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# IMPROVING POLICE PERFORMANCE THROUGH THE EXCLUSIONARY RULE—PART I: CURRENT POLICE AND LOCAL COURT PRACTICES

WAYNE R. LAFAVE\*

*What actual observation of police systems at work does suggest is that the problem of police illegality is altogether more serious and complex than is often supposed by proponents of the exclusionary rule, and that easy assertions that the rule will make significant contributions to the quality of police performance are based on doubtful and uncertain assumptions.*

Professor Francis A. Allen,  
*Federalism and the Fourth  
Amendment: A Requiem for Wolf*,  
1961 Sup. Ct. Rev. 1, 39-40

*Whatever may be said for the courts "preserving the judicial process from contamination" or against the government playing "an ignoble part" or about it being the "omnipresent teacher," I, for one, would hate to have to justify throwing out homicide and narcotic and labor racket cases if I did not believe that such action significantly affected police attitudes and practices.*

Professor Yale Kamisar  
*Public Safety v. Individual Liberties:  
Some "Facts" and "Theories,"*  
53 J. Crim. L., C. & P. S. 171, 179 (1962)

## A. INTRODUCTION

From the time of *Weeks v. United States*<sup>1</sup> until the Supreme Court's decision in *Mapp v. Ohio*<sup>2</sup> nearly fifty years later, the advisability of attempting to enforce the right of privacy through the exclusion of probative evidence in criminal cases has been a matter of continuing vigorous debate.<sup>3</sup> The argument against exclusion is summed up most succinctly

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

2. 367 U.S. 643 (1961).

3. 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.

in Justice Cardozo's terse comment: "The criminal is to go free because the constable has blundered."<sup>4</sup> The argument for exclusion has been put on various grounds, but in recent years the main point of emphasis has been that other means of protecting against unreasonable searches and seizures are ineffective.<sup>5</sup> Whatever the merits of these contentions, further debate on whether the exclusionary rule should be adopted seems pointless;<sup>6</sup> *Mapp* has imposed the exclusionary doctrine on all states, and there does not appear to be any basis for assuming that the Court will in any way make inroads on the *Mapp* holding in the years ahead.<sup>7</sup>

What, precisely, are the objectives to be realized through use of the exclusionary rule? Courts and commentators have given various explanations

4. *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

5. When *Weeks* was held inapplicable to the states, it was noted by the Court: "The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. . . . We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford." *Wolf v. Colorado*, 338 U.S. 25, 30-31 (1949). Then, in one of the leading state cases adopting the exclusionary rule, the court said: "If the unconstitutional [sic] guarantees against unreasonable searches and seizures are to have significance they must be enforced, and if courts are to discharge their duty to support the state and federal Constitutions they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures." *People v. Cahan*, 44 Cal.2d 434, 447, 282 P.2d 905, 913 (1955). The Supreme Court, in recently overturning *Wolf*, took note of this language in *Cahan*, 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*. See *Irvine v. California* . . ." *Mapp v. Ohio*, 367 U.S. 643, 652-53 (1961).

6. Criticism of the exclusionary rule, as such, has not completely abated, however. See, e.g., Wilson, Comments at panel discussion on "How Do We Live with Mallory, Mapp and Sun?," ABA, SECTION OF CRIMINAL LAW, 1963 PROCEEDINGS 32 (1964). Undoubtedly some of the criticism of the exclusionary rule, particularly that which still continues, is misdirected in that the principle concern is with arrest and search standards as presently defined. "The exclusionary evidence rule says nothing about the content of the law governing the police. It takes no position with respect to which arrests, searches and seizures, or other enforcement actions are legal or illegal. . . . One can support the rule and still hold that the present law of arrest . . . is outmoded and requires drastic reformulation." Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C & P.S. 255 (1961).

7. It has been suggested, however, that because *Mapp* is based primarily upon the notion that other remedies are lacking (see language of the Court, *supra* note 5), Congress could do away with the exclusionary rule by providing other effective sanctions. Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A.J. 815 (1964).

from time to time. One objective, essentially ethical in nature, is to protect the integrity of the law enforcement system, and more particularly, to "preserve the judicial process from contamination."<sup>8</sup> Related to this is the objective of insuring that the government does not profit from its own wrongdoing.<sup>9</sup> Similarly, it is sometimes said that the exclusionary rule serves to provide some measure of vindication for the individual whose constitutional right of privacy has been interfered with; there is what has been characterized a "privilege against conviction by unlawfully obtained evidence."<sup>10</sup> But, however important and worthwhile these objectives, it is fair to conclude that the principal reason for the exclusion of probative evidence is to favorably affect future police attitudes and practices.

Although the Court in *Mapp* made a few bows toward other objectives, the emphasis is on the exclusionary rule as a "deterrent safeguard."<sup>11</sup> "It is clear that assumptions as to the efficacy of the rule in this respect are of the first importance in the Court's view of the matter."<sup>12</sup> As the Court had said earlier in *Elkins*, "The rule is calculated to prevent, not to repair."<sup>13</sup> Justice Traynor puts it this way: "The objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward."<sup>14</sup> It is this emphasis forward, this objective of improving police performance, that gives the exclusionary rule its most solid foundation. Opponents of the rule contend that it protects the guilty and not the innocent,<sup>15</sup> but this is not so if the consequence of exclusion is the deterrence of future illegal searches and seizures of both innocent and guilty. Supreme Court cases in this area are sometimes criticized on the ground that critical evidence is suppressed simply because, after considerable reflection and thought, only four Jus-

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8. *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting). See also Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472, 498 (1948); *Atz v. Andrews*, 84 Fla. 43, 94 So. 329 (1922).

9. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 34; *Cahan v. California*, 44 Cal.2d 434, 449, 282 P.2d 905, 912 (1955).

10. Allen, *supra* note 9, at 35; *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

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

12. Allen, *supra* note 9, at 37.

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

14. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 335.

15. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 371 (1939).

tices concur with the on-the-spot good faith decision of the police regarding a hitherto ambiguous question of search and seizure law.<sup>16</sup> The price of exclusion may be worth paying, however, if, as a consequence, search and seizure standards are further developed and clarified, resulting in a higher level of police performance in the future.

With improved police performance being the major objective of and principal justification for exclusion, it is not at all 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."<sup>17</sup> Much of the pre-*Mapp* debate was addressed to the question of whether the police are in fact deterred,<sup>18</sup> but this writing "is more remarkable for its volume than its cogency."<sup>19</sup> Notwithstanding the existence of the exclusionary rule on the federal level for nearly half a century and in many states for almost as long, there has been no systematic attempt to measure the precise impact of the rule or to determine the limitations, if any, upon its effectiveness. 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."<sup>20</sup>

Although the present article is based in large measure upon observation of current police and local court practices,<sup>21</sup> the objective is not to

16. Day, *Criminal Law Enforcement and a Free Society*, 54 J. CRIM. L., C. & P.S. 360, 361 (1963) ("In the past 23 years the Supreme Court of the United States has handed down 21 opinions in which arrest, search, and seizure have been the main issues. In only 1 case did the court agree unanimously."); Waite, *Whose Rules? The Problem of Improper Police Methods*, 48 A.B.A.J. 1057, 1057-58 (1962); Kennedy, *Prosecutors and Police—Their Common Bond*, 49 J. CRIM. L., C. & P.S. 367, 368 (1958).

17. Allen, *Due Process and State Criminal Procedures: Another Look*, 48 Nw. U.L. REV. 16, 34 (1953). See also the statement of Professor Kamisar quoted in the text at the outset.

18. For citations to many of these sources, see Allen, *supra* note 9, 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).

19. Allen, *supra* note 9, at 33.

20. Allen, *supra* note 9, at 34. He adds: "Perhaps all that can be asserted with confidence is that the adoption of the rule in some jurisdictions has not eliminated the factors resulting in many unreasonable searches and seizures. To date, however, no effective quantitative measure of the rule's deterrent efficacy has been devised or applied. . . . It is not remarkable, therefore, that the Court [in *Mapp*] was confronted by the necessity of relying on hunch and inference in evaluating a half-century's experience with the exclusionary rule. The dangers lie in assuming knowledge that does not exist." *Ibid.*

21. Much of the empirical data upon which this article is based is derived from the American Bar Foundation's field research in support of its Survey of the

prove the case for those who claim the exclusionary rule does or does not sufficiently deter to justify its existence. The rule's deterrent efficacy defies precise measurement, and, in any event, the issue is largely academic since *Mapp*. What should be of concern, however, is whether the exclusionary rule is doing as good a job of improving police performance as one might hope, and if it is not, whether the factors which contribute to this result can be identified. The present article is devoted to these inquiries.

For the exclusionary rule to be completely effective in this regard, it would seem necessary: (a) that the requirements of the law on arrest, search and seizure, and in-custody investigation be developed in some detail and in a manner sufficiently responsive to both the practical needs of enforcement and the individual right of privacy;<sup>22</sup> (b) that these requirements be fashioned in a manner understandable by the front-line lower-echelon police officer<sup>23</sup> and that they be effectively communicated to him;

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Administration of Criminal Justice in the United States, with which the author has been associated for approximately the last six years. For an analysis of some of this data, see LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965). Other volumes in this 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 observations by the author of current practices in Illinois, primarily in the city of Chicago.

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

22. It is true, of course, that "the exclusionary evidence rule says nothing about the content of the law governing the police" (see Paulsen, *supra* note 6), and that therefore it is possible to discuss the exclusionary rule without any mention of the legal standards for arrest, search and seizure. Yet, much of the case for the exclusionary rule as a means of improving police performance rests upon the notion that the exclusionary sanction forces development of search law by the courts and induces legislative attention to the subject. See Paulsen, *supra* note 6, at 260; Kamisar, *Some Reflections on Criticizing the Courts and "Policing the Police,"* 53 J. CRIM. L., C. & P.S. 453, 457 (1962). Thus, attention to the way in which courts and legislatures have responded to this need to define search standards is properly a part of any consideration of the extent to which the exclusionary rule has improved police performance.

23. "Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them." *Chapman v. United States*, 365 U.S. 610, 622 (1961) (Clark, J., dissenting).

and (c) that the police desire to obtain convictions be sufficiently great to induce them to comply with these requirements. Currently, it is fair to say, deficiencies in all three respects exist.

In the following pages, current practices by the police and local courts bearing upon these deficiencies are explored. In Part II of this article, to appear in the next issue of this *Review*, attention is given to the present state of police training and to the contributions of the legislatures and appellate courts in the way of sound and understandable norms on arrest, search and seizure, and in-custody investigation.

## B. THE POLICE AND THE LOCAL COURTS

Although trial judges "have little or no direct authority to require police and other law enforcement agencies to comply with the rules of the game,"<sup>24</sup> day after day local courts must rule on the admissibility of evidence alleged to have been obtained by improper police conduct. Ideally, it would seem, individual rulings of this kind would further the objectives of the exclusionary rule by, first, reminding the errant officer once again that evidence obtained in violation of "the rules of the game" cannot be admitted, and second, informing the officer in cases of exclusion that the particular tactics employed are not within these rules. In the great many cases in which the prior improper police action occurred, not as a result of deliberate wrongdoing, but merely "from an excess of zeal on the part of the conscientious officer concerned to perform the arduous task of law enforcement as best he can,"<sup>25</sup> the norm-defining function is undoubtedly of primary importance. The threat of evidence exclusion can have little impact unless decision-making officers have some basis for determining what conduct will bring about exclusion.

The significance of this supervision of police conduct by local courts cannot be overstated; to the average police officer "the law" concerning arrest, search, and other police practices is in large measure represented by his direct and indirect knowledge of the attitudes of the local judiciary. This is particularly so in those departments where training on relevant statutes and appellate cases is less than adequate.<sup>26</sup> Most policemen, if asked to define the limitations on their authority, would respond

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24. Brennan, *Judicial Supervision of Criminal Law Administration*, 9 *CRIME AND DELINQUENCY* 227, 228 (1963).

25. *Ibid.*

26. The matter of deficiencies in police training will be explored in Part II.

on the basis of: (a) their understanding of judicial rulings in cases in which they have appeared; and (b) their understanding of the rulings, often passed on only by word-of-mouth, in cases involving their fellow officers.<sup>27</sup> The position of primacy given these decisions by the police accords with the realities of the situation, as these local court rulings on police practices, even if erroneous, are seldom made the basis for an appeal to a higher court.<sup>28</sup>

Opponents of judicial supervision of police conduct have sometimes declared that instead of policing the police the courts should devote their energies to "getting their own house in order."<sup>29</sup> But, while the quality

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27. I was somewhat taken aback when an Illinois police officer with considerable experience recently remarked that the efforts of his unit in enforcing the laws against gambling were continuously frustrated because of the "archaic state of the law." Illinois has a new substantive code of criminal law with a clear and complete definition of gambling, enacted in 1961, and also has a comprehensive and very much up-to-date code of criminal procedure, enacted in 1963, with broad powers of arrest, search and seizure. Moreover, it is fair to say that the decisions of the Illinois Supreme Court have generally defined the powers of the police broadly with regard to arrest, search, and pre-arrest and post-arrest investigation. When I asked the officer to give some specific illustrations, he made no mention of the statutes and appellate cases but instead recited the circumstances of a number of local court rulings which, if he reported them accurately, were considerably more restrictive.

28. "Quite generally, a ruling on the motion to suppress is not itself appealable because it is not regarded as a 'final order' or for some other reason. On the other hand, if the motion is granted and the evidence suppressed, the prosecution may have no case, with the result that the charge must be dismissed or the defendant acquitted. If the defendant is acquitted, the prosecution, of course, is barred from access to the appellate court by appeal. The serious consequence of this situation is that, particularly in areas of criminal litigation such as gambling, where motions to suppress are frequently filed and frequently granted, the decisions of trial judges are substantially immune from effective appellate supervision. There is reason to believe that the search and seizure law being applied in inferior trial courts sometimes bears only coincidental relation to the principles announced in decisions of the highest court of the jurisdiction." Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., C. & P.S. 246, 249 (1961).

In states where an appeal can be taken, the limited resources of the prosecutor's office makes possible only a few appeals from these rulings. Moreover, the selection of cases for appeal by the prosecutor's office is not always done wisely.

Of course, erroneous rulings in the other direction—that is, upholding what are in fact illegal searches—may not be appealed either. The defendant's representation may be less than adequate, he may not be able to afford an appeal, or the low sentence may make appeal impractical.

29. "The courts have no right to police the police. That is an executive and not a judicial function. Furthermore, the courts have enough troubles of their own. Witness what goes on in some of the municipal or magistrate courts of our large cities. In my opinion there are, in such courts, more hurts to the innocent and more trampling over of basic individual civil liberties and ethical considerations than you will find in most police departments. Much of the concern, energy, and efforts that the courts expend with respect to police conduct could be better



of justice in the lower criminal courts, particularly in large metropolitan centers, has long been a subject of criticism,<sup>30</sup> few would seriously consider the proposition that judicial review of police practices should await further improvements in the operation of local courts. More appropriate, perhaps, is an inquiry into how good a job the local courts are doing in policing the police, considering the nature of the operation of these courts in current criminal justice administration. As to this "delicate problem in the relationship of judge and officer,"<sup>31</sup> it can be asked: To what extent is the front-line judiciary effectively contributing to the control of police practices by the declaration of sound, understandable,<sup>32</sup> and consistent<sup>33</sup> rules in a manner which can be expected to favorably influence subsequent police actions?

### 1. *Court Evaluation of Police Conduct*

A common complaint of the police is that local courts fail to recognize and understand their problems, so that rulings on prior police conduct are made without an adequate factual picture of the law enforcement context out of which the particular issue arose. "Peace officers . . . ask that the courts look at the facts that lead to an arrest, or a search and seizure, at the time, the place, and under the circumstances, as seen by an arresting officer in the light of his specialized training and experience."<sup>34</sup> Considering the manner in which and the circumstances under which issues regarding police practices are put to trial judges, it is not surprising that the police complaint has some validity.

Evaluation of police conduct is a significant part of the business of the crowded misdemeanor courts of the large cities, as these courts handle gambling and other cases in which the manner of acquisition of physical evidence by the police is likely to be the only real issue before the court. It is not uncommon for these courts to spend a substantial

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spent on getting their own house in order." Inbau, *The Social and Ethical Requirements of Criminal Prosecution*, 52 J. CRIM. L., C. & P.S. 209, 212 (1961).

30. See Nutter, *The Quality of Justice in Misdemeanor Arraignment Courts*, 53 J. CRIM. L., C. & P.S. 215 (1962); Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320 (1956); Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951).

31. Brennan, *supra* note 24, at 228.

32. See Justice Clark's caution to his brethren on the Court quoted in note 23 *supra*, which would seem equally applicable to local courts.

33. Justice Clark went on to observe in *Chapman*, *supra* note 23, at 623 that inconsistent rules are "disastrous to law enforcement."

34. Day, *Criminal Law Enforcement and a Free Society*, 54 J. CRIM. L., C. & P.S. 360, 364 (1963).

portion of their time, perhaps the first few hours of each day's session, in hearing motions to suppress evidence. Cases in which motions have been made are often dealt with quickly, one after another, and disposed of before other cases, involving only a trial on the merits, are heard.

In many of these courts, defense counsel in a given case will orally present his motion to suppress without assigning in advance any specific reasons for it. Rather, the arresting-searching officer is immediately sworn and cross-examined by the defendant's attorney.<sup>35</sup> Although this attorney may not be familiar with the facts which led up to the search of his client, he nonetheless will ask a series of questions (the same questions are put in about every case) designed to establish that the critical evidence was uncovered in a search and that the search was not preceded by certain and direct knowledge by the officer of defendant's violation (which 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). During this examination the assistant state's attorney or district attorney assigned to this courtroom, who has had no opportunity for advance preparation to oppose the motion, 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.

Even when the officer is examined by the prosecution, it is unlikely that he will have an opportunity to relate all of the facts and circumstances that prompted him to make the arrest and search. Rather, the assistant state's attorney will put a few questions to the officer in an often unsuccessful attempt to uncover some facts which would afford a basis in law for the arrest and search. In the few instances in which the officer is given an opportunity to fully develop all of the relevant facts, he often is unable to do so effectively and completely.

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 this in-

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35. It is apparently this procedure that prompts the police complaint that "in many cases we find that our officers appear to be on trial, rather than the person charged with crime." Quote of a chief of police in ABA SECTION OF CRIMINAL LAW, 1955 COMMITTEE REPORTS 44 (1956).

formation: 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.<sup>36</sup> 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 only produce 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).<sup>37</sup>

Even if the facts are fully developed, the judge is seldom afforded any additional guidance for his decision. Both defense and prosecution, equally unprepared because of the circumstances, do little by way of citing authority to support their respective positions. The trial judge is unlikely to make any direct inquiry into the beneficial or detrimental aspects of the law enforcement practice in question, and even if a question is asked, trial counsel seldom are able to present accurately a picture of the current practice and why it is followed. No such inquiry is made of the police officer, and if asked he would undoubtedly disclaim responsibility for making this kind of evaluation. Under these circumstances, there is no assurance that the trial court's decision will be sound, or where there

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36. In states where possession of such slips is a misdemeanor, but a misdemeanor arrest can be made without warrant on reasonable grounds to believe, as is the case in Illinois, ILL. REV. STAT. ch. 38, §§ 28-1, 107-2 (1959), or in states where the suspect's conduct is a felony, for which arrest without warrant on reasonable grounds is possible, as is the case in Michigan, MICH. STAT. ANN. §§ 28.773 (making indictable common law offenses felonies, which has been held to include conspiracy, *People v. Smith*, 296 Mich. 176, 295 N.W. 605 (1941); a runner for the policy syndicate clearly appears to be engaged in a conspiracy), 28.874, such evidence would seem to be sufficient for arrest and search. In states where the conduct qualifies only as a misdemeanor, and the more common in-presence arrest requirement prevails, the critical question is whether the in-presence norm requires actual direct observation of the offense itself or only observation of facts and circumstances giving reasonable grounds to believe that the offense is occurring in the presence. See LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* ch. 11 (1965).

37. An empirical study of the operation of Chicago Municipal Court some years ago also underscored the general failure to adequately develop the facts upon a motion to suppress. "The routine has become so common that there is now very little attention paid to the facts and the motions are made and sustained as a matter of course. . . . In most instances the farce played out in this branch

is a relevant principle previously announced by a higher court of the state, that the decision will be consistent with it.<sup>38</sup>

If one moves to the less hectic felony court or to the more leisurely rural courtroom, the circumstances are more conducive to intelligent assessment of the police practices being challenged. Yet, it is fair to say that there as well, many factors are present which militate against an adequate evaluation. Although the mind of the arresting-searching officer may be probed in greater detail, limitations in the officer's narrative ability may still be a serious drawback. And even if the facts of the individual occurrence are adequately developed, the prosecutor still can seldom articulate the relevant problems as they appear to the police, as he is relatively detached from the day-to-day problems of the police and from the enforcement practice which gives rise to the legal issue in the particular case. While private counsel representing a business client would believe it to be of utmost importance to consult fully with his client, prosecutors commonly proceed on the assumption that the police need not be consulted.

Thus it is that local judges are time and time again called upon to evaluate questioned police conduct without an adequate development of the facts, without a sufficient presentation of existing authority, and without the necessary understanding of the law enforcement context within which the practice in question occurs.<sup>39</sup>

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of the Municipal Court obscures the factual situation." Dash, *supra* note 30, at 391.

38. See the comment on the inconsistency between trial court and appellate court action, *supra* note 28.

Thus, the police sometimes indicate 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).

39. All of the preceding comments have to do with evaluation of police conduct by trial judges with training and experience in the law. When this task is performed by nonlawyer magistrates, as is sometimes the case in Philadelphia, the situation can hardly be expected to be any better.

"The search and seizure question is frequently raised before the magistrate at the preliminary hearing which is ordinarily held the morning after the arrest in one of twelve divisional police courts throughout the City of Philadelphia. The cry of *Mapp v. Ohio* is raised before the magistrate whenever there is physical evidence, a police officer who seized it, and, most important, a defense counsel to object to it. Defendants are not represented by counsel in most preliminary hearings, however, so that the magistrates are rarely confronted with this issue. When they are, the Assistant District Attorney, who attends all such hearings, is instructed to request that the question not be ruled upon by the magistrate,

## 2. Police Understanding of Local Court Action

Implementation of the exclusionary rule at the local level has a limited impact upon subsequent police action because a clear picture of local court attitudes is not communicated back to the police department. The individual officer whose case has been lost is not expected to report back to his superiors precisely why this occurred. Some rulings, ordinarily those the testifying officer believes to be particularly outrageous, may be passed on to other officers, but often become distorted in the retelling. A "court officer" or other representative of the police department may be on regular duty in the courtroom, but his responsibilities are not thought to include evaluation of and reporting on the loss of cases because of rulings on police conduct. Although police generally manifest a real concern with what happens to their cases once they reach court,<sup>40</sup> they have failed to make a concerted effort to gain an adequate understanding of precisely what practices need be avoided to prevent exclusion of evidence in the local courts.

The situation is complicated, however, by the fact that the opportunity for even the testifying officer to comprehend adequately the court's ruling and its basis is limited. As indicated earlier, defense counsel will very often present his motion to suppress unsupported by any specific allegation of wrongdoing by the police. As the hearing on the motion progresses, it

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who need not be a lawyer, but he reserved for the Court of Quarter Sessions on a motion to suppress pursuant to Rules 100 and 101. The District Attorney's Office has insisted on this position in view of the complicated factual situations and subtle legal problems which defy solution even after extensive hearings, analysis, briefing, and legal argument before judges learned in the law. Nevertheless, magistrates do on occasion suppress evidence at the preliminary hearing. . . .

"In those cases in which the magistrate has decided adversely to the Commonwealth, the District Attorney's Office has a remedy by asking for a rearrest. In that event, the defendant is brought before a judge in the Court of Quarter Sessions for a second preliminary hearing. At that time the judge can rule on the search and seizure question in virtually the same way as he would were he considering a pretrial motion to suppress. As a discretionary matter, however, the District Attorney does not seek rearrests in all cases where the magistrate has discharged the defendant; therefore the dispositive order on the constitutional question of search and seizure is sometimes made by the magistrate." Spector, *Mapp v. Ohio: Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4, 29-30 (1962).

40. Although some have asserted that the police "are generally insensitive to a court's rejection of evidence merely because of the impropriety of the methods used to obtain it," Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 Nw. U. L. REV. 77, 78 (1957), I have not found this to be the case, particularly when the entire case rests upon the evidence in question. The exception, however, is when there has developed an arrest-for-purposes-other-than-conviction policy such as discussed *infra* at p. 421.

is not uncommon for there never to be a clear statement by any party or by the judge himself of precisely what aspect of the officer's actions lies at the heart of the controversy. When the judge ultimately either grants or denies the defense motion to suppress, it is unlikely that he will give any explanation. Any elaboration on the ruling is directed toward counsel, and no effort is made to enlighten the officer on the matter.<sup>41</sup> The arresting-searching officer, upon hearing the judge declare "motion granted," usually departs with a bewildered expression on his face; seldom does he have any clearer understanding of the limitations on his authority than he had prior to the hearing.<sup>42</sup> The assumption apparently is that police practice is positively influenced by exclusion of evidence even without police knowledge of why the decision was made.

### 3. *Inconsistency in Multijudge Courts*

There has been considerable attention to the fact that disparity in sentencing is undesirable because, among other things, it has an adverse effect upon offenders.<sup>43</sup> The problem of disparity in sentencing practices

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41. Although a hearing on a motion to suppress does not present the most desirable circumstances for effective education of police officers concerning their authority and its limitations, it is unclear why so many trial judges fail to make even a minimal effort toward achieving the "police-educating" objectives of the exclusionary rule. The pressures of time in the metropolitan courts may be the principle explanation. However, a harassment-type police enforcement program, discussed *infra* p. 427, if it includes bringing those being proceeded against into court for judicial termination of the case, may also contribute. Local judges may be aware of—and may approve of—such a program, in which case explanation to the officer of the reasons for dismissal is hardly necessary. See Comment, 47 Nw. U. L. Rev. 493, 498-99 (1952). However, if the judge is uncertain as to which cases brought before him are a consequence of this program and which are instances of a conscientious attempt to obtain a conviction, he may refrain from any attempted explanation in all cases.

42. This is so notwithstanding the fact that the exclusionary rule has long been in effect in these jurisdictions. As might be expected, officers first faced with exclusion after *Mapp*, with little or no prior background on the requirement for a lawful arrest or search, also learned little from the process of evidence exclusion in local courts:

"In the first days after *Mapp*, law enforcement officials in Philadelphia were uncertain as to what course to take. Policemen, who for years had presented their evidence in court without any regard to how it had been obtained, could not understand the subtleties of what constituted a legal search and seizure. When some Philadelphia trial judges applied principles from liberal federal decisions on search and seizure, the vice squad detective and the policeman on the beat could understand neither the logic of what had been decided nor the formula for how to act in the future in order to obtain admissible evidence." Spector, *supra* note 39, at 5. He concludes that "the right to privacy has not been significantly promoted during that time [the first year after *Mapp*] since the police have not fully understood and hence not fully complied with the *Mapp* rule." *Id.* at 42.

43. See, e.g., Glueck, *The Sentencing Problem*, 20 Fed. Prob. 15 (Dec. 1956).

of judges within a particular metropolitan court is especially acute, as it encourages "judicial shopping" and "has redounded in favor of the professional criminal or 'repeater' as opposed to the first offender."<sup>44</sup> Disparity in decisions on what police behavior is proper has an equally detrimental effect. It likewise tends to favor the professional criminal, and perhaps more important, impairs to a considerable extent the desired consequence of exclusion: a higher standard of police performance in future cases. This disparity in judicial standards for police conduct appears to be fairly common in multijudge courts, and has been the object of criticism.<sup>45</sup>

Inconsistent rulings by the various judges of a multijudge court compound the previously described difficulty of effectively communicating to the police the standards for future performance. If one judge approves what another judge disapproves, then the officer who has presented similar cases before both judges lacks a clear understanding of whether or not his conduct was really proper. Moreover, once an officer discerns a substantial disparity between the attitudes of the various judges, he may conclude that if the judges cannot agree then it is futile for him to try to determine and abide by any set standards.

One of the major impediments to the effective operation of the exclusionary rule as a means of elevating police performance has been the lack of understanding by the police that courts have an obligation to insure that law enforcement methods conform to the standards essential for the maintenance of a democratic society. Too often the police view the courts as a roadblock in the way of enforcement rather than as an agency sharing responsibility for the development and maintenance of a fair and effective enforcement system. Police acceptance of the true role of the courts is not enhanced, however, when they come to recognize that the various judges of the court are not applying the same standards to them; the observed disparity in standards bolsters the oft-held suspicion that the courts are not acting for the high purpose of protecting the rights of criminal defendants, but are merely interested in freeing some of the guilty.

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44. Nutter, *supra* note 30, at 217.

45. *E.g.*, "Unfortunately, what may be 'reasonable' to one judge may not be 'reasonable' to another. . . . One judge deciding a motion to suppress may find the search reasonable. At the trial, another judge may find it not reasonable." Comments of Kings County, N. Y., District Attorney Edward S. Silver, in ABA SECTION OF CRIMINAL LAW, 1962 PROCEEDINGS 26-27 (1963).

The animosity between police and court is increased, resulting in still less acceptance of the court role of police supervision, when the inconsistency in the attitudes of local judges leads to "judicial shopping." Police respect for the processes of the court falls sharply when it becomes apparent that the exclusion of evidence in a given case depends in large measure upon the ability of defense counsel to maneuver the case before a judge who holds the particular law enforcement practice in contempt.<sup>46</sup> Illustrative of the technique is this description of the Chicago practice:

Sometimes the judge denies the motion to "suppress" the evidence. Defense counsel will then demand a jury trial. This automatically results in a continuance and reassignment of the case to another judge. When he hears the case, the defense attorney renews the motion to "suppress" the evidence hoping that this judge will accede. The jury trial is not really wanted, of course. It is immediately waived when defense counsel has achieved his real objective, which is simply another hearing from another judge on his motion to quash the search warrant or suppress the evidence. The defense attorney has every expectation that eventually a judge will rule in his favor. So he applies for continuances, or for a change in venue, or for a jury trial until he gets the case before the right judge. Such maneuvers are usual, not exceptional.<sup>47</sup>

Disparity in attitudes of local judges regarding proper police conduct also results in police frustration. Perhaps no one judge's standards are unduly restrictive; each judge will suppress where certain police practices have been established, but he will also admit evidence which certain of his colleagues would suppress. When the police cannot know in advance which judge will hear a particular case<sup>48</sup> (and it is unlikely that they can know

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46. Commenting on the then proposed code of criminal procedure for Illinois, Chicago Superintendent of Police O. W. Wilson took note of proposed section 50-11(e), which said that "the motion [to suppress] shall be made only before a court with jurisdiction to try the offense but the motion may be renewed if the trial takes place before a judge other than the one who heard the motion," and then remarked:

"While we recognize the need for these provisions, we are concerned over a current practice whereby counsel is able to have a case transferred from one judge to another, renewing the motion to suppress before each judge. It is questionable as to how this problem can be solved, but current practice is clearly neither necessary nor desirable." Wilson, Comments Presented at the Conference on the Proposed Illinois Code of Criminal Procedure, University of Illinois College of Law, Jan. 12, 1963, pp. 16-17 (mimeo.).

No change was made in the Code in response to this criticism. ILL. REV. STAT. ch. 38, § 114-11(e) (1959).

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

48. In areas where it is possible to predict which judge will be hearing



where "judicial shopping" is a common practice), the only way they can proceed with confidence is to avoid all practices which would be condemned by any one of the group of judges sitting on the local court. This leads to the police view that the limitations upon their authority must be defined in terms of the most restrictive attitudes of the various judges. The police thus find their authority defined more narrowly than is contemplated by the statutes or appellate cases, and it may appear to them that all possible means of evidence acquisition in certain cases have been effectively blocked. The situation as it appears to the police, and the probable police reaction thereto, has been aptly expressed as follows:

The inconsistent views of different judges . . . thwart the police. Some judges, for example, feel strongly that gambling raids should not be made without search warrants even in public places where gambling is openly observed. In an effort to comply with this view, the police obtain search warrants based upon observations made by plainclothes police who gain admission to gambling rooms as patrons. Often, however, other judges will quash such search warrants on the ground that the plainclothesmen should have announced the fact that they were policemen before entering the gambling room. Because they failed to do this—in the view of these judges—the police were "trespassers." Other judges may concede that the plainclothesmen were not trespassers. But they hold that observations of gambling made on one date do not establish that gambling will be going on the following day when the raid is made. Still other judges will hold that the grounds for the search warrant are insufficient because the observations by plainclothesmen are not corroborated and substantiated by "disinterested third persons."

All of these judges may be acting from the best of motives. But their decisions result in a "what's the use?" attitude among police-

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certain kinds of cases, the police may refrain from enforcement against certain offenses which require resort to tactics disapproved by that judge:

"The influence of the court becomes most formalized when it is known in advance which judge will hear a case on a given day—a situation most dramatically illustrated in those communities in which judicial assignments are rotated monthly. The attitudes, likes and dislikes of the different judges as they assume the bench result in a monthly change of enforcement policies which is as identifiable as the turning of the calendar. On the evening of the last day of the month, police attention may move abruptly from panderers and prostitutes to bookies and burglars. The effect of the change in judges not only permeates the entire police department, but provides habitual offenders with a reliable indication of the degree of freedom with which they can engage in their chosen activities." Goldstein, *Police Decisions and Police Discretion in the Criminal Law Process* (a paper presented at the Third Dedicatory Conference of the University of Chicago Law School, Jan. 7, 1960) p. 6 (mimeo.).

men detailed to gambling and vice assignments. Finding them futile, the police, unfortunately, tend to abandon efforts to suppress gambling and vice by *legal* means. However, the continuing pressure of their superiors and the fear of newspaper exposés force them to make some attempt to suppress gambling and vice. So they resort to harassing raids and arrests without warrants, with little hope of successful prosecution in our courts. Thus a vicious circle of contempt for law enforcement and the administration of criminal justice is set up. The courts lose respect for the police; the police lose respect for the courts; and the public loses respect for both.<sup>49</sup>

Complete uniformity in the decisions of judges on police practices, of course, is not possible, just as one cannot expect to train all police to react in exactly the same (and correct) way to the variety of situations with which they may be faced. Assessment of multifarious police actions is a difficult task, particularly when sufficient guidance from statutes and appellate cases is not always available.<sup>50</sup> Be this as it may, it seems obviously desirable to minimize these inconsistencies. However, there has been little effort to devise methods of achieving this objective.<sup>51</sup>

#### 4. *Inconsistency Because of Nature of Defendant's Conduct*

Observers of the activities of local courts have discerned that rulings on police practices sometimes tend to vary depending upon the nature of the crime with which the defendant is charged. Thus, "what is 'reasonable' to a judge in a narcotics case is not 'reasonable' to the *same* judge in a gambling case."<sup>52</sup> Of course, it is probably true that the nature and seriousness of the conduct against which the police are proceeding does have some legitimate bearing upon whether the actions of the police were proper.<sup>53</sup>

49. Wilson, *supra* note 47, at pp. 143-44.

50. This lack will be discussed in Part II.

51. Notwithstanding the existence of the exclusionary rule in the observed jurisdictions for many years, there has apparently been little effort by judges in metropolitan courts to ascertain whether they are being at all consistent and whether "judicial shopping" or other manifestations of inconsistency are impairing the operation of the court.

More understandable, perhaps, is the fact that in states where exclusion first became necessary because of *Mapp* trial judges initially were "at odds with their fellow judges in applying the principles in practice." Spector, *supra* note 39, at 14.

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

53. The rationale of such a position is that a greater interference with individual liberty is warranted where the crime is of a very serious nature. Justice Jackson expressed such a view when he said:

"If we assume, for example, that a child is kidnaped [*sic*] and the officers

However, it is fair to say that in current practice it is not uncommon for local judges to surpass this notion and base arrest and search rulings<sup>54</sup> primarily upon personal attitudes concerning the defendant's conduct.

Trial judges, for one reason or another, may feel that it is undesirable to convict certain of those who are, technically at least, guilty of some criminal act. On some occasions this is a consequence of a feeling of sympathy for the offender who, in the eyes of the judge, should not be treated as a criminal.<sup>55</sup> Sometimes the desire is to avoid having to impose severe penalties upon the defendant, which perhaps cannot be avoided if he is convicted because of restrictions on the sentencing discretion of

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throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (dissenting opinion). While the Restatement of Torts' definition of the peace officer's privilege lists the seriousness of the offense as a factor "to be considered in determining whether the actor's suspicion is sufficiently reasonable," RESTATEMENT, TORTS § 119, comment j (1934), express recognition of this by appellate courts is unusual. An exception is the following from *United States v. Kancso*, 252 F.2d 220, 222 (2d Cir. 1958):

"The word 'reasonable' is not to be construed in the abstract or in a vacuum unrelated to the field to which it applies. Standards which might be reasonable for the apprehension of bank robbers might not be reasonable for the arrest of narcotics peddlers."

There is evidence, however, that the seriousness of the offense actually plays a part in an appellate court's determination of whether a given arrest and search was valid. For example, the Michigan court has upheld an arrest for kidnapping where made upon the sole basis that an officer had observed a car circling the block with the occupants "apparently closely watching all onlookers," *People v. Minchella*, 268 Mich. 123, 255 N.W. 735 (1934), but has declared invalid an arrest for bootlegging made because the occupants of a car traveling very slowly looked back at the motorcycle officer who passed them. *People v. Roache*, 237 Mich. 215, 211 N.W. 742 (1927).

54. The same can be said for court rulings on aggressive police methods which bear at least some resemblance to entrapment. Trial judges in current practice do impose limitations upon police encouragement which are more restrictive than the law of entrapment, Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963). In many instances the basis of the judge's rulings seems to be not so much a disapproval of the police methods as it is a feeling that the defendant (often a prostitute or homosexual) should not be convicted.

55. This may be the case, for example, when the defendant is being prosecuted for soliciting or engaging in homosexual conduct. The judge may feel, perhaps correctly, that prosecution and conviction will accomplish little or nothing, and that it would be far better for the unfortunate defendant to receive psychiatric treatment.

The police are usually equally sympathetic to the plight of such persons (as opposed to transvestites, who are often viewed with contempt by the police and

the judge.<sup>56</sup> In still other cases the feeling may simply be that the offense is not a serious one,<sup>57</sup> or considering the triviality of this kind of conduct, that the police department is expending far too great a proportion of its resources against it.<sup>58</sup> Sometimes these attitudes, if they were actually communicated to the police, would be acceptable to them;<sup>59</sup> more often, however, because of the different perspective of and pressures upon the police and local judiciary, agreement could not be expected.<sup>60</sup>

Actual disclosure of these attitudes, however, even when they control the disposition of the case before the judge, is the exception rather than the rule. Sometimes the judge will merely find the defendant not guilty notwithstanding the more than adequate evidence of guilt.<sup>61</sup> But, because

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who may be subjected to a program of harassment by them. See LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* ch. 23 (1965).). However, the police are subjected to considerable pressure to act against other homosexual activities, particularly when homosexuals congregate in facilities used by other citizens or when they carry on solicitations in such places.

56. Or, the judge may be concerned about the collateral consequences, which may be thought to be too severe under the circumstances. For example, conviction for gambling on licensed premises may be avoided where possible because of an assumption that conviction would be followed by license revocation proceedings.

57. "Now, on the whole, judges are competent and upright men who can be counted upon to uphold the law. For some reason, however, the dignity and majesty of the law is not brought to bear in gambling cases. Perhaps this is merely a reflection of the prevailing community attitude. For even in gambling cases in which the syndicate is known to have a controlling interest, the courts display a good-natured tolerance and leniency. Judges, it seems, do not comprehend the relationship between a single petty gambling violation and the enormously lucrative racket which such violations, in aggregate, represent.

"For example, a keeper of a Chicago gambling house and six patrons were recently arrested and brought before one of our local judges. After hearing the case he remarked, 'Since there is wide-open gambling at race tracks, I don't see why this court should convict anyone of gambling.'" Wilson, *supra* note 47, at 142.

58. A trial judge in one large midwestern city acknowledged that there had been open hostility between himself and the inspector in charge of the vice bureau for approximately ten years. He was critical of the practice of the inspector in charge of the vice bureau in assigning 28 men to the task of building, accosting, and soliciting cases against prostitutes and homosexuals, as compared with the 22 men assigned to the homicide unit of the police department. The judge noted that in his judgment the amount of vice to be found in the city was lower than in any other city of comparable size in the country.

59. For example, should the judge be of the view that the adultery statute need not be enforced, the police would undoubtedly agree. On police nonenforcement in this area, see LaFave, *The Police and Nonenforcement of the Law—Part II*, 1962 Wis. L. Rev. 179, 197-99. On the general problem of the effect of such judicial attitudes on future enforcement practices, see LaFave, *The Police and Nonenforcement of the Law—Part I*, 1962 Wis. L. Rev. 104, 121-25.

60. See, for example, notes 55 and 57 *supra*.

61. Thus, in one case a Chicago judge forthrightly asserted: "The persons arrested in this raid have broken the law by gambling and now I will break the law by discharging them." Wilson, *supra* note 47, at 142.

it is questionable whether it is the proper function of a trial judge to acquit the guilty when there is sufficient admissible evidence of guilt,<sup>62</sup> many judges prefer to seek other means of explaining the failure to convict. In those cases in which the defendant moves for suppression of critical evidence, the granting of the motion to suppress—even though the arrest and search were within the requirements of law—serves this purpose well.

The use of the exclusionary rule in this way so as to avoid convicting certain defendants further debilitates the exclusionary doctrine as a means of enhancing the quality of future police performance. When, as is often the case, the true objective of the judge escapes the testifying officer, the incident is viewed merely as a condemnation of certain police arrest-search practices which this judge or other judges have upheld on other occasions. As with inconsistency between judges of multijudge courts, the result is either confusion as to what the governing norms really are or else a belief that the judiciary is incapable of adhering to a consistent pattern of rulings in carrying out its police-supervising function. When the police do begin to discern the true motives of the judge, the hostility between police and court increases. The police, traditionally sensitive to criticism of their

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The current practice with regard to judicial decisions not to convict the guilty is explored and analyzed in detail in the forthcoming volume in the American Bar Foundation Survey of Criminal Justice series, NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL.

62. Case law on this point is generally lacking. In *State v. Evjue*, 254 Wis. 581, 37 N.W.2d 50 (1949), the court observed that the appellate tribunal lacked the power to review or reverse such decisions, but the concurring opinion labelled the trial judge's action as "reprehensible."

In a California case the trial judge, without a prior motion or hearing, dismissed gambling complaints against a number of Negro defendants on the basis that there was discriminatory enforcement by the police. Because California law requires the listing of reasons for dismissal in an order entered upon the minutes of the proceedings, these reasons were brought to the attention of the appellate court, which commented:

"A judge dismissing criminal charges without trial upon his own motion must record his reasons so that all may know why this great power was exercised and such public declaration is indeed a purposeful restraint, lest magistral discretion sweep away the government of laws.

"A dismissal 'in furtherance of justice,' upon review, must show that there has been the exercise of a valid legal discretion, amounting to more than the substitution of the predilections of a judge for the alleged predilections of the peace officers." *People v. Winters*, 171 Cal. App.2d 876, 882, 342 P.2d 538, 542, 543 (1959).

It is probably fair to say that the trial judge has the power to acquit the obviously guilty but that there exists no recognized discretion lodged within the formal role of the judge to so use this power. However, the Model Penal Code would expressly give to the trial judge the power to dismiss prosecutions for "de minimis infractions" (as determined by the criteria listed in the statute) by filing a written statement of his reasons. MODEL PENAL CODE § 2.12 (Proposed Official Draft, 1962).

action is based upon careful examination of the grounds for such action by a impartial judicial officer, does not accord with the actual practice in many locales. Particularly in large urban areas, judges often view their warrant-issuing function as merely perfunctory in nature. Warrants are issued by judges, often while they are engaged in trying cases or holding preliminary examinations, with little or no attention to the question of whether the complaint or affidavit meets the requirements of law. One observer of this practice described it in this fashion:

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, between the hours of 9:30 and 11:00 a.m., the judge signed ten or fifteen warrants.<sup>67</sup>

Essentially the same procedure has been observed when search warrants were issued. Even when the judge was not engaged in other business at the time, actual inquiry into the grounds for issuance of the warrant was not undertaken.<sup>68</sup> One result of this practice, of course, is that subsequently, upon a motion to suppress, the evidence obtained incident to the service

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67. From report of field researcher, American Bar Foundation Survey of the Administration of Criminal Justice in the United States.

68. 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."

operations, particularly object to the achievement of certain other (perhaps worthwhile) objectives under the guise of disapproval of current law enforcement techniques.

##### 5. *Inconsistency Between Before-the-Fact and After-the-Fact Supervision*

Under existing arrest and search law the police are often allowed to act without first obtaining a warrant from a judicial officer, even though there is adequate time to actually obtain one.<sup>63</sup> It has been argued, however, that in such circumstances the police should nevertheless secure a warrant because "the duty of the police in our kind of society requires them to follow that legal course which conforms most to democratic values,"<sup>64</sup> and some of the writing for police consumption so recommends.<sup>65</sup> Yet, in current practice warrants are actually obtained in a relatively small—but important—percentage of cases. In some of these instances the warrant is necessary, as where authority to arrest without warrant is lacking or where a search of premises not incident to an arrest is desired. In other cases a warrant, though not required, may be secured because other factors have necessitated a delay in police action or because the investment of time and effort in an extended period of prior investigation makes it particularly desirable that the case not be lost by exclusion of evidence.<sup>66</sup>

The assumption that resort to the warrant process prior to arrest or search provides added protection for the individual, in that the subsequent

63. The United States Supreme Court so held in *United States v. Rabinowitz*, 339 U.S. 56 (1950), and most state courts, usually citing *Rabinowitz*, have reached the same conclusion.

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

Not only is police action with warrant often considered the preferred alternative, but some would impose a more strict requirement than that pronounced in *Rabinowitz*, *supra* note 63. One court has said that "while the ease and practicability of obtaining the warrant of arrest" does not alone render an arrest without warrant invalid, the "availability of the safeguards afforded by an impartial, judicial magistrate is a factor bearing on reasonable, probable cause." *Clay v. United States*, 239 F.2d 196, 204 (5th Cir. 1956); see also *Carter v. United States*, 314 F.2d 386 (5th Cir. 1963); *Hopper v. United States*, 267 F.2d 904 (9th Cir. 1959). And the view has recently been expressed by one commentator that it is "imperative" that the fourth amendment be read as requiring a warrant for arrest except in limited situations in which the exigencies of the situation do not allow the taking of this step in advance of arrest. Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 501 (1963).

65. *E.g.*, HOUTS, FROM ARREST TO RELEASE 26 (1958): "No arrest should ever be made except on the authority of a warrant of arrest if it is at all practicable to obtain one."

66. For an extended discussion of the various reasons arrest warrants are obtained when not needed, see LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY ch. 1 (1965).

of such warrants may be excluded on the basis that the warrant in question was not issued on adequate grounds.<sup>69</sup>

In other instances the judge may give the appearance of carrying out his before-the-fact supervision of police action in that he will scrutinize the complaint or affidavit or will examine the requesting officer before issuing the warrant. However, the frequent quashing of these warrants on motions to suppress makes it apparent that the standards applied to police action before the fact and after the fact are not the same.<sup>70</sup> The police are understandably outspoken in their criticism of the repeated instances in which a judge

may issue a search warrant based upon evidence which he believes constitute probable cause. However, after the raid has been made and the case comes before him for trial he may reverse himself and hold that the grounds upon which he himself issued the search warrant were insufficient. Thereupon he quashes the search warrant and "suppresses" the evidence.<sup>71</sup>

It is not clear why judicial officers have abdicated to the police their authority to determine on a case-by-case basis whether an arrest warrant or search warrant shall issue.<sup>72</sup> Some judges may feel that the police

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69. Usually this is done by showing that grounds for issuance of the warrant were not present. However, it is also possible in some instances for defense counsel to show that the proper procedure for warrant issuance was not followed. For example, see *Commonwealth v. Simmons*, 26 Pa. D. & C.2d 120 (Phila. Co. Q. Sess. 1961), where the trial court suppressed evidence obtained by a search warrant after the officer who obtained the warrant admitted he had not been put under oath.

70. It is not here suggested that the mere fact a given warrant is ultimately quashed shows that different standards are being employed. The probable cause issue, of course, cannot be foreclosed by the fact it was once passed upon by the warrant-issuing magistrate, and there will always be cases in which defense counsel, at the motion to suppress, can show that the judge was in error in issuing the warrant. However, considering the substantial number of warrants quashed in this manner in some jurisdictions, it seems evident that the information for warrants is not as severely tested at the time of issuance as at the subsequent action to suppress the evidence.

71. Wilson, *supra* note 47, at 143.

72. The practice was observed in a number of states which have long adhered to the exclusionary rule. In states without the exclusionary rule prior to *Mapp v. Ohio*, it is easier to understand how such a careless procedure might have developed, although in one sense the judicial abdication under those circumstances was even more reprehensible because no subsequent vindication of the rights of the individual searched incident to an improperly issued warrant was possible.

"Search warrants have long been used under Pennsylvania practice, but the formalities of their execution and substance were not scrutinized prior to the time Pennsylvania became an exclusionary state under the mandate of *Mapp*. . . .

"Prior to 1961 it was commonplace to see police officers obtain search war-



should be given a free hand to arrest and search, even though subsequent conviction will thus be made impossible.<sup>73</sup> The fact that the pressure of other demands limits the available time of the judges, particularly in metropolitan courts, may also be of significance.<sup>74</sup> The judges may rationalize this abdication on the ground that the trial of contested cases, which they view as their primary responsibility, will afford them an opportunity to review the matter after the arrest and search have been made.

What is clear, however, is that the practice has a most undesirable effect upon the operation of the criminal justice system generally, and upon the functioning of the exclusionary rule in particular. For one thing, the inconsistency between the standards applied when a warrant is requested and when it is subsequently challenged further compounds the uncertainty in the minds of the police as to what the legal norms governing their conduct actually are. Somehow the requirements for a valid arrest warrant or search warrant come out differently by the mere passage of a day or two.

Secondly, the repeated spectacle of a judge quashing a warrant that he or one of his colleagues issued a few days earlier creates doubts in the minds of the police both as to the abilities of the local judiciary to set standards for police action and as to the reasons for excluding evidence. The lack of concern with *preventing* illegal arrests and searches, as opposed to *excluding* the fruits thereof after the event, strengthens the oft-held police view that the courts are merely interested in freeing the guilty and hampering law enforcement. If it were otherwise, reasons the conscientious officer, the judge would have indicated the deficiencies in the information at the time when the warrant was requested (when the police

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rants from magistrates at divisional police courts before hearings, without being sworn and with very little, if any, information being given to establish probable cause." Spector, *Mapp v. Ohio: Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4, 23-24 (1962).

73. Certain judges apparently approve of an informal program of repeated arrests without conviction of certain offenders, such as gamblers, described *infra* p. 422. In one case a judge, at a hearing on a motion to suppress, held that the search warrant for a gambling place issued earlier by one of his colleagues was insufficient. He then remarked to the writer in an approving tone, "The police harass the hell out of these people."

74. It is in these same metropolitan areas that the need for careful attention to matters of arrest, search and seizure is greatest because of the volume of crime and the nature of the enforcement task faced by the police. "At the Pennsylvania District Attorneys' Association Conference, held on July 9 through 11, 1962, most of the county prosecutors stated that they had not been confronted with a single problem on search and seizure in the year after the adoption of the exclusionary rule in *Mapp*. On the other hand, metropolitan areas like Pittsburgh and Philadelphia have been inundated with search and seizure questions." Spector, *supra* note 72, at 43.

might have been in a position to remedy the defect by further investigation) instead of merely putting his temporary stamp of approval on a procedure to be condemned a few days hence.

Finally, the judge's disinterest in exercising superintending control at the time of warrant issuance largely renders ineffective what otherwise would appear to be the course of action often dictated by the existence of the exclusionary rule. The desired impact of this sanction upon the concerned officer is that he will refrain from knowingly making illegal searches and will, when possible, obtain prior judicial scrutiny of the grounds for his action when he may be in doubt. However, he finds that even when he resorts to what, in theory at least, is "that legal course which conforms most to democratic values,"<sup>75</sup> he has no real assurance that his arrest or search will be lawful or that the evidence uncovered thereby can be used to obtain a conviction.

#### *6. Toward Improving the Police-Local Court Situation*

Contested cases which involve rulings on evidence claimed to have been illegally obtained call for the trial judge to decide whether the police action was proper and to do so for the express purpose of affecting police practice if found to be improper. In current practice, however, the factors discussed above contribute to seriously impair the achievement of this most worthwhile objective. Frequently the circumstances of the individual case are not adequately developed to provide a basis for a sound ruling. When a decision is made there is often no effort to communicate the reason to the officer involved. Marked inconsistencies between the rulings of various trial judges on the same court, between the rulings regarding evidence acquisition for different offenses, and between the standards for before-the-fact and after-the-fact supervision of police all contribute adversely to the operation of the system. They create further ambiguity as to the governing legal norms, bolster police suspicions concerning the ability of local courts to set police standards, and deter the development in the minds of the police of proper attitudes concerning the true role of the courts in performing this supervisory function. With the judge not being completely familiar with the law enforcement problem and the police being unaware of the basis for the trial judge's decision, it would indeed be surprising if this were to constitute an effective method of supervising police behavior.

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75. Hall, *supra* note 64.

The problem clearly calls for better communication between the various agencies in the criminal justice system. Currently police, prosecutors, and judges carry out their respective roles with little or no attention to the impact of their actions on the other agencies or upon the effective operation of the total system. Proposals directed toward "achieving teamwork between courts and law enforcement agencies"<sup>76</sup> are, of course, often viewed with suspicion because of the fear that the objective is to determine "how the courts and the agencies can most effectively gang up against the criminal accused and their attorneys."<sup>77</sup> This concern is legitimate, and may mean that it would be unwise for trial judges to become directly involved in police training programs.<sup>78</sup> However, the exchange of views between police, prosecutor, and court, if addressed to the crucial problem of promoting the police-educating function of the exclusionary rule, to the end of both improving law enforcement and giving greater protection to those suspected of criminal behavior, does not seem inappropriate.<sup>79</sup> The obvious difficulty in developing a set of clear standards for police conduct<sup>80</sup> is no excuse for avoiding the problem.

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76. This was the title given to a panel discussion before the Criminal Law Section of the American Bar Association a few years ago. Many of the participants indicated their dissatisfaction with the title, and all felt constrained to observe that they were not proposing any unholy alliance between the courts and enforcement agencies, ABA, SECTION OF CRIMINAL LAW, 1962 PROCEEDINGS 9-40 (1963).

77. *Id.* at 10.

78. "Can or should judges take any part beyond their pronouncements in particular cases to help law enforcement agencies avoid mistakes in arrest, detention, interrogation, and other procedures? . . . But only last August at the San Francisco meeting of the American Bar Association a symposium was held on the question whether direct participation of judges in the training of police officers in the rules of the game was feasible. No conclusions were reached, although if there was a concensus it seemed to me to be that the approach involved too large a risk of public suspicion of unseemly cooperation between judges and law enforcement agencies, and so might create doubts of the impartiality of judges as between the government and the accused. Nevertheless this may be an area well worth the thought and study of judges and their organizations such as this one." Brennan, *Judicial Supervision of Criminal Law Administration*, 9 CRIME AND DELINQUENCY 227, 228-29 (1963).

79. "I think it important that the courts come out of their 'ivory towers' and sit down from time to time with the law enforcement people in their community and discuss some of these basic problems. It might be advisable, too, to invite defense counsel and law professors to such conferences." Comment of Kings County, N. Y., District Attorney Edward S. Silver, ABA, SECTION OF CRIMINAL LAW, 1962 PROCEEDINGS 27 (1963).

80. Justice Brennan has observed "that unlike others of the amendments making up the Bill of Rights, only the Fourth Amendment has in it the prohibition against *unreasonable* searches and seizures. Perhaps there is a little more difficulty in laying out guidelines outside the context of specific cases as to just what it is that constitutes an *unreasonable* search and seizure. Heavens knows, on the civil side, in centuries of effort, we have yet to agree on who is a 'reason-

Rather, it indicates that careful attention to the means of realizing this objective is all the more important.

Each agency can also make a contribution by seeking improvements in its own operation:

*Police.* The police without hesitation rail against the local judiciary for the suppression of evidence in cases where they are convinced that, to use police parlance, there was a "good pinch." What is too often overlooked, however, is that the courts cannot make a fair appraisal of facts without a careful presentation of all the relevant information which led to the police action in a given case. Since police conduct often can be characterized as "reasonable" only by consideration of the expertise of the officers involved,<sup>81</sup> it is extremely important that police training in the art of giving an accurate, complete, and understandable in-court statement of the reasons action was taken be improved.<sup>82</sup> Similarly, further

able' man in measuring the standard of negligence and in other contexts of the law. . . ." *Id.* at 40.

Professor Allen has cogently observed: "If, as we are told, hard cases make bad law, one would expect much bad law in the search and seizure area; for the cases are often hard, indeed. They are hard both because they place in sharp conflict interests of great and of the cost obvious importance and because of confusion and inadequacy in the theory of the 'right of privacy.'" Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., C & P.S. 246 (1961).

81. See LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY ch. 12, section D (1965).

82. Chicago Police Department, Training Bulletin, vol. 5, nos. 7 & 8 (1964), contains a good statement on an officer's responsibilities with regard to court testimony and decorum. Included is the following:

"Your main function in court, like that of any other witness, is to supply the pertinent facts, so that the court or jury may reach a just decision. Your testimony simply tells what you saw or found out. The picture you present will be sharp or fuzzy, depending upon your ability to present your facts clearly. . . .

"Listen to the question being asked. Do not rush into the answer until you are fully aware of what is called for. Wait until the attorney finishes the question. If you do not understand the question, say so. It is quite proper to say, 'I am sorry, sir, I do not understand your question.' If you answer in a hurry, you may rush into a serious mistake. . . .

"You must testify with honesty and accuracy, regardless of its effect. The court depends upon your testimony for its knowledge of the case. The judge's decision to impose punishments or penalties on the defendant is based on your testimony and that of other witnesses. No case ever justifies deviation from the truth to obtain a conviction. You are a representative of the people and as such have a responsibility to present the facts with complete impartiality. . . .

"Think of your testimony as a chain of events in their order of occurrence. This will help you keep your facts straight and the court to better understand the situation as you describe it. Tell what you did, saw, or heard in proper sequence. This will minimize confusion and misunderstanding on the part of your listeners and make your testimony more interesting and effective." The Chicago department has also issued a series of bulletins on the law of arrest, search and seizure, and in-custody investigation which stresses the importance of not

attention should be given to elevating the quality of arrest reports and other police documents which may come before the trial judge or serve as the sole background for the prosecutor's questioning of the officer. Reports which deal only in conclusions or omit important facts, along with those which unwittingly give the prior action an appearance of illegality,<sup>83</sup> increase the chances of exclusion.

In addition, police agencies need to give more attention to understanding exactly how their cases are disposed of in the local courts, particularly those in which the prosecution is terminated by the exclusion of critical evidence. Individual officers must learn that it is important to discern the basis of local court rulings on their practices; the case that is lost is not a total failure if thereby some added understanding of arrest and search law can be acquired. Moreover, by the use of their court officers or other means, police departments need to obtain an accurate overall picture of the reasons for their successes and failures before local courts. This information, now seldom available, could be used to determine the deficiencies in police training, to provide the grounds for a high-level exchange of viewpoints with the local judiciary, and to determine what lower court limitations should be brought to the attention of the appellate courts.<sup>84</sup>

*Prosecution.* In current practice there is considerable uncertainty as to the proper role of the prosecuting attorney. He may be viewed primarily as trial counsel for the police department, reflecting the views of the department in his court representation; as a sort of "house counsel" for the police, giving legal advice to the department on how to develop enforcement practices which will withstand challenge in court; as a repre-

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only complying with the law but also reporting and testifying in a fashion which will make the compliance apparent. Chicago Police Department, Training Bulletin, vol. 5, nos. 1-17 (1964).

83. For example, sometimes an arrest report will include a declaration by the officer that he searched the suspect, found certain contraband, and then placed him under arrest. In some instances the report may be accurate, in that the arresting-searching officer did not understand the necessity, absent extraordinary circumstances, of making the arrest before the search. In other instances, however, the actual situation may have been one in which the officer's actions prior to the search actually constituted an arrest, though he failed to consider it or report it as such.

84. In jurisdictions where the prosecution can appeal from the suppression of evidence, limitations on the resources of the prosecutor's office allow for appeal of only a small percentage of cases in which it is thought the trial judge erred. The tendency is for the prosecutor to appeal only the cases involving serious crimes, but, from the police point of view it may be preferable to appeal a specific minor case which is representative of a great volume of cases in which evidence has been suppressed, perhaps erroneously, because local judges do not approve of a specific, common law enforcement practice.

sentative of the court, with the responsibility of enforcing rules designed to control the police; or as an elected official who will try to reflect community opinion in deciding when to prosecute. Although most prosecutors' offices may be engaged to a certain degree in all these functions, the staff ordinarily does not have occasion to review or evaluate existing law enforcement policies and practices. The attention of the prosecutor is usually focused on individual cases of assumed major importance, while his often overworked and inexperienced<sup>85</sup> assistants find that all of their time is needed in determining charges, preparing for and appearing at trials, and conducting the routine business of the office.

Although it might be said that the prosecutor does perform the trial counsel function, the difficulty is that, when certain police practices are brought into question in the court, the prosecutor is not likely to be in position to articulate the relevant problems as they appear to the police. This is because he is relatively detached from the day-to-day problems of the police and from the enforcement practices which gives rise to the legal issue in court. It does not appear inconsistent with the prosecutor's obligation to refrain from utilizing the fruits of police illegality<sup>86</sup> to suggest that, as with counsel for a private client, the prosecutor should consult fully with his police "client" and attempt to represent their views in court more adequately. A prosecutor who did understand the problems of the police would not only be in a better position to focus the attention of the trial courts on the true nature of the issues before them, but also could better decide what issues are in greatest need of clarification from the appellate courts.<sup>87</sup>

There is uncertainty as to what agency has responsibility for serving as "house counsel" for the police. Although some prosecutors have assumed this function, in many locales communication between the police and prosecution agencies is almost nonexistent. The police, if in need of a "legal advisor," are expected to deal with the city attorney or mu-

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85. See Kuh, *Careers in Prosecution Offices*, 14 J. LEGAL ED. 175, 176-78 (1961), on the turnover in the New York County District Attorney's office and the problems caused thereby.

86. "It is the duty of the prosecutor to know not only whom to prosecute, but *when*. . . . Unhesitatingly he should refuse to go forward with the presentation of evidence which has been obtained by illegal police invasion of a private home. If his case *depends* upon such evidence, he should dismiss the prosecution. If he can present a case without the use of evidence illegally procured, it should not be offered." *Williams v. United States*, 263 F.2d 487, 491 (D.C. Cir. 1959) (Danaher, J., concurring).

87. See *supra* note 84.

nicipal corporation counsel, although these officers do not have responsibility for the trial of criminal cases or for arguing the propriety of police practices on appeal. To the extent that local court rulings are more understandable to the law-trained assistant prosecutor than to the testifying officer, the prosecutor's office may be in the best position to improve police cognizance of them. Also, as long as courts continue to refrain from advising the police on the legality of their action before-the-fact, review of warrant requests by the prosecutor's office may be desirable.<sup>88</sup>

*Courts.* The urgency of disposing of the host of cases on the trial docket leaves little opportunity for many trial judges to stand back and view the product of their work and its consequences. Such self-appraisal, however, is urgently needed. Some thought should be given to whether the police-supervising, police-educating function of the court is being realized or can be realized under existing procedures.<sup>89</sup> In the long run, it would seem, more judicial energies would be conserved by striving for improvements rather than by continuing on the present treadmill of repeated exclusion without any appreciable effect upon police practice.

One police administrator who devoted considerable effort to improving the training of his men on arrest, search and seizure commented, "Now if we could only teach the judges." The criticism may be unwarranted, but it does seem fair to say that judges on metropolitan courts should evince some concern over attaining a measure of uniformity in

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88. In a few jurisdictions the law allows or contemplates involvement of the prosecutor in the warrant issuance process. See MICH. STAT. ANN. § 28.860 (1954); WIS. STAT. ANN. § 954.01 (1958).

89. Perhaps some attention should be given to changing the procedures themselves. As noted earlier, one difficulty in current practice is that often exclusion of evidence occurs without any clear statement of the basis for the decision. Consider, in this regard, the following proposal of the Chicago Crime Commission:

"For years, criminals in Illinois have avoided conviction by persuading a court to 'suppress' the evidence against them on the ground that it was obtained by police officials through an unlawful search and seizure. While recognizing that citizens should be protected in their constitutional right against unlawful invasions of privacy, the Crime Commission is concerned that too broad interpretation of this privilege has resulted in unwarranted protection for criminals.

"An important step to limit abuse of the privilege by a careless or uninformed judge was taken when the state legislature recently authorized the state to appeal from the granting of a motion to suppress evidence on the ground of improper search. Unfortunately, however, the abuse still continues—in many cases because of the time and expense involved in prosecuting an appeal.

"The Crime Commission now proposes an additional legislative step to prevent a judge from taking hasty and ill-conceived action in suppressing evidence of crime. It is suggested 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.

"This legislation will force the judge to place on the record the reasons

their views regarding police conduct. Even if they were only concerned with the impact of their inconsistencies on in-court tactics ("judicial shopping" and the like) it would seem that the need for efforts in this direction is apparent.<sup>90</sup>

Some of the problems defy easy solution. As long as judges continue to feel that certain criminal conduct should not result in conviction, and as long as the suppression of critical evidence is used to attain this (perhaps desirable) end, police supervision by the courts will suffer. Perhaps express recognition of some judicial authority to acquit the guilty, along the lines of the Model Penal Code proposal,<sup>91</sup> would help. Similarly, attaining a measure of consistency between before-the-fact and after-the-fact supervision cannot be easily accomplished. Resolution of these problems may require some reorientation of the entire system.

### C. ENFORCEMENT WITH OBJECTIVES OTHER THAN CONVICTION

The assumption underlying the exclusionary rule is that the police will not deliberately engage in an unreasonable search and seizure if they know that the fruits thereof cannot be used to obtain a conviction of the offender. In many instances the assumption is justified; the police, for example, are not likely to jeopardize the case against a suspected murderer by acquiring evidence against him through means they know are almost certain to require its exclusion.<sup>92</sup> By the same token, however,

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for his ruling and provide the prosecutor, the observers and the appellate courts with an opportunity to measure the judge's ruling against existing law to see if he has erred by going too far in favor of either prosecution or defense.

"It is also suggested that this provision, by requiring trial judges to support their decisions by a written statement, will induce those few who have not thoroughly studied the applicable law to do so before rendering an off-hand ruling ruling that may ruin an otherwise successful prosecution. CHICAGO CRIME COMMISSION, A TWELVE-POINT LEGISLATIVE PROGRAM FOR ILLINOIS 17 (1964).

ILL. REV. STAT. ch. 38, § 114-12(e) was recently amended to require that "the order or judgment granting or denying the motion [to suppress] shall state the findings of fact and conclusions of law upon which the order or judgment is based." H.B. 151, 74th Gen. Ass. (Ill. 1965).

90. Conferences of judges for the purpose of insuring uniformity in sentencing are now the vogue. Similar meetings might be held for the purpose of realizing greater uniformity in police supervision.

91. MODEL PENAL CODE § 2.12 (Proposed Official Draft, 1962).

92. That is, assuming the absence of corruption. It has been noted that one argument made against the exclusionary rule is that it "gives an ordinary policeman the power to confer immunity upon an offender. By overstepping the bounds of the law, a policeman's action can place vital evidence beyond the reach of the prosecution." Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C. & P.S. 255, 256 (1961). See *People v. Defore*, 242 N. Y. 13, 23, 150 N.E. 585, 588 (1926).



the threat of exclusion will not deter if conviction is not the principle objective of the police. The exclusionary rule has an impact "only in those situations in which the police are proceeding with the conscious purpose of securing evidence to use in prosecuting the defendant."<sup>93</sup> This limitation takes on considerable importance when one considers that "the desire to obtain convictions . . . constitute[s] . . . only a part of the explanation for American police misconduct."<sup>94</sup>

### 1. *Some Current Police Practices*

It is currently the practice in some locales, particularly in large urban centers, for the police to make arrests and to conduct searches under circumstances which they know in advance will make conviction of the offenders involved impossible. These tactics are used primarily against violators of the gambling and liquor laws, but also are employed in sections of the community that have a particularly serious crime problem.

#### a. *Gambling and Liquor Law Violations*

Although social gambling is not a matter of concern to police,<sup>95</sup> a large share of available law enforcement resources is devoted to the suppression of professional gambling, which is a major activity of organized crime. In most metropolitan areas, one of the major forms of gambling, especially among minority and low-income groups, is a daily lottery commonly referred to as policy or numbers.<sup>96</sup> Operation of a particular numbers syndicate or policy wheel requires an elaborate organization of bet takers ("writers"), runners ("bagmen"), and clerks ("office workers").<sup>97</sup> The gross annual play on policy and numbers has been

93. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 55.

94. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 37.

95. Even if it is included within the gambling statute, which is often the case, police routinely refuse to arrest for such conduct. See LaFave, *The Police and Nonenforcement of the Law—Part II*, 1962 WIS. L. REV. 179, 192-94.

96. See, generally, Peterson, *Obstacles to Enforcement of Gambling Laws*, 269 ANNALS 9 (1950); 1 ABA COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT 11 (1952); *Hearings on H.R. 3024, H.R. 8410 and S. 1658 Before the House Committee on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. (1962); *Hearings Pursuant to S. Res. 69 Before Permanent Subcommittee on Investigations of the Senate Committee on Government Operations*, 87th Cong., 1st Sess. (1961); *Hearings on H.R. 468 Before Subcommittee No. 5 of the House Committee on the Judiciary*, 87th Cong., 1st Sess. (1961).

97. Although it is common for the terms "policy" and "numbers" to be used interchangeably, the police usually use them to describe two different forms of lottery. In each case, the bets are small, usually from ten cents to a dollar. In

estimated conservatively at one billion dollars.<sup>98</sup> Other forms of gambling, such as bookmaking or the operation of a gaming room, may be small operations but usually are associated with an organized criminal syndicate. Horse books gross from three to five billion dollars a year,<sup>99</sup> and many millions also are bet annually in other kinds of gambling establishments. The illegal manufacture and sale of liquor is sometimes an independent undertaking, but often is an integral part of a syndicate operation.

In some areas, the police frequently arrest persons involved in professional gambling or illegal liquor sales without any intention of subjecting them to prosecution or of even bringing the case to the prosecutor's attention. Subject to this procedure are the owners, operators, and frequenters of places where gambling or illegal liquor sales occur, bookies, numbers or policy writers and carriers, liquor carriers, and similar persons. The number of offenders in these categories who are handled in this way may greatly exceed those who are actually prosecuted; for example, in a precinct of one large city in which gambling and liquor violations are a serious problem, a total of 592 gambling arrests were made in a six month period, but only 24 of these resulted in prosecution. In the same period, 420 arrests were made for violation of the liquor laws, but only 36 cases were prosecuted.

Police action of this type against liquor or gambling places may result from a specific complaint,<sup>100</sup> but more often these places are dis-

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playing numbers, the bettor selects a three-digit number between 000 and 999, and the winning number is determined on the basis of some statistic reported daily, such as certain digits of the total amount of money bet at a particular race track on that date. While the actual odds are 1000 to 1, most syndicates pay at 600 or 500 to 1. In policy, the player selects a series of three two-digit numbers, and the winners are determined by an actual drawing of a series of numbers (how many are drawn varies from wheel to wheel, but usually it ranges between 6 and 12 different two-digit numbers). Big winners are those persons who have had all three of their numbers drawn; they may be paid at odds as high as 6,000 to 1 (as is true of the "Super Chief" wheel in Chicago) or as low as 400 to 1 (as is true of the "Panama Limited" wheel in Chicago), depending of course on the number of different two-digit numbers drawn by the wheel they are playing. Players are notified of the numbers drawn by each wheel (most have two drawings daily) by the distribution of "hit slips."

For a more detailed description, see 1 ABA COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT 91-94 (1952); Jacoby, *The Forms of Gambling*, 269 Annals 39, 43-45 (1950).

98. ABA COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT 94 (1952).

99. *Id.* at 79. For a more detailed description of bookmaking operations, see Lawrence, *Bookmaking*, 269 Annals 46 (1950).

100. In one case a man called the precinct, identified himself, and stated that a noisy party was going on in the apartment below and that he could hear gambling. Armed with this information, the cleanup squad went to the address,

covered by surveillance of suspected establishments. Following is a report of a typical raid:

Passing by the establishment at approximately 1:00 a.m., the cleanup squad<sup>101</sup> officers observed two men who were probably serving as lookouts in the shoe shine parlor in front of this building. The officers traveled around the block and then pulled into an alley. Two of them walked in the front of the establishment, the shoe shine parlor, while the other two men stationed themselves at the rear door. Through the door, they could hear a large number of voices. This reporter waited at the rear of the establishment together with the sergeant and one of the other members of the cleanup crew.

In very short order, the door was opened by one of the other officers. There was a large round table in the center of this back room with 32 people gathered around it. There were cards on the table, but there was no money present. The sergeant theorized that the money was removed as soon as one of the lookout men had seen the officers. Although the officers operate in plain clothes, they are usually well known to professional gamblers in the neighborhood. Those present in the room continued to engage in their card game, though with the absence of cash at the table.

The sergeant then ordered that everybody in the room turn toward the wall. With two officers starting at each end of the lineup, they began to search for concealed weapons. On finding a jack-knife they removed it and threw it onto the center of the table. Approximately 50 jack-knives were found, but no other type of weapon. With the search of all 32 individuals completed, the officers then went through the line again taking down the name, address, birth date, and sex of each of the individuals in the room. In the meantime, one of the officers had radioed for a patrol wagon.

The patrol wagon arrived and was backed up to the rear door of the establishment. A large number of people had gathered out-

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listened at the door, and then without notice broke in and seized the cards, dice, and money. All twelve persons were arrested. The woman in possession of the apartment was booked for investigation of violation of the gambling laws, and instructions were left to release her in the morning. The others were lectured and sent on their way after a time, except that those with outstanding traffic warrants had to post the amount due prior to release.

101. In this particular municipality, six to eight officers are assigned to a cleanup squad in each precinct. These officers work in plainclothes under the direction of the inspector in charge of the precinct. They are considered a precinct vice squad whose primary function is to enforce gambling and liquor laws. While the cleanup squads appear to devote most of their efforts to arrest and search without thought of prosecution, other agencies in the department are engaged in the more elaborate, extensive, and time-consuming investigations necessary for actual prosecution of gambling and liquor law violators.

side to inquire about their relatives. The sergeant instructed all of them to leave or they too would be placed in the wagon. Fifteen of the 32 people were then placed in the wagon and driven to precinct headquarters. At the precinct these individuals were placed in the bull pen. The wagon then returned to pick up the others.

At precinct headquarters no effort was made to book these individuals. The cleanup squad instead listed them in their report and phoned the names in to the administrative unit of the traffic division in order to determine whether or not there were any traffic warrants outstanding on them. As a result of this check, four individuals were detained on outstanding traffic warrants. The clean-up squad also detained the owner of the premises and the individual who was operating the game. The 26 other persons were taken out of the bull pen at 2:15 a.m. and released.<sup>102</sup>

The situation is much the same in other instances in which the police gain entry to a place where it is known or thought that a considerable number of persons are involved in illegal activity. Such a raid may be directed at handbooks,<sup>103</sup> "blind pigs,"<sup>104</sup> or places where there are professionally operated card games or gambling devices.

Similar tactics are employed against inside gambling activity that is even more secretive because there are no walk-in customers. For example, a bookie may operate a "wireroom" in which he receives and lays off bets via telephone. A numbers or policy operation must have an "office," a place to which all bets and money are delivered and at which detailed record-making occurs for the purpose of determining winners and the amounts owed by and to the various runners and writers. In both the "wireroom" and the "office," many precautions are taken to prevent police entry without use of force and to make the destruction of evidence possible should forced entry be attempted.<sup>105</sup> The police make forcible entries into these premises and arrest the bookies and "office workers" without thought of obtaining their conviction.

Persons in the lower echelons of the numbers or policy syndicates,

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102. The report is by a field researcher for the American Bar Foundation Survey of the Administration of Criminal Justice.

103. The handbook is a bookie operation which has walk-in customers. Often great precautions are taken to insure that only regular customers can gain entrance. Some handbooks have fairly modest arrangements; others are elaborately equipped with odds boards and a battery of communications devices.

104. These are establishments at which liquor is sold illegally.

105. See note 127 *infra*.

that is, persons who write and carry the bets, also frequently are arrested. The police suspect certain persons of being "writers" or "bagmen" either because of their past records or because of their suspicious actions. They are stopped on the street and searched, and if evidence of gambling is found they are arrested. Similarly, persons suspected of carrying illegal liquor are stopped, searched, and then detained if the search discloses illegal liquor.

In these cases, it is common practice to seize not only the illegal liquor or gambling paraphernalia but also telephones, money, and automobiles when it appears they have some connection with the offense for which the arrest is made. Although it is usually known at the time of arrest that conviction is probably impossible (because the necessary evidence is not available or would be excluded), disposition of these cases varies from place to place and, to a certain extent, from offense to offense. Lesser offenders, such as the mere frequenters of gambling places or "blind pigs," are often detained a few hours and then released. In some locales the standard practice is for professional operators, particularly those with syndicate connections, to obtain their release via a writ of habeas corpus;<sup>106</sup> actual prosecution is not even undertaken. By contrast, in other areas these cases are actually brought to court, where they are ordinarily disposed of by suppression of evidence or a finding that there is not sufficient evidence of the illegal activity to convict. From observation of these cases in court it is apparent that the police have no expectation that there will be a conviction. Little or no effort is made toward that end; police "testimony seems calculated to insure the exclusion of the seized evidence, or at least to save time in disposing of a case in which the search is obviously illegal."<sup>107</sup>

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106. For example, when a "bagman" fails to make his rounds it is presumed by the syndicate that he has been picked up, so a writ of habeas corpus is promptly obtained. Thus, in one case a carrier was arrested at 1:50 p.m. and the officers arrived at the vice bureau with him at 2:19. At 2:38 an attorney called to inquire about the carrier, and at 2:47 the lieutenant was notified of the writ, and a hearing set at 3:15.

Because of this prompt action by the syndicate in some areas, it is not uncommon for a writ to be issued on a person who has not been arrested. The action is taken when a "bagman" does not appear at a particular pick-up station at or shortly after the appointed time, which sometimes occurs because he has been caught in a traffic jam.

107. Comment, 47 Nw. U. L. Rev. 493, 498 (1952). See also Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 391 (1951).

For example, on a motion to suppress in a case involving a "bagman" the officer usually will concede that he searched first and arrested second, and either will give no grounds for his action or will say that the defendant was a "known police character" or a "known policy man."

### b. Aggressive Street Patrol in High-Crime Areas

The crime problem facing the police in large metropolitan centers is, of course, far more serious than elsewhere. And, within these cities the crime rate is particularly high in certain sections—usually overcrowded slums—where the factors contributing to crime are most prevalent. Police concern with the crime problem in these sections of the city often is manifested by using aggressive patrol techniques in such places.

The number of regular precinct personnel available to answer calls for police service is naturally higher in the high-crime sections of the community.<sup>108</sup> Beyond this, however, many departments deploy a special force into these areas during certain critical periods of the day. These police ordinarily do not respond to calls for service, but rather have the sole responsibility of engaging in aggressive street patrol. Although these officers are expected to be on the alert for certain persons wanted in connection with past crimes,<sup>109</sup> most of their activity is directed toward persons engaging in suspicious conduct and other persons who, while not acting in a suspicious manner, have engaged in some conduct that affords an excuse for police inquiry.

Officers assigned to this duty usually patrol with two men to a car. If they see a pedestrian who "looks kinky," they may stop and question him and perhaps subject him to a frisk or a full search.<sup>110</sup> This procedure is employed without regard to whether the law of the jurisdiction allows "field interrogation" and frisk under suspicious circumstances, or whether, if the law does so provide, the circumstances are sufficiently suspicious to justify the action.<sup>111</sup> It is also common practice to stop a moving vehicle,

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108. Until recent years the distribution of police personnel in many cities was most unsound in that the force was distributed evenly among three eight-hour shifts and among beats of equal area. Now, however, most large departments attempt to obtain maximum results by uneven distribution, based upon time-place studies of past criminal conduct. See WILSON, *POLICE ADMINISTRATION* ch. 13 (2d ed. 1963).

109. These officers study carefully the pictures and word descriptions of wanted persons listed in the daily bulletin, and are continually on the alert for them. In addition, they keep at hand the latest "hot sheet," listing the license numbers of stolen automobiles, and check many of the cars in the area against it.

110. For example, on one occasion officers observed a young man walking down the street wearing a raincoat. It was not and had not been raining, and the temperature was extremely high. The officers stopped this individual, asked him why he was about, checked to see if he had any weapons or property hidden under the coat, and then had him remove the coat in order to determine if he was wearing it to conceal "tracks" on his arms from taking narcotics.

111. "Field interrogation" is the term police use to describe the stopping and questioning of suspicious persons. A frisk ordinarily is distinguished from a full-fledged search in that the former involves a patting down of the person for

question the driver as to his reasons for being about, frisk the driver and sometimes other occupants of the car, and search the car. Sometimes this is done because of the driver's generally suspicious conduct, such as an apparent attempt to elude a following patrol car, or a "double-take" at a patrol car headed in another direction. More often, however, these stops are based upon some minor offense by the driver, such as a burned out tail light, absence of license or city permit sticker, or a moving traffic violation. Arrest or citation for the minor offense does not occur except when the search is fruitful or the driver is argumentative. Although basing the search on the minor violation may be expressly prohibited by the law of the jurisdiction,<sup>112</sup> this violation serves as a means of justifying to the suspect the stopping and subsequent investigation.

The disposition of these cases also varies from place to place and from case to case. If a search uncovers a concealed weapon, sometimes seizure of the weapon is the only action taken; if the individual voices any objection, he may be told that he could be prosecuted and convicted. It is more common, however, for the offender to be arrested. In some locales he may be able to terminate the case by a writ of habeas corpus, although this is unlikely unless he is a syndicate employee. Most cases go to trial, although here again it is a foregone conclusion in most instances that conviction is not possible because the weapon, stolen property, or whatever else was found will be suppressed. Only in a relatively few cases, where the offense uncovered is serious and it is thought some convincing explanation can be given for the police conduct, is it subsequently decided to treat the case as one in which conviction is a serious objective.<sup>113</sup>

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the purpose of determining whether he is carrying a concealed weapon. Some states have authorized field interrogation under certain circumstances by statute or case law, and some also allow the officer to frisk for his own protection. See 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 (1960); LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 344-47 (1965). A forthcoming volume of the American Bar Foundation Administration of Criminal Justice series, entitled *DETECTION OF CRIME*, will explore the problems in this area in considerable detail.

112. Not so many years ago, it could be said that full search of a car incident to a traffic arrest was accepted by most appellate courts as a proper enforcement technique. This was because of a tendency for these courts to take a rather mechanical approach, assuming that a lawful arrest for any offense would allow a search even if the offense was not one for which it could be expected that a weapon, evidence, or fruits of that crime might be found. See Note, 1959 WIS. L. REV. 347. In the last few years, however, more and more appellate courts have condemned the practice and excluded evidence found by following it. Illustrative is *People v. Watkins*, 19 Ill.2d 11, 166 N.E.2d 433 (1960).

113. For example, in one case officers stopped a car because it lacked a rear license plate. As they approached the car, two of the occupants exited from the

Why do police make arrests and searches in cases where prosecution will not even be attempted or, if attempted, will clearly result in acquittal or dismissal? One reason is that conviction or meaningful conviction for certain crimes is thought to be an unattainable objective, either because of judicial reluctance to convict or to impose meaningful sentences, or because of an inability of the police to uncover sufficient evidence by acceptable means. Secondly, in the police view there is considerable public and other pressure for *some* official action against the criminal activity involved. Finally, the police feel that arrest and its attendant circumstances, even if not followed by conviction, accomplish certain desirable objectives.

2. *Reasons for the Practice: Conviction or Meaningful Conviction Thought Impossible*

a. Judicial Reluctance to Convict or Impose Meaningful Sentence

In some communities many trial judges display a higher degree of leniency in what they characterize as "minor gambling cases" than they do in most other cases. Presumably this is a reflection of the views of at least a certain segment of the community regarding the offense of gambling. The police, of course, are highly critical of this judicial attitude, and contend that judges who react in this way apparently "do not comprehend the relationship between a single petty gambling violation and the enormously lucrative racket which such violations, in aggregate, represent."<sup>114</sup>

One way this leniency may be manifested is by acquittal of the offender who has been proven guilty beyond a reasonable doubt. 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

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vehicle and fled. The officers were unable to catch them, but they did prevent the driver from fleeing and subjected him to a search. In the car they found mail addressed to a number of different persons residing in a particular two-block area of the city. Many of the envelopes, all of which had been opened, contained welfare checks. In the driver's pockets were a number of social security cards from which the original names and signatures had been erased; these, of course, would be filled in with names matching the stolen checks and then would be used for purposes of identification in cashing the checks. It was decided that the driver should be turned over to the federal authorities for prosecution.

114. Wilson, *How the Police Chief Sees It*, Harper's, April 1964, pp. 140, 142.



law by gambling and now I will break the law by discharging them."<sup>115</sup> Although acquittal of the guilty may constitute improper conduct by the trial judge, it is of course a decision that is not subsequently subject to reversal.<sup>116</sup>

If the judge does convict, he may be most lenient in the imposition of sentence. Although some concern has been expressed over whether the maximum penalties provided in the gambling statutes are high enough,<sup>117</sup> the fact remains that often the actual punishment imposed is merely a small fine far short of the statutory maximum.<sup>118</sup> In the police view, the sentences commonly imposed in gambling cases are inadequate for two reasons. First, they are not sufficient to deter:

115. *Ibid.*

116. In most jurisdictions, the state cannot appeal from an acquittal. Such an appeal is possible in Wisconsin to challenge rulings adverse to the state on questions of law, and in one case the prosecution challenged the trial judge's finding the defendant not guilty, claiming that the evidence pointed conclusively to defendant's guilt. Said the court:

"We consider that this court has no power under the statute or constitution to review the merits of the acquittal or to reverse the judgment.

"We appreciate that this conclusion puts out of the reach of an appeal by the state purely arbitrary findings of not guilty by trial judges in the face of the facts and the law but we are confident that instances of this sort will be rare. In any case neither the statute nor the constitution authorizes intervention by this court and the matter must therefore rest with the conscience of the trial judge in the light of his oath of office. We are satisfied that upon waiver of jury trial his decision stands upon the same footing as the verdict of a jury." *State v. Evjue*, 254 Wis. 581, 594, 37 N.W.2d 50, 56 (1949).

117. In Illinois gambling is punishable by a fine up to \$500 and imprisonment up to one year, or both. Subsequent convictions for most forms of gambling may result in a fine up to \$1000 or imprisonment up to three years, or both. ILL. REV. STAT. ch. 38, § 28-1 (1963). Observed the Superintendent of Police of Chicago:

"We also hope to persuade the legislature that it is absurd to classify vast and lucrative rackets, such as gambling and vice operations, as mere misdemeanors, punishable by a small fine and brief imprisonment. The law now makes no distinction between the friendly poker game in the privacy of one's home and the vast city-wide numbers racket grossing millions of dollars a year. . . .

"[T]he Chicago Police Department had a bill introduced at the last session of the legislature which would establish the crime of syndicated gambling and make it a felony punishable by imprisonment in the penitentiary. . . .

"[I]t was permitted to languish and die on the calendar in the closing days of the session." *Wilson*, *supra* note 114, at 144-45. See also CHICAGO CRIME COMMISSION, A TWELVE-POINT LEGISLATIVE PROGRAM FOR ILLINOIS 3-4 (1964).

118. I have reported the Detroit experience elsewhere as follows:

"While penalties up to one year in jail or a fine of \$500 are possible, MICH. STAT. ANN. §§ 28.533 to 28.547 (1949), the courts are not disposed to levying such penalties. In fact, because of the low sentences received, the present practice is to charge gamblers under the disorderly persons statute, MICH. STAT. ANN. § 28.364 (1949), the maximum for which is 90 days or \$100 fine or both, as it is known that no greater sentence would result. If the offender is engaged in gambling for a profit, he customarily receives only a money fine, and if he is a frequenter of a gambling place, he will most likely receive a suspended sentence. Detroit Police

A well-organized and productive gambling house or numbers racket could take in one quarter of a million dollars each week. If, after a long and vigorous period of investigation and observation, the defendant was charged with violating the gambling laws and convicted, the resulting punishment is so obviously weak and unprohibitive that the defendants are willing to shell out a relatively small fine or serve a relatively short time in jail. The gamblers and numbers men confidently feel that the odds are in their favor. If they operate for six months or a year, and accumulate untold thousands of dollars from the illegal activity, then the meager punishment imposed upon them if they are caught is well worth it.<sup>119</sup>

Secondly, and this is in part reflected by the above reference to "a long and vigorous period of investigation," the police tend to evaluate the sufficiency of the sentence by weighing it against the amount of police resources necessary to bring about conviction.<sup>120</sup> If the penalty ultimately imposed is insignificant when weighed against the time and effort which has gone into building the case, the police question whether it is worth the effort to confine their detection practices to those which will allow conviction.

The police also complain that in some cases conviction is impossible because of "loopholes" in the law. However, it is questionable whether the problem is so much attributable to deficiencies in the legislative prescription as it is to the fact that trial judges sometimes declare the relevant statute inapplicable to provide a basis for acquittal. Gambling statutes, for example, typically are drafted broadly to avoid loopholes.<sup>121</sup>

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Dept., 90th Stat. Ann. Rep. 46 (1955)." LAFAVE, *op. cit. supra* note 111, at 478 n.16.

"Where statutes provide very severe penalties, courts seems reluctant to impose them. In many communities, bookmaking and other forms of gambling have come to be openly tolerated. Where this attitude prevails, it is difficult to obtain convictions or deterrent sentences in bookmaking cases." 1 ABA COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT 81 (1952).

119. This was the view one Michigan enforcement official expressed to a field researcher of the American Bar Foundation Survey of the Administration of Criminal Justice.

120. "Individuals occupying top positions in organized crime rarely, if ever, commit any overt acts in violation of existing laws. They are reaping the profits, however, of organized criminal activity engaged in by others at their direction. To implicate the higher-ups requires a long, drawn-out investigation and many months of observation and surveillance. When the only punishment to be expected as a result is a small fine and a few days in county jail, the investigative effort is simply not worthwhile." Wilson, *supra* note 114, at 144.

121. See 2 ABA COMM'N ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT 75 (1953); LAFAVE, *op. cit. supra* note 111, at 89-90.

This is true of the Illinois Criminal Code, yet officers in that state have objected that loopholes are often judicially created. Thus, bookmakers are sometimes acquitted on the ground that no offense has been committed because their records do not include a written declaration of the odds involved in the various bets.<sup>122</sup> It is very questionable whether the 1961 statute justifies the conclusion that the odds must be stated,<sup>123</sup> though a 1954 appellate court case is often cited by the defense as support for this proposition.<sup>124</sup> Such interpretations of the statute resulting in acquittals are not appealable,<sup>125</sup> and a recent attempt to remedy the situation by amending the gambling statute failed.<sup>126</sup>

#### b. Inability to Obtain Evidence Within Premises by Acceptable Means

Judicial reluctance to convict certain offenders may also be manifested by the granting of a defense motion to suppress evidence in cases where the evidence actually was obtained lawfully. Although this undoubtedly occurs, it is fair to say that far more cases are lost at this stage because the law of search is inconsistent with what the police view as the practical needs of law enforcement, or because of a lack of attention by appellate courts or legislatures to certain common search questions.

One serious problem the police face is that of obtaining by acceptable means the critical evidence in cases of certain in-premises violations. In many instances, the offenders need only a moment's advance notice of pending police entry in order to dispose of evidence that would be

122. Most bookies, of course, would have no occasion to make a written record of the odds, for they pay off winners on horse races in accordance with the track odds. The bookie usually records his bets on ruled pads, referred to by the police as "20-liners" and "40-liners." A typical entry might read: "WRL 4 D 8 10-5-0 15.00 00." The first entry is the customer's initials; the next grouping indicates that the bet is on the fourth race, Detroit track, horse number 8; the next grouping indicates that the bet is \$10 win, \$5 place, and nothing show; the following entry merely shows the total amount bet (often labelled as the "In" column); and the last entry is the amount, if any, won by the bettor (often labelled the "Out" column).

123. The applicable subsection of the gambling statute refers to one who "uses or keeps any book, instrument or apparatus for the purpose of recording or registering bets or wagers . . ." ILL. REV. STAT. ch. 38, § 28-1(a)(5) (1963).

124. In *People v. Lloyd*, 3 Ill. App. 2d 257, 257-1, 121 N.E.2d 329, 334 (1954), the court declared that "odds must be stated in order to make out an offense . . ."

125. ILL. REV. STAT. ch. 38, § 120-1 (1963). Few states allow the state to appeal from an acquittal.

126. The syndicated gambling bill introduced in the Illinois legislature on behalf of the Chicago Police Department, see note 117 *supra*, included the following statement: "Bookmaking is the receiving or accepting of such bets or wagers regardless of the form or manner in which the bookmaker records them." H.B. 1458, 73rd Gen. Ass. (Ill. 1963).

essential for conviction. The card game for high stakes can be transferred quickly into a friendly game for sport simply by withdrawing the stakes from the table. The operator of a "wireroom" need only destroy his bet records, which he is usually prepared to do either by burning<sup>127</sup> or by other means.<sup>128</sup>

127. The records usually can be destroyed on very short notice. It is common for the "wireroom" 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. Some "wirerooms" are equipped with metal or extra heavy wooden doors with multiple locks and other special hardware in order to delay forcible entry following notice until the burning can be completed. In one case in which the police finally gained entry only to find the bookie standing by a roaring fire in a metal pot, they made an unsuccessful attempt to have him charged with arson.

"Some bookmakers have recently taken to using a highly flammable paper of unidentified substance on which to make better notations, the police said.

"As detectives burst into a room on a raid the bookmaker merely touches the betting slips of flammable paper with a lit cigarette or cigar and the evidence goes up in a flash of flame. The paper burns almost immediately into powdered ashes, the police said.

"Apparently the bookies are reaching into the bag of magicians' tricks these days," one detective remarked." *New York Times*, Nov. 19, 1964, p. 1, col. 8, p. 49, cols. 1-3.

128. Small quantities of records are sometimes simply flushed down the toilet. Also, special paper that can be destroyed promptly without use of fire may be used:

"Intelligence unit police raided two bookmaking wire rooms Friday. . . .

"On both raids, detectives were equipped with a chemical neutralizer, but didn't have to use it.

"They had expected the betting records to have been treated chemically so they would dissolve when they came in contact with water. This is the latest gimmick used by bookmakers to destroy evidence of betting slips." *Chicago Sun-Times*, June 6, 1964, p. 1, cols. 2, 8.

"An alleged Brooklyn bookmaker attempted to stay out of trouble with police yesterday by dissolving betting notations written on gelatin paper in a bowl of cold water.

"But he was unsuccessful and the principal evidence . . . is a block of transparent, congealed gelatin sitting in an icebox . . . .

"Betting notations, . . . made with a ballpoint pen on the separate sheets of gelatin paper before they dissolved into a solid block, can still be deciphered through the transparent gelatin, according to the police. . . .

"The police said that when detectives . . . smashed open the door and burst into the apartment La Francesca threw a large number of betting slips into a bowl of water on a table beside the telephone he was allegedly using to take bets.

"[The police] rushed into the kitchen of the apartment, found a wooden cooking spoon and fished out the sheets of gelatin paper, by then congealed into a solid block about half an inch thick.

"La Francesca and the evidence were rushed to Police Headquarters, where the betting notations were photographed and the block was placed in a refrigerator to be presented in court when La Francesca is tried. . . .

"The gelatin paper dissolves much more quickly in hot water—in 15 to 20 seconds—the police said, and reported that if La Francesca had kept a pot of boiling water handy they would not have been able to salvage the evidence against him.

"The arrested man told the police that he usually kept boiling water ready, but that he had moved into the Brooklyn apartment only two days before and had not yet had time to buy a pot and had to rely on the bowl of cold water." *New York Times*, Nov. 19, 1964, p. 1, col. 8, p. 49, col. 1.

The prevailing rule on entry of premises to effect an arrest is that forcible entry (including instances in which all that is necessary to gain entry is to lift a latch, turn a knob, unhook a chain, remove a prop, or turn a key)<sup>129</sup> is proper only after the officer has given notice of his purpose and has demanded admittance. "Upon refusal of such demand, or if no refusal be made by word or act, upon the expiration of a reasonable time, the privilege to effectuate a forcible entry arises."<sup>130</sup> Although such notice is not required when it reasonably appears that the occupants are already aware of the officer's objective,<sup>131</sup> other exceptions have seldom been recognized.<sup>132</sup> The relevant statutes usually reinforce the position that notice is required,<sup>133</sup> rather than recognize any exception on the basis that unannounced entry is sometimes essential to prevent the destruction of evidence.<sup>134</sup> Likewise, there are few appellate cases support-

129. See Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 798 (1924).

130. RESTATEMENT, TORTS § 206, comment *d* (1934).

131. *E.g.*, *United States v. Frierson*, 299 F.2d 763 (7th Cir. 1962).

132. The few cases found fall into the following categories:

(1) Those allowing entry without notice and demand where it reasonably appears that prompt action is required for the protection of a person within, *Commonwealth v. Tobin*, 108 Mass. 426 (1871); *People v. Woodward*, 220 Mich. 511, 190 N.W. 236 (1922).

(2) Those allowing entry without notice and demand where it reasonably appears that such entry is required for the protection of the arresting officer, *People v. Hammond*, 54 Cal.2d 846, 357 P.2d 289 (1960); *People v. Maddox*, 46 Cal.2d 301, 294 P.2d 6 (1956); *People v. Potter*, 144 Cal. App. 2d 350, 300 P.2d 889 (1956); *Read v. Case*, 4 Conn. 166 (1822).

(3) Those allowing entry without notice and demand where it reasonably appears that such entry is required to prevent the destruction of evidence, cases cited note 135 *infra*.

(4) Those allowing entry without notice and demand where it reasonably appears that by such entry the actual commission of an offense can be observed, *People v. Ramsey*, 157 Cal. App. 2d 178, 320 P.2d 592 (1958).

(5) Those allowing entry without notice and demand where it reasonably appears that by such entry the escape of the person to be arrested can be prevented, *People v. Maddox*, 46 Cal.2d 301, 294 P.2d 6 (1956).

133. Most states have a statute in essentially the following language, which is from ALI, CODE OF CRIMINAL PROCEDURE § 28 (Official Draft, 1930): "An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in section 21, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose." For citation of the state statutes, see *Ker v. California*, 374 U.S. 23, 50 n.4 (1963) (dissenting opinion).

134. Compare the recent New York enactment regarding search warrants, which allows an officer to enter "without notice of his authority and purpose, if the judge, justice or magistrate issuing the warrant has directed in writing that the officer executing it shall not be required to give such notice. The judge, justice or magistrate may so direct only upon a showing under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of or that danger to the life or limb of the officer may result, if such notice were to be

ing any such exception.<sup>135</sup>

The situation in Illinois is typical. The newly enacted Code of Criminal Procedure is silent on the question,<sup>136</sup> and appellate cases in point are not to be found. Under these circumstances, it is not surprising that evidence is frequently suppressed when it is established that the police made their entry without prior notice.<sup>137</sup> Although this kind of case is a recurring one, no state's attorney has yet attempted to obtain an appellate court holding that the need to prevent destruction of evidence sometimes justifies unannounced entry.<sup>138</sup> Rather than forego enforcement against "wirerooms" and similar in-premises activities, the police resort to enforcement against the conduct without expectation of conviction.

There are other forms of in-premises illegal activity which of necessity involve a certain amount of in-and-out customer traffic. Included are the illegal sale of liquor, the operation of a handbook (which, unlike the "wireroom," deals with walk-in bettors), and the operation of a policy station (usually located in the home or business establishment of the policy writer). Although precautions are normally taken to insure against entry by other than regular customers or new prospects who have been checked upon, plainclothes officers sometimes are able to gain entry into such establishments by posing as prospective customers. After ob-

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given." N.Y. CODE CRIM. PROC. § 799. See Siegel, *New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?*, 30 BROOKLYN L. REV. 274 (1964); Note, 38 ST. JOHNS L. REV. 392 (1964).

135. *People v. Hammond*, 54 Cal.2d 846, 357 P.2d 289 (1960); *People v. Barnett*, 156 Cal. App. 2d 803, 320 P.2d 128 (1958); *People v. Ruiz*, 146 Cal. App. 2d 630, 304 P.2d 175 (1956); *State v. Smith*, 37 N.J. 481, 181 A.2d 761 (1962).

136. The statutes merely declare that "all necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest." ILL. REV. STAT. ch. 38, § 107-5(d) (1963).

137. Illustrative is one observed case in which officers of the gambling unit received information from a reliable informant to the effect that he had just placed a bet via phone with a particular person at a particular number. After determining through the telephone company the location of the subscriber with that number, detectives immediately drove to the location. About a block away a "wrong number" call was made to the bookie to insure he was still on the premises. Upon learning he was still there, officers crept quietly up a rear stairway to the second floor apartment, opened a screen door, entered the apartment, tiptoed up behind the bookie, and then placed him under arrest and seized the bet records spread out on the table before him. At trial a defense motion to suppress was granted because of the purported unlawful entry.

138. It must be acknowledged that it is presently uncertain how much leeway the states have to make exceptions to the notice and demand requirements. In *Ker v. California*, 374 U.S. 23 (1963), the Court upheld an instance of unannounced entry only after noting that the evidence (narcotics) could easily be destroyed and that there were grounds to believe defendant was expecting the police. Four members of the Court entered a vigorous dissent, contending that the case of hot pursuit is the only exception authorized under the constitution.

serving the illegal activity for a time, they arrest the proprietor and customers.

The heart of the prosecution's case in these instances is, of course, the observation of the plainclothes officer. Testimony as to these observations is sometimes suppressed, however, on the ground that the officer was a trespasser while inside the premises under these circumstances. The notion, as expressed in one decision commonly cited by the defense in these instances, is that the officer's action in posing as a customer was "fraudulent," and thus the permission to enter was ineffective because given "in ignorance of [the officer's] official character and purpose."<sup>139</sup> The police understandably are perplexed by such rulings; while certain affirmative misrepresentations may be sufficient to vitiate consent,<sup>140</sup> it is difficult to fathom the justification for exclusion when the officer has merely represented himself as a prospective customer of the defendant's illegal activity.<sup>141</sup> Again, the police frustration often leads to enforcement without expectation of conviction.

Other rulings by local courts regarding forms of police entry into premises are likewise viewed with disdain by enforcement officials. Some of these rulings find no justification in the appellate cases, while some are based on higher court pronouncements that are arguably a result of inadequate analysis. Illustrative of the former is the so-called "hotel rule" of some trial judges: an officer in the upper-floor corridors of a hotel is a trespasser, and the fruits of his investigation while there are

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139. *People v. Dent*, 371 Ill. 33, 35, 19 N.E.2d 1020, 1022 (1939).

140. Some courts have held the consent to be ineffective because of affirmative misrepresentations that the officer is other than a member of the general public. In *Fraternal Order of Eagles v. United States*, 57 F.2d 93 (3d Cir. 1932), it was held improper for officers to gain entry into a lodge hall by misrepresenting that they were members of a similar club in a distant city and by presenting false membership cards. Similarly, in *United States v. Mitchneck*, 2 F. Supp. 225 (M.D. Pa. 1933), an officer's entry into a private residence by representing himself as a salesman was held to be unlawful. Compare *United States v. Bush*, 283 F.2d 51 (6th Cir. 1960), where the court said it was not improper for the officer to pose as a member of the public and gain entry into premises as a possible customer for the sale of illegal liquor, even though the officer suggested to the defendant that they had mutual acquaintances in order to gain his confidence.

141. Recently the Illinois Supreme Court put to rest the dictum in the *Dent* case, *supra* note 139, which has often served as the basis for suppression in these cases. An officer, without disclosing his identity, entered a policy station as a customer, made a policy bet, and observed policy paraphernalia. A search warrant was issued on the basis of this officer's observations, but at trial the evidence was excluded on the ground that it was based upon information illegally obtained. The supreme court held that the officer was not "under any obligation to voluntarily identify himself as a policeman prior to entering the premises." *People v. Walker*, 30 Ill.2d 213, 215-16, 195 N.E.2d 654, 656 (1964).

consequently inadmissible.<sup>142</sup> Illustrative of the latter is the holding that when an officer, after knocking at a door and hearing an invitation to enter, enters and observes gambling paraphernalia, the evidence is inadmissible unless the officer can prove that the invitation came from the tenant rather than from one of the tenant's guests.<sup>143</sup> (It seems highly questionable whether such a case should be governed by artificial concepts of consent or agency rather than by the more basic question of whether it was reasonable for the officer to enter under such circumstances.) Suppression of evidence in these and similar instances gives further substance to the police view that there are no lawful means of obtaining evidence of certain in-premises criminal conduct.

c. Inability to Establish Acceptable Grounds for On-the-Street Action

To a considerably lesser extent, the police find it difficult to engage in certain on-the-street enforcement action in a manner acceptable to the courts. For example, in some locales the police find it almost impossible to make an arrest of a "bagman" for possession of gambling paraphernalia that will withstand challenge on a motion to suppress. Police records in some communities reflect the curious fact that most convictions of such offenders result from officers stumbling onto the evidence in the course of making lawful arrests for other misconduct; few convictions follow from arrests for the offense of possession made by officers assigned the task of gambling enforcement.

In those jurisdictions where possession of gambling paraphernalia is

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142. For example, in one case two "bagmen" for a policy syndicate were trailed to a particular hotel, and on subsequent days again were observed to enter the hotel at the same time, after having made a series of pickups at other places. Knowing that the "office" of the policy wheel was probably located in the hotel, but being unaware of the precise room, an officer in janitor's clothes was stationed in an upper hallway to observe which room the "bagmen" entered. A search warrant was obtained on the basis of these observations, but at trial the warrant was quashed on the ground that it was based upon information obtained while trespassing.

143. In Illinois, at least, suppression on this basis finds support in a supreme court decision. In that case, two police officers were sent to investigate a woman suspected of running a policy game in her home. They rang the doorbell and someone inside said "come in." They entered and found defendant and another woman seated at a table full of policy paraphernalia. In a very brief opinion from which three members of the court dissented, the issue was dealt with simply as one of consent and agency: "The gist of the act of invitation by another to enter the premises without a search warrant is that the invitation must be extended under specific authorization. [Citation omitted.] If anyone may indiscriminately waive the rights of another, the waiver is not a personal one; hence the constitutional privilege would be of no value." *People v. Dent*, 371 Ill. 33, 34, 19 N.E.2d 1020, 1021 (1939).



only a misdemeanor and arrest without warrant for a misdemeanor is allowed only under the traditional in-presence standard, the basic problem is one of what evidence is sufficient to support a lawful in-presence arrest for such possession. Most in-presence arrests for other misdemeanors are based upon the fact that the conduct constituting the offense was observed directly by the arresting officer, and the tendency is to view this as the sole basis for such arrests. It is not uncommon for arrests for possession of policy slips to be declared illegal because no slips actually were observed or because prior to arrest the officer was unable to view the slips closely enough to conclude beyond a doubt that they were policy slips.<sup>144</sup> If this is a correct application of the in-presence standard, it is fair to conclude that the "bagman" enjoys almost complete immunity from arrest without warrant;<sup>145</sup> few carriers lack the presence of mind to conceal their precious cargo from view.<sup>146</sup>

In fairness to the trial judges who suppress the evidence in the situations described above, it must be acknowledged that appellate courts have seldom subjected the in-presence arrest standard to careful analysis. It is unclear, for example, precisely how the violation must come to the officer's attention; illustrative is the holding that an admission of possession is "not the nature or kind of evidence" to justify arrest.<sup>147</sup> The basic question, upon which the courts are not in agreement, is whether the in-presence standard requires the officer to be *certain* of the violation at

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144. Police, in a jurisdiction where possession is a misdemeanor and the in-presence standard applies, watched a woman stop at a number of suspected policy stations. Each time she emerged with a handful of yellow slips. When she saw the officers observing her, she put the slips under her blouse. She was arrested and taken to the women's division, where a search disclosed policy slips and \$14.59 in gambling funds. The prosecutor refused to charge, stating: "Those slips of paper could have been just any yellow slips of paper. I have some yellow slips of paper on my desk, but just because they are yellow and a certain size does not mean that they are bet slips." When such cases reach court the explanation for suppression of the slips is often similarly stated.

145. Arrest with warrant still would be possible if probable cause could be established, though this raises problems similar to those discussed in the following text concerning arrest on reasonable grounds to believe. The delay in obtaining a warrant also would raise the problem of later finding the "bagman" at a time when he possessed the critical evidence. Most "bagmen" take considerable precautions to "shake" any police "tail," and they also frequently change their route patterns to avoid being discovered at the same time and place on subsequent occasions.

146. Some do, however. See *People v. West*, 15 Ill.2d 171, 154 N.E.2d 286 (1958), where the slips were in plain view on an automobile seat. And sometimes business is so good that the bag or other container used to carry the slips may be overflowing. See *People v. McGowan*, 415 Ill. 375, 114 N.E.2d 407 (1953).

147. *Allen v. State*, 183 Wis. 323, 335, 197 N.W. 808, 812 (1924). Rather, the court added, there must be "evidence that comes to the officer through his sense of sight or other natural senses . . . ."

the time of arrest,<sup>148</sup> or whether a *reasonable belief* suffices.<sup>149</sup> The first of these positions the police consider completely impractical because it in effect immunizes from arrest the offender whose misdemeanor conduct is not of a kind that can be observed directly and unmistakably by a bystander.

A reasonable-grounds-to-believe standard is applied to the arrest when (1) the conduct is viewed as being a felony,<sup>150</sup> (2) the conduct is a misdemeanor but the law of the jurisdiction allows misdemeanor arrest on

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148. This result is supported by those cases holding that an officer is liable in damages if no misdemeanor was in fact committed, even though he reasonably believed that the offense was occurring in his presence. See cases collected in Stone, *Arrest Without Warrant*, 1939 WIS. L. REV. 385, 387. It might be said that these cases also support the view that arrest on reasonable belief of a presently occurring misdemeanor is lawful if it ultimately turns out that the misdemeanor was in fact being committed. Such a rule is difficult to support as a standard to guide the conduct of the police, who can be expected to act only upon the basis of what reasonably appears to be true at the time the decision is made.

The confusion in this area is attributable in large measure to the statements of the early commentators, who simply said without elaboration that there must actually be a misdemeanor committed. See Warner, *Modern Trends in The American Law of Arrest*, 21 CAN. B. REV. 192, 200 n.16 (1943).

149. Illustrative of this view is a case in which a man was arrested for driving an unregistered auto notwithstanding his assertion before arrest that he had made application. After noting that application would be sufficient under the substantive statute involved, the court said:

"If, however, the . . . [officer] had reasonable grounds to disbelieve the statement . . . , then he might still be justified in the eye of the law in making the arrest . . . ; for the police officer charged with the duties and responsibilities that such officers are is not required to justify his action in making an arrest by a subsequent showing that as a matter of fact the offense was committed. It is sufficient if he has reasonable ground for believing that the offense has been committed by the person whom he then arrests." *Bursack v. Davis*, 199 Wis. 115, 120-21, 225 N.W. 738, 741 (1929).

More explicit is this statement from *Edwards v. State*, 190 Wis. 229, 231, 208 N.W. 876 (1926), quoting from *Ex parte Morrill*, 35 Fed. 261, 267 (9th Cir. 1888): "A crime is committed in the presence of the officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe, or reasonable ground to suspect, that such is the case."

A different statement of the misdemeanor arrest privilege would insure such a result. For example, § 6(1)(A) of the Uniform Arrest Act would allow an officer to arrest without warrant for a misdemeanor whenever "he has reasonable ground to believe that the person to be arrested had committed a misdemeanor in his presence." See Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942). The act is set out at pp. 343-47.

150. That there may be a basis for viewing the conduct as a felony is sometimes overlooked. For example, in Michigan possession of policy slips is a misdemeanor under MICH. STAT. ANN. § 28.538 (1949), but the fact of possession is substantial evidence of a conspiracy, since a policy wheel of necessity involves several persons acting in concert. Although the crime of conspiracy is not included in the Michigan code, it is a common law offense, and while only a misdemeanor at common law, indictable common law offenses are felonies in that state. MICH. STAT. ANN. § 28.773 (1949). It has been held that this includes conspiracy.

reasonable grounds to believe,<sup>151</sup> or (3) the conduct is a misdemeanor but the in-presence test is taken to mean reasonable grounds to believe a violation is occurring in the presence of the officer. The likelihood of the evidence being suppressed under these circumstances is not so great, yet such a result is not uncommon even when it would appear that a lawful arrest has been made. Such arrests are usually based upon the fact that the individual (often with a record of past gambling offenses) is traveling in an area of the city where policy is a popular pastime, is making a series of stops day after day at locations where policy writing has occurred in the past, is making these stops during the time of day when policy slips are picked up, and perhaps is carrying a package with "something" in it. Because of a failure to consider what these facts would mean to an experienced officer,<sup>152</sup> such arrests often are declared unlawful.<sup>153</sup> Appellate cases dictating

People v. Smith, 296 Mich. 176, 295 N.W. 605 (1941).

Commented the legal advisor to one large Michigan police department: "Take for instance an arrest for possession of policy slips. An officer can watch that man dealing with someone else, and, instead of arresting him for possession, he can arrest him for conspiracy. Even if he doesn't know the other man, he can refer to him as John Doe, and then you've got a valid arrest. . . . And if he finds in this man's possession gambling paraphernalia and he charges him with possession, academically that's a good search. But whether it will be in court is another question."

151. For example, in Illinois the police can arrest without warrant for any offense on reasonable grounds to believe. ILL. REV. STAT. ch. 38, § 107-2 (1963).

152. Compare, however, the following observation by a federal judge in denying a motion to suppress in a fact situation much like that described in the text above:

"It is common knowledge that the numbers business in the area has developed and sharpened into a high degree of stealthy and surreptitious activities aimed at side tracking and deceiving law enforcement officers. It is also known that law enforcement officers engaged in tracking this lottery trafficking have acquired a high degree of knowledge of the traffickers, their identities and their methods in such trafficking." United States v. Schwartz, 234 F. Supp. 804, 807 (W.D. Pa. 1964).

153. It should also be mentioned, however, that sometimes all of these facts are not put before the court. This is in one sense a contributing cause of the problem and in another sense a consequence of it. That is, if an officer is not adequately trained to present his grounds in court, this will lead to suppression in cases where there were in fact grounds for arrest and where, as a practical matter, no greater amount of evidence could possibly be obtained. But, in other instances the failure of the officer to present all of the facts may be attributable to a conclusion from prior experience that to do so would be futile. Knowing the evidence will be suppressed in any event, the testifying officer merely tries to get the proceedings over with as quickly as possible.

Cases in which the officer's testimony on the motion to suppress is not as complete as it might be also raise a difficult question as to the approach to be taken by a reviewing court. A possession-of-policy-paraphernalia case that recently reached the United States Supreme Court points up the difficulty. Beck v. Ohio, 379 U.S. 89 (1964). Although Justice Harlan in his dissent was of the view that from the record there was "no lack of common understanding at trial that the informant had given the officer the crucial information" that the offender would be involved in the activity at a particular time and place, *id.* at 102,

a contrary result are not to be found; prior instances of such suppression are either unappealable or, where appealable, unappealed.<sup>154</sup> Since it is the rare case in which any greater amount of evidence against the "bagman" can be uncovered prior to arrest, the choices open to the police are again either to cease enforcement in this area or to continue to make these arrests without expectation of conviction.

Although the connection is not so close, it is fair to say that the aggressive patrol technique in high-crime areas also results in part from police inability to obtain judicial approval of certain other on-the-street action. At least some of those who are simply stopped and searched are engaged in suspicious conduct short of that sufficient to support an arrest. In a few jurisdictions, either by case law<sup>155</sup> or statute,<sup>156</sup> the police are authorized under such circumstances to conduct a "field interrogation,"<sup>157</sup> consisting of brief on-the-street detention and interrogation.<sup>158</sup> In most states, however, this practice has not received careful analysis, with the result that the common approach is to say that an arrest on inadequate grounds occurred at the time of the initial stopping. Lacking clear authority to take this preliminary step, the police tend to proceed directly to a complete arrest and search.

### 3. *Reasons for the Practice: Pressures for Unrelenting Police Action*

Of course, the fact that the police view conviction or meaningful con-

the majority refused to draw such an inference from a record which did not include a specific statement by the officer of what his informant had told him.

154. This is attributable to a lack of effective communication between police and prosecution agencies. Although it would be most desirable, from the police viewpoint, to obtain appellate review regarding this frequently recurring situation, the prosecutor is unlikely to recognize the need and instead will expend the resources of his office seeking review of felony cases.

155. The cases are cited in 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, 391 nn.30, 31 (1960).

156. Section 2 of the Uniform Arrest Act provides for field interrogation under some circumstances. This provision has been adopted in three states. DEL. CODE ANN., tit. 11, § 1902 (1958); N. H. REV. STAT. ANN. § 594:2 (1960); R. I. GEN. LAWS, tit. 12, ch. 7 (1956). Recently, a "stop-and-frisk" provision was enacted in New York. N. Y. CODE CRIM. PROC. § 180a. See Siegel, *New York "Frisk" and "Knock-Not" Statutes; Are They Constitutional?*, 30 BROOKLYN L. REV. 274 (1964); Note, 38 ST. JOHNS L. REV. 392 (1964).

157. This is the phrase commonly used by the police to describe the stopping and questioning situation. See BRISTOW, *FIELD INTERROGATION* (1958); LAFAVE, *op. cit. supra* note 111, at 344-47.

158. It may also include a "frisk" of the suspect by the officer for purposes of self protection, which makes it more difficult to determine whether the practice is inconsistent with the constitutional guarantee against unreasonable searches and seizures. Some states, by case law or statute, have provided that under some circumstances the officer may frisk as well; others have not. See sources cited in notes 155 and 156 *supra*.

viction as unattainable in some cases does not in itself explain why the common practice of arresting for purposes other than prosecution or conviction exists. Instead of continuing with an enforcement program of fixed dimensions and merely altering the objective in some cases, it might be thought that police administrators would react to the dilemma described earlier by redefining the focus of their enforcement activity. If, for example, it is nearly impossible to obtain essential evidence against "wireroom" operators in a fashion that will be accepted by local courts, then why not abandon enforcement in this area<sup>159</sup> in favor of increased efforts against some other conduct? This view has not prevailed in police thinking, and consequently it is not enforcement but the expectation of conviction that is abandoned. One reason for this, to be discussed shortly, is that the police have concluded that certain desirable investigative and punitive objectives can be realized by continued police action even if meaningful convictions are unattainable. A second reason is that public, institutional, and other real or imagined pressures militate against substantial withdrawal from the enforcement activity in question.

Public attitudes, or, more accurately, what the police perceive public attitudes to be,<sup>160</sup> can have a significant impact upon law enforcement.<sup>161</sup> Police agencies generally have not been shielded effectively from

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159. It has been suggested that such abandonment also ultimately might inure to police benefit by dramatizing the impracticality of current restrictions upon the police:

"I would like to see the police of some city or state run a little experiment—announce publicly that from henceforth on the police department is going to follow the rules just as the courts have laid them down. In other words, the police are not going to cheat one bit. Furthermore, let it be known that the police are not going to be responsible for the consequences. Then try it for about three weeks. I predict that you will have such disorder, such chaos, such a dangerous situation, that there will be a clamor for a return to normality and for giving the police meaningful weapons with which to fight the suspected perpetrators of crimes." Statement of Professor Inbau in *A Forum on the Interrogation of the Accused*, 49 CORNELL L.Q. 382, 401 (1964).

160. There is, of course, no assurance that police perceptions of what the public wants accurately reflect the true desires of the community. Professor John P. Clark, Department of Sociology, University of Illinois, has conducted an interesting empirical study of the extent and nature of police isolation in three medium-sized Illinois communities. He found a fairly high correlation between police perceptions of community expectations and actual public expectations, although there are some striking differences—particularly as to expectations on when a warning should be employed in lieu of arrest. See Clark, *The Isolation of the Police: A Comparison of the British and American Situations*, to appear in a forthcoming issue of J. CRIM. L., C. & P.S.

161. The effect upon law enforcement of public attitudes has long been recognized as an important problem. See, e.g., SMITH, *POLICE SYSTEMS IN THE UNITED STATES* 5-7, 18-19, 285-86, 366-67 (1940); ARNOLD, *THE SYMBOLS OF GOVERNMENT* ch. 7 (1935).

public pressure; indeed, law enforcement agencies often are structured to insure a large measure of popular control. These agencies are decentralized and fragmented,<sup>162</sup> and the selection of police administrators and police officers usually occurs in a fashion calculated to insure that they will be responsive to local opinion.<sup>163</sup> Also, the very nature of policing is such that it is essential to maintain public support; "in a democratic society . . . [the police depend] upon the public with regard to detection, evidence, financial support, and in the last analysis, the police job itself."<sup>164</sup> The police literature abounds with exhortations regarding the need to maintain good public relations and continued popular support.<sup>165</sup>

Under these circumstances, it is not too surprising that enforcement practices are sometimes tailored to fit what the police believe to be public expectations. Police administrators assert that "there is a wide discrepancy between what the people expect the police to do and what the police are permitted to do under the law,"<sup>166</sup> and then frankly admit

162. Smith notes that these are "the most striking characteristics of American police patterns, since no other part of the world has carried local autonomy in police management to such extreme lengths." SMITH, *op. cit. supra* note 161, at 342 (1940). Generally any change toward more consolidated police power is opposed. *E.g.*, Hoover, *The Basis of Sound Law Enforcement*, 291 *Annals* 39, 40 (1954).

"The police, under local control as in our form of government, are inclined to provide the protection their citizen-employers demand . . . ." Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 *J. CRIM. L., C. & P.S.* 395, 398 (1960).

163. Popular election of the sheriff is the general rule in this country, SMITH, *op. cit. supra* note 161, at 84-85 (1940), and selection of an appointed police administrator is apt to involve careful consideration of how responsive the various candidates likely would be to local opinion. Sherwood, *Roles of City Manager and Police*, *Public Management* 110 (May 1959). Possible candidates for the job may be limited to local residents, as is usually the case with regard to membership in the department. SMITH, *op. cit. supra* note 161, at 162, 246. Such a "police leader, appointed by representatives of the people, has to consider the hazard of unresponsiveness." Germann, *Hurdles to Professional Police Competence: IX. Confusions About Police and Civil Liberties*, 8 *Police* 28 (Jan.-Feb. 1964).

164. Hall, *Police and Law in a Democratic Society*, 28 *IND. L. J.* 133, 143 (1953).

165. *E.g.*, WILSON, *POLICE ADMINISTRATION* chs. 10, 11 (2d ed. 1963); INTERNATIONAL CITY MANAGERS' ASSOCIATION, *MUNICIPAL POLICE ADMINISTRATION* chs. 14, 15 (5th ed. 1961); CLIFT, *A GUIDE TO MODERN POLICE THINKING* ch. 29 (1956); Ashenhust, *Police Public Relations*, 2 *Police* 7 (March-April 1958); Brereton, *Law Enforcement—A Profession*, 1 *Police* 12 (May-June 1957).

166. Wilson, *Police Authority in a Free Society*, 54 *J. CRIM. L., C. & P.S.* 175, 176 (1963). "The police action demanded by the citizen from his protector is illegal in many jurisdictions," the Chicago Superintendent has commented on another occasion. Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 *J. CRIM. L., C. & P.S.* 395, 398 (1960). Commissioner Murphy of New York has lamented, "We cannot achieve, in our various communities, a

that under these circumstances they choose to respond to the public demand. Thus, Superintendent Wilson of Chicago has declared, "If we followed some of our court decisions literally, the public would be demanding my removal as Superintendent of Police and—I might add—with justification."<sup>167</sup> Chief Parker of Los Angeles has taken the view that "it is anticipated that the police will ignore these legal limitations when the immediate public welfare appears to demand police lawlessness."<sup>168</sup> And Chief Schrotel of Cincinnati has stated the dilemma of the policeman in these terms: "either he abides by the prescribed rules and renders *ineffective* service, or he *violates* or *circumvents* the rules and performs the service *required* of him."<sup>169</sup>

The fact that ignoring or violating the rules will result in the suppression of critical evidence and acquittal of the offender apparently is of little significance here. The police motivation is "to relieve the department of public pressures and unwelcome attention,"<sup>170</sup> and this is accomplished if arrests are made; a lack of convictions is less often viewed by the public as a reflection on the police as it is a reflection upon the prosecutor or court. Thus, in terms of maintaining popular support, the aggressive street patrol is a most significant part of the total enforcement program. Stolen property is recovered, dangerous weapons are removed from circulation, and occasionally a person wanted for a serious and much-publicized offense is arrested. The satisfaction of the general public that the police are "on the job" is, of course, thought to be a more important desideratum than the good will of the minority and low-income groups found in the high-crime areas where the aggressive patrol is utilized.

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climate of law and order when there is a gap between the police and the public they serve." *A Forum on the Interrogation of the Accused*, 49 CORNELL L.Q. 382, 383 (1964).

167. Wilson, *Police Authority in a Free Society*, 54 J. CRIM. L., C. & P.S. 175, 177 (1963).

168. Parker, *The Police Service—A Key to Community Quality*, 55 J. CRIM. L., C. & P.S. 273, 276 (1964).

169. Quoted in Germann, *Hurdles to Professional Police Competence: VII. Confusions About Police and Civil Liberties*, 8 Police 55, 56 (Nov.-Dec. 1963).

170. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 39.

"Some police executives and officers become frustrated because of pressures. With rising crime rates and pressures for action, particularly with respect to the anti-social offenses in extreme public disfavor, some police accept and implement policies that are technically illegal, in order 'to get the job done,' and in order to 'take the heat off.' When this happens, the end becomes a justification of the means, and the urges of expedient action replace any rational attention to civil rights." Germann, *Hurdles to Professional Police Competence: IX. Confusions About Police and Civil Liberties*, 8 Police 28 (Jan.-Feb. 1964).

The situation as to gambling and liquor violations is somewhat more complex because of the ambivalence of public attitudes toward such crimes.

On the one hand, there is considerable public tolerance of and participation in much of this criminal behavior and little disposition to cooperate with official efforts to eliminate it. On the other hand, evidence of police failure to eliminate gambling . . . brings down upon the department the wrath of a hostile press and other organs of public opinion.<sup>171</sup>

The pressure for tolerance appears to be fairly well distributed among the various criminal justice agencies; for example, it in part explains the judicial reluctance to convict or impose meaningful sentences. The pressure for vigorous enforcement, however, focuses directly upon the police because it is the police agency that normally determines the outer boundaries of enforcement. In the face of such pressures, there is considerable reluctance to retreat from aggressive enforcement against professional gambling. Rather, the arrest-without-conviction process in one sense allows the police to respond to these conflicting pressures simultaneously.

There is no substantial corresponding public pressure upon the police to conform their activities with what the law on arrest, search and seizure allows. In the first place, it would appear that the public is largely ignorant of the nature of the constitutionally required restrictions.<sup>172</sup> Secondly, "illegal searches are typically less offensive to the dignity of the citizenry and less often characterized by violence and brutality than are illegal interrogatory practices, . . . [and therefore they are] less likely to attract the interest of the press . . . [or] to arouse community opinion . . ."<sup>173</sup> As one commentator puts it:

No other constitutional guarantee is so openly flouted with so little public outcry. The people, usually jealous of their constitu-

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171. Allen, *supra* note 170, at 38-39.

172. "There exists a sizable ignorance about *police*, and we find many people who are unfamiliar with the role of law enforcement in a democratic society, and many who do not understand the goals of law enforcement.

"Often, people who blindly support . . . police are unaware of the nuances of legality, morality, and efficiency involved in any police undertaking and in any action by a police officer." Germann, *Hurdles to a Professional Police Competence: VII. Confusions About Police and Civil Liberties*, 8 *Police* 33, 35 (Sept.-Oct. 1963).

173. Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 *MINN. L. REV.* 1083, 1098 (1959).



tional freedoms, do not react to this violation of a fundamental guarantee as they do to violations of the right to freedom of speech, press, religion, and assembly. It does not shock the public conscience like brutal coercion of confessions or punishment without the safeguards of a trial.<sup>174</sup>

Finally, there appears to be little public concern with how the police treat people as long as they restrict their activities to those the public thinks are criminals.<sup>175</sup> Thus, the illegal search that uncovers evidence establishing the suspect's guilt does not come in for public disapprobation.

One factor that undoubtedly increases the impact of presumed public pressures upon the police is the prevailing defensive attitude of the police themselves. There is great hesitation upon the part of police administrators to acknowledge that the police are unable to cope with the crime problem, whatever the reason. They fear that the public would misinterpret the situation and that consequently respect for and confidence in the police would deteriorate.<sup>176</sup>

Most law enforcement officials long ago resigned themselves to the role of the underdog upon whom the unsolved problems of

174. Comment, 47 Nw. U. L. Rev. 493 (1952).

175. This conclusion is strongly supported by the findings of a most interesting empirical study. Westley, *The Police: A Sociological Study of Law, Custom and Morality* 118 (unpublished Ph.D. thesis, Dep't. of Sociology, Univ. of Chicago, 1951).

"If the majority of people in a community, in and out of the police service, take the position that the criminal syndicate member . . . [and other offenders] should be 'treated as an enemy of society,' and that 'any and all means should be used to neutralize his insidious attack upon the community,' it is quite possible, and highly probable, that police practices will reflect those kinds of mental commitments. . . ."

"And a portion of American police practices seems to be generally tolerated, if not totally blessed: harassment of anti-social elements; illegal entries for the purpose of obtaining information . . ." Germann, *Hurdles to Professional Police Competence: IX. Confusions About Police and Civil Liberties*, 8 *Police* 28 (Jan.-Feb. 1964).

176. In a recent Harris Survey it was concluded that currently, "while a majority of the public now expresses confidence in law enforcement agencies, sizable minorities feel they are doing an inadequate job." A cross-section of the public was asked: "Would you rate the job being done by law enforcement officials (on the local level, state level, federal level) positively or negatively?"

The public ratings were as follows:

<i>Local law enforcement</i>	<i>Per Cent</i>
Positive	64
Negative	34
Not sure	2
<i>State law enforcement</i>	
Positive	65
Negative	27
Not sure	8

society were piled high. . . . [T]he average police official . . . has learned two characteristics of his job: he must bear this burden well and he must refrain from discussing it lest it be a source of embarrassment to him and the community.<sup>177</sup>

As a former New York Deputy Commissioner puts it, the police-perceived public distaste for authority

tends to discourage policemen from disclosing their weaknesses and needs. Instead they are given to the defensive report which boasts that, while the situation is difficult and challenging, "your dedicated police department is on top of the job."<sup>178</sup>

Thus, it is not thought feasible to withdraw from a particular enforcement activity with the explanation that such action is necessitated by the legal restrictions on the police or the attitudes of the local judiciary.

There are also other pressures, some of an institutional nature, which make it difficult to delimit enforcement activity to that which will allow subsequent convictions. An officer in charge of a specialized unit, such as a vice squad or aggressive patrol force, can be expected to resist any redefinition of enforcement policy that would diminish the size of his unit or the scope of its operation. Likewise, he will not look favorably upon any possible change that would adversely affect his particular division's paper record of achievement. Inasmuch as it is common police practice to measure efficiency in terms of the number of arrests or "clearances" made, any drop-off in arrests (even of the unconvictable) would likely be viewed within the department as a sign of retrogression. Somehow a record of 100 arrests and 80 clearances but only 10 convictions outshines one of 30 arrests, 25 clearances, and 20 convictions. This near obsession with the apprehension of the offender as an end in itself also filters down to the lowest ranks, where "the natural ardor of the chase"<sup>179</sup> also takes hold.

#### *4. Reasons for the Practice: Ability to Realize Certain Objectives Without Conviction*

Whatever remaining doubts the police may have about the wisdom of

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##### *Federal law enforcement*

Positive	64
Negative	27
Not sure	9

Chicago Daily News, Dec. 8, 1964, p. 5, col. 1-4.

177. Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140, 143-44 (1963).

178. Dougherty, *The Case for the Cop*, Harper's, April 1964, pp. 129, 132.

179. This apt phrase is from the pen of Lord Justice Devlin, who also has some other interesting observations on why police act the way they do. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 55 (1958).

making arrests and searches when conviction or meaningful conviction will not follow are swept away upon consideration of what can be accomplished even without conviction. As the chances of conviction diminish these other consequences take on added importance, and finally they become the primary objectives within certain avenues of enforcement. Police come to view arrest without conviction as a means of imposing some sanctions upon offenders, getting weapons out of circulation, recovering stolen property, and "keeping the lid on" in high-crime areas of the community.

A number of sanctions can be imposed upon the violator of the gambling or liquor laws even when conviction is unattainable or is not attempted. A period of detention, ranging from a matter of hours to a couple of days, is possible. Some offenders are released by the police after a few hours, others may obtain their release then or later by posting bond or by habeas corpus, while still others may be held until their case reaches court and is then dismissed. The police view this brief period of custody not only as a means of punishment but also as a means of interrupting, at least for a time, the illegal activity.

Except in those cases (usually involving frequenters of illegal gambling or liquor establishments) where the police release the offender after a few hours, the costs of obtaining release and terminating the action are an added sanction. In some locales it is customary for professional gambling and liquor offenders, particularly those with syndicate connections, to obtain release by writ of habeas corpus.<sup>180</sup> This requires the services of an attorney.<sup>181</sup> Added to that cost is the charge of the professional bondsmen,<sup>182</sup> because counsel at habeas corpus hearings ordinarily do not challenge the basis of the original arrest in order to obtain the outright release of their clients.<sup>183</sup> Rather, habeas corpus is viewed merely as a means of

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180. See note 106 *supra*.

181. In the one metropolitan area studied in which use of the writ for this purpose is very common, the attorneys' fees for obtaining release on such a writ usually are \$75.

182. In all of the jurisdictions observed, the bondsman would charge 10% of the bond as his fee. The amount of bond set in these cases varies considerably, but the lowest bond observed was \$300, set on a policy "bagman."

183. Just why this is so is not entirely clear. Some defense attorneys, when asked why they did not challenge the arrest and detention in order to obtain outright release of their clients, said they thought this would be inappropriate and that the judges would not listen to such an argument. It may be that their clients do not think it desirable to challenge the arrest and release practice directly; they may prefer present practice to what they think the police might do in the event of a successful challenge. There may be some truth to the claim that judges would not listen to arguments for outright release. Judges know of, tolerate, and in a sense support the arrest-for-purposes-other-than-conviction practice.

bringing about a prompt release on bond.<sup>184</sup> In other communities this use of the writ has not developed, but bondsmen's and attorneys' fees nonetheless become a charge on these offenders' illegal operations. At the first regular appearance of the offender in court, bond will be set unless the system is such that it is possible to go to trial immediately. Everyone expects that the trial will be terminated upon the granting of a motion to suppress the evidence obtained by the police, but the services of counsel are thought necessary to insure this result.

The offender may incur other costs because of the interruption of his illegal activity and the seizure of his records. For example, if a "wireroom," policy "office," or similar activity is uncovered in a particular apartment or house, the offender usually will find it necessary to relocate his operation. The cost of obtaining other quarters for use during a period when rent has already been paid on the premises previously used increases the operating expense of the illegal business. Moreover, in order to maintain good "customer relations," those who take bets in various forms of gambling operations often feel compelled to pay off all bettors who claim to have had winning bets, a matter which cannot be disproven because of police

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184. There appears to be considerable confusion about precisely what is to be decided when habeas corpus is brought concerning a person recently arrested and not yet brought into court, and also about when, if ever, it is proper to set bail. It would appear that outright release is proper only if there are presently no grounds to support an arrest or if, notwithstanding the existence of such grounds, there is not sufficient evidence to charge and the time for in-custody investigation has expired. Continuation of custody would appear proper if grounds supporting the arrest are present, the time for in-custody investigation has not expired, and the custody of the suspect is essential to the investigation. Release on bail would seem proper if the person were charged, and, perhaps, when it is necessary to adjourn the habeas corpus hearing for a time. It also would seem proper when the time for post-arrest investigation has not expired but it is clear that continued custody of the suspect is not essential to the investigation. See *LAFAVE ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 332-37 (1965).

Appellate cases on these problems are rare. In one fairly recent case the Michigan court quoted with approval language of the United States Supreme Court in *Barth v. Clise*, 79 U.S. 400, 402 (1870), that the judge has custody over the prisoner from the time of his production until the case finally is disposed of and that "pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court." *People v. McCager*, 367 Mich. 116, 123, 116 N.W.2d 205, 208 (1962). Shortly after the decision in this case, the court issued an order to lower courts in the state directing that only brief continuances be granted, and the court then added: "Because determination of legal cause of detention in habeas corpus proceedings must be made expeditiously, with no more than such brief delay as above indicated, the question of release of a prisoner on bail pending hearing should not arise until after determination that legal cause exists for detention. Thereafter, if the offense for which the prisoner is detained is bailable, release may be ordered on bail notwithstanding the existence of legal cause for detention." 42 MICH. ST. BAR J. 56 (April 1963).

seizure of the bet records. In policy and numbers, where winners are paid at extremely high odds, such payoffs are not made.<sup>185</sup> A bookie, however, with an established clientele of regular bettors, ordinarily will pay off all claimed winners. Knowing this, the police often will time a raid on a "wireroom" so that the arrest of the bookie occurs after all bets for that day have been received.

Of major significance in these cases is the fact that the police seize all property used in the illegal operation. If the activity involves use of a telephone, it is removed at the time of the raid. Frequently there is a working arrangement between telephone company officials and law enforcement personnel to prevent reinstallation of a telephone for this offender.<sup>186</sup> Any illegal liquor or gambling paraphernalia found will either be destroyed on the spot or else seized. Since these items are contraband,<sup>187</sup> the person from whom they were seized is not entitled to their return even if the search was unlawful.<sup>188</sup>

Money which is thought to be connected with the illegal enterprise also is seized. Funds which are "in play" when police interrupt a gambling game obviously are connected with the crime, but it is less certain that this nexus is present when money on the person of an arrested bookie or bagman is seized. It is common practice for the police to question these individuals in an attempt to distinguish between private funds and gambling funds, and the case report in these instances will indicate whether the confiscated funds were "admitted to be used in gambling." In one

185. Usually players are forewarned of this possibility. For example, in Chicago the B & O and related policy wheels distribute a small eight-page booklet listing pay-off rates. On the last page the player is cautioned, "We Pay No Shut-Out Books," and then is advised to "Please notify management of any complaints."

186. For example, in one large metropolitan area the practice is for the police, after a telephone removal, to inform the prosecutor's office and the telephone company of this fact. Under a standing agreement with the company, the telephone will not be reinstalled until such time as a clearance is obtained from the prosecuting attorney's office. The prosecutor has delegated this clearance function to the vice bureau of the police department. In this department, over 200 telephones were seized in a one-year period.

187. Contraband usually is defined as any article "which it is unlawful for a person to have in his possession . . ." *Carroll v. United States*, 267 U.S. 132, 150 (1925). Included are such items as lottery tickets, *United States v. Seltzer*, 5 F.2d 364 (D. Mass. 1925); slot machines, *State v. Hoffman*, 245 Wis. 398, 14 N.W.2d 148 (1944); cards, chips, and dice, *State v. Gambling Equipment*, 45 Ariz. 112, 40 P.2d 746 (1935); and illegal liquor, *State v. McGee*, 55 S.C. 247, 33 S.E. 353 (1898).

188. *United States v. Jeffers*, 342 U.S. 48 (1951); *Trupiano v. United States*, 334 U.S. 699 (1947).

large urban center, approximately 34,000 dollars was confiscated from gamblers over a one-year period.<sup>189</sup>

In cases where the gambler is not prosecuted or, if prosecuted, is not convicted, the funds seldom are returned. In some police departments a high administrative officer is given the responsibility of determining whether or not to return money obtained in a gambling raid. The criteria which usually govern his decision are (a) whether the person has an extensive criminal record, and (b) whether he was clearly guilty of the offense for which conviction is unattainable. If this officer refuses to return the money, the individual will sometimes bring suit to force return, but, as one police official observed, this is done only when the individual feels that the amount is worth fighting for. Sometimes the court will order return of the money, either because there is no convincing evidence that the money was used in gambling or else because it is thought the illegal search requires return. It has been held, however, that neither acquittal of the gambling charge nor suppression of the money because it was obtained by an illegal search necessarily compels return of the money.<sup>190</sup> Moreover, since the quantum of proof in the civil action is only a preponderance of evidence, recovery has been denied in a number of cases in which the connection

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189. In this same municipality, \$8,810.31 was seized in one precinct in a six-month period. It is interesting to note that the money was taken from 582 individuals, only 24 of whom were ever prosecuted.

190. For example, in *Dufauchard v. Ward*, 51 Ill. App. 2d 42, 200 N.E.2d 833 (1964), it was held that plaintiff, though acquitted in the criminal action, was not necessarily entitled to return of money alleged to be an integral part of his gambling operation, because the instant action, being a civil suit, required proof only by a preponderance of evidence. In *Martucci v. Detroit Comm'r of Police*, 322 Mich. 270, 33 N.W.2d 789 (1948), plaintiff was suing for return of money seized by the police as gambling funds, but also was able to raise in his behalf the fact that in the criminal case the money was suppressed as having been obtained by an unreasonable search. In one part of the opinion the court seems to say simply that the exclusionary rule is not relevant in a recovery action ("Likewise, in the instant case we hold that the money, admittedly the proceeds of gambling, cannot be recovered by mandamus. The dismissal of the criminal proceedings for technical reasons does not in any way alter such result." *Id.* at 273, 33 N.W.2d at 791.). Elsewhere the court suggests that it does apply but that a new determination of the legality of the search, applying the civil standard of proof, is appropriate. ("On the question of whether or not the court in the civil action is bound by the determination of the examining magistrate in the criminal case, we hold that it is not. For one thing, the rules of evidence governing the two cases are unlike. . . . Notwithstanding the examining magistrate concluded that there had been an unlawful search and seizure, there is sufficient evidence in this record to sustain a finding of a lawful search and seizure." *Id.* at 274, 33 N.W.2d at 791.)

A somewhat similar issue has arisen in the federal courts in cases where gambling funds uncovered by an unlawful search are made the object of a forfeiture proceeding under the internal revenue laws. The courts are not in agree-

between the money and the gambling operation was not clearly established.<sup>191</sup>

The public nuisance law of some jurisdictions permits other items not per se illegal but used in connection with the illegal activity to be confiscated. The statutory provisions of Michigan are illustrative. There "any building, vehicle, boat, aircraft or place" used for purposes of lewdness, prostitution, gambling, or the illegal storage or sale of narcotics or intoxicating liquor is declared a nuisance.<sup>192</sup> Such nuisance may be perpetually enjoined,<sup>193</sup> with the risk of substantial penalties for contempt should the injunction be violated,<sup>194</sup> or the vehicle, boat, or aircraft or contents of the building may be seized and sold, with the proceeds going to the state.<sup>195</sup>

The most common use of these provisions is against automobiles operated by "bagmen" in making their pick-ups and deliveries.<sup>196</sup> When the police

ment on the question of whether the exclusionary rule applies in such instances. Compare *United States v. \$1,058.00 in United States Currency*, 323 F.2d 211 (3rd Cir. 1963) (holding exclusionary rule not applicable), with *United States v. \$5,608.30 in United States Coin and Currency*, 326 F.2d 359 (7th Cir. 1964); *United States v. \$4,171.00 in United States Currency*, 200 F. Supp. 28 (N.D. Ill. 1961) (both holding the exclusionary rule applicable). It is interesting to note that Supreme Court cases can be found supporting both positions. In the first of the above three cases, the court said it was compelled to the result by *United States v. One Ford Coupe*, 272 U.S. 321 (1926), while the last case cited above relied upon *Boyd v. United States*, 116 U.S. 616 (1886).

191. For example, see *Dufauchard v. Ward*, note 190 *supra*, where the court refused to return \$844 found in the pocket of a walking bookmaker. The court observed:

"Plaintiff seeks to distinguish the facts of this case from those in other contraband cases, claiming a difference in character of the depository where the money was kept in plaintiff's drawers rather than in counter drawers, as in *People v. Wrest*, 345 Ill. App. 186, 103 N.E.2d 171 (1951) or in slot machines, as in *Germania Club v. City of Chicago*, 332 Ill. App. 112, 74 N.E.2d 29 (1947). We believe that variations in the type of receptacle, limited only by the ingenuity of persons notorious for their resourcefulness, do not require the application of any different legal principle, provided only that the money, as in the case at bar, is shown to have been the stake or otherwise an integral part of the gambling operation. Cases from other jurisdictions illustrate the wide variety of storage places from which cash has been seized and held subject to confiscation: *State v. Fossett*, 11 Terry 460, 50 Del. 560, 134 A.2d 272 (1957) (desk of bookmaker); *Commonwealth v. Blythe*, 178 Pa. Super. 575, 115 A.2d 906 (1955) (apron of bingo-game operator); *Fairmount Engine Co. v. Montgomery County*, 135 Pa. Super. 367, 5 A.2d 419 (1939) (safe in basement of engine house in which lottery was operated); *Rader v. Simmons*, 290 N.Y. 449, 49 N.E.2d 523, 525 (1943) (pockets of policy "banker"); and *Kenny v. Wachenfield*, 184 A. 737, 14 N.J. Misc. 322 (1936) (pocket of bookmaker)." 51 Ill. App. 2d at 42, 200 N.E.2d at 835-36.

192. MICH. STAT. ANN. § 27A.3801 (1962).

193. MICH. STAT. ANN. § 27A.3805 (1962).

194. MICH. STAT. ANN. § 27A.3820 (1962). The person offending may be fined not more than \$1,000.00 or imprisoned in the county jail not more than 6 months, or both.

195. MICH. STAT. ANN. § 27A.3825 (1962).

196. The provision allowing confiscation of automobiles has been held to be constitutional, *People ex rel. Wayne Prosecuting Attorney v. Sill*, 310 Mich. 570,

confiscate a car in such a case, the usual practice is to begin a nuisance action without regard to whether the search that uncovered the violation was lawful. Sometimes such action is not undertaken and the car is returned; this is done when the search was not legal *and* the offense is a minor one committed by a person who does not have a prior record. In other instances, however, it is common for the case to reach the point at which a "consent decree"<sup>197</sup> is entered, allowing the owner of the automobile to recover his car upon the payment of court costs. The costs are set at an amount calculated to induce the owner to enter into the consent decree rather than challenge in court the validity of the nuisance proceedings.<sup>198</sup> The prosecutor is amenable to the consent decree procedure in most cases because he knows that the nuisance action might successfully be challenged because of the unlawful search.<sup>199</sup> The owner of the car also ordinarily prefers this alternative, because the cost is less than the attorney's fees would otherwise be and he does not have to wait the two or three months which would elapse before the nuisance action could be decided in his favor. Actual trial of the nuisance action to determine

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17 N.W.2d 756 (1945), and it has been held that a single instance of an automobile being used to transport mutual tickets was sufficient for the automobile to be declared a nuisance and sold. *People ex rel. Wayne Prosecuting Attorney v. Bitonti*, 306 Mich. 115, 10 N.W.2d 329 (1943).

197. The typical decree states that the owner of the car is permanently enjoined from using the automobile for illegal activity, that the car will be returned upon payment of costs, and that the owner frees the officers from any liability for damages by acknowledging that the seizure of the car was lawful.

198. In one city the local judges have established a scale of court costs based upon the age of the automobile. For example, costs for return of a new car are \$119, while costs for a car manufactured four or more years earlier are \$69. Because this is so, "bagmen" usually use old cars in their business; sometimes the car is not even worth the court costs, in which case the owner will not appear, and a default decree will be entered. In one four-month period in this city, 163 consent decrees and 20 default decrees were entered.

199. The local judges are apparently of the view that the exclusionary rule is applicable in such a nuisance action. There are no appellate cases under the Michigan statute that so hold, however. Compare the view taken by the Michigan Supreme Court toward a somewhat analogous situation in the *Martucci* case, discussed in note 190 *supra*.

There is no agreement in the cases elsewhere on whether the exclusionary rule is applicable in a proceeding to forfeit an automobile used in criminal activity. Compare *Commonwealth v. One 1958 Plymouth Sedan*, 414 Pa. 540, 201 A.2d 427 (1964); *United States v. One 1956 Ford Tudor Sedan*, 253 F.2d 725 (4th Cir. 1958) (both holding auto can be forfeited notwithstanding illegal seizure), *with United States v. One 1963 Cadillac Hardtop*, 220 F. Supp. 841 (E.D. Wis. 1963); *United States v. One 1960 Lincoln Two-Door Hardtop*, 195 F. Supp. 205 (D. Mass. 1961) (both holding that illegally seized evidence is inadmissible).

Subsequent to the completion of this article the United States Supreme Court has held that the exclusionary rule must be applied in forfeiture cases. *One 1958 Plymouth Sedan v. Pennsylvania*, — U.S. —, 85 Sup. Ct. 1246 (1965).



whether the car should be declared a nuisance occurs only when the vehicle owner is unwilling to enter into a consent decree or when the prosecutor, convinced of the legality of the search against one who has committed a serious violation or who has a bad record, knows he has a very good case.

Although the above sanctions sometimes also are imposed upon those searched or arrested by aggressive street patrols in high-crime areas, the police view of what is achieved through the latter practice is somewhat different. First, the activities of these patrols, though often illegal, are considered an effective "show of force" that deters to some extent the amount of street crime in the area. Also, the aggressive patrols sometimes uncover evidence which aids in the investigation of other offenders—persons who cannot raise the question of unlawful search because they lack the standing to do so.<sup>200</sup> Stolen property is recovered, and, though it is not contraband, it cannot be reclaimed by the person searched against the claim of the rightful owner.<sup>201</sup> Thus, even though successful prosecution of the possessor may be impossible because of the nature of the search, the police can clear another burglary or theft and can minimize the actual harm done to the victim.

Removing dangerous weapons from circulation by the arrest-search practices of the aggressive patrols is of considerable importance to the police. Because guns and other weapons are not per se contraband,<sup>202</sup> the person searched might in many instances insist upon the return of the weapon. Thus steps are frequently taken at one stage or another to persuade the person involved not to press for its return. In some cases, for example, the searching officer may indicate that he is being lenient in merely seizing the weapon instead of having the person prosecuted for carrying a concealed weapon.<sup>203</sup> If the offender is actually brought to trial

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200. The prevailing rule on standing is that in order to challenge a search and seizure as unreasonable "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." *Jones v. United States*, 362 U.S. 257, 261 (1960). Compare the unique California position: "Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights." *People v. Martin*, 45 Cal.2d 755, 759, 290 P.2d 855, 857 (1955).

201. *Boyd v. United States*, 116 U.S. 616, 624 (1886).

202. Certain kinds of weapons, or weapons put to a particular use, are sometimes characterized as contraband. *E.g.*, *Gemert v. Pooler*, 171 Wis. 271, 177 N.W. 1 (1920).

203. Sometimes the officer merely may seize the weapon and not make an

for carrying a concealed weapon, but the search that uncovered the weapon is declared to have been unreasonable, the judge may "suggest" to the defendant that for his own good it would be best if the gun were not returned to him.<sup>204</sup>

### 5. *Toward Remediating the Situation*

The arrest-for-purposes-other-than-conviction phenomenon is the product of diverse, intermeshed causes. Moreover, it is a practice which tends to be self-perpetuating; as this informal imposition of sanctions replaces trial, conviction, and sentencing as a means of dealing with certain offenders, to the knowledge of all participants in the criminal justice process, there is less and less concern from all quarters about making the abandoned formal processes workable. Under these circumstances, it is fair to say that remediating the situation would not be an easy task.

It may be profitable to inquire whether the availability of the exclusionary rule should not be broadened to prevent the government from further profiting from the wrongdoings of the police. For example, the current practice of making illegal searches because of an awareness that the fruits thereof could be used in court against other persons<sup>205</sup> raises a serious

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arrest. For example, officers stopped a car because a tail light was burned out, searched the driver, and found a knife in his pocket. They searched the entire car but found nothing else of significance. One of the officers cautioned the driver to have the light fixed and then walked back to the patrol car without returning the knife. The suspect followed the officer back to the car and asked if he could have his knife back, to which the officer responded: "Do you want to end up in court?" The driver shrugged his shoulders, returned to his own car, and drove off.

204. For example, in one case a defendant was brought into court on a charge of carrying a concealed weapon. Defendant's attorney made a motion to suppress, after which the arresting officer explained that he made the arrest because he thought the man matched a wanted notice for a robbery suspect. The officer made no attempt to elaborate on this, and, in response to a question from the judge, he said it was learned later that the defendant was not the wanted man and that he had no record. The assistant prosecutor indicated he did not oppose suppression of the gun, and the judge granted the motion. Then the judge asked the defendant whether he desired to "stay out of trouble," to which the defendant replied in the affirmative. The judge added, "Then you do not want the gun back, do you?" Defendant and his counsel both quickly agreed.

205. Although the police undoubtedly are not totally aware of the significance of the standing concept as it relates to how illegally obtained evidence might subsequently be introduced in court, there is some appreciation of the possible use of such evidence against others. For example, in Illinois the case of *People v. Tillman*, 1 Ill.2d 525, 116 N.E.2d 344 (1954), has sometimes been called to the attention of the police. There an informant of unknown reliability told officers that a man of a certain description was selling narcotics and that he, along with a heavy-set woman, could be found in a certain room in a certain hotel. They went to the room and found such a woman standing in the hall outside the room and

question concerning the prevailing doctrine on standing.<sup>206</sup> Similarly, the holding of some courts that the exclusionary rule has no application in a forfeiture or similar proceeding because it is a civil action,<sup>207</sup> when viewed against the practice described earlier, also bears reexamination.<sup>208</sup> It must be admitted, however, that these doctrines on the limits of the exclusionary rule are by no means the predominant causes of the described practices.<sup>209</sup>

How the pressures upon the police to exceed the limits of their authority

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saw a man answering the description lying asleep in the room. The officers illegally searched the woman and found narcotics on her person, and this evidence, together with the prior information was held to provide grounds for arrest and search of the man.

206. See note 200 *supra*.

207. Courts taking this approach usually make two assumptions: (1) that the exclusionary rule applies only in criminal cases; and (2) that a forfeiture proceeding is not a criminal case. See, *e.g.*, *Commonwealth v. One 1958 Plymouth Sedan*, 414 Pa. 540, 201 A.2d 427 (1964). Both assumptions are questionable. Part of the considerable evidence that the Fourth Amendment has a much wider frame of reference than mere criminal prosecutions is the fact that many of the searches the colonists found so objectionable were made under forfeiture statutes. *Frank v. Maryland*, 359 U.S. 360, 376-77 (1959) (dissenting opinion). Moreover, forfeiture actions begin to look much like criminal cases when one finds judges denying forfeiture because of conviction or acquittal of the criminal charge on the theory of double jeopardy, or denying forfeiture where it is discretionary because of a view that the criminal sanction imposed was adequate. On the latter practice, see *Commonwealth v. One 1959 Chevrolet Impala Coupe*, 201 Pa. Super. 145, 191 A.2d 717 (1963). As to the former: "The somewhat anomalous nature of forfeiture as, in effect, punishment inflicted for a crime by means of a civil proceeding in rem has given rise to most of the difficulties apparent in the cases determining whether the results of a criminal prosecution for the offense in question should be regarded as conclusive in the subsequent forfeiture proceeding. Under the traditional notions as to double jeopardy, the state should be given only one shot at the offender, and there seems to be little doubt that the man in the street would regard the ordinary forfeiture proceeding, where property innocent in itself is taken merely because it was allegedly used in carrying out a crime, as a second shot. Such broad policy considerations would appear to justify the conclusion reached in the case of *Coffey v. United States* (1886) 116 US 436 . . . that an acquittal in the criminal prosecution bars the forfeiture as to the acquitted defendant. However, certain difficulties arise in the application of the rule. Neither the *Coffey* Case nor subsequent cases applying its rule appear to have decided whether it is founded upon broad *res judicata* principles or upon the rules as to double jeopardy or *autrefois acquit*. The difference in the burden of proof imposed upon the government in the two proceedings, and at least technical differences in the parties and issues, logically preclude an application of *res judicata*; and if double jeopardy is relied upon, it is difficult to explain the numerous cases holding that a prior conviction is no bar to a subsequent forfeiture." Annot., 27 A.L.R.2d 1137, 1138-39 (1953).

208. Since the above was written the United States Supreme Court has resolved the question. In one *1958 Plymouth Sedan v. Pennsylvania*, — U.S. —, 85 Sup. Ct. 1246 (1965), the Court held that the exclusionary rule is applicable to forfeiture cases.

209. Many other purposes are served beyond admitting the evidence in forfeiture proceedings or in criminal proceedings against others. Moreover, as noted earlier, even where the exclusionary rule is thought applicable in forfeiture cases, the consent decree device is still available.

can be overcome is not readily apparent. Undoubtedly more could and should be done by the organized bar to enhance public appreciation of the importance of constitutional limitations on police authority, but this is a long-range task. But, it has been said that

it is unsound to assume that police conduct is merely a necessary effect of public attitudes, and that until the latter change, the former will persist. . . . Indeed, the challenge to the conscientious police official is precisely to use legal controls in such ways as to alter unsound, undemocratic attitudes and misdirected emotions.<sup>210</sup>

It is unclear, however, whether this challenge can be met unless more efforts are made to insulate the police from public pressures.

Police administrators generally have failed to subject the existing practices in their department to careful scrutiny and evaluation. "The average police official traditionally concentrates on day-to-day requirements. He is often so responsive to the needs of the day as to make time unavailable in which to respond to the total law enforcement needs of the community over a longer period of time."<sup>211</sup> Thus, the arrest-for-purposes-other-than-conviction practice continues as a presumably effective short-range solution, without attention to the adverse impact the practice may have on attaining other goals. For example, it would be relevant to ask whether deliberate violation of existing rules on arrest and search in certain areas of enforcement does not lead ultimately to greater across-the-board limitations upon police authority.<sup>212</sup>

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210. Hall, *Police and Law in a Democratic Society*, 28 *IND L.J.* 133, 161 (1953).

211. Goldstein, *Research and Training Needs in Police Administration*, Oct. 22, 1962 (paper prepared for Center for Programs in Government Administration, University of Wisconsin).

212. Courts are undoubtedly influenced by their assumption as to how police will react to legal requirements. If there is confidence that they will stay well within defined limits, their powers may be stated broadly. "We like to grant large powers so as to prevent any legal quibble about their extent, but we expect the holders of them to act fairly and reasonably and well within them." *DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND* 16 (1958). On the other hand, if it is thought that the police will regularly exceed the limits, the tendency is to impose severe and perhaps unrealistic limitations. "Among the opponents of the amendment [broadening the powers of the police in Japan] there seems to have been this feeling: Allow the police seven miles and they will go nine miles; therefore, if we want to keep them at seven miles, better give them six miles." Abe, *Police Detention and Arrest Privileges Under Foreign Law—Japan*, 51 *J. CRIM. L., C. & P.S.* 429, 423 (1960).

The search-incident-to-arrest-for-a-traffic-violation situation would appear to be an excellent example. Some years ago I noted that few courts found reason to question the validity of such searches. Note, 1959 *Wis. L. Rev.* 347. This is no longer true, and a number of appellate courts have condemned the practice. It is

Of course, just as responsibility for the present situation does not lie solely with the police, the police alone cannot remedy the situation. To the extent that current practices are an accommodation resulting from a basic difference between the police and the courts concerning the desirability of enforcement against certain forms of professional gambling, it is clear that means must be sought to overcome this internal conflict in the criminal justice system. Some meaningful dialogue between the police and the judiciary is desirable, to the end of eliminating insofar as is possible the unhappy situation in which the police are responsible for enforcement where conviction is largely unattainable or largely meaningless.

However, perhaps the greatest lesson to be learned from the practices described herein is simply this: In the preoccupation with the exclusionary rule sanction, the fact too often overlooked is that a negative sanction can induce proper law enforcement behavior only if the police have available proper and meaningful methods of carrying out the tasks that are expected of them. This is in no sense depreciatory of the exclusionary rule itself, for it "says nothing about the content of the law governing the police."<sup>213</sup> But the success of the exclusionary rule does depend in some measure upon "the content of the law." It is unlikely, for example, that the present mode of enforcement against the "wireroom" bookie will cease until some lawful means of obtaining evidence against such an offender is clearly identified.

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my guess that this change in attitude is not attributable so much to a more sophisticated analysis of the law of search and seizure than it is to a haunting suspicion that the police were abusing the privilege. In this regard, it is interesting to note that the cases in which the courts switched to the more restrictive view often involved arrests for traffic violations not by officers assigned to traffic enforcement, but instead by officers responsible for the vice crimes. *E.g.*, *Barnes v. State*, 25 Wis.2d 116, 130 N.W.2d 264 (1964); *People v. Watkins*, 19 Ill.2d 11, 166 N.E.2d 433 (1960).

213. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C. & P.S. 255 (1961).