

The BJA Executive Session on

Police Leadership

2013

The BJA Executive Session on Police Leadership is a multi-year endeavor started in 2010 with the goal of developing innovative thinking that would help create police leaders uniquely qualified to meet the challenges of a changing public safety landscape.

In support of an integrated approach to creating safe and viable communities across America, the project directors recruited 20+ principals from a range of disciplines. The principals, in turn, led national field teams of practitioners focused on the work of policing and the organization of the future.

To gain new insights on leadership, the *BJA Executive Session on Police Leadership* engaged police chiefs in documenting their own paths and invited leaders to participate in various audio and video forums to tell their stories and discuss the future of policing and police leadership.

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The principals are supported in their work by a team that includes project co-directors Darrel W. Stephens and Bill Geller, project strategist Nancy McKeon, and BJA Senior Policy Advisor Steve Edwards.

Creative Problem-Solving and the Law: Challenges and Opportunities for Leaders of Police and Prosecution Organizations

Part I: Police Organizations

by
Michael S. Scott

A. The Relationship of the Police to the Law

Police commonly refer to their occupation as “law enforcement.” They do so in part to unify the various names of agencies and titles of agents who engage in similar work: “police departments and police officers,” “sheriff’s offices and deputy sheriffs,” “state patrols and troopers,” “the FBI and agents,” and so forth. The term “law enforcement” is perceived by some to connote greater professionalism and to avoid some of the negative historical connotations of the term “police.” But the label “law enforcement” connotes something beyond symbolism, something more substantive: it suggests that enforcing the law is the principal function of these agencies and agents,

that it is the very purpose for which they were created. This notion holds great appeal, to both those in the occupation and those outside of it. To those inside the occupation, it offers a clear sense of purpose and mission. To many it suggests that their work is objectively defined, not subject to the messiness of political influences and considerations, and that police work is not arbitrary or oppressive. And it accurately describes one of the distinguishing aspects of their daily work. The label, however, carries drawbacks as well. It belies the true complexity of the occupation's multidimensional function. The agents of this occupation do enforce the law, to be sure, but as often as not, they don't, either because the agent opts for an alternative means of resolving an incident or because enforcing the law is wholly irrelevant to the problem at hand, such as when no law has been violated, but the agency's assistance or service is nonetheless required. It disguises the discretionary decision-making that is inherent in the occupation's daily work and which is often deemed essential to the goal of doing justice. And although it accurately describes one aspect of the occupation's daily work, it fails to capture the many other aspects, such as informing and cautioning citizens, rendering comfort and aid to those injured, protecting people from harm, and reassuring the public of their safety and that assistance is close at hand. Moreover, when police are criticized for being arbitrary or excessive in their enforcement of the law, their defense that they were merely "enforcing the law" seldom suffices to quiet the criticism: those challenging police actions usually want a fuller explanation or justification.

So, police have long had a conflicted understanding of their relationship to the law. On one hand, they understand the law as their lodestar: so long as they operate within the mandates and restrictions of the law, they are reasonably insulated from challenge and critique. On the other, they understand that the law often fails to provide them with the authority, the guidance, or the resources they require to carry out their full mission, broadly defined. One way of posing this tension within the occupation is to call the following question: Is law enforcement an *end objective* of policing, or merely a *means* to achieving other end objectives, and if so, what are those other end objectives? The answer to this question has enormous implications for all that police agencies and officers do. Secondly, it has important implications for the police relationship to lawyers, primarily those government lawyers with whom police most often interact—city, county, state, and district attorneys; in-house police counsel; and municipal or county corporation counsel.

If law enforcement is understood to be an end objective for police, it carries important ramifications. This weakens the argument that police ought to pick and choose both which laws to enforce and the circumstances under which they enforce them. The fullest enforcement of the law, with absolute impartiality to the circumstances of the law-breaking or of the offender, would constitute the ideal. This perspective argues in favor of devoting the maximum level of police resources to the task of detecting and enforcing law violations. It implies that police should principally ascertain whether a law was violated in a particular incident and, if so, enforce it, and if not, extract themselves from the situation and move on to the next incident, deferring to unnamed others to address matters that do not entail clear law violations.

The argument that police should not exercise discretion in choosing which laws to enforce and under what circumstances was strongly made in 1960 by law professor Joseph Goldstein. Professor Goldstein wrote, “The ultimate answer is that the police should not be delegated discretion not to invoke the criminal law.... [T]he police should operate in an atmosphere which exhorts and commands them to invoke impartially all criminal laws within the bounds of *full enforcement*. If a criminal law is ill-advised, poorly defined, or too costly to enforce, efforts by the police to achieve *full enforcement* should generate pressures for legislative action. Responsibility for the enactment, amendment, and repeal of the criminal laws will not, then, be abandoned to the whim of each police officer or department, but retained where it belongs in a democracy—with elected representatives.”¹ Professor Goldstein advocated the establishment of Policy Appraisal and Review Boards, comprising attorneys general, chief justices, heads of corrections departments, chairpersons of parole boards, legislators, police chiefs, local prosecutors, and local chief judges, that would determine, as a matter of policy, what laws police should enforce and under what circumstances. Professor Goldstein acknowledged the need for discretion in law enforcement, but he fundamentally rejected the idea that police alone should exercise it. He envisioned a quite elaborate and deliberate review process, one far different from the sort of on-the-spot, street-level, unreviewable discretion commonly exercised by police. In the mid-1970s, law professor Ronald Allen concurred with Professor Goldstein, asserting, “We do not say to the police, here is a problem. Deal with it. We say to the police: Here is a detailed code. Enforce it. ... I unequivocally reject the suggestion that the police should engage in rulemaking that directly affects the scope of the substantive criminal law. I do not think that the structure of our law permits the police to exercise this kind of authority. Perhaps more importantly, I am convinced that it would not be wise to accord the police this power, even if it were permissible to do so.”²

If, however, law enforcement is understood to be a means to achieving other policing objectives, this too carries important ramifications. If law enforcement is a means to other ends, it potentially represents a substantial power shift away from the legislative branch of government which enacts laws and to the executive branch of government—the police in particular—which enforces them. Arguably, this weakens the concept of the rule of law, placing the law squarely within the realm of administrative discretion. Police no longer would be held accountable solely on the basis of whether they were acting within the constraints of the law, but their accountability would extend to whether their actions were reasonable and proper in light of the policing objectives they sought to achieve. There would be two steps in police accountability: 1) determining what policing objectives were sought and whether police properly prioritized competing objectives, and 2) whether police actions were reasonably likely to achieve those objectives. As complex as it can be at times to ascertain whether police action was lawful, determining whether it was appropriate is eminently more complex.

¹ Goldstein, J. “Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice,” *Yale Law Journal* 69(4): 543-594 (1960).

² Allen, R. “The Police and Substantive Rulemaking: Reconciling Principle and Expediency,” *University of Pennsylvania Law Review* 125(1): 62-118 (1976).

The argument that law enforcement is better understood as a means to achieving other policing objectives was strongly and consistently argued by law professor Herman Goldstein (on occasion, confused with Professor Joseph Goldstein) from the early 1960s to the present.³ Professor Goldstein asserted:

Much of the difficulty in attempting to dissect the police function stems from the tendency to confuse police objectives with the methods the police employ in achieving them. This is especially true for law enforcement, which is so often viewed as an end in itself rather than a means to an end. Admittedly, statutes frequently define the police job as enforcing the law. In practice, however, the police have a whole range of objectives, and law enforcement is but one of several methods by which they get their job done.⁴

Professor Herman Goldstein's viewpoint has been shared by other notable legal scholars, including Professors Kenneth Culp Davis⁵, Frank Remington⁶, and Gregory Williams⁷.

What might other policing objectives be, if not solely the enforcement of the law? Sir Robert Peel and his colleagues, Richard Mayne and Charles Rowan, leaders and founders of the London Metropolitan Police force, reputedly set down in 1829 that the basic mission of police is the prevention of crime and disorder, and that the test of police efficiency is their absence, not the visible evidence of police action in dealing with it.⁸ The American Bar Association articulated various policing objectives in 1973 as follows:

Standard 1-2.2. Major current responsibilities of police

In assessing appropriate objectives and priorities for police service, local communities should initially recognize that most police agencies are currently given responsibility, by design or default, to:

³ Goldstein, H. "Police Discretion: The Ideal Versus the Real," *Public Administration Review* 23(3): 140-148 (1963); Goldstein, H. "Police Policy Formulation: A Proposal for Improving Police Performance," *Michigan Law Review* 65: 1123-1146 (1966-67); Goldstein, H. *Policing a Free Society*, Cambridge, MA: Ballinger (1977).

⁴ *Policing a Free Society*, at 34.

⁵ Davis, K.C. *Police Discretion*, St. Paul, MN: West Publishing (1975). Professor Davis most notably advocated for recognizing the police authority and responsibility to guide and control their discretionary enforcement authority through administrative rulemaking.

⁶ Remington, F. "The Role of Police in a Democratic Society," *Journal of Criminal Law, Criminology & Police Science* 56: 361-65 (1965). Professor Remington wrote: "To a major extent, responsibility for deciding what laws are to be enforced under what circumstances must be left to the police."

⁷ Williams, G. "Police Rulemaking Revisited: Some New Thoughts on an Old Problem," *Law and Contemporary Problems* 47(4): 123-183 (1984). Professor Williams, after examining police history and the legal doctrines of full-enforcement statutes, separation of powers, delegation of power, due process, and equal protection, concluded "...police do have authority to develop rules and control arrest decisions and that police agencies should embrace and use that authority to provide greater uniformity in decision-making. Courts should likewise recognize police rulemaking."

⁸ The so-called Peel's Principles of Policing are widely cited, but their origin is less certain than many imagine. Peel, Mayne and Rowan produced a number of documents attendant to the establishment of the Metropolitan Police, although none of them alone resemble the modern statements of those principles. Lentz, S.A. and Chaires, R.H. "The Invention of Peel's Principles: A Study of Policing 'Textbook' History," *Journal of Criminal Justice* 35: 69-79 (2007).

- (a) identify criminal offenders and criminal activity and, where appropriate, to apprehend offenders and participate in subsequent court proceedings;
- (b) reduce the opportunities for the commission of some crimes through preventive patrol and other measures;
- (c) aid individuals who are in danger of physical harm;
- (d) protect constitutional guarantees;
- (e) facilitate the movement of people and vehicles; (f) assist those who cannot care for themselves;
- (g) resolve conflict;
- (h) identify problems that are potentially serious law enforcement or governmental problems;
- (i) create and maintain a feeling of security in the community; (j) promote and preserve civil order; and
- (k) provide other services on an emergency basis.⁹

The American Bar Association and other legal and police scholars who endorse the view that law enforcement is a means to policing ends further assert that police must often choose from among these competing, and sometimes conflicting, objectives. Among the implications is that, on occasion, even where police have clear evidence that a law has been violated, enforcing that law is not necessarily the most appropriate course of action, particularly when doing so might compromise achieving some other, higher priority, policing objective such as preserving the peace or protecting constitutional guarantees. In essence, they argue that the law provides police with significant parameters within which they may act, but it often is insufficient, by itself, to dictate to police what is the most appropriate course of action. This means that, often, police must turn to sources of authority and guidance, other than or in addition to the law, for determining what action to take under particular circumstances. Among those sources of authority and guidance might be the following:

- police professional expertise (based on research knowledge and practical experience)
- community values, norms, priorities, and preferences
- available and viable alternatives to formal law enforcement
- policies and priorities of other criminal justice agencies (prosecutors, courts, corrections)

The tension between the view that police are bound to enforce the law to the extent possible and the view that police are not so bound will likely endure in perpetuity. There are

⁹ American Bar Association Standards for Criminal Justice, *Standards on the Urban Police Function*. Volume I, 2nd Ed. (1980, originally published in 1973). Professor Herman Goldstein, who was the principal reporter for the American Bar Association's Standards on the Urban Police Function, revised this list of policing objectives in his own book, *Policing a Free Society*, in part to better reflect his view that apprehending offenders was better understood as a means of controlling conduct that threatened people's lives and property, rather than as a policing objective itself.

important principles that argue in favor of both views. To a large extent, the jurisprudential debate has leaned in favor of the view that police necessarily and appropriately enjoy discretionary authority in deciding which laws to enforce and under what circumstances, although even those holding this view continue to press for developing improved mechanisms by which police decision-making can be limited, guided, controlled, and made more transparent and just. They argue that with such discretionary authority there must be concomitant accountability for its proper exercise. On this count, much work remains to be done. Police tend to accept that their discretionary authority is necessary, or at least unavoidable, but they aren't always wholly comfortable acknowledging such authority openly.

B. Police Discretion and Accountability

Even though the legal academy and the police themselves no longer wage great debates about the propriety of police discretion, the matter remains far from settled. Assuming that police possess discretionary authority that includes some latitude to determine which laws to enforce and under what circumstances, and assuming that law enforcement is but a means to other policing end objectives, much remains to be settled as to 1) how police will establish and prioritize their end objectives, 2) how they will choose from among discretionary alternatives in determining what action to take under particular circumstances, and 3) how police discretionary choices will be reviewed and controlled, if at all.

It is helpful to clarify the nature and breadth of police discretionary authority. Determining which laws to enforce and under what circumstances is an important dimension of police discretion, but far from the sole one. Moreover, police discretion is exercised at various levels within the police hierarchy, with different levels enjoying different degrees of latitude over various matters. Below is a list of various types and levels of police discretionary authority:

Line-level discretion

- Whether to arrest, warn, ignore, or take some other action in response to a clear law violation
- What action to take in response to an incident or public-safety problem in which there is no clear law violation
- Where to patrol and what to investigate
- How to investigate (e.g., stop and question, search)
- What violations or public-safety problems to give special attention and emphasis

Intermediate-level discretion (e.g., supervisory)

- What problems to ask line-level personnel to focus on
- Where to concentrate police resources
- What tactics to use, encourage, discourage or prohibit in light of professional judgment and preference
- How to define "productivity" among line-level personnel

Policymaking-level discretion (e.g., command staff and chief executives)

- What actions to require, encourage, prohibit or discourage officers to take as a matter of policy or procedure

- How to allocate police resources (personnel, funds, authority)
- What public-safety problems to give high priority
- What policing philosophy to promote
- What policing strategy to promote
- How to structure the police agency

With respect to most of these dimensions of police discretion, the law is silent or unclear. Yet, each of these discretionary decisions potentially has profound effects upon the public and whether it benefits from fair and effective policing.

It is also helpful to acknowledge that police enjoy varying degrees of latitude for each dimension of their discretionary authority. Those degrees might be characterized as follows:

- Police may make a choice that may not be overturned by others
- Police may propose a choice, but it must be approved by others before taking effect
- Police may make a choice, but it may be overturned by others, either before or after taking effect
- Police may not make a choice without clear prior authorization from others
- Police may not make a choice: their actions are dictated by others

Who might these “others” be? Depending upon circumstances and the nature of the discretionary decision, they could include any of the following:

- The decision-maker’s police superior officer
- The jurisdiction’s political executive (e.g., mayor, city manager)
- The legislature (as expressed through law)
- The jurisdiction’s legal counsel (e.g., city attorney, district attorney)
- A court of appropriate jurisdiction
- The community (or some segment of it)
- Another governmental or non-governmental agency

In sum, the police, presented with an immensely diverse array of requests and demands for their service; tasked with achieving a wide range of overlapping and sometimes competing objectives; possessed of limited explicit authority, time, personnel, expertise, and support; guided by laws and rules that are sometimes directly relevant and useful, but often unclear, unenforceable, and inapplicable; and influenced by diverse interests with differing preferences as to what police should do; must make choices—lots of choices—as to how best to manage their work.

A few examples that exemplify the sort of discretionary decisions made at the various levels within police organizations—line, supervisory, and policy—will help illustrate the challenges of managing police discretion.

Line-level: A residential drug house

Picture a house in a residential neighborhood that is undergoing noticeable economic and physical deterioration. The beat officer has reason to suspect the house is being used as a center for retail drug trafficking which is contributing to further neighborhood decline. In hopes of keeping her beat “clean,” the officer sets out to deal with this problem house. How should the officer proceed? Below are several strategic options:

Option 1: *Arrest and seek prosecution.* The officer’s first instinct—being a “law enforcement officer”—is to arrest drug buyers and sellers on drug trafficking charges. But doing so safely and with sufficient evidence to secure convictions would take resources beyond what the officer has herself. Moreover, many arrests of buyers might not be effective if there are always more buyers to take their place (or if the buyers she arrests aren’t out of commission for very long and have no reason to worry about harsh punishment). Many arrests of sellers might not be effective if the sellers are renters and they, too, are easily replaced by new drug dealing tenants.

Option 2: *Disrupt the market.* The officer might decide not to concern herself too much with securing convictions, but rather to use her arrest authority more to inconvenience prospective buyers and sellers. She might make a lot of pretext traffic stops in the area to discourage buyers from entering the neighborhood. This might even lead to vehicle searches (either incident to arrest or on a consensual basis) that turn up drugs that can be seized.

Option 3: *Employ civil remedies.* The officer might eschew criminal law in favor of civil laws that might be enforced to some good effect. She would need to work with city attorneys to explore various options such as nuisance abatement, eviction, civil asset forfeiture, code enforcement, injunctions, condemnation, civil trespass, receivership, or zoning. Whether the city attorney’s office possesses the requisite expertise in all these civil law areas is uncertain.

Option 4: *Organize and mobilize.* The officer might try to organize the law-abiding neighbors and mobilize them to action—to identify and report suspicious activity, to protest against the drug dealing, to testify in legal proceedings (as witnesses or possibly as plaintiffs), to clean up the physical deterioration, to lobby the government for stronger action.

Option 5: *Change the environment.* The officer could seek to change the physical environment of the neighborhood such that it was less hospitable to retail drug trafficking. She might work with city planning, traffic, or engineering agencies to close certain streets and alleys, reroute traffic, enhance lighting, install surveillance cameras, trim trees and shrubbery, restrict parking— anything to discourage prospective drug buyers from coming into the neighborhood to buy drugs and leaving swiftly and safely.

Option 6: *Control facilitators.* The officer might focus attention on third parties who, while not directly involved in trafficking drugs, nonetheless profit from the illegal market. She might put pressure on the owner of the house who profits from charging rent but ignores the illegal activity of his tenants; on the nearby motel owner who facilitates the trade by renting rooms on an hourly basis with little concern that the rooms are being

used for consuming the drugs and for prostitution that supports the retail drug trade; or the nearby convenience store that sells legal products which are often used as drug paraphernalia (rolling papers, products that can be converted into crack pipes, glassine bags for packaging drugs, etc.).

Intermediate (supervisory) level: panhandling in a commercial district

Picture a commercial district in an urban area with lots of shops and pedestrians and an abundance of “street people” who panhandle for spare change from passersby at all times of the day that the street is full of pedestrians. Some even panhandle motorists stopped at traffic lights. In response to numerous complaints from merchants and pedestrians, the police supervisor for the area sets out to address the problem. Because the problem occurs nearly every day of the week and across multiple police shifts, the supervisor cannot reasonably expect a single beat officer to tackle the problem alone. Below are several strategic options:

Option 1: *Enforce existing ordinances.* Giving initial consideration to an enforcement crackdown on panhandling, the supervisor reviews existing state statutes and city ordinances that might regulate panhandling and related conduct. He finds a state statute that prohibits vagrancy, one definition of which is to “be a person who derives his or her support from begging.” He finds a city ordinance that prohibits soliciting anything of value from another person in a public place for purposes other than raising funds for a legitimate charity. The supervisor can’t recall the last time he saw an arrest or citation for either of these offenses. One option is for the supervisor to direct patrol officers who work the area to begin enforcing these two laws. A possible drawback is that these two laws might be outdated and unlikely to survive any legal challenge to them. Both are highly likely to be deemed unconstitutional, under either the federal or state constitutions. Moreover, the city attorney’s office has already complained of being swamped with ordinance violations and is therefore not likely to be eager to prosecute vigorously panhandling citations; and most certainly, the district attorney’s office is going to be even less inclined to do so. These prosecutors’ offices are likely to believe there are far more serious law violations demanding their scarce time and attention.

Option 2: *Change the ordinances and enforce them.* The supervisor might work with the city attorney’s office or the state attorney general’s office to draft new laws prohibiting panhandling that would be constitutional, and then enforce those. But that wouldn’t address the low priority these offenses would be given by the prosecutors and courts. To remedy that, the supervisor might lobby the city and/or district attorney’s offices to take these cases seriously and to do so by building a community coalition of support among the area merchants and pedestrians.

Option 3: *Employ civil remedies.* The supervisor might work with the city attorney’s office to modify zoning laws to prohibit panhandling in the commercial district, but permit it in other areas of the city. If this were deemed constitutional, it might entice the panhandlers to voluntarily leave the commercial district to avoid any trouble with the law. Or it might give the city legal authority to cite panhandlers for zoning violations.

Option 4: *Harass the offenders.* The supervisor might decide not to worry about securing convictions in panhandling cases, but simply to use arrest authority to harass the panhandlers until they get tired of being arrested, and move out of the area. He could motivate his officers by holding a contest among officers, with the officer who makes the most panhandling arrests winning first pick in choosing vacation days that year.

Option 5: *Control facilitators.* The supervisor might opt to pay more attention to those who give money to panhandlers—the supply side of the market—reasoning that if people didn't give money to panhandlers so willingly, the panhandlers might move out of the area, or give up begging altogether. A public awareness campaign might be needed to change community attitudes and habits about panhandling. This might take more time, expertise, and resources than the supervisor feels he can afford.

Option 6: *Change the environment.* The supervisor might choose to alter the physical environment of the street in ways that make it less convenient to panhandle. This might be done by removing seating and shelter areas that panhandlers use to rest. Or it might be done by removing some traffic signals that cause vehicles to stop in the roadway in the commercial district.

Policy level: immigration enforcement

Picture a community in which a large influx of immigrants begins to generate demands upon the police to “do something.” Concerns are expressed that many of the recent immigrants are undocumented, or as it is more commonly expressed, “illegal”; that they are taking jobs away from citizens; that they commit a lot of crime; and that they consume a lot of government benefits to which they are not entitled. The community's mayor, at whose pleasure the police chief serves, tells the police chief that she must prepare a plan of action for the mayor, who in turn will share it with the common council for their endorsement. Below are several strategic options:

Option 1: *Enforce immigration laws.* The police chief could propose that the police department apply for federal authorization that enables local police officers to enforce federal immigration laws and, if granted, direct officers to check the citizenship or immigration status of all persons with whom they have any contact and whom they suspect are not lawfully in the United States. If any such person is found to be in violation of any immigration law, officers would be directed to take the person into custody and refer the matter to federal immigration authorities. The police chief knows that this approach will be popular among the majority populace of the community, but unpopular among the minority immigrant populace, including those who are in the country lawfully. The chief also knows there will be a split of opinion among her police officers and supervisors as to the propriety of this approach, although she is confident they will adhere to whatever policy and procedure is established. The chief also worries that undocumented immigrants in the community will become even more reluctant to report their own crime victimization, tell police about other crimes they have witnessed, or to seek assistance from police for any reason, for fear of being deported.

Option 2: *Refuse to enforce immigration laws.* The police chief might propose that local police purposely not apply for federal authorization to enforce federal immigration laws as a clear signal to the local immigrant community that the local police are not to be feared as an instrument of their potential deportation. She would understand, as a practical and legal matter, how difficult it might be for her officers to know who is and who is not present in the country lawfully, and that their suspicions might be little more than hunches. This might lead to officers checking the immigration status of very few individuals—which would fail to achieve much reduction in the number of undocumented persons in the community—or it might lead to officers checking the immigration status of many individuals, a good many of whom will turn out to be legal immigrants or citizens, but who will bitterly resent being treated like criminals, and to allegations of racial or ethnic profiling. In essence, this approach would have the police refuse to participate in immigration enforcement, ceding that responsibility entirely to the federal government, but otherwise conducting business as usual with regard to the local immigrant community. The police chief would know that this approach will not satisfy the majority populace that is complaining about immigrants, and that elected officials will incur some of their wrath.

Option 3: *Enforce only in serious cases.* The police chief might propose a middle ground plan in which local police officers are directed only to check the immigration status of individuals whom they arrest for serious crimes, and not to check the status of individuals who are complainants, victims, witnesses, or minor law violators, even if they suspect them to be undocumented immigrants. This approach might prove mutually acceptable to the majority and minority communities because it demonstrates police action against the most problematic immigrants and avoids some potential for underreporting of crime and reluctance of immigrants to cooperate with police.

Option 4: *Assist the immigrants.* Going a step beyond merely refusing to participate in immigration enforcement, the police chief might choose to take a proactive approach to assisting the local immigrant community, irrespective of immigrants' legal status, in various ways that might include: (1) encouraging immigrant crime victims to report their victimization to police and taking proactive measures to reduce their victimization risk (for example, helping them to avoid becoming victims of crimes for which they are particularly vulnerable such as street robbery, domestic violence, human trafficking, and employment fraud); (2) assisting immigrants in avoiding committing certain offenses, such as driving without a proper license or other offenses with which they might be unfamiliar on the basis of their native culture, customs, and laws; and (3) generally reaching out to immigrant communities to let them know that police are there to help them assimilate into mainstream society. Obviously, this approach would be greatly resented by the majority populace that had been vocal in their complaints about immigrants.

Option 5: *Investigate serious crimes affecting immigrants.* The police chief might propose a plan to have police aggressively address specific crime problems in which illegal immigration is a significant contributing factor, such as human trafficking, wholesale drug trafficking; immigrant street gangs; and known criminal immigrants who have records for committing serious and violent crimes, either in the United States or in their home country. This approach would be designed to assure immigration critics that police are taking seriously one of their principal concerns: that some immigrants are committing

serious crimes in the United States; and thereby alleviate some of the demands on police to deal aggressively with less serious concerns about immigrants, including the sole concern that they lack the proper documents to be in the country.

Option 6: Control facilitators. Rather than targeting immigrants themselves for immigration enforcement, the police chief might opt to target those who unlawfully employ illegal immigrants and who take advantage of their illegal status by paying them low wages and abusing them with regard to worker safety and other labor laws. This approach would likely lead to some heightened immigration enforcement against the illegal immigrant workers once they are discovered, but it would also lead to better protection of legal immigrant workers and potentially remove the main incentive for illegal immigrants to come to a community: obtaining jobs for which immigration status is not checked. There likely would be a split of opinion among the majority populace and among business owners as to whether it is fair for the police to target local businesses rather than the illegal immigrant workers themselves.

In all three of the scenarios above, police have open to them at least a half-dozen strategic options for addressing the underlying problem. Clearly, the letter of the law is relevant to nearly all strategic options, but seldom does the letter of the law alone determine which option police must or ought to choose. In so many instances, the law—or more precisely, the laws—leave police with a variety of strategic options. It should also be clear from the above scenarios just how divergent some of these options are, one from another. Who becomes the target of police attention and what the consequences will be for those targeted can vary dramatically across options. What the police response will cost, and who will bear that cost, likewise can vary dramatically. Who is held responsible for the underlying problem varies as well. In short, which option police choose often matters greatly.

But if the law alone does not determine police discretionary decisions, what else does or should? And how should police go about deciding which option to choose? Who should be consulted and whose approval or endorsement should they seek, if anyone's? How should police be held accountable for the strategic option they adopt?

1. How Should Police Choose From Among Strategic Options?

When presented with an array of strategic options, police should consider for each, at a minimum, the relevant law (including constitutional rights), effectiveness, community support, cost, ethics, and practicality.

Law: The law may not dictate police strategic options, but it is nearly always relevant to the determination. Police, with assistance from legal counsel, should first identify those laws that are relevant to the problem at hand, considering local, state, and federal laws and regulations, both criminal and civil. The next step is to determine just what the relevant laws either require, allow, or prohibit police from doing. Consideration must then be given as to the precise mechanism by which each law under consideration would potentially impact the problem at hand. For example, is the law designed to deter potential or arrested offenders? Is it designed to change the opportunity structure for the problem, such that the offending behavior is less appealing to offenders? Special consideration should be given to Constitutional principles—such as 1st Amendment rights pertaining to

free speech and political protest, 2nd Amendment rights pertaining to gun possession, or 4th Amendment rights pertaining to search and seizure—that might be implicated in various strategic options.

Effectiveness: The decision-making process should then consider what is known from research and prior practice, either in that jurisdiction or elsewhere, about the effectiveness of various strategic options in controlling the problem. Has the strategy been tried before, and if so, with what results and under what circumstances? Fifty or sixty years ago, this would have been a most difficult inquiry for police because there wasn't much operations research on which to draw nor any efficient means of learning what other jurisdictions had done in the past to address similar public safety problems. Although there remain large gaps in the professional knowledge about police effectiveness, much progress has been made. The body of policing knowledge continues to grow and to become more accessible. Police today can access research and practice on the police response to various public safety problems through such information resources as the following:

- Campbell Collaboration Systematic Reviews of Crime Prevention
- Center for Evidence-Based Crime Policy at George Mason University
- Center for Problem-Oriented Policing (the Problem-Oriented Guides for Police)
- Jill Dando Institute of Security and Crime Science
- National Criminal Justice Reference Service (that includes the publications of the National Institute of Justice, the Bureau of Justice Assistance, the Bureau of Justice Statistics, the Office of Juvenile Justice & Delinquency Prevention, and other U.S. Department of Justice agencies)
- National Research Council's 2004 report, *Fairness and Effectiveness in Policing: The Evidence*
- Urban Institute's Justice Policy Center

Community Support: Depending upon the nature of the underlying problem, various communities of interest will support or oppose different strategic options. Often, police will not be able to satisfy all communities of interest equally, but police should consider which community's interests are most vital and which strategy will yield the optimal level of overall community support for the effort. For example, in addressing a problem of organized theft at retail stores, some strategic options will focus on the thieves, with an eye toward making it more difficult or risky for them to steal, whereas other strategic options might focus on the merchants, with an eye toward getting them to adopt improved security practices that would prevent theft. Obviously, in this scenario the thieves and the merchants will have different opinions as to which of them ought to be the focus of police attention, but others who might be affected by the police strategy—such as the retail corporations, loss insurers, employees, customers, private security firms, retail security technology firms, and the local government—will have their own perspectives as well. Although police cannot and should not always cater to popular opinion in choosing strategies, they should not be blind to it either as it potentially affects both the degree to which the strategy is successful in controlling the problem and the degree to which the police are perceived to have addressed the problem equitably.

Cost: Any strategic option police choose will generate some costs, both for the police and for others. The financial costs might be fixed (or sunk), meaning that the cost of the resource has already been spent or committed, subject only to how it is to be used; or marginal, meaning additional finances must be committed to implement the strategy. One of the perceived advantages to adopting conventional policing strategies, such as law enforcement or preventive patrol, is that most of the costs required of police to implement them are already committed in the form of police officers' salaries, equipment and fuel budgets, the thought being that since the officers have already been hired, trained, and equipped for these tasks, they might as well be used for them. However, whatever tasks police perform, conventional or otherwise, necessarily carry opportunity costs: the inability to attend to other matters or perform other tasks.

Even police choosing to do nothing in response to a public safety problem carries costs, namely the social costs generated by the problem, including the continuing costs of police responding to incidents associated with the problem.

As important as calculating the overall costs of strategic options is calculating who will bear those costs. Where police choose to adopt a strategy that emphasizes law enforcement, not only does enforcing the law generate costs for the police to investigate and process arrests, it generates costs for the jails to house the prisoners, the prosecutor to review and process the cases, public defenders to represent the defendants, the courts to adjudicate them, probation or parole offices to monitor convicted offenders, witnesses and victims to participate in legal proceedings and, of course, the defendants to defend themselves and/or pay their fines or serve their sentences. Most, though not all, of these costs are ultimately borne by the taxpayers. However, where police choose alternative strategies, they often seek to shift responsibility and concomitant costs for addressing the public safety problem to others outside the criminal justice system. For example, in addressing the problem of gasoline drive-offs (thefts), where police adopt a strategy to persuade or compel gasoline stations to require their customers to pay before they pump the gasoline, thereby eliminating the opportunity for theft, the gasoline stations are likely to incur some cost in the form of lost sales from the impulse/ancillary buying of non-gasoline products that customers commonly purchase when they enter the station to pay for their gasoline. This turns out not to be a trivial cost in the existing structure of the retail gasoline market. But neither is the cost of not requiring gasoline stations to adopt this preventive measure: that generates substantial costs in the form of police handling of theft incidents, as well as higher gasoline prices to offset the theft losses. The possibilities for distributing costs to address this one public safety problem exemplify the possibilities that are present in the police response to many other public safety problems. All too rarely, however, these cost distribution calculations are not made explicitly nor deliberated openly so that police can factor these cost considerations into their strategic decision-making.

Ethics: Professor Herman Goldstein, in his teaching about police, often invoked the expression "lawful, but awful" to describe police practices that, while technically permitted under the law, were either distortions of how the law was intended to be applied or generated quite negative consequences for the police, the community, victims, or the criminal justice system. Where it was not proscribed by law, strip searching all persons arrested

for shoplifting prior to booking them into jail is one example of a “lawful, but awful” practice. And so police would do well in deciding from among strategic options for addressing public safety problems to give careful consideration to the ethical implications of each option. Will the police practices that emanate from a strategic option be perceived as being carried out under the spirit of the law and not just under its letter? Will they enhance the public’s perception of police fairness and integrity, or compromise it? Will they make wise and efficient use of scarce public resources, especially the resources of the criminal justice system? Will they honor the principle that police, in a democratic society, ought to employ the least coercive measures necessary to achieve their lawful objectives? Will they equitably distribute responsibilities and costs among the various actors who contribute in some way to the underlying public safety problem? Will they avoid creating the perception that police are targeting certain social groups due to prejudice or bias against them? Will they minimize the physical, psychological, and career risks to the police officers who have to implement the strategies?

Practicality: Police should assess practical considerations, such as whether the requisite expertise and resources are available to implement the strategy, including those of the police, the jurisdiction’s lawyers (e.g., whether they possess the requisite time and expertise to pursue a legal action to a satisfactory conclusion), and other groups and organizations. They should also consider how long it would take for the strategy to have an impact on the problem, weighing that against the urgency of finding a resolution to the problem.

2. Who Should Police Consult in Weighing Strategic Options?

The very definition of police discretion is the freedom police enjoy to choose from among alternative actions. This does not, of course, preclude the police from soliciting and receiving input and advice from others prior to choosing a course of action, where time and circumstances so permit. Obviously, such consultation won’t be possible or practical in the context of the many immediate discretionary decisions officers make in the field daily, such as whether to stop a person, search them, use force, or make an arrest under exigent circumstances. But, with even the luxury of a slightly longer amount of time in which a decision must be made, police discretionary decision-making can be improved through consultation. Sometimes, the law requires some degree of prior consultation and approval, such as is often the case when police are considering whether to place an individual into custody for purposes of an involuntary mental health evaluation and commitment. In such cases, the law often requires that police first consult with mental health professionals as to the medical justification for and propriety of a detention. As police discretionary decisions become more of the strategic, rather than the tactical, variety, the luxury of time expands and the opportunities for prior consultation do as well. In strategic matters, who ought to be consulted necessarily varies by the nature of the problem. For example, in making strategic choices for addressing drug-related problems, police might do well to consult with local prosecutors and corporation counsel, jail staff, drug treatment professionals, neighborhood associations, and criminologists with expertise on such matters. In making strategic choices for addressing problems involving immigrants, police might do well to consult federal immigration officials, other police agen-

cies that have addressed similar problems, immigrant community leaders, local government officials, consular officials of the relevant immigrants' countries of origin, employers who hire immigrants, and social service agencies that provide immigrants services.

As a general proposition, police ought to consult with any groups or individuals with a substantial stake in the strategic choices under consideration. Soliciting such prior consultation potentially benefits police in several ways. It potentially provides police with moral support for the strategic option chosen and possibly some resource support; it potentially protects police against public criticism for either failing to solicit any consultation or for the strategic choice they make; it potentially strengthens the legitimacy of the police as a democratic institution by virtue of police openness to public input; and it potentially helps police avoid some consequences of their strategic choice that they may not have anticipated on their own.

Although it sounds odd, police should nearly always first consult themselves in their discretionary decision-making. That is, police should first consider what their own professional standards allow or prohibit, or encourage or discourage. These professional standards might be reflected in professional codes of ethics; professional practice guidelines; police agency accreditation standards; departmental mission or value statements; departmental policies, procedures, and guidelines; or colleagues' or superior officers' professional judgment. Assessing strategic options against both professional and departmental pronouncements can take police decision-makers a long way toward prudent and wise strategic choices.

As a starting point, it is worth reflecting on how the police department approaches discretionary decision-making. Does the police department acknowledge in a clear and open fashion the legitimacy of discretionary decision-making? Does it offer clear guidance to its employees about the scope and parameters of their discretionary authority? Does it train its employees how to make discretionary decisions, including when to solicit input from others and who those others might be? For too many police agencies, the concept of "police discretion" remains shrouded in secrecy and uncertainty, practiced but seldom preached such that line-level personnel make discretionary decisions in a highly tentative and tenuous context. To take but one example of police discretion—the discretion to arrest where legal grounds exist to support an arrest—the vast majority of police agencies, to this day, lack any written policy on this matter. Perhaps police policymakers believe that it is better not to explicitly authorize police officers not to effect an arrest where legal grounds exist to do so, fearing that such explicit authorization might open the police agency to legal liability or public criticism for willfully disregarding the law. And yet those same police policymakers are no doubt privately quite thankful that their police officers do exercise discretion in their arrest decisions, lest the jails fill up, the prosecutors become overwhelmed, the courts become clogged, police resources become sapped, and the public become alienated by an abundance of minor law violations. If, however, an officer's discretionary decision not to arrest turns out badly for one reason or another, the agency's policymakers might deny that they ever authorized its officers to disregard the dictates of the law. Consider the following alternative possibility: a police department written policy that addresses the matter of arrest discretion squarely.

Police Discretion – Police officers, of necessity, exercise professional discretion in deciding whether or not to arrest people for violations of the law. Other specific laws, department policies, or orders of a supervisor may further limit officers’ discretion and direct an officer to effect an arrest.

1. In general, police officers, using sound professional judgment, may take the following factors into consideration when deciding whether or not to arrest a person:
 - a. the seriousness and nature of the offense (generally, the more serious the offense, the more likely arrest is the preferred course of action);
 - b. the potential that arrest will effectively resolve a conflict;
 - c. the availability of legal alternatives to arrest that would adequately resolve the conflict or problem;
 - d. the likelihood that the person will be deterred from future violations by warning and education;
 - e. the officer’s belief that the person made an honest mistake in violation of the law;
 - f. the victim-witness’s interest in prosecution;
 - g. the likelihood of formal prosecution of the offense;
 - h. the potential that arrest will create more serious breaches of the peace or other problems (e.g., inciting riot);
 - i. legitimate competing priorities for police resources.

2. The following factors are among those that are *improper* for a police officer to consider in deciding whether or not to make an arrest:
 - a. the person’s economic status, race, ethnicity, gender, or other status for which the law prohibits legal discrimination;
 - b. the revenue likely to be generated by fines or penalties imposed upon conviction;
 - c. the personal or professional relationship that the person has to the police officer or to other influential persons;
 - d. the personal advantage to the officer for processing or avoiding processing of the arrest (e.g., overtime compensation, desire to finish tour of duty, avoidance of paperwork, etc.)¹⁰

The notion that criminal justice professionals do and should exercise discretion even where the law has clearly been violated is well recognized among prosecutors. The American Bar Association’s Criminal Justice Standard on “Discretion in the Charging Decision” reads, in part:

The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public

¹⁰ The language of this policy was first adopted by the Lauderhill, Florida, Police Department in 1995 when the author served as its police chief. The policy has since also been adopted by the Port Washington and Madison, Wisconsin, police departments. The author is unaware of other similarly explicit policies.

interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.¹¹

This ABA standard goes on to articulate the factors that a prosecutor should and should not take into account in making a charging decision.

Some prosecutors, and perhaps some police as well, might feel that only prosecutors should enjoy such explicit discretionary authority on law enforcement matters, that the police function ought to be restricted to arresting offenders and the prosecutorial function ought to encompass the discretionary judgment about formal charging. But whatever police and prosecutors prefer to believe about their respective functions, the practical reality is that police officers, supervisors, and executives routinely engage in discretionary decision-making that affects whether particular laws should be enforced and under what circumstances. The question then becomes whether police agencies ought to acknowledge this reality openly and seek to guide it and control it, or ignore this reality and allow the police discretionary decision-making to continue, but in the absence of formal guidance and control.

As noted earlier, police arrest decisions are far from the only discretionary decisions they make. So, arguably, police policies and procedures ought to go well beyond addressing this aspect of discretion, and indeed, many police agencies' policies do so. A typical police department policy and procedure manual will, of course, be laden with many mundane and technical rules and regulations about administrative and procedural matters—who is to report to whom under what circumstances, what uniform items are permitted, how officers should comport themselves, and the like—but many also address substantive policing matters, in which police officers must make choices about how to handle various types of public safety incidents.

In reviewing but one police agency's policy and procedure manual, one finds, in addition to the many administrative and procedural rules and regulations, substantive guidance to police officers on how they should handle incidents involving barricade persons and hostages, robberies, bomb threats, sexual assaults, domestic violence, abandoned infants, landlord-tenant disputes, trespassing, traffic crashes, computer crimes, public demonstrations and assemblies, labor disputes, intoxicated persons, mentally ill persons, and immigration violations. While this manual provides officers with some substantive guidance as to how they should handle these 15 types of incidents, one is left to wonder why these 15, of the hundreds of different types of incidents police commonly handle, were selected. Do the agency's administrators presume that its officers do not need or would not benefit from guidance on how to handle most incident types; that perhaps the law or officer training and judgment provide them all the guidance they require? Upon closer examination of the 15 substantive policing policies, one discovers that, in the main, these policies and procedures principally address how officers are expected to handle and/or investigate isolated incidents from a tactical and procedural standpoint; they seldom reach beyond to the strategic level at which decisions are made as to options for controlling and preventing these types of public safety problems on a wholesale basis. Some policies and procedures

¹¹ American Bar Association Criminal Justice Standard 3-3.9.

do little more than restate what the law requires of police. The best of these policies provide officers not only with procedural guidance, but also clarifications of relevant laws, resources to which officers can refer parties involved in the incident, and recommended or required courses of action. It could be argued that the police policy and procedure manual is not the ideal source for guiding police discretionary decisions, whether tactical or strategic, but that only begs the questions: what is the better source, and do police agencies provide it?

Among other possibilities for guiding police officers' discretionary decision-making are the following:

- training (pre-service, in-service, and external training programs could give special attention to discretionary options available to police officers in specific contexts, weigh the advantages and disadvantages of each option, and perhaps recommend best options on the basis of research and practice)
- supervision (field supervisors can be made available to officers to guide them in their discretionary decision-making in the field)
- performance review (going beyond standard police-officer performance reviews, agency administrators could review their officers' strategic decision-making by assessing how officers were addressing chronic crime and disorder problems within their work assignments)¹²
- good-practice guidelines (police agencies could write their own good-practice guidelines for officers, distinct from the manual of policies and procedures, and make these available to officers to consult¹³ or they could make use of good-practice guidelines
- produced for the whole police profession such as the Problem-Oriented Guides for Police produced by the Center for Problem-Oriented Policing)
- peer consultation (committees or advisory groups could be made available to officers to solicit input and advice from a cross-section of peers from within or outside the police agency)¹⁴

Ideally, police officers' discretionary decision-making should be informed and guided by a combination of policy, good-practice guidelines, training, supervision, peer review, and performance review.

3. How Should Police Be Held Accountable for the Strategic Options They Choose?

Police policymakers

¹² The Lauderhill, Florida, Police Department experimented in the 1990s with annual "state of the beat" reports made by field officers to agency administrators. Officers would brief administrators on persistent public-safety problems occurring within the beat and on officers' efforts to remediate them. In turn, administrators would provide officers with feedback, advice, and resource support.

¹³ The New York City Police Department experimented with such field guides briefly in the 1990s. They covered recommended good practice for addressing problems pertaining to drugs and disorderly groups.

¹⁴ The Newport News, Virginia, and San Diego Police Departments created problem-solving advisory committees for this purpose in the 1980s and 1990s.

At the policymaking level, police are ultimately held accountable for their strategic choices through the political process used to appoint and remove the police chief executive. If those who appoint and retain the police chief executive become dissatisfied with policing strategies, they can exercise what authority they have to replace the police chief executive with one whose strategic preferences are more to their liking. This political process varies considerably across U.S. jurisdictions. Some police chief executives are directly elected by citizens (sheriffs), some appointed by elected political executives, some appointed by appointed city or county managers, some appointed by quasi-independent police boards. Some police chief executives can be removed by election, some can be removed at the pleasure of the appointing authority, and some can be removed only for just cause. However imperfect these processes are, and however rare it might be that the police chief executive's tenure turns on matters of policing strategy, the political process is at least theoretically capable of holding the police accountable for their strategic choices. Police chief executives and their elected or appointed supervisors should routinely discuss the major strategic options for addressing major public-safety problems.¹⁵

Police commanders

Within police agencies, accountability for strategic choices is perhaps most directly imposed at the level of the commander of a geographic police area—a precinct or district. At this level, both the police executives and the community can and often do hold area commanders accountable for strategy. The widely adopted Compstat method is designed precisely for the purpose of holding commanders accountable for achieving substantive policing results such as fewer crimes and reduced fear of crime. The community, whether through community leaders or popular opinion, exerts its influence on police commanders' strategic choices with the strength of that influence varying with the degree to which police commanders perceive their professional success to be tied to community satisfaction with policing strategy and tactics. In most organizations, the police chief executive can re-assign a commander whose strategic options he or she finds unsatisfactory.

Police officers

Perhaps the most interesting challenge is to design and implement a system or method for holding line-level police officers (including detectives) accountable for their strategic choices. One doesn't ordinarily think of line-level personnel as having much input or authority over strategy. They certainly do not in other fields such as the military. But given the rather peculiar nature of police work, particularly at the local jurisdictional level, line-level personnel—patrol officers especially—enjoy considerable latitude in establishing their own policing style which has strategic elements to it, albeit applying primarily to each officer's own work, not to that of other officers. Consider, for example, the patrol officer whose primary, and maybe exclusive, response to all traffic-related problems is intensive enforcement of traffic laws. In response to speeding complaints, the officer runs radar and issues speeding citations. In response to a traffic crash problem at a road inter-

¹⁵ A short monograph titled *Effective Policing and Crime Prevention: A Problem-Oriented Guide for Mayors, City Managers, and County Executives* (2009) was written to encourage and guide communication between police chief executives and government executives.

section, the officer sets up at the intersection and issues citations for signal and turn violations. In response to a drunken-driving problem, the officer sets up outside taverns and arrests drunken drivers. At least in that officer's beat and while that officer is working, the policing strategy is clearly one of deterrence through intensive traffic enforcement. In choosing this strategy, the officer is choosing not to adopt alternative strategies, such as reducing the opportunities for motorists to commit these offenses through environmental design (e.g., narrowing roadways to discourage speeding, delaying traffic light changes to reduce crash probabilities, promoting the use of alcohol ignition interlocks to prevent drunken drivers from operating their vehicles). Likewise, each officer's preferred method of dealing with many other common policing problems—underage drinking, disorderly youth, drug dealing in open-air markets, noise complaints, public intoxication, street prostitution, homeless encampments, bar fights, thefts from vehicles, etc.—can and often does vary across police officers.

Because much of patrol officers' work is conducted in relative obscurity—often with only the officer and the other participants in the incident witness to how the incident was handled—seldom do patrol officers' preferred methods (strategic choices) come under wider scrutiny. The occupational norm of many police agencies is to defer to officers' preferred styles and strategies for addressing public safety problems, so long as they don't generate many misconduct complaints, extra work for other police employees, or excessive overtime pay. In other words, rarely is a patrol officer asked to articulate and justify why he or she chooses one policing strategy over others in addressing common policing concerns. Some patrol officers would not mind being asked such questions: they would be quite comfortable explaining their reasoning and receiving input from others that might enhance and improve their strategic decision-making. Other officers might be very uncomfortable with any interrogation of their methods and strategies, either on general principle that their discretion ought to be respected through silence or because their preferred methods and strategies are dubious on either effectiveness or ethical grounds. Still others might be confident in their choices but not in their ability to verbalize their rationale for what—for them—are largely intuitive decisions. It is the rare police agency that has any system for inquiring how and why its officers police as they do. Lost are opportunities both to correct bad policing practices and to promote good policing practices among other officers. And lost are opportunities to enhance fluency in discussing why some choices are preferable to others given the facts of particular problems and events.

As a test of the challenge inherent in developing a system for holding police officers accountable for their discretionary decision-making, consider the policy above on arrest discretion. What might be the enforcement mechanism for such a policy? Can one imagine a system in which police officers are asked to justify their arrest decisions, not solely against the legal standard of probable cause, but against a more expansive professional standard that sought to determine whether the decision was the best, the optimal, the wisest, or the most prudent course of action. What might be the practical consequences for an officer who is deemed to make arrest decisions that are “lawful, but awful”? Or the officer whose arrests are lawful but wasteful?

In the long march toward true professionalism in policing, developing and implementing meaningful systems for holding police officials—from chief executives to line-level officers—accountable for their discretionary decision-making might well be one of the final steps. True professionalism—whether among physicians, lawyers, engineers, military officers, journalists, educators, etc.—demands personal accountability to high standards of the profession’s practitioners. Whereas the law may hold professionals only to minimal standards (i.e., that they not intentionally, recklessly or negligently cause harm to others through their practices), each respective profession needs to hold its practitioners to higher standards that also consider ethics, efficiency, and effectiveness in one’s practice.

C. The Relationship between Police and Lawyers

If we reconsider the relationship of the police to the law, moving away from the notion that the police exist solely or even primarily to enforce the law to the fullest extent possible and toward the notion that the law functions more as a tool that can be applied to help police achieve other, broader objectives, then we should likewise reconsider the relationship of the police to lawyers.

The conventional understanding of the relationship between police and lawyers is something like the following:

Prosecutors: Prosecutors (who work in offices known variously as district, state or circuit attorney offices) relate to police principally by reviewing their arrests, deciding whether to charge the arrestees, and collaborating with police in preparing cases for court proceedings. Prosecutors may also advise police on legal matters, most commonly questions on search and seizure. They may also provide some legal training to police officers, either in training classes or via training bulletins. On occasion, prosecutors charge police officers with crimes committed in the course of their official duties.

Corporation counsel: City or county attorneys—the counsel for the governmental corporation—typically relate to police by reviewing their arrests for ordinance violations, deciding whether to charge the arrestees, and collaborating with police in preparing the cases for court. They might also provide the police with legal opinions on matters pertaining to local government law. They also defend the police organization and local government in civil suits alleging police improprieties.

Police in-house counsel: In police agencies that employ their own in-house lawyers, most commonly the police attorney relates to police administrators by providing them with legal advice and services on matters pertaining to civil liability risks and employment law. They might also provide the agency with some legal training and advice on the drafting of police policies and procedures.

Public defenders and private defense lawyers: These lawyers typically relate to police as adversaries in criminal cases, challenging the veracity and reliability of police officers as witnesses.

As vitally important as the above aspects of the police-lawyer relationship are, against the backdrop of a broader understanding of the relationship of the police to the law, police require a broader and different relationship with lawyers.

Police need access to government lawyers who can help police use the law creatively and fairly toward the achievement of legitimate police objectives, not merely lawyers who see their role as telling police what they cannot do in the interest of reducing the government's liability exposure. Much of the conventional lawyer relationship to police is reactive and negative: the attorneys respond to what police have already done and seek either to minimize any negative impact of police action on the government's interests or prevent repetition of police action that might have negative consequences in the future. As police work becomes more proactive and preventive, so too should the role of lawyers. Government lawyers' relationship to police should become more proactive and affirmative: it should be oriented as much toward helping police accomplish their multiple objectives fairly and effectively as it is toward protecting the government from the negative consequences of police action.

One way in which government lawyers can better help police achieve public safety objectives is to expand their repertoire of legal expertise. Police need lawyers who are expert in criminal law and in local ordinances, to be sure, but they would also benefit greatly from having available government lawyers who are equally expert in other areas of the law such as the following:

- torts (e.g., premises and product liability)
- property (e.g., nuisance, civil trespass, eviction, condemnation, zoning)
- government regulations (e.g., building, fire, business, occupational safety, occupational license, and public health codes)
- civil injunctions and restraining orders
- asset forfeiture
- receivership
- conditions of release (bail, probation, and parole)
- alternative dispute resolution (e.g., mediation, negotiation, arbitration, restorative justice)
- interagency agreements with organizations with whom police collaborate
- drafting and introducing new legislation and regulations

It is not enough that government lawyers be proficient in these areas of the law; they must also be able to think creatively to help police use the right legal tools to control and prevent particular public safety problems, and to help police determine whether a law-oriented response to the problem is advisable in the first instance. In some instances, application of the law might be irrelevant, inconsequential, or even counterproductive. The problem might better call for environmental design, community action, informal dispute resolution, or some other approach that does not directly implicate enforcing a law.

As a nice illustration of the value of having police access to this breadth of legal expertise and problem-solving orientation, the Oakland, California, Police Department and the Oakland City Attorney's Office collaborated to form a "Beat Health Unit" whose mission

was to eliminate criminal and nuisance activity associated with real property in the city.¹⁶ Another example was the New York City Police Department's Civil Enforcement Initiative of the 1990s in which police department lawyers' roles were expanded to working in collaboration with field operations officers. The in-house NYPD lawyers helped sworn personnel use a range of civil law enforcement approaches to deal with properties at which crimes and nuisances were common and to address other public safety problems.¹⁷ The NYPD describes the Civil Enforcement Unit's activities as follows:

The Civil Enforcement Unit (CEU) uses civil litigation in both judicial and administrative venues to expand the NYPD's ability to respond to crimes and quality of life issues. CEU attorneys work with enforcement personnel to address crime trends and conditions (e.g., firearms, driving while intoxicated, narcotics, prostitution, weapons, trademark counterfeiting, auto crime, and gambling).¹⁸

In a number of other jurisdictions, prosecutor's offices devote at least part of their staff to practicing what is known as community prosecution, as described in more detail in the following section. The application of the concept varies across jurisdictions that espouse it, but at its core community prosecution entails prosecutors working closely with both the community and the police to identify chronic public safety problems and to develop and implement responses to control and prevent those problems that are more effective than previous efforts. Rather than specializing in the prosecution of certain types of crimes, as their conventionally-oriented colleagues do, community prosecutors start with the public safety problem and determine how best to respond to it. This approach closely mirrors community- and problem-oriented policing approaches.¹⁹ In some instances, police need lawyers (including judges where appropriate) to exert greater leadership in addressing public-safety problems, particularly where police influence and authority is insufficient to persuade agencies and organizations to take actions that are necessary to controlling and preventing a public safety problem.²⁰ In particular, police need help from lawyers thinking through how to persuade and compel citizens and groups that control the conditions generating crime and disorder problems (e.g., retailers, gun dealers, alcohol purveyors, product manufacturers) to adopt more socially responsible practices.

Toward the goal of establishing this broader relationship between police and government lawyers, it would naturally be helpful if lawyers were trained to think of the law as a tool that can be put to service in pursuit of public safety objectives, rather than as something

¹⁶ Mazerolle, L.G. and Roehl, J. *Controlling Drug and Disorder Problems: Oakland's Beat Health Program*, National Institute of Justice Research in Brief, March 1999. See also, Oakland Police Department, "The Oakland Airport Motel Program: Eliminating Criminal and Nuisance Behavior at a Motel," submission to the Herman Goldstein Award for Excellence in Problem-Oriented Policing, 2003. Unfortunately, the City of Oakland disbanded the Beat Health Unit in 2005.

¹⁷ New York City Police Department, *Civil Enforcement Initiative*, June 1992; Bratton, W.J. "Policy Review: The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes," *Journal of Law and Policy* 3:447 (1995).

¹⁸ *Id.*

¹⁹ Wolf, R.V. *Community Prosecution and Serious Crime: A Guide for Prosecutors*. Bureau of Justice Assistance and Center for Court Innovation (2010).

²⁰ Goldstock, R. "The Prosecutor as Problem Solver: Leading and Coordinating Anticrime Efforts," *Criminal Justice* 7: 3-9, 48-49.

to be enforced for its own sake; to appreciate that the application of the law alone often does not suffice to resolve public safety problems; to recognize police as independent professionals, rather than mere enforcement agents of the government attorney's office; and to themselves possess some expertise in understanding the nature of crime and disorder problems and competence in using problem-solving skills and methods to address them. Unfortunately, with rare exception, this is not how lawyers are trained, either in law school or on the job. To a large degree, government lawyers remain decades behind the police in terms of their understanding or acceptance of their broader role in society, and law schools remain yet another decade behind the government lawyers in developing lawyers for this expanded role.

In the next section, we explore the multidimensional, collaborative approaches that prosecutors are using to expand their public safety strategies.

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The author is Michael S. Scott (University of Wisconsin Law School).

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