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# POLICE POLICY FORMULATION: A PROPOSAL FOR IMPROVING POLICE PERFORMANCE\*

*Herman Goldstein\*\**

THE police function in this country is much more varied and much more complex than is generally recognized. This is particularly true today in the congested areas of large urban centers where the demand for police services is especially great and where the police are confronted with an increasing variety of difficult situations, many of which stem from dissatisfaction with the economic and social conditions existing in such areas. As law enforcement has become more difficult, it has, for the same reasons, taken on new importance as a function of local government.

Contributing to the major current concern regarding law enforcement is the growing awareness of the fact that the police are simply not equipped to respond adequately to the increasing demands being made upon them. This should not come as a surprise to anyone. Law enforcement agencies, over the years, have never been provided with the kind of resources, personnel, education, and leadership which their responsibilities have required.<sup>1</sup> Substantial progress has been made in recent years, especially when compared with the rate of improvement in the past, but such progress has occurred in an uneven manner and its effect has frequently been diminished by backsliding. Within this period, standards and goals have been significantly increased, but they remain modest when related to the magnitude and complexity of existing problems.

Recent improvements have centered upon providing the police with better equipment, more personnel, higher compensation, in-

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\* Segments of this article are drawn from the author's contribution to a manuscript, prepared in collaboration with Professor Frank J. Remington of the University of Wisconsin Law School, which appears as chapter two, entitled *Law Enforcement Policy: The Police Role*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967).

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1. Among the most significant works spanning the past half century that document the absence of adequate resources in law enforcement are: FOSDICK, *AMERICAN POLICE SYSTEMS* (1920); FULD, *POLICE ADMINISTRATION* (1910); NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON POLICE*, No. 14 (1931); SMITH, *POLICE SYSTEMS IN THE UNITED STATES* (2d ed. 1960).

creased training, and improved management techniques. All of these measures are badly needed and each contributes to raising police efficiency. But it is becoming increasingly apparent that operating efficiency alone is not enough.

Future progress toward fulfilling the law enforcement function is likely to depend primarily upon the degree to which the police and others effectively respond to the numerous problems involved in employing our legal system to deal with the infinite variety of behavioral situations which confront the police. Many of these situations are obviously beyond the control of the police. Their improvement depends upon the correction of existing social and economic conditions, increased effort on the part of community welfare agencies, and changes in the law, in court procedures, and in the functioning and orientation of correctional agencies. Nevertheless, there remain many problems that are within the capacity of the police themselves to resolve.

The issues that are involved in those aspects of the law enforcement problem with which the police themselves can deal are much more difficult to resolve than those that are raised in the attempt to increase operating efficiency. They relate, for the most part, to the highly sensitive and delicate function of exercising police authority. Their solution, difficult as it may be, is essential if the police are to achieve a system of law enforcement that is not only efficient, but also fair and effective. The degree to which the police succeed in meeting these latter objectives will determine, in the long run, the strength of the law enforcement function in our democratic society.

## I. THE EXISTING POLICY VACUUM

### A. *The Nature of the Police Function*

The most acute problems confronting the police do not receive the kind of attention that they deserve from persons outside police agencies because of a common lack of understanding of the true nature of the police task. Police officers are daily engaged in handling a wide variety of complex situations, but the nature of such situations is rarely communicated to those outside the police establishment. If the police were to analyze their workload in a systematic manner and to make public the results of their findings, it is likely that several of the most widespread notions regarding the police function would be dispelled.

One common assumption is that the police are primarily engaged in activities relating to the prevention of serious crime and the ap-

prehension and prosecution of criminals. Actually, only a small percentage of the time which an average police officer spends on duty is directly related to the handling of serious offenses. This is especially true in small jurisdictions where few crimes occur. But it is equally true in the most congested areas of our large cities where high crime rates are experienced; for, even in such areas, a police officer, during a typical tour of duty, is occupied with a variety of tasks that are unrelated to the crime problem: assisting the aged and the mentally ill; locating missing persons; providing emergency medical services; mediating disputes between husbands and wives, landlords and tenants, or merchants and their customers; caring for neglected children; providing information about various governmental services and processes; regulating traffic; investigating accidents; and protecting the rights of individuals to live where they want to live and say what they want to say.<sup>2</sup>

Another popular misconception is that the police are a ministerial agency, having no discretion in the exercise of their authority. While this view is occasionally reinforced by a court decision,<sup>3</sup> there is a growing body of literature that cites the degree to which the police are, in fact, required to exercise discretion—such as in deciding which laws to enforce, in selecting from among available techniques for investigating crime, in deciding whom to arrest, and in determining how to process a criminal offender.<sup>4</sup> Broad and oftentimes ambiguous statutes defining their powers and the limited resources made available to them are the major factors among several that require the police to assume such a discretionary role.

A third widespread notion regarding the police function is that the primary authority available to and used by the police is that of invoking the criminal process—that is, arresting a person for the pur-

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2. While it is rare for police agencies to articulate this range of functions, it is even rarer for them to respond directly to such functions in a structured manner. For an interesting example of the latter, see Winston-Salem, N.C. Police Department, *A New Approach to Crime Prevention and Community Service* (mimeo. 1966).

3. See, e.g., *Bargain City U.S.A., Inc. v. Dilworth*, 407 Pa. 129, 179 A.2d 439 (1960); *State v. Lombardi*, 8 Wis. 2d 421, 99 N.W.2d 829 (1959).

4. See, e.g., BANTON, *THE POLICEMAN IN THE COMMUNITY* 131-46 (1964); LAFAVE, *ARREST* 61-161, 490-527 (1965); SKOLNICK, *JUSTICE WITHOUT TRIAL* 71-88 (1966); Abernathy, *Police Discretion and Equal Protection*, 14 S.C.L.Q. 472 (1962); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); H. Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140 (1963); J. Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962); LaFave, *The Police and Nonenforcement of the Law* (pts. 1-2), 1962 WIS. L. REV. 104, 179; Remington, *The Role of Police in a Democratic Society*, 56 J. CRIM. L.C. & P.S. 361 (1965); Remington & Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481.

pose of prosecuting him for having committed a crime. However, for every time that a police officer arrests a person, he also disposes of scores of incidents by employing a lesser form of authority, such as ordering people to "move on," turning children over to their parents, or separating combatants. Furthermore, when an officer does decide to make an arrest, it is not always with the intention of prosecuting the individual; rather it may be for the much more limited purpose of safeguarding the arrestee or controlling a given type of criminal activity, such as prostitution or gambling.<sup>5</sup>

Finally, it is widely believed that, in the investigation of criminal activity and especially in the identification of offenders, police officers depend primarily upon physical evidence that is subject to scientific analysis. Admittedly, collection and analysis of physical evidence does constitute an important facet of police work; in some cases, it holds the key to identification and is the factor upon which the value of all other evidence depends. But, in the vast majority of cases, the analysis of physical evidence, to the extent that there is any, is merely supportive of evidence acquired through some other means. Despite the major and often fascinating advances that have been made in the scientific detection of crime, primary dependence is still placed upon the work of detectives who, once a crime has been committed, set out in search of motives and bits and pieces of information from victims, witnesses, and various other persons who might have some knowledge that will contribute to the identification of the perpetrator of the crime. It is often a rather tedious and undramatic process that depends, for its success, upon the resourcefulness and perseverance of the investigating officers. Involved in the typical investigative effort are such important practices as the questioning of individuals, the search of private premises, the use of informants, and, in some cases, the employment of a variety of "undercover" techniques to acquire firsthand knowledge of criminal activity.

#### B. *Absence of Adequate Guidelines*

One of the consequences of recognizing the true nature of police activities is that one realizes there are vast areas of the police function which, in the absence of adequate legislative guidelines, are left to the discretion of individual officers. Moreover, even when existing laws are clearly applicable, the police are often required to select from among the various alternative forms of action which exist within the outer limits of the authority prescribed by such laws.

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5. LAFAYE, ARREST 437-89 (1965).

There have been some isolated efforts on the part of the police to fill this gap by providing more detailed guidance for the day-to-day work of their personnel. Such efforts have related primarily to traffic enforcement techniques and the handling of juvenile offenders.<sup>6</sup> The overall picture, however, reflects a reluctance on the part of police administrators to establish policies to fill the existing void. This reluctance is in sharp contrast to the strong tradition within police agencies for promulgating a variety of standard operating procedures to govern the internal management of the police force. The difference in attitude appears to be attributable largely to the real doubts possessed by the police as to the propriety of their assuming a policy-making role that so closely parallels the legislative function.<sup>7</sup>

Confronted each day by frequently recurring situations for which no guidance is provided, the individual officer either develops his own informal criteria for disposing of matters which come to his attention—a kind of pattern of improvisation—or employs informal criteria which have, over a period of years, developed within the agency of which he is a part. While such criteria are neither articulated nor officially recognized, they tend to take on some of the characteristics of officially promulgated policies. Functioning in this manner and employing their own imagination and resourcefulness, individual police officers often succeed to an amazing degree in muddling their way through: disputes are resolved; dangerous persons are disarmed; people not in control of their capacities are protected; and many individuals are spared what, under some circumstances, would appear to be the undue harshness of the criminal process. Unfortunately, the results are often less satisfactory, primarily because the criteria that are employed emerge largely in response to a variety of pressures to which the police are exposed and are therefore not carefully developed. For example, the high volume of work which an officer must handle dictates a desire to take shortcuts in the

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6. In the area of traffic enforcement, a number of jurisdictions have developed "tolerance policies" which establish the point above the speed limit at which officers are to warn a motorist or issue a summons to him. Some also provide criteria for making similar decisions with regard to other types of motor vehicle violations. Such policies are most frequently promulgated by state police organizations, and they demonstrate that a need is felt for providing guidelines for the isolated officer who cannot frequently consult with his supervisor or fellow officers. They also reflect a desire on the part of administrators to achieve uniformity in the overall operations of the agency. For a discussion of policies relating to the handling of juveniles, see text accompanying notes 18-19 *infra*.

7. For a more detailed discussion of this point, see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE ch. 2 (1967).

processing of minor incidents. The personal conveniences of an officer—in making a court appearance, completing reports, or working beyond a scheduled tour of duty—become important determinants of how a case is handled. The desire to solve crime becomes a dominant consideration.<sup>8</sup> And such indefensible criteria as the status or characteristics of the complainant, the victim, or the offender may often be among the most seriously weighed factors, since an officer, left to function on his own, understandably tends to respond to a given situation on the basis of his personal norms regarding individual or group behavior.

Continuation of current practices, which can perhaps best be characterized as a process of “drift,” is clearly not in the interest of effective law enforcement. The potential for arbitrariness inherent in an uncontrolled exercise of discretion is clearly inconsistent with the objective of fairness that constitutes so basic an element in the exercise of any form of governmental power. Nor are current practices desirable from the police standpoint; in the absence of guidelines, police officials are continually vulnerable to criticism for the manner in which an officer chooses to exercise his discretion. They are “damned if they do and damned if they don’t.” Police administrators, moreover, are without an effective means for controlling the behavior of individual officers. Thus, since effective restraints are lacking, incidents tend to arise that prompt legislatures and courts to step in and take actions which often have repercussions—in the form of curtailment of police powers—far beyond the specific situation that initially served to arouse their interests.

There is an obvious need for some procedure by which an individual police officer can be provided with more detailed guidance to help him decide upon the action he ought to take in dealing with the wide range of situations which he confronts and in exercising the broad authority with which he is invested. Viewed in somewhat different terms, the challenge is to devise procedures which will result in police officers employing norms acceptable to society, rather than their personal norms, in their exercise of discretion.

### C. *Alternative Solutions*

There is no single way in which the existing policy vacuum can be filled, nor is it likely or desirable that it be filled in its entirety.<sup>9</sup> But

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8. This factor is explored in some detail in SKOLNICK, *JUSTICE WITHOUT TRIAL* 164-81 (1966).

9. Banton observes that the only long-term solution to the problem of police discretion is for the police and the public to share the same norms of propriety. BANTON, *THE POLICE AND THE COMMUNITY* 146 (1966).

the width of the existing gap—especially as one views the functioning of the police in our large urban centers—affords ample opportunity for reducing its size.

The police are accustomed to looking toward the legislature and the courts for their guidance. There has, in recent years, been a special focus upon the latter since the appellate courts have undertaken to establish, with increasing specificity, the rules of constitutional, procedural due process.<sup>10</sup> Such judicial activity, especially that of the Supreme Court, has been viewed by one commentator as action of “desperation,” taken because of default on the part of others to fill the existing vacuum.<sup>11</sup> It has been argued that the Court, in taking on this rule-making function, has assumed an uncomfortable role which it is not equipped to fulfill and which constitutes, at best, an awkward and somewhat ineffective process for hammering out detailed rules of criminal procedure.<sup>12</sup> Among the major liabilities which are cited with respect to this approach are the breadth and especially the rigidity of the Court’s holdings. In addition, in evaluating the courts as a source of guidance, it must be recognized that many of the most important and perplexing problems encountered by the police never become the subject of court proceedings.

Traditionally, both federal and state legislatures have restricted themselves to providing the police with a minimum set of broadly stated guidelines covering the major elements in criminal procedure.<sup>13</sup> They are often cited as the logical branch of government to remedy the need for additional guidelines since they have the capacity to explore problems on their own initiative, to gather facts, to elicit public opinion, and to act in a manner which is subject to later adjustment.<sup>14</sup> The recent proposal of the American Law Institute, embodied in its Model Code of Pre-Arrest Procedure, represented an effort to move in this direction, incorporating, as it did, detailed legislative guidelines for police activity during the period from investigation and arrest to the time the suspect is pre-

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10. The most recent and most specific rules are found in *Miranda v. Arizona*, 384 U.S. 436 (1966).

11. Packer, *Policing the Police: Nine Men Are Not Enough*, New Republic, Sept. 4, 1965, p. 19.

12. *Id.* at 18. See also Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Packer, *Who Can Police the Police?*, The N. Y. Rev. of Books, Sept. 8, 1966, p. 10.

13. See LaFare, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 568-79 (1965); Remington & Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481.

14. See Packer, *Policing the Police: Nine Men Are Not Enough*, New Republic, Sept. 4, 1965, pp. 20-21.

sented in court.<sup>15</sup> In at least one major area covered by the Model Code, however, the opportunity for careful legislative consideration has since been significantly restricted by the Supreme Court's action in *Miranda v. Arizona*.

Even if legislatures become active in spelling out guidelines for the police, it must be recognized that there are now, and presumably always will be, many areas—particularly as one gets closer to the day-to-day problems encountered by the police—in which it is neither feasible nor desirable for the legislature to prescribe specific police practices. Variations in the size of police jurisdictions within a state, changing social conditions, and variations in the nature of the police function, among other factors, require that there be room for administrative flexibility. It seems apparent that the infinite variety of complex situations which confront the police today makes it essential that the most detailed and specific policies for handling them be formulated at the level closest to that at which they arise.

In light of the above considerations, it seems reasonable that, within legislative boundaries that may in some areas be more detailed than those which now exist, the police themselves be given the responsibility for formulating policies which will serve as guidelines in their effort to achieve effectiveness and fairness in their day-to-day operations, and that there be an explicit recognition by the legislatures of the necessity and desirability of the police operating as an administrative policy-making agency of government. Obviously, such police-made policies would be subject to challenge if they were not consistent with the general legislative purpose or with such legislative criteria as are provided to guide and control the exercise of administrative discretion. Subject to appropriate review and control, the exercise of administrative discretion in this manner is likely to be more protective of basic rights than the routine, uncritical application by police of laws which are often necessarily vague or overgeneralized in their language.

## II. THE VALUE IN RECOGNIZING THE POLICE AS AN ADMINISTRATIVE AGENCY HAVING IMPORTANT POLICY-MAKING RESPONSIBILITIES

Police participation in the development of policies to fill the existing vacuum and to cope with rapidly changing social and behavioral conditions would be a valuable contribution to the operation of police agencies, to the professionalization of the police, and to the overall functioning of the criminal justice system. Some of the specific advantages are set forth in detail below.

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15. ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, 1966).

*A. The Maintenance of Administrative Flexibility*

The police have always had a great deal of flexibility in their operations, but this has been primarily as a result of legislative default rather than of deliberate, overt legislative choice. The traditional legislative response with respect to difficult issues like the control of gambling activities or the stopping and questioning of suspects has been either to deal with them by means of an overly generalized statute, as is true with respect to gambling activities, or not to deal with them at all, which has been true, at least until recently, with respect to stopping and questioning suspects. The practical consequence has been to leave police with broad flexibility, but the delegation of responsibility has been implicit at best and police have not taken it as a mandate to develop and articulate proper enforcement policies. The action of appellate courts in setting down increasingly specific rules to govern police conduct is partly a result of this failure. This trend toward judge-made rules is inspired in large part by a prevalent assumption that police are unwilling or unable to develop proper policies and to conform their practices to such policies. The police, by assuming responsibility for the development of appropriate administrative policies, will have the opportunity to reverse the trend and, as a consequence, to preserve the flexibility which they need if they are to meet adequately the wide range of problems which they confront under constantly changing conditions.

*B. A Sound Basis for the Exercise of Discretion*

The formulation of administrative policies affords the police an opportunity to establish sound grounds for the exercise of their discretion. Careful analysis of existing practices, which is a necessary step in the formulation of policies, should result in the exposure and rejection of those considerations which, according to standards of fairness and effectiveness, are inappropriate. Development of defensible criteria would, in addition, afford an opportunity to incorporate into police decision-making considerations that are based upon existing knowledge regarding the various forms of behavior with which the police are concerned. In the long run, the exercise of discretion in accordance with defensible criteria would create greater confidence in the police establishment. More immediately, it would lead to a reduction in the number of arbitrary actions taken by individual officers, thereby substantially reducing the tensions which such actions often create—particularly in areas in which minority groups are affected.

### C. *Acknowledgment of the "Risk Factor" Involved in Policing*

Numerous factors contribute to the defensive posture commonly assumed by the police. Among them is an awareness on their part that members of the public will often question their exercise of discretion in a case in which subsequent developments focus attention upon an officer's decision. For example, a police officer may locate one under-age youth in a group of young people engaged in a drinking party. The fact that the youth is only one month under age may prompt the officer to release him with a warning. However, if the youth subsequently becomes involved in a serious accident, the fact that he was released earlier in the evening will often result in the officer's being castigated by his superior, because the officer has no publicly-acknowledged right to exercise discretion although all agree that it is both necessary and desirable that he do so.

Given the wide range of responsibilities that the police have, they cannot be held to a system of decision-making which involves no risk-taking—any more than could psychiatrists in deciding whether to release a person who has attempted suicide or parole board members in voting upon the release of an inmate. The formulation of policy and its articulation to the public would, over a period of time, begin to educate the public to recognize that the police must not only exercise discretion, but must also assume a risk in doing so. Prior statements of policy which "put the community on notice" with regard to police functioning in various areas would afford some relief from the current dilemma in which, in the absence of such policy formulations, the police are subject to both ridicule for not exercising discretion and condemnation for making discretionary judgments when they do not work out.

### D. *A Means for Utilizing Police Expertise*

Many actions which the police officer takes are based upon the knowledge and experience he has accumulated in his years of service. In concluding that a crime is being committed, an officer may reach a judgment quite different from that which would be reached by an inexperienced layman or even an experienced trial judge, since the officer may have, for example, the ability to recognize the smell of narcotics or the sound of a press used in printing illegal numbers or policy tickets. There has, however, been little effort made to capitalize upon police experience. In order to do so, the police would necessarily have to attempt to assess its reliability; they would have to distinguish accurate inferences (such as, the sound is that of a gambler's printing press) from inaccurate or improper ones (such as

Negroes are immoral). It would also be necessary for the police to systematize their experience so that it can be effectively communicated to new officers through training programs and to others, like judges, when the propriety of police action is challenged. To the extent that operating criteria reflect police experience, the police are afforded a vehicle in the policy-making process for articulating their expertise.

#### *E. More Effective Administrative Control Over Police Behavior*

While the actions of an individual officer may appear on the surface to be improper, there is often no basis on which his superior can take disciplinary action against him, since his conduct violates neither the law nor any existing departmental policies. In such a situation, the police administrator is caught in a conflict between his desire to be responsive to a citizen who has reason to complain about a policeman's behavior and his fear concerning the reaction of his force to seemingly arbitrary discipline where there is no clear breach of a preannounced standard of proper conduct.

The reluctance to characterize an officer's conduct as unwise is increased when the administrator feels that to do so will result in either the officer or the municipality being sued for damages. Consideration of this possibility may force the administrator into the position of defending a given action as legal, and thus seemingly "proper," even though it reflected poor judgment on the part of the officer. To minimize the likelihood of similar situations arising in the future, the administrator may urge his subordinates to use "common sense," but such a request is of little value unless he is prepared to spell out precisely what is meant by "common sense."

The promulgation of policies to which police officers are required by regulation to adhere would provide a basis for disciplining those who violate such policies. But, more important, it would serve in a positive way to inform members of a force what is expected of them. Progress in elevating the quality of law enforcement is much more likely to be realized if one views clear and defensible standards as a basis for eliciting a proper response from police officers, rather than considering such standards primarily as the basis for the taking of disciplinary actions against police officers.

#### *F. The Improvement of Recruit and In-Service Training Programs*

Recruit training in police agencies is frequently inadequate because the instruction bears little relationship to what is expected of the officer when he goes to work in the field. In the absence of guide-

lines that relate to an analysis of police experience, the instructor usually is left with only the formal definition of police authority to communicate to the trainee, and this is often transmitted to the student merely by reading statutory definitions to him. Students are taught that all laws are to be fully enforced. The exercise of police authority is similarly taught in doctrinaire fashion. With this kind of formal training, the new officer finds, upon his assignment to the field, that he has to acquire from the more experienced officers with whom he is initially assigned a knowledge of all the patterns of accommodations and modifications. As he becomes aware of the impracticality and lack of realism of much of what he learned as a student, he unfortunately begins to question the validity of all aspects of his formal training.

Obviously, there is a need for training more directly related to the important problems which the officer will face in the field—training which will not only instruct him on the limits of his formal authority, but also inform him of the department's judgment as to what is the most desirable administrative practice to follow in exercising his authority. Carefully developed administrative policies would serve this important function.

#### *G. A Basis for the Professionalization of the Police*

It is now commonplace to refer to practically any effort that is aimed at improving law enforcement as a contribution to the professionalization of the police. Thus, improved training, application of the computer to police work, adoption of a code of ethics, and increased salaries have all, at one time or another, been cited as contributing to police professionalization.

Certainly, there is much that police do today that would not, under any definition of the term, be viewed as constituting professional work. Directing traffic at a street intersection or enforcing parking restrictions requires stamina, but little knowledge. In sharp contrast to these functions, however, are the responsibilities of a patrolman assigned to police a congested area in which numerous crimes occur; he is called upon to make highly sophisticated judgments having a major impact upon the lives of the individuals involved. Such judgments are not mechanical in nature, but rather are every bit as complicated and difficult to make as are the decisions made by any of the behavioral scientists, and in many instances they are more difficult because they must be made under the pressure of the immediate circumstances.

Development of criteria for dealing with such complex social and behavioral problems will require extensive research, the systematizing of experience and knowledge, and continual testing of the validity of the assumptions and findings upon which the criteria are based. The formulation of such criteria will also require adherence to values relating to the role of the police and law enforcement in a democratic society that are more basic than those values which are involved in a consideration of technical operating efficiency. The making of judgments based upon criteria that are formulated pursuant to extensive experience, research, and experimentation together with a commitment to values that reflect a sense of responsibility to society constitute important elements in the development of a true profession.

#### H. *A Method for Involving the Police in the Improvement of the System of Which They Are a Part*

Decisions relating to the enforcement function have traditionally been made for the police by persons outside the police establishment. The police have typically not even been consulted when changes have been contemplated in the substantive or procedural criminal law, despite the fact they clearly have more experience than anyone else in dealing with some of the basic issues. Failure to involve the police in most revision projects is probably due to the fact that police personnel are not considered qualified to deal with the complicated questions involved. But, if it is true that police lack the necessary skill to participate in such efforts, this lack of ability is in large measure attributable to the fact that in the past they have not been involved in the making of important decisions.

There is, today, a strong commitment to the involvement of disadvantaged groups, like the poor and the young, in decisions about their roles in society. This commitment is based on the belief that they will respond most affirmatively if they have a feeling of participation in such decisions. The same need is apparent with respect to the police, for, in this sense at least, they also are a disadvantaged group. Law enforcement personnel are more likely to want to conform and are more likely to develop an ability to conform if they are made a part of the process for making important decisions affecting their function.

### III. ILLUSTRATIONS OF AREAS OF POLICE FUNCTIONING WHICH ARE SUBJECT TO POLICY FORMULATION

Practically every aspect of police functioning gives rise to important and sensitive issues of a kind which can and should be dealt

with through the careful and systematic development of policies by a law enforcement agency. The following are merely illustrative of the types of functions that are in need of attention, the difficult issues to which they give rise, and the importance of facing up to them.

A. *The Decision Whether To Invoke the Criminal Process*

Whether a criminal prosecution is initiated against an individual depends, in most instances, upon police judgment. Theoretically, this judgment is based upon the statutory definition of the crime, although it is abundantly clear that there are many situations in which a violation has in fact occurred and is known to the police, but in which there is no effort by the police to make an arrest. Among the factors accounting for this discretionary decision not to invoke the criminal process are the volume of violations of a similar nature, the limited resources of the police, the overgeneralization of legislative enactments defining criminal conduct, and the various local pressures reflecting community values and attitudes.

The social gambling situation affords a good example of the dilemma which the police face. In most jurisdictions, all forms of gambling are illegal. Yet it is apparent that legislatures neither intend nor expect that such statutes be fully enforced. The consequence is that local police are left with the responsibility for developing an enforcement policy for their particular community. The policy of a department may, for example, be clear, albeit unwritten, that games of chance at church carnivals will be permitted because of their charitable nature.<sup>16</sup> However, in the same community, the police response to gambling in a private home may vary with the circumstances of the individual case. Whether the police take enforcement action may depend on the answers they obtain to several key questions: is there a complainant and, if so, is he adversely affected by the gambling activity; is the gambling the prime purpose for the group's getting together or is it incidental to some other activity or pastime; is the activity organized; do the participants know each other; were they steered to the location for purposes of engaging in gambling or is the assemblage a get-together of old friends; what is the amount of money involved; and is there a profit separate from winnings being realized by the individual hosting the activity or by any one of the individuals present. The existence of any one of these factors will not necessarily result in an arrest, but the police usually will take

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16. For an interesting case study growing out of an unarticulated policy of non-enforcement against bingo in churches and synagogues, see LOGUE & BOCK, *THE DEMOTION OF DEPUTY CHIEF INSPECTOR GOLDBERG* (Inter-University Case Program, No. 78) (1963).

action when there is an insistent complainant or when a combination of factors suggests that the gambling activity is commercial in nature. The difficulty is that the employment of such criteria by individual officers may lead to disparity in practice and, even where practice is consistent, may involve basic policy questions which are not raised and thus not considered or resolved. Complaints may originate from neighbors who are disturbed by the noise or from wives who are either concerned over the monetary losses of their spouses or resent their absence from home. Should a police agency allow itself to be "used" under such conditions? Does the fact that enforcement takes place only when there is an insistent complainant constitute a desirable pattern of action?

The tests used in practice to determine whether the game is "commercial" rather than "social" also raise important policy questions which have not been resolved. Social gambling in a slum area assumes a different form than does social gambling in a middle-class neighborhood: a number of men commonly get together in a private apartment, placing comparatively small bets on a dice game. Such activity is endemic to such an area. When the police investigate such games they typically find that the participants cannot identify each other. The gambling is therefore viewed as not being "social" and thus is considered properly subject to enforcement. Yet, considering the pattern of life in such an area, is there any reason to characterize this behavior as more reprehensible than that engaged in by a group of men involved in a poker game for some financial stakes at a local country club? Pursuant to present practices, the participants in the dice game will generally be arrested, searched, transported to a lock-up, detained overnight, and brought before a judge the following morning. The net effect of such actions for the police seems obvious: relationships with the residents of the area, which typically are already very strained, are further aggravated.

The police action with regard to the dice game in the slum area is often in response to complaints from neighbors who are disturbed by the game. It may also be a response to the general police concern, based on prior experiences, that dice games in such areas frequently end in fights, which in turn sometimes result in homicides. Intervention by the police therefore is viewed as serving a crime prevention function. But neither the attitude of the community nor the relationship of the dice game to more serious crime is studied and evaluated. As a consequence, the current police practice gives the appearance of being the product of improper class or racial discrimination.

The police treatment of aggravated assaults raises issues of a different character. This type of offense comes to police attention more routinely because it frequently occurs in public, the victim or witnesses seek out the police, there is a desire for police intervention before more harm is done, or simply because the victim desires police assistance in acquiring medical aid. Even though the perpetrator is known to the victim in a high percentage of these cases, however, there frequently is no arrest or, if an arrest is made, it may be followed by release without prosecution. This is especially true in the slum areas of large urban centers and is due primarily to an unwillingness on the part of the victim to cooperate in a prosecution.

If the parties involved are related or are close friends, the victim is frequently unwilling to establish the identity of the assailant, attend show-ups, view photographs, or even answer questions truthfully. If the victim does cooperate at the investigation stage, he may still refuse to testify at trial and may even express a desire that the assaulting relative or acquaintance be set free. Due to the frustrations police officers have experienced in handling such cases, they often take less than the expected degree of interest in pursuing a prosecution when there is any early indication of reluctance on the part of the victim to participate in the prosecution. In some jurisdictions, the accumulated police experience results in an early decision not to prosecute and, in some cases, not to arrest.

It would be possible for the police to prosecute more frequently those persons who commit assaults by resorting to the issuance of a subpoena to compel the attendance of the victim at trial, assuming the judge would be willing to compel the victim to testify. This procedure, however, is seldom used. Given the high volume of cases and the competing demands upon a police agency, the path of least resistance is to acquiesce in the desires of the victim. Such acquiescence is often rationalized on the ground that the injured party was the only person harmed and the community as a whole was not affected by the crime. These cases can be written off statistically as clearances—which are viewed as an index of police efficiency—and thus the most immediate administrative pressure is satisfied.

There is some question about the relationship between current police practice in slum assault cases on the one hand, and the amount of crime and the community's attitude toward police on the other. If the criminal justice process has some deterrent value, why would it not deter assaultive behavior in the slum area? To what degree does an awareness of the attitude of the police toward assaultive conduct result in the formulation of negative attitudes on the part of slum

residents toward law and order in general? What is the impact upon the residents of such an area when an attack by a slum resident upon a person residing outside the area results in a vigorous prosecution?

Today, these and other basic policy questions which can be raised are not dealt with by the police. Routine practices are not examined in the light of overall enforcement goals and, as a consequence, may very well serve to complicate rather than solve important social problems. Were the police to review their current practices, they might well conclude that, insofar as assaults, for example, are concerned, it is desirable to base police decisions to arrest on such criteria as the nature of the assault, the seriousness of the injury, and the prior record of the assailant, rather than primarily on the degree to which the victim is willing to cooperate.

#### B. *Selection of Investigative Methods*

In the past few years, increasing attention has been given by legislatures and particularly by courts to the propriety of current police detection and investigation methods.<sup>17</sup> Nevertheless, there remain many areas in which the determination as to the investigative technique to be used is left to the police. For example, neither legislatures nor courts have yet reflected much concern with the propriety of police use of "undercover" or "infiltration" techniques, surveillance, or other methods which afford an alleged offender an opportunity to commit a crime in a manner which will make evidence of his offense available to the police. If the present trend toward judicial rule-making continues, it is not at all unlikely that current investigative practices thought by police to be proper and effective will be subject to increasingly specific rules. This has already occurred with respect to in-custody investigation, which is now specifically controlled by the *Miranda* decision. Whether this will occur with respect to other police practices will depend in large measure upon whether the police can develop policies which differentiate the proper from the improper use of particular investigative practices and can see to it that improper methods are not used as a matter of informal departmental policy or by individual officers out of either ignorance or excessive zeal.

Field interrogation is illustrative of important police investigative techniques which may or may not survive attack. Police have

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17. The extent to which legislatures and courts have addressed themselves to three specific areas of police investigation—the conduct of searches, the use of "encouragement," and the stopping and questioning of suspects—is explored in MCINTYRE, TIFANY & ROTENBERG, *DETECTION OF CRIME* (to be published in 1967).

generally argued that their right to stop and question people is essential, especially with respect to those persons who are observed in an area in which a crime has just been committed. With several exceptions, however, there has been little effort made to provide individual officers with carefully developed guidelines so as to assure that such interrogation is sparingly and carefully employed under conditions that justify its use.

The use of field interrogation as an investigative technique is complicated by the fact that it is a part of the total preventive patrol program—which is a current response by police in large cities to the demand that the “streets be made safe.” Preventive patrol often involves stopping persons using the streets in high-crime areas and making searches of both persons and vehicles. The purpose of this technique is not only to talk with individuals who may be suspected of having recently committed crimes but, more broadly, to find and confiscate dangerous weapons and to create an atmosphere of police omnipresence which will dissuade persons from attempting to commit crimes because of the likelihood of their being detected and apprehended.

It is probably true that a program of preventive patrol does reduce the amount of crime on the street, although there has been no careful effort to measure its effectiveness. It is also apparent, however, that some of the practices included in a preventive patrol program contribute to the antagonism toward the police felt by minority groups whose members are subjected to them. A basic issue, never dealt with explicitly by police, is whether, even from a purely law enforcement point of view, the gain in enforcement outweighs the cost of community alienation.

The continuation of field interrogation as a police investigative technique depends upon whether the police are willing to develop policies which carefully distinguish field interrogation from street practices which are clearly illegal and to take administrative steps to demonstrate that a proper field interrogation program can be carried out without it leading also to an indiscriminate stopping and searching of persons.

### C. *The Decision Not To Prosecute Individuals Who Have Been Arrested*

While in some states it is the practice to take all arrested individuals before a judge, it is standard procedure in others for the police to release some individuals prior to their scheduled court appearance.

Drunkards are often given their freedom once they are sober; juveniles are often released after consultation with parents or a social service agency; and in large urban areas, narcotic addicts and small-time peddlers are often released with a grant of immunity in exchange for information leading to the arrest of more serious violators.

Where it is the practice to release some drunkards without charging them, eligibility for release tends to be based upon such factors as appearance, dress, reputation, place of residence, and family ties. The process is generally intended to separate the common drunkard from the intoxicated person who "knows better" but, in the judgment of the police, simply had "one too many." Whether this kind of distinction adequately serves an enforcement or social welfare objective is not entirely clear. Certainly police, who are daily confronted with the problem of the drunkard, ought to give continuing attention to whether defensible criteria are being employed and, perhaps more important, ought to lend support to and participate in an effort to develop ways of dealing with the alcoholic which are more sensible than the current arrest and release programs.

Criteria have been formulated in some communities to assist police in deciding whether a juvenile offender should be released to his parents, referred to a social agency, or brought before the juvenile court.<sup>18</sup> In other communities, however, such decisions continue to be made by the police without an articulated basis and the decisions often reflect the use of such indefensible criteria as the color of the child, his attitude toward the police, or the status of his parents in the community.<sup>19</sup>

The practice of releasing some narcotic addicts and peddlers in exchange for information or co-operation raises other complex issues. Persons involved in narcotics control assume that the investigation of narcotics traffic requires the accumulation of knowledge from those who are involved in the distribution or use of such contraband and that convictions cannot be obtained without the help of informants who co-operate in return for immunity. The potential for abuse in pursuing this practice makes it critically important that the standards for extending an offer of immunity and for measuring

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18. See, e.g., CHICAGO POLICE DEPARTMENT, YOUTH DIVISION, *MANUAL OF PROCEDURE* (1965).

19. See, e.g., Piliavin & Briar, *Police Encounters With Juveniles*, 70 *AM. J. SOCIOLOGY* 206 (1964); Goldman & Nathan, *The Differential Selection of Juvenile Offenders for Court Appearance*, in NATIONAL RESEARCH AND INFORMATION CENTER, NATIONAL COUNCIL ON CRIME AND DELINQUENCY (1963). For an overall view of the police function in the juvenile process, see WHEELER & COTTRELL, *JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL* 28-31 (1966).

co-operation be uniformly and fairly applied. There is, moreover, a need for continual evaluation of the practice to determine whether the gain derived from it really justifies the costs which are involved.

D. *The Issuance of Orders to Individuals Regarding Their Movements, Activities, and Whereabouts*

The public, whether as pedestrians or motorists, generally recognizes the authority of the police to direct their movements in traffic. There are many other situations, however, in which police regularly tell people what to do under circumstances where police authority is less clear. For example, police order people to "keep the noise down" or to stop quarreling—usually in response to a complaint from a neighbor; direct a husband to stay away from his wife when they have had a fight; order a young child found on the streets at night to go home; order troublesome "characters" to stay out of a given area; and tell persons congregated on street corners to disperse.

Police generally assume that congregating on a street corner is likely to give rise to disorderly conduct, especially if such assembling takes place outside of a tavern, if those assembled are intoxicated to varying degrees, and if there is heavy pedestrian traffic which is likely to be blocked by the congregating group. The technique ordinarily used by police in such a situation is to order the persons to "move on," thus presumably minimizing the risk of a group disturbance. There is a tendency, however, for this technique to become standard operating procedure as applied to all groups that congregate on sidewalks and street corners, without regard to the varying character of the groups. For example, in some cultural groups, congregating on the streets is the most common form of socializing; and in some congested areas of a city, the corner is used because of the absence of adequate public recreational facilities. For police to respond to these situations in the same manner as they respond to the situation involving an intoxicated group outside a tavern may not serve any real enforcement objective and may instead strain the relationship between the police and the residents of those areas in which the street corner is the place of social and recreational activity.

The practice of ordering people to "move on" is one which has major implications and warrants more careful use. In confronting the question of what should be their proper policy in dealing with congregating groups, the police would have an opportunity to give attention to why groups congregate, to distinguish those congregations which create risk of serious disorder from those which do not,

and to relate police work to other community programs designed to create positive social and recreational opportunities for persons who now lack these opportunities.

### E. *The Settling of Disputes*

A substantial amount of the on-duty time of police officers is devoted to the handling of minor disputes between husbands and wives, neighbors, landlords and tenants, merchants and customers, and taxicab drivers and their riders. Relatively little importance is attached to the handling of such matters by police administrators, particularly those in large urban areas. The patrolman who responds to the report of such a disturbance may inform the parties of their right to initiate a prosecution, may undertake to effect a resolution of the dispute by ordering the parties to leave each other alone (as, for example, by advising an intoxicated husband to go to the movies), or may use some other form of on-the-scene counseling. The approach taken in each case is a matter of choice on the part of the individual officer.

Important policy questions are raised with respect to the way the police handle all disputes and, in particular, to the way they handle domestic disturbances. Yet there has been no systematic effort made to measure the results which may be obtained under the alternative methods which police use, nor has there been an effort made to develop more adequate referral resources (such as social agencies) which might, if they existed, provide a basis for a positive police program for dealing with such disputes. In an effort to develop adequate policies to guide the actions of the individual patrolman, police agencies should compile several relevant facts: how often the same families become involved in disturbances that require police intervention; how often the husband or wife swears out a complaint; the disposition of such cases and the impact that varying dispositions have in preventing future disturbances; the number of serious assaults or homicides which result from domestic disturbances and whether these follow a pattern which might enable a patrolman to identify a potentially dangerous situation; and the kinds of cases which can be referred, with positive results, to existing community resources for dealing with family problems.<sup>20</sup>

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20. The techniques which are used by police in handling domestic disturbances have been the subject of a research project conducted with the co-operation of the Chicago Police Department by Raymond I. Parnas, a graduate student in criminal law at the University of Wisconsin. The results of the study are currently being prepared for publication.

Through the process of careful evaluation of existing practices and experience, the police can acquire a competence which should enable them to develop more adequate follow-up procedures in the domestic disturbance case. This added competence should increase the value and effectiveness of the emergency intervention function of the police and should, in the long run, reduce the heavy burden that is presently placed on the police in dealing with this type of recurring social problem.

#### F. *The Protection of the Right to Free Expression*

None of the functions which the police perform illustrates the sensitive and unique role of the police in a democratic society as well as that which is involved in the safeguarding of the constitutional rights of free speech and assembly. Police frequently are called upon to provide adequate protection for a speaker or demonstrating group that wishes to exercise the right to express one's opinions—opinions that are often unpopular and which are often voiced in the presence of a hostile audience.

Many urban police agencies have not developed and formulated policies to guide police action in such situations. Although the issues involved in recent demonstrations reflect many factors which are beyond police control, it is nonetheless a fact that the manner in which police respond to demonstrations will determine, in large measure, whether violence will break out and, if it does, the degree to which the resulting conflict will escalate and spread.

The problem is a particularly difficult one because police officers may themselves identify more with maintaining order in their community, especially to prevent disorder created by outsiders, than with their basic responsibility to protect the right of free expression of social and political views. For example, the officer in a police district which consists of a white neighborhood may view a Negro march through the neighborhood in favor of open housing as a threat to both public order in his district and the values of the very people in the neighborhood upon whom he depends for support in his day-to-day work. In rural areas or small cities the population may be relatively homogeneous and thus the police officer can be responsive to all of the local citizens without this producing conflict for him. But a very real conflict may develop for the officer in a large urban area, since such areas are typically made up of communities which differ in economic, racial, religious, or other characteristics. The officer who protects the right of free expression of ideas may find him-

self protecting an attack upon the very segment of the community with which he identifies.

In order for the police to respond adequately and consistently in the highly tense situations which arise from political and social demonstrations, there obviously must be a careful effort on their part to work out, in advance, policies which will govern their actions. This development of policies must be coupled with an effort to communicate them to individual officers in a way which will give each officer a basis for identifying with the protection of freedom of expression as an important enforcement objective. In addition, an effort must be made to articulate such policies to the affected community so that the public will understand the reasoning behind police actions. This, in itself, can serve to lessen the likelihood of major disorders.

#### IV. IMPLEMENTATION

Since police agencies do not presently have the capacity to fulfill the kind of policy-making role that has been outlined in this article, implementation of this program will require numerous adjustments in their existing procedures, orientation, and staffing. The nature of these requirements is discussed in detail elsewhere,<sup>21</sup> but their general character will be summarized here.

As a prerequisite, it will be necessary for the police to develop a systematic process for the identification and study of those aspects of their operations which are in need of attention. Police administrators must take the initiative in seeking out the problem areas by analyzing complaints, by observing the results of police activities as reflected in the courts, and by the various other procedures available for analyzing the functioning of their respective departments. It is essential that the police develop a research methodology for exploring the kinds of problems that are likely to be identified—a procedure that equips them to clarify issues, to identify alternatives, to obtain relevant facts, and to analyze these facts in a manner that provides a basis for the development of a departmental policy. The end product must include clearly articulated criteria that will serve as guidelines for police officers and that will be open to public view. Flexibility being one of the major values in administrative policy-making, it is important that provision be made for the periodic re-

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21. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE ch. 2 (1967). With specific reference to the need for controlling police conduct, see H. Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L.C. & P.S. (to be published in June 1967).

consideration of those policies which are adopted so that adjustments to new developments can be effected and corrections may be made of deficiencies which become apparent after functioning under existing policies.

A police agency which accepts policy-making responsibility must develop more adequate systems of control than now exist to assure compliance of its personnel with the policies adopted by its administrators. The agency must also expect and should welcome responsible outside review of such policies as a protection against arbitrary policy-making.

Numerous changes will be required in existing patterns of leadership, personnel selection, training, and organization in order to equip the police to fulfill adequately their broader responsibilities. It is important, for example, that police leaders be provided with an education that will allow them to grasp fully the unique function of the police in a democratic society and that will enable them to support the overriding values relating to individual liberty which often conflict with their attempt to achieve the goal of maximum efficiency in the arrest and successful prosecution of offenders. It is important also that patrolmen in their training, be provided with a professional identification that is supportive of the proper role of the police and that aids in developing a willingness on their part to conform with administrative policies.

The progress realized in the law enforcement field in recent years, especially in the area of training and education, contributes significantly to achieving some of these objectives. Such efforts, however, have suffered for lack of an adequate definition of direction and purpose. The potential of current improvement programs would be vastly increased if those programs were related to the need for the police to develop their own capacity to formulate and implement law enforcement policies. Incorporating this requirement as an objective would serve to provide such programs with the kind of focus for which the need has long been apparent.