

Michigan Law Review

Volume 63 | Issue 6

1965

Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions

Wayne R. LaFave
University of Illinois

Frank J. Remington
University of Wisconsin

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Courts Commons](#), [Evidence Commons](#), [Judges Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Wayne R. LaFave & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

Available at: <https://repository.law.umich.edu/mlr/vol63/iss6/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONTROLLING THE POLICE: THE JUDGE'S ROLE IN MAKING AND REVIEWING LAW ENFORCEMENT DECISIONS

Wayne R. LaFave* and Frank J. Remington**

IN the administration of criminal justice, the judiciary currently carries an important responsibility for the fair, effective, and efficient operation of the system. "Plainly, there is no stage of that administration about which judges may say it is not their concern."¹ Moreover, as Mr. Justice Brennan recently observed, "the judicial supervisory role, like other aspects of legal regulation, is changing, and the trend certainly is one toward enlargement."² Because this is so, it is becoming increasingly important to understand the relationship between the judge and the police in the development and implementation of law enforcement policies and practices.

Of obvious importance to the process of judicial supervision of police practices is the exclusionary rule, which requires the exclusion of probative evidence when it has been obtained by the police through the use of improper law enforcement methods. In recent years the responsibility of the trial judge in applying the exclusionary rule has become considerably broader. *Mapp v. Ohio*³ held the rule applicable to the states, and *Wong Sun v. United States*⁴ held that exclusion is not limited to physical evidence; *Rogers v. Richmond*⁵ made it clear that trustworthy confessions may sometimes be excluded because of the methods used to obtain them, and, more recently, *Escobedo v. Illinois*⁶ established denial of counsel as another basis for suppression of evidence.

Other recent developments, such as *Aguilar v. Texas*,⁷ give new

* Associate Professor of Law, University of Illinois.—Ed.

** Professor of Law, University of Wisconsin.—Ed.

1. Brennan, *Judicial Supervision of Criminal Law Administration*, 9 CRIME & DELINQUENCY 227, 233 (1963).

2. *Ibid.*

3. 367 U.S. 643 (1961).

4. 371 U.S. 471 (1963).

5. 365 U.S. 534 (1961).

6. 378 U.S. 478 (1964).

7. 378 U.S. 108 (1964). In *Aguilar*, the Court held the exclusionary rule applicable to evidence (narcotics) obtained upon the execution of a search warrant which was issued by a justice of the peace and which was based upon an affidavit submitted by police officers. The affidavit read, in relevant part: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Id.* at 109. The majority, speaking through Mr. Justice

emphasis to the view that it is desirable for judges, in the first instance, to decide whether an arrest or a search shall be made. Such decisions, it has been asserted, should be made by a neutral and detached magistrate rather than by the police, who are engaged in the "competitive enterprise of ferreting out crime."⁸ There is also continuing emphasis upon the desirability of bringing a person before the magistrate promptly after arrest in order to enable the judicial officer to decide whether there was probable cause for the arrest and detention.

The trend thus seems to be toward according the judiciary an even greater role in both the making and the review of important law enforcement decisions. The objective, of course, is greater fairness in law enforcement policy and practice. Unfortunately, however, as revealed by observation of current practice, judicial participation is often perfunctory and often has a destructive rather than a constructive impact upon law enforcement practice. This is not to say, as some have contended, that judges are responsible for the crime rate or that "courts have no right to police the police" when they should be "getting their own houses in order."⁹ Rather, the basic point is that the increasing involvement of judges in law enforcement makes it imperative that more attention be given to the utility of judicial participation as a means of achieving law enforcement policies and practices which are both effective and consistent with democratic values.

We have chosen to focus here upon judicial involvement (1) in determining whether arrest and search warrants should issue and (2) in reviewing such decisions after they have been executed (and, perhaps, made) by police officials. A comparison of some recent findings respecting the actual practice at the trial level with the "ideal" as set forth in appellate opinions may allow some conclusions to be drawn both as to the present effectiveness of appellate

Goldberg, stated: "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which led to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' . . . or, as in this case, by an unidentified informant." *Id.* at 114-15.

8. *Giordenello v. United States*, 357 U.S. 480, 486 (1958); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

9. Inbau, *The Social and Ethical Requirements of Criminal Prosecution*, 52 J. CRIM. L., C. & P.S. 209, 212 (1961).

rulings on these subjects and as to the ultimate feasibility of further implementation of those rulings. Finally, since the exclusionary rule is, theoretically at least, one of the strongest arms of judicial control over police practice, it is proper that it be re-examined and its practical deficiencies set forth.

I. JUDICIAL PARTICIPATION IN THE MAKING OF LAW ENFORCEMENT DECISIONS

A. *The Assumption*

It is frequently assumed, especially by appellate courts, that it is desirable for law enforcement decisions, such as the decision to arrest, to be made by judicial officers. Thus, "when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."¹⁰ Even in the face of "facts unquestionably showing probable cause,"¹¹ a search by an officer may violate the Constitution if a magistrate's concurrence in the decision to search is not first obtained.

Under current law, however, there are exceptions. An example is the case of a search incident to a lawful arrest, even when there is time to obtain a warrant prior to the search.¹² Some members of the Supreme Court¹³ and some commentators¹⁴ have been highly critical of this exception, and it has recently been suggested that the Court may be ready to return to the position that a search of premises incident to arrest may be undertaken only if the circumstances do not allow a warrant to be obtained prior to the search.¹⁵

There has been less emphasis upon the desirability of obtaining an arrest warrant prior to arrest than upon the desirability of ob-

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

11. *Agnello v. United States*, 269 U.S. 20, 33 (1925).

12. This is the impact of the Supreme Court's overruling of *Trupiano v. United States*, 334 U.S. 699 (1948), in *United States v. Rabinowitz*, 339 U.S. 56 (1950).

13. Justices Black, Frankfurter, and Jackson dissented in *Rabinowitz*, and Justice Douglas, who took no part in the case, has elsewhere suggested his disapproval. Douglas, *The Means and the End*, 1959 WASH. U.L.Q. 103, 110.

14. E.g., Broeder, *Wong Sun v. United States—A Study in Faith and Hope*, 42 NEB. L. REV. 483, 496-501 (1963); Kaplan, *Search and Seizure—A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 489-93 (1961); Comment, 28 U. CHI. L. REV. 664, 678-92 (1961).

15. Broeder, *supra* note 14, at 496-98. Broeder bases this view upon: (1) a reading of *Chapman v. United States*, 365 U.S. 610 (1961), as possibly overruling *Rabinowitz*; (2) the Court's granting certiorari on the question in 1960; and (3) a footnote reference in *Wong Sun v. United States*, 371 U.S. 471 n.8 (1963), to the effect that the discussion therein "implies no view" on the matter.

taining a search warrant prior to conducting a search. An arrest without warrant is generally allowed when there are reasonable grounds to believe that the suspect has committed a felony, regardless of whether there is time first to obtain a warrant.¹⁶ Further, although an arrest warrant is typically required for misdemeanors committed out of the presence of the arresting officer,¹⁷ an increasing number of states are abandoning this position.¹⁸ However, the Supreme Court recently has indicated a clear preference for arrests made with a warrant¹⁹ and has suggested that the standards "are more stringent where an arrest warrant is absent."²⁰ This position has also been taken by some federal circuit courts,²¹ and one commentator recently expressed the view that it is "imperative" that the fourth amendment be read as requiring a warrant for arrest except in limited instances where the exigencies of the situation do not allow taking this step in advance of arrest.²²

The judicial officer is to be preferred over the police officer, the Supreme Court has said, because resort to the warrant process "interposes an orderly procedure"²³ involving "judicial impartiality"²⁴ whereby "a neutral and detached magistrate"²⁵ can make "informed and deliberate determinations"²⁶ on the issue of probable cause. To leave such decisions to the police is to allow "hurried actions"²⁷ by those "engaged in the often competitive enterprise of ferreting out crime."²⁸ The exclusionary rule is not sufficient;²⁹ it is important that "a disinterested observer should pass on the case

16. Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., C. & P.S. 386, 388 (1960).

17. *Id.* at 389.

18. *E.g.*, ILL. REV. STAT. ch. 38, § 107-2 (1963); WIS. STAT. § 954.03(1) (1963).

19. *Beck v. Ohio*, 379 U.S. 89 (1964). The ill-fated *Trupiano* case also contained strong dictum to the effect that arrest warrants should be required for all offenses except where the crime "plainly occurs before the eyes of an officer." *Trupiano v. United States*, 334 U.S. 699, 705 (1948).

20. *Wong Sun v. United States*, 371 U.S. 471, 480 (1963).

21. *Carter v. United States*, 314 F.2d 386 (5th Cir. 1963); *Hopper v. United States*, 267 F.2d 904 (9th Cir. 1959); *Clay v. United States*, 239 F.2d 196 (5th Cir. 1956). For a discussion of the rules announced by several courts in an attempt to encourage police resort to arrest warrants, see Kaplan, *supra* note 14, at 499.

22. Broeder, *supra* note 14, at 501.

23. *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

24. *Ibid.*

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

26. *Aguilar v. Texas*, 378 U.S. 108, 110 (1964) (quoting *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)).

27. *Ibid.*

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

29. The rule "is calculated to prevent, not to repair." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

before a deprivation of personal liberty occurs."³⁰ Moreover, requiring a judicial decision in advance prevents the magistrate from being "subtly influenced by the familiar shortcomings of hindsight judgment."³¹

The ideal, it has been said, would be for police to seek a warrant prior to arrest or search even when not required by law, for "the duty of the police in our kind of society requires them to follow that legal course which conforms most to democratic values."³²

B. *The Current Practice*³³

Judicial participation in law enforcement decisions is not very meaningful in practice. The judicial officer is usually not consulted

30. Foote, *Problems of the Protection of Human Rights in Criminal Law and Procedure* (Santiago, Chile, May 19-30, 1958), U.N. Doc. No. TE 326/1 (40-2) LA, at 41-42 (1958). (Emphasis added.)

31. *Beck v. Ohio*, 379 U.S. 89 (1964).

32. Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 172 (1953).

This notion that having the judge actually make the law enforcement decision provides greater safeguards for those suspected of crime can be utilized to justify other forms of judicial involvement. Unlike the rule on the federal level as set forth in *Mallory v. United States*, 354 U.S. 449 (1957), many states allow a period of in-custody investigation after arrest for purposes of gathering additional evidence relevant to the charging decision. (For example, on the Michigan and Wisconsin position, see LaFave, *Detention for Investigation by the Police—An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331, 344-55.) It can be argued that in such a system the decision on whether the circumstances justify further investigation should not be made by the police, as is the common practice, but should instead be made by a magistrate with power to remand the suspect to the police in appropriate cases. Such a remand system has been proposed as an alternative to *Mallory* (Comment, 68 YALE L.J. 1003 (1959)), and is to be found in a few states and a number of foreign countries. (LaFave, *supra* at 333-34 nn. 20, 21) Similarly, it has been argued that judges should be given responsibility for actually conducting in-custody interrogations (Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L., C. & P.S. 1017 (1934)) and for releasing suspects without prosecution because of lack of evidence (Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 25 (1957)) or because of policy reasons, as with the drunk arrested for his own safety. Compare CAL. PEN. CODE § 849 (allowing "any peace officer" to make the release), with MASS. ANN. LAWS, ch. 272, §§ 44-46 (1956) (requiring the officer to file a complaint, which the judge may dismiss in certain cases).

33. Much of the empirical data upon which the descriptions of current practices are based are derived from the American Bar Foundation's field research in support of its Survey of the Administration of Criminal Justice in the United States, with which the authors have been associated for some years. The first published volume carrying the final results of the Survey is LAFAVE, *ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965). Other volumes in the series soon to be published are on the detection of crime, the charging decision, the adjudication decision, and the sentencing decision.

The ABF field studies were conducted in Kansas, Michigan, and Wisconsin and focus primarily upon practices in Wichita, Detroit, and Milwaukee. The present article is also based upon other observations by the authors in Illinois (primarily in Chicago) and Wisconsin.

No attempt is made herein to identify certain practices with specific localities. In part, this is necessary to preserve confidential sources of information. Moreover,

in advance, and, when he is, his participation is largely perfunctory.

Arrest warrants are seldom obtained prior to arrest.³⁴ Even when a warrant is obtained, the objective of the police usually is not to acquire a judicial evaluation of the grounds for arrest; rather, the warrant is sought as a bookkeeping device or to serve some other administrative function.³⁵

In large urban areas particularly, arrest warrants are commonly issued without any meaningful participation by a judicial officer. If the judge actually signs the warrant, as is almost always required by law,³⁶ he is likely to do so without a careful reading of the complaint and without any direct examination of the complainant. This task is often performed by the judge while he is engaged in the trial of cases or the holding of preliminary examinations. Illustrative is the following report:

"All during the preliminary examinations this morning the judge was signing arrest warrants. It was difficult for me to judge the number of warrants signed, since this was going on while witnesses in the preliminary examinations were being questioned. I noticed that the clerk would sometimes go to the opposite side of the courtroom, administer the oath to the officer or complainant wishing to have the warrant signed, and then, very quietly, take the warrant to the bench for the judge's signature. This judge was not appreciably bothered by this duty, since he merely signed his name to the warrant while listening to the testimony of the witnesses in other matters. The clerk, incidentally, administered the oath as quietly as he could so that the proceedings would not be disturbed. I would say that, be-

identification is not necessary, as the purpose of this article is not to criticize any agency with respect to the most difficult problems it faces but rather to report and analyze such practices as do exist in the hope that it will provide a solid basis for improvement. It should not be assumed that all of the practices described necessarily prevail in all of the jurisdictions named above.

34. In many jurisdictions, however, arrest warrants are obtained on those persons in police custody who are going to be prosecuted. The warrant issued after arrest serves as either a manifestation of the charging decision or a basis for commitment of the defendant unable to post bail.

Even if the law requires a warrant for arrest, as is commonly true of the misdemeanor occurring out of the officer's presence, no warrant is sought if some reason for immediate apprehension is apparent and there is no critical evidence which would be excluded because of the lack of a warrant. On the reasons why the police sometimes believe it is impractical to comply with the warrant requirement in misdemeanor cases, see LAFAYE, *op. cit. supra* note 33, at 22-28.

35. On the various functions served by the warrant, see *id.* at 36-51.

36. In most jurisdictions the issuance of arrest warrants is by statute the responsibility of judicial officers. See, e.g., KAN. GEN. STAT. § 62-602 (1949). Wisconsin, however, has a unique statute allowing a magistrate or the district attorney to sign the warrant. WIS. STAT. § 954.01 (1963). And compare the Michigan provision, which requires concurrence of the magistrate and prosecutor for most offenses. MICH. COMP. LAWS §§ 300.12, 774.4 (Supp. 1961); MICH. COMP. LAWS § 764.1 (1948).

tween the hours of 9:30 and 11:00 a.m., the judge signed ten or fifteen warrants."³⁷

When court is not in session, judges seldom make any greater inquiry into the basis for issuing the process.³⁸ In some jurisdictions the judge has his clerk sign the warrant and thus does not even see the complaint upon which the arrest is to be based.

As a general proposition, there is greater judicial concern over the issuance of search warrants than over the issuance of arrest warrants. This is difficult to understand, since at least as many searches are conducted incident to arrest warrants as are conducted incident to search warrants; in some respects the arrest warrant confers a broader power of search than does the search warrant.³⁹

Although most judges view the issuance of a search warrant as an important responsibility, this is not true in all jurisdictions. There is, for example, evidence that some judges issue search warrants without giving detailed consideration to whether sufficient grounds exist. Serious consideration of the legality of the search is postponed until the issue is raised by a motion to suppress the evidence on the ground that it was illegally obtained. Sometimes when the case is tried before the judge who originally issued the warrant "he may reverse himself and hold that the grounds upon which he himself issued the search warrant were insufficient."⁴⁰ When this occurs with some regularity, it is apparent that the judge does not apply the same standards in issuing the warrant as he does when the admissibility of the evidence is challenged.

C. *The Causes and Consequences of the Practice*

Because only the fiction of before-the-fact judicial control is maintained in practice, the result is often lesser instead of greater

37. From a report of an American Bar Foundation field researcher. See note 33 *supra*.

38. For example, this incident was reported by a field researcher for the American Bar Foundation: "After arriving in court, the police officer went directly to the court room of the examining magistrate. The court was not in session, so the officer went to a back room adjacent to the judge's chambers where a group of men were playing cards. One of them said that the judge was on his way out of the building. The officer returned to the hallway and found the judge about to board an elevator. They exchanged a brief greeting with the officer extending the warrant toward the judge. Without completely unfolding the document, and certainly without reading it, the judge signed and returned it without any question. The officer thanked him as the latter disappeared into the elevator. It appeared to me that the only possible information which the judge could have learned about the case from this transaction would be an inference that the defendant was involved in a burglary, since the officer was assigned to the holdup and breaking and entering bureau."

39. See Kaplan, *supra* note 14, at 492-93.

40. Wilson, *How the Police Chief Sees It*, Harper's Magazine, April 1964, pp. 140, 143.

protection against unjustified police action than if the warrant process were not utilized. When the process—however meaningless—is used, police often appear to be less concerned with whether an adequate basis for an arrest or search exists than they are when the decision to arrest or search is theirs alone. Their assumption (true in theory but seldom true in practice) is that the warrant process is a judicial responsibility.

When judges give only perfunctory attention to whether a basis for the warrant exists, the warrant process is deprived of the advantage it would otherwise have from the point of view of the police. Since there is no real assurance that the arrest and search will be lawful and the evidence admissible, the inducement to seek an advance judicial determination in doubtful cases is often lacking. In addition, the inconsistency between the standard applied when a warrant is requested prior to arrest or search and the standard applied when the admissibility of evidence is later challenged creates uncertainty in the minds of the police as to what legal norms actually govern arrest and search. Furthermore, the spectacle of a judge quashing a warrant he or one of his colleagues issued a few days earlier creates police doubt as to the ability of judges to “police the police.” The lack of concern by the local judiciary with *preventing* unconstitutional arrests and searches, as opposed to *excluding* the fruits thereof after the event, contributes to a police view that the courts are only interested in freeing the guilty and hampering law enforcement.

It is not entirely clear why judges do not participate in a more significant way in decisions regarding whether arrest or search warrants should issue. In urban areas it may be explainable in part by the pressure of other demands on their available time. However, this does not appear to be a major factor, since meaningful participation does not occur even in instances where there is clearly time for a careful decision by the judge. It seems more accurate to conclude that many judges are reluctant to become truly involved in what they conceive to be a relatively ministerial task of issuing process. The judge is likely to be more interested in the trial of cases and in other matters which seem to him to be clearly judges' work.

One judge, when asked why he did not give more careful attention to requests for arrest warrants and search warrants, explained, “I have complete confidence in the police and prosecutor's office.” It does seem clear that most judges are willing to rely heavily on the

prosecutor and, to a somewhat lesser extent, on the police where the prosecutor's advice is not routinely sought. Yet this clearly is not a satisfactory explanation, for the practice continues in jurisdictions where judges frequently suppress evidence obtained by search incident to a warrant.

Perhaps the assumption is that the decision to arrest or search is the responsibility of the police and prosecutor, with the role of the judge being limited to review of the decision if it is later challenged in an adversary setting. However, since such review occurs only when a motion to suppress is presented by the defendant,⁴¹ it is limited to instances in which service of the warrant results in finding physical evidence⁴² critical to the prosecution.

Whatever the reasons for the practice, the divergence between it and the ideal raises doubts about the feasibility of maximum judicial participation in the actual making of law enforcement decisions.

II. PROMPT JUDICIAL REVIEW OF LAW ENFORCEMENT DECISIONS

A. *The Assumption*

*Mallory v. United States*⁴³ held that federal officers must bring an arrested person before the nearest available magistrate as soon as it is administratively feasible to do so. Because the states have not followed the *Mallory* approach of excluding confessions obtained during unlawful delay,⁴⁴ the requirements in this respect remain unclear in many jurisdictions.⁴⁵ But, even in states which

41. It is commonly thought that review of the arrest occurs in all cases through prompt appearance of the defendant before a magistrate, but this is not the case. See text accompanying notes 43-64 *infra*. A form of review occurs at the preliminary hearing held some days later, but the focus then is not upon whether there were grounds for arrest but rather upon whether there presently is "probable cause" to subject the defendant to trial.

42. Although the Supreme Court in *Wong Sun v. United States*, 371 U.S. 471 (1963), held that the exclusionary rule applied to verbal evidence obtained by illegal arrest, the case appears to have had very limited impact because of the narrow interpretation given it by most courts.

43. 354 U.S. 449 (1957). This was the Court's interpretation of FED. R. CRIM. P. 5(a), which requires federal officers to take persons arrested before a commissioner "without unnecessary delay."

44. In *People v. Hamilton*, 359 Mich. 410, 102 N.W.2d 738 (1960), Michigan became the first state to adopt the *Mallory* sanction. However, subsequent decisions by the court make it doubtful that illegal detention will alone bring about exclusion of a confession. See *People v. McCager*, 367 Mich. 116, 116 N.W.2d 205 (1962); *People v. Harper*, 365 Mich. 494, 113 N.W.2d 808 (1962).

45. The state statutes are collected in LaFave, *supra* note 32, at 332-33. States with identical statutory language have placed quite different interpretations upon them. For example, the phrase "without unnecessary delay" has been interpreted most strictly in New York, and the contention that delay was needed for purpose

clearly allow some delay for purposes of in-custody investigation,⁴⁶ it is generally assumed that reasonably prompt appearance before a judicial officer is an important safeguard in the criminal justice system.⁴⁷

It is often said that prompt appearance before the magistrate insures that the validity of the suspect's arrest will receive immediate and careful review by a judicial officer. The Supreme Court has observed that legislation calling for appearance without delay requires "that the police must with reasonable promptness show legal cause for detaining arrested persons."⁴⁸ In *Mallory*, the Court asserted that an arrested person should be brought "before a judicial officer as quickly as possible . . . so that the issue of probable cause may be promptly determined."⁴⁹ Commentators have often asserted that, when the case cannot be immediately tried, the magistrate's duty is to inquire into the evidence and to release the suspect if the evidence is found to be lacking.⁵⁰ In current practice, however,

of investigation has been said to be "no excuse under the statute." *People v. Snyder*, 297 N.Y. 81, 92, 74 N.E.2d 657, 662 (1947); see also *People v. Kelly*, 8 App. Div. 2d 478, 188 N.Y.S.2d 663 (1959); *People v. Trinchillo*, 2 App. Div. 2d 146, 153 N.Y.S.2d 685 (1956); *Bass v. State*, 196 Misc. 177, 92 N.Y.S.2d 42 (Ct. Cl. 1949). Yet, in interpreting the same words, other courts have approved detentions where "the officers in good faith were energetically endeavoring to discover the true facts" (*Mooradian v. Davis*, 302 Mich. 484, 489, 5 N.W.2d 435, 437 (1942)), or where "the crime committed has not been fully solved" (*People v. Kelly*, 404 Ill. 281, 289, 89 N.E.2d 27, 29 (1949)). States without statutes are in similar disagreement. Compare *State v. Beebe*, 13 Kan. 589 (1874), with *Peloquin v. Hibner*, 231 Wis. 77, 285 N.W. 380 (1939).

46. For example, Michigan and Wisconsin. See LaFave, *supra* note 32, at 346-53.

47. Putting aside the assumption that prompt appearance insures immediate review of the grounds for the arrest, the prompt appearance requirement can operate to the benefit of the suspect in other ways. If in-custody investigation is not allowed or is kept within reasonable limits, there will be little chance for coercion of a confession or other improper investigative techniques. Appearance in court gives visibility to the suspect's arrest, makes it possible for him to learn of the charge against him, and allows him to make contact with counsel and friends. Moreover, if the suspect is brought before a magistrate without delay he will at least have the opportunity to obtain his release on bail.

Of course, it has been argued that too strict a requirement can operate to the suspect's disadvantage in that public charging will occur without the suspect first having an opportunity to be cleared by the police. See *Goldsmith v. United States*, 277 F.2d 335 (D.C. Cir. 1960).

48. *McNabb v. United States*, 318 U.S. 332, 344 (1943).

49. *Mallory v. United States*, 354 U.S. 449, 454 (1957).

50. Illustrative are the following:

"A defendant will be discharged by the examining magistrate unless the police have immediately available enough evidence, if uncontradicted, to prove his guilt. . . . If he [a police officer] brought the defendant before a magistrate without the proper evidence the defendant would immediately be released." ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 39 (1947).

"We come now to the last of the magistrate's functions, his final contact with the criminal case—the setting of bail. In its nature this function . . . presupposes that, the preliminary examination having been held, he has decided that there is sufficient (i.e., 'probable') cause to bind the accused over to the grand jury." PUTTKAMER, ADMINISTRATION OF CRIMINAL LAW 98 (1953).

at least in many jurisdictions, the initial appearance before a judicial officer does *not* include a judicial inquiry into whether there were grounds for the arrest or are grounds for requiring that the suspect post bail as a condition of his release.

Some of the mistaken impressions as to what occurs at this first appearance are undoubtedly attributable to the confusing terminology often used to describe this step. It is sometimes referred to as an arraignment,⁵¹ which tends to confuse it with a step which comes substantially later in the process and at which the felony defendant is called upon to plead. More frequently, it is referred to as the preliminary hearing,⁵² which is a hearing before a judicial officer at which the prosecutor calls witnesses for the purpose of establishing probable cause and obtaining a bindover to the grand jury or to trial where the grand jury system has been abolished. The actual practice in many jurisdictions, however, is for the magistrate at the

"At this appearance—popularly but in most states erroneously called arraignment—the first duty of the magistrate is to inquire into the arrest and see that the subject is properly charged with the commission of a specific criminal offense. . . . If the arrest was without a warrant, one must be issued. A complaint must be signed . . . to support the warrant." HOUTS, *FROM ARREST TO RELEASE* 83 (1958).

"Today the person arrested in advance of the filing of a formal accusation against him is brought before a magistrate for the sole purpose of ascertaining whether the authorities can present enough evidence against him to warrant his being continued in custody (or in bail) pending further action by the authorities looking either to the lodging of a formal accusation against him or to his release." MAYERS, *THE AMERICAN LEGAL SYSTEM* 32 (rev. ed. 1964).

"In most countries the law requires that shortly after arrest, the person arrested should be brought before a judicial or other competent authority who will pass upon the propriety of the arrest and determine whether he should be kept in custody or released. This requirement of a post-arrest check affords the arrested person *ipso jure* a prompt opportunity to have the legality of, as well as the necessity for, his arrest determined by an independent authority." United Nations Commission on Human Rights, *Study of the Right of Everyone To Be Free From Arbitrary Arrest, Detention, and Exile*, U.N. Doc. No. E/CN.4/813, p. 59 (1961).

"You cannot arrest a man without a warrant unless you have reasonable grounds for making the arrest. Therefore, the law fits logically—that when you have no warrant and yet arrest a man, it is up to you to bring him immediately before a magistrate to show you have reasonable grounds for arrest." Statement of Attorney General Francis Biddle in *Hearings on H.R. 3690 Before the Subcommittee on the Study of the Admission of Evidence of the House Committee on the Judiciary*, 78th Cong., 1st Sess. 30 (1943), quoted in statement by Professor Yale Kamisar in *Confessions and Police Detention, Hearings on S. Res. 234 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. 767 (1958).

51. As is the case in *Mallory v. United States*, 354 U.S. 449, 454 (1957). This slip of the pen is apparently the reason why, in congressional hearings in response to *Mallory*, the state statutes dealing with arraignment, as opposed to those on initial appearance, are collected. See Exhibit 31 in *Confessions and Police Detention, Hearings on S. Res. 234, supra* note 50.

52. See *Goldsmith v. United States*, 277 F.2d 335, 338 n.2a (D.C. Cir. 1960), where the court asserts that this stage of the process should not be called an arraignment but instead a preliminary hearing. Yet *FED. R. CRIM. P.* 5, to which the court refers, merely calls it an "appearance before the commissioner," at which time the commissioner is to "inform the defendant . . . of his right to have a preliminary examination," which is to be held "within a reasonable time."

initial appearance merely to notify the defendant of the charge, set bail, and ask him whether he wants a preliminary hearing.⁵³ If the defendant answers in the affirmative,⁵⁴ this hearing is scheduled for a week or ten days later, for it is only then that the prosecution and defense will be prepared.⁵⁵ The preliminary hearing, coming

53. By contrast, it is commonly assumed that unless the preliminary examination was already held and probable cause found, the accused would not be required to post bail in order to obtain his release. See, e.g., PUTTKAMER, *op. cit. supra* note 50, at 98.

54. However, most defendants waive the preliminary examination. See Miller & Dawson, *Non-Use of the Preliminary Examination—A Study of Current Practices*, 1964 WIS. L. REV. 252.

55. This delay in holding the preliminary examination has been observed in some locales in Kansas, Illinois, Michigan, and Wisconsin. In Michigan, the statutes require the preliminary hearing to be held within ten days of the initial appearance (MICH. COMP. LAWS § 766.4 (1948)), while in Wisconsin the statute provides for the preliminary hearing to be held within ten days unless the defendant consents to a longer period (WIS. STAT. § 954.05 (1963)). The Kansas statutes are silent on the matter of delay of the preliminary hearing, and the new Illinois code simply declares that the judge before whom a person is brought following arrest shall "Hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense." ILL. REV. STAT. ch. 38, § 109-1(b)(3) (1963).

Although no attempt has been made to uncover all of the statutes in point, the situation country-wide would appear to break down as follows:

(1) In some states, the statutes appear to call for a very prompt preliminary hearing after arrest, although there is provision for continuance of the hearing upon a showing of "good cause." ARK. STAT. ANN. § 43-608 (1964) (not more than three days at a time "for the purpose of procuring the attendance of witnesses . . . or other sufficient reason"); CAL. PEN. CODE § 860 (not more than two days at a time, not more than six days in all); FLA. STAT. § 902.05 (1963) (also two and six days, respectively); IDAHO CODE § 19-804 (1948) (also two and six days, respectively); IOWA CODE § 761.4 (1950) (not more than thirty days); NEB. REV. STAT. § 29-501 (1956) (where "necessary for any just cause"; no stated time limit); NEV. REV. STAT. § 171.390 (1963) (not more than two days at a time, not more than six days in all); N.H. REV. STAT. ANN. § 596:1 (1955) ("as should be judged reasonable"; no time limit); N.M. STAT. ANN. § 41-3-4 (1953); N.Y. CODE CRIM. PROC. § 191 (not more than two days at a time); N.D. CENT. CODE § 29-07-07 (1960) (not more than three days at a time; not more than fifteen days in all); OHIO REV. CODE ANN. § 2937.02 (1954) (not to exceed ten days, and "absence of counsel or material witnesses is reasonable cause for continuance"); OKLA. STAT. tit. 22, § 254 (1937); ORE. REV. STAT. § 133.640 (1963) (not more than one day at a time, not more than six days in all); S.D. CODE § 34.1402 (Supp. 1960) (two and six days respectively); TENN. CODE ANN. § 40-1104 (1955) (not more than three days at a time); UTAH CODE ANN. § 77-15-5 (1953) (not more than one day at a time; not more than twelve days in all); WYO. STAT. ANN. § 7-167 (1959) ("until the cause of delay be removed and no longer").

(2) In some states the statutes are similar to those in Michigan and Wisconsin, in that they merely set an outer limit on delay. ALA. CODE tit. 15, § 129 (1958) (ten days); ME. REV. STAT. ANN. ch. 147, § 10 (1954) (not more than ten days delay at a time); MINN. STAT. § 629.47 (1947) (same); MONT. REV. CODE ANN. § 94-6104 (1947) (same); R.I. GEN. LAWS ANN. § 12-10-9 (1956) (not more than fourteen days at any one time); VA. CODE ANN. § 19.1-102 (1960) (not more than ten days at a time); WASH. REV. CODE § 10.16.040 (1956) (ten days in all).

(3) In some states the statutes simply require that the magistrate hear the evidence "within a reasonable time" or that he may delay for certain purposes. DEL. RULES OF CRIM. PROC., Superior Court, Rule 5(c) ("within a reasonable time"); GA. CODE ANN. § 27-403 (1953) ("A reasonable time shall be given to the defendant or prosecutor for the preparation of his case"); TEX. CODE CRIM. PROC. art. 246 (1954)

as it does some time after the arrest and initial appearance, is not so much a check upon the police decision to arrest as it is a check upon the prosecutor's decision to go to trial.

Some states by statute require police who have arrested a person without a warrant to take him before a magistrate and submit evidence to justify the issuance of an arrest warrant.⁵⁶ If the warrant is issued it becomes the basis for continuing custody or requiring bail for release. More common is legislation which merely requires that a complaint be filed with the magistrate,⁵⁷ leaving somewhat uncertain the magistrate's control function in such circumstances. In at least some of these jurisdictions, however, the practice is to obtain *both* a complaint and a warrant at or before the time the defendant is first brought before a judicial officer.⁵⁸

("magistrate may at the request of either party postpone the examination to procure testimony"). The requirement on the federal level is simply that "the commissioner shall hear the evidence within a reasonable time," FED. R. CRIM. P. 5(c), and, while it is clear that the hearing is not always held at the time the defendant is initially brought into court (e.g., *Jackson v. United States*, 285 F.2d 675 (D.C. Cir. 1960)), it is not known how common this is in practice. One court held that a continuance of twenty days to allow the government to secure witnesses was not a denial of a preliminary hearing within a reasonable time. *James v. Lawrence*, 176 F.2d 18 (D.C. Cir. 1949).

(4) In some states the only reason for delay mentioned is defendant's need to secure counsel. KY. CRIM. RULES 3.08 (1964); N.C. GEN. STAT. § 15-87 (1953).

56. E.g., LA. REV. STAT. § 15:70 (1951) (a statute concerning the duties of officers arresting without warrant, making reference to the "return of the officer making the arrest, indorsed upon the warrant upon which the accused person shall be subsequently held"); MO. REV. STAT. § 544.170 (1959) (contemplates that those held "shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense"); N.C. GEN. STAT. § 15-46 (1953) (persons arrested without warrant to be taken to a magistrate, "who, on proper proof, shall issue a warrant"); WYO. STAT. ANN. § 7-155 (1959) (on arrest without warrant "until a legal warrant can be obtained").

57. E.g., CAL. PEN. CODE § 849 (if arrest without warrant, person to be taken before magistrate and "a complaint stating the charge against the arrested person, must be laid before such magistrate"); N.H. REV. STAT. ANN. § 594:22 (1955) (where arrest without warrant, defendant to be taken to court so "that a complaint may be made for the offense"); OHIO REV. CODE ANN. § 2935.05 (1954) (to go to magistrate for "a complaint stating the offense for which the person was arrested").

58. As to the practice in Kansas, Michigan, and Wisconsin, it has been said:

"Despite the fact that most arrests are accomplished without a warrant, in practice the warrant is invariably issued if a subsequent decision is made to prosecute the suspect. Since the warrant is primarily conceived in formal law as an arrest-authorizing document, the reason for the practice is not immediately apparent. In some jurisdictions offenses triable by a justice of the peace may be tried, and a preliminary examination of serious offenses may be held, on a complaint alone, and there would appear to be no insurmountable reason why this could not be done everywhere.

"In the states under intensive consideration here, some officials charged with the responsibility for administering the criminal law believe that the formal law requires that a warrant be issued even after an arrest without one. Others are simply uncertain. Of those who believe that a warrant is required, some do not know the reason; others give reasons ranging from statutory necessity to custom, including, in some instances, justification of custody. Yet all of them

B. *The Current Practice*

In practice, the extent of real judicial participation when the warrant is issued after arrest is certainly no greater than it is when the warrant is issued prior to arrest. The process is routine and does not involve judicial inquiry into whether a basis for the warrant exists. The assumption apparently is that the warrant serves either as a manifestation of the charging decision or as an official record supporting custody by a law enforcement agency and that, in either case, no inquiry into the supporting facts is required.

The warrant issued after arrest is most often utilized as a record of the prosecutor's decision to charge the arrested person with a crime. After arrest of a person for a relatively serious offense, the usual practice is for the police to consult with the prosecutor in order for the latter to decide whether to proceed with the case. If the prosecutor believes that the evidence is sufficient to support a prosecution and that there are no policy reasons dictating a contrary course, he will authorize the preparation of a complaint and warrant. These documents are then taken to court, either during or before the initial appearance of the person named in the warrant, and the judge or his clerk routinely signs the arrest warrant.⁵⁹ Because in this kind of case the warrant is a charging document and because the prosecutor in this country has always dominated the decision to bring charges,⁶⁰ perhaps it was "inevitable"⁶¹ that the prosecutor and not the magistrate should actually decide when the warrant should be issued.⁶²

recognize that whatever the necessity in formal law, in practice the warrant is regarded as the charging document."

Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision—A Study of Current Practices*, 1964 WASH. U.L.Q. 1, 2-3.

59. For a more complete description of the practice in Kansas, Michigan, and Wisconsin, see Miller & Tiffany, *supra* note 58, at 4-7.

60. *Id.* at 7-8, and many sources cited therein.

61. *Id.* at 9.

62. It may be that in practice the prosecutor gives greater protection to the suspect than would the magistrate if he were the decision-maker, for the prosecutor will be concerned with matters above and beyond the existence of probable cause. For one thing, he will be exercising what is commonly referred to as the "prosecutor's discretion," and thus will eliminate on policy grounds some cases in which the evidence is sufficient. For another, the prosecutor will likely require more evidence than would otherwise be necessary for issuance of a warrant, for ordinarily he will not want to bring a case to trial unless there is a strong probability of conviction.

Nonetheless, it must be recognized that the notion of prompt *judicial* review of police action is clearly a fiction under these circumstances. Because of the almost complete lack of attention to the issuance of warrants *after* arrest, it is difficult to say whether the constitutional requirement that the matter be passed upon by a judicial officer, as expressed in *Aguilar v. Texas*, 378 U.S. 108 (1964), has any application here.

In some places, warrants are issued promptly after arrest without involving the prosecutor and without any significant decision by a judicial officer. This occurs when the custody of an arrested person is to be transferred from one law enforcement agency to another. He is brought before a judicial officer prior to the charging decision in order to enable the magistrate to effect the transfer. Thus, where city police turn persons arrested for state offenses over to county authorities for "housing" prior to trial, a suspect may be taken before a magistrate immediately for preparation of a complaint and warrant, documents which are thought to justify an assumption of custody by the county authorities. The magistrates have come to view this as merely a clerical task and consequently do not make any inquiry into the existence of probable cause.

The fact that the warrant issued after arrest serves functions other than judicial review of the arrest decision points up the relevance of a statement made by Alfred Bettman over thirty years ago. Commenting in the *Wickersham Report* on the inadequacies of earlier crime surveys, he said that they had failed to answer one basic question about the warrant process: "Should the clerk of court be the official in whom this function is placed, and using clerical methods, or the prosecuting attorney using methods appropriate to his office, or the magistrate using methods of a judicial nature?"⁶³ Today, the appearance of judicial control is maintained, while in fact only prosecutorial or clerical functions are performed.

Some judges may not give the arrest decision any greater scrutiny if the case is brought to them on habeas corpus. At least this is true in one jurisdiction where the writ of habeas corpus is commonly utilized by those in police custody. The writ challenges the validity of the present detention rather than the original arrest, but often hearings are scheduled promptly after arrest, when there is not likely to be any evidence other than that available to the arresting officer. In such a situation the detention might be challenged on the ground that the arrest was illegal. In practice, however, the judge makes no inquiry into the grounds for arrest; instead, he merely sets a time by which the police must either charge or release the suspect.⁶⁴ One

63. National Commission on Law Observance and Enforcement, Report No. 4, Prosecution, 1931, at 88.

64. This is accomplished by adjourning or continuing the habeas corpus hearing for the amount of time allowed. If at the expiration of the time the suspect was not charged, the judge would then order his release. It is unclear whether this practice, observed in certain locales in Michigan, still prevails in view of recent developments there. See *People v. McCager*, 367 Mich. 116, 116 N.W.2d 205 (1962), and "Order of Superintending Control—Habeas Corpus Proceedings," dated March 7, 1963, in Mich. S.B.J., April 1963, p. 56.

judge, when asked why an inquiry into the grounds for arrest was not made, responded only by saying that there should be time for investigation. Defense attorneys, when asked why they did not challenge the arrest in some cases, said that they felt this would be inappropriate and that the judges would not listen to such an argument. Thus, even in an adversary setting there is judicial reluctance to consider the legality of the initial law enforcement decision, and the arrested person's remedy is limited to a promise of release if a decision to charge is not made within a short period of time.

III. EXCLUSION OF EVIDENCE AS A MEANS OF JUDICIAL CONTROL

A. Objective of the Exclusionary Rule

From *Weeks v. United States*⁶⁵ in 1914 until *Mapp v. Ohio*⁶⁶ nearly fifty years later, the exclusionary rule has been a matter of vigorous debate.⁶⁷ The criticism that "the criminal is to go free because the constable has blundered"⁶⁸ has not prevailed, and the Court in *Mapp*, finding that the other means of protecting against unreasonable searches were ineffective,⁶⁹ imposed the exclusionary doctrine on the states.

Courts and commentators have explained the *raison d'être* of the exclusionary rule in various ways. It is sometimes said that the objective is that of "preserving the judicial process from contamination"⁷⁰ or of insuring that the government does not profit from its own wrongdoing;⁷¹ sometimes the rule is characterized in terms of the defendant's "privilege against conviction by unlawfully obtained evidence."⁷² However, it is fair to conclude that the principal reason

65. 232 U.S. 383 (1914).

66. 367 U.S. 643 (1961).

67. Probably the last pre-Mapp debate was *The Exclusionary Rule Regarding Illegally Seized Evidence—An International Symposium*, 52 J. CRIM. L., C. & P.S. 245 (1961). A number of references are to be found therein to earlier written views both pro and con.

68. This, of course, is the now famous comment of Judge Cardozo in *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

69. In *Mapp*, the Supreme Court emphasized the findings in California, expressed in *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), to the effect that other remedies were inadequate, and then said: "The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*." *Mapp v. Ohio*, 367 U.S. 643, 652-53 (1961).

70. *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting). See also Frankel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472, 498 (1948).

71. Allen, *Federalism and the Fourth Amendment—A Requiem for Wolf*, in SUPREME COURT REVIEW 1, 34 (Kurland ed. 1961).

72. Allen, *supra* note 71, at 35.

for the exclusion of probative evidence is to deter improper police practices. The Court in *Mapp* emphasized the need for the exclusionary rule as a "deterrent safeguard,"⁷³ and on an earlier occasion stated that the rule "is calculated to prevent, not to repair."⁷⁴ It is intended to be a complement to judicial participation in the making of law enforcement decisions and to judicial review of such decisions after the fact.

Thus it is not surprising that thoughtful commentators have said that "the ultimate test of the exclusionary rules is whether they deter police officials from engaging in the objectionable practices."⁷⁵ However, despite the existence of the exclusionary rule on the federal level for over half a century and in many states for almost as long, there has been no systematic attempt to measure its precise impact or to determine the limitations, if any, upon its effectiveness.⁷⁶

The effectiveness of the exclusionary rule depends upon: (1) whether the requirements of law are developed in sufficient detail and in a manner responsive to both the practical needs of enforcement and the individual right of privacy; (2) whether these requirements are expressed in a manner understandable by the front-line police officer and are effectively communicated to him; and (3) whether the desire of the police to obtain convictions is sufficiently great to induce compliance with the requirements of law. Although sufficient data is not available to allow any precise measurement of the actual impact of the exclusionary rule, it is fair to conclude from examination of current practices that none of these three essentials have been adequately achieved.

B. *Inadequate Communication Between Trial Courts and the Police*

Hearings on motions to suppress evidence allegedly obtained by illegal police investigative practices are often conducted in a

73. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

74. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

75. Allen, *Due Process and State Criminal Procedure—Another Look*, 48 NW. U.L. REV. 16, 34 (1953). See also Kamisar, *Public Safety v. Individual Liberties—Some "Facts" and "Theories,"* 53 J. CRIM. L., C. & P.S. 171, 179 (1962).

76. Much of the pre-*Mapp* debate was addressed to the question of whether the police are in fact deterred. For citation to many of these sources, see Allen, *supra* note 71, at 33 n.174; Kamisar, *Wolf and Lustig Ten Years Later—Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1146 n.227 (1959). However, it has been said that this writing "is more remarkable for its volume than its cogency." Allen, *supra* note 71, at 33. The obvious difficulty is that adequate empirical evidence to justify the conclusion either that the police are deterred or that they are not deterred has been unavailable. Moreover, it is not easy "to devise methods to produce a persuasive empirical demonstration." *Id.* at 34.

manner not calculated to encourage careful consideration of the factual and legal bases for the motion. Moreover, when a decision is made by the trial judge, he seldom explains it in a manner likely to have an impact upon the particular police practice that is in issue. This is particularly true in the large urban centers and is to a lesser extent the case in rural areas or smaller cities.

Defense counsel often present the motion to suppress orally and without articulating any specific ground upon which it should be granted. The police officer is immediately sworn and cross-examined by defense counsel, who, even without preparation, is in many cases able to cast doubt upon the propriety of the police conduct.⁷⁷ The assistant prosecutor assigned to the courtroom frequently has had no opportunity for advance preparation or even consultation with the officer⁷⁸ and may, therefore, not be able to draw from the officer an adequate presentation of the law enforcement practice involved in the particular case.⁷⁹

As a consequence, trial courts rarely are given an accurate or complete picture of the law enforcement practice challenged by the motion to suppress. Seldom does the trial judge himself initiate inquiry to determine what the current policy and practice is with respect to arrest, search, the use of informants, or whatever else may be in issue. No such inquiry is made of the police officer involved in the case, and, even if he were asked, he probably would not be capable of giving a comprehensive answer. Yet the hypothesis underlying

77. Defense counsel's questions are usually intended to establish that the evidence was uncovered by a search not preceded by conclusive knowledge by the officer of defendant's violation. This is ordinarily the same thing as establishing that the items were uncovered by search, since the violation in question is usually possession of the items sought to be suppressed.

78. Thus, during the defense counsel's examination of the police officer, the prosecutor is likely to be frantically examining the officer's written report of the case for the purpose of getting clear in his own mind the circumstances leading up to the arrest and search. However, this report, prepared primarily for other purposes, is not likely to be very revealing in this regard even if carefully written, which is the exception rather than the rule.

79. By way of illustration, the arrest of a "bagman" (a courier for a policy or numbers operation) which resulted in the finding of a package of bet slips on his person might in point of fact be based upon the following information: that he has a previous record as a bagman; that he has been observed for some days traveling a regular route in an area of the city where policy is a popular pastime; that he is making stops at a number of locations, some of which have been identified in the past as "policy stations"; that he made these stops during a time of day when policy slips are usually picked up; and, perhaps, that he is carrying a package with something in it. Defense counsel's examination of the officer will establish that the officer did not actually see the gambling paraphernalia until after the arrest, and the prosecution's attempt at rehabilitation may produce only the vague assertion by the officer that the defendant was a "known policy employee" (which may be the only information recorded on the arrest report).

the exclusionary rule is that it will have a prospective and positive effect upon police practice.

It is also unlikely that the large-city trial judge will receive helpful argument on the relevant law. As a rule, neither prosecution nor defense are sufficiently prepared to present an adequate argument based upon prior appellate decisions. The consequence is that some trial courts apply to current police practice a standard quite at variance with that which has been announced by the appellate court.⁸⁰

Nor are police well informed about the trial judge's decision or its legal basis. The trial judge seldom explains his decision in a way likely to be understood by the police officer,⁸¹ and the prosecutor assigned to the case rarely assumes it to be his duty to inform the police department of the meaning of the decision or of its intended impact upon current police practice. The individual officer whose case has been lost is not expected to report the reason for the decision to his superiors. Some decisions, usually those the officer believes to be particularly outrageous, may be passed on to other officers by word of mouth, but they often become distorted in the retelling. If a "court officer" is assigned to the court by the police department, his responsibilities do not include reporting the judge's rulings on police conduct. Obviously, police can not be affirmatively influenced to change their methods of law enforcement by the exclusion of evidence when there is no communication to them of why the decision was made.

Inconsistency in trial court rulings further complicates the situation. For one thing, there is often a substantial disparity in the standards applied by the various judges of a multi-judge court. Once an officer learns of the conflicting attitudes of these judges, his acceptance of the court's role as supervisor of police practices is lessened; he is likely to conclude that whether evidence will be excluded in a given case depends in large part upon the ability of defense counsel to maneuver the case before a judge who will rule in his favor. The decisions of a single judge also may vary, depending upon the nature of the crime involved. "What is 'reasonable' to a judge in a narcotics

80. Thus the police sometimes indicate that their complaint is not addressed to the higher courts, but only to the local courts: "The police can also live with the exclusionary rule as applied by the higher courts of our states. The shoe begins to pinch in the lower courts, however, where frequently evidence is suppressed and defendants set free on grounds that I feel would not be sustained in our higher courts." Wilson, *Police Authority in a Free Society*, 54 J. CRIM. L., C. & P.S. 175, 177 (1963).

81. The Chicago Crime Commission plans to introduce legislation requiring "that whenever a judge rules on a motion to suppress evidence on the ground that it was illegally seized, he shall file written findings of fact and conclusions of law in support of his order." CHICAGO CRIME COMMISSION, A TWELVE-POINT LEGISLATIVE PROGRAM FOR ILLINOIS 17 (1964).

case is not 'reasonable' to the *same* judge in a gambling case."⁸² There are a number of reasons why this occurs, including the fact that the judge may in this way prevent conviction of a defendant he believes should not be treated as a criminal.⁸³ Even assuming that there are sometimes valid reasons for this result, its accomplishment by suppression of evidence further debilitates the exclusionary doctrine as a means of enhancing the quality of future police performance.⁸⁴

C. *Inadequate Communication Between Appellate Courts and the Police*

Communication between police and appellate courts is also less than adequate and occurs on a haphazard basis. Because appellate courts typically hear only those cases in which police practice is challenged on a fairly narrow set of facts, the picture presented to them is somewhat distorted. Appellate counsel fail to compensate for this by putting the individual case in the context of the overall enforcement policy involved. Instead, argument is commonly confined to an analysis of prior appellate decisions. Counsel for the state usually prepares the appeal without any consultation with the police for purposes of learning what significance the practice has for them.⁸⁵ As a consequence, the court, which cannot itself gather the

82. Remarks of Kings County, N.Y., District Attorney Silver, in 1962 PROCEEDINGS, A.B.A. SECTION OF CRIMINAL LAW 26-27 (1963).

83. The judge may hesitate to accomplish the same result by simply declaring the guilty defendant not guilty. Indeed, it is not clear whether it is a proper function of a trial judge to acquit the guilty when there is sufficient admissible evidence of guilt. Although case law on this point is generally lacking, see *State v. Evjue*, 254 Wis. 581, 37 N.W.2d 50 (1949).

84. A third form of inconsistency has been mentioned earlier in this article: inconsistency between before-the-fact and after-the-fact supervision. As noted earlier, it results in still greater confusion as to the governing norms and also raises doubts in the minds of the police as to whether the objective of the judges is to prevent illegal police action or simply to free the guilty.

85. For example, a few years ago the Supreme Court of Illinois had before it a case which involved the right of a Chicago police officer to stop and question a person found in an alley under suspicious circumstances. The case raised a very vital question concerning the propriety of what the police usually refer to as "field interrogation," a common and significant practice in Chicago and elsewhere. Prior Illinois case law on the right to stop and question was fairly ambiguous, being limited to fact situations where the police put questions to persons sitting in parked cars. *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56 (1943); *People v. Henneman*, 367 Ill. 151, 10 N.E.2d 649 (1937). Despite the importance of the issue to the Chicago police, no one in the department was consulted on the appeal or even knew that the case was being appealed. Thus it was not made apparent to the appellate court that the case put into question the entire "field interrogation" policy. The result was that the court faced the stopping and questioning issue only indirectly, leaving the policy still somewhat up in the air. *People v. Faginkrantz*, 21 Ill. 2d 75, 171 N.E.2d 5 (1961).

needed information,⁸⁶ must make judgments about current practices and about the significance of these practices upon inadequate data.⁸⁷ It also means that the court must make a decision intended to have a prospective effect upon police policy and practice without having a thorough familiarity with the policy and practice it intends to affect. Finally, the failure to involve the police at this stage means that they are not induced to discuss or rethink the policy challenged on appeal.

The communication in the other direction—appellate courts to the police—is likewise unsatisfactory. Training materials become outdated, and officers who have completed their training often are not kept up to date on legal developments relevant to their work; some departments make no effort to disseminate such information to personnel at the operational level.⁸⁸ Even when appellate opinions are made available to the police, it is evident that they are not written in a way which makes it easy for the police to understand what they are expected to do. For example, the holding in the recent, important case of *Escobedo v. Illinois*⁸⁹ reads:

“We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied ‘the Assistance of Counsel’ . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.”⁹⁰

86. Professor Hurst, in his excellent study of the development of legal institutions in this country, points out: “As fact finders courts were inherently hampered by the limiting tradition of their office. It was not the proper work of judges to initiate broad solutions of public problems. The courts inherited no staff which they could use for independent fact finding. They had no independent funds with which to finance inquiries.” HURST, *THE GROWTH OF AMERICAN LAW* 412 (1950).

87. Indicative of this is the fact that it is common for appellate courts even today to cite the *Wickersham Report on Lawlessness in Law Enforcement* (National Commission on Law Observance and Enforcement, Report No. 11, 1931) in regard to the treatment of persons in custody and for the proposition that abuses can be prevented only if persons arrested are taken immediately before a magistrate. This report is over thirty years old and was itself primarily based upon appellate decisions and newspaper accounts. Thus reliance upon this report for information as to current practice is based on the doubtful assumption that the appellate opinions were reliable evidence of current practice. Perhaps appellate opinions do give an indication of the kinds of police abuses which do occur, but this does not mean that they constitute an adequate basis for assessing the legitimate needs of law enforcement.

88. For example, in one large police department it was the practice until a few years ago for a clerk in the commissioner's office promptly to file away appellate opinions sent to the police department by the county prosecutor.

89. 378 U.S. 478 (1964).

90. *Id.* at 490-91.

The opinion does not say that the police cannot interrogate at all; it does not say that suspects must be warned of their rights; it does not say that all suspects must be allowed to consult counsel upon request.

Lawyers, of course, will recognize the quoted language as an effort to limit the scope of the decision to the particular facts, and many would undoubtedly applaud the Court for moving with caution in this new and sensitive area. Yet, the consequence is that, while the police know that a voluntary confession may be suppressed, they have little basis for translating the requirements of *Escobedo* into a revised interrogation practice which will be both effective and in conformity with the requirements of the Constitution.

The translation of appellate cases into operating police practice is handicapped by the fact that most police agencies do not have effective legal counsel available to them. Prosecuting attorneys seldom make a systematic effort to act as legal advisers to police departments within their jurisdiction. Most of them, for example, would not think it their responsibility to translate *Escobedo* into a specific statement of appropriate interrogation policy. Even the largest police departments are usually without competent legally-trained personnel on their staff, and, when a request for such personnel is made, it will likely be denied on the ground that the corporation counsel furnish the needed service.⁹¹ In point of fact, however, the corporation counsel typically respond only when a specific question is asked, is generally removed from the problems of criminal justice, and do not conceive of their responsibility as including participation in the development of proper law enforcement policies for police.

D. *Inherent Limitations Upon the Effect of a Negative Sanction*

Even when police do understand the requirements of law, the exclusionary rule does not always induce conformity with those requirements. As Professor Barrett has pointed out, the exclusionary rule "comes into play only when a successful police search has turned up evidence which is to be offered at the trial. . . . In short, the rule has a deterrent impact only on illegal searches and those illegal arrests to which searches are incident."⁹² And it has impact on those

91. This occurred recently in Chicago.

92. Apparently, this continues to be the case, although it can be argued that the Supreme Court in *Wong Sun* has also required the suppression of confessions because of illegal arrest. The reasoning of the opinion is far from clear. The Court first indicates it is handling the case as it would a search case because "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence," but then goes on to say that the oppressive circumstances present

procedures only in those situations in which the police are proceeding with the conscious purpose of securing evidence to use in prosecuting the defendant."⁹³

The exclusionary rule does not itself prohibit improper police conduct; it only makes unlikely the conviction of the person against whom such conduct is directed. Obviously, such a rule can have an impact only in those cases in which the police desire a conviction, which is not true with regard to many offenses today. Most illustrative are the gambling crimes, at least those involving persons other than the "higher-ups" in the "syndicate." Police in many parts of the country have concluded that meaningful conviction of the ordinary commercial gambler, such as the numbers runner or bookie, is impossible.

Many trial judges are unwilling to convict in minor gambling cases, notwithstanding adequate admissible evidence to support a conviction.⁹⁴ When a conviction is obtained, the penalty imposed is

make it "unreasonable to infer that Toy's response was sufficiently an act of free will" *Wong Sun v. United States*, 371 U.S. 471, 486 (1963).

Most courts have given *Wong Sun* a very limited interpretation. *Rogers v. United States*, 330 F.2d 535 (5th Cir. 1964); *Hollingsworth v. United States*, 321 F.2d 342 (10th Cir. 1963); *United States v. Burke*, 215 F. Supp. 508 (D. Mass. 1963); *Mefford v. State*, 235 Md. 497, 201 A.2d 824 (1964); *State v. Lavallee*, 104 N.H. 443, 189 A.2d 475 (1963); *State v. Jackson*, 43 N.J. 148, 203 A.2d 1 (1964), are all cases refusing to apply *Wong Sun* to statements obtained later at the police station. *Contra*, *United States v. Sims*, 231 F. Supp. 251 (D. Md. 1964); *People v. Robinson*, 13 N.Y.2d 296, 196 N.E.2d 261 (1963); *State v. Mercurio*, 194 A.2d 574 (R.I. 1963).

Other limitations on the exclusionary rule likewise tend to narrow the number of cases in which the threat of exclusion is effective. Illustrative is the rule on standing. The leading case on standing is *Jones v. United States*, 362 U.S. 257 (1960), in which the Court, after clarifying some aspects of the standing doctrine, then went on (in what might be characterized as strong dictum) to state the rule's apparent outer boundaries in these terms: "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Id.* at 261.

More in keeping with the objectives of the exclusionary rule as set forth in *Mapp* is the unique California position announced in *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955), allowing defendants to raise the question of illegal search of other parties when the evidence obtained thereby is offered against them.

The effectiveness of the exclusionary rule is further impaired by the common holding that exclusion is not required when the state brings a civil forfeiture action against the offender. Illustrative of many cases taking this view is *Commonwealth v. One 1958 Plymouth Sedan*, 414 Pa. 540, 201 A.2d 427 (1964). The Supreme Court has granted certiorari in this case to consider whether the Constitution requires application of the exclusionary rule in such proceedings. 85 Sup. Ct. 323 (1964).

93. Barrett, *Personal Rights, Property Rights, and Fourth Amendment*, in *SUPREME COURT REVIEW* 46, 54-55 (Kurland ed. 1960).

94. Illustrative is the reported comment of one trial judge when the keeper and six patrons of a gambling house were brought before him: "Since there is wide-open gambling at race tracks, I don't see why this court should convict anyone of gambling. The persons arrested in this raid have broken the law by gambling and now I will

often a small fine, which the police view as hardly commensurate with the seriousness of the conduct or the amount of police resources expended to bring about the conviction.⁹⁵ Moreover, the police may conclude that under existing search law it is impossible to obtain evidence against certain offenders by lawful means. For example, when police are prohibited from entering premises without prior notice and request for admission, as is true in most jurisdictions,⁹⁶ they are likely to conclude that the wireroom bookie cannot be convicted. The only evidence typically available against him is his bet records, and he is ready to destroy them upon a moment's notice.⁹⁷

Despite the current difficulty in convicting ordinary gamblers, public and institutional pressures for police action continue. The result often is a program of searches and arrests without any thought of prosecution or conviction. Such a program serves some purposes which police may feel are advantageous to law enforcement: offenders are subjected to at least a brief period of incarceration; they must spend money to gain their release or to terminate the proceedings;⁹⁸ any gambling paraphernalia or gambling funds will be seized;⁹⁹ there are costs attendant upon the interruption and relocation of the criminal operation;¹⁰⁰ and certain property used in the illegal business may be subjected to forfeiture.¹⁰¹ Where these results

break the law by discharging them." Wilson, *How the Police Chief Sees It*, Harpers Magazine, April 1964, pp. 140, 142.

95. For the view of one police official on this score, see Wilson, *supra* note 94, at 144.

96. For citation to the state statutes in point, see *Ker v. California*, 374 U.S. 23, 50 n.4 (1963) (dissenting opinion).

97. It is common practice for the bookie to keep at hand a metal waste basket or similar container and a supply of lighter fluid or other flammable liquid. It does not take long, after the police announce their presence, to burn the records beyond recognition. The more sophisticated bookie often uses flash paper, which goes up in smoke at the touch of a lighted cigarette, or gelatin paper, which dissolves upon contact with water. See N.Y. Times, Nov. 19, 1964, p. 1, col. 8, and p. 49, cols. 1-3; Chicago Sun-Times, June 6, 1964, p. 1, cols. 2-8.

98. Included are the bondsman's fee and the fee for the attorney who will obtain the individual's release on habeas corpus or will appear to insure suppression of the evidence before trial.

99. If the individual sues for return of his money, the state is not barred by a prior acquittal in a criminal action from proving the money is connected with gambling, and in this civil proceeding the exclusionary rule is not applied to prevent proof of the connection. *E.g.*, *Dufauchard v. Ward*, 51 Ill. App. 2d 42, 200 N.E.2d 833 (1964); *Martucci v. Detroit Comm'r of Police*, 322 Mich. 270, 33 N.W.2d 789 (1948).

100. The bookie will have to relocate his wireroom, and the policy or numbers syndicate operators will have to move their "office." Also, the bookie, if he has a small, select clientele, may deem it advisable to pay off all of his customers who claim they had placed winning bets with him.

101. Most common, in states where the statutes so provide, is forfeiture of automobiles used to carry gambling paraphernalia. As noted earlier, the exclusionary rule is usually thought not to be applicable in these proceedings. See note 92 *supra*.

have replaced conviction as an objective of police action, it is not unusual for the police to become even less selective in deciding whom to arrest or search.

IV. TOWARD MORE EFFECTIVE CONTROL

Appellate court insistence both on maximum judicial participation in the decision to issue process and on the exclusionary rule is aimed at *preventing* unconstitutional arrests and searches. Judicial review of law enforcement decisions is also premised upon prevention. In current practice, however, none of these three techniques for control of the police has been implemented in a completely meaningful manner. As a consequence, the goal of prevention is not being achieved.

If maximum judicial participation in the making of law enforcement decisions is desirable, new ways must be developed to insure that it is meaningful. Steps must be taken to insure the availability of sufficient judicial manpower, and ways must be devised to overcome the present disinterest of judges in performing these kinds of tasks. The alternative is to abandon the ideal of actual judicial participation in most of the important law enforcement decisions and to structure the system in a way which will give primary responsibility for these decisions to the police or prosecutor.

To suggest this alternative is not to say that judicial responsibility for insuring fairness in the law enforcement process should likewise be abandoned. Perhaps this responsibility can better be discharged if the judge is not viewed as a direct participant in the making of law enforcement decisions, but instead is seen as the person responsible for review of the policies, as is generally the courts' relationship with other administrative agencies. This might provide a more significant judicial control over law enforcement decisions, particularly if courts were systematically to require police to articulate their enforcement policy and practice relevant to the issue in the individual case. Both courts and police would thus be forced to consider the propriety of the general policies applicable in a particular case, instead of merely considering individual situations on an *ad hoc* basis.

The situation is much the same as to the ideal of prompt judicial review of all arrest decisions. If other than clerical or prosecutorial functions are to be served by the issuance of an arrest warrant after arrest, additional means of bringing this about must be found. Again, the choice is between somehow inducing judges to exercise

responsible review on a case-by-case basis or else expressly assigning the task to some other agency.

As for the exclusionary rule, its limited impact is attributable in large measure to inadequate communication between the police and the courts. On the one hand, it is necessary that courts gain a better understanding of the factual bases of police action and of the underlying policies being furthered by such action. On the other hand, police must be more effectively informed as to what must be done to avoid exclusion.

The fact that the exclusionary rule sometimes brings about certain unanticipated and undesired consequences does not mean that it is undesirable, but it does mean that the rule is not itself adequate to induce police to comply with the requirements of law. This is particularly true in the case of arrests and searches involving such offenses as gambling, where conviction is difficult and the consequences of conviction are relatively meaningless from a law enforcement point of view. Perhaps what is needed is a basic reappraisal of the kinds of substantive responsibilities police ought to be given. Certainly there needs to be an awareness that negative sanctions are not sufficient. Inducing police to develop methods of constructive compliance with the requirements of law requires more than judicial threats. It requires that proper and lawful methods be identified and communicated effectively to the police and that the criminal justice process be made as meaningful as possible, not only for defendants but also for agencies whose task it is to help administer the process.