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PROSECUTOR DOMINANCE OF THE WARRANT DECISION: A STUDY OF CURRENT PRACTICES

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This article is a by-product of the authors' participation in the analysis phase of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. The ABF study, underwritten by a Ford Foundation grant, is concerned primarily with isolating and identifying the critical problems in current criminal justice administration. The complete study, to be published soon, is based upon detailed observation of the actual practices of police, prosecutors, courts and probation and parole agencies in Kansas, Michigan and Wisconsin. The law in action part of this article is also based on that data.

A recurring theme in discussions of pretrial criminal procedure is the need that an impartial official determine whether the available evidence is sufficient to justify issuance of a warrant.[1] This insistence on impartiality indicates that some interested persons commonly urge officials to give positive answers to requests for warrants, an inference fully justified by the facts of current administrative practice. Such requests are nearly always transmitted by police officers—even when they originate with private citizens—although occasionally the private citizen communicates directly with the warrant-issuing authority. The problem can be phrased in these terms: should the

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1. *Light on Grand Jury Procedure,* 15 J. AM. JUD. SOC'Y 120, 122 (1931):

> One of the big elements in law enforcement lies in the issuing of warrants, and this is commonly overlooked. Should not a responsible judge pass upon every application for a warrant, rather than a deputy clerk or police sergeant? The warrant bureau, supervised by a member of a strong bench, should exist in every city of any size, as it did in the Detroit Recorder's Court as first constituted. It is in the responsible exercise of the power to issue warrants that the police are to be held to their duty and civil rights protected.

See Sullivan, *A Comparative Survey of Problems in Criminal Procedure,* 6 ST. LOUIS U.L.J. 380, 386 (1961).

police—or the private citizen—have freedom to insist on prosecution without the approval of some other official in the criminal administrative system?

The assumption, usually made explicit, is that impartiality is to be obtained by making the inquiry a judicial one. Recently the Supreme Court of the United States construed Rule 4 of the Federal Rules of Criminal Procedure to impose such a requirement:

> The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inference from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, 333 U.S. 10, 14 . . . . The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by the complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.[2]

To hold otherwise, the Court said, would be to read the substantive requirements out of Rule 4, "and the complaint would be of only formal significance, entitled to perfunctory approval by the Commissioner."[3]

What is seldom made clear is whether the insistence on the impartial judgment of a third person—judicial or otherwise—is designed to protect the citizen from unjust arrests or to protect the suspect already in custody from improper prosecution.[4] This lack of clarity results in part from the fact that arrest warrants are commonly used to serve both purposes; the language occurs in discussions of warrants used for arrest purposes.

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

In the states under intensive consideration here, some officials charged with the responsibility for administering the criminal law believe that the formal law requires that a warrant be issued even after an arrest without

2. Giordenello v. United States, 357 U.S. 480, 486 (1958).

3. *Id.* at 487.

4. *Ibid.*

one. Others are simply uncertain. Of those who believe that a warrant is required, some do not know the reason; others give reasons ranging from statutory necessity to custom, including, in some instances, justification of custody. Yet all of them recognize that whatever the necessity in formal law, in practice the warrant is regarded as the charging document.

Power over warrants may be affirmative or negative. Neither prosecutors nor magistrates, alone or acting together, have the sole power to prevent prosecution on the ground that the evidence is insufficient. Neither is a self-starter. Prosecution occurs only on complaint, and complaints originate with citizens or the police. If citizens decline to disclose the facts of criminal conduct which come to their attention, or if the police decide that evidence is not sufficient to justify seeking a warrant from the deciding authority, the latter has no opportunity to make a decision, either positive or negative. In certain categories of situations the police make arrests without any intention of charging. In some of them the generalized decision not to charge rests on the insufficiency of the evidence to sustain a conviction. No doubt, in some cases the police decide that arrests in the first instance were improper because the evidence sufficiency standard for making an arrest was not met. In others, even though the arrest was a valid one, the additional evidence necessary to meet the presumably higher charging standard might not have become available. Indeed, in some cases new facts discovered between the time of arrest and the time when the charging decision must be made might weaken rather than strengthen the inference of guilt, leaving the evidence wholly insufficient to proceed further. In any of those situations, the suspect might be released by the police without a decision by any other official. When that occurs, an effective decision to prevent issuance of a warrant is made by the police themselves.

Although the significance of police participation in the warrant decision is substantial, it receives only incidental attention here. Primary emphasis is on the class of cases in which the police seek a warrant because they believe, among other considerations, that the evidence is sufficient to justify charging. In that class of cases, a study of current administrative practices indicates two general areas of concern: (1) the divergence between the formal allocation of power to issue warrants and the observed practice, and (2) the procedures used by prosecutors to insure that warrants are issued only on sufficient evidence. The first two following sections underscore the first problem and attempt to provide a functional explanation for the divergence. Judicial abdication of the formal power to prevent issuance of warrants not based on sufficient evidence to constitute probable cause leaves the power to make that determination in the prosecutor. Thus viewed, the system is seen as one dominated by the prosecutor in which the only

practical restraints are self-imposed, and the third subsection explores those restraints. The article concludes with a contrast between the practical limitations on charging and the common assumption about the need for independent judicial determination of probable cause for issuance of a warrant.

I. Divergence of Law and Practice

The three states have allocated the power to issue warrants in three different ways. Nonetheless, it is readily apparent from a study of current practice that in each of those states the prosecutor alone makes the effective warrant decision. It is of primary interest that the formal law in each state provides in varying degree for judicial intervention in the warrant process, which could serve as a limitation on the power of the prosecutor. However, magistrates vested with power to control prosecutors have not exercised the power.

In Michigan, statutes give only magistrates the power to issue warrants, both in cases which are cognizable before them and in cases which are not.[5] Warrants may not be issued except on probable cause,[6] and prior approval

5. Mich. Stat. Ann. §§ 28.860, .1195 (1954). An exception is made in both sections as to warrants which are requested by members of the department of public safety for traffic or motor vehicle violations. See also Mich. Stat. Ann. § 13.1222 (1958) excepting alleged violations of fish and game laws. Mich. Stat. Ann. § 28.1169 (1954) authorizes inquests by justices of the peace and the result of the inquest may be the issuance of an arrest warrant, Mich. Stat. Ann. § 28.1178 (1954).

6. "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them nor, without probable cause, supported by oath or affirmation." Mich. Const. art. I, § 11. Similar provisions are found in Wisconsin and Kansas. Wis. Const. art. I, § 11; Kan. Const. Bill of Rights § 15.

7. The statutes provide that warrants may not issue until the prosecuting attorney has approved in writing the issuance of such warrant or until security for costs is filed with the magistrate. The Michigan Supreme Court has considered the addition of the alternative proviso a safeguard against unwarranted issuance of warrants by magistrates and not a means of implementation of another section of the Michign statutes, Mich. Stat. Ann. § 28.1249 (1954), which provides for filing of security for costs when prosecutions are commenced by private persons. This construction is made clear in People v. Griswold, 64 Mich. 722, 31 N.W. 809 (1887). In affirming a conviction for an offense cognizable by justices despite the fact that no prosecutor approval had been obtained prior to issuance of the warrant, the court said:

> The object sought to be accomplished by that statute was to guard against the indiscretion, frequently indulged in by magistrates, in permitting legal proceedings to be instituted against parties for crime without any previous inquiry into the circumstances. *Id.* at 723, 31 N.W. at 810.

Nonetheless, the court further held that the sanction for the failure to secure an order from the prosecuting attorney as an alternative to the filing of security for costs was not the loss of jurisdiction to try the accused. The proviso is enforced by the fact that magistrates who issue warrants without approval of the prosecutor and without requiring the filing of security for costs cannot collect their fees. Sunderlin v. Board of Supervisors, 119

of the prosecutor is required.[7] The observed practice does not reflect this formal allocation of power and responsibility. Typically in Detroit, after the prosecutor's office has issued to the complainant or to the police officer an official recommendation for a warrant, the police officer and the complainant then go to the warrant clerk's office of Recorder's Court. In this office, complaint forms are kept which contain the required language for twenty-six of the most common misdemeanors and forty-seven felonies and high misdemeanors. The blank spaces in the printed forms are filled in with information taken from the prosecutor's recommendation; any further information needed may be obtained from the investigating officer's write-up, or orally from the complainant or the officer. The complaint is then signed. The signed complaint and the warrant are taken to a judge of Recorder's Court who has been given responsibility for signing warrants. This judge is also responsible for conducting initial appearances and preliminary examinations.

While one or the other of those proceedings is in progress, the police officer and the complainant approach the clerk, who administers the oath to the complainant, and they then take the warrant to the bench for the judge's signature. At most, the judge merely scans the warrant before signing; frequently he signs without examining the contents at all. Obviously, whatever the reasons, it is clear that magistrates do not exercise any real control over the issuance of warrants, and the effective decision is made by the prosecutor.[8]

The Kansas statute also confines the power to issue warrants to magistrates, but, unlike the Michigan statute, does not require the concurrence of

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Mich. 535, 78 N.W. 651 (1899). The requirement was first confined to offenses cognizable before justices of the peace. Mich. Pub. Acts 1883, No. 108. Subsequently this limitation on the power of the magistrate was extended to situations beyond the scope of the original rationale by requiring prosecutor approval of cases not cognizable by justice of the peace. Mich. Pub. Acts 1929, No. 290. Here is implicit recognition of the greater capacity of the prosecutor to perform the screening function. It remains true, however, that approval of the prosecutor, at least in cases cognizable before magistrates, is not a jurisdictional prerequisite, and that magistrates can in fact charge without such approval.

8. One reporter noted that the judge did not seem appreciably bothered by this duty, since he merely signed his name to the warrant while listening to the testimony of the witnesses in other matters. A judge responsible for the signing of warrants explained that he quickly scanned the information contained in the warrants to see if there were sufficient grounds for the issuance of them, but, being a former prosecutor himself, he placed a great deal of faith in the procedure established for screening requests and very seldom refused to sign a warrant. Other instances were reported in which the examination was even more cursory. In one, for example, the judge was caught just before getting on an elevator and asked to sign a warrant; he did so without completely unfolding it to see what the charge was.

the prosecutor in the decision.[9] Thus the formal law gives the magistrate exclusive authority to make the determination of probable cause prerequisite to the issuance of arrest warrants. Observation of the practice, however, makes it clear that the magistrate plays virtually no role in warrant issuance. In Wichita, the complaint and warrant are both prepared by the county attorney's office and are then delivered to the office of the clerk of the Court of Common Pleas where the complaint is signed before a deputy clerk of that court, who then issues the warrant. That there is considerable doubt expressed by personnel of the county attorney's office about the validity of warrants so issued does not inhibit the practice except when extradition may be involved. Then, because of the increased probability that the warrant might be challenged as improperly issued, the judge is usually requested to sign it.

Either the magistrate or the prosecutor may issue arrest warrants in Wisconsin without the concurrence of the other.[10] Despite this express authority, the prosecutor seldom signs warrants himself. Typically, the complaint is prepared by the prosecutor's office, but is taken to the clerk of court, who prepares and signs the warrant. One judge authorized to issue warrants told a reporter that he had never refused a warrant, that he seldom knew anything about its being issued, and that he regarded it as a ministerial function of the clerk. What purpose is served by insisting that magistrates, or their clerks, perform this step is unclear. Perhaps some notion of freedom from responsibility, or even from civil liability, induces it.

In short, while the details vary considerably from state to state, and even among different courts of a state, there is virtually no judicial inquiry into the existence of probable cause for the issuance of arrest warrants. And this is true despite the variety of formal schemes for the allocation of this function. In each of the three states the determination whether a warrant

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9. KAN. GEN. STAT. §§ 62-601, -602, 63-201 (1949). Authority to issue an arrest warrant is also vested in the coroner upon return of a coroner's jury's inquisition stating the finding to be that death was caused feloniously and the warrant so issued must be made returnable to a magistrate. KAN. GEN. STAT. §§ 19-1010, -1011 (1949). See also KAN. GEN. STAT. §§ 13-606, 14-806, 15-506 (1949) providing such authority for police judges in 1st, 2nd, and 3rd class cities.

10. WIS. STAT. ANN. §§ 954.01, .02 (1958). An exception similar to that in Kansas is found in Wisconsin. WIS. STAT. ANN. § 966.12 (1958) provides that:

> If any person charged by [a coroner's inquest] . . . with having committed any such offense shall not be in custody the coroner shall issue a warrant for his apprehension, and such warrant shall be made returnable before any other magistrate or court having cognizance of the case, who shall proceed thereon in the manner that is required of magistrates in like cases.

A coroner may hold an inquest with or without the authority of the district attorney. WIS. STAT. ANN. § 966.01 (1958).

should issue is made by the office of the prosecuting attorney. The following section offers a functional explanation of this divergence between formal law and its current administration.

II. Functional Explanation of the Dominance of the Prosecutor in the Warrant Decision

Although scholars have not dealt thoroughly with the subject,[11] enough work has been done to establish that the present significance of the prosecutor in the administration of criminal justice in general in this country, and his dominance of the warrant decision in particular, did not derive from English common law.[12] The public prosecutor, as that institution is known in this country, plays a comparatively small role in the administration of criminal justice in England today;[13] that role was an even smaller one at

11. Note, *The District Attorney—A Historical Puzzle,* 1952 Wis. L. Rev. 125, 138: "It is submitted that the anomalous figure of the public prosecutor in the United States stands out in our Anglo-American system of criminal law as a historical challenge to the interested research scholar." See also Moley, Politics in Criminal Prosecution 48 (1929): "The great and constantly increasing significance of the American prosecuting attorney has been strangely neglected by institutional commentators and historians."

12. The different theories of prosecution in this country and in England are stated by one writer to be the "fundamental and outstanding procedural difference" between the two systems of criminal administration. Howard, Criminal Justice in England 1 (1931). See also National Commission on Law Observance and Enforcement, Report on Prosecution 6-11 (1931); Moley, op. cit. *supra* note 11. Howard, *op. cit. supra* at 3-4 summarizes the present English theory of prosecution as follows:

> The prosecution of criminal offenses, save in those special classes of cases which are conducted through the agency of governmental officials such as the Law Officers of the Crown [the Attorney-General and the Solicitor-General], the Director of Public Prosecutions or the solicitors to the government departments and boards, is in legal theory left wholly to the agency of private individuals who are not compelled to set the law in motion and who have only within comparatively recent years been encouraged to do so by legislative provisions authorizing the repayment on a still inadequate scale of the costs of the actions out of public funds. And a criminal case, though differing from a civil action in that it is conducted nominally in the name of the Crown with the avowed object of punishing the offender, and having once been started cannot be compromised or abandoned at the pleasure of the prosecutor, in many respects more nearly resembles an ordinary law-suit between complainant and defendant than a proceeding instituted and carried on by the sovereign power.

While the theory is that the prosecution is in "private" hands, in fact the vast majority of prosecutions are controlled by the police. Private prosecutions usually include the general class of commercial crimes while the police generally prosecute robbery, burglary, etc., and cases in which the injured party cannot afford to prosecute or does not take sufficient interest in the case for other reasons. In both types of prosecutions a private solicitor and a barrister are hired to aid in the collection of evidence and the actual presentation of the case.

13. Howard, *op. cit. supra* note 12, at 156 points out, however, that although the number of public prosecutions undertaken by the Director of Public Prosecutions is small compared to the number of private prosecutions, the significance of the Director does not depend upon that alone. He provides assistance to various other agencies, the police and

the time the American institutions developed.[14]

Various explanations have been offered why the English practice of leaving control over prosecutions for the most part in private (and police) hands was not adopted here.[15] But, whatever explanation is accepted, observers of the system agree that the prosecutor is now the most important figure in the administrative process.[16]

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poor complainants. Further, the offenses that he prosecutes are generally graver than those left to private prosecutions.

14. Public prosecutions are now handled by the Director of Public Prosecutions. That office was not created until 1879 by passage of the Prosecution of Offenses Act, 42 & 43 Vict. c. 22. Prior to statutory creation of the office of Director, public prosecutions were primarily carried on by the Solicitor to the Treasury Department, and a small role was played in such prosecutions by the Law Officers of the Crown, including the Attorney-General and the Solicitor-General. MOLEY, *op. cit. supra* note 11, at 193-98.

15. HOWARD, *op. cit. supra* note 12, at 5 states:

> It is patent . . . that what the United States has done is simply to graft on to the English (or as it is frequently called, the *accusatorial*) type of criminal procedure the Continental institution of the public prosecutor, at the same time rejecting those fundamental juristic conceptions upon which the *inquisitorial,* or Continental, system is predicated.

Howard does not specifically discuss the causes for this choice, but seems to attribute it simply to the fact that the first such system established on that pattern in Connecticut in 1704 was a sufficient precedent for the other colonies.

THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION, *op, cit. supra* note 12, at 7 states:

> The influence of the French *procureur du roi* in giving final shape to the American institution of an official prosecutor is obvious. After the Revolution, especially in the era of rising Jeffersonian democracy, things English were for a season discredited and things French regarded with enthusiastic interest. The American official prosecutor, Federal and State, is a compound of the English attorney general and the French avocat general and *procureur du roi,* on the basis of the colonial county attorneys.

Another possible theory has been suggested which would attribute the divergence between the American and English practice to the influence of the Dutch settlements in colonial America. The early Dutch law provided for the office of the Schout in essence a public prosecutor of the Continental variety. Note, *The District Attorney—A Historical Puzzle,* 1952 WIS. L. REV. 125.

16. MOLEY, *op. cit. supra* note 11, at vii. Advertence has been made to the position of the prosecutor by many writers. See, *e.g.,* HEALY, THE PROSECUTOR IN CHICAGO IN FELONY CASES (ILLINOIS CRIME SURVEY) 285 (1929) ("The whole question of the administration of criminal law depends in the main upon the individual who is at the head of the prosecutor's office . . . ."); KNIGHT, THE PROSECUTOR OUTSIDE OF CHICAGO IN FELONY CASES (ILLINOIS CRIME SURVEY) 249 (1929) ("The state's attorney . . . has almost absolute control of policies and actual administration of the criminal law in the courts."); LASHLY, PREPARATION AND PRESENTATION OF THE STATE'S CASE (MISSOURI CRIME SURVEY) 113 (1926) ("The very heart of the criminal process is the prosecuting office. Its power over the life of a case is practically without limitation. The prosecutor may prosecute or refuse to prosecute."). HURST, THE GROWTH OF AMERICAN LAW—THE LAW MAKERS 174 (1950) ("The overshadowing fact here was the dominant and largely unsupervised discretion of the district attorney, or public prosecutor. This officer was an American creation.").

When the prosecutor's *de facto* control over prosecutions generally is combined with the observed practice of using the arrest warrant primarily as a charging document rather than to perform its historical arrest authorizing function,[17] it is inevitable that the prosecutor should assume control over its issuance. It is nonetheless true, however, that the formal law, while liberally recognizing that the prosecutor has great discretion in controlling prosecutions,[18] still conceives of the arrest warrant as performing its histori-

17. See text following note 4 *supra.*

18. The power of the prosecutor over prosecutions generally is largely a power to prevent prosecution. The discretionary use of nolle prosequi is perhaps the most potent of control powers. While the English prosecutor, as noted earlier, has much less control over prosecutions than does his American counterpart, even English law has long recognized the power to prevent prosecutions by use of the nolle prosequi. See, *e.g.*, HOWARD, *op. cit. supra* note 12, at 35, 136-37, 360-61. The control of prosecution by this device is discussed generally in Emery, *The Nolle Prosequi in Criminal Cases,* 6 MAINE L. REV. 199 (1913).

The formal laws of the three states vary somewhat in recognition of this power. Language appears in a Kansas case, Williams v. Cave, 138 Kan. 586, 27 P.2d 272 (1933), which states the judicial view of nolle prosequi in that state. The court adopted the position of the Massachusetts court in Commonwealth v. Tuck, 20 Pick (37 Mass.) 356 (1838):

> There are three periods of the prosecution, in which a nolle prosequi may be entered,—before a jury is impaneled, while the case is before the jury, and after verdict. In the first it is perfectly clear that a nolle prosequi may be entered at the pleasure of the prosecuting officer. Such is the constant practice. It may be that the indictment is defective and he may wish to procure another. He may discover that the evidence will turn out different from what he expected, and he may wish to vary the charge to make it conform to the proof. Or he may have good reasons for not wishing to prosecute at all. There may be innumerable causes for discontinuing the prosecution; of all which he must judge, upon his official responsibility.

However, KAN. GEN. STAT. § 62-1437 (1949) provides that no indictment or information shall be dismissed except by order of the court on motion, thus limiting the discretion of the prosecutor.

The Michigan statutes have a similar provision:

> It shall not hereafter be lawful for any prosecuting attorney to enter a nolle prosequi upon any indictment, or in any other way to discontinue or abandon the same, without stating on the record the reasons therefor and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes. MICH. STAT. ANN. § 28.969 (1954).

There appears to be a complete lack of discussion in the formal law of Wisconsin of the subject of nolle prosequi. Wisconsin does have, however, a statute which limits the power of the prosecutor at an earlier stage in the proceedings. WIS. STAT. ANN. § 955.17 (1958) provides:

> If the district attorney determines that an information ought not to be filed, he shall subscribe and file with the clerk of the court a statement of his reasons for not filing an information . . . . The court or presiding judge shall examine the statement and the evidence filed, and if he is not satisfied with such statement, the district attorney shall file an information and bring the case to trial. If said statement is satisfactory the judge shall indorse "approved" upon it. Thereupon the action shall be dismissed and the defendent shall be discharged.

Early Kansas cases have recognized the discretionary power of the prosecutor at even earlier stages in the proceedings. Thus, in Foley v. Ham, 102 Kan. 66, 169 Pac. 183

cal function, and, for the most part, still vests in the judiciary the power to determine the sufficiency of the evidence to justify arrest.[10] Magistrates, in

(1917), the accused was arrested, a preliminary examination was held, and he was bound over on the charge. Subsequently, the county attorney's request not to file an information was granted by the district court on the grounds that there was insufficient evidence to warrant a prosecution. However, the complaining witness then applied to other justices of the peace to issue a warrant on a complaint charging the same offenses. Two of them refused but a third issued a warrant and held an examination, which resulted in the discharge of the defendant for want of evidence. A complaint was then filed before another justice, the defendant in the present action, who issued a warrant for the accused's arrest. In the preliminary examination which followed execution of the warrant, the county attorney filed a motion to dismiss which was denied and the present action of prohibition was then instituted. In granting the writ of prohibition, the court said:

> Notwithstanding that the county attorney is not required to attend a preliminary examination unless asked to do so, we hold that he may appear if he sees fit, and when he does his authority is as complete as though his presence had been requested . . . . The power effectively to control a prosecution involves the power to determine when and before what tribunal it shall be brought and maintained, and therefor whether it should be discontinued. We conclude that the justice of the peace should have acted upon the direction of the county attorney and dismissed the case. *Id.* at 69, 169 Pac. at 185.

The same reasoning was applied in another case which involved an offense triable by a magistrate, State v. Court of Coffeyville, 123 Kan. 774, 256 Pac. 804 (1927), where the court stated that "the dismissal or nolle prosequi of the criminal action rests entirely within the discretion of the prosecuting officer, except as that discretion may be limited by the statute." *Id.* at 777, 256 Pac. at 806.

19. Even though the courts still recognize that magistrates, except in Wisconsin, are responsible for the issuance of warrants—at least in a negative sense as in Michigan—there is some recognition that the magistrate would be better advised to ascertain the position of the prosecuting attorney with respect to the warrant being sought. The Michigan Supreme Court, while holding that mandamus will not lie to compel a sheriff to serve a warrant for the arrest of the person named therein, said that the magistrate

> certainly ought very seldom to hold a party to bail or to convict him on trial when the prosecuting attorney in good faith advises him that no crime is made out. It would be proper, also, in many cases that he should seek the advice of the prosecuting attorney in advance of the issue of any warrant, and refuse a warrant even when the complainant is able to make *prima facie* showing of a technical offense, if the prosecuting attorney is of opinion that the case would fail on full hearing, or that the criminal intent was so far wanting that the cause of justice would not be advanced by the prosecution. Beecher v. Anderson, 45 Mich. 543, 548, 8 N.W. 539, 541 (1881).

There has been similar recognition of the power of the prosecutor to prevent prosecutions in Kansas, despite statutory vesting of the power to issue warrants solely in the magistrate. In State v. Forbriger, 34 Kan. 1, 7 Pac. 631 (1885), a warrant was sought by a private person from a district judge for a misdemeanor after the prosecuting attorney had refused either to request a warrant or to follow the alternative procedure of filing an information directly in the district court. On appeal, the supreme court affirmed the denial of the warrant even assuming that the appeal could be taken and that the district court rather than a magistrate would have been authorized to issue the warrant. The court set out the lower court's opinion and stated that they would probably have reached the same result if the issue had been presented to them. The district court had denied issuance of the warrant on the grounds that

> If private persons can prefer criminal complaints against others directly to the district judges or to the justices of the supreme court, and cause such judges or justices

fulfilling this role, would theoretically be determining whether the available evidence was sufficient to justify an arrest, while the prosecutor's concern would be with the existence of adequate evidence to charge, along with his estimate of the social desirability of commencing or preventing prosecution for other reasons than probability of guilt.

Why this contemplated distribution of function is not realized in current administration is not entirely clear. What is clear is that some pragmatic considerations enter the picture. If magistrates were to issue arrest warrants against the wishes of the prosecutor—or even issue them frequently without prior consultation—there would be many initial arrests or further detentions of persons suspected of crime but who have already been screened out by the prosecutor. The screening may have been on technical evidence sufficiency grounds, on a stiffer standard of probable convictability, or on grounds other than the sufficiency of the evidence. Whatever the grounds, it will have occurred. To issue a warrant under those circumstances would entail the following: (1) a belief on the part of the magistrate that his judgment is superior to that of the prosecutor; (2) at least in some instances, a belief that the grounds other than sufficiency which the prosecutor used were inappropriate; (3) a willingness to take what would, in all likelihood, be a futile step, since the power of the prosecutor to nolle prosequi the case would almost certainly be exercised to prevent prosecution. The refusal to issue a warrant without prior prosecutor approval, then, is not mysterious.

Why magistrates perfunctorily issue warrants requested by prosecutors is less clear and depends to a substantial extent on different considerations. Ordinarily, a prosecutor would be effectively stymied by the refusal of a magistrate to issue a warrant, because he cannot proceed without the technical approval of a magistrate except in Wisconsin. Of course, outside the large metropolitan centers, the prosecutor could "shop around" and present

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to enter upon preliminary examinations of the alleged offenders without reference to the views of the attorney general or the county attorney as to the propriety or expediency of instituting such criminal prosecutions, great labor will be cast upon such judges and justices, and much expense thrown upon the public in addition to what has heretofore been customary. *Id.* at 2.

The complainant argued that this was the system contemplated by the applicable statutes which vests the authority to issue warrants in the judiciary. The district judge, nevertheless, said that:

The judge has not conversed nor held any communication with the county attorney concerning the proposed prosecution . . . and knows nothing of his views on the subject . . . . And it is generally both impracticable and indelicate for a judge to make a preliminary investigation of charges of crime for the purpose of deciding whether a public prosecution should be instituted or not. That duty is specially committed to the county attorney of each county, and only "in extreme cases" where it is apparent that the prosecuting officer is abusing his discretion for the purpose of shielding persons accused of public offenses, would the court be justified in compelling the filing of an information by a county attorney when after an investigation he has determined not to do so. *Id.* at 4.

his request to a series of magistrates until he found an acquiescent one. And it may be that under the old fee system, fear of retaliation by the prosecutor with a consequent loss of fees was a factor in magistrates' surrendering control. But the same reluctance to oppose the wishes of the prosecutor is found in large metropolitan centers with unitary multi-branch courts which effectively prevent "shopping around."

Another possible explanation is that magistrates realize that their offices have certain inherent limitations to which a prosecutor is not subject. Traditionally magistrates have been laymen, who might feel a certain diffidence in disputing the essentially legal conclusions reached by law-trained persons.[20] Whether lawyers or laymen, magistrates do not have the investigational facilities available to prosecutors. These may be overriding reasons for deferring to the prosecutor's judgment in so many cases that automatic issuance has become the accepted practice, with the power of refusal effectively lost by disuse. Then too, in serious cases, magistrates may feel that their control over the process can be exercised more effectively at the preliminary examination stage. In short, the complete dominance of the prosecutor over the warrant decision is partly a concomitant of his general power to control prosecutions, and partly a recognition of his greater capacity to make the initial decision correctly.

III. Self-Imposed Evidence Sufficiency Controls

With the decline of judicial participation in, and the prosecutor's parallel rise to power over, the issuance of arrest warrants, that process may now be described accurately as one of self-limitation. Reasons are obvious why a prosecutor would find intolerable a situation in which warrants were issued charging a substantial number of persons who later proved unconvictable. Not only would the ends of justice be disserved, limited resources would be dissipated to the detriment of the protection of society. If, as folklore has it, prosecutors tend to believe that the public judges them in terms of their conviction records, another barrier to charging unconvictables is present.[21]

These factors alone would provide an adequate incentive for establishing

20. In People v. Griswold, 64 Mich. 722, 31 N.W. 809 (1887), speaking of the requirement for prosecutor approval before the issuance of arrest warrants, the court said that:

> The object sought to be accomplished by that statute was to guard against the indiscretion, frequently indulged in by magistrates, in permitting legal proceedings to be instituted against parties for crime without any previous inquiry into the circumstances. *Id.* at 723, 31 N.W. at 810.

21. Of course, extensive use of the nolle prosequi power is an alternative, but, at least in large metropolitan areas, it is a more highly visible one, frequently the subject of newspaper criticism.

administrative controls to insure that his assistants—to whom are entrusted the daily routine decisions of the office—would charge only when the evidence of guilt nearly precluded acquittals. When this consideration is coupled with a desire to treat suspects uniformly—both to further widely-held values of fairness and equality and to escape criticism for doing otherwise—a search for devices to insure that suspects are not charged on inadequate evidence is nearly inevitable.[22]

Three principal methods might be utilized to accomplish these ends. The most obvious one would be complete examination and evaluation of evidence available at the time the charging decision must be made. A second would be the establishment of intra-office review procedures, and a third the development of specialization within the office, or reliance on specialists in other departments.[23] A consideration of the extent to which these methods are utilized constitutes the bulk of this section.

A. *Investigation of Available Evidence*

As a general proposition, a detailed consideration of the available evidence itself would be more likely to result in an accurate evaluation of its adequacy than would reliance on a police officer's oral or written summary of it. Perhaps in the interest of saving time, a detailed consideration is not customary in any of the jurisdictions studied.

In each of them, the source of information most often relied on is the police officer and his report or summary of the case which he brings with him when he requests a warrant. Occasionally witnesses, the suspect, or the victim are also interviewed, but there is no readily discernible pattern. Indeed, it depends to some extent on whether the requesting police officer brings them with him, and to some extent on whether the request is made by a private complainant rather than the police.[24] In some cases, but by

22. Obviously other factors tend toward the same conclusion. Uniformity of treatment remains a desirable goal when considerations other than evidence sufficiency come into play. And procedures which assure that sensitive cases get full consideration are important to the politically-minded prosecutor.

23. In practice the prosecutor sometimes takes advantage of specialization in other departments, *e.g.*, police or welfare, but when that occurs, reliance on the specialist is commonly so complete that there is no longer any decision by the prosecutor whether to charge, for the advice of the specialist is followed automatically.

24. In some cases, the police do not receive notice of the case until after the prosecutor's office has received the complaint. Primarily this occurs simply because the complainant decided to take that course of action rather than the more usual one of notifying the police first. When this occurs, it is obvious that the prosecutor will interview the complainant, even if a decision is not made at the time whether to charge, but the case is referred to the police. Often, in this type of case, the complainant will also bring witnesses to the prosecutor's office who will then also be interviewed.

no means routinely, reports of medical examiners, results of polygraph tests, and physical evidence either of the crime or the condition of the victim are examined.[25] And occasionally, defense attorneys are permitted to present arguments about the sufficiency of the evidence and even to call the attention of the prosecutor to additional evidence.[26] It remains true, however, that in the usual case, maximum efforts to scrutinize each piece of evidence carefully are not made. Inevitably this must mean that screening on evidence sufficiency grounds is not so complete as it might be.

B. *Intra-office Review Procedures*

A quite highly regularized system of intra-office review was established in the prosecutor's office in Detroit largely because of dissatisfaction over practices which had developed in the absence of such a system. Police officers, considering themselves familiar with the individual characteristics and reaction patterns of various assistants in that office, "shopped around" for the particular assistant who, they believed, would regard their requests for warrants most sympathetically.[27] To insure uniformity in charging, both in its evidence sufficiency and policy aspects, as well as to alert more experienced personnel to problems sensitive because of unusual community interest or political connotations, the prosecutor requires that the initial decisions of junior assistants be reviewed by one of two experienced senior assistants.[28] Although recommendations of warrants for felonies are thus normally reviewed,[29] review of recommendation for misdemeanor warrants is far from

25. Also commonly relied on is the prior record of the suspect, but in theory at least this would relate more directly to the general desirability of prosecution than to the sufficiency of evidence to warrant it.

26. The evidence which is perhaps adverted to most commonly by defense attorneys is the good character of the accused, and his reputation in his neighborhood and on his job.

27. Several assistants in that office have attributed the initiation of this system to a period in the 1930's when the practice of "shopping around" was prevalent. Under the old system all that was necessary to have a warrant typed up in the warrant clerk's office was a recommendation from one assistant prosecutor.

28. At first the Chief Assistant Prosecutor handled this review function; then one or two of the more experienced assistants were delegated that job and today the bulk of such work is carried on by two men who are experienced prosecutors. Since there is generally no scheme for allocation of the review in any particular type of case to one of the senior assistants or the other, a very limited type of shopping is still possible on the review level. However, this was not observed in the actual functioning of the procedure.

29. A general class of cases excepted from the review procedure is traffic offenses. One of the offices in the prosecutor's complex of offices is denominated "Traffic Warrant Division." A junior assistant is assigned to this office and his duty is to review all traffic cases throughout the county and either recommend or reject the issuance of a warrant. The same procedures are followed which generally prevail in other types of cases with

uniform. This is partly the result of misunderstanding among the assistants, and partly it reflects the fact that some misdemeanors are regarded as more important than others.[30] Whether denials of recommendations are similarly subject to review is also a matter of some disagreement in the office.[31] The result is that some assistants send the denials for review and others do not. Despite the fact that other goals are served as well, in actual operation the

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the exception that no screening is done by senior members. This is apparently true whether the traffic offense charge is a felony or a misdemeanor.

30. While generally the practice has developed that review is not sought in misdemeanor cases, there are discernable groups of cases constituting exceptions to that rule. One of these groups consists of accosting and soliciting cases. One of the two men primarily responsible for review stated that this exception arose in the 1930's as a result of a flood of such cases being sent to Recorder's Court and early sessions court, and that the judges objected because of the number of such cases. He continued:

> Now it is up to us to screen these out before they get to court, and as a result of this about half of the accosting and soliciting cases which are brought before us are screened out, not particularly because there is or is not a defense of entrapment or any other defense, but principally because the Recorder's Court does not want to be bothered with this type of case any more than they have to.

A second group of misdemeanors are sent for review despite any clear evidence sufficiency question—disputes arising between whites and Negroes. This practice was attributed to the added public pressures caused by the National Association for the Advancement of Colored People. A third group of cases which may or may not include misdemeanors is subject to review. That group is composed of sex crimes. The purpose seems to be twofold: to keep track of sex offenders generally, and to allow charges to be dropped against those charged with exposure who seem able to afford private treatment. If these are the only functions of review in this type of case, then it clearly does not serve evidence sufficiency purposes.

Other types of misdemeanors may also be subject to review, but the cases do not fall into any discernable class other than that the officer seeking the warrant decided to take that course of action. In many of those cases, the police generally know that an offense has been commited, but do not know exactly what offense to charge. Apart from these general practices, the senior assistants may get any type of case to review.

31. The predominant opinion of the assistants, both junior and senior, is that there is supposed to be review whether the decision by the junior assistant is affirmative or negative. The two points of view may be seen in the following exchange that took place between two junior assistant prosecutors:

> All they [the senior assistants] are interested in is finding out what cases that you approve on. If you deny to recommend the issuance of a warrant, then it must be for some good reason, and they are not particularly interested in knowing what goes on.

The other junior assistant disagreed, contending that when an assistant refuses a warrant recommendation he should send notice of this action to the final review assistants:

> because the purpose of the final review is to make sure that we are not taking the law into our own hands. It is even more important for those men to check up on the cases which we refuse because they do get to see the ones which we approve which are taken to them.

The discrepancy between these two opinions may be attributed to the fact that there is no manual of procedure in the office, but those who contended that review was necessary even in case of a negative decision asserted that reviews in such cases had been the practice for many years prior to the exchange noted above.

most significant effect of the system is to provide a review of the sufficiency of the evidence for the purpose of assuring conviction.[32]

In Detroit, the police officer seeking a warrant may still select his initial review assistant on any basis he wishes, and he conceivably would do so on the assumption that an initially favorable reaction would carry some weight with the final review assistant. Indeed, to the extent that negative decisions are not reviewed, it would be surprising if police officers did not continue to place importance on selection of the initial review assistant. A similar result would be anticipated in the case of misdemeanors when they are not subject to review.

The same shopping around practices existed in Milwaukee, but the response there differed from the Detroit response. In Milwaukee, an investigator has been given the task of assigning police officers who come in with warrant requests to one of the assistant prosecutors. Since reference is made to whichever assistant happens to be free at that time, shopping around is effectively precluded. But there is no regularized review procedure as in Detroit. In Wichita, neither of the above techniques has been used. Police officers are free to select the assistant to whom they make their warrant requests, and the action of the assistant is not subject to any systematic review. Perhaps the much smaller size of the office in Wichita is a reason why the problem has not created difficulties there. Of course, nothing precludes informal non-systematic consultation among prosecutors in any of the offices.

C. *Specialization*

Another obvious way to insure that only suspects against whom the evidence is adequate are charged, is to leave the determination to those with

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32. The advisability of having such a system has not gone unchallenged by the prosecutors participating in it. A junior assistant strongly objected to the procedure:

> Frankly, if I were organizing this office, I would eliminate that function. Most of us have been here as long as these two people who review the case, and although I have held that responsibility myself, I do not approve of it. Some say that two heads are better than one; my own feeling is that two heads are better than one if you do not want to get anything done. It is a little bit of an affront to have your judgment questioned and challenged, and in my own opinion I think this office should be eliminated.

While this opinion does not seem to be generally shared by others in the office, some support was given it by another assistant who supposed that if the turnover in the prosecutor's office were less than it is, and "we didn't keep getting young, or comparatively new and inexperienced assistants" it would not be necessary to have this final review operation. The reporter in this office made another observation. He said he had

> the distinct impression that the assistant prosecutors on the other side of the floor, who originally review these cases probably overcharge, and the principal function of people like [one of the senior assistants] . . . is to sort of down-grade the offenses which are charged so that their likelihood of prosecution in court will be greater.

special knowledge of the proof requirements in particular classes of cases.[33] Specialization among the assistant prosecutors at the charging level is uncommon. Apparently the office in Wichita is completely unspecialized. There are some areas of specialization in Detroit. A single assistant handles all requests for warrants in traffic cases not handled as ordinance violations, and another all cases in which a proceeding under the Sex Psychopath statute is indicated. In addition, the Felony Bureau of the prosecutor's office, a group of detectives assigned to the office, conducts investigations in areas of white collar crime, and makes recommendations directly to one of the senior review assistants, thus by-passing the initial review stage. Similarly, there are some areas of specialization within the prosecutor's office in Milwaukee. For example, all cases of obscene literature are referred to a specific assistant, as are cases dealing with narcotics and automobile financing problems. Nevertheless, the percentage of cases which fall within any of these categories is relatively small, and for the most part the warrant decision is not made by specialized assistants.

IV. Critique

It is difficult to analyze comparatively the formal law and current administrative practices in the area of control over warrant issuance without concluding that an aura of unreality surrounds the problem. Nowhere does the declared law seem so at odds with the facts of the law in action. Yet the formal law statements[34]—as well as expressed concern over the situation[35]—seem, on the surface at least, to be aimed at shadows. The substance is not at all what the commentators seem to assume it is.[36]

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33. Obviously, if a specialist were required to pass on evidence sufficiency in certain classes of cases, shopping around would be impossible in those cases.

34. In Wong Sun v. United States, 371 U.S. 471, 481 (1963), the Court said:

> The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the *police*, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. (Emphasis added.)

35. See, *e.g.*, the quotation set out in note 1 *supra*.

36. However, some commentators seem more aware of the problem as it is actually presented in current administrative practice. See, *e.g.*, Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 45-46 (1962):

> The data presented in the preceding portion of this article amply demonstrate that our system of criminal courts is organized to deal with a situation in which police and prosecutors screen out all but the most clearly guilty before involving the courts. Under present arrest policies, if the police complied with the law and brought all arrested persons promptly before magistrates the courts would be swamped. Many persons who would otherwise have been released from police custody without the stigma of a court record would be charged and, probably, subjected to the expense and publicity of a preliminary hearing before securing their release. Many others whose guilt could be clearly established through brief investigation while in police custody would go free because of the inability of the police to conduct such investigation. The public would have to pay the very sub-

Several systems for controlling charging to make it conform to widely held community ideals of fairness and efficiency can be posited. A simple one might leave the decision to the private citizen, with the risk of bearing the cost of unsuccessful prosecution as a deterrent to the spiteful and the frustrated. Arguably such a system would most accurately and directly reflect community mores. Another might leave the decision to the police, and such a choice could find its principal justification in the notion that, because of their greater familiarity with all of the problems of administering a complex system of criminal justice with limited means, society might come closer to getting maximum benefit from its tax dollars. Still another system might place a heavy obligation—with strict sanctions for violation—on private citizens and police alike to bring to the attention of the prosecutor all instances in which anyone is suspected of crime, leaving the decision whether to prosecute entirely to that official. In another system, the prosecutor could be placed under the same obligation as the private citizens and the police, with the charging decision residing solely with a judicial official. Each of the latter two choices might be regarded as insuring equality of treatment and impartiality more certainly than the others. Aspects of all four of those systems can be found—or have existed—in parts of the United States.

In fact, however, the dominant system in the United States today purports to be a combination of the third and fourth alternatives described above. In form, it more closely resembles the fourth than the third; in practice, however, a distinction must be drawn between the system as it operates for minor offenses and serious crimes. For serious crimes, the possibility of the preliminary examination means that the decision may be shared by the prosecutor and magistrate, but for minor offenses, unlike the formal law model, the power to charge resides exclusively with the prosecutor.

Against this background, some analysis of criticism of the present system is in order, partly to determine the merits of the criticism, and partly to point out that the criticism does not relate to situations which its language is broad enough to encompass.

Most commentators who insist that the impartial judgment of a third person is vital to a satisfactory warrant issuing process, seldom make clear whether such impartial judgment—judicial or not—is designed to protect the citizen from improper arrest, or the suspect already in custody from improper prosecution. This lack of clarity results in part from the fact that

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stantial cost involved in employing the large number of additional judges that would be necessary. And, unfortunately, it is by no means clear that the liberties of the ordinary law-abiding citizen would be enhanced as a result.

To the author, at least, it is clear that the direction of reform is to regulate, but not to abolish, police-prosecutor screening. Of all the questions involved, the most important, and the most difficult, is that of the extent to which police-prosecutor screening can be shifted from the post-arrest to the pre-arrest stage. . . .

arrest warrants are commonly used to served both purposes. But another factor may be more significant. It is best illustrated by a consideration of the assumption underlying *Giordenello v. United States.*[37] There the Court emphasized the need for an impartial judicial inquiry to serve as a curb on the consequences of *police* self-interest. The assumption seems to be that the confrontation is between the police and the magistrate. If federal police officers regularly sought pre-arrest warrants from federal commissioners without the prior approval of the United States Attorney, the assumption would be validated, and the concern of the Court that a Federal Commissioner make an independent judgment—and have the facts before him in sufficient detail to make it intelligently—would be understandable. It is clear, in any event, that the Supreme Court of the United States, when it requires a complaint replete with facts from which the inference of probable cause may be drawn instead of a bald assertion of probable cause, is concerned not with the requirements for charging but those for arrest.[38]

37. 357 U.S. 480 (1958).

38. The clearest expression of this is found in Weeks v. United States, 216 Fed. 292 (2d Cir.), *cert. denied,* 235 U.S. 697 (1914). There the United States Attorney had filed an information against the accused charging a misdemeanor. The information was neither verified nor supported by an affidavit showing personal knowledge or probable cause. Defendant appeared voluntarily, pleaded not guilty, and was convicted. On appeal, two principal issues were presented: (1) whether an attorney for the United States can proceed in the courts of the United States by information so verified according to common law; and (2) whether the United States Constitution placed any additional limitations on that method of prosecution. The first issue was decided in the affirmative. In addition to disputing the court's interpretation of the common law, the defense raised the issue of the fourth amendment's proscription, asserting that the amendment required that the information be verified in such a manner as to show the existence of probable cause. The court rejected the contention:

> It does not appear, however, that, in obtaining leave of the court to file the information, there was ever presented to the court any complaint under oath or any affidavit showing probable cause to believe that the person accused in the information had ever committed the offense charged against him. If the fourth amendment makes it necessary that, under all circumstances, an information must be verified or supported by an affidavit showing probable cause, then proceedings had in the prosecution of the defendant cannot be sustained. But the right secured to the individual by the fourth amendment, as we understand it, is not a right to have the information, by which he is *accused* of crime, verified by the oath of the prosecuting officer of the government or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except "upon probable cause supported by oath or affirmation," and naming the person against whom it is to issue. If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against who it is issued has committed the crime with which he is charged. But, if no warrant has issued, no arrest been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the fourth amendment has been infringed. . . . No such warrant has been at any time issued, and no application for its issuance has ever been so much as requested. *Id.* at 302. (Emphasis added.)

It is interesting to note also that the court cited State v. Gleason, 32 Kan. 245, 4 Pac.

Even if the assumption is correct that a high percentage of arrests in the federal system are made on warrants, the further assumption that those warrants are issued without the concurrence of the prosecutor is not correct. More important, neither assumption is valid when the state systems under

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363 (1884) for the proposition that some states require, because of constitutional mandates similar to the fourth amendment, that prosecutions by information require the verification of the information on oath. However, the Kansas statutes provide that in this type of prosecution, when the information is filed in the district court, a warrant is to be issued. Thus, the rule is understandably different from the federal rule where the information may not necessarily be used to support the issuance of an arrest warrant. For a collection of the federal cases on this question, see United States v. Pickard, 207 F.2d 472 (9th Cir. 1953).

A contrary federal rule appears in United States v. Tureaud, 20 Fed. 621 (E.D. La. Cir. 1884), the court asserting that the provisions of the fourth amendment were applicable to all information proceedings. However, the express assumption underlying that holding was that: "All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing, unless it is followed by a *capias*." *Id.* at 622. This, however, is not the case, and *Weeks, supra,* took the position that "What is said as to the necessity for a verification of the information we think is correct in any case where the application for the issuance of a warrant of arrest is based on the information." Weeks v. United States, 216 Fed. 292, 300 (2d Cir. 1914). This position was adopted by the Supreme Court in Albrecht v. United States, 273 U.S. 1 (1926). The information filed in that case was not verified by the United States Attorney; it recited merely that he "gives the court to understand and be informed, on the affidavit" of a third person who had been sworn by a state official not authorized to administer oaths in the federal criminal proceedings. Upon filing of the information, a bench warrant was issued for the arrest of the defendant, and was executed. When brought into court, bond was given without objection. Subsequently, a motion was made to quash the information on the grounds that it was not properly supported by verification or probable cause as set out above. The Court, on appeal from the conviction, conceded that the arrest warrants so issued were in violation of the fourth amendment, but stated that "it does not follow that because the arrest was illegal, the information was or became void." *Id.* at 5. The Court noted that if the defendants had entered a voluntary appearance, the affidavits could have been treated as surplusage, and would "not have vitiated the information. The fact that the information and affidavits were used as a basis for the application for a warrant did not affect the validity of the information as such." The Court then directed its attention to the question of whether the invalid arrest warrants affected the validity of the proceedings:

> The invalidity of the warrant is not comparable to the invalidity of an indictment. A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. . . . But a false arrest does not necessarily deprive the court of jurisdiction of the proceeding in which it was made. Where there was an appropriate accusation either by indictment or information, a court may acquire jurisdiction over the person of the defendant by his voluntary appearance. *Id.* at 8.

The Court then found that the defendants had waived the defect in the warrant by failing to move to quash the warrant before the defect had been cured. Adverting to the possibility of such a motion, the Court quoted with approval State v. Turner, 170 N.C. 701, 702, 86 S.E. 1019, 1020 (1915).

> Even if one is wrongfully arrested on process that is defective, being in court, he would not be discharged, but the process would be amended then and there, or if the service were defective it could be served again. *Id.* at 11, n. 13.

scrutiny here are considered. Police officers do not seek warrants from magistrates—either before or after arrest—without the prior approval of the prosecutor. At least in the three states under intensive investigation here, the warrant is rarely an arrest document: it is issued after arrest and serves as the charging document in the overwhelming majority of cases.

It is just this step which seems to be overlooked, or, at least, discounted completely, in discussions of the need for inquiry about the presence of probable cause.[39] It may be that the proponents of a system of judicial inquiry are so obviously dissatisfied with a system of screening by prosecutors that they deem it unworthy of mention, and prefer that both at the initial and final charging stages—the warrant and the preliminary examination—the decision be made by a judicial official. If so, they are dissatisfied with the present system, for there is no evidence that any but the most trivial cases are prosecuted without the prior approval of the prosecuting attorney. Effective judicial review of the charging decision occurs not at all in minor offenses, and only at the preliminary examination level in serious ones. When one considers that preliminary examinations are waived in as many as ninety per cent of the cases in some jurisdictions, the extent of judicial participation in charging is even less.[40] It is more likely that proponents of judicial screening have in mind only pre-arrest warrants—probably based on the fallacious assumption that most arrests are accomplished with a warrant, or a conviction that they should be. But that assumption is wholly unrealistic in metropolitan communities certainly, and is probably seldom realistic in rural areas as well. There can, of course, be no real basis for believing that what critics

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39. The insistence on judicial control of warrant issuance extends to situations where it is apparently recognized that the warrant under discussion is a pre-arrest warrant. See, *e.g.*, Commonwealth v. Krubeck, 23 Pa. County Ct. 35, 37 (1899):

> The ordinary mode of criminal procedure requires a warrant of arrest founded on probable cause, supported by oath or affirmation, to be first issued against the accused by some magistrate having competent jurisdiction. The accused, who may be an innocent person, thus secures at the outset the efficient guaranties against the oppression of power or prejudice afforded by the moral and legal responsibilities of a public oath, and the liability on the part of his prosecutor to respond in damages if the prosecution be malicious. The fitness and propriety of this procedure, and its equal justice to accuser and accused, make it unwise to depart from it, except under special circumstances or pressing emergencies.

40. Official statistics indicate that during the period between January 1, 1958 and July 1, 1961, the waiver rate for Milwaukee County, Wisconsin, was almost ninety percent. The figure is an average of the waiver rates for each of the years involved as computed by the Wisconsin Judicial Council. See WISCONSIN JUDICIAL COUNCIL BIENNIAL REPORT J-153-58 (1959); WISCONSIN JUDICIAL COUNCIL JUDICIAL STATISTICS B-109-13 (1959); WISCONSIN JUDICIAL COUNCIL BIENNIAL REPORT 1-108-13 (1961); WISCONSIN JUDICIAL COUNCIL JUDICIAL STATISTICS B-108-13 (1961).

Caution should be used in transferring figures from urban to rural areas. During the same period, the waiver rate for all other Wisconsin counties was 77 percent. *Ibid.*

have in mind is judicial control of arrests and prosecutor control of charging, since they have apparently not considered the problem in those terms.[41]

Finally, it is possible that the prosecutor is viewed as somehow less able—or more biased—than a magistrate, and that the approval of both should be obtained, not only for pre-arrest warrants, but for post-arrest warrants as well. At least to the extent that prosecutors are lawyers and magistratees laymen, the conclusion about relative ability is not tenable. And a potent factor in making the charge of greater bias invalid as well is the notorious interest of elected prosecutors in maintaining a good conviction record.[42] In summary, meshing this oft-stated need for independent judicial determination of probable cause at the warrant stage with the facts of current criminal justice administration is a difficult task. In that light, it is also hard to agree with the reasons stated for the need. To the extent that the formal law still vests in magistrates the power to determine whether warrants should be issued, it is well founded in English common law,[43] but anomalous

41. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 88 (1931):

> None of the [crime] surveys, however, searchingly faced, either in the gathering of fact data or in the discussion, this problem of whose function it should be to determine the instituting of prosecution and what should be the working methods and principles which govern its administration. Should the clerk of a court be the official in whom this function is placed, and using clerical methods, or the prosecuting attorney using methods appropriate to that office, or the magistrate using methods of a judicial nature?

42. On two occasions we have adverted to the prosecutor's concern over his conviction record, describing it as "folklore" in one instance and here as "notorious." The research on which the article is based turned up no single instance in which an official adverted to such a motive. It is true, however, that many writers, including former prosecutors, have asserted the conviction record hypothesis. It is also true that "convictability" is in fact the standard regularly insisted upon as a prerequisite to warrant issuance.

43. Although it is clear that the English law vested the power to issue warrants in magistrates, it is also clear that this power was originally gained by usurpation rather than by statute. This power aggrandizement by the justices took place during the period between the fourteenth and seventeenth centuries. Although the legal status of warrants issued by justices after an indictment appears never to have been questioned, warrants issued prior to indictment were considered illegal by Coke. IV BLACKSTONE, COMMENTARIES 290. Blackstone further states that "contrary practice is by others [Hawkins] held to be grounded rather upon connivance than the express rule of law, though," he admitted, "now by long custom established." *Id.* at 290.

While the exact origin of arrest warrants is obscure, it seems clear that they are related in some fashion to the ancient "hue and cry." The latter institution has been traced to the time of Alfred and, indeed, was clearly codified by 1285. 13 Edw. I, cc 1, 2 provided, in case of robbery within the hundred, the contemporary political unit, the inhabitants of the hundred should be liable for the amount of the robbery, unless they responded with the body of the criminal. Aggrieved persons were required to complain to the constable or sheriff whose duty it was to arouse the citizenry to join him in an attempt to follow and capture the culprit. Thus, the citizens were under a positive duty to arm themselves and to aid in this pursuit.

under a public prosecutor system as it now exists in the United States.

At a later stage in the development, the hue and cry could be raised even by a private citizen, provided he was aware that a felony had been committed. Thus it was not necessary in all cases that approval of a peace officer or a justice of the peace be obtained. Curiously enough, in its original form, the hue and cry seems quite analogous to the complaint and warrant of a later day, though both were oral. Yet as time passed, the analogy became nearer to that of the right of a citizen to arrest without a warrant. Perhaps the proper conclusion is that within the hue and cry we find the origins of both the arrest warrant and arrest without a warrant by a private citizen.

In 1327 the office of justice of the peace was created, charged with responsibility for keeping the peace. 1 Edw. 3, c. 16. A statute of 1360, 34 Edw. 3, c. 1, perhaps in recognition of an inherent power, authorized justices specifically "to take and arrest all those that they may find by indictment, or by suspicion and to put them in prison." Some time thereafter it became the practice of the justices to delegate their arrest powers in writing in response to complaints made to them. After the practice of issuing warrants had become common, if still of questionable legality, the utilization of the hue and cry method of apprehension of felons fell into disuse, although there apparently was a period of overlap between the two institutions. Although the exact reasons for this decline are, of course, uncertain, there is one factor which undoubtedly played a role in the ultimate abandonment of the procedure. This factor has been the inconvenience of the method even before the practice of issuing warrants arose. The *posse commitatus* which was aroused by the hue and cry were able to search for the felon in only one direction at a time since they were bound together in a group. Since this was the case, the citizens were of limited help to the peace officer unless it was certain where the suspect was to be apprehended. On the other hand, it would have been convenient for some persons to be authorized to search in one direction, others in another, and the peace officer in another. This became especially true when the search was no longer confined to a walled city. In short, the practice which was highly beneficial to police in their infancy, became a burden to them as policing methods progressed.

The legality of the practice of issuing arrest warrants did not become firmly established until 1848. 11 & 12 Vict. c. 42 §§ 1, 2, 8. The necessary conditions for issuance were expressed by Hale in the following terms:

> He [the justice] may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; and the reason is, because he is a competent judge of the probabilities offered to him of such suspicion. . . .
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> But that I may say it once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion, for he is in this case a competent judge of those circumstances that may induce the granting of a warrant to arrest. 2 HALE, PLEAS OF THE CROWN 109-10 (1847).