1967

Administrative Problems in Controlling the Exercise of Police Authority

Herman Goldstein

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Herman Goldstein, Administrative Problems in Controlling the Exercise of Police Authority, 58 J. Crim. L. Criminology & Police Sci. 160 (1967)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

ADMINISTRATIVE PROBLEMS IN CONTROLLING THE EXERCISE OF POLICE AUTHORITY

HERMAN GOLDSTEIN

The author is Assistant Professor of Criminal Justice Administration at the University of Wisconsin Law School. He is currently engaged in a program of research and training in law enforcement under a grant from the Ford Foundation.

Mr. Goldstein served from 1960 to 1964 as Executive Assistant to the Superintendent of Police in Chicago. Previously, as a Research Associate with the American Bar Foundation's Survey of the Administration of Criminal Justice, he studied police operations in Michigan and Wisconsin.

Upon his graduation from the University of Connecticut, Mr. Goldstein embarked upon graduate studies in governmental administration at the University of Pennsylvania, where he received his Master's degree.

In this article, Mr. Goldstein draws upon his personal experience as an observer of police operations, and as an administrator in a large police agency, to examine some of the complex problems encountered in exerting control over police conduct. As a basis for his analysis, the author distinguishes the several forms of most commonly cited misconduct, noting the quite different problems which each presents. Often-ignored factors inherent in the nature of the police function that complicate review and control of police actions are described. Considering the effect which this range of problems and factors has in limiting the value of existing and proposed methods for exerting control from outside the police agency, the author concludes that improved control over police conduct is primarily dependent upon the willingness of a police administrator to exert tighter and more effective controls over his personnel.

Among the most significant trends in the law enforcement field during the past decade has been the increase in efforts to subject the exercise of police authority to review and control from outside the police agency.

For most of this period, attention has been primarily focused upon the effect of the "exclusionary rule", whereby evidence obtained illegally is not admissible in a criminal prosecution. Adoption of the rule has placed all trial judges in the position of reviewing and controlling police practices that bear upon the manner in which evidence is acquired.¹ More recently, increased tensions experienced in some communities in the relationship between the police and local citizens have focused attention upon proposals for the establishment of civilian review boards to air complaints against police officers. Efforts on the part of the police to reduce such tensions have given rise to a third development—the establishment of new programs to improve police community relation-

ships in which a special effort is made by the police to subject their operations to greater public view.

Each of these developments has been the subject of widespread interest and discussion. Nationwide application of the exclusionary rule gave rise to heated debates between law enforcement officials and those who have defended judicial review, but this argument has since been greatly overshadowed by the controversy relating to civilian review boards—a controversy that has embroiled entire communities. The polarization of views which has taken place and the involvement of broader community issues have had the unfortunate effect of beclouding the already complex problems involved in the control of police conduct.

Difficulties experienced in administering a police agency have not been adequately explored, nor has there been sufficient effort to assess the effectiveness of the several forms of control that have been advocated. Particularly bothersome is the degree to which the taking of extreme positions for purposes of argument has served to distort reality. A necessary first step in this effort to examine some of the underlying problems in the control of police conduct is a restatement of several basic propositions.

¹ See, in particular, LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965), and Brennan, *Judicial Supervision of Criminal Law Administration*, 9 CRIME & DELINQUENCY 227 (1963).

RESTORING A PROPER PERSPECTIVE

Control of official behavior under our system of government is obviously a matter of legitimate public interest. But the police—and especially police organizations—have come to bristle at the mere mention of “controls” and, in some quarters, have gone so far as to disclaim the right or competence of any external group to review police conduct.² Those who have taken this position ignore the fact that the high value which our society places on individual rights requires that there not only be limitations on the authority exercised by governmental agencies, but that there be effective controls to assure that such power is not exceeded or abused. The need for controls is especially acute with regard to the police, for their authority—to arrest, to detain, to search, and to use force—is unique among governmental powers in the degree to which it is disruptive of freedom, invasive of privacy, and sudden and direct in its impact upon the individual.

Secondly, it must be recognized that there has been a demonstrated need for control. Police understandably are sensitive to having documentations of abuse in years past cited to support the contention that the police of today are not to be trusted. It is generally conceded that such practices as were described in the Wickersham Reports of the 1930's, for example, no longer exist.³ But the total record of police misconduct, scattered as it is, is too long and too recent to be ignored. Beyond this, it seems apparent that the very nature of the police function is likely to continue to give rise to situations in which an individual officer may misuse his police powers. Considering these factors, it is not sufficient for the police to continue to respond to demands for the establishment of some form of controls, as has often been done in recent years, by citing the absence of any evidence of current abuse.

A third factor relates to the complexity of the

police task and the conditions under which the police ordinarily function. Few citizens have a basis for understanding the milieu in which a police officer assigned to patrol duties operates, unless their own work exposes them to the kinds of problems confronted by the police. The officer working in a congested section of a large city rushes about the area to which he is assigned, caring for one incident after another. His time is spent dealing with a concentration of social ills and with an infinite variety of situations requiring some form of action. Incidents considered as unusual occurrences by the average citizen constitute the officer's routine work load.

Most of the people with whom an officer is called upon to deal are in a highly emotional state. A large percentage are intoxicated. Many are abusive. And some are downright vicious. Speed in the making of decisions is often essential in order to avoid further harm to a victim, to safeguard the officer, or to prevent some form of mob action. Information required for the making of careful decisions is not always readily available, nor is it always possible to consult with superior officers when guidance is needed.

It is not suggested, as some would contend, that the existence of these and other similar conditions makes it impossible for a person outside a police agency to review police actions, or that the existence of such conditions serves to justify whatever action may be taken. But it is suggested that discussions relating to the problems inherent in controlling police behavior be undertaken with a full awareness of the need for considering the complex environment in which the police must usually function.

The fourth and perhaps most important factor lost sight of in the polarization of views that has taken place is that primary dependence for the control of police conduct must, under any conditions, continue to be placed upon existing systems of internal discipline. An agency functioning outside a police department simply does not have the capacity to substitute for the numerous echelons of supervisory officers that are required around the clock, twenty-four hours a day, to provide the kind of on-the-spot direction and control that is necessary to assure conformity by hundreds and sometimes thousands of police officers to established standards of conduct. External controls are likely to be effective only if they induce a desire and willingness on the part

² The most vociferous objections to civilian review boards may be found in the publications of the Fraternal Order of Police. For the position of the International Association of Chiefs of Police, see *THE POLICE CHIEF*, June 1965, pp. 8-9.

³ National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement, No. 11 (1931). The U.S. Supreme Court itself acknowledged, in recently reviewing the record of police abuse, that the examples which they cited were “undoubtedly the exception now”, but the Court went on to state that the examples are nevertheless sufficiently widespread to be the object of concern. *Miranda v. Arizona*, 384 U.S. 436, 447 (1966).

of police administrators and their supervisors to elicit conformity from their subordinates. This need makes it essential that increased attention be devoted to the problems encountered by police administrators in exerting internal controls; and that consideration be given to the impact which the several forms of external control have upon internal discipline.

DISTINGUISHING AMONG THE SEVERAL FORMS OF MISCONDUCT

Among the factors complicating the discussion of control mechanisms has been a failure to identify and separate out the several forms of behavior that are of primary concern.

1. *An Abuse of Police Authority in Dealing with Citizens or a Breach of Intradepartmental Discipline?* Current public concern focuses primarily upon police conduct which involves interaction between a police officer and a citizen in contentious situations. The questioned actions often involve the exercise of some form of police authority, such as the holding of a person in physical custody, the search of a person or of private premises, the use of force, or the seizure of property. A substantial percentage of the complaints currently coming in for special attention have alleged what has come to be referred to as verbal abuse. Complaints relating to such actions, which deprive a citizen, in some measure, of his freedom, property, privacy, or personal dignity, differ substantially from those which allege (a) violations of regulations relating to the internal management of an agency or (b) the existence of corrupt practices.⁴

Departmental regulations prescribe detailed rules to govern the conduct of officers both on and off duty. Personnel, for example, are typically required to wear a prescribed uniform, to be in possession of certain equipment, to report on and off duty at specified times, and to follow a myriad of general orders and standard operating procedures governing the processing of police business. In addition, an officer in his personal life is typically held to account for associating with certain types of individuals, for becoming intoxicated, for mismanaging his personal finances, and for any form of sexual conduct outside of marriage.

Police administrators have traditionally as-

sumed a direct responsibility for assuring conformity with such regulations and for ferreting out corrupt practices. A police chief, regardless of the size of his agency, tends to feel personally embarrassed when an officer is found to be sleeping on duty, when he is found to be in the company of known criminals, or when he is found to have accepted a bribe. In well-run police agencies, departmental supervisors themselves take the initiative in ferreting out such violations and are willing to initiate disciplinary action. This attitude is in sharp contrast to the lack of concern commonly displayed with regard to the alleged abuse of police authority.

While current public interest is not focused upon police efforts in achieving compliance with rules such as have been cited or with efforts to ferret out corrupt practices, the high level of conformity that is accomplished in these areas suggests that there may be elements in the systems of control that are employed which are worth adapting in efforts to establish a more effective control over the exercise of police powers. Chief among these appears to be the existence of a personal commitment on the part of the police administrator and his supervisory officers to achieving the objective that the system of control is designed to accomplish. Where such a commitment does not exist, as for example in agencies in which supervisory officers are themselves corrupt, the system fails.

2. *Illegality or a Lack of Propriety?* Only in a minority of cases alleging an abuse of police powers will evidence clearly support the fact that the officer did exceed his authority. In the vast majority of such cases, the actions of the officer, though they may have harshly disrupted freedom or privacy, are legally justified and clearly within the scope of his police powers. What is really at issue is the propriety of his action (a) in terms of simple courtesy and good public relations and (b) in deciding whether he *should* do what he clearly has *power* to do. The former of these is easily understood. The latter is much more complex and has become the subject of growing attention.⁵

⁴ The latter is generally viewed by the police as a distinct class of wrongdoing even though corrupt practices so often involve an abuse of police power, i.e., the exerting or withholding of police action in exchange for money or other reward.

⁵ This is reflected in the rapidly increasing body of literature on various aspects of police discretion that has appeared since 1960. Included among the major works are: BANTON, *THE POLICEMAN IN THE COMMUNITY* 127-146 (1964); LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 61-161, 490-527 (1965); SKOLNICK, *JUSTICE WITHOUT TRIAL* 71-88 (1966); Abernathy, *Police Discretion and Equal Protec-*

Contrary to the common image, the police are expected to exercise discretion in the application of their authority. Broadly stated or ambiguous statutes, and limitations on manpower, among other factors, require that they do so. But due in part to the fact that there has been a general failure to recognize the existence of these discretionary areas, the police are rarely provided with adequate guidelines to aid individual officers in dealing with the infinite variety of situations which they confront. There are, consequently, no criteria for judging the propriety of individual actions, and individual officers are thus left free to function to the outer limits of their authority in the handling of a given case.

Through various patterns of accommodation and improvisation that have evolved over the years, police officers tend to develop a reasonably uniform sense of propriety for functioning in these uncharted areas. After several months on the job, a new police officer will find himself employing a wide variety of devices for invoking less than his full authority in disposing of numerous incidents which come to his attention. He will, for example, find himself ordering a disorderly group congregated on the street to "move on". He will separate combatants. He will order a child found on the streets after curfew to go home. He will turn a juvenile offender over to his parents. And he will arbitrate and mediate disputes between husbands and wives, landlords and tenants, and merchants and their customers. In selecting from among available alternatives, including arrest, the officer will typically consider such factors as the gravity of the offense, the character of the individuals involved, and their attitude in responding to his orders or requests. Considering the informality of the process and the fact that the criteria employed are rarely articulated, the actions taken are surprising both in their uniformity and in their effectiveness.

tion, 14 S.C. L. REV. 472 (1962); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Goldstein, H., *Police Discretion: The Ideal Versus the Real*, 23 PUBLIC ADM. REV. 140 (1963); Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 60 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 (Parts I and II)*, 1962 WIS. L. REV. 104, 179; Remington, *The Role of the Police in a Democratic Society*, 56 J. CRIM. L., C & P.S. 361 (1965); Remington and Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481.

An officer may, however, employ his own personal norms in exercising discretion rather than those which have informally developed in the agency. This may result in his taking action which appears unduly harsh, invasive, or costly when related to the nature of the conduct being investigated or proceeded against. He may, for example, arrest an elderly lady for participating in social gambling. In the absence of adequate guidelines, such an action would not be violative of any law or police statement. Indeed, from the officer's standpoint, the action may reflect a sincere desire to conform to his personal understanding of the duty which he has sworn to fulfill, even though the action would be inconsistent with the general view of proper restraint in making arrests. Similarly, based upon a literal interpretation of the statutes, an officer may be legally justified in searching a person, in seizing property, or in using force in situations in which the majority of police officers, exercising what has come to be referred to as the "common sense" of police work, would choose not to act or would take some lesser form of action.

Since the exercise of discretion by police officers has generally not been acknowledged, there has been no method established by which such discretion is subjected to review or control. Existing control mechanisms, designed to deal with those situations in which an officer has clearly exceeded his legal authority, have occasionally been employed to review discretionary acts, but they are obviously not adapted to this function. Thus, for example, a chief of police can hold an officer to account who has gone beyond his authority in dealing with a citizen but, short of such a violation, he is only in a position to characterize a given action as "improper" and urge that the officer exercise more "common sense" in dealing with similar situations in the future. This dilemma suggests the need for more formalized guidance which would also serve as the standard by which the propriety of a given decision may be measured.⁶

⁶ The manner in which this can best be accomplished has been one of the principal concerns in the program of research and training in law enforcement and criminal justice administration being conducted at the Law School of the University of Wisconsin under a grant from the Ford Foundation. See Goldstein, H., *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. — (1967). A more comprehensive analysis of the role of the police as a policy-making agency, prepared by the author in collaboration with Professor Frank J. Remington, appears as Chapter 2, in the *Report by the Police Task*

3. *Individual Wrongdoing or Department-Wide Practice?* A review of the actions of a police officer in a given situation may indicate that his authority was clearly misused, but that his actions were consistent with those taken by his fellow officers under similar circumstances and, indeed, consistent with the instructions or the expectations of his superiors. This forces an awareness of the stark fact that many routine, department-wide police practices are without legal foundation. Police administrators, especially in large cities, will generally acknowledge this to be the case, regretting the existence of such practices, but asserting their necessity for effective public protection.⁷ While the practices take on a different form from one city to another, it would frequently be found that police officers routinely search known gamblers; arrest common prostitutes without evidence of their having engaged in soliciting; seize dangerous weapons discovered by illegal search; and take large numbers of chronic alcoholics into custody on less than firm legal grounds.⁸

The short-cutting of legal procedures often reflects an effort on the part of the police to respond to public demands that they deal with various types of deviant behavior despite the fact that they have encountered difficulty in attempting to do so in a legal manner.⁹ Thus, for example, the extreme difficulty in acquiring necessary evidence against an experienced prostitute and the ineffectiveness of the monetary fine that is typically imposed even when the necessary evidence is acquired have often led to an unexpressed police policy of harassing common street prostitutes. Police think this desirable in order to meet public expectations; to reduce the nuisance which streetwalking prostitutes present to uninvolved passersby; to assist in the control of venereal disease; and to reduce the number of

more serious crimes, like robbery, that are often committed in conjunction with prostitution. While such illegal use of police authority may not be condoned, it must nevertheless be viewed sympathetically as symptomatic of more complex problems in the criminal justice system.

Most significant, from the standpoint of the control of police behavior, is that a complaint that cites such illegal conduct on the part of an officer does not really raise questions regarding individual conduct, but rather questions the informal policies of the agency. Existing control mechanisms, designed as they are to control individual behavior, cannot adequately perform the quite different and more complex task of exposing and reviewing enforcement policies and practices. This is especially true with regard to the internal disciplinary machinery of a police agency. However strongly committed an agency may be to disciplining the conduct of its employees, it is not likely to criticize the actions of an officer which, though of questionable legality, are in accord with a practice knowingly and consciously engaged in by the agency. This suggests that department-wide policies, as distinct from the individual conduct of police officers, can be adequately controlled only from outside a police department.

FACTORS INHERENT IN THE NATURE OF THE POLICE FUNCTION THAT COMPLICATE THE REVIEW AND CONTROL OF POLICE CONDUCT

While many of the problems in the control of official conduct are common to all agencies of government, those which are encountered in the control of law enforcement officers are complicated by a number of peculiarities inherent in the nature of the police function.

1. *The Adversary Nature of the Police Function.* Contacts between officers and citizens are often initiated under conditions that are emotionally charged—such as immediately after a fight, a disturbance, or the commission of a crime of passion. Any action on the part of an officer, in restraining the parties or in effecting an arrest, serves to raise the emotions of those involved to a still higher pitch. The exchange of words in so highly charged an atmosphere often leads to physical reactions—with each verbal or physical act by the citizen and the officer countered by a stronger reaction—frequently escalating to the point that force is applied.¹⁰

¹⁰ In an effort to avoid such situations, the Chicago

Force, President's Commission on Law Enforcement and Administration of Justice (April, 1967).

⁷ See, for example, Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P.S. 395, 398 (1960), and LaFAVE, *op. cit. supra* note 5, at 456 (1965).

⁸ The existence of each of these practices is described in detail in LaFave, *supra* note 7, and in McINTYRE, TIFFANY, AND ROTENBERG, *DETECTION OF CRIME* (to be published in 1967). Both volumes are based upon the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. See, also, LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. REV. 391, 422-429 (1966).

⁹ For a detailed exploration of the factors that apparently give rise to these practices, see LaFAVE, *id.* at 429-455.

A review of this kind of incident involves the difficult task of weighing whether the provocations warranted the reactions which they elicited. The task is most delicate when the allegation is one of verbal abuse and the review necessarily consists of weighing the choice of words on the part of each party and the tone in which they were expressed.

A somewhat different set of problems is created by the fact that the hard core of criminal offenders against whom the police must take action do not have the least hesitation to make a false allegation regarding police conduct if there is the slightest possibility that such an allegation will benefit their situation by clouding the issue of their own guilt. Such individuals may also file a false allegation as a means for "getting back at" the police officer whose actions resulted in their being arrested and charged with a crime. Persons engaged in organized crime and the operators of disreputable establishments that are subject to police regulation are among those who make use of this technique as a means of harassing arresting or investigating officers.

The frequency with which such allegations are made and the degree to which they are established to be unfounded leads to a tendency on the part of police supervisors to discredit all complaints of persons frequently engaged in criminal activity or subject to strict police regulation. Among the obvious dangers in adopting such a posture is the fact that the most common and most difficult offender is among those who are especially vulnerable to the abuse of police authority. An officer may conclude that an offender's reputation is such that his word would not be trusted in a subsequent review. This tendency requires that complaints filed by persons with the poorest of reputations be investigated with the greatest of care.

2. *The Isolated Conditions Under Which the Police Function.* Review of a citizen's relationship with a police officer is often complicated by the isolated conditions under which the two parties come in contact with each other. By the very nature of the police function, a person spotted alone in certain areas of a community becomes the subject of police attention. His isolation from others is one of the factors contributing to his

being considered suspect. Thus, police are understandably attracted to individuals found during the early hours of the morning walking in commercial areas, loitering in alleys, or lounging about other locations normally devoid of persons during such hours. The absence of witnesses to such contacts makes it difficult to reconstruct the relationship, should some aspect of it subsequently be subject to question.

This same factor contributes to the difficulties experienced in supervising and directing police actions on a continuing basis. It is possible—and, in fact, relatively easy—to hold large numbers of police officers to a given form of conduct when they are functioning together in a group under the direct eyes of several echelons of supervisors and large numbers of citizens. Such is the case, for example, when police are assigned to the handling of a demonstration. But it is a far more complex task to elicit conformance with established standards of conduct when one or two officers are functioning on their own in the nooks and crannies of a built-up and highly congested urban area. The only effective form of control, under such conditions, is an ingrained desire on the part of the officers to want to act properly.

3. *The Defensive Posture of the Police.* The persons most likely to witness police actions are other police officers. But, when such actions are challenged, the fraternal spirit that binds all law enforcement officers usually results in the witnesses supporting the position of the accused officer, whatever his position may be, or results in their claiming a lack of sufficient knowledge.¹¹

This attitude understandably grows out of the defensive posture which the police have traditionally assumed in this country. Police officers share a common concern over the possibility that they will be killed or injured, that they will be subject to false accusations, or that they will be deprived of the benefits to which they are entitled in their jobs. The resulting solidarity is reinforced by shared experiences in reacting to frequent public criticism of police functioning—criticism which often cites shortcomings that result from factors over which the police, themselves, have little control.

Because of the defensive posture which they

Police Department has defined the "professional" police officer as one who "does not allow himself to be personally offended or to become emotionally involved in any controversy." *Chicago Police Department, On This We Stand* 17 (1966).

¹¹ In fairness, it must be recognized that the tendency on the part of police officers to close ranks in defense of a fellow officer is a characteristic common to many other fields of endeavor, e.g., the notorious difficulty in establishing malpractice in the medical field.

assume, the police fail to distinguish allegations of individual wrongdoing from a broader form of criticism of police conduct. The individual allegation, as a result, elicits the same kind of unified defense as any of the other factors that serve to bind officers together. As a result, an almost inflexible code develops that prevents any officer from testifying as to the actions of another that might be considered improper or illegal. The implications which this "conspiracy of silence" has for the control and review of police conduct are obvious.

4. *Conflicting Demands on the Police Executive.*¹² Police efforts devoted to preventing crime consist of actively ferreting out and investigating suspicious circumstances and people. Because of the emphasis placed on prevention, the average officer is under considerable pressure from his superiors to be energetic in carrying out this function. He is urged to patrol intensively the areas to which he is assigned—to probe, to search, and to explore, in an effort to identify any situation or circumstance that suggests a crime is likely to be committed. He is told that an officer who conceives his function to be solely that of responding to calls for police assistance is not performing well as a police officer. A variety of administrative devices are employed to implement this concept, all of which place a high value, in the form of rewards and prestige, upon positive results. Thus, for example, an officer is likely to receive a special commendation for having apprehended, as a result of his patrol efforts, a person about to commit a burglary.

The difficulties in this area grow out of the fact that individual officers are left to define the limits of their preventive activities. Some seem capable of satisfying the need for active patrol by discreetly inquiring into the circumstances and individuals that arouse their suspicions. Others, however, investigate and question aggressively, thereby offending in varying degrees the individuals with whom they come in contact. A police chief who feels that the effectiveness of his preventive efforts is dependent upon the degree to which he can motivate his men to be vigorous in their patrol activities is hard-put to review a complaint alleging overly-aggressive behavior.

A second and somewhat similar conflict is

posed by what is viewed by some as the competitive nature of the police function. The public tends to define police operations in detecting crime and identifying criminals as a battle of wits between the "good guys" and the "bad guys". Efforts to deal more effectively with the crime problem are characterized as a "war" on crime. Police officials and individual police officers, motivated by a desire to fulfill a "winning" image, take up this cudgel. In large cities, the police themselves sporadically declare "war" against streetwalking prostitutes, bars in which homosexuals congregate, or honky-tonks in which bar girls solicit for drinks and in which prostitution thrives.

When the lines are drawn in this manner, it becomes especially difficult for the police administrator to hold his men to the rules of the game. The competitive atmosphere that is created suggests, at times, that the offender must be apprehended and prosecuted at any cost. The more despicable the offender or the nature of his offense, the more difficult it becomes to exercise restraints. Thus, for example, residents of a community terrorized by a serious murder, by the strangling of a series of women, or by the rape of a child will urge that no stone be left unturned in the search for the offender. Such pressures are taken by individual police officers as a mandate to employ techniques which they might otherwise not employ in attempting to identify and apprehend the offender. Appalling as such offenses may be, and desirous as a chief of police may be to solve them, it often becomes his task to remind the community of the limitations of police authority and to remind his subordinates that the constitutional safeguards that guarantee due process were especially designed to guard against such "lynch-like" pressures; that it is under just such conditions that these safeguards receive their supreme test. A weak chief succumbs to the pressures together with his men.

There exists still a third kind of conflict which the police administrator must resolve. As a leader of a body of men, the chief must behave in a manner which elicits the support of his subordinates and which results in their performing in accordance with his instructions. Maintaining a high level of motivation in a police operation is an especially difficult task because so much of what an officer does is frustrating, routine, and endless.

Like all employees—and especially those en-

¹² Each of the superior officers at the various echelons of supervision in a police agency experience the same conflicts in somewhat varying form.

gaged in a military or semimilitary organization—police officers are most likely to respond positively to a leader who, by his actions, demonstrates that he is prepared to support them in handling the most difficult aspects of their work. Desired support may, for example, take the form of being physically present at the scene of a riot or a serious crime when an especially difficult challenge has been presented to the agency. But, of the several types of support, subordinates attach the greatest importance to a chief's willingness to defend his men against public criticism. This does not present a problem when the administrator agrees that the actions criticized were both legal and appropriate under the circumstances. The conflicting pressures arise when the actions of the officer were clearly illegal or ill-advised.

Chiefs respond to this kind of a situation in different ways. There are those who place a higher value on maintaining a good relationship with their subordinates than upon being responsive to well-founded public criticism. Such chiefs are prepared to defend the actions of their officers, however illegal or improper they may have been; or they are, as a minimum, prepared to resolve all questionable cases in favor of their personnel. The chief who attempts to balance, in a judicious manner, the interests of his men with the public's interest undertakes the more difficult chore, for he must be prepared to incur the wrath of either his subordinates or his public or both in borderline cases. His conclusions may lead to his punishing an officer who, in the eyes of his fellow officers, acted heroically. Or he may, upon weighing the evidence, find it necessary to dismiss charges against an officer who appears, in the minds of the public, to be clearly guilty of the alleged charge. In fulfilling this delicate role, a police administrator becomes aware of the fact that an officer wrongfully accused of an illegal or improper action is himself subject to "lynch-type" pressures and, as such, experiences all of the problems of the most unpopular of defendants in a criminal case.

5. *Limitations Inherent in the Complaint Process.* Practically all forms of control over police behavior depend heavily upon the filing of complaints by aggrieved citizens. Some police agencies have undertaken on their own initiative to test the conformity of their personnel with established operating procedures, and some have experimented with various techniques for checking on the integrity of their personnel. But such techniques

have generally not been employed to uncover the misuse of police authority.¹³

Failure to take the initiative in seeking out abuses is not so much a reflection of a lack of interest as it is a reflection of a hesitancy to make use of the kind of techniques which would be required. The few police administrators who have employed persons to pose as prisoners, or have otherwise created an opportunity for an allegedly abusive officer to act under conditions which would provide evidence of his abuse, have been severely castigated by the public and especially by police organizations representing rank and file interests.

The complaint process itself, upon which major dependence is placed, has many shortcomings. It is not a valid measurement of misconduct, nor is it an effective means of assuring that all abuses of police authority are brought to official attention. Individuals most subject to abuse are those with the least competence and the least standing to complain. Ghetto residents, for example, are generally unaware of how one goes about challenging the exercise of authority. Many lack an understanding of the limitations on police powers. But even if they are aware that a given action was illegal and they are made familiar with the processes by which complaints may be filed, aggrieved parties may choose not to file a complaint. Persons residing in such areas are fearful of possible reprisal. They fear that their future conduct might be subject to special scrutiny. And they fear endangering a relationship with the police which they depend upon should the need for a variety of emergency services arise. Even when mechanisms are established to facilitate the filing of grievances, the percentage of complaints arising from ghetto areas is small in relation to the density of population and the probability that abuses occur.¹⁴

Similarly, persons continually engaged in criminal activity, such as a narcotic addict or a street prostitute, fear retaliation. Others such as homosexuals or the customers of prostitutes, refrain from complaining about questionable police actions because of the embarrassment that a full revelation is likely to cause them.

It is in the nature of a complaint process that

¹³ Investigative efforts designed to uncover corrupt practices (which practices usually involve an abuse of police powers) are an exception.

¹⁴ For a description of the New York City experience in this regard under its short-lived, civilian-dominated review board, see *N.Y. Times*, Oct. 21, 1966, p. 1, col. 7 (city ed.).

positive action is required of the complainant. He must seek out the procedure by which complaints are to be filed. He must identify himself and provide sufficient information to enable the initiation of an investigation. He must be prepared to assist in the investigation, to identify alleged wrongdoers, and to participate in any formal disciplinary proceeding or any criminal prosecution which may result. Involvement becomes costly in terms of time, travel, and days lost from work. A common awareness of the inconvenience one is caused and the degree to which one is placed in an accusatory position serves as a major deterrent. Yet, all of these processes are essential in order to weed out the large percentage of unjustified complaints that are filed and to protect an officer from false accusations.

Limitations inherent in the adversary nature of the complaint process as it has been employed have recently led to the suggestion that citizens' complaints be viewed primarily as a means for identifying and improving areas of police functioning in need of correction—rather than as a means for initiating an action against an individual police officer.¹⁵

INADEQUACIES IN EXISTING AND PROPOSED METHODS OF EXTERNAL CONTROL

When one considers the most commonly cited mechanisms for the control of police behavior from outside a police agency as they relate to the problems that have been discussed, their value, limitations, and inadequacies become more clearly apparent.

1. *Civil Action*.¹⁶ The instituting of a civil action against a police officer is perhaps least satisfactory, both as a means of seeking redress and as a means for positively influencing police conduct. Because it is a complex process requiring the assistance of counsel, the cost involved makes it unavailable to the vast majority of persons who have a basis for complaint. Juries are not likely to have compassion for a plaintiff, however abused, if he is guilty of a crime or is disreputable.

Most police officers and police administrators view a civil action as an attack from "outside" that must be defended at any cost. Counsel is usually assigned to officers named in a suit, however inde-

fensible the action of the officers may have been.¹⁷ Attorneys on a city's legal staff who are regularly assigned to defending such actions, or who are retained for the purpose, generally view their function as being limited to providing the best defense for the individual officer. They do not conceive it to be their role, even when it is established that the officer was at fault, to suggest a reevaluation of the departmental practices that appear to have given rise to the officer's actions in the particular case. If such an effort were made, the time required for processing a civil action would most likely divorce the impact of the finding from the practices to which it relates.

A civil action may interfere with administrative efforts to control police conduct. The filing of a suit in some jurisdictions results in the suspension of any form of internal disciplinary action because it is feared that such action may prejudice the pending litigation.

2. *Judicial Review*. The enforcement of the various exclusionary rules required by constitutional interpretation or court policy places all trial judges very explicitly in the role of controlling police practices. Judicial control is, however, limited to the review of only those aspects of police functioning that relate to acquiring evidence in cases in which there is an intention to initiate a prosecution. Such cases represent but a very small segment of the total number of actions in which the police are typically engaged. For every incident in which a police officer exerts his authority as the first step in a process leading to a prosecution, he handles a multitude of other incidents in which he checks out suspicious circumstances, separates combatants, orders people to disperse, or in some other manner uses his powers without effecting an arrest.¹⁸ And even if an arrest is made, it is not always indicative of a desire to prosecute. In many cases it is intended only to serve some other more short-lived objective, such as the harassment of prostitutes or the safeguarding of drunks.¹⁹

In those cases in which the legality of police per-

¹⁷ The practice may stem from a desire on the part of a municipality, as an employer, to "back up" its employees in the discharge of their duties. An added factor, in some jurisdictions, however, may be the possibility of a municipality's incurring some financial obligation. In Illinois, for example, municipalities are required to indemnify policemen for judgments rendered against them for injury negligently caused in the performance of their duties. ILL. REV. STAT., Ch. 24, §1-4-5 (1965). The desire to keep a city's financial burden as low as possible motivates a municipality to assure adequate counsel.

¹⁵ GELLHORN, *WHEN AMERICANS COMPLAIN* 184-195 (1966).

¹⁶ For a detailed examination of the problems and issues in the bringing of civil actions against police officers, see Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

formance is questioned by introduction of a motion to suppress evidence, rulings are made in a manner which serves neither to influence the future behavior of the officer nor to influence the policies and practices of the police agency. Judges seem content to consider each motion to suppress as a review of the conduct of individual officers, even when the officer's conduct appears to be consistent with departmental practices. Not only are the broader problems not addressed, but the suppression of evidence has no effect upon the behavior of the individual officer. Given the choice, the officer is likely to conform to the expectations of his most immediate superiors rather than of the courts.

Should the individual officer desire to adhere to judicial requirements, he would often find it difficult to do so. Motions to suppress are frequently granted without an adequate explanation to the officer as to the reasons why his actions in acquiring evidence were considered illegal. Secondly, the absence of uniformity among the views of judges sitting in the multiple courts of large cities results in subjecting the individual officer to conflicting instructions.

It is possible and certainly desirable to modify the current system of judicial review so as to increase its effectiveness and to make it a constructive instrument for the improvement of police functioning. To accomplish this will require a number of basic changes in judicial practice and an ability and willingness of a police administrator to devise means for assuring the conformity of his personnel.²⁰

3. *Civilian Review Boards.* Most of the recent

¹⁸ Banton argues that a patrol officer is primarily a "peace officer" rather than a "law officer"; that far more of his time is spent in keeping the peace by supervising his beat and responding to requests for assistance than is spent in enforcing the law in the sense of arresting offenders. BANTON, *THE POLICE AND THE COMMUNITY* 1-85 (1964).

For an illustration of the manner in which a police officer assigned to a congested area of a large city spends his time, see *A Report by the Police Task Force, President's Commission on Law Enforcement and Administration of Justice*, Chapter 2, (April, 1967).

¹⁹ See, in particular, the discussion of arrests for purposes other than prosecution in LAFAYE, *op. cit. supra* note 5, at 437-489 (1965).

²⁰ Specific proposals for strengthening the existing system of judicial control are made in LAFAYE and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965); LAFAYE, *op. cit. supra* note 8, (pts. 1-2), 30 MO. L. REV. 391, 566 (1966); and *A Report by the Police Task Force, President's Commission on Law Enforcement and Administration of Justice*, Chapter 2, (April, 1967).

efforts to establish civilian review boards have been intended primarily to provide citizens—and especially those members of minority groups residing within ghetto areas—an opportunity to air their grievances regarding the exercise of police authority. The several boards that have actually been established are without power to control police behavior. They are authorized to receive complaints, to hold hearings, and, as their concluding action, to advise police authorities on the form of disciplinary action, if any, that ought to be taken.²¹ The boards are no better equipped than are police chiefs to initiate action against what appears to be improper—but legally authorized—police actions. Nor are they expected to initiate inquiries into the policies and practices of a police agency. Their primary orientation is toward the review of individual wrongdoing, and their influence upon police behavior not specifically subject to their review appears limited to the deterrent effect which their existence creates.

Grievance procedures, in themselves, are of major importance. It is essential that citizens be provided with easily accessible means for expressing their concern over an alleged abuse of governmental power. It is especially important, in the interests of fairness and equality of treatment, that such means be made available to the least articulate segment of the community whose members are most often subject to police action. The essential nature of this need is underlined by recognizing that the frustrations resulting from unaired complaints and grievances against the police and other agencies of government are among the factors generally viewed as contributing to the kind of violence that has recently erupted in several of the country's largest urban areas.

Important as they are, however, it must be recognized that grievance procedures that air complaints against individual police officers serve a limited function. The broader objective must remain that of correcting or eliminating the situations that give rise to such complaints. Progress

²¹ For a succinct description of the development and experience of existing civilian review boards, see GELLHORN, *WHEN AMERICANS COMPLAIN* 170-195 (1966). See also Beral and Sisk, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499, 511-519 (1964).

For a discussion of some of the arguments for and against such boards, see Inbau, *Democratic Restraints Upon the Police*, 57 J. CRIM. L., C. & P. S. 265, 269 (1966) and Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., C. & P. S. 238, 241 (1966).

toward this goal, in the long run, is dependent upon the development of more effective means for controlling police conduct. This suggests, as a very minimum, that grievance machinery be constructed with an appropriate concern for the manner in which it affects control mechanisms. The complaint process ought to support and reinforce the system of internal discipline upon which primary dependence is placed for the control of police conduct.

While the point has not been made explicitly, it has been argued that civilian review boards would have the opposite effect.²² Because of the adversary relationship between the complainant and the accused police officer to which the existence of such a board would give emphasis, it is claimed that whatever force or commitment may have developed within a police agency for self-discipline would be abandoned in the face of a more compelling desire on the part of police personnel to support a brother officer who stands accused before such a board.

4. *The Ombudsman Concept.* Stimulated by the current wave of interest in the control of police conduct, increased support appears to be developing for adopting the ombudsman concept—so well established in the Scandinavian countries and in New Zealand—as a form of control over the full range of governmental functions in the United States.²³

The concept has much to be said in its favor as a means for airing grievances, for controlling official conduct, and, at the same time, for improving the effectiveness and fairness of administrative operations. Among its features is the fact that the ombudsman achieves his control through the support and reinforcement of internal systems of discipline.

²² See, for example, *IACP Position Statement on Police Review Boards*, THE POLICE CHIEF, June 1965, pp. 8-9, and the Statement of Police Commissioner Vincent L. Broderick, *N.Y. Times*, Feb. 9, 1966, p. 1, col. 1; p. 30, cols. 4, 5 (city ed.). More specific reference is made to this point in a policy statement of the Chicago Police Department, in which it is claimed that the existence of a civilian review board "would not improve discipline but would in fact tend to lower the disciplinary level because an adversary rather than a straight fact finding system would be created and investigating officers and other officers called as witnesses would tend to shield a brother officer from the board. All progress that has been made toward penetrating this 'blue curtain' would be lost." Chicago Police Department, *On This We Stand* 17 (1966).

²³ For the most comprehensive treatment of the ombudsman concept, see GELLHORN, *OMBUDSMAN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1966).

When he has a basis for criticism, the criticism is typically directed at the head of an agency, who is held responsible for the performance of his subordinates, rather than against individual employees.²⁴ Agency heads are expected to investigate allegations of wrongdoing and to take appropriate action. The ombudsman becomes involved only when he has reason to believe that a complaint alleging wrongdoing has been inadequately dealt with by administrative officials or when he believes that the policies and practices to which a complaint relates ought to be subject to review and possibly to modification.

There are a number of other features in the ombudsman concept that have special value when related to the problems encountered in the control of police conduct. The mere presence of a detached, independent critic would serve, in a very important way, to support a police administrator desirous of making the right choice when confronted with strong pressures that move him in the other direction. Application of this form of control to all agencies of government would lessen the defensive posture which police assume when singled out from among other agencies for special scrutiny. And the transfer in emphasis from exclusively negative criticism—in the form of recommendations for disciplinary action or in the form of dismissal of criminal charges because of the way in which evidence was acquired—to constructive suggestions for change and improvement would afford the opportunity for making the complaint process serve as an effective method for strengthening administration.

Left unsettled, however, is the application of the ombudsman concept to police functioning which is of a discretionary nature. The fact that an ombudsman is limited in his review of the discretionary acts of administrative officials is recognized in the several countries in which the institution now exists.²⁵ This limitation would loom as a much more serious problem if the concept were applied to police activities in this country, for vast areas of police functioning currently involve the exercise of discretion. The complexity of our society gives rise to a far greater number and variety of situa-

²⁴ This is in sharp contrast with current practice in this country in which it is an exception for supervisory officers to be disciplined for the wrongdoing of their subordinates.

²⁵ See, for example, HURWITZ, *THE OMBUDSMAN* 8 (1962). See, also, the discussion of an external review of discretionary judgments in GELLHORN, *WHEN AMERICANS COMPLAIN* 221 (1966).

tions to which basic legislative provisions do not apply. Complicating the situation is the fact that the propriety of police exercising any discretion is very much at issue, there being no formal recognition of their authority to do so.

Meaningful review by an ombudsman of situations involving the exercise of discretion by the police would require, as a prerequisite, legislative acknowledgment of the need for the police to employ discretion within broad legislative bounds.²⁶ Subsequently, it would become necessary for the legislature and administrative agencies to share in the development of criteria for decision-making that would provide guidelines for operating personnel and that would constitute a basis for the desired review and control of police conduct.²⁷

SUMMARY AND CONCLUSION

Recent efforts to control police behavior from outside a police agency have been characterized by a desire to realize rapid results—stimulated by an awareness of the lack of progress that has been made in this area over the years and by the recent surge of interest in equalizing the protection afforded individual rights. Such efforts have not had the benefit of extensive prior research, nor has there been a systematic attempt to accumulate the experiences of those who have, in varying degrees, been in some way involved in the broad function of controlling police behavior. Familiarity with police operations suggests that there are several working hypotheses that should be subject to further exploration and study.

The nature of the police function is such that primary dependence for the control of police conduct must continue to be placed upon internal systems of control—upon the traditional system of organization by which an administrator and his superior are held strictly and continually accountable for the performance of their subordinates. There is considerable potential for realizing improved control over the exercise of police authority by adapting administrative procedures now commonly employed in achieving other forms of internal discipline. The primary requisite is a

stronger commitment on the part of police administrators to this goal—a commitment which may often conflict with the most immediate objectives of arrest and prosecution. A strongly committed police chief, however, is not likely to achieve total effectiveness on his own because of the isolated conditions under which individual officers normally function. An added requirement—and the most difficult of realization—is the development of a form of self-discipline and personal commitment on the part of individual police officers that subverts the predominant concern for efficiency to an overriding concern for the fairness of his actions. Since training affords the opportunity for institutionalizing values and norms, the need for development of such a commitment should constitute a major challenge for existing and newly established police training programs.

External controls over police conduct are essential under our form of government, and it is important that police join in a recognition of their value and purpose. Citizens dissatisfied with the manner in which a complaint is handled ought to have the opportunity for an independent review. An effective means ought to be available for questioning agency-wide practices and policies. And an external critic ought to be available to protect and support a police administrator against contrary pressures in his efforts to attain proper goals.²⁸ But external controls should be designed in a manner that reinforces the internal systems of discipline upon which primary dependence continues to be

²⁸ A new program, proposed by a group in Chicago, and referred to as "Citizens Alert", attempts to achieve some of these objectives. It establishes procedures for aiding the residents of depressed neighborhoods in filing complaints where there is evidence of significant police misconduct. In setting forth their objectives, the sponsors of the project acknowledge the difficulties of police work in such areas and state: "We have a superintendent of police in Chicago who seems to be quite anxious to eliminate poor police practices and raise the quality of his force. However, he has tremendous problems of morale and is himself constantly faced with the 'blue curtain,' i.e., the protective shield which policemen interpose against inquiry by anyone who did not himself rise through the ranks. At least in part, Citizens Alert could assist the Department by creating outside pressures which will give the superintendent greater freedom to act against unprofessional police conduct." Among the alternative methods listed for handling of cases is a referral to the police department's internal investigation division (IID). The purpose of such referral, as indicated in the proposal for the project, is "to continue to test the effectiveness of the IID and to constantly give them an opportunity to demonstrate good faith in their procedures." *Prospectus for The Chicago Metropolitan Area Citizens Alert* (mimeo.), January, 1967.

²⁶ It is conceivable that an ombudsman could function effectively in reviewing discretionary judgments without specific legislative acknowledgment of the propriety of police exercising discretion, but this would require that he, himself, assume the position that the exercise of discretion by the police is appropriate and that he be prepared to assert this view when faced with questions relating to discretionary actions.

²⁷ See *supra* note 6.

placed. They should not be oriented toward the control of individual misconduct, but rather should be directed at a review of the conditions that make such misconduct possible.

Whether one is concerned with the effectiveness of internal or external controls, the currently wide gap between the law and practice must in some manner be narrowed if there is to be a basis for review. The propriety of police exercising discretion must be formally recognized and a means designed that will serve to systematize decision-making in these discretionary areas; that will provide guidelines for operating personnel; and that will provide a basis for the desired review and control.

Pervading all of these considerations is the need for reducing the factors that contribute to the complexity of controlling police conduct. Chief among these are the extremes that exist in the range of pressures brought to bear upon the police by the various segments of the public with which they must deal. At one end are those who have the capacity to exert considerable pressure, often resulting in the police responding by employing practices that are illegal or at least questionable. At the other end of the range are those who, lacking status, tolerate police conduct that is clearly improper.

The police administrator having a professional commitment to eliciting conformity on the part of his personnel to standards of fairness as well as effectiveness will recognize the desirability of his

initiating steps to create a better balance in the pressures exerted on his department.²⁹ He must seize every opportunity that presents itself to familiarize those who exert unreasonable pressures on a police agency with the limitations that exist on the exercise of police powers. At the same time, he must assist in developing the capacity of all citizens—and especially minority groups—to exert their rightful demands for a high quality of police service. The existence of a more uniform public demand for policing that reflects an awareness of the unique role of the police in a democratic society would serve to reduce the factors that presently complicate the control of police conduct. It would also serve to lend needed support to the kind of professional commitment to fairness as well as effectiveness that is so basic a requirement for those having administrative responsibilities in the police field.

²⁹ It is for this reason that current efforts on the part of the police to develop programs aimed at improving police-community relations are especially significant. What is called for, however, goes far beyond some of the existing programs which are limited in their objective to improving communication with minority groups or, most narrowly defined, to improving the community's image of its police force and its understanding of police problems. The programs having the greatest potential are those which seek to bring about the kind of involvement on the part of the police that will result in their working closely with citizens, citizen groups, and various community resources in identifying and attempting to solve some of the communitywide problems that give rise to crime, to individual hardships, and to community tensions.