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COMMENTARY

TOWARD CHECKS AND BALANCES OF POLICE AUTHORITY

STANLEY VANAGUNAS*

I. INTRODUCTORY NOTE

The American Bar Association's *Standards Relating to the Urban Police Function*, as a whole a singularly superior work in a long neglected area, summarizes its commentary on police authority by an unequivocal recognition that existing controls are not adequate and calls for experimentation in new approaches.¹ The ABA echoes similar concerns on part of the President's Commission on Law Enforcement and Administration of Justice² and the preponderant view of contemporary students of American police. It is to this issue that this essay responds.

Its methodology consists of proposing a model of a police agency as an integrated function of all branches of local government. The emphasis is on new delineation of legislative and judicial authority and responsibility for police policy formulation and implementation. The overlying theoretical framework, while cognizant that ours is basically a bureaucratic form of government, rests on the premise that the separation of powers doctrine is a legitimate aspiration in the conduct of public business.

II. POLICE AUTHORITY AS A DILEMMA

The central responsibility of the police is to enforce criminal laws and to maintain the peace. However, not every lawful act is orderly nor is every orderly act a lawful one. This dichotomy confronting the police is further complicated by the special requirements of policing in a democratic society whereby the police must enforce the law and maintain the peace in a manner which in itself

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1. AMERICAN BAR ASSOCIATION, *STANDARDS RELATING TO THE URBAN POLICE FUNCTION* 144, 170 (1972).

2. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 115 (1967).

abides by the rule of law and advances the values of a democratic legal order.³ An incremental dissonance introduced to this already complex task is the fact that Americans are very much a heterogeneous people. Differing racial and ethnic minorities properly claim some values of legality and of public order that are on the periphery of consensus and at variance with the conceptions of criminality and social tranquility held by the majority or by those in authority to influence the prevailing law.⁴ The nation's police, certainly the police of the problem ridden, pluralistic urban areas, have been charged with an unenviable duty.

The formal authority granted to the police to implement this most complex task demands enforcement compliance with strict legality. Police enabling state statutes rigidly direct criminal prosecution of transgressors of the law.⁵ Yet the criminal codes of the same states set down what are ultimately legal fictions; broad prohibitions of conduct deemed detrimental to an ideal concept of health, welfare, and safety of an abstract constituency. Particularly in the area of order maintenance is the law obscure, generally providing local ordinances in the form of nebulous aggregates such as "disorderly conduct" or "disturbing the peace."

The vacuum between formal authority for police responsibility and the ambiguity that is the essence of the police function was filled by an artful expedient—police discretionary power.⁶ Aside from outright corruption or other flagrant personnel inadequacies, the major problems that Americans have with their police ultimately deal with the uses and abuses of police discretion. Consequently, to seek new approaches in the control of police authority is to seek modification in their exercise of discretion.

The dichotomy between law enforcement and peace keeping, the fact of a heterogeneous society, and the abstract nature of criminal law are not the sole reasons for the existence of police discretion. It exists also because police resources are limited, compelling priority choices among alternative objectives and because,

3. J. SKOINICK, *JUSTICE WITHOUT TRIAL* 71-72 (1966); and Hall, *Police and Law in a Democratic Society*, 28 *IND. L.J.* 133 (1953).

4. See for example: M. NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS* (1973).

5. J. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 557 (1960); and, AMERICAN BAR ASSOCIATION, *supra* n.1, at 117.

6. "The much heralded discovery that policemen are not merely ministerial officers, applying the laws as interpreted by the courts, must be considered the understatement of the decade." E. BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY*, 29 (1970).

perhaps in the first instance, police officers are not homogeneous automatons dispassionately eyeing crimes and their perpetrators on a uniform scale of social values.⁷ The reasons giving rise to police discretion also point to a main element in its significance. Police discretion should not be ordinarily perceived as usurpation of power by the police, but rather, as a legitimate exercise of ambiguously implied authority necessary to realize perceived responsibility.

III. POLICE DISCRETION DEFINED

The most commonly observed discretion within the police function occurs on the individual police officer level. Many students of the police have pointed out the exigency of circumstances where a patrolman is confronted by decisions whether to search, to detain, to arrest, or to seek prosecution.⁸ Reflection will reveal that this type of discretion is of quasi-judicial nature as the decisions involved deal with the interpretation of the law by a police officer. He determines the probability that an offense has been committed, weighs the evidence, considers "precedents" and disposes of the case. Without prejudicial connotations it can be said that the police, on their daily operational level, act as the "judge, trial, and jury" in the preponderance of lesser offenses. For example, in a relatively recent Chicago study it was established that out of a possible 500 arrest situations of youthful offenders the police arrested 100 and finally presented a total of 40 for court action.⁹

The second type of discretion, less visible but of equivalent importance, is the discretion exercised by police administrators in making such decisions as are involved in the allocation of police resources in the community for such services as criminal apprehension and detection, traffic control, crime prevention, safeguarding of constitutional freedoms, prevention of civil disorders, provision of emergency services, and others.¹⁰ An illustration of poignant significance of "administrative discretion" is, for example, the decision to vigorously enforce "morals" offenses such as prostitution or homosexuality which decisions, by necessity, involve the depletion of police resources otherwise available for, as one alternative,

7. H. Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUBLIC ADMINISTRATION REV. 140 (1963).

8. *Id.* and, J. Goldstein, *supra* n. 5.

9. Morris, *Politics and Pragmatism in Crime Control*, 32 FEDERAL PROBATION 9 (1968); and for general support of the above position, Bittner, *The Police on the Skid-Row: A Study of Peace Keeping*, 32 AMERICAN SOCIOLOGICAL REV. 699 (1967).

10. AMERICAN BAR ASSOCIATION, *supra* n. 1, at 53-70.

street crime. Again reflection will reveal that this second type of police discretion, i.e., on the agency as opposed to the individual police officer level, involves a substantial element of what in other areas of governmental activity, would be clearly recognized as legislative prerogatives. The propriety of police executives exercising legislative functions is a discordant note in the formulation of an adequate police policy.¹¹

The ultimate scenario that emerges is that the police, traditionally conceived of as an executive governmental function, are in fact performing duties many of which involve the preemption of legislative and judicial responsibilities. This is not, as previously stated, an example of usurpation of powers. On the contrary, it can perhaps be said that the police are reluctant "grantees" of authority which accrued to them not through systematic delegation of responsibilities but because of *ad hoc* community pressures, the twenty-four-hour availability and investigatory capability of the police, and their authority to use force lawfully.¹²

The fact that the police do exercise judicial and legislative discretion more through default rather than intent, mandates active re-intervention on the part of the courts and legislative bodies into the conduct of police services. The argument, however, is not to deny the police the authority to exercise such discretion but to visibly delegate it and to place it under the review auspices of those branches of government where it properly belongs. Restating in the previous terminology, the courts have a duty to review the discretionary acts of individual officers as such are quasi-judicial in nature and correspondingly, legislative bodies of local government in particular, have the obligation to take continuous and active interest in police policy formulation as such includes the exercise of legislative prerogatives.

It is proposed here that any scheme to impose additional external controls over police authority must meet the following criteria if it is to be successful. In the first instance, the contemplated controls should not be contrary to police *ethos* which is conceived to be the "rule of legality."¹³ Secondly, and relatedly, the controls

11. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 13-18 (1967).

12. AMERICAN BAR ASSOCIATION, *supra* n. 1, at 47-52.

13. Ninety-one percent of the police officers surveyed in a 1969 IACP study of "Police and Their Opinions," responded positively to the query that: "It is absolutely essential for police to learn how to do their work in compliance with court decisions." L. RADELET, THE POLICE AND THE COMMUNITY 14-15 (1973).

should not be remote from that body of institutions from which the police agency in question perceives as deriving its enabling authority. It is assumed that such institutions are the community as represented in the jurisdiction's chief executive, the city's legislature, and the local judiciary. Thirdly, the contemplated external controls should support and reinforce the system of internal discipline.¹⁴ It is also assumed that the latter concept encompasses the need by the police department to maintain "good morale."

The once widely heralded civilian review boards have lost a significant amount of credence as a viable control technique although the concept retains its currency. Poor experience in cities such as New York, Philadelphia, and Rochester with civilian review boards indicates the need for the three sets of criteria previously enumerated. The boards antagonized the police because they were perceived as undermining the managerial privilege of conducting a system of internal discipline. Secondly, the civilian review boards tended to become places for emotional catharsis for the many frustrations of minority inner-city citizens rather than organs for dispassionate inquiry into possible police misconduct. But perhaps most significantly, because of their extraneous origin to the accepted institutions of criminal justice, the boards, regardless of how fair they were in fact, carried an aura of partiality to outside pressures rather than empathy for the rigors that modern day administration of justice encompasses.¹⁵

IV. CENTRAL ELEMENTS OF THE PROPOSED MODEL

The remaining part of this essay seeks to lay out a general framework for active and continuing participation by the judicial and legislative branches of local government in the formulation and conduct of police policy. As previously stated, their foreseen role is to formally delegate and periodically review the discretionary powers of police. The emphasis is not on curtailment of such authority. The ensuing model also assumes that all other accepted control mechanisms attaching to the police function will remain in effect. For example, the system of internal discipline within the police agency is assumed as well as the existence of various exter-

14. H. Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY, AND POLICE SCIENCE 170 (1967); and, AMERICAN BAR ASSOCIATION, *supra* n. 1, at 160-170.

15. Comment, *Police-Philadelphia's Police Advisory Board—A New Concept in Community Relations*, 7 VILL. L. REV. 656 (1962); and W. GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* 179-192 (1966).

nal judicial sanctions such as the exclusionary rule, civil action against a municipality, or remedy through injunction.

The model is based on the "strong-mayor council" form of municipal government. This form was chosen since it is the most representative type of government for the largest cities of the nation; the central locus of complex and problematic police work. Of the forty-six American cities whose population exceeds, 250,000, over seventy percent are governed by an elected mayor and a representative legislature.¹⁶

The following main characteristics of government are assumed for the hypothetical municipality:¹⁷

1. A popularly elected mayor with formally assigned authority to give direction to the major departments of city government.
2. A legislative body, a council, whose members are popularly elected either from wards or at large.
3. A number of major administrative officers (including the chief of police) who are appointed by the mayor with the consent of the council; and
4. A municipal court, or at least the existence of laws enabling the creation of such.

A fundamental concern of this model is its feasibility and acceptability in the realm of urban reality. "Acceptability" is primarily a political question and consequently dependent upon the many unique variables characterizing individual cities. "Feasibility" of implementing the model within a given jurisdiction is largely contingent upon the extent of home rule a given city may exercise within the laws of its parent state. In the case of police responsibility, no entirely satisfactory comment can be made to accurately show where the home rule privileges of cities begin and those of the state legislatures end. It is assumed that the structural changes in the municipal legislative and judicial process recommended by this model are within home rule authority of the vast majority of municipalities. This assumption rests on the marked and persistent trend in most states to liberalize home rule provisions so as to give urban areas maximum flexibility to cope with their many problems.¹⁸

16. INTERNATIONAL CITY MANAGEMENT ASSOCIATION, *THE MUNICIPAL YEAR BOOK* 4 (1973).

17. C. McCANDLESS, *URBAN GOVERNMENT AND POLITICS* 163 (1970).

18. In 1972 for example, Iowa granted complete home rule to its cities in all areas, except finance. Arkansas also passed a statutory home rule act, and Colorado improved its procedures for adoption of city home rule charters. Missouri, Montana, and Pennsylvania

V. THE RECOMMENDED ROLE FOR MUNICIPAL LEGISLATURES IN THE CONTROL OF POLICE AUTHORITY

City councils are traditionally empowered to define the behavior of persons and organizations which are beyond accepted community norms of conduct, i.e., they may enact criminal laws not covered by state statute. A corollary to their law making function is the council's power to conduct investigations. Additionally, municipal legislatures allocate the city's revenue for various functions and determine the kinds and intensity of public services that will be provided by the municipal government.¹⁹ The council's authority to intervene into the administration of the police is clearly established.

Reassertion of legislative authority into the conduct of police affairs requires the following sequence of action:

1. The council, as its initial task and in conjunction with community and city department-head cooperation, should seek to review the criminal code of the state and the existent criminal ordinances of the municipality. These would then be reformulated, to the extent feasible, into a comprehensive and specific code of ordinances meeting the legislative intent of the state statutes and *particularly* in response to realistic methods available to the police to enforce such ordinances. For example, blanket prohibitions against "sodomy" would be reformulated into prohibitions of concretely defined homosexual conduct which can be realistically enforced. The standard of "realism" would encompass the cost of police services in the light of other priorities and the consideration of maintaining the dignity and efficacy of the police function.²⁰

2. The municipal legislatures should also determine the overall priorities of law enforcement problems of the community and stipulate as a matter of ordinance which activities should receive the preponderance of police interest. Such ordinances, while allowing for police command initiative, should squarely face up to the impossibility of full enforcement and delineate preference areas for police resource allocation. For example, relative priorities should be stated as to the degree of desired police emphasis on apprehension and detection of criminals, on street crime prevention, on provision of emergency services by the police to the public, or on traffic control.

likewise passed progressive home rule constitutional amendments. INTERNATIONAL CITY MANAGEMENT ASSOCIATION, *supra* n. 16, at 7.

19. McCANDLESS, *supra* n. 17, at 187.

20. AMERICAN BAR ASSOCIATION, *supra* n. 1 at 115-116.

3. By means of a clear and explicit ordinance, the city council should publicly and formally delegate residual "legislative" discretion to the police department as a matter of fiduciary trust.

4. The city council should activate a permanent subcommittee, a "Public Safety Policy Committee," and entrust it with the responsibility for continuous review to assure that the police department meets the policy ordinances formulated and that the latter continue to reflect community needs over time. Legislative review of police conduct should be achieved in conjunction with the traditional budgetary review process.

Systematic methods of police performance valuation are long overdue. Elements of the "Program Planning Budgeting Systems" (PPBS) technique lend themselves to the measurement of police effectiveness. This approach is characterized by a precise definition of police program purposes (presumably spelled out in the above recommended ordinances), identification of quantifiable indices of performance, and cost/benefit studies to measure effectiveness in terms of revenue outlays. An alternative approach is to use the "Program Analysis and Review" (PAR) system which, while requiring minimal paper work, compels analysis of issues confronting the police, mandates program definition, and requires follow-up through police department evaluative reports submitted with budgetary requests.²¹ Lack of adequate data to implement aspects of a systematic review cannot remain an excuse. Most jurisdictions have the current capability to produce adequate data on reported crime rates, crime clearance rates, arrests and clearances per police department employee and per unit of expenditure, and population served per police employee and per unit of expenditure. Data which is generally nonexistent but the accumulation of which can be assured at a reasonable expense includes a victimization survey, crime clearance by victim, percent and typology of city population expressing lack of sense of security, and percent and typology of city population expressing satisfaction with public service.²²

Recommendations of police performance evaluation system should not obfuscate the primary importance of legislative reformulation of criminal laws and ordinances to reflect police "realities"; the delineation by ordinance of police resource allocation

21. Fletcher, *From PPBS to PAR in the Empire State*, 65 STATE GOVERNMENT 198 (1972).

22. Barbour, *Measuring Local Government Productivity*, INTERNATIONAL CITY MANAGEMENT ASSOCIATION MUNICIPAL YEAR BOOK 38-46 (1973).

priorities; the formal delegation of residual "legislative" discretion to the police command; and the establishment of a permanent legislative technique for review of police performance. All these steps are new and significant and, if implemented, they will reassert the proper and necessary legislative role in the conduct of police services to the community.

VI. A RECOMMENDED ROLE FOR THE JUDICIARY IN THE CONTROL OF POLICE AUTHORITY

It was previously pointed out that the discretionary power of the police officer is vast and that it is of quasi-judicial nature. Exercise of such discretion is then within the review prerogatives of the judiciary as to its propriety in the context of the federal, state, and local laws. It should be noted that while the concern here is the imprudent use of discretion rather than flagrant police misconduct, the difference between the concepts is often obscure. Use of the baton where the restraining hand will do, can be, for example, an incident of improvident discretion or an act of malicious brutality. Consequently, the role envisioned for the judicial branch of local government also encompasses review of outright police misconduct.

This model contemplates that concurrently with the ordinances previously recommended, the city council would enact laws that will define a judicial role in reviewing police practices. Specifically:

1. The body of city ordinances should formally recognize the main elements of discretionary power of the police officer stipulating that he has the authority to decide whether, for example, to arrest or to seek prosecution.

2. The council, again by means of an ordinance, should delegate such discretionary power as a fiduciary trust and place responsibility upon the chief of police to maintain its propriety and compatibility with the laws of the jurisdiction and the land.

3. The council should create a municipal judicial office, the "Justice of Police," with the responsibility to provide a forum for citizens complaints against the police. It is of the essence that this office, either part-time or full-time dependent upon anticipated usage, be considered as a formal adjunct of the judicial branch of local government; the source, by a long standing tradition of Anglo-American law, of the rule of legality. Consequently, the person holding this position should have similar qualifications to those of a trial judge and be appointed by the mayor with the consent of the council from a list of candidates submitted by the

municipal bar association.

Significantly, the purpose of this new office would *not* be to settle disputes between parties but rather to safeguard, in the manner of an "ombudsman," the exercise of the "quasi-judicial" discretion by the police. The "Justice of Police" would utilize the complaints entered by the citizenry not for the determination of the guilt or innocence of a particular police official, but as a vehicle to continuously monitor the propriety of police discretionary power and related practices. The police department's command would remain the primary investigator and disciplinarian in the disposition of individual complaints.

VII. THE EXECUTIVE ROLE

It should be evident to the reader that the model, in stipulating the indicated role for the legislative and judicial intervention in police decision making, considers executive responsibility as the cornerstone in controlling police discretion. Given the realities and complexities of the contemporary police function, legislative and judicial entry into police policy can be but a supplemental, albeit necessary, safeguard to the exercise of police authority. Consequently, as its central focus the model envisions an internal system of control within the police agency which is grounded on an ideal of professionalism. And by professionalism "is meant that practice must involve technical skills and fiduciary trust in the practitioner's exercise of discretion."²³

VIII. CONCLUDING NOTE

James Q. Wilson, a noted student of the American police, concluding his commentary on the study of eight urban police departments, observes that while these agencies all showed sensitivity to their political environment—they were not governed by it. "To be governed," states Wilson, "means that the policies, operating procedures, and objectives of the organization are determined deliberately and systematically by someone with authority to make these decisions."²⁴ The preceding model seeks to point out directions where conscious governance can again enter the conduct of police affairs.

23. BITTNER, *supra* n. 6, at 55.

24. J.Q. WILSON, VARIETIES OF POLICE BEHAVIOR 230 (1968).