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# POLICE SCIENCE

## THE ROLE OF POLICE IN A DEMOCRATIC SOCIETY

FRANK J. REMINGTON

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A few years ago a city council of a midwestern city voted a pay raise for members of the police department. The city fire chief publicly announced his opposition to the raise on the ground that the two uniformed services—the police and firemen—had always been considered equal so far as salary is concerned. The fire chief argued that equality of pay is proper since both the police and firemen have the same interest and responsibility, namely, the safety of persons and property in the community.

The mayor vetoed the pay raise for other reasons. The interesting question of the similarity or dissimilarity of police and fire department responsibility thus was not resolved.

No doubt many, perhaps a majority, of the people in an American community would equate the responsibility of the two uniformed services. Yet, this seems to be obviously wrong and to be based upon a misconception about, or unawareness of, the nature of the police function in a democratic society. In saying this it is hoped that no one will conclude that fire fighting is unimportant or that firemen are overpaid. It is an important task, a dangerous one and, like most public employment, not overpaid. But, because both policemen and firemen wear uniforms and because both jobs involve personal danger, does not mean that their basic responsibilities are similar.

The difference between the police and firemen's responsibility in our society is a basic difference though one that is not readily apparent. In fire fighting the objective is the prevention and extinguishing of unfriendly fires. The methods which the fireman uses can be evaluated in relation to

their effectiveness in achieving the desired objective which is to put out the fire. In police work the goal is difficult to define and even more difficult to achieve. Oversimplified, the objective is a law enforcement policy suitable to the particular community involved. The methods used must therefore be tested against an objective which is inevitably an ambiguous and uncertain one. Whereas the decisions which fire fighters are called upon to make are largely ones of physical science, the decisions which police must make are political, social, and psychological and very much affected by the democratic nature of American society. One symptom of this basic difference is the fact that fire fighting is typically popular while crime fighting is often very unpopular.

The police should play a major role in fashioning and implementing a proper law enforcement policy for their community.<sup>1</sup> This is an obviously important and difficult task, one seldom apparent to the

<sup>1</sup> There is increasingly adequate literature on the responsibility of police for the development of law enforcement policy. See for example LAFAYE, *ARREST* (Little, Brown & Co. 1965); GOLDSTEIN, H., *Police Discretion: The Ideal Versus the Real*, 23 *PUBLIC ADM. REV.* 140 (1963); GOLDSTEIN, H., *Guidelines for Effective Use of Police Manpower*, 45 *PUBLIC MANAGEMENT* 218 (1963); GOLDSTEIN, H., *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 60 *YALE L.J.* 543 (1960); MYREN & SWANSON, *POLICE DISCRETION WITH JUVENILES, POLICE WORK WITH CHILDREN*, (U.S. Dept. of Health, Education and Welfare, Children's Bureau 1962); ABERNATHY, *Police Discretion and Equal Protection*, 14 *S.C.L. REV.* 472 (1962); BREITEL, *Controls in Criminal Law Enforcement*, 27 *U. CHI. L. REV.* 427 (1960); KADISH, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 *HARV. L. REV.* 904 (1962).

public. Indeed its existence is often denied by police, themselves, probably because they are fearful of having to account for the discharge of so immense a responsibility. The consequence is unfortunate. Police are denied the status, training, and resources which are needed because of a lack of appreciation of the difficulty of the police task.

There are practical reasons why police must assume a major social responsibility whether they want to or not:<sup>2</sup>

1. All criminal laws cannot be enforced fully because the resources made available to the police are clearly insufficient.

2. Even if resources were adequate, the full enforcement of all criminal laws would create an intolerable situation, because it would require the arrest of persons whose conduct is not sufficiently serious to warrant subjecting them to the criminal process. This is caused by overgeneralization in criminal statutes; using the criminal law to solve problems of proof as is done when gambling statutes are drafted very broadly to insure that there are no loopholes for the professional gambler; making the criminal law reflect the aspirations rather than the actual achievable goals of the community which is a characteristic of some of our crimes of sexual immorality; and a failure to revise the criminal law to reflect current opinion as to what conduct ought to be made criminal. But the latter point ought not to be overstressed. Even the most careful revision, such as those accomplished in Wisconsin, Illinois, and Minnesota will not produce a criminal code which is capable of mechanical application to the wide variety of situations which arise. Legislatures expect that enforcement agencies will exercise good judgment in developing an enforcement program.

3. To a major extent, responsibility for deciding what laws are to be enforced under what circumstances must be left to the police. The judge gets the case only after there has been an arrest and prosecution. He can exercise some influence by indicating what he deems to be instances of overzealous enforcement, but he is in no position to review instances in which no enforcement takes place at all. The same is true of the prosecutor, although his contact with the enforcement problems is greater and he can, to some extent, share this responsibility with the police.

Although the necessity of police exercising dis-

cretion is obvious, this fact is often denied by police themselves and as a consequence is not recognized by most segments of the community. Recently, a chief of police indicated that it was not his policy to enforce the curfew ordinance literally, pointing out that there were instances in which children, including his own, might be on the street after the curfew without there being any indication of wrongdoing on their part. The following day the local newspaper published an editorial asking whether we live in a country which has a government of law or a government of men. The editorial suggested to the chief of police that it was his responsibility to enforce the law, not to question its desirability or the appropriateness of its applicability in a particular situation. The editorial further suggested that if the chief thought the law to be improper in any regard, that his redress ought to be to ask the City Council to change the law. The obvious editorial assumption is that police ought to confine themselves to ministerial functions. It is this writer's guess that the chief has decided not to make any more public statements rather than meeting the issue head on. This would be an understandable decision for him to make. The unfortunate consequence is that the general community continues to be unaware of the complexity of the task which a police agency has in current criminal justice administration.

A few years ago the Pennsylvania legislature enacted an amendment to its "Sunday Blue laws" to make it clear that selling goods on Sunday is a crime in Pennsylvania. Apparently the legislature was concerned with the tremendous growth of so-called "bargain city centers" operating at the outskirts of large cities which do a large volume of business, particularly on Sunday. Their growth has seriously affected the downtown stores. The police commissioner in Philadelphia announced that he did not have resources enough to enable him to proceed against all violators. Because of this he indicated that he would proceed against the large violators. This seems to be an obviously realistic and sensible position for the commissioner to take. When prosecution was brought against a large violator, the violator raised, as a defense, the issue of denial of equal protection.<sup>3</sup> His ground was that it was a violation of the constitutional guarantee of equal protection to differentiate in the law enforcement policy between the large violator and the small violator. The Philadelphia court sustained

<sup>2</sup> This issue is discussed in detail in REMINGTON & ROSENBLUM, *The Criminal Law and the Legislative Process*, 1960 ILL. L.F. 481.

<sup>3</sup> *Bargain City v. Dilworth*, 29 U.S.L. Week 2002 (Pa. Ct. Com. Pls. June 10, 1960).

the defendant's claim and dismissed the prosecution, apparently on the assumption that police can proceed against all violators simultaneously, an obviously impossible course to follow.

It is interesting to contrast a case decided by the United States Supreme Court which involved a similar issue, but instead of the Philadelphia Police Department the Federal Trade Commission was involved. The Court upheld the Federal Trade Commission's decision to proceed against certain violators rather than others stating:

... the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.<sup>4</sup>

If the Federal Trade Commission is to have responsibility "to develop that enforcement policy best calculated to achieve the ends contemplated" by the legislature, why not recognize that the Philadelphia police have a similar responsibility? Both the Federal Trade Commission and the police department are enforcement agencies. But it is apparent that the one is thought of as having an important policy making role in government; the other is thought of as an agency with a mission to do what it is told to do. This reflects a prevalent and unfortunate misconception of the function of police, a misconception for which police themselves are partly responsible.

This prevalent assumption that police do not have a policy making responsibility is also reflected in the current relationship between police and courts in regard to the kind of methods which police can properly use to detect crime and identify its perpetrators. Currently courts spend a great deal of time and effort making rules to control police practice. These rules are enforced by the exclusion of evidence which is obtained by police in violation of the rules.

Police say that there are so many rules that they cannot effectively enforce the criminal law. According to this view, courts have handcuffed the police. Critics of the police argue that the alternative to rigid court control is police lawlessness. On this issue the debate rages and contributes nothing to an improvement of the current situation which badly needs improving.

Courts have become increasingly involved in tel-

ing police what they can and cannot do because police have not adequately assumed responsibility for setting their own standards. One brief illustration will clarify this point. Police have an important interest in so-called field interrogation programs. These have neither been sustained nor held invalid in most states. When challenged, as they will inevitably be, a court has two alternatives. It can consider the propriety of the existing police policy or the court can make a policy for the police. As a matter of fact, very few police departments have a written policy statement on when a field interrogation can properly be made. (A notable exception is the statement of the New York Police Department.<sup>5</sup>) Faced with this situation a court must rely upon its own judgment as to what a sound policy is.

If the court decision fails to reflect the legitimate needs of the enforcement agency, police often react by asserting that courts ought to get out of the law enforcement business. This is highly unrealistic. Courts have historically assumed and no doubt will continue to assume responsibility for insuring that governmental power is not abused to the detriment of the individual rights of citizens. The question ought not be whether courts or police will have exclusive domain. Rather the need is to develop methods for constructive cooperation between courts and police in the discharge of their common objective, a system of criminal justice administration which is both fair and effective.

Put most simply, positive judicial participation in law enforcement requires that courts fully appreciate the problems which police face and that police, in turn, fully appreciate the objectives of the judiciary as reflected in court decisions. This is not the situation today.

Courts are not adequately informed about the current needs of law enforcement.<sup>6</sup> When court cases are argued, particularly appellate cases, counsel typically bases his argument on an analysis of prior judicial decisions from his own and other jurisdictions. This does not give the court an adequate picture of how the facts of the particular case fit with generally prevailing police practice and

<sup>5</sup> See Police Department, City of New York Circular No. 25 N.Y. June 25, 1964.

<sup>6</sup> See, e.g., Judge Lumbard concurring in *Williams v. Fay*, 323 F.2d 65, 70 (1963): "... I cannot concur without pointing out that the courts have been left to make rules and apply constitutional standards with little, if any, real knowledge or guidance regarding the difficulties which face the police in solving such crimes in our crowded metropolitan centers."

<sup>4</sup> *Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 2 L.Ed.2d 370 (1958).

policy. About four years ago a state Supreme Court had before it a case which involved the right of an officer to stop and question a person found in an alley under suspicious circumstances. The case thus involved the very vital law enforcement question of the validity of a field interrogation program. Despite the importance of this issue to the police department involved, that department was not even aware of the fact that the issue was being argued in the Supreme Court. The department obviously was in no position to present to the court, through counsel, an adequate picture of the function and importance of a field interrogation program to law enforcement today.

Police are in part at least responsible for this situation. When asked, police often are reluctant or unable to state clearly what their current policy and practice is or to document the reasons why the policy or practice is necessary for effective law enforcement. This is because there is seldom adequate commitment by police themselves to a continuing reevaluation of their own policies and practices to insure that they are both fair and effective. Because of this default it is not surprising that courts have stepped in and done the job themselves. The need is not for lament over judicial intervention, but rather the development of greater police concern with the adequacy of their own programs. Achievement of a situation in which police have major responsibility for their own programs requires that police be willing to subject those programs to critical reevaluation rather than leaving this to courts to do.

There is need also for more adequate communication of court decisions to police. In some small departments important decisions may never become known to the individual police officer. Even in large departments there are serious problems. The greatest impact upon police practice may come from the day to day decisions of the trial courts. Commonly these are not written and are, as a consequence, passed on by word of mouth from the officer involved in the case to other officers in the department. In the process, a great deal of distortion inevitably occurs. Even when appellate opinions are available it is evident that they are not written in a way that makes it easy for police to understand what they are expected to do. For example, the opinion in the recent important case of *Escobedo v. Illinois*<sup>7</sup> said:

· 84 S. Ct. 1758 (1964). See also *People v. Dorado*, 394 P.2d 952 (Cal. 1964).

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation [of the Constitution].

Lawyers will recognize this as an effort to limit the scope of the decision to the particular issue before the Court. The opinion does not say that police cannot interrogate a suspect at all; it does not say that they must warn all suspects of their right to remain silent; it does not say that all suspects must be allowed to consult with counsel if they request the right to do so. Rather it identifies these as important factors which may, under some circumstances, make police interrogation unconstitutional. It is apparent how difficult a task it is for police to translate this into a revised interrogation practice which will be both effective and in conformity with the requirements of law. This is particularly so because most police do not have available to them effective legal counsel.<sup>8</sup> Prosecuting attorneys seldom make a systematic effort to act as legal advisors to police departments within their counties. Most would not, in current practice, think it their responsibility to translate the *Escobedo* decision into a new interrogation procedure to be followed within their county. Even the largest police departments are commonly without competent, legally trained personnel on their staff. For example, a chief in a very large city tried, a few years ago, to get authorization to hire competent counsel, but the request was denied on the ground that the Corporation Counsel furnishes that service. In fact, however, the Corporation Counsel responds only when a specific question is asked and does not see his responsibility as including the development of law enforcement policies and practices which conform with the requirements of law.

There is obvious need for more effective communication between police and courts. This requires a recognition by police that courts perform a legitimate and necessary democratic function in review-

<sup>8</sup> A current program at the Northwestern University Law School under the direction of Professor Fred Inbau is designed to encourage lawyer interest in becoming Police Legal Advisors.

ing police policies and practices and a recognition by courts that police have a part to play in the determination of what methods of law enforcement are fair and effective.<sup>9</sup> This will not happen unless police acknowledge that they have an important policy making responsibility. It will not happen if police continue to assume that a law enforcement tactic is proper unless a court has said it is im-

<sup>9</sup> This is an objective of a current police-law program at the University of Wisconsin Law School. Professor Herman Goldstein, formerly executive assistant to O. W. Wilson, and now a member of the law faculty, is involved in a program designed to produce more adequate mutual understanding between the police and legal professions.

proper. Flexibility in the use of law enforcement power requires that police themselves assume a major responsibility for setting their own standards of propriety without waiting for courts to do this for them. To accomplish this will require that police themselves engage in a continuing process of re-evaluation of law enforcement policies and practices to insure that they are both effective and responsive to the requirements of a democratic society.

This is the kind of responsibility, willingly assumed, that distinguishes a profession from an occupation.