made by departmental policymakers about exactly how much of an intrusion upon the public at large is feasible — including in a political sense — in the interest of law enforcement. In its truncated discussion of roadblocks in *Prouse*, the Court unfortunately said nothing about whether law enforcement guidelines were necessary or desirable in the conducting of roadblocks. But the Court significantly distinguished the random stop conduct in *Prouse* from that attending the alien-check roadblock earlier approved by the Court in *United States v. Martinez-Fuerte*.¹⁷⁴ That case *does* make some exceedingly important observations about the significance of law enforcement policies relating to roadblock operations. Specifically, the Court in *Martinez-Fuerte* (1) stressed that, with regard to the type of roadblocks upheld by the Court, the "location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources"; (2) emphasized that "deference is to be given to the administrative decisions of higher

171. Wasserstrom & Seidman, *supra* note 116, at 93.

172. *Id.* at 95.

173. *Id.*

174. 428 U.S. 543 (1976).

ranking officials"; and (3) cautioned that those decisions are nonetheless "subject to post-stop judicial review."¹⁷⁵ Moreover, lower courts increasingly are taking positions that make it most advantageous for the police to engage in careful rulemaking concerning driver's license/auto registration checkpoints. Some of the decisions place great emphasis upon the existence of and compliance with discretion-limiting directives from supervisory officials, intimating that such guidelines are essential,¹⁷⁶ while others at least express a preference for a system of "written policy and supervision."¹⁷⁷

The Supreme Court addressed the roadblock issue more directly in *Michigan Dept. of State Police v. Sitz*,¹⁷⁸ upholding the Department's sobriety checkpoint program under which "checkpoints are selected pursuant to . . . guidelines, and uniformed police officers stop every approaching vehicle."¹⁷⁹ In rejecting the state court's conclusion that the checkpoint program was unconstitutional under the *Brown v. Texas*¹⁸⁰ balancing test because it failed the "effectiveness" part of that test, the Court stated:

The actual language from *Brown v. Texas*, upon which the Michigan courts based their evaluation of "effectiveness," describes the balancing factor as "the degree to which the seizure advances the public interest." This passage from *Brown* was not meant to transfer from politically ac-

175. 428 U.S. at 559, 566. The Court in *Martinez-Fuerte* proceeded to review the administrative decision to place an alien checkpoint at San Clemente and found that the "location meets the criteria prescribed by the Border Patrol to assure effectiveness." 428 U.S. at 562 n.15.

176. *E.g.*, *State v. Coccoma*, 177 N.J. Super. 575, 427 A.2d 131 (1980) (emphasizing that as a result of *Prouse* the prosecutor urged each police department to adopt rules and procedures on roadblocks; that the chief in this town did adopt them; that they limited discretion by, *e.g.*, establishing a precise formula as to the pattern of stops — "every 5th car during light traffic hours" — at roadblocks; and that the police at the scene did in fact follow these "specific, defined standards in stopping motorists"); *State v. Shankle*, 58 Or. App. 134, 647 P.2d 959 (1982) (stressing that the Oregon State Police Policy Manual included factors on how to locate the checkpoint and how to conduct it, including what pattern of stops to utilize, so that "the procedures to be applied by the police officers were explicitly set out in their policy manual").

177. For example, *State v. Cloukey*, 486 A.2d 143, 147 (Me. 1985), which, however, rejected defendant's argument that the roadblock was unconstitutional because "there was no decision made by policy making supervisory officers either as to the necessity for and reasonableness of the road block, or to the procedures to be used in setting up the road block." 486 A.2d at 146.

Compare *State v. Marchand*, 104 Wash. 2d 434, 706 P.2d 225 (1985), expressing "doubt whether an internal directive of a law enforcement agency can overcome constitutional defects in a statute." The statute in *Marchand* permitted random stops, while the State Patrol's written procedures mandated stopping and inspection "in groups of vehicles without discrimination." But, this policy was not as carefully drafted as those approved in other cases and, as far as the court could tell, "they may be overridden by local supervising officers, and . . . individual officers may decide to implement them at any time or place without supervisory authority," and thus the court ultimately concluded "that the State Patrol procedural policy offers exactly the kind of unconstrained and unfettered discretion that *Prouse* condemns." 104 Wash. 2d at 440-41, 706 P.2d at 228.

178. 110 S. Ct. 2481 (1990).

179. 110 S. Ct. at 2487.

180. 443 U.S. 47 (1979).

countable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.¹⁸¹

This passage from *Sitz* may be read as encouraging policymaking at the police level, for it reflects a disinclination by the Court to second-guess certain kinds of law enforcement decisions. It also explains, or at least intimates, what kinds of law enforcement policies are most likely to receive such deference. For one thing, the Court indicates that the challenged practice arose out of a decision concerning how best to utilize "limited public resources," a kind of police decision that presumably ought to receive considerable respect. For another, the Court emphasizes the propriety of leaving the decision to employ sobriety checkpoints with "politically accountable officials." That squares with the previously discussed concept of representative reinforcement: the decision was, in effect, a decision to enforce the DWI laws by placing a burden on the motoring public at large, and consequently it is the kind of law enforcement decision for which the political process presumably affords an effective check.

Viewed more broadly, however, *Sitz* is rather disappointing. It does *not* reflect a commitment by the Court either to take full account of relevant police guidelines or to submit those guidelines to meaningful judicial review. The necessity for doing either is virtually assumed out of existence by the slight-of-hand manifested in the *Sitz* excerpt set forth above. By asserting that the case involves nothing more than a decision belonging *entirely* to the police to choose from among what are conclusively characterized as "reasonable alternative law enforcement techniques,"¹⁸² the Court finds it unnecessary to assay or even articulate all the considerations that entered into the law enforcement judgment that checkpoints constitute a "reasonable alternative." That judgment, if made within the framework of *Brown v. Texas*, would be that the benefits of the contemplated practice outweigh its intrusiveness.

But, just how intrusive a roadblock is depends, as noted earlier, upon the safeguards attending its operation — those which minimize the effect of the seizures upon motorists and those which eliminate the

181. 110 S. Ct. at 2487.

182. 110 S. Ct. at 2487.

risk of arbitrary action by those operating the checkpoint, as reflected in applicable police guidelines.¹⁸³ Were there guidelines in *Sitz*? Yes; as the Court noted, an advisory committee "comprising representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute . . . created guidelines setting forth procedures governing checkpoint operations, site selection, and publicity."¹⁸⁴ However, the *Sitz* majority deemed it unnecessary to reveal in what manner those guidelines minimized the intrusiveness of the checkpoint operation, except to note the extremely important requirement that "[a]ll vehicles passing through a checkpoint would be stopped."¹⁸⁵

This disinterest in the existing guidelines in *Sitz* contrasts sharply with many of the earlier lower court decisions regarding sobriety checkpoints. In those decisions, courts generally accepted that these roadblocks must be "established by [a] plan formulated or approved by executive-level officers of the law enforcement agencies involved" which contains "standards . . . with regard to time, place" and similar matters.¹⁸⁶ This, the courts explain, is necessary because "[i]n the absence of record evidence that the decision to establish the roadblock was made by anyone other than the officers in the field, the roadblock in question [has] certain characteristics of a roving patrol,"¹⁸⁷ namely, an appreciable risk of an arbitrary basis for the site or time decision. Thus, a failure to have these decisions made by supervisory officials has been a factor stressed by courts in holding a particular sobriety checkpoint illegal,¹⁸⁸ while other cases upholding these roadblocks

183. Pre-*Sitz* cases in the lower courts properly concluded that such a roadblock is illegal if the officers at the scene are operating "without specific directions or guidelines." *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983); see also *State v. Jones*, 483 So. 2d 433, 438 (Fla. 1986) ("[I]t is essential that a written set of uniform guidelines be issued before a roadblock can be utilized."); *Nelson v. Lane County*, 304 Or. 97, 111, 743 P.2d 692, 700 (1987) (stressing "supervising officer relied on a manual setting forth procedures for the roadblocks"). This is because it is essential that the "officers in the field [have] no discretion to pick and choose who would or would not be stopped." *State v. Deskins*, 234 Kan. 529, 542, 673 P.2d 1174, 1185 (1983) (upholding the sobriety checkpoint at issue there because it did not involve such discretion); see also *People v. Bartley*, 109 Ill. 2d 273, 289-90, 486 N.E.2d 880, 887 (1985) (stressing that vehicles were "stopped in a preestablished, systematic fashion" pursuant to existing "guidelines on the operation of the roadblock"); and compare *Commonwealth v. McGeoghegan*, 389 Mass. 137, 144, 449 N.E.2d 349, 353 (1983) (checkpoint violated fourth amendment where "the officers used their own discretion in deciding which cars to stop"); *Webb v. State*, 739 S.W.2d 802, 810 (Tex. Crim. App. 1987) (checkpoint operation illegal, as "absolutely no evidence of formal, neutral guidelines formulated by superior law enforcement officials").

184. 110 S. Ct. at 2484.

185. 110 S. Ct. at 2484.

186. *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 9, 663 P.2d 992, 1000 (1983) (Feldman, J., concurring).

187. *State v. Olgaard*, 248 N.W.2d 392, 394-95 (S.D. 1976).

188. E.g., *State v. Crom*, 222 Neb. 273, 277, 383 N.W.2d 461, 463 (1986) (fact that "there

have placed considerable emphasis upon the fact that a high-level plan determined where and when the roadblocks would be operated.¹⁸⁹ Lower courts have also focused upon the presence or absence of other established procedures, such as those providing notice by advance publicity¹⁹⁰ or at the checkpoint scene.¹⁹¹

As for the perceived benefits underlying the decision by Michigan law enforcement authorities to utilize sobriety checkpoints, the opinion of the *Sitz* majority is again wanting. True, the Court says "empirical data" supports the checkpoints' efficiency and then points to trial testimony "that experience in other States demonstrates that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped."¹⁹² To this, the three dissenters cogently respond (i) that "there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols";¹⁹³ and (ii) that in any event the benefit articulated by law enforcement witnesses at trial was instead deterrence, about which no evidence was offered.¹⁹⁴ Obviously, meaningful judicial review of law enforcement policies cannot occur in such circumstances.

Whether *Terry* stops pursuant to a "plan" rather than on individualized suspicion are permissible in somewhat different situations is unclear. In *Brown v. Texas*,¹⁹⁵ where the Supreme Court asserted that either individualized suspicion or "a plan embodying explicit, neutral limitations on the conduct of individual officers" was required by the fourth amendment, the invalidated stop was of a pedestrian whom two

was no plan formulated at the policymaking level of the Omaha Police Department" was fatal to program's constitutionality); *Commonwealth v. Amaral*, 398 Mass. 98, 100, 495 N.E.2d 276, 278 (1986) (mere fact captain in state police set up the roadblock not a sufficient showing; need to show he used "carefully established standards and neutral criteria" in determining "the time and location of roadblocks").

189. *E.g.*, *People v. Bartley*, 109 Ill. 2d 273, 289, 486 N.E.2d 880, 887 (1985) (stressing that "[t]he potential for arbitrary enforcement is reduced when the decision to establish a roadblock is made and the site of the roadblock is selected by supervisory-level personnel," as here); *Commonwealth v. Tarbert*, 517 Pa. 277, 293, 535 A.2d 1035, 1043 (1987) ("[T]he very decision to hold a drunk-driver roadblock, as well as the decision as to its time and place, should be matters reserved for prior administrative approval . . .").

190. *E.g.*, *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984); *Commonwealth v. Trumble*, 396 Mass. 81, 483 N.E.2d 1102 (1985); *Lowe v. Commonwealth*, 230 Va. 346, 337 S.E.2d 273 (1985).

191. *E.g.*, *State v. Jones*, 483 So. 2d 433 (Fla. 1986); *State v. Leighton*, 551 A.2d 116 (Me. 1988).

192. *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481, 2487-88 (1990).

193. 110 S. Ct. at 2495 (Stevens, Brennan and Marshall JJ., dissenting).

194. 110 S. Ct. at 2495-96 (Stevens, Brennan and Marshall JJ., dissenting).

195. 443 U.S. 47, 51 (1979).

policemen on midday patrol saw walking away from another man in an alley in an area with a high incidence of drug traffic. Because the Court's "plan" thesis was set out in this context, it raises the question whether stops without individualized reasonable suspicion but pursuant to a neutral plan would be lawful when undertaken for more generalized or more traditional enforcement purposes, where the usual practice has been to focus upon particular suspects. That is, if in *Brown* it had been established that the officers stopped the defendant pursuant to a police department "plan" to question all pedestrians found in the "high drug problem area," would the outcome have been different? I doubt it. For one thing, the "high drug problem area" in most municipalities would be an area populated by minorities, and thus this police policy could not be supported by the previously discussed representation-reinforcement theory. Put differently, this would not be an instance in which a uniform policy had substantially reduced the "risk that the politically less powerful are being forced to bear disproportionate privacy losses."¹⁹⁶ Moreover, this does not seem to be the kind of policy that would in fact substantially eliminate discretion by officers in the field, for the simple reason that stopping *all* pedestrians would likely be well beyond police capabilities.

However, if the "plan" could somehow be more carefully and tightly formulated, then there would be good reason to look with favor upon this kind of law enforcement planning by police agencies. The chances of drawing up a suitable plan appear greater if the plan addresses a somewhat special problem existing at a certain time and place. The point is illustrated by *State v. Hilleshiem*,¹⁹⁷ where two officers devised a plan to stop all vehicles entering a certain park after dark because of a wave of vandalism, which had caused \$8000 worth of damage. Though the court cautioned that "[i]n the balancing equation, stopping motorists for the purposes advanced here might have even less public benefit than a stop to check illegal immigration or drivers' licenses,"¹⁹⁸ suppression of the evidence obtained in a stop pursuant to this scheme was ordered only because the plan had not been developed at a policymaking level, where presumably this issue would have received more careful attention.¹⁹⁹ *Hilleshiem* thus sug-

196. Wasserstrom & Seidman, *supra* note 116, at 95.

197. 291 N.W.2d 314 (Iowa 1980).

198. 291 N.W.2d at 319.

199. Compare *People v. John BB.*, 56 N.Y.2d 482, 438 N.E.2d 864, *cert. denied*, 459 U.S. 1010 (1982), upholding a burglary-investigation stop pursuant to a uniform plan developed and implemented by an officer in the field. For criticism of *John BB.* and approval of *Hilleshiem*, see Kerr & Feldman, *Roving Roadblocks and the Fourth Amendment*, 20 CRIM. L. BULL. 124 (1984).

gests, as occasionally has been held,²⁰⁰ that when police administrators have been able to identify a rather unique law enforcement problem in a discrete location such as a park, a carefully drafted "plan" responding to that problem might well authorize stops for questioning at that location without individualized suspicion.

Turning now to the other variety of *Terry* stop, that made upon individualized reasonable suspicion, it is necessary to ask once again about the actual and potential contribution of police guidelines in articulating clear and proper standards of police conduct. At least as an abstract matter, it seems that administrative regulations on this subject would be helpful. If, as the Supreme Court has emphasized, the requisite degree of suspicion depends upon the evidence "as understood by those versed in the field of law enforcement,"²⁰¹ then surely this expertise can be brought to bear not only through the particular experiences of individual officers in the field but also by the collective learning of the agency as revealed in announced policies. In addition, law enforcement regulations on what constitutes reasonable suspicion might give appellate courts "full appreciation" of the "overall impact and implications" of specific investigative activities and might "govern the exercise of discretion" by police, or so argued one judge with respect to the common practice of DEA agents stopping suspected drug couriers at airports.²⁰² But the experience of courts with the law enforcement guidelines that emerged in that precise area, the so-called "drug courier profile," raises profound questions about what can be accomplished by rules governing this sort of police activity.

Profiles are

an increasingly popular law enforcement tool. Most prominent among the profiles in use today are those used to identify hijackers and those used to identify persons who smuggle illegal aliens into the country. Less prominent are the drug smuggling vessel profile, the stolen car profile, the stolen truck profile, the alimentary-canal smuggler profile, the battering parent profile, and the poacher profile.²⁰³

200. *E.g.*, *People v. Meitz*, 95 Ill. App. 3d 1033, 420 N.E.2d 1119 (1981). In *Meitz*, the court upheld a stop where

the police officer was responding to a governmental interest in stopping a rash of auto thefts occurring on a particularized parking lot. Prior to instituting the registration check procedure, the police department determined the times in which the thefts were likely to occur and the automobiles that were to be the most susceptible. The department then instructed its officers to stop all susceptible vehicles leaving the two exits of the parking lots during the hours in which the thefts had originally occurred.

95 Ill. App. 3d at 1037, 420 N.E.2d at 1122.

201. *United States v. Cortez*, 449 U.S. 411, 418 (1981).

202. *United States v. Vasquez*, 612 F.2d 1338, 1350, 1352 (2d Cir. 1979) (Oakes, J., dissenting).

203. Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye,"* 65 N.C. L. REV. 417, 423-25 (1987) (footnotes omitted).

But in terms of frequency of use by law enforcement officers and frequency of confrontation by appellate courts, none matches the drug courier profile. "Between 1976 and 1986 over 140 reported cases involved airport stops by DEA agents based on the 'drug courier profile.'"²⁰⁴ The content of the profile seems not to have always remained constant, which is one of the criticisms of it,²⁰⁵ but as most commonly confronted in the cases²⁰⁶ the profile consists of seven primary and four secondary characteristics:

- The seven primary characteristics are: (1) arrival from or departure to an identified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as rapid turn-around time for a very lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers.

The secondary characteristics are: (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or distribution cities.²⁰⁷

The Supreme Court's most recent²⁰⁸ lucubration regarding this profile is *United States v. Sokolow*,²⁰⁹ holding the police had grounds to stop the defendant as a suspected drug courier on the particular cluster of characteristics present in that case.²¹⁰ In marked contrast to some of the Supreme Court cases previously discussed, *Sokolow* does not express any deference toward the law enforcement guidelines —

204. *Id.* at 417.

205. Smith, J., dissenting in *Bothwell v. State*, 250 Ga. 573, 588, 300 S.E.2d 126, 137, *cert. denied*, 463 U.S. 1210 (1983), objected that "profile characteristics appear to vary wildly from airport to airport and case to case, giving the profile a shifting, chameleon-like quality."

206. Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 871-72 (1985).

207. *United States v. Elmore*, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

208. The Court's earlier encounters with the profile occurred in *Florida v. Rodriguez*, 469 U.S. 1 (1984); *Florida v. Royer*, 460 U.S. 491 (1983); and *United States v. Mendenhall*, 446 U.S. 544 (1980), which, it is said, have merely "created confusion among the lower courts." Becton, *supra* note 203, at 454.

209. 109 S. Ct. 1581 (1989).

210. In *Sokolow*,

the agents knew, *inter alia*, that (1) he paid \$2100 for two airplane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.

109 S. Ct. at 1583.

that is, the drug courier profile — relied upon by the DEA agents. Indeed, the Court framed the issue not as whether the profile somehow counted in the government's favor, but rather as whether the profile counted *against* the government. No, the majority responded: "A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."²¹¹ But this was not good enough for the two dissenters, Marshall and Brennan. Though on other occasions (for example, in *Bertine*) these two justices had decried the failure of administrative regulations to confine police discretion sufficiently, this time their concern was that the profile tended to discourage individual exercise of discretion! They objected:

It is highly significant that the DEA agents stopped Sokolow because he matched one of the DEA's "profiles" of a paradigmatic drug courier. [A] law enforcement officer's mechanistic application of a formula of personal and behavioral traits in deciding whom to detain can only dull the officer's ability and determination to make sensitive and fact-specific inferences "in light of his experience," particularly in ambiguous or borderline cases. Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention.²¹²

Though at first blush such a judicial assessment of law enforcement policy might strike one as curious at best, on reflection the seeming incongruity vanishes. For one thing, the profile differs substantially from the law enforcement guidelines discussed earlier. The others occasionally involve factual determinations of a general nature (for example: Is this a sensible location to place an immigration checkpoint? Is this a sensible place to put a sobriety checkpoint?), but in the main call for what are essentially policy judgments (for example: Do we prefer to impound all arrestees' cars, or should some simply be left at the scene? With available resources, how often should we inspect auto dismantling shops?). The profile, on the other hand, is intended to establish which air travelers are probably drug couriers, which is a specific factual determination, that is, one concerning the sufficiency of suspicion regarding particular individuals. Before courts readily accept that kind of law enforcement guideline, they are certainly obliged "to require that the government provide satisfactory

211. 109 S. Ct. at 1587.

212. 109 S. Ct. at 1588 (Brennan and Marshall, JJ., dissenting) (citation omitted).

empirical evidence that the profile is 'valid' and actually 'works.'"²¹³ No such showing has been made, as Professor Cloud highlights in a comparison of the drug courier profile and the hijacker profile:

Unlike the drug courier profile, the hijacker profile was designed systematically. The Task Force employed social science methodologies to develop the profile. After studying known hijackers, the task force compiled twenty-five to thirty characteristics in which hijackers differed significantly from the air-traveling public. By putting only a few of them together they arguably obtained a reliable combination sharply differentiating potential hijackers from non-hijackers.

Unlike the drug courier profile, the hijacker profile was tested systematically to measure its validity. These procedures included field tests involving several hundred thousand air travelers as well as the historical application of the profile to known hijackers.

The drug courier profile has never been subjected to any comparable process of validation. The government has not conducted any systematic study to determine whether the drug profile has any predictive validity. Indeed, the only evidence of its effectiveness has generally been the testimony of agents who utilize the profile in the field. This testimony is typically deficient because even when agents "were recognized as having made stops in a substantial number of past instances where their suspicions proved to be correct [there was no] evidence as to the number of instances in which innocent passengers had been subjected by them to investigatory stops."²¹⁴

A second reason the drug courier profile has deservedly not received deference from the appellate courts is that the profile fails to limit meaningfully the discretion of agents in the field (or, more precisely, in the airport). For one thing, as the lower court noted in *Sokolow*, the profile has a "chameleon-like way of adapting to any particular set of observations."²¹⁵ As another court put it, "there is no such thing as a single drug courier profile; there are infinite drug courier profiles. The very notion is protean, not monolithic."²¹⁶ This is why the profiles tell us that it is suspicious to get off an airplane first²¹⁷ or last²¹⁸ or in between,²¹⁹ and this is also why they are an object of ridicule.²²⁰ For another thing, the profiles do not predetermine just what combination of suspicious factors must exist for a lawful stop, an

213. Cloud, *supra* note 206, at 873.

214. *Id.* at 874-75 (footnotes omitted) (quoting *United States v. Place*, 660 F.2d 44, 48-49 (2d Cir. 1981), *aff'd.*, 462 U.S. 696 (1983)).

215. 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd.*, 109 S. Ct. 1581 (1989).

216. *Grant v. State*, 55 Md. App. 1, 6, 461 A.2d 524, 526 (1983).

217. *United States v. Moore*, 675 F.2d 802 (6th Cir. 1982).

218. *United States v. Mendenhall*, 446 U.S. 544 (1980).

219. *See United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980).

220. *See LaFave, A Fourth Amendment Fantasy: The Last (Heretofore Unpublished) Search and Seizure Decision of the Burger Court*, 1986 U. ILL. L. REV. 669, 671.

especially critical matter given that some of those factors (for example, traveling from a source city) "describe a very large category of presumably innocent travelers."²²¹ Given this latter problem, it appears that the lower court's efforts in *Sokolow* to distinguish "ongoing criminal activity factors" (at least one of which would be required in every case) from "personal characteristics"²²² were a meaningful response to such amphibolic law enforcement guidelines, though the court's application of this distinction admittedly was not without difficulties.²²³

V. ARRESTS: POLICE LIMITS ON FORCE AND CUSTODY

Of the important decisions a police officer must make, none carries potential consequences more serious than the determination whether to employ force against a suspect to make an arrest. A mistaken failure to utilize force may result in escape of the suspected offender and, in some instances, subsequent serious harm to others. A mistaken use of force, especially a firearm, may result in serious injury to or even the death of the suspect or bystanders. Moreover, "[p]olice use of firearms to apprehend suspects often strains community relations or even results in serious disturbances."²²⁴ No wonder, then, that this subject is a matter of special concern to responsible police administrators²²⁵ and that, contrary to the situation at the time of the ABF Survey,²²⁶ police guidelines on the use of force are now very common.²²⁷ These guidelines may quite properly impose limitations more stringent than those the legislature has adopted.²²⁸

The absence of an internal police shooting policy or . . . the existence of internal shooting policy that merely restates the law, leaves officers only

221. *Reid v. Georgia*, 448 U.S. 438, 441 (1980).

222. *United States v. Sokolow*, 831 F.2d 1413, 1419, 1420 (9th Cir. 1987), *rev'd.*, 109 S. Ct. 1581 (1989).

223. The *Sokolow* majority questioned, for example, whether the lower court's illustrations of "ongoing criminal activity" factors, traveling with an alias or taking an evasive path through the airport, had "the sort of ironclad significance attributed to them by the Court of Appeals." 109 S. Ct. at 1586.

224. TASK FORCE REPORT, *supra* note 41, at 189.

225. See Edwards, *The Shot in the Back Case: Tennessee v. Garner*, 14 N.Y.U. REV. L. & SOC. CHANGE 733 (1986).

226. See W. LAFAVE, *supra* note 1, at 209 ("Police manuals and instructional materials . . . tend to be ambiguous on the use of force in making arrests. Some police manuals make no mention of the problem at all."). Similarly, TASK FORCE REPORT, *supra* note 41, at 189, comments that "a 1961 survey of Michigan police forces found that 27 out of 49 had no firearms policies."

227. See Fyfe, *Tennessee v. Garner: The Issue Not Addressed*, 14 N.Y.U. REV. L. & SOC. CHANGE 721, 723 n.10 (1986).

228. *Long Beach Police Officers Assn. v. City of Long Beach*, 61 Cal. App. 3d 364, 372, 132 Cal. Rptr. 348, 352 (1976); *Chastain v. Civil Serv. Bd. of Orlando*, 327 So. 2d 230 (Fla. Dist. Ct. App. 1976).

their own subjective criteria for deciding whether to use deadly force. Unfortunately, in these hurried and excited circumstances, an officer's best judgments are often not equal to those that could be formulated at leisure, and in advance, by top level policy makers with the time to consider more fully the merits and ramifications of various alternative actions.²²⁹

When the Supreme Court had occasion to decide under what circumstances police may constitutionally resort to deadly force in attempting to make an arrest, the Court made use of law enforcement policies in an unusual way. The case was *Tennessee v. Garner*,²³⁰ a wrongful death action brought under the federal civil rights statute. A Memphis police officer had shot and killed an unarmed youth fleeing from the burglary of an unoccupied house. The officer's actions conformed to a state law following the common law rule, which (as the Court noted) "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon"²³¹ The actions also conformed to police department policy, which was slightly more restrictive but still allowed use of deadly force in cases of burglary. It was not this particular police regulation which grabbed the Court's attention, however, but rather the pattern revealed in the regulations of other departments across the country:

Overwhelmingly, these are more restrictive than the common-law rule. . . . A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm. . . . Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not.²³²

The Court concluded that this narrower position rather than the common law rule squared with the fourth amendment.

In reaching this result, which was urged upon the Supreme Court by many police groups,²³³ the Justices found the police guidelines highly relevant in several respects. First, said the Court, "[i]n light of the rules adopted by those who must actually administer them, the older and fading common law view is a dubious indicium of the constitutionality of the Tennessee statute now before us."²³⁴ This reliance

229. Fyfe, *supra* note 227, at 722-23 (footnotes omitted).

230. 471 U.S. 1 (1985).

231. 471 U.S. at 12.

232. 471 U.S. at 18-19 (citations omitted).

233. "The Police Foundation, together with nine national and international Associations of Police and Criminal Justice Professionals, plus the Chiefs of Police Associations of two states and thirty-one law enforcement chief executives, joined as amici curiae in support of Cleamtee Garner, the father of the deceased minor." Edwards, *supra* note 225, at 735.

234. 471 U.S. at 19 (footnote omitted).

upon the police regulations and, in addition, modern statutes on the subject, apparently constituted "an open effort to divine a national trend or consensus concerning the common law rule."²³⁵ This is not to suggest that "the Court was doing nothing more than acting prudently to cover its political flank."²³⁶ Rather, as one perceptive commentator has noted,

[T]he Court's concern with current practice is both defensible and suggestive of a process that is quite sophisticated. For if the Court is engaged in the explication of values, it makes very good sense to refer to and be guided by the value judgments of other societal decision makers. . . . Thus, . . . interpretation need not flow from the top down, but may come from the bottom up as well. Indeed, this vertical dialogue is especially appropriate to a process of constitutional interpretation that implicates society's values.²³⁷

Second, the Court utilized the array of police regulations to rebut arguments by Tennessee that the Court's restrictive standard was impracticable. Asserting that "[w]e would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement,"²³⁸ the Court concluded, in effect, that widespread existence of the narrower rule in police guidelines demonstrated the lack of such adverse effects. Specifically, the Court noted there had been "no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today."²³⁹ As for the contention that the Court's rule "requires the police to make impossible, split-second evaluations of unknowable facts," the Court responded that "this claim must be viewed with suspicion in light of the similar self-imposed limitations of so many police departments."²⁴⁰

Whether the unique use of police regulations found in *Garner* is likely to be repeated in future cases is unclear, although I doubt it will become a common occurrence. There are probably not that many other policy areas in which a consensus will emerge from the police regulations as clearly as in *Garner*. Further, this collective judgment about what the police should or should not do is likely to carry the weight it did in *Garner* only when, as there, it tends to demonstrate that the police are operating more narrowly than existing law would

235. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 683 (1986).

236. *Id.* at 684.

237. *Id.* at 684-85.

238. 471 U.S. at 19.

239. 471 U.S. at 19.

240. 471 U.S. at 20.

permit. Nevertheless, *Garner* demonstrates to the police establishment that if the "position" of the police on an important issue of constitutional policy is effectively presented to the Court, the Court will consider it.

While the existence and content of police regulations was very much in the forefront in the *Garner* Court's analysis, quite the opposite was true in two of the Court's other arrest cases: *United States v. Robinson*²⁴¹ and its companion, *Gustafson v. Florida*.²⁴² In *Robinson*, a District of Columbia police officer arrested defendant for operating a motor vehicle after revocation of his operator's permit, searched defendant incident to that arrest, and discovered heroin inside a cigarette package in the left breast pocket of defendant's coat. In a footnote, the Court observed that a general order of the D.C. Metropolitan Police Department mandated custodial arrest for this type of traffic violation and that established procedures in the department required a search of those arrested; yet the Court then admonished that "[s]uch operating procedures are not, of course, determinative of the constitutional issues presented by this case."²⁴³ The defendant contended that the bases for search incident to arrest — to find evidence of the crime for which the arrest was made, and to find any weapons the arrestee might use to escape — did not exist in this case. The Court responded that it disagreed with the "suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."²⁴⁴ Thus, concluded the *Robinson* Court, in every "case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."²⁴⁵ In *Gustafson*, where marijuana cigarettes were found on defendant's person following his arrest for not having his operator's license with him while driving, the defendant claimed his case was different from *Robinson* in several respects, including that there were no applicable police regulations requiring the officer to take the defendant into custody or to make a full-scale body search incident to arrest. The Court summarily dismissed that argument with the observation that these differences were not "determinative of the constitutional issue."²⁴⁶

241. 414 U.S. 218 (1973).

242. 414 U.S. 260 (1973).

243. *Robinson*, 414 U.S. at 223 n.2.

244. *Robinson*, 414 U.S. at 235.

245. *Robinson*, 414 U.S. at 235.

246. *Gustafson*, 414 U.S. at 265.

There is good reason to be concerned about the *Robinson-Gustafson* holding that every custodial arrest, even for a minor traffic violation, permits a full search of the arrestee's person. There is good reason to be even more concerned with the Court's later holding in *New York v. Belton*²⁴⁷ that in every instance in which "a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."²⁴⁸ In all such instances, as the *Robinson* dissenters emphasized, "there is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search."²⁴⁹ Given that "[v]ery few drivers can traverse any appreciable distance without violating some traffic regulation,"²⁵⁰ this is indeed a frightening possibility. It is apparent that virtually everyone who ventures out onto the public streets and highways (including Supreme Court Justices²⁵¹) may then, with little effort by the police, be placed in a position where his or her person and vehicle are subject to search.

Because of this, the proposition that the fourth amendment should be construed to bar custodial arrests for minor violations is an appealing one. That issue was not considered in the *Robinson-Gustafson* decisions, although this possibility may underlie Justice Stewart's somewhat cryptic comment in his *Gustafson* concurrence "that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments."²⁵² But as yet, as Justice Stevens has more recently noted, "the Court has not directly considered the question . . ."²⁵³ It is true that "a persuasive claim" can be made that custodial arrest for lesser offenses is unconstitutional; the argument is grounded in two important fourth amendment principles discussed earlier — those concerning preventing arbitrary exercise of government power, and those that require balancing the individual privacy interests and governmental interests regarding custodial arrest.²⁵⁴ This suggests that if the Court ever does reach this

247. 453 U.S. 454 (1981).

248. 453 U.S. at 460 (footnotes omitted).

249. 414 U.S. at 248 (Marshall, J., dissenting).

250. B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 65 (1969 ed.).

251. *Rehnquist Is Given Ticket for Speeding*, N.Y. Times, Sept. 13, 1986, at 10, col. 1.

252. 414 U.S. at 266-67 (Stewart, J., concurring).

253. *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting).

254. See Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMPLE L. REV. 221, 224 (1989).

question, a *Garner*-style assessment would be in order, in which case the extent to which police regulations across the country do require use of the citation alternative would be most relevant.²⁵⁵

Although the Court in *Robinson* and *Gustafson* had no occasion to consider that broader question, it is unfortunate that the Court did not resolve the narrower issue so dramatically posed by the respective state of applicable police regulations in those two cases: whether the control of police discretion in *Robinson* and the absence of control in *Gustafson* was the dominant characteristic in the cases — one which should have produced different results in the two decisions. Had the Court reflected more carefully upon the proper relevance of law enforcement guidelines in such cases, it might have realized the ineluctable rationality of this syllogism: "Arbitrary searches and seizures are 'unreasonable' searches and seizures; ruleless searches and seizures practiced at the varying and unguided discretion of thousands of individual peace officers are arbitrary searches and seizures; therefore, ruleless searches and seizures are 'unreasonable' searches and seizures."²⁵⁶ As Professor Amsterdam has put it so eloquently, "[i]f the Court had distinguished the two cases on this ground, it would . . . have made by far the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued against the writs of assistance in 1761 and 'the child Independence was born.'"²⁵⁷

Perhaps the Court's failure to take this step was grounded in the assumption that the risk of arbitrariness in law enforcement may be sufficiently overcome by allowing a particular defendant to prove that an officer acted from an ulterior motive. But tangible evidence of subjective motivation is difficult for defendants to produce and difficult for courts to assess,²⁵⁸ which perhaps explains why Justice White was once moved to observe that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."²⁵⁹ And this may explain why the Supreme Court ultimately held that fourth amendment issues

255. Just what the pattern is here is unclear. Doubt has sometimes been expressed as to whether police regulations requiring use of citations in specified circumstances have been promulgated. See Salken, *supra* note 254, at 252-53. But rulemaking on this subject has often been urged upon the police. See, e.g., 2 ABA STANDARDS FOR CRIMINAL JUSTICE § 10-2.3(b) (2d ed. 1980); ALI MODEL CODE OF PRE-ARREST PROCEDURE § 120.2(4) (1975).

256. Amsterdam, *supra* note 5, at 417.

257. *Id.* at 416 (footnote omitted).

258. As one appellate judge commented about *Robinson*, it is "next to impossible to determine that in making the arrest the police were motivated by the desire to search for evidence of a crime not related to the arrest." *State v. Florance*, 270 Or. 169, 197, 527 P.2d 1202, 1215 (1974) (O'Connell, C.J., dissenting).

259. *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting).

should be judicially resolved by use of an objective standard. The decision is *Scott v. United States*,²⁶⁰ a wiretapping case in which the defendants' "principal contention" was that the evidence must be suppressed because the agents did not make a good faith effort to comply with the minimization requirement. The Court concluded that the government's response, that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional,"

embodies the proper approach for evaluating compliance with the minimization requirement. Although we have not examined this exact question at great length in any of our prior opinions, almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him. . . .

We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. . . . The Courts of Appeals which have considered the matter have likewise generally followed these principles, first examining the challenged searches under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.²⁶¹

Although it is not clear that the Court in *Scott* meant to "apply its supposed objective test to the issue of pretextual fourth amendment activity,"²⁶² applying this test produces the following results: (1) If the police arrest *X* for crime *A*, as they would have in any event, in the anticipation or hope of thereby finding evidence of crime *B* on *X*'s person, the latter "underlying intent or motivation" does not make their action illegal.²⁶³ (2) If the police stop *X*'s car for minor offense *A*, and they "subjectively hoped to discover contraband during the stop" so as to establish serious offense *B*, the stop is nonetheless lawful if "a reasonable officer *would* have made the stop in the absence of the invalid purpose."²⁶⁴ (3) If police obtain a search warrant to search *X*'s premises for evidence of crime *A*, which again they would have done in any event, the search is not illegal merely because the police suspect they might find evidence of crime *B*.²⁶⁵ (4) If *X*'s car is searched in the hope or expectation of finding evidence of crime *B*, but that search was

260. 436 U.S. 128 (1978).

261. 436 U.S. at 136-38.

262. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363, 367 (1989).

263. *E.g.*, *Horne v. Commonwealth*, 230 Va. 512, 515-17, 339 S.E.2d 186, 188-89 (1986).

264. *E.g.*, *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988) (quoting *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986)).

265. *E.g.*, *State v. Riedinger*, 374 N.W.2d 866, 876 (N.D. 1985).

an inventory which would have been made in any event,²⁶⁶ or a search for evidence of crime *A* which would have been made in any event,²⁶⁷ again the evidence is admissible. The decisions reaching these conclusions (often by relying on *Scott*) are sound, for when the action would have occurred in any event, there is no *conduct* which ought to have been deterred and thus no reason to bring the exclusionary rule into play for purposes of deterrence.

But some of the allegedly pretextual search and seizure cases are of another kind. The driver of an automobile suspected of unlawful drug activity is placed under custodial arrest for a traffic violation and then searched, although the arrest was not "one which would have been made by a traffic officer on routine patrol against any citizen driving in the same manner."²⁶⁸ A person suspected of drug activity is arrested late at night inside the premises of another by state police holding city arrest warrants for two minor traffic violations, hardly the usual practice in dealing with outstanding traffic warrants.²⁶⁹ An arrestee's car is impounded and then inventoried "contrary to the usual procedure followed in traffic cases."²⁷⁰ Situations such as these involve what the Supreme Court has properly characterized as "serious misconduct by law-enforcing officers,"²⁷¹ but this does not mean that the *Scott* reasoning is inapplicable. These and similar fact situations involve "serious misconduct" *in spite of* rather than *because of* the "underlying intent or motivation" of the police. That is, the proper basis of concern is not with *why* the officer deviated from the usual practice but simply that he *did* deviate. It is the *fact* of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which, in this context, constitutes the fourth amendment violation.

As a result, the question of what police ordinarily do in a particular set of circumstances becomes critical in these so-called pretext cases. Illustrative are the facts in *United States v. Guzman*,²⁷² where a New Mexico state patrolman stopped a car because the driver did not have his seat belt fastened; the stop led to other events which uncovered cocaine in the car. The court explained that under the rule stated above:

266. *E.g.*, *State v. Rodewald*, 376 N.W.2d 416, 422 (Minn. 1985).

267. *State v. Oliver*, 341 N.W.2d 744, 745-47 (Iowa 1983).

268. *Diggs v. State*, 345 So. 2d 815, 816 (Fla. Dist. Ct. App. 1977).

269. *Harding v. State*, 301 So. 2d 513 (Fla. Dist. Ct. App. 1974).

270. *State v. Volk*, 291 So. 2d 643, 644 (Fla. Dist. Ct. App. 1974).

271. *Abel v. United States*, 362 U.S. 217, 226 (1960).

272. 864 F.2d 1512 (10th Cir. 1988).

If police officers in New Mexico are required to and/or do routinely stop most cars they see in which the driver is not wearing his seat belt, then this stop was not unconstitutionally pretextual at its inception, even if Officer Keene subjectively hoped to discover contraband during the stop. Conversely, if officers rarely stop seat belt law violators absent some other reason to stop the car, the objective facts involved in this stop suggest that the stop would not have been made but for a suspicion that could not constitutionally justify the stop.²⁷³

In *Guzman* no evidence in the record pointed one way or another, as the district judge had erroneously decided in defendant's favor on a subjective state-of-mind theory. This did not require remand because the appellate court found another basis upon which to rule in defendant's favor. But if remand *had* been necessary, then the district court would have had to make a factual determination of whether drivers violating the seat belt law are, on the one hand, "rarely" stopped or, on the other, "routinely" stopped. In such circumstances, as the reference in *Guzman* to when police are "required" to stop such offenders suggests, it is exceedingly important that the litigants and the court focus on the question of whether or not a police rule on the subject exists. Admittedly a court might find a practice "routine" even absent such a regulation, but when no applicable law enforcement policy exists there is reason to be uneasy about applying the *Scott* approach. Lacking such documentation, testimony by individual officers regarding what they perceive as the "routine" in their department carries at least some of the risk that made the intent-of-the-officer approach unpalatable to courts: a significant chance that the truth of the matter will not be accurately established by the self-serving declarations of the officer whose conduct has been challenged. This suggests that this is an area of fourth amendment litigation within which the existence of and reliance upon law enforcement regulations takes on special importance.

Some courts have given *Scott* a quite different interpretation, with the unfortunate result that pretext contentions are being dismissed even when it is shown (perhaps by noncompliance with an existing police regulation) that the established "routine" was not followed.²⁷⁴

273. 864 F.2d at 1518 (citation omitted).

274. Typical of this approach are these three cases, all involving pretext arrest claims and all relying heavily on *Scott*: *United States v. Causey*, 834 F.2d 1179, 1181, 1186-87 (5th Cir. 1987) (police, suspecting defendant but lacking grounds to arrest him for robbery, learned of outstanding warrant for defendant's arrest because of his failure to appear in court to answer petty theft charge; because the police "took no action that they were not legally authorized to take," defendant's pretext claim rejected notwithstanding the facts; as stressed by the dissenters, that this warrant was "seven and a half years old, issued for failure to appear in city court to answer to a charge that itself could no longer be prosecuted because the statute of limitations had run," and that the "police never had a practice of following up on such warrants, and in foraging through old records in search of a warrant against Causey they were not following any established pol-

These decisions interpret the *Scott* "objective assessment" test as, in effect, eliminating any meaningful way of mounting a pretext claim, for they treat as irrelevant *both* what evidence may exist regarding the actual intentions of the police and what evidence may exist that the officers did not act as they ordinarily do. These courts thus treat police regulations as having no fourth amendment significance.²⁷⁵ Yet, noncompliance with a police regulation is powerful evidence that the fourth amendment has been violated, for when a defendant has raised a pretext claim the proper question is not whether the officer *could* have acted as he did but rather whether the officer *would* have so acted absent an invalid purpose.²⁷⁶ Only by putting the proposition this way is it possible to uncover and respond to arbitrary police conduct which, as we have already seen, is one central concern of the fourth amendment.

VI. REMEDIES: THE LIMITS OF THE EXCLUSIONARY RULE

The remedy for fourth amendment violations that courts most frequently invoke is the exclusionary rule. As declared in *Mapp v. Ohio*,²⁷⁷ this rule is "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible."²⁷⁸ In practice, however, the exclusionary rule is somewhat narrower than this quotation would suggest. Because in recent years the Supreme Court has stressed that the exclusionary rule's "major thrust is a deterrent one,"²⁷⁹ the Court generally has set the boundaries of the exclusionary rule by considering just when exclusion

icy"); *United States v. Basey*, 816 F.2d 980, 991 (5th Cir. 1987) (lawfully stopped burglary suspect asked to prove he carried adequate liability insurance for the car; when he could not do so he was arrested, incident to which evidence of the burglary discovered; pretext contention dismissed with the observation "that the deputies had probable cause to and could lawfully arrest Basey for violation of the Texas financial responsibility statute"); *State v. Bruzzese*, 94 N.J. 210, 229, 245, 463 A.2d 320, 330, 339 (1983) (detective ran routine check on defendant, suspected of burglary at which distinctive footprint left, and learned of an outstanding contempt of court arrest warrant for failure to appear in municipal court in response to a summons for a minor offense, apparently a traffic violation; while executing warrant at defendant's home, boots with distinctive pattern similar to the footprint seen and seized; because by statute the officer had "the power to serve a contempt warrant," court concludes it irrelevant that, as the dissent put it, the detective "conceded that he did not ordinarily serve contempt warrants and that it would have been routine practice to call the defendant and tell him to come to police headquarters"), *cert. denied*, 465 U.S. 1030 (1984).

275. As the court put it in *Bruzzese*, "there is no need to determine whether [the officer's] conduct constituted a 'deviation,' " for allegedly pretextual conduct is not to be "deemed unreasonable merely because a police officer deviates from his department's standard operating procedure." 94 N.J. at 228, 463 A.2d at 329-30.

276. *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986).

277. 367 U.S. 643 (1961).

278. 367 U.S. at 655.

279. *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

would significantly further the deterrence objective. Under this approach, as Professor Amsterdam once put it, the rule is perceived as "a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease."²⁸⁰

Police regulations sometimes have a bearing on whether the exclusionary rule is an appropriate sanction: for example, a regulation may be used to show that illegally seized evidence should be admitted because of its "inevitable discovery" by lawful means.²⁸¹ In the following discussion, however, my concern is with the possible relevance of the police regulatory process to fourth amendment remedies in an even more direct fashion. Two separate issues are considered. One focuses on a more controversial limitation upon the exclusionary rule,²⁸² the so-called "good faith" doctrine; the question is whether or not police reliance upon a departmental rule or policy should be deemed to constitute a form of "good faith" action that makes the suppression remedy unnecessary. The second issue relates to a possible need to supplement the exclusionary rule because it is admittedly an imperfect fourth amendment remedy, one which comes into play only when illegal police activity has uncovered evidence of criminal

280. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964).

281. The "inevitable discovery" doctrine is a subset of the broader proposition that it is inappropriate to exclude evidence that cannot fairly be characterized as a "fruit" of the antecedent fourth amendment violation. As the Supreme Court explained in *Nix v. Williams*, 467 U.S. 431, 447 (1984), "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings." But, to ensure that this exception to the fruits doctrine is applied only when those circumstances exist, the Court cautioned in *Williams*, the prosecution must "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." 467 U.S. at 444. Just as with the previously discussed pretext doctrine, the critical word here is "would"; it is again not good enough that the police *could* have lawfully uncovered the evidence on some alternative basis.

This means, of course, that in many circumstances the courts are well advised to inquire whether or not a relevant police policy existed. The presence or absence of such policy may determine the critical fact question whether or not certain other events inevitably *would* have occurred. *E.g.*, *State v. Badgett*, 200 Conn. 412, 434, 512 A.2d 160, 172 (1986) (although defendant had been lawfully arrested, search of his car which uncovered drugs was unlawful because not on probable cause and because delayed and thus not incident to arrest; remand for determination of whether drugs would inevitably have been discovered in inventory, which necessitates consideration of "whether such a search would have been conducted according to standard state police operating procedures").

282. Compare, *e.g.*, Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith"*, 36 VAND. L. REV. 1511 (1983); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982); Mertens & Wasserstrom, *supra* note 31; all opposing the "good faith" exception *with, e.g.*, Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 CRIM. J. ETHICS, Summer/Fall 1982, at 35; Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982).

activity by one who both (i) has standing to object to that unconstitutional conduct, and (ii) is a person the authorities are interested in prosecuting. Specifically, this second issue concerns whether court-mandated police rulemaking is in some circumstances a necessary or appropriate additional means for protecting fourth amendment rights.

Justice White, dissenting in *Stone v. Powell*,²⁸³ expressed the view that the exclusionary rule

should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed.²⁸⁴

The Supreme Court has not adopted such an across-the-board "good-faith" exception, but has recognized two circumstances in which the exception does apply. These are the reliance-on-magistrate situation in *United States v. Leon*²⁸⁵ and the reliance-on-statute situation in *Illinois v. Krull*.²⁸⁶

In *Leon*, the district court suppressed drugs found in execution of a facially valid search warrant because the affidavit for the warrant did not establish probable cause. The court of appeals affirmed, but the Supreme Court reversed, holding that "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."²⁸⁷ The Court grounded this conclusion in a balancing-of-interests analysis, which considered the "substantial social costs" of the exclusionary rule on the one hand and, on the other, the benefits of the rule in terms of deterrence, which in the *Leon* circumstances were deemed "marginal or nonexistent."²⁸⁸ The Court concluded that judges did not need deterrence and, in any event, would not be deterred by exclusion,²⁸⁹

283. 428 U.S. 465 (1976).

284. 428 U.S. at 538 (White, J., dissenting).

285. 468 U.S. 897 (1984).

286. 480 U.S. 340 (1987).

287. 468 U.S. at 900.

288. 468 U.S. at 907, 922.

289. The Court stressed that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment," and then added that, in any event, it did not appear "that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." 468 U.S. at 916.

and further, that deterrence of the police simply was not involved in this setting because "there is no police illegality and thus nothing to deter."²⁹⁰

In *Krull*, concerning search of an auto junkyard pursuant to an administrative inspection statute later found unconstitutional, the Court held that "a good-faith exception to the Fourth Amendment exclusionary rule applies when an officer's reliance on the constitutionality of a statute is objectively reasonable, but the statute is subsequently declared unconstitutional."²⁹¹ In abandoning its own clearly established pre-*Leon* rule that police conduct undertaken pursuant to an unconstitutional legislative conferral of search or seizure authority is unlawful and thus a basis for suppression under the *Mapp* exclusionary rule,²⁹² the Court concluded that the "approach used in *Leon* is equally applicable to the present case."²⁹³ The Court looked for and found factors equivalent to those which were determinative in *Leon*. Specifically, the Court in *Krull* first reasoned that legislators were not in need of deterrence and would not be deterred by exclusion.²⁹⁴ The Court then declared: "The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant."²⁹⁵

Does it follow that a "good-faith" exception to the exclusionary rule should also be recognized in those cases in which the officer who conducted the seizure or search (now determined to be illegal) reasonably relied upon some police rule or policy? From the standpoint of deterring the officer who made the search or seizure, one can argue that suppression where the officer relied upon a police regulation makes no more sense than where the officer relied upon a statute or a warrant. Moreover, it can be contended that such an extension of the "good-faith" exception would have the added advantage, even more so than the possible judicial uses of police regulations discussed earlier, of

290. 468 U.S. at 921.

291. 480 U.S. at 346.

292. See *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Berger v. New York*, 388 U.S. 41 (1967).

293. 480 U.S. at 349.

294. The Court declared that "legislators, like judicial officers, are not the focus of the rule," for like judges they are not inclined to act contrary to the fourth amendment, and added that there was "nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent" on legislators enacting such statutes. 480 U.S. at 350-52.

295. 480 U.S. at 349.

providing police departments with strong encouragement to engage in careful self-study to produce clear and comprehensive rules governing day-to-day police practices.²⁹⁶ This would in fact *advance* the cause of deterrence: "Police will be most effectively deterred from unconstitutional conduct if police departments respond institutionally to search and seizure decisions by continually promulgating field regulations reflective of developing fourth amendment law, and by training officers to follow such regulations."²⁹⁷ In addition, so the argument proceeds, this also would focus the exclusionary rule on instances in which there were institutional failures to protect fourth amendment rights, for (assuming the individual officer complied with the existing policy) the costs of evidence suppression would quite properly not be imposed where "the police department in question has taken seriously its responsibility to adhere to the fourth amendment."²⁹⁸ So focused, the exclusionary rule would have a much more solid grounding, for it would "be based upon an institutional, or systemic, view of deterrence."²⁹⁹

Although these are rather compelling arguments, it is nonetheless doubtful — at least to one not enamored with the "good faith" exception the Supreme Court has given us so far — whether such use of police regulations in fourth amendment adjudication is desirable.³⁰⁰ The Supreme Court in *Leon* and *Krull* asserted that the fourth amendment exclusionary rule has no application to judges and legislators, unlike police; these distinctions were critical to the Court's analysis and to the result reached in these two cases. But it cannot as plausibly be asserted that the exclusionary rule is not directed to those upper-level police officials who are responsible for formulating law enforcement policies touching upon fourth amendment rights. It may be true that police administrators, as compared to officers on the beat, are not directly "engaged in the often competitive enterprise of ferreting out crime"³⁰¹ and thus are less tempted to cut corners. Yet there is no apparent empirical basis for concluding that law enforcement personnel at the policymaking level are so intensely committed to fourth

296. Comment, *Rethinking the Good Faith Exception to the Exclusionary Rule*, 130 U. PA. L. REV. 1610, 1618-19 (1982) ("The heretofore absent incentive for the promulgation of such regulations can be provided by permitting, under a good faith exception, the use of evidence seized pursuant to such regulations.").

297. *Id.* at 1618.

298. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1050 (1974).

299. Comment, *supra* note 296, at 1619. For a useful discussion of why that view of deterrence is a more sensible one, see *id.* at 1627-31.

300. See LaFave, "The Seductive Call of Expediency": *United States v. Leon*, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895.

301. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

amendment values that they can always be trusted to draft regulations that sufficiently respect those values. As a result, one can hardly be sanguine about the prospects of such draftsmanship if those officials knew — which would be the message of a “good-faith” exception operating in this area — that even if a regulation does not satisfy the requirements of the amendment, it will nonetheless provide “a grace period during which the police may freely perform unreasonable searches.”³⁰²

I am *not* suggesting here that some judgment must be made about the malevolence level of police administrators as compared to, on the one hand, judges and legislators and, on the other, beat patrolmen. The fourth amendment is not concerned merely with calculated and deliberate noncompliance with the amendment’s proscriptions, and thus the exclusionary rule is also applicable to the more common fourth amendment violations resulting from carelessness. As the Supreme Court recognized in *Stone v. Powell*,³⁰³ what the exclusionary rule demonstrates is “that our society attaches serious consequences to violation of constitutional rights,” which encourages those making critical search and seizure decisions “to incorporate Fourth Amendment ideals into their value system.”³⁰⁴ In other words, the exclusionary rule serves not only to deter the occasional ill-spirited officer, but, more importantly to influence police behavior more generally by creating an “incentive to err on the side of constitutional behavior.”³⁰⁵

As I discussed earlier, there are many other ways, without such an extension of the “good-faith” exception, in which police regulations in fact are and potentially might be brought to bear in a meaningful way upon the adjudication of fourth amendment issues. Thus, it is especially important that those officers responsible for preparing and promulgating these regulations do “incorporate Fourth Amendment ideals into their value system” and, when in doubt, “err on the side of constitutional behavior.” The importance of such a frame of reference is further highlighted by the much greater potential an ill-drafted regulation carries for harm than the single mistake by an officer in the field, which ordinarily affects but one person. In this and other ways, “Fourth Amendment violations become more, not less, reprehensible when they are the product of Government policy rather than an indi-

302. *Illinois v. Krull*, 480 U.S. 340, 366 (1987) (O'Connor, J., dissenting).

This grace period might well be substantial, for if the very existence of the police regulation presents a barrier to application of the exclusionary rule, a defendant would have no incentive to bring that regulation into question.

303. 428 U.S. 465 (1976).

304. 428 U.S. at 492.

305. *United States v. Johnson*, 457 U.S. 537, 561 (1982).

vidual policeman's errors of judgment."³⁰⁶ That explains why "any rule intended to prevent Fourth Amendment violations must operate not only upon individual law enforcement officers but also upon those who set policy for them."³⁰⁷ On balance, grounding a "good-faith" exception to the exclusionary rule in reliance upon police regulations is undesirable.³⁰⁸

Another possible remedy for fourth amendment violations, especially those of a recurring nature, is an injunction. Although traditional principles of equity law limit somewhat the circumstances in which this remedy is available,³⁰⁹ courts no longer will decline to enjoin continuing fourth amendment violations by unquestioned acceptance of the hoary maxim that equity will not interfere with criminal law enforcement.³¹⁰ There are, however, certain practical considerations that courts sometimes consider in determining the appropriateness of injunctive relief. For example, courts have declined to issue injunctions against police violations on the grounds (i) that it was impossible to formulate an injunction clearly expressing what was prohibited and what was permitted,³¹¹ and (ii) that it was not feasible to involve the court in the day-to-day operations of the police department.³¹² These concerns are certainly legitimate.

The problem of drafting a clear injunction is particularly acute in the fourth amendment area, for it is especially difficult to define with

306. *United States v. Peltier*, 422 U.S. 531, 558 n.18 (1975) (Brennan, J., dissenting).

307. 422 U.S. at 558 n.18 (Brennan, J., dissenting).

308. This conclusion does not call into question those decisions holding that when a police officer is a defendant in a § 1983 action, he may assert his good faith as a defense, *Pierson v. Ray*, 386 U.S. 547 (1967), and that such good faith can be established by the officer's reliance upon information conveyed to him by his department concerning the extent of his fourth amendment authority, *see, e.g., Dominguez v. Beame*, 603 F.2d 337 (2d Cir. 1979); *Thompson v. Anderson*, 447 F. Supp. 584 (D. Md. 1977). The considerations in that context are very different. *See LaFave, supra* note 282, at 343-47.

309. The plaintiff must lack an adequate remedy at law, *see, e.g., Gomez v. Layton*, 394 F.2d 764, 766 (D.C. Cir. 1968) (stressing that courts "are not always required to await criminal trials which may never materialize in order to vindicate crucial constitutional rights"), and must show there is an imminent threat of harm, *see, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (plaintiff, who alleged he was subjected to a chokehold after he stopped for traffic violation, could not have such conduct enjoined "[a]bsent a sufficient likelihood that he will again be wronged in a similar way").

310. *See, e.g., Harmon v. Commissioner of Police*, 274 Mass. 56, 174 N.E. 198 (1931) (court refused to interfere with police who had already searched defendant's club 70 times without finding any illegal activity).

311. *Wilson v. Webster*, 315 F. Supp. 1104 (C.D. Cal. 1970).

312. *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968). As one appellate tribunal elaborated, courts "should avoid unnecessarily dampening the vigor of a police department by becoming too deeply involved in the department's daily operations, both because of the vital public interests at stake, and because of the danger that the court could become enmeshed in endless time-consuming bickering and controversy." *Lewis v. Kugler*, 446 F.2d 1343, 1351 (3d Cir. 1971).

precision such concepts as probable cause and unreasonableness. If an injunction were to do no more, in effect, than command the officers in a department not to search unreasonably, a particular officer "will either disregard the injunction when he realizes that it fails to give him any indication of how to act in the given situation . . . , or he will react too cautiously and refuse to do anything at all for fear of being held in contempt."³¹³ But there is a solution to this problem: the court might simply "direct appropriate orders to the responsible officials, with a view to having the situation corrected by them internally,"³¹⁴ a process "by which the police can be required to identify, articulate, and defend, as well as be afforded an opportunity to change, their official policies and practices."³¹⁵ In short, the court could mandate rulemaking regarding particular fourth amendment activities for which existing police rules are either inadequate or nonexistent.

This approach is advantageous for several reasons. As Professor Herman Goldstein has noted:

When used in this manner the process contains a number of the elements so seriously lacking in some of the most commonly proposed systems for controlling police conduct. It operates on the top police administrator, thereby applying pressure to the entire agency rather than to individual police officers. It focuses upon administratively tolerated and continuing patterns of police violations, rather than isolated incidents of wrongdoing. It is more concerned with preventing such violations in the future than in providing redress for the past. And it has the potential for contributing, in a very significant way, to stimulating police agencies to better control their personnel through the structuring of discretion by requiring that the agency itself produce explicit guidelines for police functioning in important areas. By depending on the agency to formulate the policy, the court may produce a much more workable operating code tailored to local needs than the court could ever prepare on its own.³¹⁶

This technique is illustrated by the actions of the federal district court in *Council of Organizations on Philadelphia Police Accountability and Responsibility v. Rizzo*.³¹⁷ The court found that the violation of constitutional rights by a small percentage of Philadelphia police could not be dismissed as rare, isolated instances, and that, while such acts did not result from a "conscious" departmental policy of violating constitutional rights, it was departmental policy to discourage the fil-

313. Comment, *Injunctive Relief for Violations of Constitutional Rights by the Police*, 45 U. COLO. L. REV. 91, 99 (1973).

314. *Lewis v. Kugler*, 446 F.2d 1343, 1351 (3d Cir. 1971).

315. *Gomez v. Wilson*, 477 F.2d 411, 426 (D.C. Cir. 1973) (Bazelon, C.J., concurring in part and dissenting in part).

316. H. GOLDSTEIN, *supra* note 31, at 179.

317. 357 F. Supp. 1289 (E.D. Pa. 1973).

ing of citizen complaints, to resist disclosure of final disposition of complaints, and "to avoid or minimize the consequences of proven police misconduct."³¹⁸ The court directed the defendants — the mayor, city managing director, and police commissioner — to prepare "a comprehensive program" for dealing with the problem, which was to include: (1) revision of police manuals to address such matters as "unnecessary damage to property and other unreasonable conduct in executing search warrants" and "limitations on pursuit of persons charged only with summary offenses"; (2) "revision of procedures for processing complaints against police"; and (3) prompt notification to concerned parties of the action taken in response to such complaints.³¹⁹

In *Rizzo v. Goode*,³²⁰ the Supreme Court reversed. After first concluding there was no "threshold statutory liability" upon which equitable relief could be granted,³²¹ the Court next expressed concern that the district judge's injunctive order, "significantly revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department's 'latitude in the 'dispatch of its own internal affairs.' " "³²² Relying upon the rule that in federal equity cases "the nature of the violation determines the scope of the remedy" and also upon "important considerations of federalism,"³²³ the Court concluded:

Contrary to the District Court's flat pronouncement that a federal court's legal power to "supervise the functioning of the police department . . . is firmly established," it is the foregoing cases and principles that must govern consideration of the type of injunctive relief granted here. When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts.³²⁴

This characterization of the district court's action is both unfortunate and inaccurate. In fact, as the three *Rizzo* dissenters noted, the district court's "remedy is carefully delineated, worked out within the administrative structure rather than superimposed by edict upon it,

318. 357 F. Supp. at 1318.

319. 357 F. Supp. at 1321.

320. 423 U.S. 362 (1976).

321. 423 U.S. at 377. The Court concluded "that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution," and that "petitioners' failure to act in the face of a statistical pattern" of fourth amendment violations from a small percentage of the police department was not the equivalent of the affirmative action required under 42 U.S.C. § 1983. 423 U.S. at 377, 376 (emphasis in original).

322. 423 U.S. at 379.

323. 423 U.S. at 378.

324. 423 U.S. at 380 (ellipses in original).

and essentially, and concededly, 'livable.'"³²⁵ It carried with it the special benefits described earlier. In particular, it left the police commissioner "free to frame orders to patrolmen and alter enforcement procedures to achieve the desired result with a minimum adverse effect on the morale and efficiency of his police department,"³²⁶ while minimizing "the danger that federal injunctive remedies might inhibit constitutional as well as unconstitutional law enforcement practices."³²⁷

Rizzo, then, represents yet another instance in which the Supreme Court failed to take full advantage of the police policymaking device as a meaningful technique for the protection of fourth amendment rights. Particularly regrettable is that *Rizzo* apparently bars federal courts in injunction proceedings from granting the type of relief that would often best accommodate the interests of the plaintiffs, the police department, and the enjoining court. Though admittedly the scope of the *Rizzo* holding is not entirely clear,³²⁸ it appears to proscribe the mandated-rulemaking form of relief even when not accompanied by the more controversial features of the *Rizzo* district judge's order. That is, if a district court "stopped short of reorganizing the department's disciplinary apparatus and simply required the Police Commissioner to develop rules to govern the conduct of the individual police malefactors," it seems that "the *Rizzo* holdings on Section 1983 liability and equitable restraint combine to render this limited remedy unavailable."³²⁹ The most disturbing aspect of *Rizzo*, consequently, "is that, in its haste to reject the relief granted, the Court has erected a barrier to far less intrusive remedies."³³⁰

VII. CONCLUSIONS AND REFLECTIONS

"American police have always been expected to exercise discretion in the performance of their duties."³³¹ Discretion involves "the making of decisions and implies that a decisionmaker can make choices

325. 423 U.S. at 387 (Blackmun, J., dissenting).

326. Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143, 149 (1968) (footnote omitted).

327. *Id.* at 153.

328. See Note, *Rizzo v. Goode: Federal Remedies for Police Misconduct*, 62 VA. L. REV. 1259, 1272 (1976), commenting on the uncertainty regarding "whether high police officials could be proper defendants when the magnitude of the abuses is different in kind or degree, but either no demonstrable policy exists or plaintiffs can only establish one that has evolved *de facto* at lower levels in the police department hierarchy."

329. *Id.* at 1279-80.

330. *Id.* at 1283.

331. Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 123, 181.

among alternative courses of action,"³³² which is the essence of police work; it "is fraught with decision," and "patrol officers exercise choice constantly."³³³ It is those circumstances — complexity plus discretion — which prompted the recommendation in the ABF Criminal Justice Survey (often echoed since by commentators and in reports and law reform proposals, and sometimes acted upon by the police) that police agencies draft written policies for the guidance of their officers. Discretion is inevitable, but in a democratic society the discretion allowed public officials should not be "unconfined and vagrant"; it needs to be "canalized within banks that keep it from overflowing."³³⁴

I have assumed, as have many others, that rulemaking is desirable even with regard to the fourth amendment activities of the police, despite the fact that the exclusionary rule assures considerable attention to such police conduct by the courts. The existence of a substantial body of case law on the subject of search and seizure is no reason to forgo rulemaking, for there is ample room for creative administrative regulation within the interstices of extant fourth amendment doctrine.³³⁵ What Amsterdam calls "the more flexible and professional technique of rulemaking"³³⁶ is especially promising as a means for (1) affording greater protection against arbitrary searches and seizures, a major fourth amendment concern, (2) assuring a more meaningful contribution of police expertise, and (3) controlling those kinds of fourth amendment activities that almost never reach the courts and thus are untouched by the operation of the exclusionary rule.

It is fair to ask at this point whether or not, in the new regime of police rulemaking, these benefits have been fully realized. The answer quite clearly is no. With respect to the fourth amendment activities of the police, there has been (presumably) a fair amount of police rulemaking and (unquestionably) a substantial amount of court review of police searches and seizures. Yet the necessary synergism is lacking; it is not ordinarily the case that law enforcement guidelines constitute the centerpiece of this judicial analysis, and therefore it presently cannot be said that rulemaking has contributed favorably to our

332. Reiss, *Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 83, 89.

333. Bayley & Bittner, *Learning the Skills of Policing*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 35, 36.

334. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).

335. See Caplan, *supra* note 31, at 504 ("even in an area of the law that appears to be saturated by judicial decisions there is much uncharted terrain for the agency to map"); McGowan, *supra* note 35, at 677 ("even under the shadow of constitutional commands, there is room for experimentation in law enforcement methods; and the administrative agency model is a demonstrably effective means of pursuing such a pragmatic course").

336. Amsterdam, *supra* note 5, at 417.

fourth amendment jurisprudence, improving in the process the quality of police search and seizure practices. There are three significant reasons for this:

(1) *Insufficient judicial encouragement of rulemaking.* "To the extent that the judiciary seeks out police policy as an aid in its own decisionmaking, instead of focusing only on the conduct of the officers involved in a particular case, it can inspire more rulemaking by the police."³³⁷ Such judicial stimulation of rulemaking is present to a degree in the Supreme Court's opinions; there are several fourth amendment doctrines which by their nature encourage the adoption of police policies and regulations. Illustrative are the *Bertine* "standardized procedures" rule; the *Camara* "reasonable . . . administrative standards" requirement; the *Brown* "plan embodying explicit, neutral limitations" concept; and even the *Scott* "objective assessment" test, which lower courts have often interpreted as requiring inquiry, upon a pretext challenge, into whether the police deviated from their usual practice. *Garner* deserves special mention, for it shows that when the law enforcement community takes pains to educate the Court about what is mandated by police regulations across the country, the Court will take notice.

Closer inspection of some of these and other developments, however, supports the conclusion that the Supreme Court has fallen short of doing all that it might have done. The inventory cases, for example, are sufficiently imprecise to lend themselves to the interpretation that departmental rules on impoundment and inventory are not really necessary. Thus, in *Opperman* the Court asserts a "standard police procedures" requirement but never refers to or quotes any regulations in the Vermillion Police Department. Indeed, the Court finally refers to the quoted term as if it simply means what police departments generally often do, leaving it to concurring Justice Powell to invoke the protection-against-arbitrariness concern and to note that this concern was met by the Vermillion department's requirement of complete inventory of all impounded vehicles. As for the inspection cases, the sad fact is that the Court has created a hypertrophic exception to the warrant requirement and then made the worst of a bad situation by assuming that when no warrant is needed administrative regulations are likewise unnecessary. Perhaps even more noteworthy is the Court's improvident failure on other occasions to make police rulemaking the focal point of a decision. This has occurred both within the context of

337. Caplan, *supra* note 31, at 506.

the exclusionary rule, as with the *Robinson-Gustafson* tandem, and without, as with *Sitz* and *Rizzo*.

(2) *Nonexistent or inadequate judicial evaluation of rules.* A second important function of courts with respect to police regulations is to pass judgment on the reasonableness of the regulations; even under a rulemaking regime, courts "continue to be, as before, the ultimate shield of the citizen from the improper actions of his government."³³⁸ Here as well, the actions of the Supreme Court are less than encouraging, for the Court has kept as much distance from existing police rules as possible. In such cases as *Opperman*, *Robinson*, and *Gustafson* the Court discusses extant rules only in footnotes, and then typically only to disclaim their relevance. Similarly, in *Sitz* the Court largely ignored the guidelines that had been promulgated regarding sobriety checkpoints. *Bertine* is unique; it is the only case in which the defendant specifically challenged a particular departmental regulation, but the Court summarily dismissed the contention by misreading the regulation as containing "standardized criteria guiding an officer's decision to impound a vehicle."³³⁹

The *Sitz* case is especially disappointing, for the majority seems not to have grasped the fact that the existence of police guidelines does not call for total abdication by the Court of its fourth amendment responsibilities. The police guidelines in *Sitz*, which authorized resort to DWI checkpoints pursuant to procedures mostly unspecified by the Court, were upheld pursuant to the startling proposition that "the choice among such reasonable alternatives" was entirely for "politically accountable officials" to make.³⁴⁰ In one stroke, the Court managed to avoid any meaningful review of whether the Michigan guidelines (a) sufficiently minimized the intrusion upon those stopped at checkpoints or (b) were sufficiently grounded in a showing of the relative predicted effectiveness of checkpoints. If, as the Court earlier stated in *Robinson*, "such operating procedures are not . . . determinative of the constitutional issues,"³⁴¹ then *Sitz* falls well short of even the more limited judicial review appropriate within a regime of police rulemaking.

Exactly what posture *should* a reviewing court take with respect to a police regulation? Surely there is some middle ground between the *Sitz* approach and that of an earlier era when applicable law enforcement guidelines were treated as if they were totally irrelevant. With-

338. McGowan, *supra* note 35, at 686.

339. 479 U.S. at 376 n.7.

340. Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481, 2487 (1990).

341. United States v. Robinson, 414 U.S. 218, 221 n.2 (1973).

out suggesting that the analogy is apt in all respects, it seems that established administrative law doctrine respecting judicial review of administrative action is useful in this setting as well. Under this doctrine, courts give some deference to professional judgment. As the Supreme Court put it in *Youngberg v. Romeo*,³⁴² "courts must show deference to the judgment exercised by a qualified professional," that is, "a person competent whether by education, training or experience, to make a particular decision at issue."³⁴³ If, as in *Romeo*, the professional judgment of administrators in a state hospital regarding appropriate treatment programs is entitled to deference, then surely deference to professional judgment is likewise appropriate regarding police officials who (as put in an unobjectionable part of *Sitz*) "have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."³⁴⁴

I am not suggesting, however, that invocation of "professional judgment" commands automatic judicial approval of and deference to any and all administrative decisions. Especially when constitutional limitations are at issue, as they most certainly are when the police regulations govern fourth amendment activities, the review function of the courts must be performed with sufficient intensity to ensure accountability and fairness in the rulemaking process. The rulemaking agency must be required to satisfy the court that the decisionmaking leading to the rule at issue was both informed and rational.

Such was the conclusion in the leading administrative law case of *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,³⁴⁵ where insurance companies petitioned for review of an order of the National Highway Traffic Safety Administration that rescinded a preexisting safety rule requiring that newly manufactured automobiles be equipped with air bags or seat belts. The Supreme Court, in the course of agreeing with the court of appeals that NHTSA had failed to show sufficient justification for this action, first decided that a rule modification or rescission was subject to the same intensity of review as standards initially promulgated via informal rulemaking. The Court then proceeded to elaborate what such review entailed: the burden is on the agency to "cogently explain why it has exercised its discretion in a given manner," and this expla-

342. 457 U.S. 307, 323 n.30 (1982).

343. 457 U.S. at 323 n.30. For other illustrations of this principle, see *Goldman v. Weinberger*, 475 U.S. 503, 507-09 (1986); *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883, 891-92 (1984); and *Board of Educ., Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 207-08 (1982).

344. 110 S. Ct. at 2487.

345. 463 U.S. 29 (1983).

nation must be sufficient to enable the court to conclude that the rule "was the product of reasoned decisionmaking."³⁴⁶ A greater showing is needed "than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause," and consequently "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"³⁴⁷ What this means, the Court in *State Farm* added, is that an agency rule cannot survive judicial review

if the agency has relied on factors which [it is not allowed] to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³⁴⁸

If such "hard look" review³⁴⁹ is appropriate for the NHTSA decision on passive restraints in vehicles, then surely no lesser judicial scrutiny should suffice regarding the decision of the Michigan Department of State Police to use DWI checkpoints to combat drunken driving.

(3) *Failure of litigants to focus on rules and their rationale.* The preceding discussion emphasized that the Supreme Court has on several occasions failed to take advantage of existing opportunities either to stimulate police rulemaking or to subject such rulemaking to meaningful review. But that is not the entire story. Yet another reason exists why the perceived benefits of police rulemaking regarding their fourth amendment activities have not yet been fully realized: very often the appellate courts (including the Supreme Court) are not provided with the information needed to put the specific conduct at issue into the appropriate context. "The fact material which the appellate judicial tribunal has official liberty to consider in making its decision is

346. 463 U.S. at 48, 52.

347. 463 U.S. at 43 & n.9 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962)).

348. 463 U.S. at 43.

349. This phrase comes from the opinion of Judge Leventhal in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), in which he stated that judicial intervention is necessary "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." 444 F.2d at 851 (footnote omitted).

As explained in G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 182, 197 (3d ed. 1986):

Although Judge Leventhal says that it is the *agency* that must take a hard look at the issues before it, the phrase is also used more loosely to indicate that the *court* in a case like . . . *State Farm* takes a hard look at the agency's decision! . . . Although *State Farm* does not invoke hard look review by name, the Court's decision is generally regarded as having ratified it.

largely walled in."³⁵⁰ It consists of the record made below and such data as may be incorporated in a brief, which in most search and seizure cases collectively include neither the relevant police regulations nor supporting information that would permit a *State Farm*-style hard-look review of the applicable law enforcement policy.

Such lack of information may have a profound effect upon the way in which the fourth amendment issue before the court is perceived and resolved, as can be illustrated by comparing one of the decisions from my earlier exegesis with a more typical limited-record case. The former is the *Garner* decision, which is an especially attractive example of reliance upon rulemaking to enhance fourth amendment jurisprudence. In that case, because of the information provided in the record and briefs, it was possible for the Supreme Court to place an important decision of an individual officer (to use deadly force) into the context of his department's official policy regarding such conduct, and then to place the rule of that department into the context of law enforcement expertise more generally, as reflected in the relevant rules of a great many other police departments. Because so many departments had authorized the use of deadly force in circumstances significantly narrower than allowed at common law, the Court was able to conclude that there was no police necessity supporting continued adherence to the common law position.

In stark contrast to *Garner* is *New York v. Belton*,³⁵¹ where a New York trooper stopped a vehicle for a traffic violation and then, because he believed the occupants were in possession of marijuana, arrested the four occupants and subsequently searched the passenger compartment of that vehicle. At issue was the lawfulness of the vehicle search, which the Supreme Court resolved by announcing the broad rule that in *any* case in which "a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."³⁵² Why such a broad rule? Because, the Court explained, the police were entitled to a "straightforward rule,"³⁵³ which by implication the Court indicated was unachievable by any narrower direction to the police expressed in terms of the arrestee's actual access to the vehicle notwithstanding his arrest.

At precisely this point, the issue in *Belton* seems remarkably similar to that in *Garner*, for an oft-stated justification for the common law

350. K. LLEWELLYN, *supra* note 13, at 28.

351. 453 U.S. 454 (1981).

352. 453 U.S. at 460 (footnotes omitted).

353. 453 U.S. at 459.

any-felony rule regarding deadly force is that the police are entitled to a clearly stated and easy-to-apply rule — an argument before the Court in *Garner* and urged by the dissenters in that case. That purported justification failed in *Garner* because the Court learned the police had concluded as a rulemaking matter that narrower limits upon use of deadly force were feasible and could be expressed in departmental regulations. This strongly suggests that before the “straightforward rule” argument should carry the day in *Belton*, it would again be instructive to know what extant police regulations had to say on this matter. Did the trooper’s conduct in *Belton* conform to the New York State Police guidelines on when a vehicle may be searched incident to arrest? If not (or, even if so), does that rule identify and articulate in reasonably clear fashion specific circumstances short of the all-cases holding in *Belton* in which an incident-to-arrest vehicle search is permitted? If so (or, even more important, if not), do the rules of *other* law enforcement agencies on this same subject indicate that police have been able to articulate and live with a less expansive vehicle search rule? Despite the relevance of these *Garner*-style queries, the Supreme Court was in no position to pursue them in *Belton*, for the record and briefs did not include the information essential to their resolution.

The other point here is that even if a police regulation is put squarely before the Supreme Court (for example, because the defendant is specifically challenging it, as in *Bertine*), chances are the record will lack the supporting information necessary for a hard-look judicial review. In *Bertine*, the defendant contended “that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place.”³⁵⁴ At that juncture, it would have helped to know precisely why the Boulder Police Department had formulated the impoundment regulations as they had, and specifically why the Department had concluded that the regulations need not provide any guidance on when the impoundment alternative was permissible. But there is nothing on these points in the record, which merely contains some comments by the inventorying officer on his understanding of the purposes underlying the Department’s inventory procedures.

Although these three shortcomings make a more particularized critique of rulemaking in fourth amendment adjudication difficult, a

354. *Colorado v. Bertine*, 479 U.S. 367, 375 (1987).

few additional observations are in order. Five problem areas deserve attention:

(i) *The relevance of rules.* The Supreme Court's general disinclination to mandate or assess police rules raises anew the fundamental question of precisely what significance a pertinent law enforcement regulation should have when a court sets out to determine fourth amendment issues in an exclusionary rule context.³⁵⁵ In part, this concerns how compliance or noncompliance with the regulation bears on the issue of suppression. One possible position is that exclusion is unnecessary when the police officer reasonably relied upon a rule of his agency. But as discussed earlier, this proposition is unsound. It is grounded in an unduly narrow conception of the exclusionary rule's deterrence function, and would undesirably skew the pressures which ought to operate upon police administrators drafting and promulgating regulations.

Another position is reflected by *United States v. Caceres*,³⁵⁶ holding that the failure of an IRS agent to follow IRS electronic surveillance regulations did not require suppression. The Court reasoned that it could not "ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures," and concluded that

[i]n the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.³⁵⁷

This reasoning is rather compelling, and seems particularly applicable in the present context, where the police via rulemaking have imposed limits on their own authority beyond those courts could be expected to inflict as a matter of fourth amendment doctrine.³⁵⁸

It is clear, however, that this laissez faire approach is not appropriate for all forms of fourth amendment activity, because sometimes the existence of and compliance with administrative regulations is — or ought to be — the very warp and woof of the controlling doctrine. If,

355. Of course, also of great importance is the question of what significance a rule violation should have in other contexts, such as a civil suit or disciplinary action. See H. GOLDSTEIN, *supra* note 31, at 122-24.

356. 440 U.S. 741 (1979).

357. 440 U.S. at 755-56.

358. For example, as noted in TASK FORCE REPORT, *supra* note 41, at 17, concerning the New York City Police Department's stop-and-frisk guidelines: "Emphasis was not placed upon defining the law so much as it was upon urging the police to exercise restraint and to act well within the outer limits of their prescribed authority."

as seems to be the case, the *Bertine* "standardized procedures" doctrine is intended both to ensure against arbitrary searches and seizures and to permit departments the opportunity to determine in the first instance how the legitimate objectives of the inventory process can best be served, then surely both the existence of reasonable regulations and compliance with those regulations are prerequisites to a finding of constitutional conduct. Similarly, if the inspection cases mean that when the authorities want to be able to conduct inspections absent individualized suspicion they must act pursuant to "reasonable standards" adopted by legislation or administrative regulation, once again the existence of and conformance to those limits are essential to a finding of "reasonableness" under the fourth amendment. The same may be said of the stop-and-frisk power, where police lacking individualized reasonable suspicion must act pursuant to "a plan embodying explicit, neutral limitations." In a sense, even the *Scott* doctrine is of this character, for it will not do for the police to contend that upon a pretext challenge the courts may inquire into neither their subjective intentions nor whether the conduct deviated from usual practice.

A harder question is whether noncompliance with regulations should be determinative in other fourth amendment circumstances. Consider, for example, execution of a search warrant at premises known to be unoccupied, an action the courts have quite consistently upheld.³⁵⁹ A police department might for good reason adopt a regulation limiting the circumstances in which warrant execution in the absence of an occupant is permissible.³⁶⁰ If such a regulation is violated in a particular case, should this require suppression of the evidence obtained in execution of the warrant? The logic of *Caceres* suggests not. This would ensure that rulemaking is not discouraged and yet would not require that courts maintain a disinterest in *compliance* with existing police regulations. That is, even if the failure to comply with a police regulation governing when unoccupied premises may be

359. The cases, collected in 2 W. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.7(c) (2d ed. 1987), find support in the assertion in *Dalia v. United States*, 441 U.S. 238, 257 (1979), that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant"

360. Thus, MODEL RULES FOR LAW ENFORCEMENT, Search Warrant Execution, rule 207 (Mar. 1974), says that

[e]ntry into a vacant search site is permissible only if one of the following circumstances is present:

(i) There is reason to believe the occupants will not be returning to the premises for an extended time period, if at all; or

(ii) The investigation is likely to be frustrated or hampered if the premises are not immediately searched; or

(iii) Returning to serve the warrant at another time will cause substantial inconvenience to the search team, and will improperly waste manpower.

entered does not per se mandate suppression, compliance with the regulation on another occasion certainly deserves consideration in deciding that the warrant execution process was carried out in a reasonable fashion.³⁶¹

Though all this suggests that the *Caceres* approach is best, there is another possible alternative which, however, lies somewhat beyond current fourth amendment law. "There remains," as Judge McGowan wrote, "the interesting, albeit presently unresolvable, question of whether the judicial power could be exerted to compel the police to proceed by rule-making."³⁶² Under this approach, as its principal advocate Amsterdam explains,

- (1) Unless a search or seizure is conducted pursuant to and in conformity with either legislation or police departmental rules and regulations, it is an unreasonable search and seizure prohibited by the fourth amendment.
- (2) The legislation or police-made rules must be reasonably particular in setting forth the nature of the searches and seizures and the circumstances under which they should be made.³⁶³

Certainly this alternative deserves further consideration. It would extend the advantages of police rulemaking across the entire breadth of fourth amendment activity, and of course would nullify the rationale of *Caceres*, as suppression for nonconformance with rules would not deter rulemaking if the rulemaking was itself constitutionally compelled.

(ii) *The context of judicial evaluation.* In an exclusionary rule context, as illustrated by *Opperman*, *Bertine*, *Robinson*, and *Gustafson*, the Supreme Court has failed to focus on the applicable police regulations as intensely as it might have. As previously noted, the fault may not be entirely that of the Court, for there is no tradition in such cases for the litigants to put the issues in a manner that would naturally direct attention to the entire range of activity covered by a specific police regulation. "Lawyers striving for victory in adversary litigation cannot be expected invariably to put 'the individual case in the context of the overall enforcement policy involved.'"³⁶⁴

361. Another illustration of the central point may be derived from *United States v. Place*, 462 U.S. 696 (1983), holding that luggage may be briefly seized on reasonable suspicion but then concluding the particular seizure at issue was not of reasonable dimensions. The Court expressed concern with the failure of police to "make it absolutely clear how they plan to reunite the suspect and his possessions at some future time and place." 462 U.S. at 708 n.8. The Court did not mandate rulemaking on this subject, nor did it intimate that violation of some rule on luggage seizure would itself necessitate suppression. It seems likely, however, that if in *Place* there had been a well thought out rule dealing with notification which the agents had complied with, the case would have looked much different to the Court.

362. McGowan, *supra* note 35, at 684.

363. Amsterdam, *supra* note 5, at 416.

364. McGowan, *supra* note 35, at 678.

Although one would hope that this will change over time as police rulemaking becomes more commonplace, past experience suggests that perhaps the judicial review function would be better performed in another context. Because "judicial review is most effective if it relates to carefully developed administrative policies rather than to the sporadic actions of individual police officers,"³⁶⁵ it may well be, as some have proposed,³⁶⁶ that a more direct judicial review prompted by an injunction or declaratory judgment action is preferable. *Sitz*, however, illustrates that meaningful review is not a certainty even in this context. Although the Court emphasized that it was the sobriety checkpoint program on its face, rather than some particular seizure under the program, which was at issue, the Court nonetheless failed to scrutinize all the program's relevant guidelines. Another possibility would be some form of judicial review after promulgation but before implementation of the rules, a course which "has increasingly become a characteristic of general administrative law" and which, it has been suggested, "would appear to have significant advantages in respect of police rule-making."³⁶⁷

Even if procedural barriers stand in the way of other interested parties obtaining such review,³⁶⁸ there are many instances in which the police themselves could (and might be well advised to) obtain preimplementation review. The vehicle for doing so, of course, is application for a search warrant. Precisely this kind of review has been mandated in some circumstances (for example, under *Camara*) but not others. But, while the courts have not required that warrants be obtained in advance for such activities as establishing a roadblock at a certain place and time,³⁶⁹ police administrators would be well advised to obtain a warrant. Because these operations can be planned well in advance, there is no reason for not obtaining the prior approval of a magistrate. Such approval would minimize the chance of after-the-fact challenge of the decisions regarding when, where and how the roadblock should be operated.

Less apparent is the utility of a police-initiated judicial review of

365. TASK FORCE REPORT, *supra* note 41, at 18-19.

366. *Amsterdam*, *supra* note 5, at 429; *Quinn*, *supra* note 31, at 35-36.

367. *McGowan*, *supra* note 35, at 686.

368. *McGowan*, *supra* note 35, at 688 comments:

What is not perhaps so clear is the question of judicial power to grant such review at the instance of a party who has not yet become the object of the rules he seeks to attack. The issues are the familiar ones of standing and ripeness, with the latter being of predominant concern.

369. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (no warrant needed for illegal alien checkpoint); *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984) (no warrant required for DWI checkpoint).

some broader policy which does not fit comfortably within the traditional warrant process. For example, if a law enforcement agency were to develop some sort of "profile" for deciding when to stop persons suspected of a particular type of criminal activity, should the agency have available a mechanism to obtain an advance judicial "stamp of approval" upon the profile? Especially if the procedure were to be *ex parte*, as with a warrant application, it is at least debatable whether the review would likely be sufficiently intense or comprehensive to reveal the full range of fourth amendment concerns threatened by implementation of the policy.

(iii) *Custom versus policy*. Another troubling characteristic of some of the Supreme Court's cases discussed earlier is that they suggest a willingness to accept a vague and undocumented representation of the established practices of a particular police agency. In *Opperman* and *Lafayette*, for example, the only mention of the practices in Vermillion and Kankakee regarding vehicle inventories and effects inventories, respectively, is that the inventorying officer testified he acted pursuant to "standard procedure" in his department. In neither case is any police regulation ever quoted or even cited, and thus (as we have seen) there is lower court authority that the *Bertine*-mandated "standardized procedure" need not be memorialized in a written departmental communication. This is unsettling for two reasons: (i) there is always the risk that such testimony will be self-serving and thus fail to represent accurately what the usual practice is; and (ii) even if it is the usual practice, it does not follow that it is the considered policy of the department.

Reviewing courts must be more particular about separating mere custom from policy. As the President's Commission cautioned, the trouble with so-called standard procedures or policies which do not appear in a police manual or written set of standard operating procedures is that they "have normally developed through customary practices that rarely are the product of careful analysis and are usually not well understood by patrolmen."³⁷⁰ Existing custom may on occasion turn out to provide a basis for official policy, but it is not the business of a court to transmogrify the former into the latter: What is necessary is that there occur at the police level a "re-examination of established methods," a "conscious decision as to whether familiar ways of doing things" are actually best.³⁷¹ Only if that process has occurred is there really *policy* entitled to deference from reviewing courts under

370. TASK FORCE REPORT, *supra* note 41, at 189.

371. McGowan, *supra* note 35, at 681.

the previously-discussed *Romeo* principle, for only then can the courts see clearly

what it was that the police were doing in a particular case, and why they thought it necessary to do whatever they were doing, and what are the limitations and extensions in police logic of the claim of necessity that is advanced, and whether the claim of necessity advanced by the state's lawyers before the court is in fact the claim of necessity upon which the police acted or will ever act again, and whether the police believe in that claim seriously enough to express it in a general operating procedure.³⁷²

(iv) *Hunch versus expertise*. A central feature of our legal system, in the elegant words of Karl Llewellyn, is that it

entrusts its case-law-making to a body who are specialists only in being unspecialized, in being the official depositaries of as much general and balanced but rather uninformed horse sense as can be mustered. Such a body has as its function to be instructed, case by case, by the experts in any specialty, and then, by combination of its very nonexpertness in the particular with its general and widely buttressed expert roundedness in many smatterings, to reach a judgment which adds balance not only, as has been argued so often and so hard, against the passing flurries of public passion, but no less against the often deep but too often jug-handled contributions of many technicians.³⁷³

With respect to the actions of police agencies and their officers, then, courts are not the experts but rather the intended recipients of expertise from the police. One supposed benefit of a rulemaking regime is that it requires the ordering and communication of this knowledge and permits "the application of *expertise on a continuous and systematic basis*."³⁷⁴

But, just as it is imperative to distinguish custom from policy, there is an equally compelling need to distinguish mere hunch from expertise, for it is the law enforcement policy grounded in the latter rather than the former which, under hard-look judicial review, is entitled to judicial deference. (As suggested earlier, the unwillingness of courts to embrace the so-called "drug courier profile" seems largely attributable to the fact that courts were not provided solid data supporting its predictive validity.) One difficulty in this area is the long-standing uncertainty about which police attitudes and practices truly reflect expertise. There "has been little effort made to capitalize upon police experience or to attempt to assess its reliability: to distinguish accurate inferences from inaccurate ones; or to systematize experience so that it can be effectively communicated . . . to others, like judges,

372. Amsterdam, *supra* note 5, at 419 (footnotes omitted).

373. K. LLEWELLYN, *supra* note 13, at 263.

374. McGowan, *supra* note 35, at 678 (emphasis in original).

when the propriety of police action is challenged."³⁷⁵ Police agencies need "to undertake in-depth inquiries in support of policies and rules they decide to promulgate. It will not suffice, in establishing a policy, simply to assert an often-repeated but untested claim as to its value."³⁷⁶ Moreover, because an unadorned policy statement is unlikely to be an adequate conduit of its underlying rationale or empirical basis, it is essential that police and prosecutors work together more effectively to ensure that this supporting data also reaches the reviewing courts. When this occurs, the challenged police action is much more likely to receive a favorable judicial reaction.³⁷⁷

(v) *How much rule, and how much discretion?* "There is good discretion and bad discretion."³⁷⁸ To this apothegm might be added Llewellyn's precept that "to be *right* discretion, . . . the action so far as it affects any man or group adversely must be undertaken with a feeling, explicit or implicit, of willingness, of readiness, to do the like again, if, as, and when a like case may arise."³⁷⁹ If a major purpose of police rulemaking is to place realistic limits upon police discretion, then one mark of a reasonable regulation is that it serves to eliminate bad discretion by requiring that like cases actually be treated alike. But for the police administrator drafting the rule and the court reviewing it, there is the nagging question of precisely how broadly or narrowly this category of "like cases" ought to be defined. To take an issue considered earlier regarding *Bertine*, which is better: a rule that *all* arrestees' cars should be impounded (with perhaps one limited exception for a vehicle parked at the arrestee's premises), or a rule that an arrestee's car should be impounded only if neither parking at the scene nor turning the car over to another is feasible (then listing the myriad of factors which bear upon the feasibility of each of those alternatives)? What is lurking here, of course, is the old "bright lines" issue, which before now has been debated mainly with respect to the

375. TASK FORCE REPORT, *supra* note 41, at 20.

376. H. GOLDSTEIN, *supra* note 31, at 118.

377. See, e.g., *State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131 (Law Div. 1980) (police decision as to where to locate DWI checkpoint upheld where court advised it placed on a road "where many bars are located" and where empirical data revealed that "seven fatal vehicular accidents," in most of which "alcohol abuse by the driver of a vehicle was a contributing factor," had occurred in the past two years); *Lowe v. Commonwealth*, 230 Va. 346, 337 S.E.2d 273 (1985) (DWI roadblock upheld; court stresses plan developed after extensive research into locations within city where there had been driving while intoxicated arrests and alcohol-related accidents), *cert. denied*, 475 U.S. 1084 (1986).

378. Pepinsky, *Better Living Through Police Discretion*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 249, 253.

379. K. LLEWELLYN, *supra* note 13, at 217.

rules of police conduct promulgated by appellate courts.³⁸⁰ Is it better that the police have the easily understood command, or is it better that they make fewer intrusions under a regulation which by virtue of its complexity will sometimes be misapplied and may sometimes serve to shield deliberate arbitrariness?

Commentators on both sides of the rulemaking fence have warned that decisionmaking in law enforcement is often complex and thus ought not be compassed by overly simple rules. Professor Uviller, apparently swimming against the rulemaking tide, has expressed his concern this way:

The solace of standardized rules and procedures is largely illusory. Rigid rules tend to ossify individual responsibility and discourage individualistic thinking. Those who would shrink discretion obey the precept: "Treat likes alike." However, the overriding lesson of experience in our criminal justice operation is that every case is different. The major worry is that the people out there dealing with the problems will lose their appreciation of the differences between the cases and will begin reacting to them as repetitive.³⁸¹

Similarly, Goldstein, though an advocate of police rulemaking, cautions that "it is impossible to prescribe with any precision what should be done, since an infinite number of possible circumstances could occur." Thus for him intelligent rulemaking consists of alerting "officers to the alternatives available for dealing with a given situation, to the factors that should be considered in choosing from among available alternatives, and to the relative weight that should attach to each factor."³⁸² Doubtless both Uviller and Goldstein would take a dim view of an impound-all-cars rule.

We need to understand, however, that at the police level pressures will quite naturally push in the direction of the simplest possible rule, thus favoring, for example, the impound-all-cars alternative. This is best illustrated by a rulemaking development outside the fourth amendment area. In *Stovall v. Denno*³⁸³ the Court held that the defendant's one-on-one identification in lieu of a lineup was, under the circumstances, "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." Lower courts, stressing the Court's use in *Stovall* of the "unnecessarily" qualifier and its reference in another case to a police need

380. Compare Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) with LaFave, *supra* note 282.

381. Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call*, 47 LAW & CONTEMP. PROBS., Autumn 1984 at 15, 32.

382. H. GOLDSTEIN, *supra* note 31, at 111-12.

383. 388 U.S. 293, 302 (1967).

"swiftly to determine whether they were on the right track,"³⁸⁴ have held that a one-on-one identification soon after the crime is permissible when a prompt lineup is not feasible.³⁸⁵ The rulemaking response of the District of Columbia police department was not a regulation spelling out the factors bearing upon that unfeasibility; rather, what emerged was the so-called "sixty minute rule,"³⁸⁶ the operation of which was described thusly by top department officials:

If a suspect w[as] arrested within one hour of the time of the commission of the offense, in an area reasonably proximate to the scene of the offense, he had to be returned to the scene for purposes of identification; if arrested after one hour, he could not be so returned.³⁸⁷

One leading advocate of police rulemaking asserted that this was precisely the kind of rule the police needed; in "a large metropolitan police department of 5100 men that investigates 800-1000 robberies a month," the officers must have "a simple, easily-applied rule."³⁸⁸ This is also the justification which was offered for the rule by the department. "The result," the department spokesmen asserted, "is a rule more readily understood by those who must use it and therefore more vigorously enforced by those who must enforce it."³⁸⁹ Perhaps even more compelling proof of the strong police preference for the keep-it-simple approach is that in another large urban department lacking such a straightforward guideline, the officers in the field nonetheless managed to convince themselves that a rule of this kind existed!³⁹⁰

Much can be said for the Goldstein-Uviller thesis and also for the contrary approach deliberately adopted in the D.C. department. What this manifests is that the art/science of police rulemaking is bedeviled by a collision of those antithetical dynamics which pervade our entire legal system; here again, we are confronted with the "conflict

384. *Simmons v. United States*, 390 U.S. 377, 385 (1968).

385. *E.g.*, *United States v. Kessler*, 692 F.2d 584 (9th Cir. 1982); *State v. Hudson*, 508 S.W.2d 707 (Mo. App. 1974).

386. Caplan, *supra* note 31, at 507.

387. Wilson & Alprin, *Controlling Police Conduct: Alternatives to the Exclusionary Rule*, 36 LAW & CONTEMP. PROBS., Winter 1971, at 488, 496.

388. Caplan, *supra* note 31, at 507-08.

389. Wilson & Alprin, *supra* note 387, at 497.

390. H. UVILLER, *TEMPERED ZEAL* 107-09 (1988) (New York City). The situation here alluded to is helpfully summarized in Book Note, 87 MICH. L. REV. 1311, 1312-13 (1989) (footnote and citation omitted):

Uviller describes the precinct's almost comically persistent belief in the "two hour/two-mile rule." Uviller had protested at the officers' use of a "show-up" (a one-on-one exposure of suspect to victim for identification) instead of a regular line-up. The officers assured Uviller that because the show-up took place within two hours and two miles of the crime, its use was permissible, notwithstanding its suggestiveness and the feasibility of a traditional line-up. When pressed to find the source of the rule, officers could only point to a dated departmental memo which stated that under unusual circumstances when a line-up is impracticable, one-on-one identification could be used instead.

between the simplicity of rules and the complexity of human experience."³⁹¹ So it is that the "major challenge, in each area of police operations, is in deciding on the appropriate level of specificity for a given set of guidelines."³⁹²

Although this means there is no ready solution to the previously-stated query of how much rule and how much discretion is called for, a few observations are in order regarding the bright lines phenomenon in this setting: (1) If there are to be some bright lines in police rules, they should not inevitably be drawn as the Supreme Court has been inclined to draw them — by opting for that form of "brightness" which is most intrusive upon the interests of privacy and liberty.³⁹³ There is some hope here, as experience has shown that a police regulation might well "not seek to use the full authority granted by the case law," as when it "surrenders certain powers that are not seen as needed or helpful, even though granted by the courts."³⁹⁴ (2) With respect to certain forms of police activity, a bright line may be the only constitutional choice. For example, *Bertine* makes that so with respect to the inventory of containers within vehicles. The Court left police departments with only two choices: a rule mandating inventory of the contents of virtually *all* such containers,³⁹⁵ or a rule barring inventory of any of them. Doubtless this reflects a judgment that any less precise (even if more logical) intermediate rule provides too great an opportunity for "slippage" — inconsistent action prompted either by misunderstanding or ulterior motives. The Court's holding may also manifest another instance of the previously discussed notion of representative reinforcement at work: the Court may have concluded that the challenged police position, that inventory objectives cannot be realized by merely sealing and storing containers, is entitled to credence only if the department is prepared to bear the political costs of total adherence to such a view by henceforth so intruding upon the privacy of *all* persons whose vehicles happen to be impounded and inventoried.

* * * *

Twenty-five years ago, the ABF Survey declared that police should "reduce their enforcement policies to writing and subject them to a

391. Allen, *The Nature of Discretion*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 1, 3.

392. H. GOLDSTEIN, *supra* note 31, at 112.

393. See, e.g., *New York v. Belton*, 453 U.S. 454 (1981).

394. Caplan, *supra* note 31, at 503-04.

395. Consider the Blackmun interpretation of *Bertine* in the later *Wells* case, *quoted in supra* note 114.

continuing process of critical re-evaluation.”³⁹⁶ With respect to law enforcement guidelines governing the search and seizure activities of police, the further assumption was that judicial review of these regulations would occur and would ultimately result in a fourth amendment jurisprudence which more delicately balanced competing interests. The point of my assessment is *not* that such a system of rulemaking and review with such results is beyond accomplishment. Rather, it is that the processes of formulating police rules and subjecting them to meaningful review are not without difficulties, at least some of which may have either resulted from or accounted for the Supreme Court’s own hesitancy either to *stimulate* rulemaking or to *review* challenged rules. Clearly much remains to be done.

396. W. LAFAYE, *supra* note 1, at 513.