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## A SURVEY OF THE QUALIFICATIONS OF MAGISTRATES AUTHORIZED TO ISSUE WARRANTS

### INTRODUCTION

There is no express provision in the Federal Constitution concerning the qualifications which a person must possess before a legislature may authorize him to issue arrest and search warrants. However, the Constitution does provide that people have a right to be free from "unreasonable searches and seizures."<sup>1</sup> What, then, are the qualifications that an individual who issues a warrant must satisfy in order for a search or an arrest to be reasonable?

The earliest standard developed by the United States Supreme Court in answer to this question provided that a warrant could only be issued by "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."<sup>2</sup> More recently, the Court has expanded this

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1. U.S. CONST. amend. IV.

2. *Johnson v. United States*, 333 U.S. 10, 14 (1948). Historically, warrants have played an important role in providing a protective buffer between the crime solving exuberance of the police and the people. One student writer has found support for the belief that the "colonists feared arbitrary searches and seizures more than arbitrary arrests." Case Comment, 1966 U. ILL. L.F. 480, 482 (1966) (footnote omitted). However, in our present society such a position would be difficult to justify. In many situations it would seem that the unlawful restraint of one's person would be at least as great a hardship as the seizure of his property. A person's property is of no value to him if he has been bodily taken into custody. Hence, the standard for who may issue an arrest warrant should be no different than that required for a search warrant.

The colonists particularly feared the so called "general warrant" which allowed the executing officer to fill in the details of the person or thing to be seized. See *Draper v. United States*, 358 U.S. 307, 316 (1958) (Douglas, J., dissenting). This fear was guarded against in the prohibition that a warrant "particularly describe the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

Today, the states generally follow the common law rule with regard to when an arrest warrant is required. An officer may arrest without a warrant for any felony for which he has probable cause. W. LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 20 (1965). An arrest without a warrant for a misdemeanor can generally only be made if the offense was committed in the officer's presence. *Id.* at 17. Under current law, a search warrant is required except in "exigent circumstances." *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1970) (listing three such circumstances).

There is a general preference for first obtaining an arrest or search warrant because after the arrest or search there is a tendency to substitute "an after-the-event justification for the arrest or search." *Beck v. Ohio*, 379 U.S. 89, 96 (1964). Hence, as a practical matter the police

standard and held that a magistrate who issues warrants is required to meet the following tests: he is required to be (1) neutral and detached and (2) capable of making the probable cause determination for the particular arrest or search warrant requested.<sup>3</sup> This two-pronged standard is applicable to both the state and federal court systems because both systems are bound by the requirements of the fourth amendment to the Constitution of the United States.<sup>4</sup> However, as the comparison in this note of the various state and federal statutes will demonstrate, some states currently allow persons with unsatisfactory qualifications to act as magistrates.<sup>5</sup>

### WARRANTS IN THE FEDERAL COURT SYSTEM

Prior to 1968 the lowest tier of the federal judiciary was known as the United States Commissioner system, which was originally created in 1896.<sup>6</sup> The neutrality and detachment of these commissioners was questionable. Many commissioners were engaged in the private practice of law.<sup>7</sup> Commissioners were paid on the basis of a fee system. For the issuance of an arrest warrant the commissioner received a four dollar<sup>8</sup> fee and six dollars<sup>9</sup> for a search warrant. In addition, even though commissioners were to hold office for four years, they could be removed by the district court of the district in which they served without a showing of justifiable cause.<sup>10</sup>

Although two-thirds of the commissioners were members of the bar in the years immediately preceding 1968,<sup>11</sup> they were not required by statute to be legally trained.<sup>12</sup> Some commissioners were

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may often obtain an arrest warrant where they are not required to do so. If after the arrest or search the existence of probable cause is questioned, the police can then point to their prior approval which the court is likely to treat with a presumption of validity.

3. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

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

5. See notes 54 thru 56 *infra* and accompanying text.

6. Lindquist, *The United States Commissioner: An Evaluation of the Commissioner's Role in the Judicial Process*, 39 *TEMP. L.Q.* 138, 139 (1966). See also Lindquist, *The Origin and Development of the United States Commissioner System*, 14 *AM. J. LEGAL HISTORY* 1 (1970).

7. Tydings, *Improving The Federal Judicial System*, 4 *AM. CRIM. L.Q.* 79, 82 (1966) (an address delivered by the author in the United States Senate on October 15, 1965).

8. Pub. L. No. 85-276, § 1, 71 Stat. 600 (1957).

9. *Id.*

10. Act of June 25, 1948, ch. 646, § 631(c), 62 Stat. 916.

11. 3 U.S. CODE CONG. & AD. NEWS 4256 (1968).

12. Act of June 25, 1948, ch. 646, § 631, 62 Stat. 916.

“gasoline station attendants and chicken farmers.”<sup>13</sup> And yet, commissioners were responsible for the issuance of many of the arrest and search warrants in the federal court system.<sup>14</sup> The possibility for abuse created by the commissioner system led to the enactment of major changes in the commissioner system.<sup>15</sup>

### *Neutrality and Detachment of United States Magistrates*

Several important changes have been effectuated in the lowest tier of the federal judiciary which adequately guarantee the neutrality of these judiciary members. First, United States Commissioners, who are now designated “United States Magistrates,”<sup>16</sup> are appointed for a term of eight years<sup>17</sup> and part-time magistrates for a term of four years.<sup>18</sup> They can only be removed from office “for incompetency, misconduct, neglect of duty, or physical or mental disability.”<sup>19</sup> These provisions foster a magistrate’s independent judgment of whether or not probable cause exists, since he does not have to fear loss of his position in retaliation for his refusal to issue an arrest or search warrant. A second important alteration in the United States Magistrate system is that fee payments have been abolished. The obvious incentive created by the fee system to issue warrants perfunctorily was one of the reasons given by Congress for legislative reform.<sup>20</sup> United States Magistrates are now paid a set salary.<sup>21</sup> Third, full-time magistrates cannot hold any “other civil or military office or employment under the United States.”<sup>22</sup> However,

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13. Tydings, *Improving The Federal Judicial System*, 4 AM. CRIM. L.Q. 79, 82 (1966) (an address delivered by the author in the United States Senate on October 15, 1965).

14. Lindquist, *The United States Commissioner: An Evaluation of the Commissioner’s Role in the Judicial Process*, 39 TEMP. L.Q. 138, 141 (1966). It should be noted that Rule 4 of the Federal Rules of Criminal Procedure requires an arrest warrant to be signed by a “magistrate” who is defined by Rule 53 to include a federal judiciary member or a state judicial officer. In addition, Rule 41 of the Federal Rules of Criminal Procedure permits a search warrant to be issued by a federal judiciary member or a “judge of a state.” Hence, although the federal judiciary itself issues many federal warrants, these rules leave open the possibility for the issuance of federal warrants by state judicial officials.

15. 28 U.S.C. §§ 631-39 (1970).

16. *Id.* at § 631(a).

17. *Id.* at § 631(e).

18. *Id.*

19. *Id.* at § 631(h).

20. 3 U.S. CODE CONG. & AD. NEWS 4255-56 (1968).

21. 28 U.S.C. § 634 (1970).

22. *Id.* at § 631(c).

a part-time magistrate may, with the approval of the Judicial Conference of the United States, act concurrently as a referee in bankruptcy or clerk in a federal court.<sup>23</sup> In addition, a full-time magistrate may not engage in the practice of law,<sup>24</sup> nor may a part-time magistrate act as counsel in a criminal action in the federal courts.<sup>25</sup> Both full and part-time magistrates may not engage in any "employment inconsistent with the expeditious, proper, and impartial performance of their duties."<sup>26</sup> As a result of these changes, United States Magistrates in the federal system have achieved a high degree of impartiality in the issuance of warrants.

### *Capability of United States Magistrates*

The evaluation of the presence or absence of probable cause is the heart of the magistrate's function in the warrant issuance process. Intricate standards, particularly in the area of search warrants, have been judicially defined.<sup>27</sup> Before a magistrate can properly issue an arrest warrant he must have a knowledge of the particular elements of the crime alleged to have been committed.

Three years prior to the revamping of the lowest tier of the federal judiciary, Senator Tydings stated that

[t]he issuance of arrest and search warrants *cannot be regarded as the performance of a mere technical formality*; a United States Commissioner may be the only judicial officer in a position to ensure that individual rights are not disregarded by overzealous prosecutors.<sup>28</sup>

Without training in criminal law a magistrate would be inadequately equipped to resist and analyze a prosecutor's assertion of legal authorities. Thus, the federal system now mandates two re-

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23. *Id.*

24. *Id.* at § 632(a).

25. *Id.* at § 632(b).

26. *Id.* at 632(a) & (b).

27. A federal magistrate has recently pointed out:

Because the law of search and seizure has become increasingly complicated, the role of the . . . magistrate has *never been more critical* for the protection of those rights guaranteed by the fourth amendment.

Burnett, *Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates*, 64 J. CRIM. L. & CRIMINOLOGY 270, 280 (1973) (emphasis added).

28. Tydings, *Improving the Federal Judicial System*, 4 AM. CRIM. L.Q. 79, 84 (1966).

quirements which have eliminated any imbalance between the capabilities of United States Magistrates and prosecutors. First, with one minor exception,<sup>29</sup> federal magistrates are now required to be members of the bar of the highest court of the state in which they preside.<sup>30</sup> Second, all magistrates must attend an introductory training program, as well as attend such programs on a periodic basis.<sup>31</sup> These periodic training programs are especially necessary because of the rapid development of the case law in this area of the criminal law.

Additional duties of United States Magistrates other than the issuance of warrants may arguably make it necessary for them to be more skilled in the law than would be needed if their only function was the issuance of warrants. United States Magistrates have limited trial jurisdiction for minor criminal offenses.<sup>32</sup> In addition, they may by a concurrence of the majority of the judges in the district court to which they are assigned be authorized to perform other duties such as pretrial discovery hearings.<sup>33</sup> These extra functions of United States Magistrates which are in addition to their warrant issuance duties must be taken into consideration later in this note when evaluating the capability of persons authorized to issue warrants in the state systems, who, if limited to only the issuance of warrants, may not have to be as broadly trained as federal magistrates in order to meet the capability requirement.<sup>34</sup>

#### THE ISSUANCE OF WARRANTS IN THE STATES<sup>35</sup>

There is a considerable amount of variation among the states

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29. If no qualified person can be found who is a member of the bar, the requirement can be waived for a part-time magistrate. 28 U.S.C. § 631(b)(1) (1970).

30. *Id.*

31. *Id.* at § 637.

32. 18 U.S.C. § 3401 (1970).

33. The statute states that

[t]he additional duties authorized by rule include, but are not restricted to —

(1) service as a special master in an appropriate civil action:  
 (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and  
 (3) preliminary review of applications for post trial relief made by individuals convicted of criminal offenses . . . .

28 U.S.C. § 636(b) (1970).

34. See note 59 *infra* and accompanying text.

35. Many states have statutes which permit a police officer to issue a "summons" or

with regard to the central issue of this note—what are the the qualifications a person must possess before he may issue warrants? These differences exist in both the areas of capability and neutrality. It will be the purpose of this section to explore the areas where these differences exist, to discuss possible alternatives to remedy the differences and to recommend what is thought to be a viable solution for states whose statutes may presently fall short of the capability and neutrality standards.

### *Neutrality and Detachment*

Neutrality and detachment has come to mean separation from the governmental bodies charged with conducting criminal investigations. A police desk officer does not qualify as a neutral and detached magistrate,<sup>36</sup> nor does a district attorney.<sup>37</sup> One state, however, has held that an arrest warrant for the violation of a municipal ordinance may be issued by a police lieutenant,<sup>38</sup> however, in light of the following recent developments where police personnel have been held to not satisfy the neutrality requirement, this result is no longer valid.

In *Coolidge v. New Hampshire*<sup>39</sup> the Court made it clear that “prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations.”<sup>40</sup> In *Coolidge* state police officers seized and searched the defendant’s automobile in their quest to obtain evidence linking the defendant to a murder. They had obtained a search warrant issued by the Attorney General of New Hampshire who was also authorized by statute to act as a justice of the peace. The evidence obtained from the search which consisted of sweepings from the floor of the automobile was introduced at the trial and the defendant was convicted

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“citation” in place of making an arrest. When a summons is issued, there is no arrest. The citizen is not taken into custody. Rather, he is commanded to appear before a magistrate at some future date and answer the charge against him. E. PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 69-70 (1953). These statutes are beyond the scope of the present discussion except to note that such procedures have greatly reduced the need to obtain an arrest warrant where minor offenses are involved.

36. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

37. *White v. Simpson*, 28 Wis.2d 590, 137 N.W.2d 391 (1965).

38. *State v. Thompson*, 151 W.Va. 336, 151 S.E.2d 870 (1966).

39. 403 U.S. 443 (1970).

40. *Id.* at 450.

of murder. The Court held that this evidence was inadmissible because the search warrant was not issued by a neutral and detached magistrate. The attorney general's additional capacity as a justice of the peace did not, according to the Court, cure this defect. As a result of *Coolidge*, a search warrant issued by a prosecutor or police officer is per se invalid.<sup>41</sup>

Although *Coolidge* involved a search warrant, its reasoning has been applied to arrest warrants in *Shadwick v. City of Tampa*.<sup>42</sup> In *Shadwick* a municipal court clerk who worked within the judicial branch was found to be sufficiently neutral and detached to issue arrest warrants for the violation of municipal ordinances.<sup>43</sup> The Court was careful to rest its decision on the lack of any facts in the record to indicate "partiality, or affiliation . . . with prosecutors or police."<sup>44</sup> Hence, the Court has reaffirmed its position that prosecutors and police officers do not meet the neutrality requirement.

The *Shadwick* Court specifically reserved decision on the question of whether a person outside the judicial branch could qualify as a neutral and detached magistrate.<sup>45</sup> One such person is the mayor of a city. Some states permit him to conduct a "mayor's court"<sup>46</sup> and grant him the authority to issue arrest warrants.<sup>47</sup> Two states permit a mayor to issue both arrest and search warrants.<sup>48</sup> Where the city police force is "under the general superintendence

41. *Id.*

42. 407 U.S. 345 (1972).

43. *Id.* at 350; *accord*, *State v. Thompson*, 151 W.Va. 336, 151 S.E.2d 870 (1966).

44. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

45. *Id.* at 352.

46. Louisiana: LA. REV. STAT. § 33:414 (1967). Arkansas: ARK. STAT. ANN. § 19-1204 (1968 replacement).

47. Arkansas: ARK. STAT. ANN. § 43-406 (1964 replacement). Iowa: IOWA CODE ANN. § 368A.2 (Supp. 1973) (mayor may issue arrest warrant only for ordinance violation).

Louisiana: LA. CODE CRIM. PROC. ANN. art. 202 (West 1967).

Missouri: MO. ANN. STAT. § 542.020 (1953).

Nebraska: NEB. REV. STAT. § 29-403 (Reissue 1964) (mayors of cities and villages).

North Carolina: N.C. GEN. STAT. § 15-18 (SUPP. 1973).

48. TENNESSEE: TENN. CODE ANN. § 40-701 (1955) ("magistrate" to issue arrest warrant); *id.* at § 40-505 ("magistrate" to issue search warrant); *id.* at § 38-301 (Supp. 1973) ("magistrate" includes a mayor).

Texas: TEX. CODE CRIM. PROC. ANN. art 15.01 (1966) ("magistrate" to issue arrest warrant); *id.* at 18.01 (Supp. 1974) ("magistrate" to issue search warrant); *id.* at 2.09 (1966) ("magistrate" includes a mayor).

of the Mayor,"<sup>49</sup> it would seem that the mayor is not sufficiently detached from police investigatory activities. Whether, as in *Coolidge*, the Court will in the future hold the issuance of a warrant by a mayor to be per se invalid is not clear. In a small city the relationship of the mayor with the everyday activities of the police is likely to be close. The mayor may have just as much motivation as the prosecutor to make an arrest in order to calm public fear aroused by an outbreak of crime in the city. In practice, it would be difficult for a state to draft a statute which differentiated between mayors based on their degree of relationship with the police. A mayor of a small city would probably be more likely to use this authority to issue warrants than the mayor of a large city. The most feasible solution for the states would be to abolish the authority, where it exists, of mayors to issue warrants.

### *Capability*

It is a common practice in the state court systems to allow clerks to handle various filing and recording tasks. In addition, and to various extents, some states permit clerks to issue warrants. The Court in *Shadwick* was confronted with such a situation. There, the municipal court clerks, who were authorized to issue ordinance arrest warrants, were not required to have any legal training. The Court held that the defendant, who had been arrested for impaired driving, had failed to demonstrate that the clerk was incapable of determining whether or not probable cause existed.<sup>50</sup> The Court reasoned that the clerk satisfied the capability requirement because (1) grand juries are entrusted with determining if probable cause is

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49. ARK. STAT. ANN. § 19-1701 (1968 replacement). Under a similar provision Nebraska mayors are authorized to appoint police officers if the city council consents to the appointment. NEB. REV. STAT. § 17-107 (Supp. 1973).

50. The Court stated the following:

Appellant [defendant] . . . has failed to demonstrate that these clerks lack capacity to determine probable cause. The clerk's authority extends only to the issuance of arrest warrants for breach of municipal ordinances. We *presume* from the nature of the clerk's position that he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen guilty of impaired driving, breach of the peace, drunkenness, trespass or the multitude other common offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish.

*Shadwick v. City of Tampa*, 407 U.S. 345, 351 (1972) (emphasis added).

present in order to merit an indictment,<sup>51</sup> and (2) trial juries determine guilt or innocence in criminal trials.<sup>52</sup> This reasoning is of dubious merit because it fails to recognize that in both of these instances the laymen involved are heavily instructed as to the law which they must apply. A clerk without similar instruction or the tools to obtain an equivalent understanding of the elements of the alleged crime would not be in the same position as a grand or petit juror.

The Court in *Shadwick* emphasized that a person authorized to determine whether probable cause to believe a crime has been committed exists must be *capable* of rendering the decision. But the Court also held that a statute is not per se invalid because it permits persons other than a judge or lawyer to issue warrants.<sup>53</sup> There is presently a great amount of variation among the states as to whether and to what extent clerks may be authorized to issue warrants. Three state supreme courts have interpreted *Shadwick* as a basis for permitting clerks to issue any arrest warrant.<sup>54</sup> Three other

51. *Id.* at 352.

52. *Id.*

53. *Id.* Compare this holding with the result in *Coolidge v. New Hampshire*, 403 U.S. 443 (1970) where a warrant issued by a prosecutor or policeman was held per se invalid. See note 41 *supra* and accompanying text.

54. Kansas: In *State v. Hemminger*, 210 Kan. 587, 502 P.2d 791 (1972), the court relied on *Shadwick* stating that "there seems to be no reason why a clerk of a court may not be authorized to issue warrants." *Id.* at \_\_\_\_, 502 P.2d at 796. However, the Kansas court was dealing with a statute which was applicable at the time of arrest, but no longer in force. Kan. Laws of 1899, ch. 130, § 5 (repealed 1969) (now KAN. STAT. ANN. § 20-2006 (Supp. 1973)).

Ohio: In *State v. Fairbanks*, 330 Ohio St.2d 34, 289 N.E.2d 352 (1972) the court upheld the issuance by a court clerk of an arrest warrant for a felony. The court, in speaking about *Shadwick*, stated that

[i]t was indicated by the [U.S.] Supreme Court that a law degree is not a prerequisite to being entrusted with the responsibility of determining probable cause. "Grand juries daily determine probable cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt."

The reasoning in *Shadwick* is equally applicable to the statute involved in the instant case . . . .

*Id.* at \_\_\_\_, 289 N.E.2d at 357. The Ohio court is correct that a law degree is not necessarily a prerequisite. But it is incorrect to assume that no more training is required than that of the average juror. See the text following note 63 *infra*. The lower appellate court expressed the view that "issuing a warrant is a ministerial act." *State v. Fairbanks*, 33 Ohio App. 2d 39, \_\_\_\_, 292 N.E.2d 325, 327 (1971).

Vermont: In *Woodmansee v. Smith*, 130 Vt. 383, 296 A.2d 182 (1972), the court summarily stated that it thought the clerk who issued an arrest warrant for a felony was "neutral, detached and capable of the probable cause determination." *Id.* at \_\_\_\_, 296 A.2d at 185. The

states have statutes permitting clerks to issue only arrest warrants.<sup>55</sup> Two states have statutes which authorize clerks to issue both arrest and search warrants.<sup>56</sup> One state authorizes clerks to issue only search warrants.<sup>57</sup> These diverse statutory systems raise the question of whether there is a plan which states permitting clerks to issue warrants could adopt to meet the constitutional standards of neutrality and capability. This problem will be considered in the next subsection.

### *Possible Alternatives for Improving the State Systems*

Three possible plans are available to the states for improving their magistrate systems. First, they could devise a statute which

court gave no factual reasons to support its conclusion that the clerk was capable of the probable cause determination.

The Vermont legislature has since repealed the statutory section giving a clerk the authority to issue arrest warrants. Vt. Public Acts 1945, No. 32, § 1 (repealed 1973) (effective date of repeal October 1, 1973, Vt. Public Acts 1973, No. 118, § 28).

55. Arkansas: ARK. STAT. ANN. § 43-406 (1964 replacement) (arrest warrants); *id.* at § 43-205 (search warrants); *id.* at § 22-753 (1962 replacement) (specifically providing that a search warrant may not be issued by a clerk).

Iowa: IOWA CODE ANN. § 754.3 (Supp. 1973) (clerk may issue arrest warrants); *id.* at § 751.1 (1950) (search warrant to be issued by a magistrate).

Maine: Under prior law, Maine allowed clerks to issue warrants without specifying any qualifications. Maine Laws 1961, ch. 386, § 1. It now has a unique statute which leaves the determination of capability up to the chief district judge.

The Chief Judge of the District Court may authorize any clerk of the District Court, who is also a justice of the peace, to issue process for the arrest of persons charged with offenses, if the Chief Judge . . . is satisfied that such clerk has the necessary training and learning to perform the function.

ME. REV. STAT. ANN. tit. 15, § 707 (Supp. 1973). *See also id.* at § 706 (arrest warrants may be issued by a judge, complaint justice or other authorized person, *i.e.* clerk) and *id.* at § 55 (search warrant may only be issued by a judge or complaint justice).

56. Massachusetts: MASS. ANN. LAWS ch. 218, § 33 (1955) ("clerk, assistant clerk, temporary clerk or temporary assistant clerk" may issue *all* warrants); *id.* at § 8 (clerks appointed by the governor); *id.* at § 10 (assistant clerks appointed by clerk or district justice and removal at the pleasure of either); *id.* at § 9 (temporary clerk); *id.* at § 11 (temporary assistant clerk).

The Constitution of Massachusetts has a provision similar to the fourth amendment of the Federal Constitution. MASS. CONST., part the first, art. XIV. The Massachusetts Supreme Court has held that the contention that its warrant statute violated the state constitution "was a strained interpretation not worthy of discussion." *Commonwealth v. Penta*, 352 Mass. 271, 225 N.E.2d 58 (1967).

Missouri: MO. ANN. STATE. § 542.380 (Supp. 1974) (search warrant may be issued by any officer who can "issue process for apprehension of offenders"); *id.* at § 542.020 (officers who have power to issue process for apprehension of offenders include clerks and deputy clerks).

57. North Carolina: N.C. GEN. STAT. § 15-25 (Supp. 1973) (clerk, or assistant or deputy clerk of any court of record may issue search warrant).

permitted clerks to only issue arrest warrants for ordinance violations. This could be accomplished by a statute similar to the one upheld in *Shadwick*. The difficulty with this plan is that it does not provide for a logical cut-off point. If a clerk can issue ordinance arrest warrants, then why not for the violation of a misdemeanor or felony statute? It is probably true that the probable cause determination is simpler for municipal ordinance violations than for other offenses, but the label "ordinance" does not necessarily make this always true. For example, the probable cause determination may be very difficult for some building code violations in large cities; while conversely, the probable cause determination for violations of misdemeanor or felony statutes may be easy.<sup>58</sup> Before a person given the authority to issue warrants can even consider if sufficient facts exist to establish probable cause, he must completely understand the elements of the offense alleged. In addition, although the elements of an offense may not be very sophisticated, it may be that the probable cause determination may nonetheless be difficult because of the manner in which the facts arise. For example, it may be that the facts relied upon have been obtained from an informant. In order to make the probable cause determination in such a situation, it will be necessary to ascertain the credibility of the informant. Since in such a case it is possible for the probable cause determination for the same offense to be either easy or difficult depending on the manner in which the facts arise, the decision must be made by someone with the expertise just to ascertain whether a difficult or easy determination is involved in the first place. Thus, drawing lines based on the type of offense involved is not, at least by itself, an adequate plan for insuring capable determinations of probable cause.

A method which clearly provides capable magistrates would follow the lead of states which limit the issuance of warrants to judges.<sup>59</sup> This is the approach adopted in the federal system. Wis-

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58. *E.g.*, UNIFORM CONSUMER CREDIT CODE § 5.302 (1974) (official text with comments) [hereinafter cited U3C]. This section of the U3C provides that certain violations constitute a misdemeanor. Even though the offense is labeled a misdemeanor, this is not indicative of the difficulty of the probable cause determination. Two sections of the U3C require a knowledge of the Federal Consumer Protection Act. *Id.* at §§ 2.301(3) and 2.313(5).

59. The word "judge" in the text is used in the broad sense of any judicial official who under state law has at least limited authority to conduct trials.

Alaska: ALASKA STAT. § 12.35.010 (1962) (judge or magistrate may issue a search warrant); *id.* at § 22.15.100 (1971) (judge or magistrate may issue arrest warrants); *id.* at § 22.15.160 (judge must be member of bar, magistrate must be resident of state for six months and twenty-one years of age—supreme court can prescribe additional qualifications); *id.* at § 22.15.170 (judge appointed by governor; magistrate appointed at pleasure of district judge).

Arizona: ARIZ. RULES CRIM. PROC. rule 2.4 (1973) (arrest warrant issued by “magistrate”); ARIZ. REV. STATE. ANN. § 13-1444 (Supp. 1973) (search warrant issued by “magistrate”); *id.* at § 1-215(13) (1974) (definition of magistrate includes judges of the supreme and superior courts, justice of the peace and police magistrates of cities and towns).

California: CAL. PENAL CODE § 807 (West 1970) (arrest warrant issued by “magistrate”); *id.* at § 1528 (search warrant issued by “magistrate”); *id.* at § 808 (defining magistrate as judges of courts of appeal, superior, municipal and justice courts).

Colorado: COLO. REV. STAT. ANN. § 39-2-3 (1964) (arrest warrant may be issued by judge or justice of the peace); COLO. RULES CRIM. PROC. rule 41 (1964) (search warrant may be issued by judge or justice of the peace).

Connecticut: CONN. GEN. STATE. ANN. § 54-2a (Supp. 1973) (arrest warrants may only be issued by a judge); *id.* at § 54-33a (search warrant may only be issued by a judge).

Delaware: *See* *Caulk v. Municipal Court for the City of Wilmington*, 243 A.2d 707 (Del. 1968) where the court held that a statute authorizing a clerk or deputy clerk to issue an arrest warrant violated the Federal Constitution. *See also* *State v. Davey*, 8 Terry 221, 89 A.2d 871 (Del. 1952) (clerk may not issue search warrant).

Idaho: IDAHO CODE § 19-506 (1948) (“magistrate” to issue arrest warrant); *id.* at § 19-4406 (“magistrate” to issue search warrant); *id.* at § 19-503 (Supp. 1972) (defines magistrates as justices of the supreme court, district judges and magistrates of district court).

Illinois: ILL. ANN. STATE. ch. 38, § 107-9 (1970) (arrest warrant must be issued by judge); *id.* at § 108-4 (search warrant must be issued by judge).

Indiana: IND. CODE § 35-1-7-1 (1971) (arrest warrant to be issued by justice of the peace or judge); *id.* at § 35-1-6-1 (search warrant to be issued by judge of any court of record). *See also* *State ex rel. French v. Hendricks* Sup. Ct. 252 Ind. 213, 247 N.E.2d 519 (1969) where the court stated that

it is a long standing rule in Indiana that the determination of probable cause is a judicial determination, and not a ministerial determination. . . . “magistrate” includes the judge of any court of record.

*Id.* at 223, 247 N.E.2d at 525.

Kentucky: KY. RULES CRIM. PROC. rule 2.04 (arrest warrant to be issued by “magistrate”); *id.* at rule 13.10 (search warrant to be issued by “magistrate”); KY. REV. STAT. ANN. § 446.010(15) (“magistrate” includes county judge, police judge and justice of the peace).

Maryland: MD. ANN. CODE art. 52, § 24 (1968 replacement) (judge, police justice, or justice of the peace to issue arrest warrant); *id.* at art. 27, § 551 (1971 replacement) (judge or justice of the peace to issue search warrant).

Montana: MONT. REV. CODES ANN. § 95-603(d)(6) (1969) (judge to sign arrest warrant); *id.* at § 95-704 (judge to issue search warrant).

New York: N.Y. CODE CRIM. PROC. § 120.10 (1971) (arrest warrant to be issued by judge); *id.* at § 690.45 (search warrant to be issued by judge).

North Dakota: N.D. CENT. CODE § 29-29-06 (1974) (“magistrate” to issue arrest warrant); *id.* at § 29-29-05 (“magistrate” to issue search warrant); *id.* at § 29-01-14 (Supp. 1973) (defines magistrate to include only judges or in an “emergency” a small claims court referee who is licensed to practice law).

Oklahoma: OKLA. STAT. ANN. tit. 22, § 171 (1969) (arrest warrant issued by “magistrate”); *id.* at § 1221 (search warrant to be issued by “magistrate”); *id.* at § 162 (defines “magistrate” as a judge).

consin has adopted a plan very similar to the federal system.<sup>60</sup> The official statutory comments<sup>61</sup> indicate the change in Wisconsin was prompted by the case of *White v. Simpson*,<sup>62</sup> where a statute which permitted a district attorney to issue an arrest warrant was invalidated. By adopting qualification requirements similar to those promulgated for United States Magistrates, Wisconsin's action may indicate the beginning of a trend in this area with the federal system serving as a model.

Clearly, permitting only a judge to issue a warrant meets both the neutrality and capability tests. However, to force such a plan on all the states or to advocate its adoption by all states would be to ignore the realities of the warrant issuance process for two reasons. First, a judge is required to be knowledgeable in many areas of the law which are irrelevant to a probable cause determination. For example, since the rules of evidence are not applicable in proceedings to obtain a warrant, hearsay evidence is freely admissible.<sup>63</sup> Hence, the knowledge of a person authorized to issue warrants does not have to be as broad as that of a judge. Second, as the Court noted in *Shadwich*, judges with overcrowded municipal court dockets are likely to treat a warrant in a cursory manner.<sup>64</sup> A clerk re-

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Rhode Island: R.I. GEN. LAWS ANN. § 12-6-4 (Supp. 1973) (judge or justice of the peace to issue arrest warrant). But note that under prior law a clerk could issue an arrest warrant. R.I. Gen. Laws 1956, § 12-6-4 as amended R.I. Pub. Laws 1972, ch. 169, § 15. R.I. GEN. LAWS ANN. § 12-5-1 (Supp. 1973) (only judge may issue search warrant). Likewise, under prior law a clerk could issue a search warrant. R.I. Pub. Laws 1965, ch. 168, § 1 as amended R.I. Pub. Laws 1969, ch. 239, § 16.

Utah: UTAH CODE ANN. § 77-12-1 (1953) ("magistrate" to issue arrest warrant); *id.* at § 77-54-6 ("magistrate" to issue search warrant); *id.* at § 77-10-5 (lists "magistrates" as justices of supreme court, judges of district court, judges of city court, and justices of the peace).

Wisconsin: WIS. STAT. ANN. § 968.04(1) (1971) ("judge" to issue arrest warrant); *id.* at § 968.12 ("judge" to issue search warrant); *id.* at § 252.14 ("judge" includes a "court commissioner"); *id.* ("court commissioner" must be member of bar or official court reporter with five years experience). It is interesting to note that Wisconsin court commissioners may qualify for the position by having five years experience as a court reporter. Since a court reporter would be exposed to a number of criminal trials in five years, he would obtain a good background in the state's criminal statutes. If supplemented with an institute on the technical requirements of a probable cause affidavit, this type of on-the-job training should insure capable magistrates.

60. See note 59 *supra* (under Wisconsin).

61. WIS. STAT. ANN. § 968.04 (1971) (comment to subsection 1).

62. 28 Wis.2d 509, 137 N.W.2d 391 (1965).

63. *Aguilar v. Texas*, 378 U.S. 108, 114 (1963).

64. *Shadwick v. City of Tampa*, 407 U.S. 345, 353 (1972).

moved from the pressures of the courtroom may actually be in a better position to carefully scrutinize a probable cause affidavit.

Therefore, to insure capable determinations of probable cause, and also to avoid the difficulties with overcrowded dockets and unnecessary legal expertise, an intermediate plan is recommended for states which want to allow judicial clerks to issue warrants. It is suggested that these states develop a training and testing program for clerks. This could be accomplished by utilizing institutes held by the state bar or the state supreme court. Preliminary screening to ascertain the clerks' general abilities should be done prior to the institute. The screening could be done by either a local committee of county and city representatives or with a civil service exam. Idaho has taken a limited step in this direction, although not with relation to court clerks.<sup>65</sup> It has established an office known as "magistrate of the district court."<sup>66</sup> These Idaho judicial officers have jurisdiction over misdemeanor and quasi-criminal trials, issuance of arrest and search warrants and preliminary examinations to determine probable cause.<sup>67</sup> They are appointed by a commission.<sup>68</sup> Prior to taking office the magistrate must attend an institute held by the Sureme Court of Idaho.<sup>69</sup> The purpose of the institute is to familiarize the appointee "with the duties and functions of the magistrate's office."<sup>70</sup> However, the vagueness of the Idaho statute makes it impossible to state with certainty the exact nature and duration of the institute.

In addition to providing classroom training at an institute for clerks, two other supplemental means could be employed by the states in the training of clerks for the issuance of warrants. First, the states could select a limited number of offenses for which clerks could issue warrants. These would be the most commonly encountered offenses which are also the greatest burden on the time of the

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65. IDAHO CODE § 1-2208 (Supp. 1972).

66. *Id.* at § 1-2201.

67. *Id.* at § 1-2206(3).

68. The commission is made up of representatives from the various counties within the district court's jurisdiction. It includes three mayors, a member of the board of county commissioners and a district court judge. Two attorneys serve as nonvoting members. All appointments of the commission are subject to the approval of the majority of the district court judges within a particular district. *Id.* at § 1-2203.

69. *Id.* (expenses incurred to attend the institute are paid by the state).

70. *Id.*

judiciary. In many states an adequate division of labor between clerks and the judiciary could probably be achieved by permitting clerks to issue warrants for only traffic offenses. In this way, the states could concentrate on the elements of a manageable number of crimes. Second, the training program could be followed by a comprehensive examination which would be graded on a competitive basis.<sup>71</sup> Scores on the exam could be keyed to the clerks' salaries as an added incentive to superior performance.

### CONCLUSION

A comparison of the federal and state warrant issuance systems indicates that the federal system employs more than adequate safeguards to insure that United States Magistrates meet constitutional requirements. However, United States Magistrates have judicial duties other than the issuance of warrants such as the conducting of trials. Proper execution of these trial duties demand legal skills which are not needed by a clerk for the evaluation of a probable cause affidavit.

The widest difference between the state and federal systems is in the area of the capability of magistrates. This note has proposed an intermediate plan to resolve this difference. With proper training a clerk within the judicial branch can qualify as a magistrate. The plan is one which allows the states "some flexibility and leeway,"<sup>72</sup> but at the same time insures the issuance of warrants by neutral and capable magistrates. If adopted, such a training program will assure the states that their warrant statutes will pass constitutional muster.

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71. The purpose of this examination would be to evaluate the clerk's ability to determine the elements of the offenses for which he is authorized to issue warrants. It would also test his knowledge of the technical requirements that the probable cause affidavit must meet. These requirements are thoroughly reviewed in Burnett, *Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates*, 64 J. CRIM. L. & CRIMINOLOGY 270 (1973). One author has suggested a similar training and testing program for legal assistants working in law offices. He defines a legal assistant as "a non-lawyer who performs most of the functions of the traditional practice of law which, ethically, need not be performed by a lawyer." Strong, *In-Office Training of Legal Assistants: Why and How*, 79 CASE & COMMENT, March—April 1974, at 38.

72. *Shadwick v. City of Tampa*, 407 U.S. 345, 354 (1972).

