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SPEAKING FOR THE POLICE

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The policeman of today can truly claim the status of a professional. At no time in our history has the public received better police service, man for man and department for department. Yet, in one area, the policeman, as a professional, has neglected an important duty to the public and himself. This is the duty to speak out, to become highly articulate, on those areas of the law which vitally affect the law enforcement function.

Crime is, without doubt, our number one domestic problem, and public demand for protection against society's lawless elements has reached a peak. At the same time, laws and court decisions which prevent the police from affording this protection confront law enforcement on every side.¹

It is in this area especially that the police must become articulate. They must show to the public, the legislatures, and to the courts, just *how* a given law or decision adversely affects police effectiveness; further, if possible they should present a solution to the problem that has been created.

This article postulates this duty of the police to speak out and gives examples of areas where speaking out is most necessary. It presents cases of police articulation in the recent past. Finally, it considers the question of who should speak for the police.

¹ *E.g.*, in a speech to the United States Senate on August 11, 1969, Senator John L. McClellan of Arkansas pointed out that since 1960 the Supreme Court of the United States has reversed 63 of 112 Federal criminal convictions and 113 of 144 state criminal convictions. The Senator stated: "I simply cannot believe that our Federal Circuit Judges are so incapable and lacking in qualifications or that our State Supreme Courts are so incompetent and prone to error as to warrant such an overwhelming record of reversals by the Supreme Court". S. Cong. Reg., 91st. Cong. 1st Sess. Vol. 115, No. 136, p.S 9565. Aug. 11, 1969.

No longer can the police remain silent concerning the laws under which they must operate. The status of a professional carries with it the responsibility to be articulate on professional matters; the police of this country must undertake and accept this responsibility without delay.

THE DUTY TO SPEAK OUT

In October of 1969, a Conference on Preventive Detention was held at the Center for Continuing Education of the University of Chicago. The flier announcing the Conference listed twenty-three panelists for the three day affair. These panelists, to quote from the flier represented: "... federal and state legislators and officials concerned with criminal justice; professors of law and political science; and attorneys and members of the judiciary".² Not one policeman was listed on the panel!

Preventive detention, the right of a judge to deny bail to an individual who is found to be dangerous, is one of the most crucial and controversial issues facing our criminal justice system today. It is wholly admirable that such a star-studded panel should be convened to discuss this issue; and the interests of the panelists³ in this

² The address on the flier for further details was: Preventive Detention, Urban Research Corporation, 5464 South Shore Drive, Chicago, Illinois, 60615; Phone (312) 955-0436.

³ The panelists, broken down by occupation were: *U.S. Senators*: Samuel C. Ervin (D-N.C.); Charles Goddell (R-N.Y.)

U.S. Representatives: Claude Pepper (D-Fla.)
Law Professors: Norval R. Morris; University of Chicago; Geoffrey C. Hazard, Jr, University of Chicago; Dallis H. Oaks, University of Chicago; Wayne LaFave, University of Illinois; Jerald Israel, University of Michigan; Daniel J. Freed, Yale University; Richard

area are beyond question. Why, however, should that group, whose interest in preventive detention is certainly of equal immediacy with that of the listed panelists, be excluded?

It is the policeman on the street who must face the bullets of an armed robber who, free on bail from two previous armed robbery arrests, is committing yet another crime to secure money to pay for attorneys and bondsmen.

The desperation of an addict's need to feed his habit is a substantial factor in the danger that officers must face daily; and, an addict released on bail after several arrests compounds his desperation with each offense and release. The police executive must take into account these tendencies of persons released on bond in his crime statistic compilation and in his allocation of manpower to high crime areas. In short, the working policeman, on all levels, is intimately concerned with preventive detention; yet, if the selection of panelists for the Chicago Conference on this subject is any criterion, the policeman must be content to let this problem be worked out on a loftier level, without the intrusion of the people who must deal with it in actual practice.

Is it proper that the police remain silent in matters that affect them so critically? Are policemen somehow excluded from the free speech provisions of the First Amendment? The contention of this article is that the police of this country have a duty to society, and to themselves, as professionals, to speak out on matters that adversely affect them in the exercise of their law enforcement duty.

With few exceptions,⁴ the police establishment

Buxbaum, University of California at Berkeley.

Other Professors: Charles Hamilton, Political Science, Columbia University

Criminal Justice: Donald A. Santarelli, Deputy U.S. Attorney General for the Administration of Criminal Justice; Hans W. Mattick, Center for Studies in Criminal Justice; University of Chicago; James R. Thompson, Chief, Criminal Justice Division, Illinois Attorney General's Office

Bail and Corrections: John Locke, Bail Reform Study, National Bureau of Standards George McGraff; Commissioner of Corrections, New York City

Social Agencies: Mrs. Sarah Carey, The Urban Coalition, Washington, D.C.; Patrick Murphy, Public Order and Safety Studies, Urban Institute, Washington, D.C.; Patricia M. Wald, Neighborhood Legal Services, Washington, D.C.

Miscellaneous: Thomas Bradley; City Councilman, Los Angeles; Dick Gregory; Civil Rights Leader; David Burnham; Reporter, *New York Times*.

⁴ For instance, two police executives who were highly articulate were Orlando W. Wilson, Superintendent of the Chicago Police who retired in 1967; and, Thomas Reddin, Chief of Police in 1969 to become a television newscaster for Station KTLA, Los Angeles. Chief Red-

din in this country has remained silent on issues that vitally concern the effectiveness of how they do their job. It is not the purpose of this paper to explore in any detail the reasons for this reticence; but, it would seem that police silence in the past has been based on tradition, and on a general feeling in the police community that policemen as a group are inarticulate and should keep their silence. In one of its most incisive observations, the President's Commission on Law Enforcement and Administration of Justice pointed this out:

"... many ... decisions [are] made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs and human rights, *the former must be articulated*. They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely on intuition and common sense in what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire nation." (emphasis added)⁵

In addition to this feeling on the part of the police that they are in no position to articulate their problems, it is fashionable for intellectuals in the fields of the social sciences to advance the theory that the police should be "seen but not heard."⁶ Whatever the reasons for past reluctance

din may be in the vanguard of a "new breed" who break away from police work, as such, to enhance the scope of articulation of police problems. Thus, he is quoted in *TV Guide*, for November 1, 1969: "When I found that I could reach more people in a single TV broadcast than I could in two years of speech making as Los Angeles Police Chief, I became a TV newscaster". (p. 26)

⁵ Report of the President's Commission on Law Enforcement and the Administration of Justice, p. 94.

⁶ The best example of this point of view may be found in the "Skolnick Report," a report submitted by Jerome Skolnick, Director, Task Force on Violent Aspects of Protest and Confrontation of the National Commission on the Causes and Prevention of Violence" by Ballantine Books, New York, N.Y. (1969) Chapter 7 of this book, "The Police in Protest" is perhaps one of the most virulently anti-police pieces of writing ever to be published. Among other things, Skolnick takes the police to task for becoming "politicized", *i.e.* for speaking out. From reading Chapter 7, one hastens to re-read the First Amendment to find the language that excludes the police from its provisions.

Except as an example of an "intellectual" attack on the police, the Skolnick Report is actually of little consequence, and no policeman who is conscientiously attempting to do his job should be concerned with the bitter characterization of the police stemming from the social theories of the author of the report and his staff.

on the part of the police to speak out on the issues that affect them, it is now time for the entire law enforcement community to become vocal. The Attorney General of the United States, the Hon. John N. Mitchell, put the problem squarely before the International Association of Chiefs of Police:

"There has been a tendency to ignore the law enforcement community in favor of social scientists who can explain the motivations of the criminal, but who can do little to protect the innocent against the mugger or armed robber".⁷

The police would be well advised to take a cue from these words of the top law enforcement officer in the United States.

The police have been counseled to become vocal from other than "inside" law enforcement sources. Mr. Mark Furstenburg, then Press Assistant to Senator Joseph Tydings of Maryland, in an article in the *Police Chief*, the magazine of the International Association of Chiefs of Police, has exhorted the police to "Speak Out on the Issues".⁸ Mr. Furstenburg took the police to task for remaining silent on crucial issues facing society today; and, put forth the theory that, by the very nature of their jobs, the police are constantly involved in politics, though not in a partisan sense, whether they like it or not. Addressing the police directly, Mr. Furstenburg summarized:

"You have no choice but to be involved. If you choose the involvement of splendid isolation, you risk a great deal. You risk further alienation, less public understanding and sympathy, and legislative action based on inadequate information.

"The alternative is to get into the public debate as active participants, share your knowledge with legislatures and courts and help the public to appreciate you".⁹

The police would do well to heed this succinct advice from a non-policeman.

Police articulation can cover the widest range of

⁷ Address by Hon. John Mitchell, Attorney General of the United States at the Annual Convention of the International Association of Chiefs of Police, Hotel Fountainbleau, Miami Beach, Florida; September 29, 1969.

⁸ The *Police Chief*, August 1968, "Police and Politics—Speak Out on the Issues," by Mark Furstenburg. Mr. Furstenburg is now Public Information Director for the International Association of Chiefs of Police.

⁹ *Ibid.*

subjects imaginable. It must inevitably enter into areas of politics, police unions, and other questions concerning the policeman and his relationships to the community as a whole.¹⁰ Although some limitations in those areas may be in order, there should be no doubt as to the propriety of police articulation on all questions regarding our laws, both judge-made and statutory, and on questions of violations of those laws, as these laws and their violations affect the performance of the police function. It is in this area, that of the law, that police silence is most noticeable; and, it is in this area that the police have the most at stake, for the professional policeman is bound to operate within the confines of existing law whether he agrees with the law or not. The importance of the vocal policeman is that he may be a force for changing the laws that hamper his effectiveness.

In this context of "speaking out on the law" there appear to be two basic elements that impose a duty on the police to speak out:

- 1) A duty to the public, since a policeman is a public servant; and,
- 2) A duty to the policeman himself, as a professional and as a working officer.

The first of these duties, the public duty, arises from the fact that it is the public, whom the policeman is sworn to protect, and *only* the public, as a whole, has a right to determine how much or how little protection it wants and needs. Under our system of government, the public delegates the law-making power to the legislature and the power of interpreting laws to the courts; in the final analysis, however, the power to change either the laws or the interpretation placed on these laws resides in the people.

The problem to which the writer is addressing himself may be fruitfully considered in the context of recent United States Supreme Court decisions restricting the police and enlarging the rights of criminal defendants and suspects. Does the public agree with this expansion of individual civil liberties while society grows daily more unsafe? If public opinion polls are any indication, the answer is clearly "no". A Gallup Poll published in the *Denver Post* on February 16, 1969, entitled, "Public Wants 'Harder Line' to Win War on

¹⁰ For an excellent discussion of police and politics see: "Police Power—An In-Depth Survey" in the *Denver Post*, December 25, 1968. This is a syndicated article from the *Washington Post* concerning the "politicization" of the police in Detroit, Boston, New York, Philadelphia and Washington, D.C.

Crime," revealed the following attitude towards the courts:

"This was the question asked of 1,471 adults across the nation in the latest survey: 'In general, do you think the courts in this area deal too harshly or not harshly enough with criminals?'

"The latest results and trend:

	1969 %	1968 %	1965 %
Not harshly enough.....	75	63	48
About right.....	13	19	34
Too harshly.....	2	2	2
No opinion.....	10	16	16"

This national survey was mirrored by a Denver *Post* survey published on March 16, 1969. The purpose of the survey was to measure attitudes towards crime held by the people of Denver. Reporting on the results of questioning, 1600 residents of Metropolitan Denver, the article stated:

"By a 3-1 margin, they will cite crime and violence as the cities' biggest problem".

and,

"Other individuals by a 5-1 margin say police forces should have added manpower and they should be given more authority to arrest criminals. Others maintain strongly that the courts are entirely too lenient".¹¹

As the demand for protection from the lawless elements in our society has grown, it is highly significant that respect has declined for the Supreme Court of the United States. The Court, undeniably the leader in the atmosphere of permissiveness and leniency that has so irked the public, finds itself at an extremely low ebb in public confidence. In a Gallup Poll reported in the Denver *Post* on June 15, 1969, entitled, "*Public Esteem for High Court has Fallen in Past Six Years*", the following question was asked:

"In general, what kind of rating would you give the Supreme Court—excellent, good, fair, or poor?"

¹¹ Lest there be any cries of "backlash", it should be noted that both surveys included Negroes as well as whites and the Gallup Poll cited specifically found that the views of Negroes differed very little from those of whites with regard to the harshness or leniency of the courts.

"The latest results based on interviews with 1,515 adults and the trend:

	1969 %	1968 %	1967 %	1963 %
Excellent.....	8	8	15	10
Good.....	25	28	39	33
Fair.....	31	32	29	26
Poor.....	23	21	17	15
No opinion.....	13	11	9	16"

The analysis of the poll gave reasons for the decline:

"An important factor behind the Court's decline in public favor, as judged by the views expressed in surveys, is the growing feeling that the Court is 'too soft' on criminals. Others complain that the rights of the individual are being protected at the expense of society as a whole. Another fairly large group argues that the Court's role should be one of 'interpreting' rather than 'making' laws".

The conclusion from these polls is inescapable; in the field of law and order the public is extremely dissatisfied with the present status; yet, the discontent appears to be amorphous. It seems safe to predict that if the same persons sampled were asked to define just *how* the individual was being protected at the expense of society, they would be unable to do so.

Although the public definitely feels that the police are being hindered in their efforts to combat crime by restrictive court decisions, it is up to the police to take the next step and tell the public specifically *how* they are being hampered.

Associate Justice Byron White of the Supreme Court of the United States, in a recent speech, called for public scrutiny of Court decisions saying:

"Judicial review should be carefully watched by the public because in this country, it is the people who form the government and make the laws".¹²

The difficulty with this recommendation, however, is that no matter how carefully the citizen "watches" the *decisions* of the Court, it is the *effects* of the decisions themselves that are of para-

¹² From a speech at Adams State College, Alamosa, Colorado on August 5, 1969 as reported by the Denver *Post* of August 6, 1969.

mount importance. The area of criminal law is far from a simple one, and the effects of decisions often are not readily apparent; it is here that the duty falls upon the police. They are the ones directly affected by the decisions, and they are the ones who must speak out and assess for the public the effects of the decisions.

In actuality, the police are the *only* experts in this country in the areas of combating crime. Law professors, judges, sociologists, and others may be experts in areas of the broader field of Criminal Justice; only the police, however, know the day to day problems of being "on the street". This expertise should not be cast off lightly and, the benefit of this expertise should not be withheld from the public. The average citizen cannot realize the problems of fighting crime unless the police make these problems known to the citizen in the context of police expertise gained in fighting crime.

In addition to the public duty to speak out, the policeman owes a two-fold duty to himself to speak out on the law as it affects his work. The first of these self-duties is somewhat abstract: the policeman of today is a professional and, as such, he must constantly scrutinize his activities in order to render the best possible service to those who depend upon him for protection. If a policeman is faced with a law or court decision that hampers his effectiveness, he is duty bound, as a professional, to comply with the law or decision in question. He cannot, and must not, disregard the law or "short cut" around it. On the other hand, however, he can and should make every effort to make known to all concerned, the courts, the legislatures, and the people, the fact that he *is* hampered, in what way he is hampered, and what he believes can be done about the situation. General grumbling about being "handcuffed", or remaining aloof in the "splendid isolation" scored by Mr. Furstenburg in the quotation from his article, are *not* the hallmarks of a professional. A reasoned, articulate presentation of the difficulties caused by the law or decision, however, is demanded of those who would call themselves police professionals.

A second, and much more practical, aspect of the policeman's duty to himself to speak out concerns those areas of the law where the already dangerous job of a policeman is made more dangerous by laws or court decisions. To those who have never been involved in the realities of police work there are certain notions of "fair play" that are very appealing in theory. For example, it is

very well to sit in a court room or law class and postulate an absolute requirement that officers must knock on a door and announce their presence before entering forcibly to make an arrest or search.¹³ After all, does not fair play to persons in the sanctity of their homes require no less? However, to the officer crouching in a hallway before a door which may conceal an armed and desperate felon the picture may appear slightly different; a knock may be answered by a bullet. There is a certain question, therefore, of fair play to the officer involved also.

When an officer's safety is involved, his own self interest should compel him to speak out on laws or decisions that compound the risk factor for him.¹⁴ Again, the question of practical experience versus abstract theory becomes pertinent and the policeman must communicate his experience and expertise to those whom he asks to consider his problems.

This then, in general terms, postulates the duty of the police to speak out on the areas of the law with which they are concerned. It is now time to get down to specifics.

Four questions become immediately apparent and the rest of this article will deal with these questions:

1. To whom shall the police speak?
2. What shall the police speak about?
3. Will speaking out have any results?
4. Who shall do the actual speaking?

TO WHOM SHALL THE POLICE SPEAK?

This is, by far, the simplest of the questions to answer: the police should speak to anyone who will listen. Basically, then, the police should speak to all of the public, for no one is immune from crime, and every citizen of this country has a vested interest in how the police do their job. On a more practical level, however, the primary targets of police articulation should be the courts and the legislatures, for these are the bodies who directly

¹³ As is required of Federal officers by 18 U.S.C. #3109. This problem will be discussed below.

¹⁴ Speaking out on the safety of the officers is well illustrated by comments by Francis J. Schaefer, the Executive Director of the Pennsylvania Chiefs of Police Association before the Pennsylvania Conference of State Trial Judges in June of 1968. As reported in *Crime Control Digest* of July 3, 1968, p.7, Mr. Schaefer told the judges that the police are opposed to "bail, re-bail, and re-bail" and that many police officers wonder why they must risk their lives in continually apprehending hardened criminals who are quickly freed on bail to commit more crimes.

control the police through decisions and legislation.

In speaking to the courts and legislatures, of course, the police must follow the proper procedures and utilize the proper vehicles to present their views. The courts may be approached through the device of *amicus curiae* briefs in cases that are of vital concern to the police, and there is really no reason why such briefs should not be filed by police departments.¹⁵ Another, and much overlooked, approach to the courts is through their general rule-making power. There is no reason why a police department cannot present its problems to a court by requesting that certain police needs be considered and, if the court sees fit, accommodated by the adoption of a court rule of criminal procedure. This device has worked very successfully in Colorado, as will be subsequently discussed.

Legislatures are usually approached through their various committees, and an articulate presentation by a police officer who is prepared *with facts* to support his position can be extremely effective. One thing is certain, if the police do not present their point of view, no one will present it for them; and equally certain is the fact that legislation that can hamper effective police work *will* be presented, and most articulately, by civil liberties and social welfare groups.

The police should not be limited, however, to formalized presentations before committees. The word "lobby" is *not* a dirty word when applied to law enforcement; and, providing they stay within the bounds of legality, the police should not be prevented from lobbying in the sense that lobbying means presenting their point of view to individual legislators.¹⁶

The truism, "In unity, there is strength" applies to dealing with legislatures. In the spring of 1969, at the urging of Chief George Seaton of the Denver Police Department, the Colorado Law Enforcement Legislative Council was formed. This Council is an attempt to unify the law enforcement ap-

¹⁵ In September of 1969, the Denver Police Department in conjunction with the Colorado Attorney General filed an *amicus curiae* brief with the U.S. Supreme Court in support of the California Attorney General's petition for re-hearing in the case of *Chimel v. California*, 395 U.S. 752 (1969). This will be discussed below.

¹⁶ The Denver Police Department has two officers as full time lobbyists at the Colorado Legislature while that body is in session. These men deal with police "welfare" legislation such as pensions, working conditions, etc., but they also concern themselves with legislation dealing with the criminal laws.

proach to the legislature. The Council consists of three police chiefs, three sheriffs, and the Chief of the Colorado Highway Patrol. The purposes of the Council are, first, to arrive at a consensus in the law enforcement community as to what legislation is needed, and as to what legislation should be opposed; once this consensus is reached, the Council will present its views to the legislature and, on occasion, to the public. This is the sort of coordinated speaking out that can be highly effective and contributes to the overall professionalism of law enforcement in Colorado.

In speaking out to the public, articulation can be as varied as the situation calls for; and, in certain cases, only a direct approach to the public, as a whole, will suffice to present facts that the people have a right to know. This can be illustrated by events that transpired in Denver in March of 1969. West High School erupted into a full scale riot, and naturally the police were deeply involved in containing the resultant violence. When matters finally settled down, the Denver Police received high praise for the way they conducted themselves, and the school situation returned to relative calm. One aspect of the disturbances, however, had not been brought to the attention of the public: the cost in actual dollars, and the loss of police protection generally, due to the diversion of manpower to cover the school riot.

Chief Seaton of the Denver Police Department, a highly articulate person, spoke out forcefully on this matter at a press conference and in news releases. His statements are worth quoting:

"In the recent protest demonstrations at West High School, it was necessary to commit the entire complement of personnel and equipment of the Denver Police Department to this demonstration, either actively assigned or on a stand-by basis.

"This resulted in an expenditure of funds that, at this time, and our total analysis is not complete, has amounted to nearly *twenty-five thousand dollars*.

"A few of our expenditures are explained thusly:

Seventeen police officers assaulted, injured and hospitalized.

Twenty-five police vehicles damaged, some extensively.

Damage to private property in this area, and damage to West High School.

Overtime to be paid to more than eighty

police officers—and many other costs not listed.

“For the four days, March twentieth, twenty-first, twenty-second, and twenty-third, crime increased by twenty-two point three percent as compared to the previous week-end.

“Denver is experiencing an increase in crime in 1969 which is about ten percent above the national average. To deplete our police forces to matters other than crime, seriously hampers our ability to cope with an ever-increasing and efficient criminality, and to respond to calls for police assistance from citizens of our community”.¹⁷

This is the type of information that the public has every right to know; it is the type of information that the police have a duty to supply. This is speaking out to the public in its truest sense; this is not generalized grumbling by the police at law-breakers as a whole, but rather a detailed report to the people of just what four days of lawlessness cost them.

Thus, the question as to whom the police should speak resolves itself to this: the police must address the courts and law making bodies, but they must also “take their case to the people” as did the Denver Police Department.

WHAT SHALL THE POLICE SPEAK ABOUT?

We turn now to specifics. In this section, examples will be given on some areas of the law that affect the police and the way they do their jobs so completely and so fundamentally that there can be no question of the necessity for articulation of the practical problems involved. The examples used in this section are by no means exhaustive; they should suffice to show, however, the huge chasm between the law in the abstract and the law as it is applied in actuality. The point to be made by these examples is that these are problems that *only* the police, who deal with the realities of the matter, can recognize and speak about.

Court Decisions

The case of *Chimel v. California*,¹⁸ decided by the United States Supreme Court on the last day of the October, 1968 term is one that should make

¹⁷ Press release by George L. Seaton, Chief of Police, Denver, Colorado issued March 25, 1969.

¹⁸ 395 U.S. 752 (1969)

even the most lethargic policeman wish to speak out; for in this case, the Court delivered an opinion that evidenced a complete and utter disregard of the practical problems that a policeman must face in attempting to do his job. *Chimel* is a classic example of a decision that might have been basically sound, if confined to its facts, but which, instead, is written in such sweeping language that it goes far beyond its facts and presents the police, who must follow the decision in the myriad situations that arise on the street, with no clear guidelines as to what they may or may not do. This is the kind of decision about which the police must speak out.

Let us look at *Chimel* from a practical point of view. The facts of the case are simple. The police in Santa Ana, California went to the house of Ted Steven Chimel¹⁹ in the late afternoon of September 13, 1965 to arrest him, with an arrest warrant,²⁰ for the burglary of a coin shop. The arrest warrant was issued at 10:30 A.M. that morning. Without going into detail, it is sufficient to say that a thorough search of Chimel's house was made, incident to his arrest, and the coins taken in the burglary were found. At Chimel's trial, these coins were introduced into evidence and he was convicted. His conviction was upheld in the California District Court of Appeal,²¹ and the California Supreme Court.²² The California Supreme Court relied on *United States v. Rabinowitz*,²³ to sustain the arrest-based search which revealed the coins. The United States Supreme Court granted certiorari.²⁴

In a 6-2 opinion, written by Justice Potter Stewart, the Court reversed Chimel's conviction, overruling *Rabinowitz* and overturning nineteen years of its own precedent.²⁵ The Court laid down a

¹⁹ The name of the defendant in this case may be the most mispronounced in the history of Supreme Court jurisprudence. The Los Angeles District Attorney's office advises that it is pronounced “chī-mel” as doorbell chimes.

²⁰ The arrest warrant was concededly defective under the California Supreme Court case of *People v. Sesslin*, 68 Cal. 2d. 413, 67 Cal. Rptr. 409, 439 P. 2d 321, (1968); however, in upholding Chimel's conviction, the California Supreme Court held that the arrest was lawful because, at the time of the arrest, the officers had probable cause to arrest Chimel, independent of the warrant. *People v. Chimel*, 68 Cal. 2d 436, 439, P. 2d 333, 67 Cal. Rptr. 421, (1968). The U.S. Supreme Court assumed without deciding that this holding was correct. 395 U.S. 752, 755.

²¹ 61 Cal. Rptr. 714.

²² 68 Cal. 2d. 436, 439 P. 2d. 333, 67 Cal. Rptr. 421, (1968).

²³ 339 U.S. 56 (1950).

²⁴ 393 U.S. 958 (1968).

²⁵ Ex-Justice Fortas did not participate in the decision. Justices Black and White dissented. Justice Harlan concurred specially.

new rule dealing with searches of premises incident to a lawful arrest. Such searches may encompass only:

"... the area 'within [the arrestee's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence".²⁶

Justice Stewart further held:

"There is no comparable justification, however for routinely searching rooms other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches in the absence of well recognized exceptions may be made only under the authority of a search warrant".²⁷

Thus, with one stroke, the right of the police to make searches of the premises incident to a lawful arrest disappears.

The language used by the Court is the broadest possible, and it far exceeds the exigencies of the case, for in the *Chimel* case itself the police had ample time to obtain a search warrant.²⁸ Had *Chimel* been based on this point the police would at least have some guideline to go by; the Court could have spoken loud and clear "When there is time to get a search warrant, you must get one!"²⁹

Now, after *Chimel*, each warrantless search of the premises, where an arrest is made, must be confined to the area within the arrestee's "immediate control". But where are the guidelines for the police? *Chimel* provides no guidelines at all. Every judge who is called upon to review police action can make of it what he will.³⁰ And the officer

²⁶ 395 U.S. 752, 763.

²⁷ *Id.*

²⁸ From 10:30 A.M. when the arrest warrant was procured until "late afternoon" according to the facts.

²⁹ Even such a clear-cut, mandate as this would raise the problem of courts constantly, "second-guessing" the police as to whether there was, in fact, time to get a warrant. See *La Fave, Search and Seizure, "The Course of True Law . . . Has Not . . . Run Smooth"* 1966 U. ILL. LAW FORUM 255 at 298-299. (1966)

³⁰ Courts, now, cannot even agree as to whether or not to give retroactive effect to *Chimel*. The United States Supreme Court neatly sidestepped this issue in *Von Cleef v. New Jersey* 395 U.S. 814 (1969). Several Courts have denied retroactivity to *Chimel* including two federal Circuits: CA 2 in *U.S. v. Bennett*, 6 Cr L 2016 (9/9/69); and CA 5 in *Lyon v. U.S.*, 6 Cr L 2055 (9/4/69). Also, the California Supreme Court: People

who must make his split-second decisions on the street literally cannot know whether he is acting constitutionally or not.

Consider further the following language used by Justice Stewart with regard to when the *Chimel* rule applies:

"Such searches, *in the absence of well recognized exceptions*, may be made only under the authority of a search warrant". (emphasis added)³¹

The sentence about well-recognized exceptions is footnoted:

"8. See *Katz v. United States*, 389 U.S. 347, 357-358".

A trip to the pages cited in *Katz*, a case prohibiting warrantless eavesdropping, does not elicit these exceptions except as they are held not applicable to electronic eavesdropping. Indeed, one finds on page 357 a reiteration of the principle that searches without prior judicial approval are unreasonable "subject only to a few specifically established and well-delineated exceptions". This language is *again footnoted* so that we finally get to the exceptions. The footnote in *Katz* states:

"19. See e.g. *Carroll v. United States*, 267 U.S. 132, 153, 156; *McDonald v. United States*, 335 U.S. 451, 454-456; *Brinegar v. United States*, 338 U.S. 160, 174-177; *Cooper v. California*, 386 U.S. 58; *Warden v. Hayden*, 387 U.S. 294, 298-300".

Of these cases, *Carroll*, *Brinegar*, and *Cooper* deal with searches of automobiles;³² *McDonald*

v. Edwards; 6 Cr L 2024, (9/24/69); yet the Alaska Supreme Court awards it retroactivity. *Fresanada v. State* 5 Cr L 2460. (8/27/69)

³¹ 395 U.S. 752 763.

³² In the area of searches of automobiles, we again return to footnotes. In *Chimel*, in footnote 9, Justice Stewart writes: "Our holding today of course is entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants, 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought'. *Carroll v. United States*, 267 U.S. 132, 135; see *Brinegar v. United States*, 338 U.S. 160. 395 U.S. 752." This would seem to carve out an exception to *Chimel* in the case of automobiles; yet the 6th Circuit Court of Appeals suppressed evidence seized from a vehicle incident to an arrest in *Colosimo v. Perini*, 6 Cr L 2041, (9/17/69). The Court relied on *Chimel* and *Preston v. United States*, 376 U.S. 364, cited in *Chimel*.

deals with "exigent circumstances"; and, *Warden v. Hayden* deals with "hot pursuit". *Chimel* overrules nineteen years of what had been acceptable police practice; then, by way of "guidelines" gives a footnote to a footnote. Is there any wonder that the average police officer with a high-school education or a few years of college might be confused?

Justice John Marshall Harlan concurred in *Chimel* with reservations. He said:

"The only thing that has given me pause in voting to overrule *Harris* and *Rabinowitz* is that as a result of *Mapp v. Ohio*, and *Ker v. California* . . . every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement. We simply do not know the extent to which cities and towns across the nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; nor can we say with assurance that in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against state infringement by the Fourteenth Amendment".³³

Let us now look at some of the situations in which the broad wording of the *Chimel* opinion plus its lack of guidelines for the police make Justice Harlan's reservations truly prophetic. These are the situations about which the police must become vocal.

The Safety of the Policeman

Justice Stewart recognized in *Chimel* that there is a danger to the police from weapons in the immediate area of the arrestee, but he ignored the fact that weapons in other portions of the premises may be equally dangerous if the arrestee or others on the premises can get to them. Consider this hypothetical situation:

Two officers receive a tip that a man wanted for murder by shooting is at his brother's house; he may leave at any time, so the officers go right to the house and arrest the suspect in the living room. The suspect is on the sofa when the officers enter; upon seeing them, he starts across the room in the general direction of a desk. The officers grab him, handcuff him, and replace him on the sofa.

³³ 395 U.S. 752, 769.

Justice Stewart has stated in *Chimel*, that the officers cannot lawfully search the desk across the room; but, what if the suspect's brother is present? The officers may feel that there is a weapon in the desk, and they may fear that the brother of the suspect may go after it. But what if they do check the desk for weapons? If they find the gun, they have protected themselves from the possibility of being shot; but, in doing so, they may have violated the *Chimel* rule, at least if that case is construed strictly against them. Further, suppose that the gun in the desk is the weapon that was used in the murder for which they have arrested the suspect. *By protecting themselves, they have left themselves open to have the murder weapon suppressed because they exceeded the Chimel arrest-based search limitation.*

As a matter of fact, experienced officers are not going to take a chance that other persons beside the arrestee on the premises are harmless. The officers will protect themselves, as they have a perfect right to do. At the same time, however, the very language used by Justice Stewart in describing a lawful *Chimel* search makes the officer imperil the case against the criminal when he acts to prevent a peril to his own safety.

The Maryland Court of Special Appeals, in interpreting *Chimel*, has taken an eminently practical view by enunciating the "lunge" doctrine, *Scott v. State*.³⁴ In that case, the Maryland Court extended the searchable area under *Chimel* to extend beyond mere "arms length" into that area where the suspect could lunge to obtain a weapon or destructible evidence. This decision was doubtless predicated in large measure by concern for the officers' safety.³⁵ There is no assurance, however, that all reviewing courts would take such a realistic view or that this extension would be approved by the Supreme Court. Moreover, even the *Scott* case does not cover the situation where other parties who might attack the officers are present.

Riots and Civil Disorders

In the area of riots and civil disorders the *Chimel* restrictions on arrest-based searches, if interpreted

³⁴ Md. Court of Special Appeals, 5 Cr.L. 2426, (8/21/69).

³⁵ Another example of a court construing *Chimel* with the officers safety in mind is *State v. Moody*, Missouri Supreme Court, 5 Cr. L 3131, (July 1969). In upholding a traffic arrest-based search of an automobile, the court noted, with respect to the officers safety: "We believe that police officers, while in the performance of their duties, are entitled to all the safety and protection we can give them within constitutional limitations."

literally, could result in a situation whereby officers working under the stress of riot conditions could find themselves "second-guessed" by courts reviewing their actions at a later date in much less harrowing circumstances:

Officers under fire on the street pinpoint a suspected window from which shots are being fired. They enter and arrest the lone occupant of the apartment from which the shots emanated. They seize a rifle from him. Now, how much further may they go?

Surely, not even the broadest application of the *Chimel* rule would preclude a check of the rooms in the apartment for other potential snipers, but, what about a careful search of the apartment for a cache of arms and ammunition? Clearly, there would be probable cause to search for further weapons; and, equally clearly, a Police Department that has committed its forces to the street in a riot situation has no time to procure search warrants. But what if a carefully concealed cache of arms and ammunition is discovered in a closet in a room other than that in which the suspect was arrested? Ought this evidence to be suppressed because the warrantless search violated *Chimel's* mandate?

In the riot type situation presented above, a prosecutor could argue, of course, that the search for weapons or other evidence is justified as one of the "well recognized exceptions", mentioned by Justice Stewart. Such an exception might be the "hot pursuit" doctrine of *Warden v. Hayden*,³⁶ which permitted the warrantless search of the house of a robbery suspect when the police had entered the house within minutes of the commission of the crime. Another argument that could be advanced would be the "exigent circumstances" doctrine of *McDonald v. United States*.³⁷

Despite the foregoing possibilities regarding exceptions to the warrant rule a court that was so inclined could find ample justification in the *Chimel* opinion, as written, to second guess the police and suppress even weapons seized during the height of a civil disorder.³⁸ Supreme Court guide-

³⁶ 337 U.S. 294 (1967).

³⁷ 385 U.S. 451 (1948).

³⁸ This is not far-fetched. Some appellate courts, apparently from fear of being reversed by higher courts, interpret decisions like *Chimel* most strictly against the police. An excellent example of such an interpretation is *State v. Paul*, New Mexico Court of Appeals, 5 Cr. L. 2406, (8/8/69). In the *Paul* case, the court held that *Chimel* required that the seizure of items, discovered

lines for the conduct of officers, other than in a footnote twice removed from the text of the opinion, could prevent such a construction.

Local Search and Seizure Restrictions

There may be many cases in which local search and seizure restrictions, when read together with *Chimel*, can result in the frustration of the police in their efforts to obtain admissible evidence. Two examples of such restrictions may be cited:

in the course of a lawful search under a warrant but not named in the warrant, be held invalid. The Paul court reasoned that since *Chimel* overruled *Harris v. United States*, 331 U.S. 145 (1947) with regard to arrest-based searches, *Chimel* also overruled that part of *Harris* which has been construed as permitting the seizure of items not named in a warrant. The question of the seizure of items not named in the warrant is not discussed in *Chimel*; and *Harris* is expressly overruled only insofar as the principles of *Harris* inconsistent with those discussed in *Chimel* are concerned. Nevertheless, the Paul court has extended *Chimel* to this length thereby restricting police conduct to a greater degree than *Chimel* demanded.

Another example of a court taking the broad language of *Chimel* to its logical conclusion arose in Dade County, Florida. Mr. Howard Levine, Legal Advisor to the Dade County Department of Public Safety advised of just such a holding. He summarized the case as follows:

"On October 18, 1969 at approximately 2:40 A.M. in an area of unincorporated Dade County, Florida, in which rapes of white females had occurred on the previous Friday nights, a police officer was accompanying a lone white female to her house. As he crossed the back yard of an apartment building with her, he had occasion to look into a ground floor apartment in the building. He observed four white males smoking homemade-type cigarettes in the manner characteristic of the marijuana smoker. Also, a fifth white male was injecting a substance into the arm of a Negro male. In addition, the police officer, who had been trained in narcotics, smelled the distinctive odor of marijuana coming through an open fan vent measuring approximately three feet by three feet.

"Based upon this information, the Dade County Police Legal Advisor authorized the officer to enter the premises pursuant to the emergency doctrine and on the separate theories that both a felony was being committed in the officer's presence and that the officer had reasonable grounds to believe that the evidence of that felony was being destroyed. Obtaining a search warrant would have been impractical.

"After the officers had entered and secured the premises and had properly advised all the subjects of their Constitutional rights, each of the subjects individually admitted to possessing and smoking marijuana.

"On November 25, 1969, a judge of the Criminal Court of Record of Dade County ordered the evidence seized suppressed on the grounds that the officers had failed to obtain a search warrant."

The police officer involved in this case would be well within his rights to ask "What's the use?"

The Federal Rules of Criminal Procedure, Rule 41, prohibits the execution of a search warrant at night unless the supporting affidavit is positive the property sought is on the premises to be searched. It is not difficult to imagine a situation in which a federal officer would be faced with a situation, at night, in which he had probable cause for a search warrant but was unable to make a positive statement to support a nighttime search.³⁹ If the officer could be sure that the evidence would remain on the premises he could wait until morning and get a "daytime" search warrant. Suppose, however, that the evidence was of a consumable or destructible type which could easily be disposed of by use or sale. Prior to *Chimel* an arrest-based search would have been permissible; now, the officer is faced with the choice of seizing evidence which may be suppressed as obtained in violation of the *Chimel* rule; or, taking a very real chance that his evidence will be disposed of during the night.

The Arizona Statute, concerning search warrants,⁴⁰ to use another example, does not authorize a search warrant to issue for mere evidence. Suppose officers arrest a rape-murderer in the living room of his home. They may have ample probable cause to believe that the suspect's bloody underclothes are concealed in the house; but, the underclothes constitute mere evidence so no search warrant can be issued for them.

Assuming a consent search is refused, the combination of *Chimel* which prevents an arrest-based search of the house, and the local search warrant limitation may have created a situation whereby this vital evidence becomes immune from seizure.

In *Chimel* the majority of the court did not concern itself with the possible practical effects of the broad language of *Chimel* running head-on into local restrictions; but, the policeman who is caught between the *Chimel* opinion and his local restrictions is definitely concerned. Again, only a

³⁹ Until recently, the requirement of a "positive" affidavit for a nighttime search was the rule in Colorado (C.R.C.P. Rule 41). This has been changed, put prior to the change, many cases were personally observed by the author in which facts establishing probable cause would not be sufficiently "positive" to support a nighttime search warrant.

⁴⁰ Arizona Revised Statutes 13-1442

few words of guidelines could have alleviated these problems.

Unavailability of a Magistrate to Issue a Search Warrant

There are areas in this country where a search warrant cannot be procured for hours or days because no magistrate is available to issue the warrant:

Aspen, Colorado is a mountain resort community with only one county judge in residence to issue search warrants. If this judge is unavailable, the next nearest town is forty-two miles away. If the mountain roads are snowbound this round trip to procure a warrant may take many hours. Often, in winter the roads are not passable at all. Mr. Michael Fitzgerald, the Deputy District Attorney in Aspen has documented cases in which the unavailability of a magistrate to issue a search warrant has resulted in officers being frustrated in their attempts to recover evidence due to the fact that the evidence has been consumed while the warrant was being sought. Here again, the broad language of *Chimel* can stand as an insurmountable barrier.

Other Persons on the Premises

The problem raised by the presence of persons, other than the arrestee, being on the premises where an arrest has taken place is probably the most perplexing problem for the police that *Chimel* has raised. Justice White in his dissent in the *Chimel* case pointed up this problem.⁴¹ He discussed the fact that *Chimel's* wife was present when *Chimel* was arrested and the likelihood that she would have removed the coins in question if the officers had left to procure a search warrant. Justice White then went on to point out that even if an officer had been left on the premises serious problems are presented. Concerning the officer who remains behind to guard the house he noted:

"However, if he not only could have remained in the home against petitioners wife's will, but followed her about to assure that no evidence was being tampered with, the invasion of her privacy would be almost as great as that accompanying an actual search. Moreover, had

⁴¹ 395 U.S. 752, 775.

the wife summoned an accomplice, one officer could not have watched them both".⁴²

The majority in *Chimel* blandly ignores the reasoning expressed by Justice White. In so doing, they typify their general disregard for the practical consequences of their decision as regards the working policeman on the scene.

Two cases that arose in Denver in the Summer of 1969, after *Chimel* was decided further illustrate the practical aspect of the problem that *Chimel* has created for the police:

Both of the Denver cases involve homicides; in both cases the police had arrested one suspect who told them where a second suspect could be found. In both cases, there was no time to get a search warrant prior to the arrest of the second suspect, because of the possibility of flight of the latter.

These suspects were arrested in their respective houses, and no arrest-based search for the murder weapon was made. Friends or relatives of the suspects were present in both of the houses where the arrests were made; these persons had ample opportunity to get rid of the murder weapons while the police procured a search warrant; and, when the search warrant was finally procured the murder weapon was not found. The author was personally involved in each of the cases.

In one case we *know* that the friends of the defendant removed the murder weapon because the defendant told us that the weapon was on the premises when he was arrested.

In the second case, we cannot be sure that the mother of the defendant removed the murder weapon *itself*. We do know, from her own admission, that she removed *at least one* gun from the premises while the search warrant was being procured.

These two cases are concrete examples of the frustrating effects of the *Chimel* restrictions upon what was otherwise excellent and genuine effort. The very situation which Justice White's dissent predicted would arise, did actually arise in these two cases; and the lack of effective guidelines for the police caused the loss of valuable evidence.

Former Justice Tom C. Clark has summed up the critical need of the police for such guidelines:

⁴² 395 U.S. 752, 775 N. 5.

"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."⁴³

In a brief filed by the Denver Police Department and the Colorado Attorney General urging the Supreme Court to grant a rehearing in the *Chimel* case, the above described cases in Denver were presented to the Court as examples of the need for guidelines. The Court denied a rehearing. However, at least an attempt was made by the police to speak out to the Court.

From the foregoing examples, it should be clear that valid police procedures have been restricted by the *Chimel* case. Moreover, it should be obvious that the thwarting effect of decisions such as *Chimel* upon police effectiveness will only be aired if the police themselves air them. The average citizen, or even the average judge or lawmaker is not going to analyze cases such as *Chimel* to ascertain their effects on the police. It is for the police, rather, to make this analysis and make their findings known.

Chimel is far from the only case in which the holding, extending far beyond what the facts of the case required, can cause problems for the police which were either not foreseen, or, worse, which were disregarded by the Court. Turning from the area of search incident to arrest, let us look at another restrictive Supreme Court decision in the search and seizure area.

Davis v. Mississippi,⁴⁴ decided by the Supreme Court on April 22, 1969, is another "sleeper" insofar as the police are concerned; and another example of why the police should speak out on the problems that the Court's decisions can and do create.

Davis is a classic example of the truism that "bad facts make bad law". On concededly "bad facts", the Court in a 6-2 decision reversed the rape conviction of one John Davis.⁴⁵ In so doing, the Court ruled, sweepingly, that investigative detention for the purpose of fingerprinting, in the

⁴³ *Chapman v. United States*, 365 U.S. 610 at 622, dissenting opinion (1961).

⁴⁴ 394 U.S. 721 (1969).

⁴⁵ Ex-Justice Fortas did not participate in the decision. The majority opinion, written by Justice Brennan, was joined by the Chief Justice and Justices White, Marshall, and Douglas. Justice Harlan concurred specially. Justices Black and Stewart dissented.

absence of probable cause for arrest, is a Fourth Amendment violation and that fingerprints taken pursuant to such a detention may not be used in evidence.

The facts of the *Davis* case are important in order to point out the disparity between the fact situation and the scope of the opinion. John Davis, a fourteen year old Negro youth was convicted in Mississippi of the rape of an elderly white woman. He was sentenced to life imprisonment. Upon appeal to the Mississippi Supreme Court, his conviction was affirmed;⁴⁶ the U.S. Supreme Court granted certiorari⁴⁷ and reversed his conviction.

The rape of the victim in the *Davis* case took place on December 2, 1965 in her home. The victim described her assailant merely as a Negro youth; the only other clues found were finger and palm prints on the window where the rapist apparently entered. During the next ten days, the police engaged in "dragnet" or mass roundup tactics to a large extent. They brought to the police station about twenty-four Negro youths for interrogation and fingerprinting; Davis was one of this group. The police also interrogated some forty or fifty others concerning the rape. Davis was fingerprinted on December 3 as part of this roundup. On December 12, Davis was arrested (concededly without a warrant or probable cause); and, in the course of this arrest, his fingerprints were taken on December 14. The December 14 prints were identified by the F.B.I. as matching the prints in the victim's house.

At Davis' trial, the December 14 prints were admitted into evidence over his objections that they were the product of an unlawful detention. The Mississippi Supreme Court sustained the admission of the fingerprint evidence on the theory that it was of such a trustworthy nature that Fourth Amendment proscriptions on unreasonable searches and seizures do not apply.⁴⁸ This finding, however, was rejected by the United States Supreme Court, citing a 1958 Circuit Court of Appeals decision, *Bynum v. United States*.⁴⁹ The Court held that fingerprint evidence is no exception to the rule of *Mapp v. Ohio*,⁵⁰ that all evidence seized in violation of the Fourth Amendment is

inadmissible; that detentions for the sole purpose of fingerprinting, in the absence of an arrest warrant or probable cause, are unreasonable under the Fourth Amendment; and that evidence resulting therefrom is inadmissible in any court.

Applying this rule to the facts in *Davis* the Court said:

- 1) The December 14 prints were inadmissible because, as was conceded by the State of Mississippi, the December 12 arrest, which was the source of the December 14 prints, was without probable cause.
- 2) The December 3 prints were also inadmissible because Davis was brought in for fingerprinting, along with twenty-three others, as a part of a generalized roundup, and this "investigatory detention", in the absence of judicial approval resulted in a Fourth Amendment violation.

Hence, neither set of prints could be used in evidence against Davis and his conviction must be reversed.

Justice Hugo Black wrote a stinging dissent, one of his best. He deplored the majority's expansion of the Fourth Amendment saying:

"This case is but one more in an ever-expanding list of cases in which this Court has been so widely blowing up the Fourth Amendment's scope that its original authors would be hard put to recognize their creation".⁵¹

Thus, we see the Court again making sweeping generalizations in the law of search and seizure that the police must be forced to live with. Had the Court reversed *Davis*' conviction, *on the facts*⁵² of the case, there would be little reason to quarrel with the result. Roundup tactics are unprofessional and should not be used by the police. However, the Court laid down a blanket proscription of the use of fingerprints taken in an arrest without

⁵¹ 394 U.S. 721, dissenting opinion. Justice Black also dissented in *Chimel v. California*, *supra*.

⁵² Justice Harlan came closer to holding the case to its facts than anyone in the majority in his concurring opinion. He concurred with the result in *Davis*, but, said:

"There may be circumstances, falling short of the "dragnet" procedures employed in this case, where compelled submission to fingerprinting would not amount to a violation of the Fourth Amendment even in the absence of a warrant, and I would leave that question open". 394 U.S. 721, concurring opinion.

⁴⁶ 204 So. 2d 270 (1967).

⁴⁷ 393 U.S. 821 (1968).

⁴⁸ This was the point put forward by Justice Stewart in his dissent.

⁴⁹ 104 U.S. App. D.C. 368, 262 F. 2d 465, (C.A.D.C. 1958).

⁵⁰ 367 U.S. 643 (1961).

probable cause or those taken incident to "investigatory detention". What this means to the working policeman is that in cases where fingerprints are a critical item of evidence, he may be forced to arrest "at his peril"—because, if, in a case where the question of probable cause is a close one, he is "second guessed" by the judge regarding the arrest, then he has lost one of the prosecution's most vital items of evidence. Moreover, *Davis* creates very real practical problems in those cases where unidentified fingerprints are found and there are several suspects but probable cause is lacking to arrest any of them.

On the latter point, Justice Brennan, who authored the *Davis* opinion, suggested that a Constitutional procedure might be set up whereby a suspect could be compelled to submit to fingerprinting, in the absence of probable cause, *provided* judicial approval was first secured. Following that suggestion, such a procedure has been adopted by the Colorado Supreme Court⁵³ and this development will be subsequently discussed in detail. Few, if any, other states, however, have adopted this procedure; so the problem presented by the unidentified fingerprint cases is still very real to many police departments, and to the public at large.

Let us now consider two examples of the unidentified fingerprint problem, based upon actual cases that happened in Denver, after *Davis* was decided, but before this judicially approved fingerprinting procedure was adopted in Colorado.

In the first case, a young girl was found murdered in Denver. Her body was found in the apartment where she lived alone. In the kitchen were found two glasses partially full of beer; one bore the victim's fingerprints, one bore a set of unknown prints. The fingerprints were the *only* clues. The police checked the girl's background and learned that she had a number of boyfriends. They naturally had to be checked out as prime suspects in the killing, but there were no witnesses or any other evidence sufficient to satisfy the requirements of probable cause to arrest any of the boyfriends. Some of the suspects had police records, and the Denver Police files were checked in those instances. These suspects were cleared. However, at least five of the suspects' prints were not in the Denver files.

⁵³ Colorado Rules of Criminal Procedure, Rule 41.1, "Court Order for Fingerprinting".

The detectives assigned to the case could not compel the remaining suspects to submit to fingerprinting because of the rule in the *Davis* case, yet they were afraid to *ask* the suspects to submit to fingerprinting because they might "tip their hand" to the real killer, that is they might let him know he was under suspicion. By now, most of the suspects have left town, and, as of this writing, the killing is unsolved.

In the second case a daytime house burglary was committed in Denver. The victimized house was near a school. A neighbor had seen two teenagers, both of whom she knew, in the *yard* of the burgled house about noon, but she thought nothing of it because the kids lived in the neighborhood and quite possibly were going home for lunch from the nearby school. Fingerprints on the window sill were the only clues. Naturally, the youths seen in the yard were under suspicion; but, the facts did not constitute probable cause to arrest them. *Davis* again bars compelling them to be fingerprinted; and, if they were asked to submit, and refused, they would be alerted to the fact that they were suspects. If, in fact, they were guilty parties, they would have ample time to get rid of the stolen property. The burglary is unsolved.

These examples illustrate an all too frequent situation that the police encounter. They have fingerprints at a crime scene and they have suspects; however, in the absence of probable cause to arrest the suspect, there is no way of connecting the suspect with the fingerprints—assuming the suspect's prints are not in the police department files. The foregoing examples do not involve mass round-ups as was true in the *Davis* case; yet, the sweeping language in *Davis* effectively barred the solution of cases of the type illustrated. The point to be made here, about *Davis*, is that, as in *Chimel*, the majority of the Court did not consider⁵⁴ these very real practical problems that the police must face. Instead, we have a mass round-up situation translated into a blanket prohibition on "investigative detention" even though other

⁵⁴ It should be noted that Justice Harlan who was a majority Justice in both *Davis* and *Chimel* did, in fact, consider the practical problems involved, at least as is evidenced by his concurring opinions in each case, see above.

cases, falling far short of the dragnet procedures in *Davis*, may be adversely affected.⁵⁵

Of equal importance to the police is the aspect of *Davis* that involves a spur-of-the-moment arrest being "second guessed" in court. Consider this hypothetical case:

A robbery murder is committed in a store by a bandit wearing a rubber halloween mask. The bandit stabbed the store owner to death and fled but left his knife, with his fingerprints on it at the scene. One witness saw a man described as white, of medium height, and build, wearing a white sport shirt, blue slacks, and loafers running from the store. No color of hair or facial description is available because of the mask.

Some thirty minutes after the robbery, an officer spots a man fitting the witness' very general description, some sixteen blocks away from the scene of the crime. He arrests the man, based on the description. The suspect's fingerprints are found on the knife left at the scene. Now, suppose, at the trial of the case, the officer should be second-guessed by the judge as to his probable cause to arrest the suspect. This could easily happen. An arrest based on such a general description would present a very close question. If the judge rules that the description was too general and therefore there was *not* probable cause to arrest the suspect; the fingerprint evidence must be suppressed under *Davis*' broad mandate. If so, the case is lost and the robber-murderer must be freed.

Under the facts of the foregoing hypothetical case, there is no round-up as there was in *Davis*, rather such a case would be a stellar example of alert, efficient police work, yet, it would seem that

⁵⁵ For an excellent discussion on the need for and duty of the police to make investigative detentions in some cases see: Fisher, *Laws of Arrest*, Sec. 34, "Detention Incident to Investigation of Crime" P. 61. (Traffic Institute of Northwestern University, Evanston, Ill., 1967). The Supreme Court has had before it another case involving "investigative detention" in another context. In *Morales v. New York*, 22 N.Y. 2d 55, 238 N.E. 2d 307, 1968, the New York Court of Appeals affirmed the murder conviction of Morales over his claim that his confession (given after the proper advisements were made) was the product of a detention without probable cause. Certiorari was granted on the question: "Do state enforcement officials have authority to temporarily detain and question properly warned suspects on less than probable cause?" (6 Cr. L. 4038) The Court on December 8, 1969 refused to consider the question, after argument, because of an inadequate record. (6 Cr. L. 3013)

Davis would render this police work fruitless. But consider the dilemma of the officer who first saw the suspect: he *must* act *at once* or he may never see the suspect again. The officer is required to act at his peril, however, for if his arrest is subsequently ruled invalid, the fingerprints based on that arrest cannot be used. If the Supreme Court even considered this problem, it made no mention of it and certainly gave no guidelines to officers faced with similar situations on the street.

The foregoing examples of how two Supreme Court cases can result in immeasurably hampering police efficiency show the need for a vocal police. Situations such as those described can arise at any time in any city in this country; the overbroad language of decisions such as *Davis* and *Chimel* conflicts with the realities of fighting crime. The realities of day to day police activities must be stated by the police themselves; because only the police, who experience in practice the effects of the court decisions, are in a position to explain how the decisions adversely affect their efficiency. Moreover, if the police do not tell their side of the story, no one is going to do it for them!

Legislative Enactments

Turning from court decisions to legislative enactments, the need for police articulation can again be shown. The men who must enforce the laws and be guided by the laws, are the ones who are closest to the ways the laws actually work. If a policeman feels that he is definitely hampered by certain laws he should speak out to the legislature and, if necessary, to the public so that his problems are known.

An example of a provision of the law that restricts police efficiency to an alarming degree may be found in the Colorado Children's Code dealing with questioning of juveniles. The Code prohibits the questioning of any juvenile (a person under eighteen) unless a parent or guardian of the juvenile is present.⁵⁶ This sounds fine in theory, but presents great problems in practice. In a recent Denver Case, four young hoodlums attacked six youngsters with chains, bricks, and fists. One of the victims was a 12 year old girl. Of the suspects arrested, only one was over eighteen. The eighteen year old was questioned and jailed. The juveniles, two seventeen and one sixteen, had to be released because their parents refused to come to the police building; since there is no flexibility in the Code

⁵⁶ C.R.S. 22-2-2.

provision requiring parental presence at any questioning, the refusal of the juveniles' parents to appear stymied the investigation as far as the juveniles were concerned.

This case, involving teen-age hoodlums of the worst kind, is exactly the type of situation that the police should bring to the attention of the public. In this case, as it happens, the police did just that. The detective in charge of the case advised the newspapers of the release of the juvenile suspects and told them just *why* they were released.⁵⁷ The public was therefore made aware of exactly how the law relating to questioning of juveniles ties the policeman's hands. As the attorney for the Denver Police Department, the writer felt sufficiently strongly about this case to request one of the newspaper staff writers (also an attorney) to emphasize the case of the three released hoodlums in an article analyzing the Children's Code. The writer agreed, and he very effectively pointed out how the parents refusal to appear caused the three under-age hoodlums to be released; once again bringing to the public attention this handicapping provision of law.⁵⁸ The Denver Police will continue to obey this provision despite the obvious handicap it places on our investigations; but, at the same time, we have a duty to keep the public informed of the results of our adherence to the law.

Laws and Rules Involving the Officer's Safety

Another area of the law in which the police must become vocal, in their own self interest, involves provisions of the laws that increase the danger of police work. Two such provisions of the Federal law are illustrative of the problem. Both provisions deal with the execution of search warrants by federal officers; one, a statute,⁵⁹ requires officers to knock on a door or otherwise announce their office and purpose before entering to arrest or search; the other, a Federal Rule of Criminal Procedure⁶⁰ prohibits the execution of a search warrant at night unless the supporting affidavit is positive that the property sought is on the premises to be searched.

Two actual case experiences will illustrate the

⁵⁷ See: The Rocky Mountain News (Denver, Colorado), Friday, July 18, 1969, page 66.

⁵⁸ See: The Rocky Mountain News (Denver, Colorado), "Children's Code is Still Controversial Issue" by Richard Wood, Rocky Mountain News Court Reporter. ⁵⁹ 18 U.S.C. 3109.

⁶⁰ F.R. Cr.P. Rule 41 (c). By statute, 18 USC 1405 (1), a search warrant based upon probable cause may be served at any time in certain narcotic violations. This does not apply to dangerous drugs.

effects of the above mentioned provisions as constituting a threat to an officer's safety in certain cases. Both descriptions are based on the personal experience of the writer who participated in each raid.

In the first case, six law enforcement agencies participated in a narcotic raid on a motorcycle gang in January of 1969 in Gilpin County, Colorado. Surveillance of the house which was raided indicated that the occupants *constantly* carried side arms, rifles, and shot-guns inside the house and on the premises. It was anticipated that twelve to eighteen persons would be in the house when the raiding party of thirty-six officers "hit" it.

Since the search warrant was issued by a Colorado Court, the federal requirement of knocking and announcement did not, strictly speaking, in this case apply;⁶¹ however, federal agents from the Bureau of Narcotics and Dangerous Drugs, and the Alcohol, Tobacco, and Firearms Division of the U. S. Treasury Department were in the raiding party. It was felt that if the search uncovered any federal violations such as narcotics or firearms, the federal agents might wish to prosecute also. For this reason a decision was made to adhere to the federal standard of announcing the presence and purpose of the officers so that no question could be legitimately raised later that the execution of the search warrant did not meet federal statutory requirements.

At the time of this raid, Colorado Rules of Criminal Procedure required a "positive" affidavit for nighttime searches; and since the affidavit was not positive, the raid had to be made in the daytime.

Thus, under two rules based upon conceptions of "fair play" the officers had to make their approach to the house in full daylight, and the persons in the house had to be alerted to the officers approach. This *despite* the fact that the officers *knew* that the occupants were armed and, further, that they had records for crimes of violence. At 7:30 A.M., the Sheriff of Gilpin County announced the officers'

⁶¹ The requirements of 18 U.S.C. 3109 do not apply to the States if fundamental due process provisions are otherwise adhered to. *Ker v. California*, 374 U.S. 23, (1963). In *Sabbath v. United States*, 391 U.S. 585 (1968), there is an intimation "exigent circumstances" might excuse compliance with 18 U.S.C. 3901 even in federal cases.

presence over the loudspeaker of his car. Fortunately, all of the violators were asleep; and, due to the element of surprise, the violators were captured in their beds. *Most had fully loaded guns in bed with them. All, later told the raiders in no uncertain terms that they would have shot it out with them if they had not been caught asleep.* Twenty-nine firearms were seized including a machine gun, sawed-off shotguns, rifles and pistols.

Careful planning of the raid plus a certain amount of luck resulted in an accomplishment of the law enforcement objective without any shooting or killing. The fact remains, however, that the officers were exposed to a greater amount of danger because of the required daylight approach and the required announcement. A fire-fight most certainly would have occurred if an early rising occupant of the house, glancing out the window, had seen the approaching officers; or if the Sheriff's announcement had alerted them before they were covered and subdued.

A second case presented a similar situation except that the search warrant for narcotics was a federal warrant; however, the Denver Police were requested to participate in the raid. Since the warrant was federal, and the affidavit was not "positive", the requirement of announcement and daylight entry were applicable in this case also.

The target was a mountain cabin in which two young men had an illicit laboratory for the manufacture of methamphetamine ("speed"). One of the federal narcotic agents, undercover, had been inside the cabin. While he was there, one of the violators, a person of extreme mental and emotional instability, told the agent that he would not be taken alive on a raid. The violator showed the agent a twenty-five pound can of ether, and he told the agent that, if an attempt were made to raid the cabin, he would throw the open can of ether into an open fire which he always kept going. If he did so, the entire cabin would likely have been blown up. A medical doctor who was with the raiding party confirmed that the highly volatile ether could cause such an explosion. The undercover agent believed that the violator was unstable enough to carry out his threat to throw the ether in the fire. As in the prior example, the

raid was conducted just at daylight. One agent knocked on the door and announced his purpose while the others were at the windows ready to shoot if any of the occupants appeared to be going for the ether. Again, careful planning and luck paid off; both violators were asleep and were taken without trouble. As in the other raid, however, the fact remains that if one of the violators had risen early and looked out the window the story might have been a different one, since the ether and the open fire *were* in fact present when the raid was made.

These examples show how rules of "fair play" may be viewed quite differently by those whom they affect. In both of the described raids, the officers would have been much less vulnerable if they had been permitted to make an approach under cover of night and to make an unannounced, surprise entry. Although, not advocating nighttime execution of search warrants or unannounced entry in *all* cases, the writer believes that there should be some flexibility⁶² in these areas in order to permit the officers to take basic precautions for their own safety.⁶³ Surely, this is one area in which the police should speak out *very* loudly.

Illustrative of the fact that, whether or not the police speak out, the civil liberties groups and liberals, in general, *will* speak out is an article in the (Denver) Rocky Mountain *News* of July 15, 1969. In this article, entitled, "No-Knock Entry Meets Opposition", the American Civil Liberties Union is reported as opposing a Nixon Administration proposal which would authorize an unannounced entry to arrest or search, provided advance authorization for such entry from a magistrate is secured. Melvin Wulf, Legal Director of the ACLU, objected to such a law because "it offends our notion of what is just and fair". The police should let it be known that what is "just and fair" from the safety of Mr. Wulf's office may seem quite a bit different to an officer going into a house full of armed men. Fortunately, most judges and legislators are reasonable men, and they

⁶² Cf., e.g., #799 New York Code of Criminal Procedure which permits unannounced entry if a judge so endorses on the warrant.

⁶³ An excellent discussion of the announcement-prior-to-entry question, including the safety of the officer is "The Rule of Announcement and Unlawful Entry: *Miller v. U.S.* and *Ker v. California*", by G. Robert Blakey in 112 U. PENN. L. REV 499 (1964). Professor Blakey is now Chief Counsel to the U.S. Senate Judiciary Committee.

usually exhibit a valid concern for the safety of law enforcement officers;⁶⁴ nevertheless, it is incumbent upon law enforcement officers to bring to the attention of the courts and lawmakers the practical problems that frequently confront them.

WILL SPEAKING OUT HAVE ANY RESULTS?

Thus far in this article an attempt has been made to set forth examples of the types of issues about which the police should become vocal. The basic premises common to all of the examples presented is, first, that there is a gigantic difference between theory and actuality in the criminal law enforcement area; second, in many cases, when theory and reality meet theory breaks down resulting in decreased police effectiveness; and, third, that no one except the policeman is in a position to speak authoritatively about the *hows* and *whys* of this decrease in effectiveness. The question still remains: If the police *do* speak out on the issues, will this articulation produce any results? In attempting to answer this question, the following section describes some examples of the police speaking out; and, where concrete results have been accomplished, a description of these results will be given.

Speaking to the U.S. Supreme Court

In two recent cases, an attempt was made to speak to the United States Supreme Court on behalf of the police. In each instance, the Court was asked to consider certain decisions in light of their practical effects on police work. In the first case, *Terry v. Ohio*,⁶⁵ the "stop and frisk" case, this approach was eminently successful. In the second case, involving a petition for rehearing in *Chimel v. California*, the approach was completely unsuccessful.

In *Terry*, the Court was given a police oriented point of view through an amicus curiae brief filed by an organization called Americans for Effective Law Enforcement. AELE is a new arrival on the criminal justice scene, but, it is potentially one of the strongest organizations that could be conceived of because it represents "... Americans, by far the majority, who have an interest in seeing that *reasonable*, non-abusive police procedures which prevent crime and catch criminals are sustained by the courts".⁶⁶

⁶⁴ See, e.g., the comments of the Supreme Court of Missouri in *State v. Moody*, *supra* note 26.

⁶⁵ 392 U.S. 1 (1968)

⁶⁶ Amicus curiae brief filed in *Terry v. Ohio*, 392 U.S.

AELE was founded in 1966 by Professor Fred E. Inbau⁶⁷ of the Northwestern University School of Law, as a not-for-profit, non-partisan, non-political corporation, under the laws of the State of Illinois. As stated above, AELE has entered the criminal justice fray on the side of the law abiding majority. By a rough comparison, where the American Civil Liberties Union seeks to protect the civil liberties of our citizens, AELE will protect the right of our citizens to "secure for themselves the domestic tranquility and justice that has been guaranteed in the Preamble to The Constitution of the United States".⁶⁸

The amicus brief in *Terry* was written by James R. Thompson who, at that time, was a Professor of Law at the Northwestern University Law School. A former Cook County Assistant States' Attorney and now federal prosecutor, Mr. Thompson is an authority on arrest, search, and seizure, interrogation, and related police problems. In writing the brief for AELE, he was speaking for the police in the truest sense. In the brief, he stated:

"Apart from the desire of AELE to give voice to the American public concerned about crime and its consequences, we believe that it is important to also express what we think are the views of the law enforcement profession as a whole, unrestricted by the needs or desires to uphold a particular decision or to sustain a particular arrest or search".⁶⁹

Before going into an analysis of Mr. Thompson's brief, it is necessary to set forth the facts of the *Terry* case and the problems involved; that is, the highly controversial question of "stop and frisk".

Martin McFadden had been a Cleveland Police Detective for 35 years, assigned as a plainclothes officer to look for pickpockets and shoplifters in the downtown area of that city. At about 2:30 in the afternoon on October 31, 1963, McFadden

1, (1968) by Americans for Effective Law Enforcement, page 2. Hereafter this brief will be referred to as the "Amicus brief—*Terry*".

⁶⁷ Professor Inbau is an internationally recognized authority on criminal law and police procedures. He has been a stalwart supporter of policemen who wish to do their job in a proper and constitutional manner. He is the unquestioned leader of that minority segment of the academic legal profession that is concerned with the problems that the police must face in doing their jobs. The law enforcement profession as a whole owes a great debt to "Freddie the Cop".

⁶⁸ Preamble to the By-Laws of Americans for Effective Law Enforcement, p. 2.

⁶⁹ *Amicus brief-Terry*, p. 4.

observed two individuals, Terry and Chilton on the street. He had never seen either Terry or Chilton before, but they caught his attention. He testified: "Now, in this case when I looked over they didn't look right to me at the time".⁷⁰ Terry and Chilton were observed by McFadden taking turns walking up to a store and peering in the window; this happened several times. To the experienced eye of Detective McFadden the two were: "casing a job, a stickup".⁷¹ McFadden decided to investigate further; he went up to Terry and Chilton and asked their names. When Terry only mumbled something in reply, McFadden patted down his outer clothes and, feeling a pistol, retrieved it. A pat down of Chilton also revealed a pistol. Both men were arrested for carrying concealed weapons.⁷² Both Terry and Chilton were convicted on the concealed weapons charge, and this conviction was affirmed on appeal.⁷³ The Supreme Court of the United States granted certiorari⁷⁴ to determine whether the admission of the revolvers against Terry and Chilton⁷⁵ violated their Fourth Amendment rights. The court ruled that the weapons were properly seized and affirmed Terry's conviction.

The only purpose of this account of the *Terry* case is to point out how the Court was "spoken to" through an articulation of a police point of view; therefore, a thorough discussion of the analysis of the Court is not called for here. Suffice to say that on the facts of the *Terry* case as outlined above, the Supreme Court of the United States granted a narrowly defined right of "stop" and "frisk" to the police. This authority was summed up by Chief Justice Warren:

"We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in the light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel

his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment and any weapons seized may properly be introduced in evidence against the person from whom they were taken".⁷⁶

The Supreme Court in *Terry* did not explicitly state the extent to which their decision was based on the arguments presented in the AELE amicus brief; and, certainly the brief of the State of Ohio and oral arguments were also factors in influencing the Courts decision. Nevertheless, it is significant that in Chief Justice Warren's language quoted above, the Court did almost exactly what the AELE amicus brief had asked it to do. The AELE brief closed with an appeal that the Court acknowledge the soundness of the view expressed by the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, when it said:

"The Commission believes that there is a definite need to authorize the police to stop suspects and possible witnesses of major crimes, to detain them for a brief questioning if they will not voluntarily cooperate, and to search such suspects for dangerous weapons when such precaution is necessary".⁷⁷

This language which AELE incorporated into its request to the Court to affirm is sufficiently like the language quoted above, which the Court used to summarize its holding, so that there can really be no doubt that the AELE brief contributed in large measure to the *Terry* decision.

Let us look, then, at the AELE amicus brief as an excellent example of speaking for the police. In the Argument section, Mr. Thompson began by attempting to specify what "stop and frisk" is and what it is not. He defined the "stop":

"A police officer may detain pedestrians or motorists in public places and question them as to their identity and purpose in the particular location, when under the circumstances, such detention and questioning seems appropriate to a prudent police officer—one mindful

⁷⁰ 392 U.S. 1. The facts given herein are taken from Chief Justice Warren's opinion for the Court in *Terry*.

⁷¹ 392 U.S. 1 at 3.

⁷² Ohio Revised Code #2923.01 (1953).

⁷³ State v. Terry, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966)

⁷⁴ 387 U.S. 929 (1967).

⁷⁵ Chilton died when the appeal to the Supreme Court was pending so only the Terry case reached the court.

⁷⁶ 392 U.S. 1 at 30-31.

⁷⁷ Amicus brief—*Terry*, p. 29.

of his responsibility 'to prevent crime and catch criminals'—because reasonable suspicion of criminality has been aroused, although there is not yet probable cause to believe that a crime has been or is being committed".⁷⁸

With regard to the "frisk":

If the above described police conduct is constitutional, as we believe it is, the officer involved must have the power to act reasonably to protect himself from attack, or to prevent the suspect's escape, during the course of the detention and inquiry".⁷⁹

Thus, having presented an accurate definition of "stop and frisk", as he sees it, Mr. Thompson applied this standard to police conduct. He discussed the difference between random stopping and frisking without cause and *particular* stopping and frisking where an officer's reasonable suspicion has fallen upon a particular person or persons in particular circumstances. It is this latter stop and frisk that he sought to isolate and justify as constitutional. In so doing, he used as examples the facts of two cases, *Terry v. Ohio*, discussed above, and *State v. Dilley*,⁸⁰ a New Jersey Supreme Court case, quite similar to *Terry*, in which a "stop" and protective "frisk" had produced the seized weapon. He pointed out that in both *Terry* and *Dilley* the officers' suspicions had narrowed on particular persons and that neither case involved random or arbitrary conduct on the part of the police. He then called for a more flexible view of the Fourth Amendment. Speaking for AELE *and* for the police, he urged:

" . . . that there may be a concept of variable probable cause which applies to pre-arrest investigatory procedures such as field interrogation, and that the true test is the balancing of the degree of interference with personal liberty against the information possessed by the officer which impelled him to act".⁸¹

In the second section of the AELE brief, Mr. Thompson answered point by point the position of the opponents of stop and frisk. He demolished with clear logic each point made by the *amicus curiae* for the petitioner, the NAACP Legal Defense and Educational Fund, Inc. In each instance,

he justified "stop and frisk" only so long as it is held in the context of *proper* police conduct. Finally, he summed up the relationship of the police and the ghetto:

"The police could, of course, withdraw from the ghetto and end all police-citizen conflicts. This alternative might be somewhat tolerable, if only criminals lived in the ghetto; at least *their* interferences with human liberty in the form of murder, robbery, rape and other crimes, would be practiced only on each other. But, others live in the ghetto as well—innocent, law-abiding American citizens; by far the over-whelming majority. They are entitled under the same Constitution which the *amicus* says compels the rejection of stop and frisk to live their lives and experience the safety of their homes and their streets without fear of criminal marauders. They have suffered enough—discrimination, poverty, lack of education, appalling conditions of housing, and community alienation. Must they also be deprived of their right to the protection of the laws as well?"⁸²

This AELE brief is a classic example of an instance where speaking for the police produced results. At no point, did Mr. Thompson advocate "rubber stamping" just anything the police want, nor did he advocate *improper* police procedures; what he did advocate, however, is a standard of reasonableness should be applied to certain "on the street" confrontations and advocated it with success.

It is not a particularly pleasant task to turn from describing a highly successful brief that someone else wrote to describing a highly unsuccessful brief that the author of this paper wrote; nevertheless, it is submitted that in this paper, dealing with the question of speaking for the police, the unsuccessful brief filed by the Denver Police Department in support of the California Attorney General's petition for rehearing in the case of *Chimel v. California* should be described. The Denver Police brief is, to the author's knowledge, the first brief ever filed by a police department, as such, in which an attempt was made to bring to the attention of the Supreme Court of the United States the practical problems that its decision has created; second, one may hope that the Denver

⁷⁸ *Idem* p. 6.

⁷⁹ *Idem* p. 6 and 7.

⁸⁰ 40 N.J. 460, 231 A. 2d, 353 (1967).

⁸¹ *Amicus* brief—*Terry* p. 13.

⁸² *Idem* p. 28 and 29.

Police Department brief will be the forerunner of many more briefs going from the police directly to the courts in an effort to present the police side of the matter to the courts.

Chimel v. California was decided on June 23, 1969, the last day of the October 1968 term; consequently, if a petition for rehearing was filed, no action could be taken on the petition until the beginning of the October 1969 term. On behalf of the Attorney General of the State of California the Honorable Thomas C. Lynch, Mr. Ronald M. George, Deputy Attorney General for the State of California filed a petition for rehearing in the case of *Chimel v. California*. Mr. George had briefed and argued *Chimel* in the Supreme Court. Mr. George's petition for rehearing was joined by the Attorneys General of thirty-five states and the Territory of Guam.

In his petition for rehearing Mr. George stated:

"Furthermore, the Court's opinion provides few if any guidelines to law enforcement in meeting practical problems posed by the decision".⁸³

Mr. George then described some of these problems: the question of how broad an interpretation may be placed on a man's "reach", whether or not the police may remain on the premises when a warrant is being sought, the effect, if any, that *Chimel* will have on the "plain view" doctrine; and finally, the question of retroactivity.⁸⁴ This brief—an excellent piece of legal draftsmanship—concisely and logically attempts to persuade the Court to reconsider its holding in *Chimel*.

By August of 1969, two homicide cases in Denver had occurred in which the police were frustrated by the *Chimel* rule in their attempts to recover the murder weapon. The writer felt that if these cases were properly presented to the court, they might demonstrate how police problems suggested theoretically in Mr. George's brief could arise, in actuality, when the police were confronted by the over-broad language and lack of guidelines in the *Chimel* opinion. Mr. George was asked if he would care to have an *amicus* brief filed by the Denver Police Department in support of his petition for rehearing. He readily agreed. The writer then contacted the Honorable Duke W.

⁸³ Petition for rehearing in *Chimel v. California* filed by the Attorney General of the State of California, pg. 9.

⁸⁴ *Idem* p. 9, 10 and 11.

Dunbar, Attorney General of the State of Colorado and asked if the Denver Police Department could file the brief through his office. He agreed and his office was most cooperative in all matters of filing the brief.

Two major points were kept in mind in the preparation of the brief of the Denver Police Department. First, the brief would not argue law, but, rather, would attempt to present actual facts to the Court in order to demonstrate the devastating effect that *Chimel* had, or could have, when applied in practice. Second, the brief did not ask the Court to reverse itself in *Chimel*; merely to grant a rehearing in order to further examine the practical effects of *Chimel*; and to give the police some guidelines. Thus, the Denver Police Department's *amicus* brief closed the Argument section with the following appeal:

"We most respectfully urge the Court to grant Respondent's Petition for Rehearing in the case of *Chimel v. California* so that an opportunity might be presented for spokesmen for law enforcement, on every level, to make known to the Court the impact of this decision on our function of protecting the safety of the people of this country. Further, as a result of such rehearing the Court would have an opportunity to consider the establishment of the guidelines in this area which the police so desperately need".⁸⁵

The Denver Police *amicus* brief's basic appeal brought to the Court's attention the two previously described Denver cases in which *Chimel* created a "constitutional straight jacket" for the police. The facts of the two cases were described in detail,⁸⁶ and they were analyzed to show how circumstances conspired to create a situation in which the police were prevented from legally seizing the murder weapon.⁸⁷ The analysis was the same in both cases:

1. Police learn where a murder suspect may be found and proceed there at once to arrest him. There is no time to get a search warrant because the suspect may be alerted

⁸⁵ *Amicus Curiae* brief of the Colorado Attorney General and the Denver Police Department in support of the California Attorney General's Petition for Rehearing, p. 16. Hereafter referred to as Denver *Amicus* Brief—*Chimel*.

⁸⁶ *Idem* Pp. 5-10.

⁸⁷ *Idem* Pp. 10-14.

- that the police are seeking him and may flee.
2. Friends or family of the suspect, who have every reason to wish to protect him, are on the premises where the arrest takes place. Consent to search for the murder weapon is refused and *Chimel* bars an arrest-based search.
 3. The police must wait while a search warrant is obtained; but, in the meantime, the others on the premises have every opportunity to dispose of the weapon. The police cannot lawfully search the others on the premises because there is no probable cause to arrest them. Even if the others were searched and the murder weapon found, the police would risk having the weapon suppressed as the fruit of an unlawful search; and further; the police risk civil liability in assault and battery or other tort for making the unlawful search of the person. In both Denver cases, weapons were, in fact, disposed of by those on the premises; and, when the search warrants were finally obtained the warrant-based searches were fruitless.

It was hoped that these cases would show the Court how the broad language of *Chimel* became a constitutional shield for the friends or relatives of murder suspects who wished to accommodate the suspects by disposing of incriminating evidence against them. It was further hoped that Mr. George's petition for rehearing which advised the Court of the problems which *Chimel* could cause, together with the Denver Police brief pointing out the actual problems that *Chimel* did cause, might persuade the Court to grant a rehearing and give the police *some* guidelines so that the police could cope with such problems in the future. Finally, it was hoped that the fact that over two-thirds of the Attorneys General of the States joined in the petition for rehearing might convince the Court of the seriousness with which *Chimel* was viewed in the law enforcement community. Nevertheless, the Court denied rehearing without opinion.⁸³

Thus, we see two cases where the police, or someone speaking for the police, attempted to "speak to" the Supreme Court of the United States. In the one case, *Terry v. Ohio*, the Court listened, in

the other case, *Chimel v. California*, a good faith attempt to present police problems to the Court met with curt dismissal. Even the disappointing result of "speaking out" in the *Chimel* case may presage a more encouraging future; for a number of police departments have expressed an interest in filing similar briefs, and perhaps if enough departments are heard from, the Court may begin to listen more.

An additional encouraging note for the police concerning the Denver Police *amicus* brief is the fact that Senator John L. McClellan of Arkansas saw fit to incorporate that part of the brief which describes the two Denver homicide cases, verbatim, into the Congressional Record. This came about during a speech before the Senate on October 23, 1969 in which Senator McClellan reviewed the impact of *Chimel* on the police, citing the two Denver cases as examples of the disastrous effects of that decision.

Regarding the Denver cases Senator McClellan stated:

"These two examples graphically show how our law enforcement officers are increasingly being restricted by court-imposed special rules of criminal procedure. They give flesh and bones to the anti-septic statistics I noted above."

Here we see an unexpected, but very welcome, result of speaking out. In attempting to reach the Court, the brief came to the attention of the United States Senator who has probably done more than any other figure in this country to combat crime in a constructive and constitutional manner.

Speaking to a State Supreme Court—

In two recent instances, the Colorado Supreme Court⁸⁹ gave consideration and attention to requests by the Denver Police Department and the Denver District Attorney's Office for changes in the Colorado Rules of Criminal Procedure that were felt by these agencies to have been necessitated by recent decisions of the Supreme Court of the United States. In both cases, the Colorado Court adopted Rules that will be of immeasurable assistance to law enforcement.

Lest there be any misunderstanding, the writer wishes to state emphatically at this point that the the Colorado Supreme Court is in no way a "rubber stamp" for the police. When the police are wrong,

⁸⁹ Honorable Robert H. McWilliams, Ch. J; Hon. Edward C. Day, James K. Groves, Paul V. Hodges, Donald Kelley, Robert Lee, Edward E. Pringle J.J.

⁸³ October 13, 1969, No. 770, 6 Cr.L. 4019

the Court brings them up short in no uncertain terms;⁹⁰ and, the Court is deeply concerned with individual rights.⁹¹ However, the Colorado Court is also concerned with the rights of society as a whole; and it has consistently taken a realistic view of the day-to-day problems that the police must face.

Let us consider the response of the Colorado Court, by looking at the Rules of Criminal Procedure that the Court adopted:

*Rule 41, Colorado Rules of Criminal Procedure—
The "Night Search Warrant" Rule:*

Chimel, with all of its implications was decided on June 23, 1969. One immediate source of concern to the forces of law enforcement in Colorado was the previously discussed requirements in the Colorado Rules of Criminal Procedure that search warrants which are to be executed at night must be based on a "positive" affidavit.⁹²

In Denver, after *Chimel*, the "night search warrant" rule quickly cost the police evidence in several cases. In one, an informant of unquestioned reliability advised that a "pot party" was taking place at night at a certain house. Only a few people including the informant were to be present. The informant was at the party and left to tell the police about it. The informant absolutely refused to be "fronted", that is, to have his identity made known. Under the recent United States Supreme Court cases of *McCray v. Illinois*,⁹³ and *Spinelli v. U.S.*,⁹⁴ if a search warrant affidavit clearly shows a basis for trusting the informant's reliability and a basis for believing how the informant knows where the property sought is located, then a confidential informant's identity need not be revealed. However, in order to make a positive statement to support a nighttime search warrant, the affidavit for search warrant would have had to state that the informant saw the marijuana in the house at least within a few hours of the time that the warrant was procured. There had been only a few people present at the party, and this positive statement would

have narrowed the number of suspected informants down to those present within a period of a few hours. The violators could, therefore, by process of elimination, ascertain with reasonable certainty who the informant was. This would have "fronted" the informant as surely as placing his name in the affidavit. In view of the Denver Police Department's cardinal rule that an informant is *never* "fronted" without his consent, even by implication, and because the officers felt a positive warrant would do just this, no warrant was sought and the pot party went undisturbed. By daytime, of course, all the evidence was gone.

The writer discussed this matter with James Creamer, then the Chief Deputy District Attorney for Denver. Mr. Creamer suggested that Justice Edward Pringle of the Colorado Supreme Court be advised of the problem and the matter was presented to the Justice.

If any member of a distinguished bench can be said to be "the" specialist in an area of law, Justice Pringle is the search and seizure expert on the Colorado Supreme Court. A former Chief Justice of the Court, Justice Pringle has a national reputation in the search and seizure field, and he has written extensively on this subject, both on the bench and off.⁹⁵ It was felt that an approach to the Court on this problem could best be made through Justice Pringle.

The problem of the Colorado night search warrant rule was explained to Justice Pringle. Prior to *Chimel*, in cases such as that described in the foregoing example, officers could have entered the "pot" party to make a lawful arrest and an arrest-based search for the contraband could have been made. Since *Chimel* now forbade this, officers in Colorado were at an impasse at night if they were not *positive* for purposes of a search warrant affidavit, or if the positive warrant would jeopardize an informant's anonymity. Justice Pringle was asked if he would present to the Court a request that the positive requirement for a night search warrant be dropped from the Rules;⁹⁶ he agreed and the Court heeded the Police

⁹⁰ See, e.g., *Gallegos v. People*, 401 P. 2d 613 (1965), suppressing evidence seized incident to an arrest for which the only "probable cause" was that defendant ran as the police approached. *Hernandez v. People*, 153 Colo. 316, 385 P. 2d 996, (1963) suppressing evidence seized pursuant to a purely conclusory search warrant.

⁹¹ See, e.g., *Walker v. State of Colorado*, Colorado Supreme Court, (8/25/69) reversing a murder conviction because of prejudicial pretrial publicity.

⁹² CRCP Rule 41, (prior to October 1, 1969).

⁹³ 386 U.S. 300 (1967).

⁹⁴ 393 U.S. 410 (1969).

⁹⁵ See, e.g., Pringle and Fairfield, *The Expanding Power of Police to Search and Seize: Effect of Recent U.S. Supreme Court Decisions on Criminal Investigation.*, 40 U. COL. L. REV 491 (1968) See also *Hernandez v. People*, 153 Col. 316, 385 P. 2d 996 (1963), in which a review of the law of search and seizure was made by Justice Pringle which has been the guiding authority on Colorado search and seizure law since the decision was handed down.

⁹⁶ The requirement for a positive affidavit to support a nighttime search is not a Constitutional doctrine. Rather it is based on notions of "fair play."

Department's request. Since October 1, 1969, a search warrant based on probable cause may be executed "at any time" in Colorado.

"Speaking to" the Colorado Court, the police made known a very practical problem that had arisen since *Chimel v. California*. The Court's response was encouraging; and if the police use the new authority granted in a proper manner⁹⁷ police effectiveness will be greatly enhanced, without doing violence to individual rights or liberties.

The other problem presented by the police to the Court was more complicated, as will be seen in the following discussion of the second Rule of Criminal Procedure adopted by the Colorado Supreme Court at the request of the Denver Police Department.

Rule 41.1, Court Order for Fingerprinting

There was no question that *Davis v. Mississippi*, prohibiting the use of fingerprints taken pursuant to an unlawful arrest, was decided on a Constitutional basis.⁹⁸ Thus, Colorado, as every other state, is bound by the United States Supreme Court's holding under the doctrine of *Mapp v. Ohio*.⁹⁹ Unlike the "night search warrant" rule, which the Colorado Supreme Court could change under its rule-making power,¹⁰⁰ any Rules of Criminal Procedure affecting the fingerprint question must conform to the mandate of *Davis*.

If the Colorado Supreme Court were asked to adopt a Rule of Criminal Procedure allowing the police to take fingerprints in certain cases, even though there was no probable cause to arrest in the traditional sense, they would have to be convinced that such a procedure was constitutional within the limits of *Davis*. The writer felt that this could be done, and, as counsel for the Denver Police Department, filed a brief on behalf of that Department with the Colorado Court asking for such a rule. In effect, the police were speaking to the Court. Basically, what the police needed was a Rule that would allow the police to apply to a court for a judicially approved order to bring in and fingerprint persons who were suspects in

criminal cases even though there was no probable cause for their arrest. The Court, to consider our request, had to be convinced on three points:

1. That the police needed such a rule;
2. That such a rule, in theory, would be consistent with *Davis*, as a matter of constitutional law; and,
3. That the rule, as written, was also consistent with *Davis*, and with concepts of individual rights.

The first point presented to the Colorado Court was the need for such a procedure. The problem was presented to the Court that in many cases the police are confronted with the following type situation:

1. A crime has been committed and fingerprints have been found at the scene. The prints are possibly or probably those of the perpetrator of the crime.

2. The circumstances of the case are such that there are several suspects; yet, these same circumstances are not sufficient, in themselves, to give the police probable cause to arrest the suspects. No further evidence is forthcoming.

3. Police records are checked, and there are no prints on file for any of the suspects. (It was pointed out to the Court that this can happen in a great many cases. With more and more crimes being committed by juveniles, it quite often happens that, because the suspects are juveniles, they have not been arrested or have not been fingerprinted before.¹⁰¹ Further, being juveniles the suspects would rarely have had fingerprints taken for military service.)

4. The police know that if they bring a suspect in for compelled fingerprinting, in the absence of probable cause to arrest him, *Davis* will render the prints inadmissible in Court.

5. Of course, there is nothing to stop the police from going to a suspect and *asking* him to come in voluntarily for fingerprinting; but, the suspect would have to be warned, in no uncertain terms, that he was not required to come in. Suppose in the given case, the suspect who was politely asked to come in for fingerprinting, is, in fact, the perpetrator of the crime for which he is suspect. If the suspect is of even average intelligence, he will

⁹⁷ See text at notes 127 *et seq.*, *infra*, for the steps taken by the Court to insure that the police *did* in fact utilize the Rule in a proper manner.

⁹⁸ Brennan, writing the opinion in *Davis*, framed the issue as: "... whether fingerprints obtained from petitioner should have been excluded from evidence as the product of a detention which was unlawful under the Fourth and Fourteenth Amendments". 89 S. Ct. 1394 at 1394.

⁹⁹ 367 U.S. 643 (1961)

¹⁰⁰ Col. Rev. Stat. 37-2-27

¹⁰¹ In fact, the Colorado Children's Code CRS 22-2-2 (6) Rule prohibits a juvenile's fingerprints being sent to the Federal Bureau of Investigation unless a court has ordered him held for criminal proceedings.

refuse to accompany the officers.¹⁰² In addition, the request that he submit to fingerprinting will have apprised him of the following facts:

- (a) That he is a suspect.
- (b) That he left fingerprints at the scene.
- (c) That despite this fact, there is insufficient evidence to arrest him.
- (d) That if he leaves the jurisdiction at once he has an excellent chance of getting away free and clear.

6. The police, then, are faced with choice of possibly alerting their suspect or of total inaction.

As examples of this impasse that the police can often find themselves confronted with, the two Denver cases cited above as examples of the effects of *Davis* on the local police were presented to the Court. One of these cases, involved a homicide with prints found at the scene, multiple suspects but no probable cause to arrest them; and, therefore, no constitutional way to connect the prints with the suspects. The other case involved a burglary with prints found, very few suspects, but still no probable cause to arrest and no way to connect the suspects and prints. The point was made to the Court that the chain of events described above can arise in almost any type of case and is not limited to homicides and burglaries.¹⁰³

Thus, the attempt was made to show the need for a fingerprinting rule; however, even if the Court were convinced beyond any shadow of a doubt that the police desperately needed such a rule, if the rule could not be drawn to conform with *Davis'* mandate, it could not constitutionally be approved by the Court. The next problem, then, was to justify the creation of such a rule. For this, the writer turned to *dicta* in the *Davis* case itself. Justice Brennan, after laying down the *Davis* rule wrote:

"It is arguable, however, that because of the unique nature of the fingerprinting process such detentions might, under narrowly defined circumstances, be found to comply

¹⁰² Or, if the suspect must be permitted to call his attorney, (as would almost surely be required under the rationale of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *United States v. Wade* 388 U.S. 218 (1967) and *Gilbert v. California* 388 U.S. 263 (1967) requiring the presence of counsel, unless waived, at interrogation or line-ups), the attorney would be duty bound in most, if not all, cases to advise his client not to voluntarily submit to fingerprinting.

¹⁰³ For instance, in the *Davis* case itself the crime was rape.

with the Fourth Amendment even though there is no probable cause in the traditional sense. See *Camara v. Municipal Courts*, 387 U.S. 523 (1963). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into the individual's private life and thoughts which marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime solving tool than eyewitness identification or confessions and is not subject to such abuses as the improper line-up or third degree.

"Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprint context".¹⁰⁴

Justice Brennan went on to note that since no attempt was made to obtain advance approval to fingerprint *Davis* himself, *Davis* presents no occasion to:

"... determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause for arrest".¹⁰⁵

Thus, what is said in *Davis* on this subject is the purest *dicta*, yet it seems to be an invitation for someone to come up with the "narrowly circumscribed procedures" that Brennan hints at. And who is better suited to accept Brennan's challenge than the police, for they are most directly affected by *Davis*. Here was an excellent opportunity for the police to speak out in a very constructive manner.

The question then became whether it was pos-

¹⁰⁴ 89 S. Ct. 1394, 1398. Note that Justice Harlan in his concurring opinion in *Davis* would leave open the question of whether advance judicial approval is an absolute necessity in every case.

¹⁰⁵ *Idem* at 1398.

sible to draw a constitutional procedure for prior judicial approval for compelled fingerprinting in the absence of probable cause for arrest. The answer lay in the application and interpretation of the Fourth Amendment prohibition on unreasonable searches and seizures. "The Fourth Amendment protects people, not places"¹⁰⁶; but, at the same time, "... what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures"¹⁰⁷.

Can, then, a search and seizure be reasonable, in certain cases, even though there is an absence of "probable cause" in the traditional sense. Phrased another way, are there certain situations in which an invasion of personal or proprietary privacy may be considered reasonable despite the lack of probable cause? The Denver Police contended to the Colorado Supreme Court that the answer to both questions was "yes".

The authority for the premise that probable cause in the traditional sense is not an absolute requirement for *all* searches stems from two recent United States Supreme Court cases, *Camara v. Municipal Court*¹⁰⁸ and *Terry v. Ohio*.¹⁰⁹ In both of these cases, the Court enters into a balancing test of the governmental interest in the need to prevent crime and protect police officers (*Terry*) or to detect hazardous conditions (*Camara*), against the interest of the individual's right to privacy. As stated in *Camara* the question revolves around "the need to search, against the invasion which the search entails"¹¹⁰.

In the *Camara* case the Court overruled two prior Supreme Court cases, *Frank v. Maryland*¹¹¹ and *Ohio ex rel Eaton v. Price*,¹¹² cases which had upheld the right of states to punish homeowners for refusing to permit municipal inspectors to inspect the homes in question without warrants.

In *Camara*, Justice White, writing for the majority,¹¹³ enunciated the new rule that even administrative searches such as municipal inspections are required by the Fourth Amendment to be conducted under a "warrant procedure", except in emergency circumstances. However, Justice White rejected the contention that probable cause, as such, must be shown to believe that each dwelling,

in particular, contained a violation of the code to be enforced. He held that an "area inspection" based on an appraisal of conditions in the area as a whole would be reasonable under the Fourth Amendment, if reasonable administrative and legislative standards for conducting an area inspection are satisfied. He stated:

"The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But, reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated there is probable cause to issue a suitably restricted search warrant."¹¹⁴

This language was cited to the Colorado Court as authority for the proposition that probable cause was a flexible rather than an absolute standard; and, it was pointed out that *Camara* was the case cited by Justice Brennan in *Davis* when he discussed the possibility of a judicially supervised process for fingerprinting.¹¹⁵

Terry v. Ohio, the "stop and frisk" case, discussed above, was cited as further authority for a "balancing" of governmental against individual interests. It will be remembered that the Court in *Terry* weighed the need for preventive police patrolling and the safety of the officer against the individual's right to be free from invasions of personal privacy. In *Terry*, an invasion of personal security, suitably limited to a brief detention and to a pat down for weapons, was sanctioned, *despite* the fact that probable cause for arrest was lacking. The requirement for advance judicial approval in the search and seizure area was also stressed by Chief Justice Warren in the *Terry* opinion:

"The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached neutral scrutiny of a judge who must evaluate the reasonableness of a particular search and seizure in the light of the particular circumstances."¹¹⁶

From these cases, the Denver Police hoped to

¹¹⁴ 387 U.S. 523, 539.

¹¹⁵ 89 S. Ct. 1394, 1398.

¹¹⁶ 392 U.S. 1, 21. Warren pointed out that the street type encounters in the "stop and frisk" cases were exceptions to this rule.

¹⁰⁶ *Katz v. United States* 389 U.S. 347, 351 (1967).

¹⁰⁷ *Elkins v. United States*, 364 U.S. 206, 222 (1960).

¹⁰⁸ 387 U.S. 523 (1967)

¹⁰⁹ 392 U.S. 1 (1968).

¹¹⁰ 387 U.S. 523, 537.

¹¹¹ 359 U.S. 360 (1959)

¹¹² 364 U.S. 263 (1960).

¹¹³ Justices Harlan, Clark, and Stewart dissented.

convince the Colorado Court that the flexible standard of probable cause enunciated by the Supreme Court in certain areas could, when coupled with Justice Brennan's *dicta* in *Davis* result in a constitutional procedure for compelled fingerprinting pursuant to advance judicial authority.

The next step was to draft a Rule of Criminal Procedure that would meet all of the above tests.

The Rule of Criminal Procedure for fingerprinting, suggested by the Denver Police Department which was adopted with one change¹¹⁷ by the Colorado Supreme Court is as follows:

COLORADO RULES OF CRIMINAL PROCEDURE

Rule 41.1 — COURT ORDER FOR FINGERPRINTING

(a) *Authority to Issue Court Order for Fingerprinting:* A Court Order for Fingerprinting authorized by this rule may be issued by any judge of the Supreme, District, Superior, or County Court, (or of the Court of Appeals upon the creation of that Court).

(b) *Issuance of Order:* A Court Order for Fingerprinting shall issue only on affidavit sworn to or affirmed before the judge and establishing the grounds for issuance of the order. The order shall be directed to any peace officer of this state. If the judge is satisfied that grounds for the application exist, he shall issue the order naming or describing the person to be fingerprinted. Grounds for the issuance of a Court Order for Fingerprinting shall exist when it be shown by facts alleged in an affidavit of a peace officer that:

1. A known criminal offense has been committed, and,
2. There is reason to believe that the fingerprinting of the named or described individual will aid in the apprehension of the unknown perpetrator of such criminal

offense, or that there is reason to suspect that the named or described individual is connected with the perpetration of the crime, and,

3. The fingerprints of the named or described individual are not in the files of the agency employing the affiant.

(c) *Contents of the Order:* The Order shall state:

1. The name or description of the individual to be fingerprinted, and,
2. The names of any persons making affidavit for the issuance of the Order, and,
3. The criminal offense concerning which the Order has been issued, and,
4. A mandate to the officer to whom the Order is directed to detain the person to be fingerprinted for only such time as is necessary to obtain the fingerprints and to compare such fingerprints to the fingerprints thought to be related to the perpetrator of the criminal offense, and,
5. The typewritten or printed name of the judge issuing the Order and his signature thereon.

(d) *Execution and Return:*

1. The Order may be executed and returned only within ten days after its date.
2. The Order shall be executed in the daytime unless the issuing judge shall endorse thereon that it may be served at anytime because it appears that the suspect may flee the jurisdiction if the Order is not served forthwith.
3. The officer executing the Order shall give to the person fingerprinted a copy of the Order.
4. No search of the person to be fingerprinted under the Order may be made except a protective search for weapons, unless a separate warrant has been issued for such search under Rule 41.
5. A return to the issuing judge shall be made showing whether the person named or described has been (a) detained for fingerprinting or not, and (b) released or arrested.

(e) *Motion to Suppress:* A person aggrieved by an Order issued under this Rule may file a Motion to Suppress fingerprints seized pursuant to such Order and the said motion shall be granted if there were insufficient grounds for issuance or if the Order was improperly issued. The motion to suppress the use of such fingerprints as evidence

¹¹⁷This change was in paragraph (6) the original draft read "Grounds for the issuance of a court order for fingerprinting shall exist when it is shown by affidavit "of a peace officer that . . ." The Court very properly changed this sentence to read: "Grounds for the issuance of a Court Order for Fingerprinting shall exist when it be shown *by facts alleged* in an affidavit of a peace officer that . . ." This is, of course, a restatement of the position that warrants shall be based on facts and not conclusions of the affiant. *Aguilar v. Texas*, 378 U.S. 108 (1964) also *Hernandez v. People* 153 Colo. 316, 385 p. 2d 996 (1963) in which the Colorado Supreme Court anticipated the U.S. Supreme Court.

shall be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for motion, but the Court, in its discretion, may entertain the motion at the trial. (Effective October 1, 1969.)

With regard to the wording of the Order, the following points were advanced to the Court:

1) The proposed rule in question was purposely styled "Court Order for Fingerprinting", rather than "Search Warrant for Fingerprinting", because the "warrant clauses" of both the United States¹¹⁸ and Colorado Constitutions¹¹⁹ specify that warrants shall issue only upon *probable cause*. Since, by definition, the desired rule for compelled fingerprinting with prior judicial approval would involve less than probable cause it was felt that any drafting of the rule should be done based on the respective clauses of each constitution that prohibit only "unreasonable" searches and seizures.¹²⁰ That is, the Court Order for Fingerprinting is not a "warrant" but rather it constitutes an otherwise "reasonable" search. This was pointed up in *Terry* when Chief Justice Warren emphasized in that case, after distinguishing the warrant clause of the Constitution of the United States: "Instead the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures".¹²¹

Justice Pringle has also commented on the flexibility of the "reasonable-unreasonable" dichotomy: "Even the [United States Supreme] Court's severest critics do not expect it to disregard the Fourth Amendment entirely. Rather, the disagreements center on what sort of police conduct constitutes an 'unreasonable' search and seizure as that elastic term is used in the Fourth

¹¹⁸ U.S. Constitution, Amendment 4: "... and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized".

¹¹⁹ *Colorado Constitution—Article II, Section 7*: "... and no warrant to search any place or seize any person or things shall issue without describing the place to be searched or the person or thing to be seized, as near as may be, not without probable cause, supported by oath or affirmation reduced to writing".

¹²⁰ *U.S. Constitution—Fourth Amendment*: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

Colorado Constitution—Article II, Section 7: "The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures;..."

¹²¹ 392 U.S. 1.

Amendment".¹²² The term "Court Order for Fingerprinting" was accepted by the Court.

2) The rule requires an affidavit specifying that *facts*, not mere conclusions, must support the Court Order for Fingerprinting. In other words, even though the standard for issuance of the Court Order may be less than probable cause, no order may lawfully issue based solely on an officer's hunch.

3) A known criminal offense must be specified. Court Orders for Fingerprinting are not to be used for "fishing expeditions" or "round-ups" or we will have gone full circle to the *Davis* situation. The proposed rule was purposely not limited to felonies because on occasion a misdemeanor can quickly turn into a felony (e.g. a simple assault that results in a death "turns into" murder or voluntary manslaughter once the victim of the blow dies).

4) The requirement that the files of the agency requesting the Court Order be searched will rule out frivolous requests. This also comports with Justice Brennan's emphasis on the point that since fingerprints need only be taken once, the procedure cannot be used for harassment.¹²³

5) The Order requires that the "name or description" of the person to be fingerprinted be supplied. Here the writer presented to the court the possibility that in some cases, the name of a party sought may not be known, but a description of sufficient specificity to satisfy due process requirements might be available. Consider this hypothetical:

The roommate of a murdered girl tells the police that her roommate had been seeing a certain boy. She does not know his full name, but he was called "Rick", was blonde, about six feet tall, drove a brown Porsche and went to Denver University. This description should certainly contain sufficient specificity for the issuance of a Court Order for Fingerprinting.

6) The Rule requires that the detention be kept minimal. Brennan requires this in his *dicta* and the idea comports with the notion of a *limited* detention in those cases where there is less than probable cause to arrest. Detention is, by the terms of the order, strictly limited to that time necessary to take and compare the fingerprints of the suspect. If the suspect's prints match those believed to be

¹²² Pringle, *op. cit. supra* note 78 at p. 508.

¹²³ 89 Sup. Ct. 1394, 1398.

related to the perpetration of the crime, this fact would in most cases establish probable cause for arrest of the person fingerprinted and this suspect would then be arrested and processed as any other arrestee.

7) The requirement of daytime execution of a Court Order also stresses the necessity for a minimum intrusion. The only permissible exception being when the issuing court is convinced that the flight of the suspect is imminent. Only when such a judicial finding is made would a nighttime detention for fingerprinting be justified.

8) The person to be fingerprinted may be only searched for weapons. This would comport with *Terry's* emphasis on the necessity to protect the officer, but it will keep the physical intrusion minimal.¹²⁴

9) The provision in the Rule for a Motion to Suppress guarantees the suspect his fundamental due process rights under the Fourth and Fourth Amendment Amendments.

This, then, was the request of the Denver Police to the Colorado Supreme Court and the Court responded by adopting the rule. This was, to the writer's knowledge, the first such rule to go into effect in the United States and the first response to *Davis* embodied in the law of any state.¹²⁵

On September 19, 1969, Justices Edward Pringle and Edward C. Day of the Colorado Supreme Court announced the adoption by the Court of two above described rules, effective October 1. The Justices noted that the new rules were adopted as a consequence of the *Chimel* and *Davis* decisions respectively¹²⁶ and that the rules were "immediately necessary for effective police work". Both Justices emphasized that if the rules were abused by the police, the rules would be revised.

¹²⁴ If the suspect's prints matched the prints found at the scene and he was arrested based on the match-up, then, a thorough search of the person incident to the arrest may be made. *Chimel v. California*, 395 U.S. 752 (1969).

¹²⁵ As of this writing, the Arizona Legislature has a bill introduced dealing with this matter, "Arizona Statutes—New Chapter 5. Warrant to Detain for Purpose of Fingerprinting. Secs. 13-1481 and 13-1482". This has not become law. In addition, Senators McClellan, Hruska, and Allott have introduced S. 2997 as an amendment to the United States Code; #3507 Detention for Obtaining Evidence of Identifying Physical Characteristics". Under this bill, a judicially supervised procedure of obtaining any type of evidence of physical characteristics (not just fingerprints) would be provided.

¹²⁶ See: "Explanation Covers Rules" in the *Denver Post*, Fri., September 19, 1969 and "Colo High Court Sets New Rules" in the (Denver) *Rocky Mtn. News*, Sat., Sept. 20, 1969 p. 25.

One most important point must be made with regard to the response of the Colorado Supreme Court to the Denver Police Department's request for the two rules described herein. If the police are going to become vocal and request the Courts or legislatures to take a certain position with regard to police problems, then there devolves on the police as the requesting parties, the grave responsibility to utilize the requested procedures or laws in a proper manner. This responsibility cannot be overemphasized, and the writer, frankly can think of nothing worse than a case in which the police, after requesting and receiving a concession from the courts or legislatures, would then turn around and abuse this concession by employing it in an improper manner. The Colorado Supreme Court felt this way also. When Justices Pringle and Day announced the new rules which the police had requested, they very definitely asserted that abuse of the rules would result in revision of the rules. Justice Pringle went further than this. Before the adoption of the rules was announced, he advised the writer that the Court was going to accept the proposed rules. At this time Justice Pringle strongly emphasized the need for proper use of the broadened police powers embodied in the rules; and, he stated that he wanted the entire law enforcement community in Colorado to be put on notice not to abuse the rules. He requested the writer to see that this was done.¹²⁷

The result of this request was a Training Bulletin which the writer, through Chief of Police George L. Seaton, issued to the Denver Police Department describing the new rules. It was intended that, at Justice Pringle's request, this Bulletin would be sent to every law enforcement agency in Colorado. A few excerpts will indicate the tone that the bulletin takes. The second paragraph of the bulletin states:

"The purpose of this bulletin is, first to explain the new Rules, and, secondly, to advise our officers as strongly as possible that if the broadened police powers in the new Rules are abused, the Rules will be changed".¹²⁸

¹²⁷ The writer is legal counsel for the Colorado Association of Chiefs of Police as well as Legal Coordinator for the Denver Police Department, and was therefore in a position to speak with authority to a relatively broad law enforcement audience.

¹²⁸ Training Bulletin, p. 1.

The bulletin describes the change in the "night search warrant rule" and continues:

"From the beginning of the law of search and seizure; courts and legislators have been concerned with the idea of police breaking into a man's house at night, even with a warrant. The invasion of privacy is considered to be greater at night than it is in the daytime. The fact remains, however, that certain types of criminal activity, such as burglary—or narcotics are "crimes of the night", with the violators using the cloak of darkness to conceal their activities. As in all cases of police activity, the need for effective police procedures must be balanced against the individual rights. There can be no question, that, in many cases, we need the right to be able to execute search warrants in the nighttime when such warrants are based on probable cause instead of a positive statement. BUT, WE MUST NOT ABUSE THE NEW POWER THAT THE COURT HAS GIVEN US. If we do, the Court will take the power away; it's that simple. When the new Rules were announced by Justices Pringle and Day of the Colorado Supreme Court, both Justices said that, if abuse by police is discovered, the rules will be revised".¹²⁹

The rule permitting a Court Order for Fingerprinting is then discussed in the Bulletin, and guidelines are laid down for its implementation; with regard to this rule the Bulletin states:

"These guidelines will be added to as the law in this area is developed. The important thing to remember is that a Court Order for Fingerprinting is for a TEMPORARY DETENTION only. Once the prints have been taken a comparison should be made at once. If the suspect matches the prints found at the scene, he should be arrested. If he does not match OR if a comparison cannot be immediately made, he must be released. The quickest way to get the Court to withdraw this broadened police power is to abuse the power by holding a suspect longer than is necessary to print him and compare the prints. The rule requires the officer to make a return to the judge showing whether the suspect has been detained for fingerprinting, or not; and, whether, as a result of the fingerprinting,

¹²⁹ *Ibid* p. 2.

the suspect has been either arrested or released".¹³⁰

The Training Bulletin concludes:

"The Colorado Supreme Court has recognized the legitimate needs of law enforcement in enacting the Rules discussed. It is now up to the police to use these Rules properly as investigative tools; and, not to abuse the powers the Court has granted".¹³¹

As a Denver Police Training Bulletin this information naturally went to every Denver police officer. In addition, thanks to the special cooperation of Chief Ben Roach of the Commerce City Police Department, President of the Colorado Association of Chiefs of Police, and Mr. A. S. Reeder, Secretary of the Colorado Sheriffs and Peace Officers Association, a copy of this bulletin went to every police chief, sheriff, and other top law enforcement executive in Colorado. In addition, the writer has addressed both the Colorado Association of Chiefs of Police and the Colorado Sheriffs and Peace Officers Association regarding the new rules and the necessity not to abuse them.

This point is stressed to emphasize that *responsibility goes with police articulation*; and, that, if the police become vocal concerning the laws under which they operate, then any changes brought about by the police speaking out must be regarded by the police as evidences of trust that they *must not* abuse.¹³²

The Denver Police and Colorado enforcement generally is fortunate that Colorado has a Court of the calibre of our Supreme Court which will listen to police needs when the Court is in the exer-

¹³⁰ *Ibid* p. 7 & 8.

¹³¹ *Ibid*. p. 8.

¹³² The Colorado Rules was not the only instance of stressing non-abuse of newly expanded police powers. After *Terry v. Ohio* came down, the writer issued a training bulletin for the Denver Police on "stop and frisk" which concluded in upper case:

"The "Stop and Frisk" decision is a decision that expands proper police conduct in the search and seizure area. It was handed down by a Court who has demonstrated in the past that it is extremely suspicious of the policeman. The decision rests a fairly wide discretion in the police in the "stop and frisk" area and *this discretion must not be abused* or it is quite possible that the Court might reverse itself and take the discretion away. *If police officers stay within the limitations of the decision, it can be an extremely useful tool in fighting crime.* (emphasis in original). Carrington, Denver Police Department Training Bulletin, "Terry v. Ohio—the Stop and Frisk Decision—What it Means to the Denver Police". p. 10

cise of its rule-making power.¹³³ By the same token Denver Police and Colorado law enforcement generally, bear a heavy responsibility to justify the Court's consideration.

Speaking to the Legislature

The courses of action described above involving the police speaking to the courts are rather unusual procedures; that is, the idea of the police, as such, filing *amicus* briefs or requests for Rules of Criminal Procedure is a relatively new idea and to date has not been attempted to any great extent.

The more traditional course of action for the police, in instances where they *have* spoken out, has been to make their views known to the legislative bodies. Police articulation of problems before legislative bodies will generally be the usual route that future vocal policemen will take, although the approach to the courts should not be minimized. The results of speaking to the legislatures will, naturally, vary from state to state and city to city, and will depend largely on persuasive measures by the police and upon how receptive the lawmakers themselves are. One thing is certain, the better the police prepare themselves with facts for the presentation of their problems, the better the response will be. It should again be emphasized that if the police appear before the legislative bodies merely to engage in hand-wringing and grumbling about being handcuffed, they will do more harm than good; this "shotgun" approach can only weaken the overall effect of a more closely reasoned approach by other enforcement officers. Legislators, in most instances, are professionals; many are attorneys, and the policeman should prepare his case as thoroughly as an attorney prepares for court. One further point should again be emphasized; the police should stick to *police* problems in the areas of the law about which they become articulate. Problems involving areas of the criminal law which are collateral to direct police action, such as the actual

¹³³ On the question of Judicial Rule—in general, see "Judicial Rule-Making is Alive but Ailing" by Judge Robert M. Hale of the Georgia Court of Appeals, 55 ABAJ 637 (1969). One extremely practical point might be made about the question of the police speaking out to request either Statutes or Rules of Criminal Procedure. If a police request is embodied in a Rule of Criminal Procedure by the Supreme Court of the state in question this Rule sits on very solid legal ground. That is, even the lower echelons of state courts may, upon occasion, take it upon themselves to declare *legislative* enactments unconstitutional. It would take a lower state court judge of extreme intestinal fortitude to declare a rule of procedure adopted by his own Supreme Court unconstitutional.

trial of cases are not of direct concern to the police. It is submitted that a District Attorney would have every right to object if, without consulting his office, the police in a given area presented a request to the legislature concerning joinder of defendants or the right to comment on certain aspects of the case in opening or closing argument. Such subjects are clearly the province of the District Attorney, and this province should not be usurped by the police.¹³⁴

This is not to say, however, that the police must confine their articulation to the investigation through arrest or pre-arraignment areas of the law. Any area related to the law that directly affects how a policeman does his job or that affects his safety in doing his job is a valid field for comment. Nevertheless, the vocal policeman, speaking as a professional, should confine his expressions to those professional matters in which he is directly interested.

In this section of this paper, dealing with speaking to the legislatures, we will consider briefly whether such articulation will produce any results. One example of a fruitful approach by the Denver Police to the Colorado Legislature again involves the controversial Colorado Children's Code mentioned above. As originally enacted in 1967, the Children's Code,¹³⁵ stated that a child (that is, a person under eighteen)¹³⁶ could be taken into custody without a court order by a law enforcement officer only if the child had committed any criminal offense in the officer's presence or if there were reasonable grounds to believe the child had committed a felony.¹³⁷ Thus, a child could not be arrested without a court order in Colorado for misdemeanors or ordinance violations not committed in the officer's presence.¹³⁸

The immediate result of this provision was that

¹³⁴ In all of the cases mentioned in this paper where the Denver Police approached the United States Supreme Court or the Colorado Supreme Court or Legislature, the Denver District Attorney's Office was consulted and kept fully advised. Further, as noted above, in the "night search warrant" Rule case, the Denver Police approached the Colorado Supreme Court through the good offices of the Denver District Attorney's Office.

¹³⁵ Colorado Revised Stat., Ch. 22.

¹³⁶ CRS 22-1-3 (3)

¹³⁷ CRS 22-2-1 (a) (b) (c) 1967.

¹³⁸ Here the Children's Code differed from the general law of arrest without warrant in Colorado as CRS 39-2-20 permits arrest without warrant by an officer if *any* criminal offense (felony, misdemeanor, or ordinance violation) has been committed and the officer has reasonable grounds to believe the person to be arrested committed it.

certain Colorado misdemeanors could be committed with relative impunity by children provided an officer was not present. Simple assault and battery,¹³⁹ malicious damage to property not exceeding \$500,¹⁴⁰ and theft of property of value under \$100,¹⁴¹ were all crimes for which an officer was powerless to take a child into custody, without the time-consuming process of obtaining a court order, unless the officer had observed the violation.

The truly vicious juveniles soon learned of this provision to their great glee and took full advantage of it. Cases began to pour in to the Denver Police Department's Delinquency Control Division in which an officer had arrived at the scene of a shoplifting, a pupil striking a teacher, or a wanton destruction of property only to find a smirking juvenile present during the officer to do his worst.

This, of course, presented a very real and many-faceted police problem. The juveniles who were able to flaunt the law in the officers' faces certainly were developing no respect for the law. An irate store owner holding a juvenile for stealing a sweater had to be told that the police were powerless to act, and he would often blame the policeman. Finally, the morale of the Denver officers was not improved by being told to be on their way by hulking seventeen-year-olds who have obviously committed a crime, but who were clever enough not to do so in the officer's presence.

As a result of this situation, in the spring of 1968, William Hallman, the Chief of the Denver Police Department's Delinquency Control Division, appeared before the House and Senate Judiciary Committees of the Colorado Legislature. He described the problems caused by the lack of misdemeanor arrest powers for the police in the Children's Code as written. In the 1968 Session, the Colorado Legislature amended the arrest provisions of the Children's Code to read:

"22-2-1 Taking Children Into Custody—(1) (a)

A child may be taken into temporary custody by a law enforcement officer without order of the court: . . . (c) When there are reasonable grounds to believe that he has committed an act that would be a felony, misdemeanor, or municipal ordinance violation if committed by an adult . . ."¹⁴²

¹³⁹ CRS 40-2-35, a misdemeanor.

¹⁴⁰ CRS 40-18-1, a misdemeanor.

¹⁴¹ CRS 40-5-2, (2) (a), a misdemeanor.

¹⁴² Game, fish, parks and traffic violations are excluded from this provision but this does not cause any

This example of speaking to the legislature resulted in the legislature acting in response to articulated police problems. This is by no means always the case. To date, all attempts by the Denver Police and other law enforcement agencies in Colorado to persuade the legislature to allow some flexibility in the rule requiring parental presence at all interrogations of children¹⁴³ have met with failure. The police cannot hope to be successful in *all* cases in which they attempt to articulate police problems to the legislature; however, the juvenile arrest situation just described shows that constructive results can often be accomplished. In the latter instance the police were in a position to see clearly how a provision of law was greatly hampering police effectiveness, they spoke out on it to the proper body and the situation was remedied. It is submitted that, in cases like the Colorado juvenile arrest situation, the police are derelict in their duty if they do *not* speak out.

Speaking to the Public

This section is the last one in this article which deals with whether or not speaking out by the police will accomplish any results. In the prior sections concerned with addressing the courts and legislatures definite results, positive or negative from the police point of view, can be readily perceived. Consider the "box score" so far. Articulation of police problems has produced the desired results in some cases and not in others:

In the United States Supreme Court:

1. "Stop and Frisk"—desired result obtained; and
2. *Chimel v. California*—rehearing denied.

In the Colorado Supreme Court:

1. Night Search Warrant Rule—desired result obtained; and
2. Court Order for Fingerprinting—desired result obtained.

In the Colorado Legislature:

1. Arrest Power for Juvenile Misdemeanors—desired result obtained.
2. Flexibility in Parental Presence at Interrogation Requirement—Negative, the legal restrictions still apply.

particular problem for the police. The three critical areas, malicious mischief, simple assault, and shoplifting, which caused the problems under the old provision, have been resolved by the 1968 amendment.

¹⁴³ CRS 22-2-2 (3) (c).

Thus, in each of the above cases where the police spoke out, the results can be seen. When the police speak out to the public, there *can* be no definitive result because the public cannot respond with a "yes" or "no" legislative enactment or ruling. Nevertheless, the duty of the police to speak out to the public should not be minimized; for it is the public to whom the duty of protection is owed, and the public has a very clear cut right to know the degree of protection it is receiving from the police at any given time. For an example of speaking to the public we again turn to the Colorado Children's Code. The issue in this case was the question of the handling of recidivist offenders in the Denver Juvenile Courts. The speaker was Chief William Hallman of the Denver Police Department's Delinquency Control Division who is an extremely articulate and outspoken policeman. The vehicle was a report filed by Chief Hallman with Police Chief George Seaton entitled, "Survey of Juvenile Case Histories". This report, dated April 25, 1969 was released to the newspapers and received wide publicity in Denver.¹⁴⁴ The purpose of the report was to make certain police problems public.

The report documented a study made by Chief Hallman "... to determine the type and frequency of juvenile crimes, the arrest frequency and case disposition of the recidivist and whether or not the present system, policies and laws governing the handling of juveniles are effective".

The report criticizes the leniency shown to recidivist juvenile offenders by the Denver Courts and substantiates the criticism with facts. As a starting point, Chief Hallman selected the case history cards of 226 Denver juvenile recidivists at random and tabulated the number of total arrests for these offenders:

"Total Number of Cards and Cases Surveyed"

Total persons	226
Total arrests	2335
Average number of arrests per person	10.3 ¹

The number of arrests for each individual varied from five to twenty-nine times, and Chief Hallman pointed out that in the majority of cases, it was unusual for any punitive action to be taken until after the fifth offense.

¹⁴⁴ See: The Denver *Post*, April 27, 1969 "Youth Crime Rate linked to Leniency" and the (Denver) Rocky Mountain News, April 27, 1969—"Leniency Hit in Juvenile Crime Report".

The report breaks the cases down by type of crime and gives the figures as to cases disposed of at the police level (*e.g.*, lectured and released; prosecution refused; returned escapees). The report then continues by pointing out that of 1498 cases with which the study dealt, which were referred to the Juvenile Court, only ninety-four persons were committed to Lookout Mountain School for Boys, the Colorado juvenile correctional facility. This resulted in an average of one commitment for each 15.9 cases. A full breakdown of escapes, parole violations and persons returned to correctional facility was also given.

In making this criticism of the leniency shown by the Courts to recidivist juveniles, Chief Hallman points out that juveniles are committing 52 per cent of major crimes in Denver, and states his feeling that this figure could be substantially reduced if the recidivists were properly restrained. Therein lies the direct police involvement, referred to above, for the Denver crime rate is most certainly of vital concern to the Denver Police Department. Thus the report concludes:

"Surely, the problem of juvenile offenders, particularly those who are arrested repeatedly, and the problems they create for the community, are of major concern to the Police Department and should be of prime concern to our courts, institutions, and our legislators. This concern must be reflected in adequate court procedures, adequate laws and adequate facilities for restraint if we are to lessen or solve the problem".

This report, made public through the news media, was no broadside polemic at leniency in the abstract, but rather it was a carefully reasoned, factual approach to a critical police problem. In speaking for the police, Chief Hallman documented his case well and attempted to make the public aware of a situation that the police feel caused a definite detriment to community safety.

As noted above in the area of speaking to the public, a definitive "result" cannot be given. What is important about Chief Hallman's report is that it is a far cry from the inarticulate policeman who grumbles in generalities about "turn-'em-loose" courts. As a matter of fact, Judge Philip B. Gilliam, the Presiding Judge of the Denver Juvenile Court stated in an interview that, while he questioned some points in Chief Hallman's report, he agreed

with the report's criticism of leniency for hard-core juvenile offenders.¹⁴⁵

THE FUTURE OF POLICE ARTICULATION

Proper police articulation has an almost unlimited future, at least in such areas of the law as are dealt with in this paper. In all of the examples cited above which resulted in a positive response to police articulation, one common factor stands out. This is the fact that the police were able to articulate (or to have articulated for them) the *specific* police problems that the laws or court decisions were causing. This information is the kind of information which the courts and legislatures need if they are to consider intelligently police problems; and, as has been reiterated throughout this paper, *only* the police are in a position to present these specific problems for consideration.

Senator John McClellan of Arkansas in a floor speech to the United States Senate summed up one aspect of the policeman's current position in our criminal justice scheme:

"For as the [Supreme] Court has moved on and on to more and more attenuated questions of fairness, the single minded pursuit by some jurist of individual rights defined by an 18th Century ideal, but applied to a 20th Century society, is threatening to alter the nature of the criminal trial from a test of the defendant's guilt or innocence to an inquiry into the propriety of the policeman's conduct"¹⁴⁶

That this is true can be seen from the examples given above. From the "round-up" tactics used in *Davis* to the alert activities of Detective McFadden in *Terry*, the light of scrutiny fell directly on the police procedures used. The articulation of the problems encountered by the police in real life situations which lead to the use of a given police procedure in a given case can help the reviewing authority, court or legislature, to perceive the difference between the enforcement of the law in theory and the enforcement of the law in practice. Judges and legislators do not, as a rule, go "on the street" and witness the police problems first hand; this is not their function; the duty then arises on the part of the police to bring the "street" into the

¹⁴⁵ See: The *Denver Post*, April 28, 1969: "Judge's View-Leniency Issue Exceptions Told".

¹⁴⁶ Senate Congressional Record 91st Cong. 1st Sess. Vol. 115, No. 136, August 11, 1969, "The Use of Title II of the Omnibus Crime Control Act".

courtroom or legislative chamber by a proper articulation of the problems faced by those who must enforce the law.

WHO SHALL SPEAK FOR THE POLICE?

We have seen cases where various persons have articulated police problems in the area of the law, with varying degrees of success. The duty to speak for the police has been postulated and illustrated through this paper; the question remains: who shall be the spokesman?

Ideally, the police should speak for the police. Highly articulate command officers, like Chief Hallman of the Denver Police Delinquency Control Division, are extremely effective in their presentations because their listeners know that they are speaking from experience gained in the practical day-to-day application of police work. The problem remains, however, that in the area of the law, the courts and law makers are accustomed to be spoken to by lawyers. Is a non-lawyer policeman fully equipped to present the legal side of police problems? Can a police officer file a brief in a court without running afoul of his state's unauthorized practice of law regulations? These and other questions regarding the expertise of the police in the legal area present real problems.

The obvious answer, then, to the question of who shall be the proper spokesman for the police is that he be both policeman and lawyer. As it happens, there is now in law enforcement a rapidly-growing group of persons who fit this criterion: The Police Legal Advisor.

The Police Legal Advisor is a relatively new concept in law enforcement as we know it today; yet, the concept is "catching on" across this country with amazing rapidity. The Police Legal Advisor is a policeman-lawyer whose duties comprise being a full or part-time counsel for a law enforcement agency. By far, the most important of his duties is to advise the police on the law applicable to their work—arrest, search and seizure, confessions, line-ups, and so forth—so that their cases will stand up under the in-court scrutiny that is a part of our judicial process.¹⁴⁷

¹⁴⁷ In his speech before the International Association of Chiefs of Police—above N.7 United States Attorney General John Mitchell stressed the need for police legal advisors as part of the administration's crime control package for Washington, D.C.

"We have asked for an expansion of the Police Legal Advisor office. These Legal Advisors are available to advise police officers on the street about complex legal requirements which arise during investigation".

The impetus for the Police Legal Advisor concept really began with the Task Force Report: The Police, of the President's Commission on Law Enforcement and the Administration of Justice which devoted an entire Appendix to the need for attorneys in police departments. The Task Force Report stressed this need because:

"In recent years, the criminal law has become increasingly complex. The appellate courts have dramatically enlarged their supervision over law enforcement agencies in opinions that reflect a heightened concern with the detail and routine of policing. These opinions have narrowed the range of police behavior and demanded more refined judgments at the earliest stages of an investigation . . . A mistaken conclusion by a patrolman, usually the first officer on the scene, is often irredeemable, dooming an entire investigation, particularly if the error invokes one of the exclusionary rules".¹⁴⁸

As a partial solution to this problem the Commission Report recommended the use of a full time advisor for all major police departments and part-time advisors for the smaller ones.¹⁴⁹ One of the duties of the legal advisor, according to the Commission, would be liaison with the legislature and the community.

The Commission noted:

"Typically, police agencies are remote from the legislative process. When law enforcement officials do recite grievances, they commonly do so without consideration of possible governmental remedies. Consequently, areas which are subject to legislative solutions often remain ignored".¹⁵⁰

In effect, the Commission is suggesting that the legal advisor could speak out on behalf of the police.

Many of the advantages of having the legal advisor as the spokesman for the police are apparent. If he does his job properly he should have the respect of both the law enforcement community and the Bar. If, as is almost invariably the case, the

¹⁴⁸ President's Commission on Law Enforcement and the Administration of Justice: Task Force Report: The Police p. 63.

¹⁴⁹ President's Commission on Law Enforcement and the Administration of Justice: Task Force Report: The Police p. 65.

¹⁵⁰ *Ibid.* p. 64.

legal advisor works directly with the police officers on investigations, accompanying them on raids and being present at riots and civil disorders, he will have personal experience to draw on as to the practical problems involved in those aspects of police work that he is articulating.¹⁵¹ Thus the combination of legal training plus police experience uniquely qualifies the legal advisor to speak for the police.¹⁵²

As of this writing, there are 27 city police departments, 2 county, and 5 state law enforcement agencies utilizing the services of full or part time legal advisors. The city departments include such major cities as New York, Washington, D.C., Baltimore, New Orleans, Phoenix, Denver, and San Francisco.

The need for Police Legal Advisors had been anticipated with the 1964 funding of the Police Legal Advisor Program at the Northwestern University School of Law. This Ford Foundation sponsored program set up a means whereby Police Legal Advisor fellowships could be granted to young attorneys interested in careers in this field. The program at Northwestern was set up under the direction of Professor Fred. E. Inbau of the School of Law and is currently administered by Professor Inbau and Mr. Wayne Schmidt. Graduates of the program have served, or are now serving, with police departments in Phoenix, Dade County, Florida, Orlando, Florida, San Jose, Denver, Honolulu, Charlotte, North Carolina and Minneapolis. In addition, Police Legal Advisors in other cities periodically receive training through the Northwestern program.

The Law Enforcement Legal Unit, a national professional association of Police Legal Advisors represents the majority of police legal advisors in the United States. This organization presents another advantage to the legal advisor acting as the spokesman for the police because an interchange of

¹⁵¹ The sections on the necessity to speak out on laws that increase the personal danger to the officer—see pgs. 52 through 60, above, are based on the writer's personal experience as a participant in the two raids described. From these experiences, the writer was able, to demonstrate how the application of certain laws *actually* increases the danger to the police officers involved.

¹⁵² Further information about the police legal advisor concept in theory and practice may be found in: Caplan, *The Police Legal Advisor*, 58 J. CRIM. L. CRIM. P. S. 303 (1967). "Corpus Christi's Squad Car Lawyer", an article in the Reporter, Jan. 12, 1967, p. 43. "Legal Advisor", an article in the Police Chief, Sept. 1969 by John Burpo, Legal Advisor, Tucson Police Department.

ideas from department to department is available among the members.¹⁵³

This is by no means to say that Police Legal Advisors should be the *only* spokesmen for the police. The excellent presentation by Professor Thompson of the police point of view in the AELE brief in *Terry v. Ohio* is but one example of the fact that others who are not policemen or Police Legal Advisors can be highly convincing. In the limited area of articulating police problems of the legal nature, however, it is submitted that a Police Legal Advisor would be in a highly advantageous position to be a police spokesman because of the dual aspects of his job.

CONCLUSION

In the interest of society as well as in its own interest, law enforcement, as a profession, in this

¹⁵³ For instance the case from Dade County Florida cited above in footnote 38 was sent to the writer by the Legal Advisor of the Dade County Public Safety Director's Office pursuant to a request through the Law Enforcement Legal Unit for examples of cases where Chimel has definitely hampered police work.

country, *must* become articulate concerning the law, and its impact on the effectiveness of law enforcement. This articulation must be constructive and the duty to articulate police problems carries with it the duty, where possible, to suggest feasible alternatives to laws that hamper the police in their duties. Most important, if police articulation results in laws or rules advantageous to police effectiveness, the police must make every effort to insure that such laws or rules are not abused.

No policeman is above the law, and he must obey the laws and court decisions applicable to his work whether he agrees with them or not. At the same time, it is submitted that a constructive, well reasoned articulation of police problems can be a means of bringing about needed changes in the laws which will, in turn, increase the professional policeman's efficiency without a concomitant loss in an individual's personal liberties or freedoms. The need for this police articulation has never been greater. It is no longer optional. It is a duty!