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I. INTRODUCTION

Twenty years ago, Frank Miller completed work on his book *Prosecution*.[1] His was the fifth and final volume of the landmark American Bar Foundation (ABF) study of criminal justice administration conducted during the 1950s and 1960s. Funded by the Ford Foundation, the ABF study was a comprehensive research effort that sought to learn first-hand the practices of state and local criminal justice agencies. Separate volumes were dedicated to understanding the day-to-day operations of police, prosecutors, trial judges, and corrections officials. The objective of Frank Miller, already a member of the Washington University law faculty, was to understand better the problems confronting state prosecutors and to understand how they responded to these problems in their day-to-day work. This he accomplished in exemplary form, providing an incisive and comprehensive work that today still stands as a classic account of the prosecution process.

This symposium issue of the *Law Quarterly* affords an ideal opportunity to reflect on Miller's work in the context of the events of the past two decades and to ask what difference it has made that Frank Miller described in detail prosecutor charging practices, most of which we were previously unaware.

In the final analysis, the legacy of the ABF studies as a whole may lie in their seminal concern over the importance of detailed observation and the role it can (and should) play in the evolution of legal process and thought. Indeed, in his epilogue to Miller's book, Geoff Hazard, then Executive Director of the ABF, said: "[I]f our perception of how legal institutions actually work is not constantly corrected by fresh inquiry,

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1. F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970).

the law as we have experienced it will go the way of the Bourbon Constitution."[2] At another point he added: "What the Survey has told the legal profession is no doubt what Justice Jackson, who inspired the study, had suspected it would: that the real significance of the criminal law is not so much its doctrinal refinement but its 'delivered value'—its practical reality, day-on-day, year-on-year, at the level of enforcement."[3]

The emphasis on the importance of "practical reality" permeates Miller's book. However, Miller also emphasized the role of legal doctrine in the daily work of prosecutors and called particular attention to situations in which day-to-day practice seemed inconsistent with such doctrine. The fact, made clear throughout *Prosecution*, is that both theory and practice are important and need to be understood and continually re-evaluated in the context of the changing conditions endemic to the work of prosecutors.

Miller's work provides many examples of how careful observation of existing prosecutorial practices can furnish a basis for reconsidering the propriety of existing legal doctrine and day-to-day practice. Unfortunately, the limited space available here precludes any such exhaustive catalog. Nevertheless, three issues raised by Miller's research merit particular attention.

The first concerns the use of post-arrest warrants. Miller's painstaking description of prosecution practices in Wisconsin disclosed that the routine issuance of post-arrest warrants, a time-consuming practice, served no identifiable function.[4] A second, and more controversial discovery centered on the respective roles of the executive and judiciary in the decision to charge a suspect with a crime. Miller discovered that although prosecutors routinely made autonomous charging decisions, existing legal doctrine made it impossible to determine whether the decision was, in theory, an executive decision for the prosecutor or a judicial decision for the trial judge.[5] A third issue concerns the function of the post-arrest complaint, the need for which, Miller's work demonstrated, is as unclear as the need for the post-arrest warrant.[6]

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2. *Id.* at 354.

3. *Id.* at 357 (citing Jackson, *Criminal Justice: The Vital Problem of the Future*, 39 A.B.A.J. 743 (1953)).

4. *See id.* at 11-15.

5. *See id.* at 56-57.

6. Because the post-arrest warrant was routinely used at the time of Miller's work, it, rather than the post-arrest complaint was given emphasis. Miller's discussion pertaining to the post-arrest warrant, however, also clearly applies to the post-arrest complaint.

This tribute will focus on Wisconsin practices, in particular as they relate to the three issues discussed above. The reason for this is two-fold: one, Miller dedicated particular attention to Wisconsin, and two, the authors have greater experience with Wisconsin practice, and therefore may provide a more enlightening depiction of the significance of Miller's work. This focus on Wisconsin, however, does not limit the utility of the analysis. Indeed, one reason for the enduring quality of the ABF survey in general was its universality; the justice systems of the field sites chosen shared fundamental administrative practices with states throughout the nation.[7] Moreover, as will be seen, the same issues described in detail by Miller over twenty years ago still arise today throughout the country.

II. THE AUTHORITY TO DECIDE WHETHER TO PROSECUTE A SUSPECT—AMBIGUITY IN THE ROUTINE USE OF THE POST-ARREST WARRANT

At the time of the ABF research in Wisconsin, the State manifested its intent to prosecute a criminal suspect by the issuance of a complaint and an arrest warrant.[8] In chronicling these procedures, Miller discovered a surprising fact: arrest warrants were routinely issued in cases in which the suspect was already in custody pursuant to an arrest without a warrant. Miller speculated on why such post-arrest warrants were used, and in so doing identified a fundamental ambiguity regarding the roles of judges and prosecutors in the charging decision:

> When the prosecutor's de facto control over prosecutions generally is combined with the observed practice of using the arrest warrant primarily as a charging document rather than to perform its historical arrest-authorizing function, it is inevitable that the prosecutor should assume control over its issuance. It is nonetheless true, however, that the law, while liberally recognizing that the prosecutor has great discretion in controlling prosecutions, still conceives of the arrest warrant as performing its historical function, and, for the most part, still vests in the judiciary the power to determine the sufficiency of the evidence to justify arrest. Magistrates, in fulfilling this role, would theoretically be determining whether the available evidence was sufficient to justify an arrest, while the prosecutor's principal concern would be with the existence of adequate evidence to charge, along with his esti-

7. The *Prosecution* volume also provides detailed analysis of the criminal justice practices of Kansas and Michigan. Wisconsin, Kansas, and Michigan were selected as sites because of their representative characteristics of "middle America," mid-size urban areas, and geographic proximity to Chicago (the location of the American Bar Foundation).

8. This was also true in Michigan and Kansas. *See* F. MILLER, *supra* note 1, at 11.

> mate of the social desirability of commencing or preventing prosecution for other reasons than probability of guilt. Why this contemplated distribution of function is not realized in current administration is not entirely clear.[9]

Miller's statement highlighted the confusion created by the use of the warrant to serve two entirely separate objectives: first, to meet fourth amendment requirements for a lawful arrest and, second, to reflect, in writing, the decision to charge the suspect with a crime.[10] The former, United States Supreme Court decisions have made clear, is a judicial responsibility.[11] The latter, it would seem from almost universal practice, is a decision for the prosecutor.[12]

Miller's question, therefore, is central. Why issue an arrest warrant after the suspect has already been arrested without a warrant? Miller recorded a wide range of explanations provided by judges and prosecutors for such a practice. These ranged from a desire to obtain an early judicial decision regarding whether adequate evidence existed to continue custody of a person arrested without a warrant[13] to a bald acquiescence to custom—"we don't know the reason."[14]

Indeed, Miller discovered, the practice served no useful purpose. Wisconsin judges, for instance, did not consider the post-arrest warrant to constitute an early opportunity to establish probable cause. Illustrating this fact, Miller pointed out: "One judge authorized to issue warrants told a field reporter that he had never refused a warrant, that he seldom knew anything about its being issued, and that he regarded it as a ministerial function of the clerk."[15] The predominant role of clerks would be both understandable and defensible if the warrant merely reflected the

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9. *Id.* at 55-56.

10. *See id.* at 48 n.4.

11. Giordenello v. United States, 357 U.S. 480 (1958). The fourteenth amendment provides for the application of this requirement to the states. Aguilar V. Texas, 378 U.S. 108 (1964). The Wisconsin Supreme Court subsequently found that arrest warrants issued by prosecutors were invalid. State ex rel White v. Simpson, 28 Wis. 2d 590, 137 N.W.2d 391 (1965). The court did not address whether the ruling applied to post-arrest warrants; however, the issuance of such warrants by prosecutors was soon discontinued. *See* F. MILLER, *supra* note 1, at 50.

12. *See supra* note 5 and accompanying text.

13. F. MILLER, *supra* note 1, at 12.

14. Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U.L.Q. 1, 3.

15. F. MILLER, *supra* note 1, at 54. *See also* Miller & Remington, *Procedures Before Trial*, 339 ANNALS 111 (1962). "In practice, . . . the warrant is issued by the magistrate, or more commonly his clerk, without any effort at independent evaluation of the facts." *Id.* at 115. "In fact, . . . the practice in most cases is for the magistrate to issue the warrant as a perfunctory matter . . . ." *Id.* at 117.

charging decision. Clearly, however, the practice is not defensible when the warrant is intended to meet fourth amendment requirements.

Largely because of the visibility Miller gave the post-arrest warrant, and the reported inability of practitioners to explain what function it served, Wisconsin soon discontinued post-arrest warrants.[16] Further evidence of the influence of Miller's work is found in the American Law Institute (ALI) Model Code of Pre-Arraignment Procedure, which, citing Miller, recommended in 1966 that the post-arrest warrant not be used.[17]

III. THE LEGACY OF THE POST-ARREST WARRANT: THE DECISION TO CHARGE AS A JUDICIAL OR AN EXECUTIVE FUNCTION?

One might have hoped that the discontinuance of post-arrest warrants would clarify whose responsibility it is to make the charging decision. As Miller said, "theoretically . . . the prosecutor's principal concern would be with the existence of adequate evidence to charge, along with his estimate of the social desirability of commencing . . . [a] prosecution."[18]

Although the cessation of the post-arrest warrant meant that one no longer need be concerned about what, if any, function it served, the post-arrest complaint remained, and the same questions applied to it. Despite Miller's incisive recognition of the fundamental role confusion in the charging decision, the long-standing uncertainty as to whether the decision to prosecute is the responsibility of the judge or the prosecutor has

16. The Wisconsin Supreme Court found the post-arrest warrant unnecessary in Pillsbury v. State, 31 Wis. 2d 87, 142 N.W.2d 187 (1966). In response to the argument that the post-arrest warrant was necessary to confer jurisdiction on the magistrate, Justice Hallows stated that the court has jurisdiction by virtue of the physical presence of the defendant. *Id.* at 92, 142 N.W.2d at 190. Although *Prosecution* was not published until 1970, several years after *Pillsbury*, Miller had already published considerable research findings regarding the post-arrest warrant. *See supra* text accompanying note 14. Further, the results of the ABF Survey were known to key people in the State of Wisconsin, including Assistant Attorney General William A. Platz, an attorney of record in *Pillsbury*. Platz argued, "[w]hen, as here, a defendant is lawfully arrested without a warrant, a complaint is issued, the defendant is brought before the court and submits to its jurisdiction, a warrant for the arrest of the defendant is completely unnecessary and its issuance would be a superfluous and useless act." Brief of Defendant in Error at 17, Pillsbury v. State, 31 Wis. 2d 87, 142 N.W.2d 187 (1966).

17. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 198-99 [hereinafter MODEL CODE] (Tent. Draft No. 1, 1966) (citing Miller & Tiffany, *supra* note 14, at 9). Moreover, reflecting Miller's concerns over ambiguity, the commentary took pains to distinguish the charging decision from the arrest decision: "[I]n this Code it is provided that warrants shall issue only for the purpose of taking persons into custody who have not already been arrested." *Id.* at 199.

18. F. MILLER, *supra* note 1, at 56.

endured.[19]

It was in this factual setting that the Wisconsin legislature in 1969 enacted Wisconsin Statute 968.02, a statute intended "to give the district attorney a greater voice in the initiation of criminal proceedings."[20] The law provided that "a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed."[21] It also provided circuit judges with the statutory power to issue complaints if probable cause existed to believe a crime had been committed and the prosecutor was either unavailable or had declined to prosecute.[22] Already in existence was the "John Doe" statute,[23] promulgated by the legislature at the time of the State's inception in 1848, which allowed judges to issue a complaint and arrest warrant at the close of a John Doe inquiry if they found probable cause to believe that a crime was committed.

Taken in tandem, the statutory landscape posed a clear inconsistency as to the proper locus of the charging decision. The vesting of authority in the judge to issue complaints in times of prosecutorial refusal appears to be based on the ALI Pre-Arraignment Code. Although the Institute members who drafted the Code were familiar with Miller's work and reflected that fact by dispensing with the post-arrest warrant, the Code did not answer the fundamental question of whether the decision to charge is an executive or judicial responsibility.[24]

In any event, if the purpose of Wisconsin Statute 968.02 was to clarify

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19. *See infra* notes 25-37 and accompanying text.

20. WIS. STAT. ANN. § 968.01-02 (1969) Comment of Judicial Council.

21. WIS. STAT. ANN. § 968.02(1) (1989-1990).

22. WIS. STAT. ANN. § 968.02(3) (1989-90).

23. WIS. STAT. ANN. § 968.26 (1989-1990).

24. Section 6.02 of the Code, nearly identical in form to Wisconsin Statute § 968.02, provided as follows:

> Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a prosecuting attorney having jurisdiction over the prosecution of the offense and shall be filed only with his approval .... In any case in which a prosecuting attorney refuses to issue a complaint, a judicial officer may permit the filing of a complaint if, after hearing the complainant and the prosecuting attorney, he finds there is reasonable cause to believe that the person named in the complaint has committed the offense charged.

MODEL CODE, *supra* note 17, at 54-55. In its note to the above provision the ALI provided:

> [t]he principal thrust of this section is to vest control over the issuance of complaints charging persons with crime in the prosecuting attorney .... The prosecutor will then play the key role in screening out unfounded complaints and in determining when the evidence is sufficient to justify initiating a prosecution .... [The above provisions] provide checks upon the prosecutor's decisions not to issue complaints.

Id. at 55.

the locus of responsibility for the decision to prosecute, it failed to do so. Over much of the last twenty years, the problem remained uncontroversial in day-to-day practice because of the continued uniform acceptance of charging decisions made by prosecutors.

Recently, however, the historical ambiguity surrounding the charging decision—long-ago recognized by Frank Miller—made its presence felt in a pair of remarkable, if not startling, Wisconsin Supreme Court cases. In *Unnamed Petitioners v. Connors*,[25] decided in 1987, the court found the provision in Wisconsin Statute 968.02, allowing judges to issue criminal complaints in the event prosecutors are absent or refuse to charge a suspect, unconstitutional for separation-of-powers reasons.[26] According to the court, the charging power historically resided within the executive's prosecutorial power: "the discretion to charge or not to charge, and the discretion of how to charge, rests solely with the district attorney."[27] Because the procedure amounted to a "complete usurpation . . . of an important executive function by the judiciary," the provision constituted an unconstitutional violation of the separation-of-powers doctrine.[28]

In *State v. Unnamed Defendant*,[29] decided only two years later, the Wisconsin Supreme Court again was presented with the roles of the executive and judicial branches in the charging decision. A complainant, disturbed over the refusal of a local prosecutor to issue a complaint, desired prosecution of an alleged sexual assault. Mindful of the *Connors* finding that Wisconsin Statute 968.02 was unconstitutional, the complainant sought to commence a prosecution by means of the "John Doe" statute. After presiding over a John Doe inquiry, the circuit judge contravened the judgment of the local district attorney and issued a criminal complaint. The defendant moved to have the complaint dismissed on the ground that the John Doe statute, like Wisconsin Statute 968.02, unconstitutionally vested executive powers in the judiciary.[30]

The *Unnamed Defendant* court held that the charging component of the John Doe proceeding did not constitute an intrusion on executive power by the judiciary.[31] It further held that because the John Doe

25. 136 Wis. 2d 118, 401 N.W.2d 782 (1987).
26. *Id.* at 143, 401 N.W.2d at 792.
27. *Id.* at 128, 401 N.W.2d at 786.
28. *Id.* at 143, 401 N.W.2d at 792.
29. 150 Wis. 2d 352, 441 N.W.2d 696 (1989).
30. *Id.* at 357, 441 N.W.2d at 697.
31. *Id.* at 365, 441 N.W.2d at 701.

charging provision had existed since 1848, the statute necessarily was constitutional.[32] In so holding, the court overruled the premise of *Connors*—namely, that initiation of criminal prosecutions is an exclusive executive power.

The confusion apparent in the *Connors* and *Unnamed Defendant* opinions is perhaps understandable. The constitutional moorings of where the power to charge resides—in the executive or the judiciary—have been unclear. This confusion stems to a considerable degree from administrative behaviors observed by Miller twenty years ago. As Miller described, judges traditionally issued post-arrest warrants. What Miller pointed out, however, is that this role may well have reflected the judge's responsibility to issue the warrant when one was needed to make an arrest rather than an assumption that it was the judge who should make the charging decision.[33]

As a practical matter, in historic terms, the functions of the post-arrest warrant and the complaint have been ambiguous. Nevertheless, it is just as clear that for most of the twentieth century the decision to prosecute has resided with the executive. Frank Miller, in truly prescient style, made this much apparent over twenty years ago. While such a controversy was perhaps predictable, it is nevertheless significant that it occurs at this time.

Since the 1980s American society has witnessed a rise in the victims' movement, which asserted a right to have suspects prosecuted, particularly in sexual assault cases, even when the public prosecutor declined to do so. Evidence of the growing role and influence of the victims' movement currently manifests itself in statutory procedures and constitutional rights instituted throughout the country and designed to increase the vic-

32. *Id.* at 366, 441 N.W.2d at 701.

33. F. MILLER, *supra* note 1, at 48 n.4. This confusion exists even today. Samuel Becker, pointing out what he perceived as the faulty historical analysis of the *Connors* court, commented on the responsibilities entailed in issuing complaints: "The reasons for entrusting this authority to issue a complaint to a magistrate rather than a prosecutor . . . [is] that the district attorney is not the equivalent of a neutral and detached magistrate who may be constitutionally empowered to authorize the issuance of an arrest warrant." Becker, *Judicial Scrutiny of Prosecutorial Discretion in the Decision Not to File a Complaint*, 71 MARQ. L. REV. 749, 755 (1988). Brief analysis of Becker's statement reveals a common flaw in reasoning. He conflates the independent and distinct purposes of the complaint: first, its role as an arrest-authorizing instrument required by the fourth amendment, and second, its role of giving notice and serving as the embodiment of the decision to prosecute—two entirely different issues. For further discussion of the ongoing confusion attending the charging function see Comment, *A Proposed 'Check' on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. (forthcoming).

tims' involvement in the prosecution process.[34] Similarly, lawyers representing victims dissatisfied with decisions not to prosecute have found, in the continuing uncertainty between legal theory and practice, a basis for asserting that judges have both the authority, and, indeed the responsibility to initiate a prosecution if the public prosecutor declines to do so.[35]

In many respects, the confusion cuts to the core of the justice system; the state's power to prosecute has enormous significance, and charging is the linchpin of this power. The historical loophole recognized long-ago by Miller, and in large part blithely ignored by us since, now poses a very real issue in criminal justice administration. The long effort to "professionalize" the office of the public prosecutor is now being questioned in a legal atmosphere conditioned by strong socio-political overtones, where recurrent calls for private prosecution are heard.[36] This would seem to confirm Geoff Hazard's warning that we are headed for trouble "if our perception of how legal institutions actually work is not constantly corrected by fresh inquiry."[37]

The resulting situation is unfortunate in several respects.[38] As a result of *Unnamed Defendant*, Wisconsin judges, in times of prosecutorial refusal to prosecute, must now issue a complaint when presented with probable cause that an offense has been committed. The resulting

34. Statutory examples: ALA. CODE § 12-17-186 (1986) ("when the district attorney refuses to act, [the court] may appoint a competent attorney to act in such district attorney's place"); N.D. CENT. CODE 11-16-06 (1989) (if court finds that the "state's attorney has refused or neglected to perform" it may request the attorney general to prosecute or appoint another "attorney to take charge of" the action); COLO. REV. STAT. ANN. § 16-5-209 (West 1990) ("If after a hearing the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, he may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so."). Victims' "Bills of Rights" have been enacted in a number of states. *See, e.g.*, WIS. STAT. § 950.04 (1989-1990); FLA. CONST. art. I, § 16(b) (1990); MICH. CONST. art. I, § 24 (1990); TEX. CONST. art. I, § 30 (1990); WASH. CONST. art. I, § 3(j) (1990). This sentiment is also manifest in a growing literature demanding an increased role for victims in the prosecution process. *See, e.g.*, Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Davis, *The Crime Victim's 'Right' To a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DE PAUL L. REV. 329 (1989); Hudson, *The Crime Victim and the Criminal Justice System: Time For a Change*, 11 PEPPERDINE L. REV. 23, 31 (1984); Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488 (1988).

35. *See, e.g.*, State v. Murphy, 113 Ariz. 416, 555 P.2d 1110 (1976); State v. McMahon, 183 N.J. Super. 97, 443 A.2d 258 (1981); Petition of Padget, 678 P.2d 870 (Wyo. 1984).

36. *See, e.g.*, Abrahamson, *supra* note 34, at 519 (basic theme of the victims' movement can be summarized "as a privatization of the concept of criminal justice. It demands that the personal interest of the victim be considered within the criminal justice system.").

37. F. MILLER, *supra* note 1, at 354.

38. For further elaboration of the following discussion, see Comment, *supra* note 33.

problems are obvious. First, such a practice—an effective "end-around" of the local prosecutor—promises to increase significantly the responsibilities of judges; if this theoretical power became a practical reality, judges would be swamped with hopeful complainants.[39]

Second, and perhaps more alarming, judges *must* now apply the minimal evidentiary standard of probable cause in charging decisions. In *Prosecution*, Frank Miller quoted with obvious approval a statement by John Kaplan. Kaplan urged that prosecutors initiate a prosecution only when there is an affirmative answer to the "fundamental question . . . [of] whether, in the light of the habits of judges and juries in the area, the case could be expected to result in a conviction . . . ."[40] Miller remarked that this position "clearly parallels the findings of the field research teams of the American Bar Foundation" and proceeded to explain why prosecutors believe that this standard is sensible.[41] Since Miller's work, numerous organizations have also favored this standard, including the American Bar Association and the United States Department of Justice.[42]

If one assumes, as Miller did, that the prevailing view of practitioners was that a prosecution should be commenced only when there is a reasonable expectation of conviction, then having judges review that decision and apply a less stringent standard does not make sense. Either the prosecutors' common practice of applying the higher standard of reasonable expectation of conviction, or the judges' application of the lower standard of probable cause must change. Concern over this inconsistency was voiced by Chief Justice Nathan Heffernan, who, ironically, nevertheless authored the *Unnamed Defendant* opinion. According to Heffernan, use of the probable cause standard as the end-all of charging makes for a situation in which:

> [n]o consistent prosecutorial policy in respect to the initiation of charges can be maintained . . . . The *de facto* standard for prosecuting attorneys is . . . but for the exceptional case, not to invoke the awesome power of the

39. *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380-81 (2d Cir. 1973); Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 139 (1975) ("De novo review is not favored, because it would place a great burden on the time and energies of courts. . . .").

40. F. MILLER, *supra* note 1, at 21.

41. *Id.* at 22.

42. *See* AMERICAN BAR ASSOCIATION, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.9 (1970); U.S. DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 6 (1980) [hereinafter PRINCIPLES OF FEDERAL PROSECUTION] (pamphlet).

> state unless the crime in all likelihood can be proved beyond a reasonable doubt. Our imprimatur upon [the probable cause charging standard] may well give a gloss that runs counter to the legislative intent of Wisconsin's criminal law reforms.[43]

Further, Chief Justice Heffernan noted, the low charging standard potentially opens the way for abuses by persons with improper motives seeking to prosecute enemies; such persons may "trigger the prosecutorial powers of the state *in any kind of criminal action* where 'probable cause' can be established."[44]

In addition to the illogical, impractical effect of using the probable cause standard, it poses a fundamental conflict with prosecutorial ethics. As discussed above, it is accepted wisdom among Wisconsin prosecutors (and their peers elsewhere) that prosecution is not merited without a reasonable expectation of conviction at trial.[45] Given this, prosecutors face what amounts to a Hobson's choice: they must charge if probable cause exists, but may not charge unless there is a reasonable expectation of conviction. Thus, in cases where there is probable cause, but not sufficient evidence to convict, prosecutors will necessarily violate one of their duties.

Another problem is of a more subtle nature. Implicit in the nondiscretionary use of the probable cause charging standard is the notion that full enforcement of the criminal law is desirable and capable of being achieved. Theoretically, with the lower charging standard, all arrests brought to the attention of prosecutors would be prosecuted—and justifiably so. This would prevent situations wherein "the district attorney takes the role of prosecutor and jury."[46] In truth, however, if prosecutors were required to prosecute whenever the bare charging minimum of probable cause existed, enormous caseload increases would result. Moreover, suspects for whom the state lacked evidence to convict would incur incalculable damage to their reputations and unnecessary expense.[47]

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43. State v. Unnamed Defendant, 150 Wis. 2d 352, 367-68, 441 N.W.2d 696, 702 (1989) (Heffernan, C.J., concurring).

44. *Id.* at 367, 441 N.W.2d at 702.

45. *See* WIS. STAT. § 971.01(1) (1989-1990) (abuse of discretion to charge when evidence clearly insufficient to support conviction). *See also supra* note 41.

46. Unnamed Petitioners v. Connors, 136 Wis. 2d 118, 154, 401 N.W.2d 782, 797 (1987) (Steinmetz, J., dissenting).

47. This sentiment was also voiced by the U.S. Department of Justice:

> [B]oth as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.

Finally, the confused state of affairs regarding the charging decision bred by *Unnamed Defendant* raises fundamental separation-of-powers problems. Inquiry of Wisconsin trial judges makes clear that they are uncomfortable when asked to perform the function of the prosecutor.[48] They believe that a refusal to issue a complaint when the prosecutor's decision not to do so is defensible will make it appear that the judge and prosecutor are conspiring against the victim of an alleged crime.[49]

The need for clarification was obvious twenty years ago when Miller described the existing charging practices. The need is even more compelling today. It seems as obvious today as it was twenty years ago that the responsibility for the charging decision should rest with the prosecutor. The ambiguity reflected by the *Unnamed Defendant* decision notwithstanding, numerous groups,[50] all states,[51] and the federal government[52] agree that charging is rightfully a responsibility of local prosecutors.

IV. THE CRIMINAL COMPLAINT CONTINUES TO BE USED WITHOUT ADEQUATE CONSIDERATION OF WHETHER IT SERVES A USEFUL FUNCTION

Despite Miller's recognition of the questionable use of the post-arrest warrant and its official abandonment as a requirement, ambiguity persists. The abandonment of the post-arrest warrant left the complaint as the charging document. Unfortunately, there remained, and still remains today, confusion over what function the document serves.

When issued prior to arrest, the complaint signifies the existence of probable cause needed to comply with fourth amendment requirements for the issuance of a valid arrest warrant. However, when the complaint is issued after the arrest, as is most commonly the case, its purpose is

PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 42, at 6. Another cause for concern is that the procedure arguably disadvantages the poor and unsophisticated who lack the wherewithal to retain a lawyer to present the matter effectively to the judge.

48. Result of questionnaire given to over one hundred trial judges attending a conference in May 1990. (Copies on file with authors.)

49. *Id.* *See also* M. RICHTER, THE POLITICAL THEORY OF MONTESQUIEU 84-92 (1977) (the guarantee of an impartial judiciary is a principal justification for separation of powers).

50. *See, e.g.*, AMERICAN BAR ASSOCIATION, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.4 (1970).

51. *See, e.g.*, CAL. GOV'T. CODE § 26500 (West 1990); KY. REV. STAT. ANN. § 15.725 (1) (Michie 1990).

52. *See, e.g.*, Wayte v. United States, 470 U.S. 598 (1985); United States v. Torquato, 602 F.2d 564 (3d Cir. 1979); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

unclear. The continuing practice is for the post-arrest complaint to meet the same probable cause requirements as the pre-arrest complaint. No reason, however, appears to exist for this practice. It might be asserted, as it was with the post-arrest warrant, that the purpose of the probable cause paragraph of the complaint is to justify the continued custody of a suspect arrested without a warrant. Yet because the prosecutor issues the complaint, this practice would seem to violate the fourth amendment requirement that a neutral and detached magistrate make the probable cause decision.[53] Further, at the first appearance before the judicial officer, the opportunity to rely on the complaint to establish probable cause for continued detention is not reflected in practice.[54] In most misdemeanor cases, there is no continuing custody and thus no fourth amendment need for a probable cause finding. Moreover, in felony cases the prevailing practice of magistrates is not to make a probable cause finding, despite the fact that *Gerstein v. Pugh*[55] clearly requires such a finding. Thus, thousands of hours and thousands of dollars are expended every year without anyone taking the time to ask whether all the effort and expense serve any useful purpose.

When asked about the practical need for a post-arrest complaint,[56] Wisconsin practitioners respond as they did in the days when a post-arrest warrant was also required.[57] They say that it serves an important purpose, although they are unclear as to what that purpose is. Conversations with a number of large Wisconsin prosecutors offices indicate that the complaint is issued to avoid the immediate disclosure of the arrest report to defense counsel.[58] This is so despite the fact that arrest reports are routinely made available to defense counsel later in the prosecution process—the largest prosecutors office, in Milwaukee—makes the arrest report available immediately.[59]

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53. Gerstein v. Pugh, 420 U.S. 103 (1975).

54. Law student interns in Wisconsin prosecutor offices during the summer of 1990 report that in virtually no instances did the judge read the complaint at the initial appearance. The rare exception was when a defendant wished to plead guilty. In such times the judge would read the complaint and engage in a brief discussion of the matter.

55. 420 U.S. 103 (1975).

56. *See* WIS. STAT. ANN. § 968.01 (1989-1990) (imposing a statutory requirement for such complaints).

57. Conversation with Ben Kempinen, Assistant Professor with University of Wisconsin Clinical Prosecution Program (Oct. 1, 1990) (transcript on file with authors).

58. *Id.*

59. Conversation with Robert D. Donohoo, a long-time Milwaukee County Assistant District Attorney (Oct. 18, 1990) (transcript on file with authors).

Indeed, no practical need exists for a post-arrest complaint in misdemeanor cases, except in the limited situations in which continued custody is required or bail is set following the initial appearance. In felony cases, the complaint could properly be limited to a statement of the charge (and not include a difficult-to-draft factual statement demonstrating the existence of probable cause).[60] Nevertheless, the practice of requiring a post-arrest misdemeanor complaint continues to be thought essential in Wisconsin. This is true despite the fact that experience elsewhere, such as in the neighboring state of Minnesota, demonstrates that the post-arrest complaint can be abandoned without harm except in cases in which the defendant requests a complaint,[61] is held in custody, or is required to post bail. Even in the latter situations, the *Gerstein* requirement can be met, as in Minnesota, in both misdemeanor and felony cases by the facts contained in the arrest report.[62]

Wisconsin's abandonment of the post-arrest complaint in most misdemeanor cases and the abandonment of the probable cause requirement in both misdemeanor and felony cases (except when there is continued custody or bail) would require legislative action. Without any discussion of the practical necessity for a complaint, the Wisconsin Supreme Court has required that a complaint contain a showing of probable cause.[63] In sum,

60. This was the position of the state in State *ex rel.* Cullen v. Ceci, 45 Wis. 2d 432, 442-43, 173 N.W.2d 175, 179 (1970), an assertion not rebutted in the court's opinion which gave doctrinal, rather than pragmatic explanations for the probable cause requirement.

61. Conversation with Ben Kempinen, *supra* note 57. In addition, in 1970 Frank Remington had a year-long experience with the University of Minnesota criminal clinical program, a program administered by Professor Robert Oliphant which provided representation to indigent defendants. The judge disposed of virtually all cases at the initial appearance. The primary explanation provided was the strong desire on the part of most defendants to resolve the matter promptly so that they could return to work. Obviously, it was important to determine carefully whether the evidence in the police report indicated a likelihood of conviction if the case went to trial and to allow the client to decide whether to plead guilty after being fully informed of the alternatives.

62. Conversation with Ben Kempinen, *supra* note 57. In Rock County, Wisconsin complaints are regularly sworn to by the court officer who stands before a stack of complaints, without reading them, and swears to their accuracy. *Id.*

63. *See* State ex rel. Cullen, 45 Wis. 2d at 442, 173 N.W.2d at 179. The *Cullen* court stated: "We do not agree . . . with the contention of the state that a complaint issued subsequent to a valid arrest need not state probable cause. While its purpose is no longer to authorize the seizure of the person of the defendant, it is the jurisdictional requirement for holding a defendant for a preliminary examination . . . ." *Id.* Although there was no indication that the defendant was to be held in custody or required to post bail, the court cited the fourth amendment as the sole basis for its decision. It should be noted that federal practice differs in this regard. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 41, at 31 (2d ed. 1982) (". . . the [post arrest] complaint must meet the formal requirements of Rule 3, but it need not itself show probable cause, since the magistrate, at

unnecessary expense and delay continue, despite the fact that the practice achieves nothing worthwhile.

V. THE LESSONS LEARNED

Looking back over the events of the past twenty years, one thing is certain: careful, detailed analysis of current practices, such as that provided by Frank Miller in *Prosecution*, can make an important contribution. Miller's description of prosecution practices in Wisconsin demonstrated that certain practices, in particular the post-arrest warrant, served no useful purpose; that responsibility for the decision to prosecute, probably the single most important decision in criminal justice administration, was unclear; and that although the pre-arrest criminal complaint served an important purpose, the purpose of the post-arrest complaint remained unclear.

Sadly, however, with the exception of the post-arrest warrant, the justice system failed to recognize the inconsistencies regarding theory and actual practice pointed out by Miller. This failure has been very costly. Uncertainty about who has responsibility for making the charging decision has given rise to unnecessary litigation and continues to do so. Further, in this era of victims' empowerment, this uncertainty threatens the very essence of the prosecutorial function.

In addition, the failure to clarify the function of the post-arrest complaint continues to result in unnecessary and costly delays, particularly in misdemeanor cases. Although the numbers are not large, some suspects must remain in jail awaiting the filing of the complaint, which is costly to both the suspects and taxpayers. The time and expense required to draft unnecessary complaints in misdemeanor cases is substantial. In current practice, a judicial officer or anyone else, seldom, if ever, relies upon or even reads those complaints. Any function the complaint serves can be served equally well in almost all misdemeanor cases by the report of the arresting officer.

In felony cases, the need for a post-arrest complaint is arguably greater. The time-consuming drafting of factual allegations in the complaint, however, is of doubtful value; the facts set forth in the arrest report can serve the same function and, in practice, judges seldom rely on the complaint to make a probable cause determination prior to fixing the

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the hearing required by Rule 5.1, will determine whether probable cause exists to hold the arrested person.").

conditions of pretrial release. If the purpose of the factual, probable cause paragraph is to meet the requirements of *Gerstein v. Pugh*,[64] then at least judicial practice should be changed so that the judge makes a probable cause finding at the first appearance. If this is not to be the practice, why incur the expense of drafting such paragraphs if they serve no purpose?

Paraphrasing Geoff Hazard, if our perception of how legal institutions actually work is not constantly corrected by fresh inquiry, the law will develop into an impediment rather than a contribution to a fair and effective criminal justice system. Frank Miller pointed this out twenty years ago. But the task cannot be completed by a single effort, however important that effort may be. The need is for a continuing effort to monitor and evaluate practices and to ask hard questions about their usefulness.

64. 420 U.S. 103 (1975).