Improving Police Performance through the Exclusionary Rule--Part II: Defining the Norms and Training the Police

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I cannot concur without pointing out that the courts have been left to make rules and apply constitutional standards with little, if any, real knowledge or guidance regarding the difficulties which face the police in solving such crimes in our crowded metropolitan centers. Moreover, Congress and the legislatures have failed to make appropriate inquiry and statutory provision to meet the situation.

Chief Judge Lumbard, concurring
United States ex rel. Williams v. Fay,
323 F.2d 65, 70 (2d Cir. 1963)

I doubt that policemen have the time or inclination to read the opinions of appellate courts, and even if they did so it is hardly likely they would grasp their full import without sustained expert guidance. The basic training of a policeman is rarely adequate to make him understand what he can and cannot do in all situations; it is unlikely that without some special effort and outside help he will ever understand what he did wrong in a given case. Moreover, we cannot blame him too much for not accepting what he does not understand.


With rapidly changing techniques and the rapidly changing legal situation, the police have a tremendous burden of education, not only for the new members of their departments, but for the entering recruits. Indeed, in many respects we have to reeducate twenty-five thousand men every time a new interpretation or new decision is handed down from the Bench. This puts a terrific burden on keeping the system up to date.


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A. INTRODUCTION

In part I of this article, appearing in the last issue of this Review, it was noted that the principal basis for the exclusion of probative evidence is that of favorably affecting future police attitudes and practices. Indeed, the “ultimate test” of the exclusionary rule is said to be whether law enforcement officers are in fact deterred by the threat of exclusion. It is unfortunate but true that there is not presently available sufficient evidence for a precise measurement of the impact of the exclusionary rule in current criminal justice administration. Nonetheless, on the evidence that is available it is possible to make some judgment about whether the exclusionary rule is doing as good a job of improving police performance as one might hope and, if it is not, what factors are contributing to this result.

For the exclusionary rule to be completely effective, it would appear that (1) the requirements of the law on search and seizure and related practices must be developed in some detail and in a manner sufficiently responsive to both the practical needs of enforcement and the individual right of privacy; (2) these requirements must be set forth in a manner that can be understood and applied by the front-line lower-echelon police officer and must be effectively communicated to him; and (3) the police desire to obtain convictions must be sufficiently great to induce them to comply with these requirements.

It is fair to say that there are deficiencies in all three respects. As noted in Part I, the inability of the police to obtain convictions or meaningful convictions against certain offenders has resulted in abandonment of conviction as an objective in many cases. The result is a program of arrests and searches without concern for the legal requirements, the objective of which is the imposition of informal sanctions upon the presumably unconvictable offenders. Moreover, the local court practices described in Part I further debilitate the effectiveness of the exclusionary rule. The factual and legal bases of police action often are not adequately presented at the hearing on the motion to suppress, and in turn the specific grounds upon which evidence is suppressed are seldom adequately communicated back to the police. Inconsistencies between the standards of different judges,

between the standards applied for different crimes, and between the standards applied when warrants are requested and when evidence is challenged, all contribute to limited police understanding and acceptance of local judges' supervisory actions.

Although the exclusionary rule itself says nothing about the content of the law on arrest or search and seizure, it is apparent that the objective behind the rule cannot be realized unless there is content—and, it might be added, content that is both realistic and understandable. It would be difficult to justify the exclusion of evidence because of police misconduct if it were not thought possible that the legal system could provide the police with a reasonably definitive statement of the limitations on their authority. Indeed, it is often said that the principal benefit to be derived from the exclusionary rule is the impetus it gives to norm-defining and police-teaching; the nature of the sanction requires appellate courts to give repeated attention to police conduct, while its consequences impel legislative activity and renewed training efforts.

To conclude this survey, then, it is necessary (1) to assess the contributions of the legislatures and appellate courts in defining norms of police conduct; and (2) to determine how effectively these norms are being communicated to the police via ongoing training efforts. As in Part I, the basic objective is to identify and understand the factors that tend to deprive the exclusionary rule of its maximum effectiveness.

B. Norm-Defining by the Legislatures

1. Lack of Legislative Action

Because of the practical limitations upon the power of appellate courts to develop a comprehensive set of norms to govern police action in acquiring evidence, a preference for legislative attention to the subject often has been stated. Professor Waite explains it this way:

Wise rule-making must be based on comprehensive, accurate knowledge of need and effect. It requires the gathering of information and its study. It should be the product of various minds. As a practical matter it should give some heed to public opinion. A legislature can proceed along such lines. It can order investigations; it can set up hearings by committees. What it proposes to do, it can reveal in advance. It will then be educated by pressure groups; it will learn of public opinion through the press. Its formulations can be a compromise of various ideas and many minds.
A court, on the contrary, can do none of these things. It cannot announce tentative conclusions in advance and thereby gain the wisdom of public discussion. It cannot set up committees of inquiry; it can neither seek nor acquire information except what is furnished by partisan attorneys engaged in the trial. Its conclusions of proper policy can be no more than a voicing of personal opinions based on the limited empirical knowledge of its individual members.3

Police administrators often have voiced a similar view.4 However, this position is by no means confined to those who might be characterized as being "police-prosecution oriented."5 The Chief Judge of the United States Court of Appeals, Second Circuit, recently observed:

It is not by judicial action that the intelligence and effectiveness of local police work can be improved. It is not for the judges to define the powers of investigation and inquiry.... In these important areas only Congress and the state legislatures can redress the balance and provide due process for all the people.... While the courts must play their part, the Bar should not expect judges to discover policy and make rules in default of legislative findings and statutes which, to be effective, must be based on accumulated experience and an appraisal of competing interests.6

As this comment suggests, the several legislatures have given less than adequate attention to the need for clear-cut rules on police conduct. Indeed, a survey of existing codes of criminal procedure reflects minimal attention to the police stage of the criminal justice process in general and to the problem of search and seizure in particular. In most states today, these codes, if they deal with search at all, are confined to setting forth requirements for a search warrant.7 The statutes not only deal with the one aspect of search that least involves police decision-making, but they typically do so in a way that gives little or no attention to the police role. For the most part, these laws go into considerable detail

7. See, e.g., § 542.260 RSMo (1959); ARIZ. REV. STAT. ANN. § 13-1441 (1956); ARK. STAT. ANN. § 43-201 (1964); CONN. GEN. STAT. ANN. § 54-33a (Supp. 1964); PA. STAT. ANN. tit. 19, § 982 (1964); WASH. REV. CODE ANN. § 10.79.010 (1961).
on the authority and responsibility of the magistrate in issuing warrants and in receiving and disposing of property obtained by virtue of their execution. By comparison, the responsibilities of the police in executing search warrants are dealt with only summarily, if at all.

The other search problems of interest to the police, such as the limitations on search incident to arrest, frisking incident to a field interrogation, or search of vehicles, are seldom the subject of legislation. Those statutes that do exist are rarely of recent vintage, and, on their face at least, may be totally inconsistent with present constitutional limitations on police conduct.8

There is little evidence of any renewed efforts by the legislatures of the several states to become involved in defining norms for police conduct, notwithstanding the increased role of appellate courts in this area and the frequent criticism of their decisions.9 Although in recent years a number of states, stimulated to a large extent by the Model Penal Code, have undertaken a complete recodification of their substantive criminal law,10 there has been no corresponding effort to rework the procedural codes; at present, only Illinois has a completely revised code of criminal procedure.11 Piecemeal revision of procedural codes has continued in other states, but very little of this ad hoc legislative response has clarified the authority of the police in acquiring physical evidence.12 What has been done, however, has been stimulated in large measure by the existence of the exclusionary rule.13

8. See, e.g., Colo. Rev. Stat. § 40-11-1 (1953), making it the duty of the police “to search without warrant all persons suspected of violating the provisions” of the statute on carrying concealed weapons.

9. “There has been a law-making vacuum into which the [Supreme] Court has, willy-nilly, had to rush. Our law-making bodies, federal, state, and local, have so far defaulted on that job.” Packer, Policing the Police, The New Republic, Sept. 4, 1965, p. 17, at 18.

10. Among the states which have passed or plan to enact new substantive codes are California, Colorado, Georgia, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, New York, Oregon, and Wisconsin.


12. Unique in this regard are two recent New York enactments which have received considerable attention, the “no-knock” statute, N.Y. Code Crim. Proc. § 799, and the “stop-and-frisk” law, N.Y. Code Crim. Proc. § 180(a).

13. When People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955), imposed the exclusionary rule in California, an Attorney General’s Committee was appointed, and their recommendations led to considerable new legislation clarifying and codifying the case law on arrest and search and seizure. Kamisar, Public Safety v. In-
2. Reasons for Legislative Inaction

There appear to be a number of reasons for this failure of the legislatures to establish norms to guide the police. In part, at least, the legislative inaction may be attributable to a generally held view that the definition of standards for police conduct is exclusively a judicial responsibility. It is true, of course, that constitutional questions are inevitable when dealing with search and seizure and that the courts have had the primary responsibility in protecting the rights of individuals against governmental interference. Indeed, the legislatures cannot have the last word on constitutional issues; the "Bill of Rights is a thoroughly undemocratic document" that forbids "laws which the elected representatives of the people believe to be desirable." But, even if courts must play a large role,

this does not mean that courts are necessarily equipped to deal with all of the important issues of criminal justice administration, particularly those which do not arise in litigation. . . . [It may be] doubted whether there can be an orderly, coherent, and systematic development of criminal procedure if reliance for the development of rules of law must be placed solely upon the often fortuitous circumstances of whether the issue can be effectively raised in litigation. And even as to issues which can be effectively raised, one may doubt whether orderly development is possible in a system where only one side can challenge the validity of an existing rule by raising the issue anew in the appellate court.

Doubt as to the responsibility of the legislature in the realm of criminal procedure is also attributable to the fact that in many jurisdictions rules of court purport to deal with the subject. However, because these rules of court deal only with procedure in court, they relate only indirectly to problems at the police level. As in the case of statutes, exist-


16. The trend, evidenced by Kentucky and Pennsylvania, appears to be toward developing criminal procedure through rules of court. The National Conference of Commissioners on Uniform State Laws some years ago decided that it was preferable that these developments occur by court rules. See NATIONAL CONFERENCE ON UNIFORM STATE LAWS, 1950 HANDBOOK 181.
17. E.g., Fed. R. Crim. P. 1: "These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings. . . ."; ALASKA R. CRIM. P. 1: "These rules govern the practice and procedure in the superior court in all criminal proceedings . . . ."

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ing court rules of criminal procedure either are not addressed to search and seizure at all18 or else are confined to the issuance of search warrants.20

A second reason for the lack of legislative attention to problems at the police level derives from the basic character of these law-making bodies. Generally speaking, state legislatures do not themselves select the subject matter on which they legislate. Rather, for the most part they act only in response to the known desires of a substantial or at least articulate segment of the public.20 Although pressure groups do not always obtain precisely what they want, the fact remains that legislative attention to a particular subject is unlikely in the absence of some organized non-legislative group seeking legislation on that subject.

The police seldom have been law-seekers, and their infrequent activity in this role is not marked with success. Prior to the exclusionary rule, "law enforcement groups preferred the ambiguity of seldom-litigated rules and had no real incentive to take the risks involved in seeking legislative action."

Although the exclusionary rule should have provided the incentive, the police have expended most of their energies in criticizing court-imposed restrictions rather than in seeking legislative clarification of their authority.22

When the police do seek legislation clarifying or expanding their authority, their efforts often suffer from lack of adequate preparation and failure to marshal effective support. Partly because of the lack of legal assistance,23 proposed legislation originating with the police is likely to be poorly drafted. These proposals usually originate within a particular city department, and little or no effort is made to gather support from other police agencies in the state or even other law enforcement agencies in that locale.24 Under these circumstances, the police find themselves over-

22. The police are not alone in this regard. As Professor Packer recently pointed out, most of the public debate has been addressed to "the wrong question: Can the police operate under the rules that the courts are laying down for their governance? A better question would be: To whom can we look for the establishment of rules and sanctions to regulate the conduct of the police in a free society? If we can look nowhere else but the courts it is silly to ask whether the courts are doing an optimal job." Packer, supra note 9, at 19.
23. LaFave, supra note 1, at 418-19.
24. "Earlier this year, Superintendent Wilson sponsored in the legislature a bill to authorize court-approved law enforcement wiretapping. Things went poorly
whelmed in the legislative arena by the better organized forces opposing the legislation—often the American Civil Liberties Union.25

Much of the proposed legislation on criminal procedure originates with the organized bar. This includes both piecemeal additions to the procedure codes and, of course, complete recodifications of the law of criminal procedure.26 Because lawyers have assumed the responsibility for drafting this legislation, the emphasis typically is upon those aspects of the criminal justice process with which lawyers are directly involved. The problems of the police either are not dealt with at all or are dealt with in a superficial manner. A few sentences are thought to suffice on the matter of search and seizure, while paragraph after paragraph sets forth in great detail the rules governing such matters as the selection of a jury. If some attempt is made to deal with problems of the police, they ultimately may be deleted in order not to jeopardize passage of other parts of the proposed code.27

from the start. The bill, as originally introduced, was a shocking example of mushy thought and inept draftsmanship. Into this breach, however, stepped the State's Attorney of Cook County, Daniel Ward. He demanded, as the price of his support, substantial modifications in the bill. Although the amendments proposed by Mr. Ward did overcome some of the bill's inadequacies, this shoring up of the legislation was accomplished at the price of dramatizing a significant philosophical schism between the State's Attorney and the Police Superintendent. In addition, it pointed up a frightful lack of communication between two law enforcement leaders who should be in continual contact on such vital issues.

"Into the fray at this point jumped the American Civil Liberties Union as well as a number of editorial writers and news commentators; the legislation, they said, posed a grave threat to civil liberties. What more was needed by those legislators who already opposed the bill on less altruistic grounds? The outcome, of course, is now history; the wiretap bill never got to first base.

"... This is just one of many examples which could be cited of too little law enforcement leadership and imagination too late." Sowel, Organized Crime in Chicago—The Untapped Forces of Change, 55 J. CRIM. L., C. & P.S. 111, 112 (1964).

25. Sowel has characterized the ACLU as "a well-intentioned but sometimes painfully naive collection of civil rights purists whose stands on most law enforcement questions seems to proceed from the basic premise that every policeman is a potential Hitler or Castro." Id. at 112. While I would be somewhat more charitable toward this worthwhile organization, it is fair to say that some of the ACLU's activities seem to be directed more at proving that police are inherently evil than at seeking an objective understanding of the most difficult problems in criminal justice administration. E.g., see SECRET DETENTION BY THE CHICAGO POLICE, a Report by the ACLU, Illinois Division (1959).

26. For example, the new ILLINOIS CODE OF CRIMINAL PROCEDURE was prepared by the Illinois State and Chicago Bar Associations' Joint Committee to Revise the Illinois Criminal Code.

27. The recent Illinois experience is illustrative. When some of the proposed sections on police practices were publicly criticized by the Chicago Superintendent of Police and by the ACLU (for quite different reasons, as might be expected), the sponsoring committee decided to eliminate these sections from the proposal as forwarded to the legislature, rather than to include them either as written or revised and jeopardize passage of the entire code. Bowman, The Illinois Code of Criminal Procedure of 1963, 52 ILL. B.J. 106, 108 (1963).
When the drafting of a procedural code is undertaken, it is usually assumed that the task can be accomplished satisfactorily without involving the police. This was the case, for example, with the recent Illinois enactment, where the first opportunity for police participation came only after the printing and distribution of the tentative final draft, just a few weeks before its introduction in the legislature. The Chicago Superintendent of Police remarked, in presenting his views on the proposed legislation:

It is important that the committee recognize that my comments here today are in the nature of first impressions. The views of the Chicago Police Department were not solicited in the drafting of the code. Until a week ago, our only knowledge of it was gleaned from newspaper accounts. We have not had time, during the past week, to study it as thoroughly as we would like, nor have we had time to devise specific alternative wording for some of the sections which are of greatest concern to us. . . .

Effective administration and judicial implementation of a new code of criminal procedure will be facilitated if there is available careful explanation of the legislative purposes underlying the adoption of particular provisions. One of the real shortcomings in the past has been the failure to articulate and analyze the problems of the conscientious and able police officer who characteristically has not been consulted in the drafting process. As a consequence, adequate understanding of the problems with which a law enforcement agency must deal has been lacking.28

To some extent, the failure of legislatures to deal with important search and seizure issues also reflects the lack of an appropriate model indicating the issues and alternative ways of dealing with them. The one legislative model that has been utilized in some states is the American Law Institute's Code of Criminal Procedure of 1930.29 With the exception of a section providing that "any person making a lawful arrest may take from the person arrested all weapons which he may have about his person,"30 the Code is silent on the subject of search and seizure. No attention is given to the execution of search warrants, search incident to arrest, search of vehicles, consent search, or similar problems. Although the National Conference of Commissioners on Uniform State Laws at

29. The Code has been adopted in toto by one state and in part by twenty-two others. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1949 HANDBOOK 247.
30. ALI, CODE OF CRIMINAL PROCEDURE § 32 (1930).
one time proposed to update the Code, it was subsequently decided that uniform rules of criminal procedure should be promulgated instead. This, of course, changed the scope of the endeavor, and as with most criminal procedure rules, the subject of search is not dealt with at all. The Uniform Arrest Act offers no help as a model, for, notwithstanding the very close connection between an arrest and a search incident thereto, it does not purport to deal with the latter subject, except for the provision allowing search for weapons of a person stopped for questioning whenever the officer "has reasonable grounds to believe that he is in danger if the person possesses a dangerous weapon." This neglect of police problems in general and the vexing problems surrounding search and seizure in particular is in marked contrast to other aspects of criminal justice administration, where alternative models are now available to the legislatures.

The oft-stated preference for legislative definition of norms of police conduct rests upon two important considerations: (1) unlike courts, legislatures are not confined to any particular fact situations that may be brought before it; and (2) unlike courts, legislatures have fact-finding apparatus for gathering all relevant data necessary to the articulation of sound norms. However, "our state legislatures, as intermittent, popularly-elected, nonexpert bodies, lacking in continuity, must have fundamental policy thinking done for them." Thus, if the legislatures are to make a meaningful contribution, there must be available a body of information that is not confined to the matters dealt with by appellate courts and that provides "the facts upon which an adequate set of rules needs to be based." It is unfortunate but true that to date legal scholarship has failed to provide the necessary information for intelligent legislative action regarding police practices.

Professor Cohen's recent observations concerning the state of legal

31. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1950 HANDBOOK 181.
34. See, for example, Remington, supra note 15, concerning the availability of models relating to sentencing and correction.
35. See quotations supra notes 3 and 6, and Packer, supra note 9.
37. Packer, supra note 9, at 21.
research on the substantive criminal law are equally true—perhaps even more true—as to research on criminal procedure:

The extreme disorganization of American criminal law legislation can probably be traced to a failure of legal scholarship to provide the stimulus of creative writing and legislative models. The bulk of the writing done by legal scholars is concerned with problems reaching appellate courts. This reflects the ad hoc approach of the case-oriented scholar and tends to overlook problem areas not coming to the attention of appellate courts. An ad hoc legislative response along the lines of scholarly dissatisfaction with appellate decision-making is the typical result.8

Until recently, at least, law schools considered police problems only as "the issues were reflected in appellate decisions," and as a result "legal scholarship has not produced a basis for dealing with these questions at the legislative level ...."39

Empirical research is vitally needed; legal scholars must "understand police ... practices and policies firsthand rather than wait in the comfort of the law library for those practices and policies to be reported in appellate decisions."40 Because of the lack of such research, "the revelations of the Wickersham Commission ... remain (much to our discredit) over 30 years later as good a source of information on law enforcement practices as we have."41 And, considering the emphasis and research techniques in that study, it is none too good a source of information.42 The same can be said for the various other crime surveys that might qualify as empirical research.43

Because of this lack of helpful research identifying the basic policy questions and their dimensions, and the failure of legislatures "to develop procedures or agencies that would relieve it of detail and let it concentrate on the relatively few major issues of any session,"44 legislatures are not likely to make a helpful contribution toward clarifying the norms of police conduct even when procedural legislation is before them. An ex-

38. Cohen, supra note 36, at 263.
40. Id. at 282-83.
41. Packer, supra note 9, at 18.
42. "An indication of the preoccupation with abuses [in the Wickersham Report] is seen in the fact that it was assumed that the most ‘trustworthy accounts of individual instances of unfairness were furnished in reported judicial decisions.’" Remington, Criminal Justice Research, 51 J. Crim. L., C. & P.S. 7, 14 (1960).
43. For an excellent analysis of these surveys and their deficiencies, see Remington, supra note 42.
44. Hurst, op. cit. supra note 20, at 66.
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experience in the enactment of the new Illinois code illustrates the difficulty. The proposed code submitted to the legislature included a section directing that "any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest or most accessible judge..."45 Although the "without unnecessary delay" language was used in the existing law,46 judicial interpretation of whether this language contemplated delay for investigation in some cases was not consistent.47 In the legislature, one of the principal disputes over the proposed code was whether "without unnecessary delay" should be retained or replaced by the word "forthwith." Yet, selection of either of these alternative uses of language often viewed as synonymous by the courts in Illinois and elsewhere,48 would hardly be a clear expression of legislative judgment concerning the basic issue involved. The "without unnecessary delay" language ultimately was adopted,49 but the police of the state have no greater insight into the policy underlying the choice of this phrase than they had prior to recodification.50

3. The Future Role of the Legislatures

The legislatures, of course, never will play an exclusive role in defining the norms of police conduct. There is, however, some basis for the belief that legislative bodies will be in a position to make a greater contribution in the years ahead.

One reason is that criminal law scholars are beginning to take an interest in empirical research on the current operation of the criminal justice system. One significant study is the American Bar Foundation's Survey

45. ILLINOIS STATE AND CHICAGO BAR ASSOCIATIONS' JOINT COMMITTEE TO REVISE THE ILLINOIS CRIMINAL CODE, TENTATIVE FINAL DRAFT OF THE PROPOSED ILLINOIS CODE OF CRIMINAL PROCEDURE 1963, § 45-1(b).
47. Compare the statement in People v. Jackson, 23 Ill.2d 274, 280, 178 N.E.2d 299, 302 (1961), that the statute "cannot mean... the police do not have reasonable latitude to fully investigate a crime," with that in Fulford v. O'Connor, 3 Ill.2d 490, 500-01, 121 N.E.2d 767, 773 (1954), that "the fact that there is as yet insufficient evidence to justify preferring charges against a criminal suspect is not an excuse for detention, but is precisely the evil which the statute is aimed at correcting."

48. E.g., People v. Jackson, supra note 47.
50. Of course, even if the legislature had been adequately appraised of the fundamental issue involved, there is no guarantee that the statutory language would have been any more helpful. This is because of "the legislators' tendencies to seek out means of reconciliation and compromise—one of which is deliberate vagueness—when conflicting proposals are presented." Remington & Rosenblum, The Criminal Law and The Legislative Process, 1960 U. ILL. L.F. 481, 482 n.1.
of the Administration of Criminal Justice in the United States. Under a Ford Foundation grant of 520,000 dollars, field researchers observed the day-to-day operations of the police and other criminal justice agencies in selected jurisdictions. For some years, the mass of raw data collected by these field researchers has been subjected to sustained analysis. This analysis is now being made available in a series of five volumes, two of which focus exclusively upon problems of the police. They provide an insight into current issues of importance beyond that heretofore afforded by the appellate cases.\(^5\)

The American Bar Foundation study does not purport to provide all of the answers. Its objectives were limited,\(^6\) it focused on but a few states, and it suffered somewhat from the lack of prior practical experience in the empirical study of legal institutions.\(^7\) Hopefully, however, the Survey will stimulate further efforts at uncovering the facts upon which sound legislative policy should be based.

Secondly, some models from which to work will soon be available to legislatures. The American Law Institute is sponsoring a *Model Code of Pre-Arraignment Procedure*, which is being drafted by Professor James Vorenberg of Harvard with the assistance of Professors Bator and Fried of Harvard and Dean Barrett of the University of California. They are being aided by an advisory group made up of lawyers, judges and law enforcement officers. Among the matters the *Model Code* will deal with are investigation of crime (including both stopping and questioning and search and seizure), arrest, in-custody investigation, and treatment and disposition of arrested persons.

In addition, the American Bar Association recently has undertaken the preparation of *Minimum Standards for Criminal Justice*. This three-year project, which will cost 750,000 dollars is being financed by the American Bar Association Endowment and by the Avalon and Vincent Astor Foundations. The national committee, under the chairmanship of Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit, plans to recommend standards with the view to “improv-

\(^5\) One volume, recently published, is entitled *Arrest: The Decision To Take a Suspect into Custody*. The other volume on police practices, soon to be published, is called *Detection of Crime*, and deals with search and seizure, stopping and questioning suspects, and entrapment.


ing the fairness, efficiency and effectiveness of criminal justice" on both the state and federal level. The hope is that legislative bodies across the country will consider these standards. One of the six advisory committees is concerned with "The Police Function." Significantly, the membership of this committee, which will propose standards on search and seizure, arrest, in-custody investigation, and related matters, includes representatives of the police.

Thus, there is some basis for optimism as to the future contributions of legislation covering the powers of the police. At the same time, however, the need to proceed with the greatest of care must be recognized. Professor Packer has put it very well:

Experience with legislative reform in the criminal field has been that it is difficult to accomplish and, once accomplished, almost impossible to reopen. Any code of police practices that emerges from current activity and that achieves widespread legislative acceptance (either because it is good or because it is better than nothing) will in all likelihood set the pattern of governing law for at least the next half-century. The control of police practices is by far the most poignant single issue that arises in the oscillating maintenance of some kind of balance, or tension, between the demands of freedom and order that constitutes the chief hallmark of the open society. The courts cannot do the job alone; but the legislature cannot do it either without broader and more reflective study than has been made.

C. Norm-Defining by the Appellate Courts

1. Extent of the Opportunity

Except for the rule-making power of appellate courts, which seldom is conceived of as means for defining rules for police conduct, the courts

55. Judge Richard B. Austin of Chicago is chairman of this committee. My colleague Charles H. Bowman is serving as reporter.
56. Included on the committee are Judge George Edwards, one-time Police Commissioner of Detroit; H. Lynn Edwards, Inspector, Federal Bureau of Investigation; and Michael J. Murphy, until recently Police Commissioner of New York City.
57. Packer, supra note 9, at 21.
58. See discussion supra p. 8. Probably the most significant limitation on the police arising out of a rule of court is the requirement in Fed. R. Crim. P. 5(a) that the federal officers take arrested persons before a commissioner "without unnecessary delay." Yet, even here, it is not the rule itself that has had an impact, but rather the Supreme Court's interpretation of this ambiguous language. See, e.g., Mallory v. United States, 354 U.S. 449 (1957).
are powerless to take the initiative in declaring norms to govern the police. An appellate court can speak only on the questions presented in the cases that come before it: "our system serves the issues to this law-making body only a tiny slice at a time, and leaves the choice of the particular tiny slice to happenstance..." 59

One of the principal virtues of the exclusionary rule is that it "assures a great deal of judicial attention" to questions concerning police practices. 60 A comparison of the development of the case law in states that have long operated under the exclusionary rule with the development in the twenty-five jurisdictions that since Mapp 61 must "make up for lost time and begin their education in the biokinetics of law enforcement agencies," 62 makes this apparent. In the former states, because many defendants have raised on appeal the legality of their arrest or search, the appellate courts frequently have had occasion to determine the boundaries of lawful arrest and search. 63

63. "Our courts had not long to wait for the test cases that would compel clarification of the exclusionary rule. . . . Some hundred cases arrived in the wake of Cahan. Now that we look back on them with perspective, we find them a reasonably orderly constellation." Id. at 323.

To get some feeling for the range of problems that reach an appellate court by virtue of the exclusionary rule, I have surveyed the work of the Illinois Supreme Court over roughly the past ten years as reflected in the cases reported in 1 Ill.2d through 30 Ill.2d. Excluding the cases that did not reach the substance of the allegations concerning the police conduct, such as those finding that the defendant lacked standing to object, a total of fifty-seven cases were decided during this period. (For most of this period the allocation of appellate jurisdiction between the Illinois Supreme Court and the Appellate Court was such that the former received almost all cases involving questions of arrest, search and seizure. Also, except for the last couple of years these cases could be appealed only by the defendant; see text at note 85 infra. Of the 57 in the sample, 5 were prosecution appeals.)

Examination of the subject matter of these cases shows that the court received an interesting variety of problems, although not corresponding to the variety of problems the police actually faced. (See subsequent discussion in text for explanation of this.) Some questions reached the court repeatedly, although occasionally there were significant differences in the factual situations so that the applicability of prior holdings was in doubt. The most common issues were: whether the search was by consent (8 cases); whether a controlled purchase of illicit goods justified arrest and search (7 cases); whether information from an informant justified the arrest and search (6 cases); whether the items were in plain view and thus not discovered by a search (6 cases); whether the suspicious conduct of the defendant justified his arrest (6 cases); whether the search warrant was issued on adequate grounds (6 cases); whether the officer had actually observed an offense (5 cases); whether the items were found in a proper search of premises incident to arrest (5 cases). Some other questions only infrequently reached the court, such as: whether search incident to a traffic violation arrest was proper (3 cases); whether a
By contrast, the appellate courts in states without the exclusionary rule prior to Mapp received these issues only when an appeal was taken from a tort action against a police officer. The many barriers to recovery have severely limited the number of appeals, and the defenses available are such that an explicit statement of arrest and search norms is seldom required. Moreover, the civil suit context of the case may divert the appellate court from the question of whether the police conduct was proper to that of whether it is fair to subject the errant officer to personal liability.

Thus a single exclusionary rule case gives an appellate court a much better opportunity to contribute to the definition of police standards than does one tort case. More significant, however, is the fact that the exclusionary rule pushes a great many more cases to the appellate level. This has the obvious advantage of providing the appellate tribunal with a variety of factual situations with which to work, and also enhances the quality of each judicial contribution. If a court receives but a few cases, “the bits or slices or splinters which are cast up may be too fragmentary

description by a victim or witness was sufficient for defendant’s arrest (2 cases); whether minor deviations in the description in the search warrant invalidated the warrant (2 cases); and whether a companion of a person properly arrested could be searched (1 case).

It is also interesting to note the kinds of criminal conduct involved in these 57 cases: sale or possession of narcotics, 22 cases; gambling, 12 cases; burglary or possession of burglary tools, 12 cases; robbery, 4 cases; abortion, 2 cases; obscene literature, 2 cases; assault, 1 case; murder, 1 case; and carrying concealed weapon, 1 case.

In view of the common complaint that the appellate courts are “handcuffing the police,” the court’s disposition of these search and seizure and arrest issues should be noted. Of the 52 defendant appeals, the Illinois Supreme Court upheld the trial judge’s admission of the evidence in 40 cases, while in 12 cases it was held that at least some of the evidence should have been excluded. Of the 5 prosecution appeals, the court held that the trial judge erroneously suppressed the evidence in all 5 cases.


65. For example, in a number of states conviction is said to be conclusive evidence that the police arrested on probable cause. Note, 27 NOTRE DAME LAW. 252 (1952); Foote, supra note 64, at 507-08. Even waiver of a preliminary hearing or posting of bond is sometimes viewed as a bar to recovery. LAFAvE, op. cit. supra note 64, at 418-20.

66. Thus, the Michigan Supreme Court has asserted that “a police officer who acts in good faith in the line of duty should be protected even though overzealous in its discharge... If possible, any doubt should be resolved in favor of an honest discharge of duty by peace officers, and the courts should not place them in fear of responding in damages for the lawful and proper discharge of their duty.” Odinetz v. Budds, 315 Mich. 512, 517-18, 24 N.W.2d 193, 195 (1946). This position has been criticized as failing to give substance to the criminal law philosophy that it is better that a few escape punishment than to allow too permeating police surveillance. Foote, supra note 64, at 502.
to yield a proper picture or to allow the shaping and joining of complementary hubs and spokes and rims to form a doctrinal wheel. But, if the court receives "a related group of cases in a series," then "the court will see more, learn more from the series; the court will begin to see in the round rather than the flat, and to gain some understanding of the whole in action." The manner in which the law on arrest and search and seizure has been developed by appellate courts in exclusionary rule states certainly supports this thesis.

There are, however, some significant limitations on the opportunity of the appellate courts to define standards for police conduct even with the exclusionary rule. One is that until the recent case of Wong Sun v. United States, only physical evidence found incident to arrest could be challenged. Therefore, only crimes involving physical evidence (e.g. narcotics) were likely to raise the issue of the lawfulness of the arrest. As a consequence, while there is no lack of appellate authority on the question of when information from a narcotics informant is sufficient to justify an arrest, there is little guidance on such questions as when, if ever, an officer can arrest one or more than one member of a group of suspects each with physical characteristics fitting the description given by an eyewitness, or when an officer can make a felony arrest on the basis

67. Llewellyn, op. cit. supra note 59, at 263.
68. Ibid.
69. See note 63 supra for California’s experience in this regard. This is also supported by the Illinois survey, note 63 supra. For example, on two occasions, while upholding a gambling arrest on the ground that the officer had observed the offense, the court also asserted that the arrest and search could have been justified by virtue of the traffic offense committed by the defendant. People v. Clark, 9 Ill.2d 400, 137 N.E.2d 820 (1956); People v. Berry, 17 Ill.2d 247, 161 N.E.2d 315 (1959). However, when the traffic offense was the only basis of the search, the court then held that something more was needed before a search could be undertaken. People v. Watkins, 19 Ill.2d 11, 166 N.E.2d 433 (1960). Since Watkins, the court has had two occasions to expand upon what else is necessary: People v. Mayo, 19 Ill.2d 11, 166 N.E.2d 433 (1960), and People v. Zeravich, 30 Ill.2d 275, 195 N.E.2d 612 (1964).
72. For example, see the results of the Illinois survey, in note 63 supra.
73. Thus, in the Illinois survey, note 63 supra, only two cases present the arrest-on-a-description problem, and neither develops to any extent precisely how
of suspicious conduct he observes. These and similar questions confront law enforcement officers just as frequently or perhaps more frequently than the informant case.

A second limitation on the contribution of the appellate courts is the fact that only the defendant can take an appeal from lower court rulings on police practices in an exclusionary rule context. Only a few legislatures have removed the prohibition on government appeal, which is said to rest upon "historic principle" and "practicalities in the administration of criminal justice," despite continuing criticism of the restriction. This means that in most jurisdictions "the decisions of trial judges are substantially immune from effective appellate supervision." It is impossible to obtain an appellate ruling on a particular police practice, no matter how common it is or how important to the enforcement program it is thought to be, unless one or more trial judges admit the evidence obtained incident to that practice and the defendant is ultimately convicted and appeals.

specific the description must be. People v. Kalpack, 10 Ill.2d 411, 140 N.E.2d 726 (1957); People v. Flowers, 14 Ill.2d 406, 152 N.E.2d 838 (1958). In Flowers the court noted that "other circumstances discovered by the police strengthened their belief that defendant was the culprit," but these circumstances are not set forth in the opinion.

74. Thus, in the Illinois survey, note 63 supra, only one case presents the question of what can be done by the police when they observe suspicious conduct not relating to any previously reported offense. People v. Faginkrantz, 21 Ill.2d 75, 171 N.E.2d 115 (1960).

75. See LaFave, op. cit. supra note 64, ch. 13.

76. "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." Allen, The Exclusionary Rule in the American Law of Search and Seizure, 52 J. Crim. L., C. & P.S. 246, 249 (1961).

77. Congress has granted the federal government the right to appeal from orders granting pre-trial motions to suppress only in narcotics cases. 18 U.S.C. § 1404 (1965). A few state legislatures have enacted statutes allowing prosecution appeal from pre-trial suppression orders, e.g., ILL. REV. STAT. ch. 38, § 120-1 (1963), superceded by a similar provision in ILL. SUP. CT. R. 27(4); N.Y. CODE CRIM. PROC. § 518.


80. Allen, supra note 76, at 249.

81. It is "or more" because in some jurisdictions defendants are able, by various means, to get their motion to suppress ruled upon twice at the trial level. See LaFave, Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices, 30 Mo. L. Rev. 391, 405 (1965).
Also of major importance here is the fact that when the cases to
be considered by the appellate courts are always supplied by individual
defendants and never by the state, the courts are not in a good position
to undertake an orderly development of legal doctrine. The fortuitous
circumstances under which defendant-supplied fact situations reach a court
will limit the opportunity of that court to "build" upon existing law.82
In contrast, if the state also can select some of these fact situations, this
"managed series of educational cases, judiciously selected" would result
in a more systematic growth of significant legal principles. As Llew-
ellyn pointed out, "a bit of management in bringing on a related group of
cases in a series looks to be much more of a value than an ill."

In 1961 the Illinois legislature passed a bill providing that "the
People may sue out interlocutory writs of error to review any order or
judgment quashing an arrest or search warrant or suppressing evidence
entered preliminary to trial." The experience under this statute clearly
supports the view that appellate courts can make a more significant
contribution in defining norms for police conduct when appeal by the
state is possible. To date, prosecutors have taken five cases to the Illinois
Supreme Court and eight cases to the Illinois Appellate Court and

82. This is supported by the Illinois survey, supra note 63. For example de-
fendants may bring factual situations to the court notwithstanding the fact that
the court recently has upheld the identical practice without question. Compare
People v. Perroni, 14 Ill.2d 581, 153 N.E.2d 578 (1958), with People v. Shambley,
4 Ill.2d 38, 122 N.E.2d 172 (1954).

83. LLEWELLYN, op. cit. supra note 59, at 262. He notes that on the federal
level "this planned-sequence business" is much more common, and is practiced not
only by the Solicitor General but also by non-governmental groups frequently in
a position to press litigation on related subject matter, such as the NAACP.

84. Id. at 263.

85. ILL. REV. STAT. ch. 38, § 747 (1961) is the statute as amended by the bill.
The substance of this provision was carried over into the new ILLINOIS CODE OF
CRIMINAL PROCEDURE, ILL. REV. STAT. ch. 38, § 120-1 (1963), now superceded
by ILL. SUP. CT. R. 27 (4), which makes no change.

86. People v. Zeravich, 30 Ill.2d 275, 195 N.E.2d 612 (1964); People v. Wal-
ker, 30 Ill.2d 213, 195 N.E.2d 654 (1964); People v. York, 29 Ill.2d 68, 193 N.E.2d
773 (1963); People v. Williams, 27 Ill.2d 542, 190 N.E.2d 303 (1963); People v.
Montgomery, 27 Ill.2d 404, 189 N.E.2d 327 (1963). I have not included here People
v. Aiuppa, 29 Ill.2d 65, 193 N.E.2d 12 (1963), or People v. Nardone, 27 Ill.2d 44,
188 N.E.2d 28 (1963), which were transferred to the appellate court. See note
87 infra.
have obtained a reversal of the suppression order in every case.\textsuperscript{88} Included in this small group of cases are some situations of real importance that would not likely have reached the appellate level absent a right of prosecution appeal. For example, in one of the five cases reaching the Illinois Supreme Court it was held that reliable hearsay could be used to obtain a search warrant,\textsuperscript{89} thereby overruling two prior cases that trial judges probably would have continued to follow. Similarly, in another of these cases the court held that a police officer need not disclose his identity when he enters private premises posing as a customer of the illegal activity occurring within.\textsuperscript{90} A prior Illinois Supreme Court case\textsuperscript{91} gave some support to what until then had been the common practice of suppressing evidence in such circumstances.\textsuperscript{92} Some of the cases brought before the Illinois Appellate Court are equally significant.\textsuperscript{93}

Of course, the extent to which the right of prosecution appeal from suppression of evidence broadens the opportunity of the appellate courts to clarify arrest and search norms will depend considerably upon the criteria employed in selecting the cases to be appealed. The prosecutor,

\begin{itemize}
\item \textsuperscript{88} The fact that only thirteen cases have been appealed so far certainly shows that appellate courts are not unduly burdened by granting the prosecution the right to appeal in such cases. Of course, this does not mean that prosecutors in the state have viewed only thirteen instances of suppression as improper. Because of the limited resources of his office, the prosecutor obviously cannot appeal every case having some basis for questioning the trial judge's decision that the police conduct was improper.
\item \textsuperscript{89} People v. Williams, supra note 86.
\item \textsuperscript{90} People v. Walker, supra note 86.
\item \textsuperscript{91} People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939). Although the case dealt with a different kind of situation, many trial judges thought the language therein that an officer's entry of premises was "fraudulent" if obtained by consent of a person who allowed entry "in ignorance of [the officer's] official character and purposes" extended to the situation discussed above.
\item \textsuperscript{92} LaFave, supra note 81, at 436.
\item \textsuperscript{93} For example, in People v. Hall, supra note 87, the court held that items of contraband not named in a search warrant and unrelated to the offense for which the warrant was issued could be admitted into evidence if found during the course of a lawful execution of the search warrant. In a hypothetical situation presented at a seminar for Illinois trial judges in Chicago on September 18-19, 1964, the judges all felt that the evidence should be excluded because it was not named in the warrant. Some language in the new ILLINOIS CODE OF CRIMINAL PROCEDURE could be cited to support that view: "A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that . . . the evidence seized is not that described in the warrant . . . ." ILL. REV. STAT. ch. 38, § 114-12 (1963).
\end{itemize}
in selecting cases for appeal, is likely to choose the “big” cases—those involving serious crimes and receiving the greatest publicity—although from the police standpoint, the need for clarification of enforcement practices used against relatively minor offenses, such as misdemeanor gambling, may be much greater.94

2. Can the Courts Do the Job?

As Professor Packer has so ably pointed out, it is somewhat inappropriate to ask whether “the police can operate under the rules the courts are laying down.”95 The real question is not “whether the courts are doing an optimal job,” but rather whether it is possible to look elsewhere for “the establishment of rules and sanctions to regulate the conduct of the police in a free society.”96 Thus, in the present exploration of the actual and potential contributions of the appellate courts in defining realistic norms for police conduct, it is necessary to keep in mind the very basic point made earlier: to date, the legislatures have defaulted in their obligation to make a real contribution in this area.

One of the major complaints of the “police-prosecution oriented critics of the courts”97 is that law enforcement personnel, “those on the firing line,”98 are being subjected to controls by appellate judges who are far removed from the day-to-day problems of police work. The “experts” or “specialists,” it is said, should not have their powers defined and limited by the “amateurs” and “outsiders.”99 The courts “are not competent to make rules for police procedure,”100 declares Professor Waite; they deal with each issue only as a “legal abstraction,”101 objects Superintendent Wilson.

That our appellate judiciary are not specialists on matters of law

94. The Cook County State's Attorney (most of the appeals to date, see notes 86 and 87 supra, have been from Chicago, as might be expected) has chosen his cases reasonably well, however. People v. Walker, supra note 86, for example, is a case of considerable importance to the Chicago police, although a prosecutor would be unlikely to view it as significant.
96. Ibid.
99. For citations to a number of assertions of this kind, with a most effective rebuttal, see Kamisar, supra note 97, at 474-77.
enforcement, or indeed on any particular field, cannot be denied. But this may be a virtue rather than a vice; Llewellyn viewed "our ancient institution of ultimate review by those complete nonspecialists, the general Supreme Court, . . . as one of the wisest institutions man has thus far managed to develop."\(^1\) The objection that "amateurs" are declaring police norms is based upon a fundamental misunderstanding of our system of government. Again Llewellyn:

>[W]e have a legal system which entrusts its case-law-making to a body who are specialists only in being unspecialized, in being the official depositories of as much general and balanced but rather uninformed horse sense as can be mustered. Such a body has as its function to be instructed, case by case, by the experts in any speciality, and then, by combination of its very nonexpertness in the particular with its general and widely buttressed expert roundness in many smatterings, to reach a judgment which adds balance not only, as has been argued so often and so hard, against the passing flurries of public passion, but no less against the often deep but too often jug-handled contributions of any technicians.\(^3\)

These words of wisdom, although effectively disposing of the attack upon our appellate courts as nonspecialists, do suggest a more appropriate matter for concern. If the appellate court is to be "instructed . . . by the experts," then it is appropriate to ask whether the appellate process in general or the current practice in appealing cases concerning police conduct in particular, is such that sufficient expert knowledge is made available to insure the declaration of sound and realistic police norms. The real problem, as Judge Lumbard has suggested, may be that judges "are being required to shape the law in this field with little or no guidance from those who know most about the problems."\(^4\)

Initially, it is important to keep in mind the fact that an appellate court is not in a position to gather relevant information on its own initiative.\(^5\) "It has no fact-finding facilities, except for its members' uncertain reliance on 'what everybody knows.' It cannot independently inform itself about the dimensions of the general law enforcement problem, or identify and choose among the range of particularized solutions that

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\(^1\) Llewellyn, op. cit. supra note 59, at 333-34.

\(^2\) Id. at 263.

\(^3\) Id. at 263.


may be available." Thus, the court largely depends upon the litigants for information.

If an appellate court is to be asked to render a decision intended to have a prospective effect upon police policy and practice—and the exclusionary rule assumes this objective—then that court should have a thorough familiarity with the policy and practice that it intends to affect. This often is not the case. The "frozen record from below" presents but one individual instance of arrest or search, and appellate counsel do not attempt to compensate for this by showing the place of the individual case in the over-all enforcement policy that is involved. The state prepares its appeal without any consultation with the police to learn what significance the challenged practice has for them.

One consequence of this is that an appellate court that is concerned about the general police practice involved in the case before it may have to rely upon less than adequate data. For example, it is common for appellate courts even today to cite the Wickersham Report on Lawlessness in Law Enforcement as authority on the treatment of persons in custody and for the proposition that abuses can be prevented only if arrested persons are taken immediately before a magistrate. Not only is this report over thirty years old, but it was primarily based upon appellate decisions. Thus, the reliance placed upon this report for information as to current practice is based on the doubtful assumption that the appellate opinions were reliable evidence of the then current practices. Although appellate opinions do indicate that certain police abuses occur, this does not mean that they constitute an adequate basis for assessing the legitimate needs of law enforcement.

Another consequence is that cases often are fought out at the appellate level without an adequate characterization of the problem as seen

106. Packer, supra note 95, at 18.
108. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT NO. 11 (1931).
109. In this sense, they are not a fair representation of police practices. An Australian observer of our system has observed: "The cases which led to the examination into police practices seem to me to be cases in which the police excesses have been indefensible. It is not the ordinary case that gets to the Supreme Court of the United States. Rather, it is the exceptional case, the case involving the unusual deviation from normality which are represented in those decisions. This has its effect. People think that because this has happened, it always happens." A Forum on the Interrogation of the Accused, 49 CORNELL L.Q. 382, 429 (1964).
from a law enforcement point of view. Again, this is no criticism of the appellate judiciary, but rather of the counsel who frame the issues on appeal. The court receives the case with the "issue already drawn," and this "tends powerfully both to focus and to limit discussion, thinking, and lines of deciding."  

For example, a few years ago the Supreme Court of Illinois had before it a case involving a Chicago police officer who stopped and questioned a person found in an alley under suspicious circumstances. The case raised a very vital question concerning the propriety of what the police usually refer to as "field interrogation," a common and significant practice in Chicago and elsewhere. Prior Illinois case law on this subject dealt only with situations where the police put questions to persons sitting in parked cars, and was ambiguous. Despite the importance of the issue to the Chicago police, no one in the department was consulted on the appeal or even knew that the case was being appealed. Thus it was not made apparent to the appellate court that the case put into question the entire "field interrogation" policy. The result was that the court dealt with the stopping and questioning issue only indirectly, leaving the police in doubt as to the limitations on this common practice. It must be added that this case is by no means unique. The police across the country have long viewed "field interrogation" as a distinct law enforcement practice of major significance, yet when cases involving this practice reach the appellate courts they typically have been argued without directly confronting the question of whether stopping and questioning or frisking incident thereto is a proper law enforcement practice.

113. People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1943); People v. Henneman, 367 Ill. 151, 10 N.E.2d 649 (1937).
114. See, e.g., Bristow, Field Interrogation (1958).
115. "An officer may stop and question a suspect under circumstances in which the officer knows he will be in danger if the suspect is armed. Current police practice under such circumstances is to frisk the suspect. If a gun is found, its admissibility may be in issue in states which exclude evidence which is obtained illegally. The basic issue is whether police have the right to frisk a suspect whom they have no right to arrest. This is not the issue which is presented to the appellate court, however. Typically, the prosecution will argue that an arrest was made and the frisking was incidental to the arrest. The defense will argue that there were no grounds for arrest. However the case is decided, the principal issue, the right to frisk a suspect in the absence of an arrest, is avoided. The law and practice continue, therefore, to fail to reflect each other's influence.

"Even the issue of the right to stop and question a suspect is typically avoided with the result that this most common, most important law enforcement practice is neither condemned nor sanctioned in most jurisdictions. For example, in a
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It would appear, then, that appellate courts, through no fault of their own, are not in a position to do an optimal job because cases come to them without adequate information or adequate conceptual framing of the issue as seen from a law enforcement viewpoint. Now consider the product of the appellate court’s labors—appellate opinions. What is it that we expect from these opinions? Undeniably, “in our law the opinion has . . . a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future.”116 This rings particularly true in the exclusionary rule cases, for a court that suppresses evidence because of police misbehavior certainly has an obligation to contribute to the body of law informing the police of the legal limitations upon their authority. What Justice Clark has said of the Supreme Court is equally applicable to all appellate courts:

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.117

Here the courts face a dilemma. When an appellate court sets forth a “rule” which transcends the facts of the individual case, it becomes involved in a business which it is least equipped to handle; yet when an appellate court sets forth a “rule” that is cautiously confined to the facts of the case before it, it affords minimal guidance to the police. Professor Packer, referring to the Supreme Court, speaks to the first point:

The Court moves with greatest assurance when it looks at a particular injustice which it should right. It moves with unease when it tries to frame a general standard for police conduct. It is one thing to say: This defendant’s confession was illegally coerced

recent case in the United States Supreme Court the majority of the Court held that the issue of the right to stop and question is identical with the issue of the right to take a person into custody. While the law might properly take the position that there is no right to stop and question a suspect unless adequate grounds for arrest exist, this conclusion ought not be based upon the uncritical assumption that the questions lack important differences.” 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, 386-87 (1960).

116. LLEWELLYN, op. cit. supra note 111, at 28.
because he was illiterate, unadvised of his rights, held incommunicado, subjected to threats, beaten, or whatever. It is quite another to say: No person who is arrested may be questioned by the police until he has been advised of his right to remain silent and to have the assistance of a lawyer if he wants to. And yet it is this second kind of statement (although not, as yet, this particular one) to which the Court has been resorting with increasing frequency in the last few years.\[118\]

On the other hand, a we-hold-on-these-facts opinion may leave the police at a loss as to what they are expected to do. An excellent example is *Escobedo v. Illinois*,\[119\] which announced a "new" exclusionary rule, applicable in instances of denial of counsel. After leveling a broadside at the practice of obtaining confessions generally, the Court states its holding:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel'... and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.\[120\]

Lawyers, of course, will recognize this as an effort to limit the scope of the decision to the particular facts, hardly inappropriate as the Court begins moving into this new and sensitive area.\[121\] However, the consequence is that, while the police know that a voluntary confession may be suppressed, they have little basis for translating the requirements of *Escobedo*

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118. Packer, *supra* note 95, at 18.
120. *Id.* at 490-91.
121. "What our study shows... is (1) that a court ought always to be slow in uncharted territory, and, in such territory, ought to be narrow, again and again, in any ground for decision. Until the territory has been reasonably explored. But what our study shows is (2) that once there is a clearish light, a court should make effort to state an ever broader line for guidance. And (3) so long as each line is promptly and overtly checked up and checked on and at need rephrased on each subsequent occasion of new illumination, such informed questing after broader lines is of the essence of good appellate judging." LLEWELLYN, *op. cit.* *supra* note 110 at 389.
into a revised interrogation practice that will be both effective and in con-
formity with the requirements of the Constitution.

Apart from this dilemma, what can be said about appellate opinions? The concern here is not with the quality of appellate opinions in general, about which much has been written, but rather with the utility of opinions on arrest, search and seizure as guides to future police conduct. There are a number of opinions that are less than helpful because they fail to grapple with the facts upon which the police officer acted. For example, if the issue before the court is whether a lawful arrest was made, the court may proceed as follows: (1) an arrest can be made on reasonable grounds to believe; (2) this means that mere suspicion is not enough; (3) on the other hand, this means that evidence sufficient to convict is not required; (4) we think the officer in this case had reasonable grounds. Without a careful analysis of the facts upon which the officer in that case acted, such an opinion will be of little assistance to the police, who typically must act on the basis of a cluster of facts directing them toward a par-
ticular suspect. However, as appellate courts gain added experience in thrashing out problems of police conduct, this kind of summary treatment is disappearing.

3. The Future Role of the Appellate Courts

There is no doubt that appellate courts will continue to play a part in defining the norms to control police conduct. However, whether the courts will make a greater contribution in the future may depend in large measure upon whether they receive the benefit of effective legislative action. Judge Lumbard's words are worth repeating: "While the courts must play their part, the Bar should not expect judges to discover policy and make rules in default of legislative findings and statutes which, to be effective,

122. E.g., 1 WIGMORE, EVIDENCE § 8a (3d ed. 1940); Smith, The Current Opin-
ions of the Arkansas Supreme Court—A Study in Craftsmanship, 1 Ark. L. Rev. 89 (1947).

123. Thus, I cannot point to any case in my Illinois survey, supra note 63, which illustrates this situation, although many of the earlier Illinois cases might be criticized on this ground. Indeed, I am impressed with the care given to assessment of the weight of the various facts known by the police prior to arrest. For example, see People v. Peak, 29 Ill.2d 343, 194 N.E.2d 322 (1963).

Occasionally, however, even the recent cases in my survey are not as explicit as one might hope. It is somewhat annoying, for example, when the court upholds an arrest on a general description by observing that "other circumstances discovered by the police strengthened their belief that defendant was the culprit," but fails to even recite what these circumstances were. People v. Flowers, 14 Ill.2d 406, 152 N.E.2d 838 (1958).
must be based on accumulated experience and an appraisal of competing interests.”

For one thing, prior legislative activity can aid substantially in sharpening an appellate court’s appreciation of the conceptual framework within which a particular case is to be viewed. Illustrative is the impact of New York’s “stop-and-frisk” law upon the approach of the appellate courts in that state to that particular issue. Secondly, if the legislatures use their fact-finding capabilities to establish broad policies, then the movement of the courts “to ever-increasing generality of statement” may be halted. The courts can then return to the task of building, bit by bit, additional guidelines for the police in the context of specific factual situations. This, as Justice Brennan has observed, “is a particular problem with which appellate courts must wrestle.”

D. TRAINING THE POLICE

1. Current Status of Law Enforcement Training

Even if the appellate courts and the legislatures optimally perform their respective norm-defining functions, this alone is no guarantee of improved police service. Developments in the law of arrest and search are “likely to be ‘wasted’ on indifferent, insensitive police departments, more apt to stir thought and action when quality and training are high.” Thus, it has been said that, of the many critical problems in the administration of criminal justice today:

124. Lumbard, supra note 104, at 846.
126. Thus, in People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), the court stated and decided the case on the issue of when, if ever, police officers have a right to stop and question and incidentally thereto frisk persons engaging in suspicious conduct. Although the court does not undertake to interpret the new statute or apply it to the case, inasmuch as the conduct in question took place prior to the effective date of the statute, the court does use the statute in characterizing the nature of the issue before it. The court thereby avoided the inadequate analysis found in the prior New York cases, e.g., People v. Esposito, 118 Misc. 867, 194 N.Y.S. 326 (1922), which had fit the general pattern described in note 115 supra. The point is not that in Rivera, unlike the prior cases, the court upheld the police action; rather, it is that the court recognized “field interrogation” as a distinct law enforcement practice deserving of independent analysis.
127. Packer, supra note 95, at 18.
First comes the need for trained police. Police officers must be better instructed about their duties and powers to investigate and about the individual rights which they must respect. They must know when they may question, when they may detain, when they may arrest, when they must arraign, under what circumstances statements and confessions may be obtained, how searches may be made legally, and, generally, what means of obtaining evidence are proper. Brains and know-how must take the place of brawn and blunder, or a lengthy investigation will go for naught.\textsuperscript{130}

It is clear that the exclusionary rule has served as a stimulus to police training on the legal requirements of search and arrest. Justice Murphy's limited survey of training efforts in exclusionary rule and non-exclusionary rule states, reported in his dissent to \textit{Wolf v. Colorado},\textsuperscript{131} tended to support this conclusion.\textsuperscript{132} Since that time, additional evidence has been accumulated. California's adoption of the exclusionary rule in the \textit{Cahan} case resulted in greater efforts at training the law enforcement officers of that state.\textsuperscript{133} The impact of \textit{Mapp} was reflected by much improved training on search and seizure in jurisdictions that theretofore had been in the nonexclusionary rule category, such as Minnesota\textsuperscript{134} and Pennsylvania.\textsuperscript{135} Moreover, since \textit{Mapp} the FBI has greatly intensified its efforts in training state and local officers on the requirements of the Fourth Amendment.\textsuperscript{136}

At the same time, however, it must be recognized that the existence of the exclusionary rule is no guarantee of good police training on the law of arrest and search. Indeed, some of the states that have long adhered


\textsuperscript{131} 338 U.S. 25, 44-46 (1949).

\textsuperscript{132} Justice Murphy's conclusions were based upon the twenty-six replies received to inquiries to the police departments in the thirty-eight largest cities in the United States. He concluded that, generally speaking, it appeared that the extent and quality of training on search and seizure was much higher in exclusionary rule states. He pointed out Denver as one apparent exception, but more recently it has been established that Denver fit that general pattern—the exclusionary rule not being in effect there, training on the law of search was not given. Weinstein, \textit{Local Responsibility for Improvement of Search and Seizure Practices}, 34 Rocky Mt. L. Rev. 150, 159 (1962).


\textsuperscript{134} Id. at 181.


to the exclusionary rule are among the most backward in this regard.\textsuperscript{137} It has been some four years since \textit{Mapp} required exclusion in all jurisdictions, yet training remains very spotty in both quantity and quality. It is fair to say that presently no state in the country can serve as an appropriate model of what needs to be done.

Training first becomes important as new men are added to the police ranks. This is because "police departments seldom employ policemen as such. They employ the best available men and then try to make policemen out of them. . . . \textit{This is a burden borne by no other professional discipline.}\textsuperscript{138} Academic study in preparation for a career of police service is the exception rather than the rule; presently, thirty-eight states are without a college or university that provides facilities for training prospective policemen.\textsuperscript{139} Although in the last few years more and more states have enacted legislation to provide centers for training police recruits,\textsuperscript{140} New York is the only state with a mandatory state-wide police recruit training program.\textsuperscript{141} Elsewhere the quantity and quality of preservice training is determined by each department. Much of this training is "of the 'cram' flavor and is designed almost solely to get the student on the force, that is, to squeeze him through the civil service barrier.\textsuperscript{142} Clearly, much remains to be done to adequately prepare aspirants to the police profession.\textsuperscript{143}

In-service training is also of critical importance. It serves not only as a "refresher," but also—and this is particularly true with search and seizure—to inform and instruct the police on recent developments. The FBI has played a significant role here. In the seventy-four sessions of its National Academy, established in 1935, 4,546 specially selected law enforcement officers from the state and local level have received training.\textsuperscript{144} In addition, the Bureau has provided instructors for local law enforcement training programs; in a recent year, the FBI participated in 4,163 of these programs, reaching 117,275 local officers.\textsuperscript{145}

\begin{itemize}
\item[140.] Edwards, \textit{supra} note 136, at 91-92.
\item[141.] Lumbard, \textit{supra} note 130, at 841.
\item[143.] Brereton, \textit{The Importance of Training and Education in the Professionalization of Law Enforcement}, 52 J. Crim. L., C. & P.S. 111 (1961), traces the developments in preservice training and notes what remains to be done.
\item[144.] Edwards, \textit{supra} note 136, at 89.
\item[145.] \textit{Id.} at 90.
\end{itemize}
There is, of course, only so much that the FBI can do toward elevating the training of the nearly half million police in the country. The Bureau can aid in in-service training only if a program is initiated at the local level, and today there is a total absence of such training in many agencies. Existing training programs vary considerably in quality, particularly in the area of arrest and search law.

Assuming that a state supreme court were to decide a case of major importance on the law of arrest or search, it would be hoped that word of the decision would reach the state's various police agencies, who then would instruct their front-line personnel as to the significance of the case for future enforcement activities. This ideal is far from being realized. Established means of communicating important legal developments to police agencies are lacking. Prosecuting attorneys seldom make a systematic effort to keep the police advised, and even if the printed decisions are forwarded to the law enforcement agency there may be no effort to disseminate this information to personnel at the operational level. Thus, even if a state appellate court renders a very significant decision on arrest or search, it is unlikely that more than a small minority of the police in that jurisdiction will ever have the case brought to their attention, and those who do receive word of the decision often will not receive clear instructions on what changes in law enforcement policy or practice it requires.

2. The Limiting Factors

"The law enforcement officer," it is said, "lives in a practical world and he is entitled to plain answers to plain questions." Currently, however, he receives no answers, wrong answers, or answers that are far from plain on important questions of arrest and search. Because this must be changed before the price exacted by the exclusionary rule pays off in terms of better police performance, it is important to understand the many factors that contribute to the present situation.

146. Clift, supra note 142, at 115.
147. For example, in one large police department it was the practice until a few years ago for a clerk in the commissioner's office promptly to file away appellate opinions the county prosecutor sent to the police department.
148. As noted earlier, the case itself may not make it apparent precisely what these changes should be. See text at note 121 supra.
149. Edwards, supra note 136, at 96.
a. Fragmentized, Decentralized Law Enforcement

Decentralization and fragmentation "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." Foreign observers of our system are always startled by this fact, and frequently have commented on the relatively difficult task of developing proper police methods we have as a result of our local autonomy.

In this country there are roughly 400,000 persons employed in police protection on the national, state, and local level. Including those who exercise limited police authority or part-time authority, the number approaches a million. These people work in some 45,000 separate and distinct law enforcement agencies, each having limited geographical and subject matter enforcement responsibilities. For example, there are 350 municipal, county, and state police forces operating within a fifty mile radius of the city of Chicago. It is apparent that these circumstances make police training extremely difficult; much more difficult than, say, in England, where centralizing factors are such that the Home Secretary possesses considerable authority over all the 120 different forces with their roughly 60,000 policemen, one third of whom are in one agency, the Metropolitan Police Force.

It may be, as is often stated, that the decentralized character of American police service is desirable and that a consolidation of police service would be dangerous. Yet, there is clearly room for co-operative

152. U.S. Dep't of Commerce, Statistical Abstract of the United States 435 (1964). Other recent estimates have been somewhat lower, such as 200,000, Trebach, The Rationing of Justice 56 (1964), or 300,000, Misner, Mobility and the Establishment of a Career System in Police Personnel Administration, 54 J. Crim. L., C. & P.S. 529, 531 (1963).
154. Ibid. "Small police departments are the rule—not the exception. In 1959, the average size of police departments reporting to the Department of Justice was 47 personnel. In 1952, Earle W. Garret reported that at least 90 per cent of the nation's police departments employed less than 24 personnel each. In a more recent study, California's Attorney General reported that 63 per cent of the state's municipalities employed less than 20 sworn police personnel." Misner, supra note 152.
efforts in developing a higher caliber of police training. Some co-operation now exists, as with the operation of zone training programs, but for the most part each of the 45,000 agencies is free to determine the level and nature of the training to be given their own personnel.

Nor is there any co-operative effort to keep informed on current developments in the law of arrest and search; for the most part, each agency must establish its own channels of communication. With most of the developments being of state-wide importance, it would seem practical to develop a communication system for disseminating the critical information to all law enforcement agencies in the state. The recent action of the New York State Combined Council of Law Enforcement Officials in distributing a bulletin with guidelines on the new “no-knock” and “stop-and-frisk” laws to every New York enforcement agency illustrates what could be done.

b. Competing Demands for Local Resources

Training costs money, and with our decentralized police service the local government unit usually must assume this burden. Because of the limited taxing power of state and local governments and the general lack of revenue reform, the necessary funds are not available. Moreover, the local officials who are responsible for the allocation of tax revenues seldom perceive the needs of the local police agency. As Professor Goldstein has pointed out:

City administrators view expenditures for police operations much in the same manner as they view expenditures for the operation of a fire department—to finance men and equipment prepared to perform their assigned job. There is a somewhat mechanical concept of policemen directing traffic; aiding people in distress; and responding hurriedly to calls for assistance. Few city administrators view the police as engaged in the most delicate function of enforcing a standard of conduct upon a community; of operating within the confines of carefully constructed grants of authority; of dealing with people under trying circumstances.

159. The Council prepared 25,000 copies of this 2,000 word bulletin and saw to its distribution throughout the state. N.Y. Times, June 2, 1964, p. 33, col. 1.
160. Some of the existing state programs do provide some forms of financial assistance to local governments, however. Brereton, supra note 143.
One difficult question is how the limited funds made available for law enforcement can best be used. Again there are competing demands. Goldstein, with his wealth of practical experience in police-local government problems, states the dilemma very well:

Two strong forces presently exert themselves upon the municipal administrator who is concerned with the use of police manpower. On the one hand he is faced with a constantly increasing crime rate, growing problems in traffic control and enforcement, and new regulations and laws to enforce—all of which point to an apparent need for more manpower. On the other hand he is faced with a demand for improving the quality of law enforcement, for upgrading standards of recruitment and training, and for improving police salaries. Since both forces require the expenditure of funds, they compete against each other for whatever resources the community is able to devote to police service.

Of the competing pressures, that which calls for added manpower has the greatest public appeal. Unaware of the inner workings and problems of law enforcement, the public tends to realize a sense of comfort and reassurance on knowing that more policemen will be on duty—somewhere—in the community. In contrast, improved training or increased salaries have no similar appeal. Given both of these, the public envisages the same people in the same number performing the same work. They see little direct benefit from such improvements and demonstrate a lack of awareness of the long-range benefits such improvements are designed to accomplish.162

It is understandable, perhaps, that police administrators respond to this demand for more police over better police. It is discouraging, however, to find them suffering from the same blind spots on the specific question of how best to meet the demands the exclusionary rule has made upon the police. One suspects that the comment of one police official that because of the Mapp decision "a possible doubling of Police Department personnel might be necessary to do the same job we're doing now"163 is not atypical.

c. Competing Demands on Available Training Time

In this complicated society of the 1960's, we make some very heavy demands of the policeman. The police officer is expected to be able to handle

163. This statement was attributed to the Denver Manager of Safety. Weinstein, supra note 132, at 150 n.2.
a great variety of delicate problems in human relations. At the same time, we require that he have an understanding of the many technical aspects of crime detection and law enforcement, the statutes he is to enforce, and the legal limitations on his authority. Moreover, he must be prepared to respond quickly in emergencies.

One police administrator has asserted that “the expanding police technology . . . has increased at such a phenomenal rate that the ideal of complete competency has become a myth. No single officer can effectively perform in the diverse and highly technical fields which police science has created.” It is debatable whether the problem has as yet reached these proportions, but clearly it is extremely difficult to provide adequate preservice and in-service training to this jack-of-all trades, or, if you will, jack-of-all emergencies, particularly within the limited resources available.

Although the particular concern here is with police training on arrest and search, one consequence of the situation described above is that those responsible for training the police cannot think solely in these terms. Rather, they must consider how much time can be given to the total training program, and then make some hard choices between subjects competing for the available time. The result is that training on the law of arrest and search typically constitutes a relatively small part of the total program.

Consider, for example, the operation of the Chicago Police Department Recruit Training School, one of the most ambitious training programs in the country. This program provides a total of 455 hours of training and instruction, covering 130 different subjects. The subject given the most hours (eighty in all) is “Criminal Law Administration,” which actually includes both the substantive and procedural criminal law. Ten of these hours are devoted to “Laws of Arrest, Search, and Seizure.” Thus, slightly over 2 per cent of the total training program is all that is devoted to the subject of the legal limitations on arrest and search.

It is questionable whether the law of arrest and search can be taught adequately within this limited time. Yet, it is not apparent that this allocation of available time is necessarily wrong, considering all that must

165. This allocation is typical of above average quality current training programs. See, for example, the California State Department of Education curriculum for recruit training. INTERNATIONAL CITY MANAGERS ASS'N, MUNICIPAL POLICE ADMINISTRATION 183-84 (5th ed. 1961).
be accomplished during the recruit training program. The entire curric-
ulum of the Chicago recruit training program reflects the complexity of
the police officer's job; consider this sample of subjects covered: handling
mentally disturbed; election duties; basic patrol; principles of report writ-
ing; emergency obstetrics; crime scene procedure; police ethics; firearms prac-
tice; crowd control; basic psychology; basic sociology; human relations;
communications systems and procedures.\textsuperscript{166}

The same situation prevails as to in-service training. Even in depart-
ments having an extensive program, which is the exception rather than
the rule, the great variety of subject matter to be taught considerably
limits the time available for refresher training on the law of arrest and
search.\textsuperscript{167}

The necessary breadth of these programs also raises the question of
how much knowledge of arrest and search trainees actually absorb. As one
expert on police training has observed:

\begin{quote}
[W]hile the curriculum and method of training in many recruit
schools expose the student to a vast amount of knowledge, it also
often serves utterly to confuse him. . . .

In-service training in many police departments is much more
like that of recruit training. . . . When central training is conducted,
the variety of subjects is often more than the mind can absorb.\textsuperscript{168}
\end{quote}

d. Lack of Effective Training Materials

The state of police literature generally leaves much to be desired,
for it is not of good quality and for the most part lacks depth.\textsuperscript{169} This is
particularly true with respect to the literature on arrest and search; the
quality of writing available for police on legal subjects is, as a whole,
lower than that on technical subjects, such as fingerprinting or basic
patrol techniques. This is most unfortunate, because the published ma-

\begin{itemize}
\item \textsuperscript{166} The curriculum of the Chicago Police Department Recruit Training School
is set out in detail in \textit{Wilson, Police Administration} 166-71 (2d ed. 1963).
\item \textsuperscript{167} I would again cite the Chicago Police Department as an agency that has
done much more than most departments in this regard. A major part of the efforts
of the department are reflected in their weekly \textit{Training Bulletin}, a four-page docu-
ment distributed to each member of the force and used for roll call instruction. I
have perused the \textit{Bulletin} for a period of nearly five years (vol. I, no. 1, dated Nov.
14, 1960, through vol. VI, no. 29, dated July 19, 1965), and would estimate that
the subject matter allocation is roughly the same as that for the recruit training
program.
\item \textsuperscript{168} Clift, \textit{supra} note 142, at 115.
\item \textsuperscript{169} Gabard & Gabard, \textit{The Present Status of Police Literature}, 48 J. Crim.
\end{itemize}
materials often are used to provide the basis for department training pro-
grams, and often are purchased and studied by individual officers de-
siring to improve themselves. Some of the common types of police lit-
erature on arrest or search follow:

(1) The Scissors-and-Paste-Pot Type. Some of the material prepared
for police consumption consists of nothing more than a collection of
quotations from statutes or cases from the jurisdiction, with absolutely
no attempt at analysis. Illustrative is a sixty-five page pocket-size pam-
phlet entitled Arrests, Searches and Seizures, which the Illinois Attorney
General supplies to the police of that state. The quotations provide
the police with such fascinating information as the fact that “the word
(arrest) is derived from the French, arreter,” but accomplish little be-
yond this. As noted earlier, the need of the police is not merely to receive
the appellate cases—or, as here, bits and pieces from them. They need an
understanding of the law that provides some guide for their conduct
in the great variety of situations that will confront them. Because of the
total lack of analysis in these scissors-and-paste-pot materials, the police
are unable to develop a situation-sense sufficient to cope with specific fact
patterns.

(2) The General-Statement-for-All-Jurisdictions Type. There are, of
course, some general similarities between the laws of arrest and search
of the several states. Law enforcement officers in all jurisdictions should know
the limitations imposed on the states by the United States Supreme Court.
Yet, for the most part, any detailed understanding of the law of arrest
and search requires a careful synthesis of the statutes and cases in a partic-
ular state. A book that purports to be usable in all jurisdictions, as many of

170. This is the practice in the District of Columbia, for example. Metropoli-
tan Police Dept., Washington, D.C., Report to Board of Commissioners, D. C.,
in re: Report and Recommendation of Commissioners’ Committee on Police

171. In talking with police officers, I have found it interesting to learn how
eager they are for helpful information on how to make proper arrests and searches.
Many of them have purchased the commercially produced publications, advertised
in police periodicals, at considerable expense in the hope of improving their ef-
ectiveness.

1961).

173. Id. at 2.

174. For example, the Illinois materials, note 172 supra, are replete with general
statements to the effect that an arrest must be on reasonable grounds, that mere
suspicion is not enough, that something less than evidence sufficient for conviction
is needed, etc. The materials do not speak to what is to be done in specific recurring
situations, such as when information is received from an informant.
them do, actually will be of very limited utility in any one state. This is a common failing of the commercially produced materials directed to the police; "the need to sell to a national market results in generalities not of practical use anywhere." More likely, however, these books represent an attempt to sell to a national market material originally prepared for use in but one jurisdiction. Thus, in Alexander, The Law of Arrest, the author observes that his first effort was to prepare a manual for New York police, but that it has been "enlarged so as to be equally useful everywhere." The citations, however, are primarily to New York law.

With the bulk of the materials prepared for police consumption fitting into one of these three categories, most of the written guidance for police on arrest and search is either extremely general or downright misleading. There is a clear need for the development of effective training materials that go into the law of the particular jurisdiction in depth. A few materials of this kind are now available and could serve as an excellent model for similar efforts elsewhere.

175. A few, however, do caution the reader to supplement the general material with the law in his own jurisdiction. See, e.g., Perkins, Elements of Police Science 220 (1942); Vallow, Police Arrest and Search 7 (1962).

176. Clift, A Guide to Modern Police Thinking (1956), which deals with the law of arrest and search in ch. 26; Houts, From Arrest to Release (1958); Varon, Searches, Seizures and Immunities (1961), a two-volume work, all in common use by police agencies, should be added to the books listed in note 175 supra.


178. Ibid.

179. Some of the books in this category are excellent for use in a particular jurisdiction. Thus, Dahl & Boyle, Arrest, Search and Seizure (1961), which has been adopted for use by the Milwaukee Police Department, is an excellent statement of the law in Wisconsin, although it does include citations to cases elsewhere. This book, replete with citations to Wisconsin statutes and cases, is certainly of limited use elsewhere, although it is advertised as usable everywhere, e.g., The Police Chief 29 (June 1963), and is sold nationally.

180. Alexander, The Law of Arrest iii (1949). This is a two-volume work. See also Smith, Arrest, Search and Seizure (1959), said to be for all law enforcement officers, though most of the citations are to Maryland cases.

181. The three best works I have uncovered are: California Attorney Gen-
e. Lack of Personnel Qualified to Give Effective Training

The police seldom have received outside assistance in the training of their officers on arrest and search. As the ABA Section of Criminal Law committee on police training has pointed out, "local bar associations generally have seldom exerted leadership to aid police administrations in improving the caliber of law enforcement."\(^{182}\) Local prosecutors have sometimes given assistance,\(^{183}\) but typically the demands made on the prosecutor in conducting the business of his own office leaves little time for such efforts. Most prosecutors do not conceive of their job as including a continuing responsibility to elevate the quality of police performance through training. And even the largest police departments are usually without competent legally-trained personnel on their staffs.\(^{184}\)

Effective police training on arrest and search law calls for a unique combination of talents. First, "law enforcement principles which are both legal and effective must be taught by those who understand the day-by-day problems of law enforcement down to their very roots."\(^{185}\) Yet, this is not enough. It is very important that the instructor have the broad background and understanding of legal principles afforded by a legal education.\(^{186}\) At present those persons who serve as police instructors

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\(^{182}\) Report of the Committee on Police Training and Administration, in ABA SECTION OF CRIMINAL LAW, COMMITTEE REPORTS 43, 44 (1956).

\(^{183}\) "Many prosecutors are assuming an increasing interest in participating in the training of the police and other investigative members of law enforcement." Edwards, supra note 136, at 94.

\(^{184}\) Indeed, if a request for such personnel is made, it will likely be denied on the ground that the corporation counsel furnishes all necessary legal assistance. This occurred recently in Chicago. See also note 191 infra.

\(^{185}\) Edwards, supra note 136, at 95.

\(^{186}\) "It is my firm belief that this is a job for a specialist—for a lawyer. Criminal law is not an isolated segment which can be lifted from its context in our legal system and understood standing alone. It has frequently been said that our law is a seamless web. And it's true. For example, true understanding of criminal libel and slander is impossible without a recognition of the growing concept of right to privacy in our tort law. As a matter of fact, this concept also has a bearing on the developments of the last two decades in the law of search and seizure and of wire tapping. It is true that words of a teacher of law to law enforcers might be recorded and parroted by anyone, but this would not suffice. The breakdown would come with the questions asked in the discussion period—and without discussion, there is no true teaching. For this challenge, the tremendous fund of knowledge from which the few spoken words of the lecture are chosen comes into play. This is why a lawyer is required. The situation can be compared to an iceberg. The lecture content is that small portion of the whole which sticks above the water, but
or prepare materials for police training typically have one but not both of these qualifications. The result is that the training given is usually deficient in one direction or another. The lawyer without practical experience in the law enforcement world is likely to deal in abstractions, to teach the law of arrest and search only "as a set of forbidding rules," and to ignore the practical problems of day-to-day enforcement. On the other hand, the man with experience but without law training is usually not in a position to use the cases and statutes effectively.

The obvious need is to develop police training personnel with the necessary combination of experience and education to do an adequate job. It has been suggested that if police departments were provided with legal advisors they could contribute materially to the training task.

the tremendous base of broad legal knowledge is necessary to keep that portion afloat." Myren, *Teaching Law to Law Enforcers*, 3 Police 48 (July-Aug. 1959).

187. A few years ago I was asked by the Chicago Police Department to prepare some training materials on arrest, search, and in-custody investigation. (These materials appear in Chicago Police Department, Training Bulletin, vol. V, nos. 1-17 (1964).) Whatever merit these materials may have I feel is largely attributable to the fact that I spent a good portion of the preceding summer riding with the Chicago police and observing their problems first hand.


189. See the comment in note 186 supra.

190. See Myren, *supra* note 186, at 49.

191. "It seems almost unbelievable that a very substantial number of modern police organizations operate without the skilled services of a competent legal staff. There can be little doubt that the police deal constantly with the law on a day to day basis. This requires current and accurate information as to the law as it exists in the particular jurisdiction on a regular and continuing basis. It means that the police must have available specialized legal knowledge from a person or persons having available an extensive background in the criminal law which is kept current by a thorough examination of the case law. Only in a very small number of the largest police departments is such legal knowledge and information available today, but it must in the near future be made available to all but the smallest departments.

"This legal service should be a part of the department itself and not be merely an additional duty for some city attorney who has little interest and less background in the area of the criminal law. The fact that city and county attorneys provide adequate legal counsel in civil service matters, suits against the department and its members and other relations with the public does not mean that adequate counsel is available for the specialized investigative functions of the police.

"Perhaps the best solution is to provide within the department one or more lawyers with civilian status who can attend to this important function. This would be similar to the practice in industry where a relatively small legal department attends to the specialized internal legal needs of the corporation while litigation and the general run of legal matters are referred to outside counsel. . . ."

". . . . The legal advisor can contribute much more to the police function. He can assist the training staff by making known changes and developments in the pertinent law and participate directly in training activities." Sullivan, *Know Your Law*, 5 Police 29, 30, (May-June 1961).
f. Failure to Keep Current on Training Needs

Most police agencies have failed to identify the current training needs in their respective departments. In part this attributable to the fact that significant legal developments are not studied with a view to instructing operating personnel on the necessary changes in procedure. There is, to be sure, "a terrific burden on keeping the system up to date" when appellate opinions continue to define the police powers of arrest and search, but it is a burden on which most departments have defaulted. The unmet need is expressed as follows in one police administration text: "Recent federal and state court decisions must be examined as soon as possible, and the department policy in light of the new decisions must be carefully explained."192

Equally significant, however, is the fact that most law enforcement agencies make little or no effort to determine precisely what their existing deficiencies are in terms of compliance with arrest and search requirements. There is no feedback on the precise reason why cases are repeatedly lost in the local courts because of suppression of evidence.193 Most departments have failed to undertake any real effort at self-analysis by which current deficiencies might be identified and corrected.194 Nor is this analysis done by outsiders; this is probably attributable in part to the reluctance of the police to allow such study.195 Here again is a problem that might be solved if a police legal advisor were available. He can and should follow all major cases through the prosecution and trial phases and report to the command of the department on the result of each case. In so doing he will make available for action the lessons that are learned in this process and make it possible

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195. "Research is far behind training, unfortunately, in quantity, acceptance, and application. This is the case in spite of critical need for research in all areas of police activity—operational, technical, and administrative. There is no greater single tool for increasing the effectiveness of manpower and resources than the discovery and application of better techniques and methods which is possible only by means of continuous study and research." INTERNATIONAL CITY MANAGERS ASS’N, MUNICIPAL POLICE ADMINISTRATION 512 (5th ed. 1961).
to avoid the repetition of mistakes in investigation and errors in judgment.197

g. Lack of Quality Personnel

Finally, of course, the success of any training endeavor depends to some degree upon the abilities of the people being trained. Police training can be successful only if directed to those who have the ability to grasp the information being conveyed and the judgment to act intelligently in applying this knowledge to their day-to-day tasks. Unfortunately, there is reason to believe that many of the people now in police service do not fit in this category.

One reason is that state standards for recruitment are now lacking; each county, city, and village is free to set its own standards.198 At the same time, local administrators are reluctant to impose high standards in the face of a severe shortage of candidates for police service. Many departments are presently undermanned,199 and the many prerequisites for employment—some proper, such as physical fitness, some illogical, such as prior residency—are such that it is extremely difficult to fill the available positions.200 Lack of adequate compensation,201 along with the many unattractive facets of police work,202 has made it extremely difficult for local de-

199. For example, in May, 1962, the St. Louis Metropolitan Police Department had an authorized strength of 2,232 but a force short of this strength by 344 officers, with 150 additional vacancies to be expected each year through normal attrition. JOHNSON, CRIME, CORRECTION, AND SOCIETY 453 (1964).
200. Thus, during a 1-year period ending May 1962, the St. Louis department received a total of 1,853 applicants. Of this number, only 95—which is slightly over 5%—were accepted. The reasons for rejection were as follows: physical, 42.1%; education, 17.8%; no state driver's license, 10.1%; mental, 8.6%; under or over age, 6.2%; unsatisfactory military record, 5.3%; nonresident of Missouri, 3.4%; criminal record, 2.5%; polygraph, 2.3%; oral screening board, 1.7%. Id. at 454.
201. “Median entrance salaries range from $5,515 for the largest cities to $4,740 for cities between 10,000 and 25,000. In most population ranges, the median is higher than last year's. The same holds true of median maximum salaries, which range from $5,292 to $6,514.” INTERNATIONAL CITY MANAGERS Ass'n, THE MUNICIPAL YEARBOOK 423 (1965).
202. Chief Parker of Los Angeles, when asked why the police were having difficulty recruiting quality personnel, replied: “I think it is because of the general treatment accorded the police service by the American public. On the one hand, the public has made it extremely difficult for the police officers to work in a favorable atmosphere; on the other hand, the public has expected phenomenal results from a police force working against odds.” CENTER FOR STUDY OF DEMOCRATIC INSTITUTIONS, THE POLICE 3 (1962).
departments to attract people of real quality. Indeed, some police administrators rank this as the most critical problem in police administration today.\(^{203}\)

3. What Hope for the Future?

Although the picture described above is not encouraging, there is an increasing awareness that the quality of police training must be improved if the exclusionary rule is to have its desired effect, and there have been some signs in recent months of renewed activity in this direction.

The Ford Foundation recently has provided grants totalling 1,460,000 dollars to help strengthen the standards of police administration.\(^{204}\) One grant was awarded to the International Association of Chiefs of Police for the improvement of standards for police education both before and after entry into service. Another grant to the Southern Police Institute will support expansion of training and new research programs.

A grant to the University of Wisconsin Law School will be used in part to allow law students to intern with police agencies and to support summer seminars on police problems. Northwestern University Law School will use its grant mainly to train lawyers for service as police legal advisors, who, as noted above, can contribute much to effective police training.\(^{205}\)

In addition, mention must be made of the work in this area to be done as part of the American Bar Association's Project on Minimum Standards for Criminal Justice, described earlier.\(^{206}\) The Advisory Committee on the Police Function plans to promulgate standards on the qualifications and training of police officers. Similarly, one of the objectives of the President's Commission on Law Enforcement and Administration of Justice is "to improve training of law enforcement personnel."\(^{207}\)

Recently, the Congress enacted the Law Enforcement Assistance Act of 1965.\(^{208}\) The act establishes a new program under which the At-

\(^{203}\) When Chief Parker of Los Angeles was asked to identify the major problem in the police field today, he answered: "Our great difficulty is attracting sufficient numbers of young men to the police service who have the mental and physical qualifications to perform this rather intricate task in the field of human relations." Id. at 3.

\(^{204}\) The following information is taken from a Ford Foundation press release dated July 2, 1964.

\(^{205}\) Professor Inbau of Northwestern reports that there has been no lack of employment opportunities for the people who have completed this program to date, which perhaps indicates an increasing awareness by police agencies and local government officials of the need for police legal advisors.

\(^{206}\) See p. 15 supra.


\(^{208}\) 79 Stat. 828 (U.S. CODE CONG. & AD. NEWS 3891 (Sept. 22, 1965)).
IMPROVING POLICE PERFORMANCE

The Attorney General is authorized to make grants for the training of persons employed in state and local law enforcement and for projects designed to improve the capabilities, methods, and practices of state and local agencies responsible for law enforcement. Ten million dollars have been appropriated for operation of this program for the next fiscal year.

These and other efforts are necessary before the quality of police training reaches the point where it is possible for the honest and conscientious police officer to operate with maximum effectiveness. Neither the risk of exclusion of illegally obtained evidence nor the desire to enforce the law with due regard for the rights of the people will ensure police conduct within existing rules in the absence of sound training programs. Moreover, it is important to recognize that the quality of police service can in turn have an impact upon the ultimate definition of the norms of police conduct: "A law enforcement body that develops... such public confidence and respect will inherit a broader latitude in which to operate than will an agency that fails to recognize its proper role in the enforcement of the criminal law."

E. Conclusion

In the two parts of this article, appearing here and in the last issue of this Review, I have attempted to identify the many interrelated factors that together deprive the exclusionary rule of maximum effectiveness in achieving its primary goal—a higher standard of police performance. This is in no sense the statement of a case against the exclusionary rule, and should not be viewed as such. Rather, the fundamental point is that once committed to a sanction by which "the criminal is to go free because the constable has blundered," as we clearly are, it becomes imperative that we make it possible for the conscientious police officer to avoid these blunders in the performance of his daily tasks.

This certainly is more true today than ever before. As ABA President

209. Goldstein, Guidelines for Effective Use of Police Manpower, 45 Public Management 218, 220 (1963). This relationship is sometimes reflected in the literature. On the one hand, it has been said of the English police: "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). Compare: "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, 433 (1960).
Powell indicated in his address on the state of the legal profession, "it is not too much to say that crime is our nation's No. 1 domestic problem."\textsuperscript{210} In the current law enforcement crisis, the police must know the limits of their authority and must be induced to act within these limits. If this can be accomplished, then perhaps we can begin, as President Johnson has urged, "a thorough, intelligent and effective war against crime."\textsuperscript{211}

As I have tried to indicate, the problems are many, and it is apparent that much remains to be done before they can be solved. These are not solely police problems; the police are not alone responsible for their existence, and the police alone cannot eliminate them. The task clearly calls for the concerted efforts of the police, other agencies of prosecution, trial and appellate courts, legislatures, legal scholars, and, indeed, the entire organized bar. When these efforts come to pass, we may then achieve a level of police performance that will make possible both expert and efficient law enforcement and freedom from unwarranted official interference. We may then say that it is more than "wishful thinking on the part of the courts"\textsuperscript{212} to view the exclusionary rule as an effective deterrent.

\begin{thebibliography}{9}
\bibitem{} \textsuperscript{210} Powell, \textit{The President's Annual Address: The State of the Legal Profession}, 51 A.B.A.J. 821, 826 (1965).
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