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RULE-MAKING AND THE POLICE†

Carl McGowan*

I. INTRODUCTION

THAT remarkable man, Justice Oliver Wendell Holmes, in whose name and by whose providence we are met on this occasion, had many profound perceptions about the nature of law-making. Except for the violence of the Civil War in his youth, his life was largely lived at a time and in a society which seem simple and benevolent by comparison with our own. Some of his generalizations, nevertheless, continue to define accurately the limitations under which we confront the complexities presently assailing us on every side. This is notably true of the administration of criminal justice.

In the second of the landmark lectures in which Holmes explored the nature and development of the common law, he addressed himself to the jurisprudence of crimes, and his initial premise was stated in these terms: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, right or wrong ...."¹ This derives from the broad principle which emerged from Holmes's survey of the entire corpus of the common law, namely, that although judicial lawmaking in form purports to be logical, its substance is legislative in the sense of being compounded of "considerations of what is expedient for the community concerned."² And these considerations, in turn, are "the unconscious result of instinctive preferences and inarticulate convictions" which shape the dominant views of public policy at any one point in time.³

It is undoubtedly true, as Holmes said, that no formulation of legal rules, in the criminal law or elsewhere, can be effective to the degree that it is at cross-purposes with the beliefs and expectations of the community. But one difficulty in applying this standard lies in the accurate identification of what the prevailing consensus of those beliefs and expectations is. It would be hard indeed, in the current clamor about law and order, to make that identification with any confidence or precision. Further, we as a people are not given to ac-

† The text is that of the Oliver Wendell Holmes Devise Lectures in the form in which they were delivered at The University of Michigan on November 15-16, 1971.
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2. Id. at 36.
3. Id. at 36.

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cepting as sacrosanct and immutable a transient opinion-poll consensus about any important public policy which we believe to be grounded in error and ignorance. We have always accorded to law an educative, as well as a regulatory, function; and, if the law cannot lead, it cannot instruct.

All three of the main segments of the administration of criminal justice today—law enforcement officers, judges, correctional officials—are caught in the focus of these tensions. They are exacerbated by a seemingly endless rise in the volume of crime, which creates understandable fears and stirs strong passions, and which overtaxes the resources currently allocated to its prevention and control. They are envenomed by our unexpiated heritage of racism and enflamed by our national fascination with violence. We are, in respect of crime, deep in a sea of troubles for which there are no instant or simplistic solutions.

One who undertakes to talk about even a very narrow aspect of criminal justice perhaps owes it to his audience as well as himself to state the major reflections which his exposure to the criminal field has induced. That exposure, I hasten to say, has been solely that of an appellate judge, and has of necessity been a very restricted one. I have not been a victim of crime; and neither have I prosecuted or defended a typical criminal case or walked the beat with a policeman. I do not even see the defendants whose appeals I hear. My range of vision is confined to the cold records of criminal trials. Although I have seen what seems like an infinite number of them, my observation point is both fixed as to angle and remote in space and time from the actual happenings and from the people involved in them.

These are very real limitations upon the validity of generalization in this area of the law. But, as Justice Holmes wrote to his friend Sir Frederick Pollock, "... the chief end of man is to frame general propositions and ... no general proposition is worth a damn." It is in that spirit that the following reflections are laid before you, not as demonstrable truths but as perhaps illuminative of the point of departure for the central subject of these lectures.

First, I find little evidence to suggest that what the courts do by way of doctrine bears any significant relationship to the level of crime. Especially is this true of the kinds of crime which are at the

4. 2 Holmes-Pollock Letters 59 (M. Howe ed. 1941).
5. Dean Wigmore’s view of the consequences of the exclusionary rule reflects a differing perception: “[T]he always watchful forces of criminality, fraud, anarchy and law evasion perceived the advantage and made vigorous use of it.” 8 J. Wigmore, Evidence § 2184a n.1, at 51 (McNaughton rev. 1961).
center of our present concern. Had there never been a so-called Warren Court, it is hardly to be supposed that a dismaying growth in the volume of crime throughout the postwar years would thereby have been avoided. The typical criminal appellant before our court does not appear to determine his course of conduct by reference to judicial decisions. It is fixed, rather, by racial discrimination, bad housing, ineffective education, underemployment, and all the related ills which characterize our unbalanced social structure. Crime will go down as these conditions are attacked at their roots. It will continue to go up as our efforts and our dollars are directed to other objectives.

Second, it may be true to some extent that the level of crime is affected by the efficiency of the law enforcement process, including most notably the time it takes from arrest to final disposition. Whatever may be the maximum potential of the criminal process for deterrence, it surely diminishes as delay makes that process unreal. Merely speeding up the functioning of the criminal courts is no single panacea for the prevention of crime, but there are values in doing so which comprehend, at least in some measure, the objectives of deterrence. We should strive to this end with all the imagination and ingenuity we have, even though that effort should be made under no delusion that efficient courts offer anything like a total solution of the criminal problem.

Third, there is insufficient grasp of the fact that crime is various in its manifestations, and does not lend itself easily to our ideal of uniform rules applying across the board. The member of the Mafia bears little resemblance to the nineteen-year old public school dropout, or to the black who cannot get a job because of his color. The political crimes, which have grown greatly in the wake of the dissatisfaction of privileged as well as underprivileged members of society with various aspects of modern life, have little or nothing in common with the ordinary housebreaking or street mugging. The antitrust or securities fraud defendant, the colorless clerk of years of respectability who is suspected of murdering his wife, present problems quite unlike other defendants. The victimless offenses of alcoholism, gambling, prostitution, and sexual aberration are a world unto themselves.

Despite these differences, we try to design a criminal process of enforcement, adjudication, and correction which is uniform in its rules. And the ultimate standard for testing those rules is a Bill of Rights which, both in its terms and in its origins, was heavily preoccupied with the purely political oppressions which rebellious colonials thought to see in their governance by the mother country.
It is, thus, no occasion for surprise that against this background, with its mixture of causes, proscriptions, and superstitions, it has been difficult to achieve Holmes's "first requirement of a sound body of law," namely, correspondence with the actual feelings and demands of the community. We are many communities, not one; and we confront a bewildering variety of criminal activities, some of which arguably are not wisely to be dealt with at all in a criminal context. We are, in any event, massively involved with crime in this country today, and efforts to deal with it through the application of law are blunted to the extent that Holmes's "first requirement" is not met. My purpose in these lectures is to explore one means by which it is conceivable, although far from certain, that we could make some progress in that direction.

A common and recurring complaint on too many sides is that the police, in their efforts to prevent and to detect crime, are shackled by restrictive and unrealistic judicial mandates. This view, not unnaturally, is perhaps most widely held by the police themselves, but it is also shared by a large number of that community whose respect for legal formulations is essential to their efficacy. Not only laymen, but also many trained in the law, assert that the courts have verged too widely from their essential function of determining the guilt or innocence of the accused.

In the process, so it is said, standards of law enforcement are imposed which subordinate this function to other objectives, related neither to the central mission of the courts nor to anything which, in the nature of things, they actually know much about. The result is that the law enforcers and the adjudicators are locked in angry controversy while the guilty assertedly thrive. A considerable body of public opinion, shaped by the justified fear of seeing our cities turned into lawless jungles, tends to regard the law, as laid down by the courts, to be out of joint. This generates demands for changes in it which are not necessarily in the public interest, and which would only impede or turn back our progress towards an increasingly civilized social order.

My last impression, gleaned from several years of reading trial records at the appellate stage, is that the police are at the very core of any purpose to achieve that progress. Neither the prosecutors, nor the courts, nor the correctional officials, can operate effectively if the police function is not of the highest professional character. Moreover, millions of people who never end up in the formal criminal process are closely affected in their daily lives by the quality of the police performance. There is, thus, every reason why the police
should move into the central focus of our effort to create a sound body of criminal law and to achieve both fairness and effectiveness in the administration of criminal justice.

There is much that the police need. They have too long and too often been among the stepchildren of our society, denied the interest and attention to which the importance of their work entitled them. Today, when they are increasingly critical to our very safety, we are reaping the harvest of long years of neglect. Those years were marked by vague disapproval of police work as a career in which a bright and ambitious young man should be interested. There was a monumental lack of concern with how they were being recruited and trained, and how much they were paid. We were quite content to think about them not at all until some crisis arose when we insisted that they perform like supermen, after which we reverted to our former attitudes of massive disinterest and mild distaste.

If the current preoccupations with rising crime rates do nothing else, surely they will generate a conviction that the state of the police, like the state of the medical arts, is the continuous business of every citizen. When we are ready to support and encourage as well as to criticize, then may we plausibly insist that the police operation be a highly professional one, guided by goals other than the single one of producing an arrestee for every crime logged on the station house books.

II. EXTERNAL PRESCRIPTION AND INDIRECT SANCTION

The subject of this discourse is the role of the police in criminal rule-making. This has reference, of course, not to the rules of the substantive criminal law, but to the procedural rules of law enforcement operations. This subject, though narrow in terms, is inseparable from the central question which has immemorially challenged the criminal law and which has become acute in the present climate of rising crime. That overriding issue is, of course, the problem of how to enforce the criminal law effectively without sacrificing the rights and freedoms of the individual.

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6. Although our theory of government leaves the making of the substantive criminal law exclusively to the legislature, the police do in fact have a very real, though essentially negative, role in fashioning our substantive criminal law through their power of selective and discretionary law enforcement. For an excellent analysis of the problems and parameters of the discretionary enforcement of the criminal law, see K. Davis, DISCRETIONARY JUSTICE 80-96 (1969). What Professor Davis laments about selective law enforcement is not so much its existence as its invisibility, and it is in this context that he most vigorously urges the formulation and publication of rules by the police.

7. The concept of a constant dialectic tension in our system of criminal justice between the objectives of efficient law enforcement and the maximization of due process
The current tension between the law as stated by the courts and what the public finds acceptable is perhaps not due so much to popular disagreement with the importance of individual rights. It may rather be a consequence of the failure by many people, including judges, to appreciate fully the critical significance of the police to any practical resolution of the matter. Heretofore it would seem that our methods of providing civil protections have, contrarily, discounted that significance, as witness the fact that rules designed to protect the individual from police misconduct have typically originated in other quarters than the police.

There is a new and growing interest, however, in shifting the formulation of rules in the first instance to the police themselves. And there are some isolated signs of a readiness on the part of the police to undertake this step in the direction of self-regulation. If this proves to be more than a fleeting phenomenon, it could be quite meaningful for the entire structure of criminal justice, including not only greater fairness in its administration but also a healthier climate of public respect for the manner in which the system works.

Perhaps I can best give the matter concrete and meaningful contours by relating an experience we have recently had on our court. We have been plagued, as have all courts with criminal jurisdiction, with the problem of identification evidence. In a dismayingly high percentage of the criminal appeals which come to us, the prosecution's case rests solely on identification testimony. This is not said critically of police or prosecutor, because the fact is that, in many of the criminal episodes which are causing the greatest public concern today, there is no way to proceed except by the route of identification. The yoking on the street is rarely observed by anyone but the victim, the fleeing of the scene is usually accomplished successfully by the bandit, and, if the malefactor is eventually caught, the stolen ten-dollar bill is no longer in his possession. The police have no way to begin their investigation except by exhibiting to the victim pho-

Liberties has become an established analytical framework for most scholars in this field. See Packer, Two Models of the Criminal Process, 113 U. PA. L. Rev. 1 (1964).

tographs in their files which might conceivably include the guilty person.

If the victim picks out a photograph from those shown to him, the subject of the photograph is arrested and charged. If trial is to proceed under these circumstances alone, the case consists of an in-court identification of the defendant by the victim, supported by the latter's testimony as to his opportunity to observe at the time of the commission of the crime and of his subsequent selection of the defendant's photograph from the array presented to him. The weaknesses of identification testimony need not be recounted, since each of us knows from his own experience in a noncriminal context how difficult it is to be certain that the person we have seen only fleetingly is the one we encounter later. Juries tend to be unimpressed with this kind of evidence, and the acquittal rate is not inconsiderable in cases where it alone constitutes the government's case.

An additional element of certainty can be added, however, by testimony that the eyewitness has picked the defendant out of a formal lineup. That represents no assurance of guilt, but, in a situation traditionally fraught with the perils of mistake, it is the best that can be done, especially since the Supreme Court has added the presence of counsel for the suspect to the protections under which the suspect appears in a formal lineup. The Court has not as yet held that a lineup must be held in every case; it has said only that, if a lineup is held, the defendant must have had counsel present if evidence of the resulting identification is to be received.

In the case of which I speak, the eyewitnesses did, following the crime, select the defendant's photograph from among two separate sets shown to them, first immediately after the crime, and again the day before trial. No formal lineup was ever held, even though there was ample time for doing so. The defendant urged upon us that the failure to hold a lineup should, without more, invalidate his conviction as a matter of constitutional due process. An alternative theory pressed was that, under the circumstances here involved, the showing of the photographs on the eve of trial became a critical stage of the prosecution which required the presence of defendant's counsel. What is interesting and perhaps unique about this case is that an adoption of either of the defendant's theories would follow upon the promulgation by the police department in question of a rule that, despite the identification of the defendant by means of a photo-

graphic exhibition immediately after the crime, the arresting officer acting on this identification must promptly make arrangements for a formal lineup.

This rule had not been issued until after the events had taken place in the case before us, but it appears to be both a laudable and a sensible effort by the police not only to protect the innocent but to strengthen the case against the guilty. Its recognition could be characterized as not a self-conceived prescription by the judiciary but a reinforcement of a self-denying ordinance voluntarily imposed by the police on themselves. No judicial decision required them to do it. It was simply a step taken in the exercise of good judgment as to how a police department should function in the public interest, which comprehends both an interest in fairness to the accused and in convicting the guilty.

Justice Holmes would, I suggest, regard this police rule as a palpable contribution to the achievement of his "first requirement" of a sound body of law. His only question might be whether evidentiary exclusion should play any role at all under these circumstances, assuming that the police rule is not likely to be withdrawn and that the police command will rigorously enforce it by appropriate disciplinary action against members of the force who disregard it.

In any event, the issuance of this rule has been a heartening development. It might well not have happened if the police chief had not acted some time ago to create a General Counsel and accompanying legal staff serving only the Police Department. The rule in question was drafted by this unit, and it represents a lawyer-like response to an operational problem, formulated after that problem has been examined in all its aspects, including the practical feasibility of the prescribed rule of conduct. This is the way lawyers do, and are expected to, function in relation to the affairs of private clients; and the needs of the police in this respect are no less pressing. I have said heretofore that

[i]magination and innovation, soundly conceived in relation to specific problems, need not be the exclusive stock-in-trade of defense counsel or reform-minded legislatures and courts. The police in particular are entitled to the same kind of creative, probing, wide-ranging legal thinking which is not content to concede that, because things have always been done a certain way in the past, they must continue to be done in the same way in the future or they cannot be done at all.10

I earnestly hope that we are on the verge of a widening availability to police departments of independent legal counselling by lawyers who are not only thoroughly familiar with police operations but who at the same time are sensitive to the claims of an ordered system of liberty. It has sometimes seemed to me that if only a fraction of the talent and ingenuity available to the defense through court-appointed counsel could be directed towards advising the police in the first instance, then, given a police leadership of similar breadth, the problems of the administration of criminal justice generally, and of the courts in particular, would be greatly mitigated. It is clear that such legal resources must be forthcoming for the police if they are to be accorded a larger role in the formulation of rules governing their own conduct.

Up to this point in time, of course, that role has been minor to the point of nonexistence. Everybody, it sometimes seems, makes rules for the police but the police themselves. Certainly it is true that, to the extent police conduct in enforcing the criminal law is subject to explicit prescriptions, these have emanated from sources external to the police, notably courts and legislatures. This can doubtless be attributed to a number of factors, e.g., the traditionally low estate of the police, both in the public eye and their own, the undercommitment of resources to them, the practice of relying on the prosecutor's office for legal advice. Notably absent has been any tradition of the police department as a vital and independent executive agency.

Except in the more rural and less populous parts of the country, this tradition is changing. The head of the police department of a major city today is a prominent figure in the governmental scene, frequently nationally as well as locally, and his force is a large and highly organized entity. The departments have begun to look and act more like other large governmental agencies under the discipline of embodying their principles of action in visible rules. For the present, however, they are largely the recipients of rules from the outside.

Those that come from the courts are in two forms. One consists of rules formulated as such under judicial rule-making powers and independently of judicial decisions in particular criminal cases. A classic example of this form is to be found in what are known as the Judges' Rules in England. These were initially issued in 1912 by the members of the King's Bench Division of the High Court of

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Justice in response, it is of interest to note, to the request of the police, who wished judicial guidance as to how to proceed in the interrogation of suspects. The Rules, nine in number, deal only with this subject. They provide in essence for a warning to the suspect of his right to silence, a requirement that statements made be reduced to writing, and a prohibition upon cross-examining or hectoring the suspect for information not freely volunteered. The warning curiously enough need not be given until the interrogator has heard enough to cause him to charge the suspect with a crime.

There is no reference in the Judges' Rules to the right to counsel, although it is said that a suspect may, if he is sufficiently alert, condition his willingness to talk upon the presence of anyone he wishes.

In this country a notable example of a nondecisional judicial rule directed expressly to the police is Rule 5(a) of the Federal Rules of Criminal Procedure. It requires the police to take an arrested suspect before a magistrate without "unnecessary delay." In the cases of McNabb v. United States and Mallory v. United States, the Supreme Court put teeth into Rule 5(a) by ruling that evidence seized in violation of it—that is, during periods of unnecessary delay before presentment—cannot be admitted at trial.

The McNabb-Mallory rule has given rise to much litigation and great public controversy, culminating in the enactment by Congress in 1968 of a statute which forbids the exclusion of evidence on the ground of delay in presentment so long as such presentment occurs within six hours of arrest, or even longer if the occasion for the further delay is reasonable under the circumstances. The statute appears to have had markedly little impact, presumably because of uncertainty as to whether the Supreme Court views the McNabb-Mallory exclusionary rule as having, over and above the supervisory power, a base in the fifth amendment.

15. 318 U.S. 332 (1943).
18. The Supreme Court has not yet ruled on the statute, and cases decided before the statute was enacted leave in doubt the question whether the McNabb-Mallory rule is grounded in the fifth amendment. Compare Wong Sun v. United States, 371 U.S. 471, 486 n.12 (1963), with Miranda v. Arizona, 384 U.S. 436, 463 (1966). A number of lower court opinions have assumed sub silentio the continuing validity and viability of McNabb-Mallory. See Williams v. United States, 419 F.2d 740 (D.C. Cir. 1969); Frazier v. United States, 419 F.2d 1161 (D.C. Cir. 1969). Others have assumed the validity of
The second form taken by judicially imposed controls on police conduct is that of the application in individual cases of a rule excluding evidence acquired in violation of constitutional commands. It had its inception in the federal courts as long ago as 1914 when the Supreme Court in *Weeks v. United States*\(^1\) purported to exercise its supervisory powers to exclude evidence stemming from an unreasonable search and seizure proscribed by the fourth amendment.

The state courts were not disposed to emulate this practice, for reasons of policy pithily summarized by Chief Judge Cardozo of the New York Court of Appeals when he said of the exclusionary rule: "There has been no blinking the consequences. The criminal is to go free because the constable has blundered."\(^2\) This divergence between the two judicial systems was ended, however, in 1961 when the Supreme Court included the exclusionary rule in its earlier extension of the fourth amendment search and seizure limitations to the states.\(^3\)

In the ensuing decade that process has proceeded apace, with the result that the exclusionary rule now, in both state and federal tribunals, stands in the way of evidence tainted by fifth and sixth amendment violations as well.\(^4\)

These developments have, in effect, generated many limitations upon police conduct, and they constitute, in substance and effect, a body of rules for the regulation of police operations.\(^5\) Whatever their

\(^1\) 232 U.S. 383 (1914).


intrinsic merit, they do distinguish our criminal jurisprudence sharply from that of most other countries. In England the Judges' Rules are looked upon as admonitions intended to be helpful, and not as mandatory rules for which sanctions will invariably be brought to bear by the courts in the event of breach. English trial judges do possess the power to exclude evidence obtained in violation of the Judges' Rules, but it is a discretionary power infrequently exercised.24 In other areas not involving the interrogation of suspects, the police are free to proceed as they see fit, except in the case of wire-tapping where a warrant must first be obtained from an executive official, the Home Secretary.25 A reason usually advanced for this wide latitude afforded the police in England is that they have traditionally acted according to self-imposed standards of restraint and fair play which make close external supervision unnecessary.26

In Canada improperly acquired evidence is admissible at trial, and this even includes induced confessions to the extent that other evidence (including fruits of the confession) is confirmatory of the confession.27 Israel takes the same approach,28 and Japan has no limitations on admissibility, even in the case of confessions.29 Some countries, while placing no limitations on the admissibility of other evidence, severely restrict the use of confessions. India, by statute, requires them to be made in the presence of a magistrate;30 and Germany excludes them altogether if the defendant elects to testify in his own defense.31 Scotland prohibits all interrogation after arrest

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24. See Developments in the Law—Confessions, 79 HARV. L. REV. 935, 1094 (1966). As in this country, the English have long excluded demonstrably involuntary confessions as a matter not in the trial judge's discretion but as a matter of the defendant's right. The ground for exclusion is not deterrence or prophylaxis, nor even the privilege against self-incrimination, but the inherent unreliability of confessions not voluntarily given. See P. DEVLIN, supra note 12, at 38.

25. P. DEVLIN, supra note 12, at 66.

26. Id. at 64. How much the police comply with the Judges' Rules is a matter of some debate. Lord Devlin maintains that, even without a substantial threat of exclusion, police officers are sensitive to judicial admonitions and criticism. Id. at 27. Others maintain that the rules are so frequently ignored that they cannot be regarded as an effective restraint upon the police. See J. SKOLNIK, JUSTICE WITHOUT TRIAL 66-67 (1966); authorities cited in 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 72 n.20, at 64 (1969); Developments, supra note 24, at 1095.


28. Id. at 282.

29. Id. at 284.


31. Symposium, supra note 27, at 277.
and excludes all statements (and the fruits thereof) taken in violation of this restriction. Thus, as was the case in pre-Mapp days in this country, there are variations abroad in the evidentiary policies of admitting evidence which is reliable in its indication of guilt, on the one hand, and, on the other, excluding such evidence as a sanction to deter the future repetition of the conduct by which it was unearthed.

Apart from rules of judicial origin, police conduct is also the subject of legislative regulation. When the Mallory case, which came up from the District of Columbia, was decided by the Supreme Court by reference to Rule 5(a) of the Court's Rules of Criminal Procedure, a District of Columbia Code requirement of prompt presentment virtually identical with that required by the Rule had been on the statute books for many years. Rule 5(a) was itself an embodiment of earlier federal code provisions to the same effect. Most states have similar provisions, although in some the statute undertakes to define the permissible limits of delay. There are also many state statutes prescribing the conditions under which arrests can be made with and without warrants, and prohibiting certain forms of pressure in the interrogation of suspects.

The most comprehensive effort yet launched to write a legislative prescription for police conduct during the period prior to presentment in court is the American Law Institute's current project for a Model Code of Pre-Arraignment Procedure. As yet incomplete, drafts have been prepared which cover virtually every aspect of this critical period in the relations between police and suspect. Part I deals with such subjects as the investigative stop and questioning, arrests without warrant, and detention and interrogation prior to presentment. Part II grapples with the intensely difficult subject of searches and seizures. Not yet available even in draft are contemplated provisions


35. See statutes collected in ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Tentative Draft No. 1, Appendix IV (1966) [hereinafter ALI CODE].

36. See statutes collected in ALI CODE, supra note 35, Tentative Draft No. 1, Appendix V.

37. ALI CODE, supra note 35, Tentative Draft No. 1.

for direct penalties for violations of the Code's substantive provisions—a subject pregnant with significance for the future of the indirect sanction of the exclusionary rule.\textsuperscript{39} Thus far, the drafts have made a place for the exclusionary sanction, but under conditions of flexibility in application which have been largely absent from court decisions.\textsuperscript{40}

In its tentative and unfinished form, there can be no final and informed judgment as yet as to how successful this effort will be to provide a satisfactory and acceptable regimen for a legislature to prescribe for the police. There are obvious advantages in the legislative approach over the judicial. Decisional rule-making can occur only in the sporadic context of individual cases. The Code approach permits the whole area to be surveyed at once, with the result that the provisions made for various parts of the process can be related to, and made consistent with, each other. And, before the Code becomes law in any state, it will have to run the gamut of public legislative hearings in which all interested and informed persons can be heard, as contrasted with the immediate parties to a criminal prosecution.

The making of rules externally for police conduct suffers from two principal limitations. One is the absence of direct police involvement in the process. The other is the question of appropriate sanctions to assure their enforcement. The two obviously interact upon each other. It is a psychological truism that self-regulation tends to command a higher degree of observance by the regulated, if for no other reason than that the reasonableness of the resulting command is more self-evident. The police may be something of a special problem in this regard, but they are not exempt from the impulses and motivations which shape human conduct generally. Increased responsibility to order one's own conduct normally evokes a heightened

\textsuperscript{39} ALI Code, \textit{supra} note 35, Proposed Tentative Draft No. 1, art. 10; Proposed Tentative Draft No. 3, art. 9.

\textsuperscript{40} The provisions of Tentative Draft No. 1, art. 9, for example, apply to exclude statements and their evidentiary fruits obtained in violation of Part I of the Code. Unlike the exclusionary rule as it now exists, however, provisions exist for the "cure" of certain violations. See \textsection 9.03. Other minor violations do not lead to the exclusion of statements which are made in the presence of counsel. See \textsection\textsection 9.01-07. Under \textsection 9.09 fruits of illegally obtained statements are inadmissible "unless the court finds that exclusion of such evidence is not necessary to deter violations of [the] Code." Finally, \textsection 9.10 provides that violations which are "excusable under the circumstances" do not lead to exclusion.

The sanctions of Tentative Draft No. 4, \textsection 8.02 apply to exclude evidence obtained in violation of the search and seizure provisions of Part II of the Code, but operate only if the court finds the violation to be "substantial" (\textsection 8.02(2)); or in the case of fruits, if the court does not find that "such evidence would probably have been discovered by law enforcement authorities irrespective of such search or seizure, and . . . that exclusion of such evidence is not necessary to deter violations of [the] Code," (\textsection 8.02(2)).
sense of obligation in performance. The police, organized in a semi-military tradition, work in that tradition's responsiveness to going by the book, which is always less grudging if one has had a role in writing the book. The physical structure of the police is also directed towards discipline for failure to follow explicit commands from above.

In the matter of sanctions, it is important to note that the mode of enforcement of external rules has been almost entirely indirect in its incidence. The erring policeman rarely has had visited upon himself any penalty for his infraction. He may, indeed, never even know that, at a trial held many months after an arrest, his handling of the matter has led to a reversal or an acquittal. This is because the only sanction of any significance for the breaking of the external rules has, up to this point at any rate, been the exclusion of evidence obtained in an improper manner.

The ever-widening reach of the exclusionary rule has not been paralleled by growing confidence in its effectiveness in achieving one of its two professed purposes, namely, the deterrence for the future of police methods which the courts have put beyond the pale. Professor Oaks, the author of the most intensive survey of this effectiveness, ends essentially with the conclusion that the evidence does not admit of an acceptable conclusion one way or the other. He describes his own state of mind as tending towards the replacement of the rule, although he is not prepared to urge that step just yet.

The Chief Justice of the United States, in an opinion earlier this year, pronounced himself to be of a similar view. Justice Harlan, in one of his last expressions while on the Court, unequivocally recommended the overruling of Mapp in order to lift the constitutional burden of the exclusionary rule from the backs of the state courts. What the future portends for the rule is cloudy, but, as the Supreme Court finds itself in one of its great cycles of change in terms of its personnel, it would be rash to assert that the rule, at least as a constitutional command, is not in jeopardy.


This is so, it may be said, because, bereft of demonstrable proof that the rule in fact accomplishes its purpose to deter, it rests uneasily, at least in popular estimation, upon its other foundation of an imperative of judicial integrity. In articulating that concept, the Court has in substance said that, even if the exclusion of otherwise reliable evidence of guilt cannot deter improper police conduct, the judiciary cannot knowingly countenance or reward it. There is a serious question, however, as to whether this legal principle commands sufficient popular acquiescence to make it viable for any sustained period of time, especially in an era of public anxiety about rising levels of crime. The layman finds it difficult to grasp, and many lawyers think the highest integrity of the adjudicative aspect of the criminal process lies in the separation of the guilty from the innocent on the basis of all the relevant evidence available.

In the present climate, therefore, one does not have to declare himself uncompromisingly for or against the exclusionary rule to justify an inquiry into feasible alternatives. Its most devoted adherents may find themselves whistling in the dark in failing to do so. My own inclination is to think that the exclusionary rule has had important consequences in terms of the elevation of police standards of conduct and that, even if the rule were to be abolished tomorrow, we would, because of it, be left on a markedly higher plateau of police performance with respect to the treatment of suspects.

It is this supposition that emboldens me to think that one alternative worth exploring is greater participation by the police in the making of rules for their own guidance, and greater reliance concomitantly upon the police for the internal enforcement of such rules. To the extent that this could prove to be not merely an idle fancy, it embraces the prospect not only of progressively higher elevations in the quality of police performance, but also of relieving the courts of the necessity of seeming to obscure the search for truth by rejecting reliable evidence.

Some may think it quixotic even to speculate about an improvement in police performance and attitude, at least in the foreseeable future, commensurate with this possibility; and they may perhaps be right. There are, nevertheless, some omens of a new era. In New

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46. Indeed, how firmly the exclusionary rule is grounded on the principle of judicial integrity, even in the view of the Supreme Court, is open to question. The fact that most of the rules have been given only prospective application suggests at least a primary emphasis on deterrence. See, e.g., Desist v. United States, 394 U.S. 244 (1969); Linkletter v. Walker, 381 U.S. 618 (1965). See also notes 83-89 infra and accompanying text.
York City, Commissioner Murphy recently met with a group of five law professors and offered them full access to the Department's records for purposes of scholarly research. For what has traditionally been a closed society, this is an almost unbelievable development. The drive on corruption within the force mounted by Commissioner Murphy bodes well for the internal enforcement of other rules. The District of Columbia is another place where the advent of forward-looking leadership has altered the familiar image, and gives promise of a new style of operation for the future.

There may be other such examples of the winds of change blowing in such unlikely quarters as the police, as I am sure there are plenty of places where the old attitudes and the old ways of doing things show no signs of crumbling. But it would be unfortunate if the idea of police rule-making were dismissed as so much wishful thinking, on the grounds that the police can be trusted neither to make good rules nor to enforce them if made. Police officials have on occasion demonstrated less than professional qualities, but they are not unique in that respect. And, given the emotion-charged and isolated conditions in which individual policemen operate, one should not minimize the difficulties of enforcing rules in a major police department.

It is because the difficulties are so great, and because the police are so central to the chances for improving our system of criminal justice, that we need able men in positions of leadership in our police departments—men who are sensitive to the need for reconciling effective law enforcement with the protection of suspects' rights. It is true that without such men the outlook for the success of police rule-making is obscured. But it is also true that if proposals such as police rule-making must be dismissed out of hand because there are no such men presently in our police departments or willing to serve, then we are very badly off—so much so, indeed, that a handful of judges, attempting to control police behavior indirectly and haphazardly, face a formidable undertaking.

In any event, there is no suggestion under the police rule-making approach that the courts either could or should abdicate their ultimate responsibilities to protect the privacy and to safeguard the liberty of the individual. The last word as to the propriety of police-made rules always remains with the judicial branch; and that protects the integrity of the judicial process against frustration by police failures.

In the last analysis, of course, the case for police rule-making does not rest solely upon the prospects for improvement in police performance. Indeed, the poorer the performance, the greater the need for rules, since the worst of all worlds is a benighted department exercising the maximum discretion under invisible standards. There will be many false starts in the making by the police of their own rules, and the initial invalidation rate on judicial review may be high. The important thing is that there be movement towards a system in which the police are obliged to embody their operational policy determinations in formal rules for all to see. That way lies a chance to achieve both greater freedom from oppression for the individual and greater security for society.

III. THE POTENTIAL OF SELF-REGULATION

The timeliness of an exploration of greater participation by the police in the formulation of rules for their own conduct derives from a number of considerations. One is the growing disenchantment, shared by some of the most sympathetic observers, with the effectiveness of externally originated rules to achieve their purposes. This is especially true of rules of judicial origin, which are conceived in the context of specific cases reaching the courts for adjudication. No less a friend of individual rights than Professor Anthony Amsterdam has recently recognized the limited reach in practical terms of even the landmark decisions of the Supreme Court relating to fair and equitable criminal procedures. 48

48. Amsterdam, supra note 8.

The judges obviously have greater capabilities to elevate the criminal process from and after the point at which judicial authority attaches; and they have scored impressive successes in that regard. It is the projection of that authority to earlier stages, including police-citizen confrontations in circumstances never eventuating in formal prosecutions, that is in trouble.

Professor Kenneth Davis, in his justified concern about the wide area of justice committed to the discretion of public officials, persuasively points to the police as a compelling example of this forbidding phenomenon. 49 He argues eloquently for analogizing the police function to that of other agencies which are avowedly making and implementing policies having a major impact upon the public. It is his submission that the police should, accordingly, be required

49. K. Davis, supra note 6, at 81-96.
to emulate such agencies by articulating their policies in visible form. He would extend the full panoply of the administrative process, including formal rule-making and judicial review, to police policy formulation.

There are a number of respects in which the utilization by the police of formal rule-making procedures might secure the advantages normally characterizing the administrative process. One is the provision of flexibility. Professor Herbert Packer has commented on the rigidity which inheres in the conditions under which courts make rules in the first instance:

Nobody else is exerting control over the law enforcement process, so the justices think that they must. But they can do so, in state cases at any rate, only in the discharge of their duty to construe the Constitution in cases that come before them. And so, the rules of the criminal process, which ought to be the subject of flexible inquiry and adjustment by law-making bodies having the institutional capacity to deal with them, are evolved through a process that its warmest defenders recognize as to some extent awkward and inept: the rules become "constitutionalized." 50

Rule-making cannot, of course, give the police the flexibility to violate constitutional commands. But the Supreme Court itself has recognized the proposition stated by Professor Alfred Hill, namely, that "[e]ven when, in the apparent absence of alternatives, a procedural rule is held to be constitutionally required, it may cease to be so if suitable alternatives are developed, or if other measures have eliminated or brought under control the evil at which it is aimed." 51 The Court, in holding that the sixth amendment required the presence of counsel for the suspect when he was being viewed in a lineup, went on to say that such a requirement might not be imperative if, by "[l]egislative or other regulations, such as those of local police departments," the risks of undue suggestibility are eliminated. 52

Thus, 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. The Task Force Report on the Police of the President's Commission on Crime has identified the

advantage of flexibility as one to be gained through "the mature participation of the police, as a responsible administrative agency, in the development and implementation of law enforcement policies." 53

A second advantage inherent in the administrative process, which might be obtained in the law enforcement context, is the application of expertise on a continuous and systematic basis. Courts, when formulating rules in the first instance, are not endowed with this specialized knowledge and experience. Their interventions are necessarily of a random nature, shaped by reference only to the facts of the individual cases which reach them for adjudication. 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." 54 The judges, accordingly, may not grasp fully the wider implications and consequences of the rules they promulgate within the four corners of the isolated record before them.

Perhaps this concept can be given concreteness by reference to a recent experience of my court which demonstrates the vacuum in which judges are currently called upon to act. In an appeal from a conviction for a federal narcotics offense, the case for the government rested upon the admissibility in evidence of heroin capsules found upon the person of the defendant after he had been arrested late at night for a violation of the motor vehicle laws. 55 Precisely what the officer did or saw when he took custody of the defendant as the latter emerged from his car was unclear from the record.

The prosecution was prepared to assume on appeal, however, that there had been a full-scale search of the person; and it pressed us to embrace a general rule that the police may properly do this in the case of any lawful arrest, even though the crime for which the arrest is made is complete and there is no occasion to search for evidence of it. The policy justification advanced was that such a rule is essential to the personal safety of the arresting officer. It was said that, under circumstances in which the officer must maintain custody until the arrestee is delivered to the station house, and in the light of the realities of modern weaponry, a mere frisk is not sufficient.

These representations were made solely by the prosecutor. The police command itself had formulated no formal rule to this effect for observance by their men, and there was not before us any indication as to whether, or why, the police authorities felt such a rule to be

necessary. We had no way of knowing if the police were following an invisible rule of searching all persons arrested under similar circumstances, or whether this was an isolated incident reflecting a policy determination by the individual officer, as distinct from his superiors.

There were not before us the elements essential to the exercise of sound judgment in the formulation of a legal rule of general applicability. We would have been infinitely better equipped for that task if the police department, in proceedings analogous to general rule-making, had explored the considerations relevant to such a rule and had made a conscious and reasoned determination with respect to it. Without that, our own decisional processes were operating in a void of contending legal abstractions where the public interest could be seen but dimly, if at all.

Legislatures, cognizant of their own limitations in respect of detailed fact-gathering, specialized experience, and sluggish response to changing conditions, have turned increasingly to the administrative agency. If it be true, as Professor Goldstein has said, that even the legislatures' ability "to gather facts, to elicit public opinion, and to act in a manner which is subject to later adjustment" is overtaxed by "the infinite variety of complex situations which confront the police today," how much more so is this the case in respect of the courts.

It is important to emphasize at this point, however, that no responsible proponent of police rule-making is suggesting the abdication by either court or legislature of any role in scrutinizing its results. That would be an untenable position so long as we live under a constitutional framework of government. What is contemplated is that the police, in the classic tradition of administrative law, have a larger share in devising the rules for the governance of their own conduct in the first instance, with ultimate amenability to the commands of constitution and statute as interpreted and enforced by the courts in a reviewing stance. That, I believe, would represent a major improvement over the present situation as manifested in the case which I have just cited to you, in which our court was asked to be the rule maker of first instance in a field in which we had little expertise.

Over and above the advantages which have been thought to exist in the administrative process in all contexts, there are considerations peculiar to the functioning of the police which argue for its merits in this narrower setting. The points of contact between the police and the citizen are of infinite variety. Many of them—indeed most—

56. Goldstein, supra note 8, at 1129, 1130.
are neither directed towards gathering evidence of specific crimes, nor do they eventuate in prosecutions. There is a wide range of police practices, with potentially severe impact upon the citizen, which never come to the notice of the courts. The promulgation of formal rules relating to these operations offers the prospect of greater control of police activities presently unrestrained by external scrutiny.

Moreover, with respect both to police activities which are presently unregulated by courts, and police activities which are presently regulated through the exclusionary rule, police rule-making offers the possibility of defining—really for the first time—the rights of suspects. As Professor Amsterdam has observed, the exclusionary rule does not define the suspect's rights. It says, rather, that if a particular right is not respected, evidence thereafter accumulated may not be used at a trial. The *Miranda* rule does not say that a suspect in custody has a right to telephone a lawyer. It says only that, if he is not permitted to do so and a confession follows thereafter, that confession is unavailing for purposes of his prosecution. But what about the suspect who never confesses but still would have liked to call his lawyer? So, concludes Professor Amsterdam, the formulation by the police of detailed rules for the treatment of suspects could well provide "what the courts have never been able to supply: comprehensive and coherent definition of the rights of suspects, together with procedures for assuring that they are respected."  

The point is not an unimportant one; and it is not too facilely to be assumed that the writing of rules by the police will inevitably be niggardly and regressive in the statement of positive rights. There is something about the very process of having to write down on paper detailed guidelines for one's conduct which summons rationality and elevates principle. This is especially true if the process is highly visible and if the rule-maker is held accountable for the results; and police rule-making will serve the objectives of visibility and accountability. The making of policy by the single patrolman on the beat, of which Professor Davis so rightly complains, will be transferred to the highest echelons of leadership where it belongs. Certainly it is more likely that sensitivity to individual rights will be present in

58. Amsterdam, *supra* note 8, at 812.
59. The system is atrociously unsound under which an individual policeman has unguided discretionary power to weigh social values in an individual case and make a final decision as to governmental policy for that case, despite a statute to the contrary, without review by any other authority, without recording the facts he finds, without stating reasons, and without relating one case to another. K. Davis, *supra* note 6, at 88.
a process in which rules are visibly made by responsible police chiefs, aided by lawyers sensitive to the highest traditions of the profession, than in a process in which individual policemen are left to deal with suspects on their own.

It is also possible that police rule-making will have immediate implications for the effective administration of discipline within the police departments. Internal sanctions for departures from norms of conduct depend upon precise and prior identification of what those norms are.\textsuperscript{60} And there should obviously be less reluctance by command authorities to punish infractions of rules formulated by those authorities themselves as compared with standards imposed from without. More effective departmental discipline, along with the transfer of policy-making responsibilities to the upper levels of police leadership, should also contribute to the realization of a greater degree of uniformity in law enforcement practices—a virtue which appears sadly lacking under a system where the differing values and judgments of individual police officers are uninhibited by official pronouncements of the policies to be observed.

In the last analysis, it is the \textit{visibility} of the administrative rule-making process which is its greatest virtue. Without it, the police have never been compelled to recognize the degree to which their daily operations involve policy decisions of the greatest significance to the community. Nor have they been obliged to reach a conscious decision as to whether familiar ways of doing things, which appeal to them as effective, are compatible with overriding values generally comprehended within our concept of a government of laws.\textsuperscript{61} In its absence, there has not been the continuous re-examination of established methods, the periodic probing to see if the desired objective can be achieved through new exercises of ingenuity and imagination without sacrifice of other social ends, which are the mark of the true profession. The extension of the administrative process to the police function would markedly advance the achievement of that status.

It is appropriate, therefore, to turn to the questions of (1) the

\textsuperscript{60} The Crime Commission Task Force Report describes the existing situation:
Lacking a formulated policy and thus a preannounced basis for internal disciplinary action, the police administrator is hesitant to impose sanctions upon the individual police officer who acts improperly but whose conduct does not violate departmental regulations.

\ldots The police administrator finds himself caught in a conflict between his desire to be responsive to a citizen who has reason to complain about a policeman’s behavior and his fear of the reaction of his force to seemingly arbitrary discipline where there is no clear breach of a preannounced standard of proper conduct.


\textsuperscript{61} \textit{See Task Force Report: The Police}, supra note 8, at 17.
manner in which that process might be effectuated by the police, and (2) how its extension to them may be brought about. In respect of the former, there is no reason to think that a major police department lacks the resources or the competence to engage in general rule-making, particularly if its organization includes a legal unit in the form of a General Counsel's office. The central question to be faced is the degree of participation in it by the public.

It has been suggested that "[c]itizens' advisory committees could be consulted at the drafting stages," with final promulgation to be preceded by circulation of drafts for study and comment or for discussion at public hearings. That public participation through some such means would be useful seems obvious. It would add a democratic element to law enforcement which has long been absent; it would strike a new and healthy note of openness in what has characteristically been a largely closed society; and it would cast the widest possible net for new ideas.

From the standpoint of the police themselves, there would appear to be benefits from the resulting greater public education in, and sympathetic understanding of, the many thorny problems involved in law enforcement. Current ignorance of these problems is at the root of some of the more serious difficulties presently assailing the police, and any amelioration of it would be in the interest of the police as well as the public. In most areas of human experience, greater understanding is a necessary prelude to greater support, and law enforcement is presumably no exception to this precept.

To my knowledge there is at least one major police department in the country where a form of rule-making is already in existence, and that department is in the District of Columbia. Some instructions to patrolmen in the area of criminal law and procedure are promulgated in the form of mandatory orders which are enforced through departmental discipline. Those issued thus far deal with such subjects as automobile searches and identification procedures. They are communicated to departmental personnel, and the familiarity of the recipients with them is tested on promotional examinations. If such an order is violated, disciplinary proceedings may be instituted, with the severity of the sanctions invoked geared to the circumstances of the violation. The sanctions range from official warnings and reprimands to trial board proceedings directed towards fines, suspensions, and discharges.

The first drafts of such regulations are developed by the General Counsel, ordinarily after consultation with the operating divisions.

62. Amsterdam, supra note 8, at 815.
63. See K. Davis, supra note 6, at 92-93.
The first draft is customarily circulated on a personal and confidential basis to various knowledgeable people—prosecutors, defense counsel, law professors, police administrators, and the like. Subsequent drafts are prepared and circulated throughout the department, with comments invited. A final draft is then submitted to the Chief of Police and, if approved, is issued in his name. There have been no public hearings, and the participation from outside the department has been limited as indicated.

The process thus falls short, in the matter of public participation through notice and opportunity to be heard, of what would have been provided in that regard in normal administrative agency rule-making. But the resulting regulations do, in two significant ways, go beyond what has been described as the typical legal advisor operation.\(^{64}\) One is that the operational instructions are made obligatory, and the other is that they have manifested an apparent willingness to address problems in advance of judicial or legislative mandates, as in the case concerning pre-trial identification which I mentioned yesterday.\(^{65}\) For a voluntary system, these innovations are not inconsiderable; and the courts, at the least, are provided the reference point of a careful and detailed articulation of policy by the police as to how field operations are to be carried on.

The District of Columbia example is relevant to the second question posed above, namely, the means by which the rule-making process is to be extended to the police. It indicates that there are no apparent impediments to a voluntary undertaking by the police to proceed by rule-making in the agency tradition. It does not establish, in and of itself, that there is any likelihood that other police departments will emulate that example. Professor Davis has voiced pessimism on this score, and his doubts, in what he refers to as "the present climate of opinion," extend to the imminence of legislative action to place the police in the administrative agency mould by subjecting them to statutes comparable to the federal Administrative Procedure Act.\(^{66}\) If his forebodings are plausible, as they well may be, it is pertinent to inquire what powers the courts may have to bring about this seemingly desirable result.

There is, of course, always the possibility that judicial expressions like that of the Supreme Court in \textit{Wade}, suggesting that police regulations are an alternative to rules fashioned by the courts even in the constitutional sphere, may eventually bear fruit. They offer the police an escape from the constitutional straitjacket, and provide an in-


\(^{65}\) See text following note 8 supra.

\(^{66}\) K. Davis, supra note 6, at 95.
centive for self-regulation as opposed to the imposition of rules from without by less expert and experienced sources. It is hard to see why this avenue is not an inviting one, but it may be that it takes unusually broad-gauged police leadership to discern its merits and to make the requisite effort. It is easier to go on complaining about judicial interference to a public largely unaware that the courts themselves have suggested this means of deliverance.

There remains the interesting, albeit presently unresolvable, question of whether the judicial power could be exerted to compel the police to proceed by rule-making. Any argument to that end would presumably begin by recognizing the formidable nature of the impact which the police can and do have on the lives of their fellow citizens. With a virtual monopoly of force and the authority to use it when needed, it is perhaps not far-fetched to assert, as Professor Amsterdam has, that such extraordinary powers should always be under the aegis of visible rules for their exercise, and that the failure of the police to impose this restraint upon themselves, at least in respect of individual rights guaranteed by the Constitution, would in itself raise due process problems.

That particular constitutional concept has long embraced a requirement that agencies which have rules must observe them. In a recent application of this principle, the Fourth Circuit reversed a conviction for this reason, saying that it was of no significance that the agency procedures violated were "more generous than the Constitution requires." It quoted with approval an observation of the Second Circuit that departures from agency rules "cannot be reconciled with the fundamental principle that ours is a government of laws, not men"; and it emphasized that, in the case before it, the agency had expressly justified the rules in question as ensuring "uniformity" in the protection of personal rights.

If a court is warranted in insisting that, in order to have a gov-

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67. If the maximum benefits are to be obtained from police rule-making, of course, the system should not be conceived solely as a means of escaping the constitutional straitjacket. Ideally, the rule makers should not attempt merely to define the constitutionally permissible boundaries of police action, but should rather weigh competing interests and policies and, when appropriate, write rules which restrict police conduct more stringently than would the Constitution alone.

68. Due process of law comports the command that public agencies—particularly an agency such as the police, which possesses broad and virtually monopolistic powers to use force and restraint upon the citizenry—act according to uniform, visible and regular rules of law. When the extraordinary powers of the police are used unconstrainedly—that is, in the absence of such rules—they are used arbitrarily in a constitutional sense, in violation of due process. Such rule-less police actions may also violate standards established by state law for all administrative action. Amsterdam, supra note 8, at 814 (footnote omitted).


70. 420 F.2d at 812, quoting Hammond v. Lenfest, 399 F.2d 705, 715 (2d Cir. 1968).
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ermment of laws, an agency rigorously adhere to the rules it has, it
may not be too long a step to regard an agency operating without
rules as in a lawless posture. The Fourth Circuit has moved in this
direction in a case involving prison administration, saying:

Courts are not called upon and have no desire to lay down de-
tailed codes for the conduct of penal institutions, state or federal. . . .
[But] [w]here the lack of effective supervisory procedures exposes
men to the capricious imposition of added punishment, due process
and Eighth Amendment questions inevitably arise.71

And there are cases where the trial courts, confronted with substan-
tial violations by the police of civil rights, have commanded the po-
lice to draw up written plans and instructions governing the conduct
of members of the force.72

These last are instances of ad hoc directions by the courts to the
police to make rules, and they have occurred in the context of wide-
spread actual violation of individual rights of constitutional magni-
tude. They are, admittedly, a far cry from the exercise of judicial
power to require the making of rules in advance of such violations
or which embody self-denying restraints not constitutionally com-
pelled. But they stress the importance to the liberties of the citizen
of there being precise police rules in existence. As recognition of
that importance widens, which it appears to be presently doing, it
would be premature to predict that they will never be perceived by
the courts as an imperative of due process or as an assurance that
the public is receiving the uniformity of treatment at the hands of
the police inherent in the concept of equal protection.73

If the administrative model should prevail in respect of police
operations, and general rule-making come to be a familiar element
in the police scene, consideration must be given to the role of the
courts in that scheme of things. It is obvious that the mere fact of
rule-making is no guarantee that the rules made will in all respects
be consonant with constitutional or statutory standards.74 Neither

72. See, e.g., Hicks v. Knight, 10 Race Rel. L. Rep. 1504 (E.D. La. 1965), in which
a city commissioner of public safety and a chief of police were ordered, under penalty
of contempt, to adopt and publish a plan for police coverage of picketing and demo-
strations in the city. In conjunction with this, they were directed to "[d]evelop and
adopt in writing a set of specific instructions as to the duties of individual police officers
and police supervisors in executing the plan," and to "[a]dopt in writing a plan for
instituting disciplinary action against any police officer of the City . . . who refused
. . . to know and perform . . . [his] assignment under the plan." 10 Race Rel. L. Rep.
at 1507-08. See also Cunningham v. Grenada School Dist., 11 Race Rel. L. Rep. 1776
(N.D. Miss. 1966); Note, The Federal Injunction as a Remedy for Unconstitutional
Police Conduct, 78 Yale L.J. 143 (1968).
73. See Comment, Equal Protection as a Defense to Selective Law Enforcement by
74. It would, of course, be desirable for courts to be able to review police regulations
does the existence of valid rules mean that they will never be ignored or violated. The courts remain to make such determinations and to prescribe their consequences. They continue to be, as before, the ultimate shield of the citizen from the improper actions of his government. The relevant inquiry is as to the reconstruction of the role of the courts so that they can more effectively review police conduct by reference to rationally conceived prior rules, as distinct from formulating such rules in the first instance.

A first question in this regard has to do with the timing of the review. May police rules, upon promulgation, be judicially examined before they are implemented, or will the inquiry into validity come only upon challenge by a particular criminal defendant in the course of his prosecution? The former course has increasingly become a characteristic of general administrative law, and would appear to have significant advantages in respect of police rule-making.76

There is, first, the desirability, in these times of congested dockets, of reducing the number of individual criminal appeals as much as possible. If a police practice embodied in a general rule withstands scrutiny by the courts promptly after issuance, defense attorneys will have no basis for filing repeated criminal appeals incorporating the same challenge. A second advantage is that pre-implementation review would enable the courts to examine a broader range of police practices. This includes those which do not normally produce evidence and which do not, therefore, come to light in a criminal trial. These very practices may, however, have substantial impact upon rights of privacy and the inherent dignity of the individual.

A third consideration emerges from what has been described as a weakness of the present system of judicial review, namely, that it represents "a decision about the propriety of the actions of the individual officer rather than a review of departmental administrative policy."76 Pre-implementation review would shift the focus from

75. As is commonly the case with other administrative agencies, the sequence might be: (1) rule-making proceedings, followed by (2) judicial review of the proposed rules, upon proper petition by interested parties, followed by (3) implementation of the rules, to the extent that they are approved by the courts. The first step, it should be noted, refers to final agency action; it may, of course, be desirable to have an administrative review procedure within police departments.

76. TASK FORCE REPORT: THE POLICE, supra note 8, at 31.
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It is the latter which is the more vital concern of the courts. It is also true that a first essential of adequate administration of discipline within the police department is the early establishment of the illegality of the conduct sought to be punished. If there are clear definitions of proper police conduct which have successfully survived challenge in the courts, the police administrator is immeasurably strengthened in his capacity to secure adherence to those definitions by the prospect of departmental discipline.

Lastly, improper police activity is, even apart from conviction of crime, frequently irreparable in a literal sense. It entails limitations upon freedom of movement and invasions of privacy for which there are virtually no means of redress. Thus it is important that rules liable to such defects be examined as quickly as possible and their implementation prevented. Pre-implementation review would serve this interest to a degree necessarily wanting in piecemeal challenges by individual defendants.

Indeed, it would appear that the availability of pre-implementation review is important if, in the matter of sanctions, police rule-making is to offer a possible alternative to the exclusionary rule. If objections may only be made in individual prosecutions, the judge

77. Although police administrators might be expected effectively to discipline their subordinates, it is less likely that they can objectively review department-wide official policy. As Professor Goldstein has written, supra note 60, at 164:

Existing control mechanisms, designed as they are to control individual behavior, cannot adequately perform the quite different and more complex task of exposing and reviewing enforcement policies and practices. . . . However strongly committed an agency may be to disciplining the conduct of its employees, it is not likely to criticize the actions of an officer which, though of questionable legality, are in accord with a practice knowingly and consciously engaged in by the agency. This suggests that department-wide policies, as distinct from the individual conduct of police officers, can be adequately controlled only from outside a police department.

78. Under the present system, a police administrator who is confronted with action of dubious propriety by a subordinate often does not know whether the conduct is legal, and cannot know until after a defendant challenges the action in his trial. This fact may hinder effective departmental discipline in two respects. First, the administrator may be reluctant to appear to his men to be restraining them in the absence of any "need" to do so, i.e., the conduct may be perfectly legal. And, second, if the administrator believes that the conduct is effective in apprehending lawbreakers, he may want to allow his men to continue to act accordingly, in the hope that a court will eventually give its approval.

If, however, there is a clear definition of the boundary of proper police conduct in the form of a police regulation to which a court has given its approval prior to implementation, the administrator might not be so hesitant to institute disciplinary proceedings. So long as a clear standard of conduct has been breached, his men could not question the propriety of punishment. And, even if he regarded the conduct as effective, there would be no reason to avoid disciplining the offender. If he believed that such conduct should be permitted in the future, his proper course would be to reopen rule-making proceedings and present to a reviewing court a proposed regulation which authorized the conduct. Punishment of the officer for breach of the prior rule would be neither inconsistent with the subsequent rule-making proceedings, nor "prejudicial" to the administrator's case in court when the revised regulation is reviewed.

77. Although police administrators might be expected effectively to discipline their subordinates, it is less likely that they can objectively review department-wide official policy. As Professor Goldstein has written, supra note 60, at 164:

Existing control mechanisms, designed as they are to control individual behavior, cannot adequately perform the quite different and more complex task of exposing and reviewing enforcement policies and practices. . . . However strongly committed an agency may be to disciplining the conduct of its employees, it is not likely to criticize the actions of an officer which, though of questionable legality, are in accord with a practice knowingly and consciously engaged in by the agency. This suggests that department-wide policies, as distinct from the individual conduct of police officers, can be adequately controlled only from outside a police department.

78. Under the present system, a police administrator who is confronted with action of dubious propriety by a subordinate often does not know whether the conduct is legal, and cannot know until after a defendant challenges the action in his trial. This fact may hinder effective departmental discipline in two respects. First, the administrator may be reluctant to appear to his men to be restraining them in the absence of any "need" to do so, i.e., the conduct may be perfectly legal. And, second, if the administrator believes that the conduct is effective in apprehending lawbreakers, he may want to allow his men to continue to act accordingly, in the hope that a court will eventually give its approval.

If, however, there is a clear definition of the boundary of proper police conduct in the form of a police regulation to which a court has given its approval prior to implementation, the administrator might not be so hesitant to institute disciplinary proceedings. So long as a clear standard of conduct has been breached, his men could not question the propriety of punishment. And, even if he regarded the conduct as effective, there would be no reason to avoid disciplining the offender. If he believed that such conduct should be permitted in the future, his proper course would be to reopen rule-making proceedings and present to a reviewing court a proposed regulation which authorized the conduct. Punishment of the officer for breach of the prior rule would be neither inconsistent with the subsequent rule-making proceedings, nor "prejudicial" to the administrator's case in court when the revised regulation is reviewed.
must impose the only sanction he has—exclusion of evidence—if there is to be any incentive to identify and attack questionable rules. Thus, pre-implementation review may not only decrease the incidence of unlawful infringement of citizens’ rights by the police, but also advance the public interest in convicting the guilty.

The virtues of pre-implementation review of the product of police rule-making are plainly evident. 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.79

In the federal judicial system, the case-or-controversy requirement of the Constitution might seem to interpose a barrier. But the shadow of United Public Workers v. Mitchell80 is arguably not so long as it once was, particularly in the context of state, as opposed to federal, action.81 And the patent interest of the courts themselves in having the aid of police-made rules as guides to decision in the quicksands of the criminal field would undoubtedly find expression in a willingness to go to the outermost limits of judicial ingenuity in finding jurisdiction to review.

The critical issue with respect to police rule-making, as it is for rules made for the police by courts and legislatures, is that of the

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79. An argument to the effect that there is not sufficient personal interest (standing) on which to ground jurisdiction in the case of pre-implementation review of proposed police regulations would center on the fact that events would not have matured (ripened) sufficiently so that it could be determined exactly which persons will be adversely affected. Standing and ripeness would, in other words, be the same issue; the former would be subsumed by the latter.

80. 330 U.S. 75 (1947). See also International Longshoremen v. Boyd, 347 U.S. 222 (1954). Mitchell concerned the petition of several federal employees for a declaratory judgment that the Hatch Act prohibition against political campaigning could not be applied to them consistently with the first amendment. The Supreme Court held that the petitioners’ mere allegations of intent to perform various acts apparently within the statute’s prohibitions did not create a case or controversy.82

81. See Adler v. Board of Educ., 342 U.S. 485 (1952); Note, The Supreme Court, 1951 Term, 66 HARV. L. REV. 89, 121 (1952); III K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21.06 (1958). Furthermore, even if Mitchell is assumed to be viable precedent, it would appear not to bar pre-implementation review of police regulations covering a wide range of police practices. Mitchell cannot be read as holding that there is no case or controversy until sanctions are actually applied against an individual, since such a reading would abolish declaratory judgments. Rather, a petitioner under Mitchell may sometimes have to put himself within the scope of a statute or regulation, so that it authorizes sanctions to be applied to him, before his challenge to the statute or regulation can amount to a case or controversy. Under that interpretation of Mitchell, regulations covering a wide range of police practices would be reviewable at the pre-implementation stage, namely, those regulations covering police conduct subsequent to arrest or indictment. After a suspect has been arrested or indicted (whichever occurs first), he is in a position in which the police are authorized to act against his personal interests, just as the Civil Service Commission might have been authorized to act against the personal interests of the employees in Mitchell if they had in fact performed the acts which they alleged an intent to perform.
sanction for violation. If exclusion of reliable evidence attributable to the violation is to remain, then the police may well resist rule-making as likely to be a trap of their own contriving. They would, assuming the duty of rule-making is thrust upon them, at the least be tempted to keep their rules closely confined within minimum constitutional requirements, as distinct from placing limitations upon themselves not commanded by court or legislature. If police rule-making is to realize the maximum potential benefits, however, it should not be limited to what the courts have prescribed as minimum constitutional requirements. Constitutions do not embody all of the identifiable principles of action making for the greatest degree of fairness to the suspect or the most reasonable assurance that the guilty will be convicted. There is a wide range of procedural alternatives below the constitutional level which can contribute to these ends.

The future of police rule-making is, then, intimately interwoven with the future of the exclusionary rule. It is therefore essential to inquire as to the possible effect of a system of formal rules, made and enforced by the police, on the exclusionary rule, and as to whether there is a distinction, in that connection, between violations of constitutional requirements, on the one hand, and, on the other, violations of regulations founded upon considerations not dictated by constitutional commands.

In the former case—violations of constitutional requirements, whether or not embodied in regulations—there is room for argument as to whether the exclusionary rule, as it has thus far been conceived, represents an immutable constitutional requirement in the sense that there is a personal constitutional right never to be convicted by means of evidence acquired under certain conditions. Conversely, it may be looked upon as a flexible device which, at its inception, is justified as the only foreseeable means of preserving certain constitutional values, and one which loses its imperative character if alternative means of providing that protection come into being. In the identification cases, the Supreme Court in terms contemplated the latter approach. In other applications, its language has been cast in a more rigid mould. The effect of police rule-making on presently existing exclusionary rules, in short, will depend upon the purposes of the exclusionary sanction, and the potential of police rule-making as an alternative means for achieving them.

If the exclusionary rule has no legal foundation in anything other than the purpose of the courts to deter future violations of the governing rules, then perhaps the matter could be resolved quite simply.

The judges might say in effect to the police: If you can satisfy us that you are doing everything you can to reduce the incidence of violations through meaningful disciplinary action, we will no longer need to seek deterrence through the indirect sanction of exclusion. This would be a sensible approach, since direct discipline imposed by the police internally is far more likely to deter than remote exclusions of evidence in criminal trials. Whether it is an available one, however, depends on the accuracy of the underlying premise that the exclusionary rule is rooted in nothing more than a deterrent purpose. That is a proposition which, in the current state of the cases, does not lend itself comfortably to dogmatic assertion.

The answer, of course, may lie in the concept that there is not one exclusionary rule but several, depending upon the precise nature of the constitutional provision being immediately implemented. A look at the fourth and fifth amendments is instructive in this regard. The former is addressed to the act of search and seizure, and is formulated in language suggesting preoccupation with the values of privacy, which are damaged by the unreasonable intrusion even though the resulting evidence, if any, is never used. It may be argued, accordingly, that the exclusionary rule emanating from the fourth amendment is not a personal right to the exclusion of evidence but is, rather, a means of regulating official conduct at the time when it occurs. The fifth amendment, on the other hand, is addressed to the compulsion of testimony; and its focus is upon the use in judicial proceedings of evidence amounting to such compulsion. It may be, therefore, that the existence of alternative means of deterring the conduct giving rise to the evidence does not dissipate the necessity of keeping out of the trial evidence which in itself puts the defendant in the position of supplying proof against himself.

Justice Black came close to making this distinction when, in a recent case, he said that the fifth amendment "directly and explicitly commands its own exclusionary rule." He was unable to glean such a command from the language of the fourth amendment, although he has been prepared to assume a closer conjunction between the two amendments for exclusionary purposes than has been visi-

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83. It would be a difficult question as to the point at which police department discipline was sufficiently effective so that the deterrent rationale for the exclusionary rule could be cast aside. Regulations are not self-enforcing, and the problems of discipline in police departments cannot be minimized. See Goldstein, supra note 60, at 165-67. The burden would be on the police officials to show that their efforts provided a viable deterrent threat.


ble to other members of the Court.\(^{86}\) This conjunction is not self-evident, however, since it would appear that the ban on self-incrimination may be operative without reference to the question of whether the evidence was come by through either legal or illegal means.

In any event, it may be true that police regulations resting upon the fifth amendment must inevitably invoke the exclusionary sanction, whereas violations of those geared to the fourth need not invariably do so. And it is the use of the exclusionary rule in the search and seizure field which currently is presenting the courts with the most difficult and pressing problems, not only of reasoned application but also of public dissatisfaction, since it often results in the exclusion of concededly reliable and, indeed, conclusive evidence of guilt. Thus it is pertinent to pursue the question of whether the existence of police regulations relating to search and seizure, accompanied by rigorous departmental discipline for individual violations, would admit of the relaxation of the exclusionary rule in this area.

In \textit{Mapp} the Supreme Court articulated as the policy bases of the exclusionary rule, first and primarily, the deterrence of improper law enforcement activity, and, second, the imperative of judicial integrity, by which was meant the unseemliness of the countenancing by courts of improper police conduct. If it be assumed that police self-regulation will provide a more effective means of achieving deterrence, how far does the second policy stand as a legal barrier to the abandonment of the exclusionary rule?

Professor Oaks would say, not at all. He argues that the Supreme Court has on many occasions upheld convictions originating in unlawful police conduct.\(^{87}\) Mainly, however, he relies upon the Court's decision in \textit{Linkletter v. Walker}\(^{88}\) not to make retroactive the \textit{Mapp} extension of the fourth amendment exclusionary rule to the states. While the majority in that case did state that deterrence of illegal police conduct was the "prime purpose" of the fourth amendment exclusionary rule, it is not clear that the opinion precludes the possibility that there are other important purposes behind the rule, or that its necessary implication is that the exclusionary rule would be abolished if the deterrent function were accomplished through other means.

First, \textit{Linkletter} made the exclusionary rule operative in cases not finally disposed of when \textit{Mapp} was decided, even though the questioned police conduct occurred prior to \textit{Mapp}, rendering the

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\(^{87}\) Oaks, supra note 42, at 669.

\(^{88}\) 381 U.S. 618 (1965).
deterrent rationale inapplicable. Second, and more significant, is the manner in which the Court proceeded in *Linkletter* after it stated that retroactive application would not advance the deterrent purpose of the *Mapp* rule. The Court did not end the discussion at that point, as it might have if deterrence were the only purpose behind the exclusionary rule. Rather, the Court undertook what Justice Black, in dissent, characterized as a balancing process, in which such policy factors as the disruption of federal-state relations, the wholesale release of guilty persons, and the burden placed on the federal courts of trying to determine stale factual issues (with dubious results in terms of justice either to the accused or the state), loomed larger than the more intangible imperative of judicial integrity.

What *Linkletter* does appear to establish is that, at least when the cornerstone of deterrence is removed, the fourth amendment exclusionary rule does not rest upon an unshakeable foundation. The policy arguments for its employment are subject to being overcome by countervailing policy arguments for its rejection. The interesting speculation for present purposes is as to what the nature of those clashing policy considerations will be seen to be in the matrix of a thoroughgoing system of police self-regulation.

The "imperative of judicial integrity" has commonly been said to flow from the ideas that public respect for the courts will be eroded if they entertain evidence which has been acquired through police derelictions, and that the reception of such evidence in the judicial process operates to "legitimize" illegal conduct. The measurement of the public temper at any one point in time is an inexact process at best, and one for which the Supreme Court is perhaps not peculiarly qualified. To assert that public disrespect is the consequence of failing to exclude otherwise reliable evidence is not to prove the existence of that state of mind. The contrary assertion, namely, that the rejection of such evidence creates public disrespect for the courts may be equally plausible, albeit equally difficult to establish as the majority bent of public opinion. The truth may be that the prevailing balance on this score fluctuates from time to time, in the manner of the standing of a presidential hopeful, and that no one can be other than tentative in pronouncing judgment on such a matter.

What does seem clear is that so ethereal a concept as the "imperative of judicial integrity" does not, without more, mandate either admission or exclusion of reliable evidence improperly come by. The application of the exclusionary sanction is determined by a weighing of constitutionally cognizable interests. How far the factor of judicial integrity enters into this balance of competing values would appear to depend upon its correspondence, in Justice Holmes's phrase, "with
the actual feelings and demands of the community, right or wrong."

The assumption upon which this discussion proceeds is, of course, that there are in existence rules made by the police which are to be observed by them. A deviation from those rules brings into play another legal principle of constitutional significance which may or may not be decisive in respect of the exclusionary rule. Its operation can be illustrated by the 1969 decision of the Fourth Circuit referred to above. There a conviction for tax fraud was reversed because an Internal Revenue Service agent violated the Service's established procedure in criminal investigations by failing to inform the defendant of the purpose of the interview and of his right to retain counsel. Without deciding that such a procedure had to be followed in the absence of an agency directive on the subject, and, indeed, assuming the contrary to be the case, the court concluded that the directive, once in being, had to be followed.

In reaching this disposition, the Fourth Circuit was well within the boundaries of settled Supreme Court doctrine, marked out in many cases. A leading one in the series is United States ex rel. Accardi v. Shaughnessy, in which an admittedly deportable alien attacked the validity of his deportation order on the ground that, prior to the consideration of his application to the Board of Immigration Appeals for suspension of the order, the Attorney General had issued a list of "unsavory characters" upon which his name appeared. Departmental regulations provided that the Board was to exercise its discretion over applications for suspension, with ultimate review by the Attorney General. The Court held that, even though the Attorney General had the last word and there was no legal necessity to provide for intermediate action by the Board, "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision." Consequently, it voided the deportation order.

This so-called Accardi doctrine reflects a recurring theme that actions by an agency in violation of its own regulations are to be given no effect when the personal interests of those subject to agency action are adversely affected—and this is true whether or not the action in question would have been proper in default of a regulation on the subject. The rationale derives from the principle, underlying the concept of due process, that individual interests are to be pro-

91. 347 U.S. at 267.
ected against governmental action which contravenes express and visible limitations upon governmental power, even when those limitations are self-imposed and not contemplated by constitution or statute.

The relevance of this principle to police regulations is readily apparent. It represents a constitutionally cognizable value which, although not itself determinative of the question of whether evidence gathered in defiance of a police rule should be excluded, presumably would enter into the balancing process by which that question is to be answered. And it is to be noted that this would be true irrespective of whether the rule involved constitutional requirements, or only those of lesser degree which the police had thought it in the public interest to assume.

The Accardi principle has been formulated in a federal context, and it may possibly have less significance in a state situation. But the principle it implements is one which cannot be left wholly out of account in thinking about the role of the exclusionary sanction in cases involving evidence having its source in police disregard of their own rules. The disappearance of the deterrent element, and the discounting of the "imperative of judicial integrity," still leave it as a point to be reckoned with.

The values on the other side of the ledger are plain to see. Although we are alert to separate the innocent from the guilty, we do not think the latter should escape the consequences of their acts in defiance of the social order. Easy escape from criminal consequences threatens the stability of any society, and usually inflicts the greatest injury on those least able to insulate themselves from the conditions in which crime thrives. We think prevention is better than punishment, but we have not yet attained a state of sophistication where the latter can, with safety either to our physical or moral security, be dispensed with. At the same time, we believe that obedience to the law is indivisible, and we reject a double standard for private citizen and public official. There are consequences to be attached to violations by each, and the lawless enforcement of law is utterly alien to the premises of our legal system.

The reconciliation of these contending claims is always difficult—and no more so than in the matter of the exclusionary rule. The judge wrestling with these issues is left very much at large, and sees clearly only the diverging policy factors in the scale before him. At all events, a new factor will appear in that balance if the police take on the character of a professional, disciplined, and informed agency, ordering their operations by visible and uniform rules formulated with the aid of broad community participation.