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POLICE DISCRETION NOT TO INVOKE THE CRIMINAL PROCESS: LOW-VISIBILITY DECISIONS IN THE ADMINISTRATION OF JUSTICE

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POLICE decisions not to invoke the criminal process [1] largely determine the outer limits of law enforcement. By such decisions, the police define the ambit of discretion throughout the process of other decisionmakers—prosecutor, grand and petit jury, judge, probation officer, correction authority, and parole and pardon boards. These police decisions, unlike their decisions to invoke the law, are generally of extremely low visibility and consequently are seldom the subject of review. Yet an opportunity for review and appraisal of non-enforcement decisions is essential to the functioning of the rule of law in our system of criminal justice.[2] This Article will therefore be an attempt to deter-

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This Article was suggested by discussions during a seminar on Research in Criminal Law Administration conducted under a grant from the Ford Foundation during the summer of 1958 at the University of Wisconsin Law School. With Herman Goldstein of the Public Administration Service in Chicago, to whom I am especially indebted, I was responsible for leading discussion on police activity. Other participants in the seminar, for whose comments I am grateful, were Professors Francis Allen of the University of Chicago Law School, Richard Cloward of the New York School of Social Work, William Burnett Harvey of the University of Michigan Law School, Lloyd Ohlin of the New York School of Social Work, and Frank Remington of the University of Wisconsin Law School. I am also appreciative of the contributions made by many of my students in my courses in Criminal Law and Criminal Procedure.

1. "Invocation is the task of the officers concerned with law enforcement who . . . must provisionally assess whether a given act contravenes the . . . [criminal] code and initiate a demand for application." LASSWELL, THE DECISION PROCESS 3 (1956). More abstractly, the invocation function of the decision process is defined: "provisional characterizations of conduct according to prescriptions, including demand for application." *Id.* at 2. Professor Lasswell has broken the decision process down into seven components: intelligence, recommendation, prescription, invocation, application, appraisal, and termination. *Ibid.*

2. A judge dismissing criminal charges without trial, upon his own motion, must record his reasons so that all may know why this great power was exercised, and such public declaration is indeed a purposeful restraint, lest magistral discretion sweep away the government of laws.

People v. Winters, 342 P.2d 538, 542 (Cal. Super. Ct. App. Dep't 1959). See also Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401 (1958).

mine how the visibility of such police decisions may be increased and what procedures should be established to evaluate them on a continuing basis, in the light of the complex of objectives of the criminal law and of the paradoxes toward which the administration of criminal justice inclines.

I

The criminal law is one of many intertwined mechanisms for the social control of human behavior.[3] It defines behavior which is deemed intolerably disturbing to or destructive of community values and prescribes sanctions which the state is authorized to impose upon persons convicted or suspected of engaging in prohibited conduct.[4] Following a plea or verdict of guilty, the

3. The criminal law may increase, decrease, or leave unaffected the impact on individual behavior, if any, of family, education, religion, "civil" law, the arts, science, freedom, mass communication, economic conditions, local, state, national, foreign and international governing bodies, and membership or nonmembership in many other formal and informal, large and small, groups including unions, country clubs, and gangs.

For recognition that the criminal law is but a piece in the mosaic of social controls, see 544 H.C. DEB. (5th ser.) 500-01 (1958) (remarks of R. A. Butler, Secretary of State for the Home Department and Lord Privy Seal, in debate on improving Britain's penal system). On the need for a law of crimes as a means of controlling human behavior even in an anarchist society see RUSSELL, ROADS TO FREEDOM 130-36 (1918).

4. Sanctions are imposed by the state presumably against, or at least without regard to, the wishes of the individual being deprived. Implicit in the word "sanction," as used in this Article, is involuntariness. In this context involuntariness is not treated as a psychological concept. Thus, for example, imprisonment is a sanction even if imposed on a person who commits a crime in order to be punished or in order to escape cold and hunger in the "warmth" of a jail. See 4 FREUD, COLLECTED PAPERS 342 (Riviere transl. 1949); Levinson, *Criminality From a Sense of Guilt: A Case Study and Some Research Hypotheses*, 20 J. PERSONALITY 402 (1952); ALEXANDER & STAUB, *The Psychodynamics of the Case of Mme. Lefebvre*, in THE CRIMINAL, THE JUDGE AND THE PUBLIC 175 (rev. ed. 1956) ("The *punishment* [death commuted to life imprisonment] imposed upon her by a court of justice Mme. Lefebvre perceives as a benefaction; . . . for through this punishment she rids herself of the last remnant of the sense of guilt . . . ."); MORRIS, THE HABITUAL CRIMINAL 338 (1951). In Commonwealth v. Chester, 337 Mass. 702, 710, 150 N.E.2d 914, 918 (1958), after court's charge to jury, the defendant in a statement to the jury said: "It is my opinion that any decision other than guilty, guilty of murder in the first degree, with no recommendation for leniency, is a miscarriage of justice." After the judge imposed the death sentence the defendant said: "Thank you." Following commutation of the death sentence, he committed suicide. See also In the Matter of Davies, Conn. Bd. Pardons, Oct. 19, 1959, pp. 62-63, in which the petitioner, sentenced to death, closed the hearing, after a lengthy plea by counsel and the introduction of much psychiatric testimony, by saying:

> Gentlemen, first of all, I want to thank my friends for the efforts they gave to me. In my opinion, I think I got a fair trial and I think I should die for what I did. And I would like to stand on my Constitutional rights, and die for what I did.

Compulsory commitment for treatment whether by civil or criminal proceeding, and for whatever state objective, is a sanction so far as the person committed is concerned. See Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953) (sex psychopathy); Moore v. Draper, 57 So. 2d 648 (Fla. 1952) (tuberculosis).

state deprives offenders of life, liberty, dignity, or property through convictions, fines, imprisonments, killings, and supervised releases, and thus seeks to punish, restrain, and rehabilitate them, as well as to deter others from engaging in proscribed activity. Before verdict, and despite the presumption of innocence which halos every person, the state deprives the suspect of life, liberty, dignity, or property through the imposition of deadly force, search and seizure of persons and possessions, accusation, imprisonment, and bail, and thus seeks to facilitate the enforcement of the criminal law.[5]

These authorized sanctions reflect the multiple and often conflicting purposes which now surround and confuse criminal law administration at and between key decision points in the process. The stigma which accompanies conviction, for example, while serving a deterrent, and possibly retributive, function, becomes operative upon the offender's release and thus impedes the rehabilitation objective of probation and parole.[6] Similarly, the restraint func-

5. On deadly force see, Commonwealth v. Duerr, 158 Pa. Super. 484, 491-92, 45 A.2d 235, 238 (1946) ("an officer endeavoring to make an arrest in case of a felony, may use all the force necessary to overcome resistance, even to taking . . . [a] life"); MODEL PENAL CODE § 3.07 & comments (Tent. Draft No. 8, 1958); Beale, *Justification for Injury*, 41 HARV. L. REV. 553, 556-57 (1928).

On bail as a device for supervising released suspects and the use of deadly force by surety to regain custody of principal, see State v. Lingerfelt, 109 N.C. 775, 778, 14 S.E. 75, 77 (1891) ("The bail have their principal on a string, and may pull the string whenever they please . . . ."). See also United States v. Field, 190 F.2d 554 (2d Cir. 1951).

On accusation and bail, see The Eye Opener, Nov. 1958, p. 1, col. 3 (publication of the inmates of Oklahoma State Penitentiary):

> Occasionally, an innocent man is charged, arrested and tried for a crime against the community. When this happens, and the jury exonerates the accused, the man is released with an apology from the court.
>
> Is an apology enough? Consider that the defendant must pay all attorney costs, bail bond and has forfeited weeks and sometimes months of job pay which he cannot reclaim. His reputation may be offended because accusations by the Police often are accepted as guilt upon the defendant.
>
> We do not think such men, when freed by juries, are entitled to lifetime endowment for this miscarriage of justice; but we do believe they should not be made paupers by the expense of paying for the defense. Many an innocent man has spent his life's savings to prove such a small thing as "mistaken identity."

On imprisonment, see Sellin, *Imprisonment*, 7 ENCYC. SOC. SCI. 616 (1932):

> In one of its oldest forms, the origin of which is lost in antiquity, [imprisonment] is used for the custody of persons accused of offenses against custom or statute law. In some states this remained until relatively recent times as almost the only form of imprisonment. As late as 1771 the French jurist Jousse stated that prison was used only to hold criminals before trial and not to punish them even in case of crime.

See Application of Johnson, 340 P.2d 585 (Nev. 1959), where ten months in prison awaiting trial was deducted from time to be served under sentence imposed. See also Application of United Elec. Workers, 111 F. Supp. 858, 867 (S.D.N.Y. 1953), on the "punishment of public reprimand" by a grand jury presentment which accuses without indicting.

6. On stigma, status degradation, and the need for designing and establishing *status-elevation* as a part of the criminal process, see APPENDIX I, *infra* at 590.

tion of imprisonment involves the application of rules and procedures which, while minimizing escape opportunities, contributes to the deterioration of offenders confined for reformation.[7] Since police decisions not to invoke the

7. See, *e.g.*, SYKES, THE SOCIETY OF CAPTIVES 73, 75-76 (1958):

> Regulation by a bureaucratic staff is felt far differently than regulation by custom. . . . Most prisoners express an intense hostility against their far-reaching dependence on the decisions of their captors and the restricted ability to make choices must be included among the pains of imprisonment along with restrictions of physical liberty, the possession of goods and services, and heterosexual relationships.
>
> . . . .
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> The important point, however, is that the frustration of the prisoner's ability to make choices and the frequent refusals to provide an explanation for the regulations and commands descending from the bureaucratic staff involve a profound threat to the prisoner's self image because they reduce the prisoner to the weak, helpless, dependent status of childhood . . . the imprisoned criminal finds his picture of himself as a self-determining individual being destroyed by the regime of the custodians.

On the prison officials' plight, see Statement of A. Bernard, Warden, Nevada State Penitentiary, in Conn. State Prison, Monthly Record, March 1959, p. 25:

> All I want is for people to tell me what they want done with prisoners. I'll punish them. If they want them reformed, I'll try to reform them. If they want them confined, I'll try to confine them.
>
> The only thing is, people must realize that they can't have their cake and eat it too. If you want a man rehabilitated, you can't concentrate on punishing him. When a human being is punished he becomes resentful.
>
> Our orthodox criminal program is a peculiar combination of punishment, restraint, and half-hearted attempts at rehabilitation. These forms are all in conflict with each other. They generate friction. They impair efficiency.

See generally CONN. PRISON STUDY COMM., FINAL REPORT—A UNIFIED SYSTEM OF CORRECTION (1957). The President of the Board of the State Prison, which is responsible for handling a majority of Connecticut's felon inmate population, reported: "When I told inmates that we hope to 'rehabilitate you,' they laughed, knowing full well that nothing was being done at the prison toward rehabilitation." *Id.* at 20; see Peizer, Lewis, & Scollin, *Correctional Rehabilitation as a Function of Interpersonal Relations*, 46 J. CRIM. L., C. & P.S. 632 (1956).

Another illustration of the kind of confusion frequently arising at a single point in the process is to be found in court discussions of punishment, treatment, and criminal responsibility. See, *e.g.*, Williams v. United States, 250 F.2d 19, 25-26 (D.C. Cir. 1957):

> Two policies underly [*sic*] the distinction in treatment between the responsible and the non-responsible: (1) It is both wrong and foolish to *punish* where there is no blame and where *punishment* cannot correct. (2) The Community's security may be better protected by hospitalization . . . than by imprisonment.

(Emphasis added.) "Punish" and "punishment" are used in policy statement "(1)" to suggest different underlying meanings or concepts. The word is first used as a symbol of the vengeance or retribution function of the criminal law and then used as a symbol of the rehabilitation function. *Query*: If "punishment," however defined, were an effective rehabilitative device would the court find its use objectionable even if blameworthiness could not be established? Is involuntary confinement for an indefinite period in a mental hospital any less a deprivation, as the court seems to imply in policy statement "(2)," than involuntary confinement for a limited period in a prison? See also Allen, *Criminal*

criminal process may likewise further some objectives while hindering others, or, indeed, run counter to all, any meaningful appraisal of these decisions should include an evaluation of their impact throughout the process on the various objectives reflected in authorized sanctions and in the decisions of other administrators of criminal justice.[8]

Under the rule of law, the criminal law has both a fair-warning function for the public [9] and a power-restricting function for officials.[10] Both post- and

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Justice, Legal Values and the Rehabilitative Ideal, 50 J. CRIM. L., C. & P.S. 226 (1959); Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1953); PARSONS, THE SOCIAL SYSTEM 309-14 (1951).

8. Conflicts of purpose and function arise not only among the administrators of criminal justice within a single jurisdiction, but also between administrators in different jurisdictions. See United States v. Candelaria, 131 F. Supp. 797 (S.D. Cal. 1955), in which Federal Judge Tolin reduced a five-year sentence for a robbery of a California bank to sixty days, because the District Attorney of Los Angeles County refused to remove a California detainer, based on the same "offense," from the convicted offender. The detainer meant that Candelaria, following his release from the federal prison system, might be prosecuted by California for the same "offense" of which he was convicted and sentenced in federal court. It also meant, under Federal Parole Board policy then, but no longer in effect, that the offender could not be released on parole. Letter From James V. Bennett, Director of Federal Bureau of Prisons, to Joseph Goldstein, March 12, 1958. The court said:

> When a Federal Judge, acquainted with the type of corrective treatment which will be administrated to an offender, determines that five years of it is sufficient, it changes the character of the penalty when local police or prosecutors can administratively place a detainer which will alter the entire course of treatment of the prisoner and keep him from receiving much of what the sentencing Judge intended when the length of term was prescribed.

United States v. Candelaria, *supra* at 807. A subsequent conviction of Candelaria for robbery under the California laws was reversed as a violation of the State's double jeopardy statute. People v. Candelaria, 139 Cal. App. 2d 432, 294 P.2d 120 (Dist. Ct. App. 1956). Candelaria was then tried for burglary and convicted a third time on the basis of the same underlying set of facts. The conviction was affirmed. People v. Candelaria, 153 Cal. App. 2d 879, 315 P.2d 386 (Dist. Ct. App. 1957).

9. See Lanzetta v. New Jersey, 306 U.S. 451 (1939), holding a New Jersey criminal statute void for vagueness under the due process clause of the fourteenth amendment, in which Mr. Justice Butler said:

> No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 . . . "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its application, violates the first essential of due process of law."

Id. at 453. *But see* Koa Gora v. Hawaii, 152 F.2d 933 (9th Cir.), *cert. denied*, 328 U.S. 862 (1946) ("[T]he common law did not define those acts [comprising lascivious conduct

preverdict sanctions, therefore, may be imposed only in accord with authorized procedures. No sanctions are to be inflicted other than those which have been prospectively prescribed by the constitution, legislation, or judicial decision

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for which the defendant was convicted] with any more certainty than do the statutes today. 'The sense of decency, propriety, and morality, which most people entertain' in the community is still the test.").

How effectively the criminal law is communicated to the public, and thus actually gives fair warning, is a subject about which little empirical data have been collected, and one which deserves investigation. For judicial recognition of practical limitations on the fair-warning function see McBoyle v. United States, 283 U.S. 25, 27 (1931), holding that a "self-propelled vehicle" in a penal statute did not include an airplane, in which Mr. Justice Holmes said: "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world . . . of what the law intends to do if a certain line is passed." Apparently, however, some offenders are very well informed, see, *e.g.*, Parole File of George Drew (convicted in Connecticut for sodomy): "[At the time of arrest] found on Drew was a handwritten table showing the penalties in each of the 48 states for the crimes of Adultery, Fornication, Seduction and Sodomy." Donnelly, Goldstein & Schwartz, Cases on Problems Arising in the Promulgation, Invocation, Administration and Enforcement of a Law of Crimes, 2d tent. ed., Jan. 1959, ch. II, at 354 (mimeo on file in Yale Law Library).

For cases considering the application of the "vice of vagueness" doctrine to a variety of penal provisions, see, *e.g.*, United States v. Spector, 343 U.S. 169 (1952) (a federal statute); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952) (an administrative regulation); Watkins v. United States, 354 U.S. 178 (1957) (in a contempt of Congress case, a congressional resolution establishing a congressional committee).

Concerning these problems and common law crimes, see Commonwealth v. Mochan, 177 Pa. Super. 454, 110 A.2d 788 (1955); Regina v. Newland, [1954] 1 Q.B. 158 (C.A.); Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332 (1947).

See also MODEL PENAL CODE § 1.05 (Tent. Draft No. 4, 1955); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 440-41 (1958) and Proposed Puerto Rico Code of Correction pt. I, § 3 (Dession draft mimeo [undated]):

> *Function.* Recognition, communication and protection of the Commonwealth's preferred form of public order comprise the function of this Code. The situations within its purview are those deemed so destructive of such order as to concern the Commonwealth as a whole. Its provisions define and are intended to give fair warning of the kinds of conduct which will be regarded as precipitating such situations. The measures prescribed are shaped for the prevention and correction of such situations. The Code is thus conceived as an instrument of the total policy of Puerto Rico.

10. See, *e.g.*, Logan v. People, 138 Colo. 304, 332 P.2d 897 (1958), holding that making an appearance bond a condition of probation is invalid because, *inter alia*, forfeiture of the bond on failure to appear would be an additional punishment and thus would enlarge the punitive power of the court far beyond that contemplated "by the laws of this state"; State v. Doughtie, 237 N.C. 368, 74 S.E.2d 922 (1953), invalidating sentence of banishment as "beyond the power of the court to inflict." See also In the Matter of the Communication of the Grand Jury in the Case of Lloyd and Carpenter, 3 Pa. L.J. Rep. 55, 56-57 (Ct. Q. Sess. 1845) ("[W]hile the Commonwealth demands [from those charged with the administration of criminal justice] the vigorous execution of her humane criminal code, she seeks not its vindication, at the expense of the just rights of her citizens."); People v. Snow, 340 Ill. 464, 173 N.E. 8 (1930) ("A criminal may have forfeited his

for a particular crime or a particular kind of offender.[11] These concepts, of course, do not preclude differential disposition, within the authorized limits, of persons suspected or convicted of the same or similar offenses. In an ideal system differential handling, individualized justice, would result, but only from an equal application of officially approved criteria designed to implement officially approved objectives.[12] And finally a system which presumes innocence requires

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right to liberty, but neither courts nor any other power have the right to deprive him of it except in accordance with the law of the land."); *cf.* Wolf v. Colorado, 338 U.S. 25 (1949). For discussions of the doctrine of *nulla poena sine lege* and the concept of "ordered liberty," see generally HALL, GENERAL PRINCIPLES OF CRIMINAL LAW ch. 2 (1947); WILLIAMS, CRIMINAL LAW—THE GENERAL PART §§ 128-35 (1953).

A single criminal procedure such as indictment, information, bill of particulars and discovery, is designed to serve both a fair-warning and power-restricting function. See, *e.g.*, State v. Greer, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953):

> [A]n indictment . . . to be good must allege lucidly and accurately all the essential elements of the offense . . . charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged, (2) to protect the accused from being twice put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

On prospectivity, see, *e.g.*, State v. Jones, 44 N.M. 623, 630, 107 P.2d 324, 329 (1940), in which the New Mexico Supreme Court held movie bank nights a lottery, but at the same time precluded conviction of the defendants because they acted in reliance on a former decision and "did only that which this court declared, even if erroneously, to be within the law."

11. See, *e.g.*, Gonzalez v. United States, 224 F.2d 431 (1st Cir. 1955) (habitual offender); State v. Monahan, 15 N.J. 34, 104 A.2d 21 (1954) (youthful offenders).

12. See State v. Johnson, 28 N.J. 133, 145 A.2d 313, 315 (1958), commenting on judge's discretion in ruling on pretrial motion for discovery of defendant's confession: "In some areas an exercise of discretion must necessarily remain an intuitive response to a set of facts. Here, however, some guiding criteria can be prescribed and hence *should be*, to guard against arbitrariness and *unequal treatment* . . . ." In submitting the First Interim Report, Conn. Prison Study Comm., Nov. 19, 1956, which proposed the establishment of a board of judges to review the sentences of any aggrieved offender, Chairman Patrick B. O'Sullivan wrote the Governor on December 3, 1956:

> The difficulty of obtaining uniformity of sentencing will be apparent to anyone who gives even the most cursory thought to the problem . . . . What may appeal to one [judge] as a proper sentence will seem to another to be either inadequate or oppressive . . . . *The problem is not how to achieve uniform sentences but how to develop a uniform set of principles for sentencing and to insure the application of these principles throughout the State.* . . .

(Emphasis added.)

In State v. Young, Conn. L.J., Sept. 30, 1958, pp. 7-8, the Sentence Review Division established in response to the Prison Study Committee proposal wrote:

> To hold that the sentencing judge should ignore the facts of the particular crime, the prior record of the defendant and the probability of rehabilitation of the defendant is untenable. Young points out that there is considerable variation in sentences imposed by judges of our Superior Court for the same offense. This may

that preconviction sanctions be kept at a minimum consistent with assuring an opportunity for the process to run its course.[13]

A regularized system of review is a requisite for insuring substantial compliance by the administrators of criminal justice with these rule-of-law principles. Implicit in the word "review" and obviously essential to the operation

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well be so. Were it not so, it would indicate that judges were ignoring the principles of individual consideration which are essential in each case. A proper sentence should fit the crime and the individual.

See also State v. Johnson, Conn. L.J., July 1, 1958, p. 19 (Sentence Rev. Div.); United States v. Pendergast, 28 F. Supp. 601, 605 (W.D. Mo. 1939). In Burns v. United States, 287 U.S. 216 (1932), Mr. Chief Justice Hughes said, concerning the Federal Probation Act:

> It was designed to provide a period of grace in order to aid the rehabilitation of the penitent offender . . . . It is necessary to individualize each case to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.

Id. at 220. See also Logan v. People, 138 Colo. 321, 332 P.2d 897 (1958).

For officially approved criteria for determining the amount of bail, see FED. R. CRIM. P. 46(c); Stack v. Boyle, 343 U.S. 1, 9 (1951) (concurring opinion of Jackson, J.):

> I do think there is a fair showing that these congressionally enacted standards have not been correctly applied.
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> It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation and did not take into account the difference in circumstance between different defendants . . . . Each defendant stands before the bar of justice as an individual. . . .

13. "Booking," charging and arraigning, with all its concomitant inconveniences and embarrassments, will have to be borne by many citizens who would otherwise have been given an opportunity to make clear their innocence without being subjected to such difficulties or stigma.

United States v. Bonnano (S.D.N.Y. Dec. 2, 1959), in N.Y. Times, Dec. 3, 1959, p. 38, col. 2.

> This practice [the police holding a suspect in detention before they are ready to prefer charge] has one feature which may be of advantage to the detained person; if innocent he has a good prospect of being released without any publicity or stigma. It may be a real hardship to an innocent man to have to appear in open court, even to be discharged as guiltless . . . .

Royal Commission on Police Powers and Procedure, *Report*, CMD. No. 3297, at 58 (1929).

> The purpose of bail is to restrain as little as possible the liberty of the citizen consistent with his retention until his guilt or innocence of the offense alleged against him can be ascertained by due course of law.

Duncan v. Hodge, 46 Ala. 523, 526 (1871). Many police manuals contain exhortations reflecting this view. The RICHMOND, VA., BUREAU OF POLICE RULES & REGS. (1957), for example, provides "Advice to Policemen . . . . Whenever you deem it necessary to make an arrest, do it; but use no more force than is necessary to protect yourself and secure your prisoner"; PORTLAND, ME., POLICE DEP'T RULES & REGS. § 1124.04 (reprinted in WILSON, POLICE PLANNING 366-67 (2d ed. 1957)) provides:

> All officers should know that the prisoner has certain rights guaranteed him by the United States and Maine Constitutions . . . . He shall not be subject to more

of any review procedure is the visibility of the decisions and conduct to be scrutinized. Pretrial hearings on motions, the trial, appeal and the writ of habeas corpus constitute a formal system for evaluating the actions of officials invoking the criminal process. The public hearing, the record of proceedings, and the publication of court opinions—all features of the formal system—preserve and increase the visibility of official enforcement activity and facilitate and encourage the development of an informal system of appraisal. These proceedings and documents are widely reported and subjected to analysis and comment by legislative, professional, and other interested groups and individuals.[14]

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restraint than is necessary to hold or confine him . . . . He is assumed to be innocent until pronounced guilty. . . .

On presumption of innocence and entrapment, see Sherman v. United States, 356 U.S. 369, 372 (1958).

On public accusation, as a sanction, and the presumption of innocence, see People v. Bogdanoff, 254 N.Y. 16, 20, 171 N.E. 890, 891 (1930), quoting with approval the following from Jones v. Robbins, 74 Mass. (8 Gray) 329, 344 (1857):

> The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of the grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.

Concerning bail and the presumption of innocence, see Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."). However, the guilt or innocence of an appellant is not an issue on application for bail pending appeal. D'Aquino v. United States, 180 F.2d 271 (Douglas, Circuit Justice, 1950).

On denial of pretrial motions for discovery as undermining "our bedrock presumption of innocence," see State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) (Brennan, J., dissenting); State v. Johnson, 28 N.J. 133, 142-44, 145 A.2d 313, 318-19 (1958) (to deny pretrial discovery on "fear of perjury virtually postulates universal guilt"—in effect, overruling *Tune*).

For an expression of dissatisfaction with the impact of the presumption of innocence on the administration of criminal justice, see United States v. Garsson, 291 Fed. 646, 649 (S.D.N.Y. 1923) (L. Hand, J.):

> Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

On the application of the presumption of innocence at trial, see ALLEN, LEGAL DUTIES 271, 283 (1931); 9 WIGMORE, EVIDENCE § 2511 (1940).

Query: To what extent should the presumption of innocence be manipulated to restrict to a minimum the application of preconviction sanctions in the administration of the criminal justice?

14. It is beyond the scope of this Article to attempt to evaluate how effectively rules of evidence, for example, and present review opportunities control the behavior of police invoking the criminal process. See, *e.g.*, Irvine v. California, 347 U.S. 128, 135 (1953).

But police decisions not to invoke the criminal process, except when reflected in gross failures of service, are not visible to the community. Nor are they likely to be visible to official state reviewing agencies, even those within the police department. Failure to tag illegally parked cars is an example of gross failure of service, open to public view and recognized for what it is.[15] An officer's decision, however, not to investigate or report adequately a disturbing event which he has reason to believe constitutes a violation of the criminal law does not ordinarily carry with it consequences sufficiently visible to make the community, the legislature, the prosecutor, or the courts aware of a possible failure of service. The police officer, the suspect, the police department, and frequently even the victim, when directly concerned with a decision not to invoke, unlike the same parties when responsible for or subject to a decision to invoke, generally have neither the incentive nor the opportunity to obtain review of that decision or the police conduct associated with

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An interesting example of the exposure of police activity to review and appraisal is the vast number of cases and comments which have accompanied the development of the exclusionary rule as a device to prevent or at least discourage unreasonable search and seizures by police who seek to invoke the criminal process. High visibility and a system of review, however, will not necessarily result in full compliance by officials with the rules of law. See, *e.g.*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), and the cases and comments cited therein. In adopting the exclusionary rule, the court said:

> If the constitutional guarantees against unreasonable searches and seizures are to have significance they must be enforced, and if courts are to discharge their duty to support the state and federal constitutions they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented. . . . *Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures.* . . . Moreover, even when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights . . . . People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, was decided over thirty years ago. Since then case after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions that have actually occurred. On the other hand, reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are non-existent. In short, the constitutional provisions are not being enforced.

Id. at 447-48; 282 P.2d at 913. (Emphasis added.)

But without visibility, the likelihood of compliance is greatly reduced, if not precluded. For an interesting symposium, which highlights the need for research on actual police practices see Coakley, Peterson, Inbau, Foote, Paulsen & Leibowitz, *Symposium—Are the Courts Handcuffing the Police?*, 52 NW. U.L. REV. 1 (1957).

15. See, *e.g.*, *Editorial, "No Parking" Means Nothing*, N.Y. Times, Nov. 14, 1958, p. 26, cols. 3-4; *id.*, Nov. 20, 1958, p. 1, col. 8 (police action to "clean up the unwholesome parking abuses," and the ordering of necessary measures for "continuous and sustained enforcement" of parking rules). See also *id.*, March 3, 1959, p. 21, col. 6 (report of Detroit police failure to issue the average daily number of tickets for motor vehicle violations as a protest against integration of Negro and white patrolmen in squad cars).

it.[16] Furthermore, official police records are usually too incomplete to permit evaluations of nonenforcement decisions in the light of the purposes of the criminal law.[17] Consequently, such decisions, unlike decisions to enforce, are

16. In addition to the descriptive material in text at note 84 *infra*, see, *e.g.*, Irvine v. California, 347 U.S. 128, 137 (1953).

Nonenforcement programs may be made visible by defendants who claim that enforcement against them deprived them of equal protection of the law. State v. Jourdain, 225 La. 1030, 74 So. 2d 203 (1954) (failure to give defendant "opportunity" to become an informer); People v. Winters, 342 P.2d 538 (Cal. Super. Ct. App. Dep't 1959) (dismissal by trial judge of complaint on ground of discriminatory enforcement of gambling laws against Negroes reversed without prejudice to defendant's right to prove intentional or deliberate discriminatory enforcement). See also N.Y. Times, Jan. 5, 1960, p. 14, cols. 2-3 (charges of discriminatory enforcement of gambling laws against Negro numbers operators).

17. Lack of any basic records of the squad's activities thwarts a penetrating view of the services performed; but what is not available to this survey is by the same token also denied to superior officers of the force. The plain fact is that no one, not even the officers of the squad, has any means of reviewing that unit's conduct, work, or abiding value, because the underlying and complex pattern of precinct boundaries is controlling in such matters.

SMITH, THE NEW YORK POLICE SURVEY 20 (Institute of Public Administration 1952).

> From the evidence adduced before the Grand Jury it finds:
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> ....
>
> (3) That police officers failed to make proper entries in their memorandum books concerning the performance of their duties.

People v. Doe (Report of the Fourth December 1958 Grand Jury), N.Y. Ct. Gen. Sess., N.Y. City, March 11, 1959.

See also ILLINOIS DIVISION, ACLU, SECRET DETENTION BY THE CHICAGO POLICE 25 (1959); Parratt, *How Effective Is a Police Department?*, 199 ANNALS 153, 156-57 (1938); Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 26-27 (1957).

Reported cases on the discharge of patrolmen or conviction for neglect of duty because required reports were not made are rare. See People v. Grawunder, 2 Misc. 2d 126, 151 N.Y.S.2d 137 (Sup. Ct. 1956) (police officer's failure to disclose information, as required by police department regulation (Buffalo), is neglect of duty); Armbruster v. City of Middletown, 74 Ohio App. 321, 58 N.E.2d 778 (1944).

On the need for adequate records as a basis for internal control see INTERNATIONAL CITY MANAGERS ASS'N, MUNICIPAL POLICE ADMINISTRATION ch. 12 (4th ed. 1954); WILSON, POLICE ADMINISTRATION ch. 13 (1950).

Even highly visible criminal activity by the police theoretically subject to the criminal law as well as to departmental review sometimes is condoned. See, *e.g.*, SMITH, NEW YORK POLICE SURVEY 9, 10, 17 (Institute of Police Administration 1952) describing the department's disciplinary policy as

> ... low in its standards, ... uncertain in its application, and ... unfirm in its resolution to clear the force of undesirables .... Under such circumstances it is not surprising that the number of men charged is moderate for all types of offenses, because their commanders obviously cannot expect to be vigorously supported by trial commissioners and hence will withhold their charges until intolerable circumstances force them to act....

And violations, for example adultery, made visible in civil proceedings with concurrent failure by the police to invoke the criminal process have apparently not prompted disciplinary action. See MODEL PENAL CODE § 207.1, comment at 204-05 (Tent. Draft No. 4, 1955).

generally not subject to the control which would follow from administrative, judicial, legislative, or community review and appraisal.[18]

Confidential reports detailing the day-to-day decisions and activities of a large municipal police force have been made available to the author by the American Bar Foundation. These reports give limited visibility to a wide variety of police decisions not to invoke the criminal process.[19] Three groups of such decisions will be described and analyzed. Each constitutes a police "program" of nonenforcement either based on affirmative departmental policy or condoned by default. All of the decisions, to the extent that the officers concerned thought about them at all, represent well-intentioned, honest judgments, which seem to reflect the police officer's conception of his job. None of the decisions involve bribery or corruption, nor do they concern "obsolete," though unrepealed, criminal laws. Specifically, these programs involve police decisions (1) not to enforce the narcotics laws against certain violators who inform against other "more serious" violators; (2) not to enforce the felonious assault laws against an assailant whose victim does not sign a complaint; and (3) not to enforce gambling laws against persons engaged in the numbers racket, but instead to harass them. Each of these decisions are made even though the police "know" a crime has been committed, and even though they may "know" who the offender is and may, in fact, have apprehended him. But before describing and evaluating these nonenforcement programs, as an agency of review might do, it is necessary to determine what discretion, if any, the police, as invoking agents, have, and conceptually to locate the police in relation to other principal decisionmakers in the criminal law process.

II

The police have a duty not to enforce the substantive law of crimes unless invocation of the process can be achieved within bounds set by constitution, statute, court decision, and possibly official pronouncements of the prosecutor.[20] *Total enforcement*, were it possible, is thus precluded, by generally

18. For a general discussion of the ineffectiveness of departmental and civil service procedures as devices for establishing police policy and for holding police officers accountable for their actions, see SMITH, POLICE SYSTEMS IN THE UNITED STATES 146-57, 204-32 (rev. ed. 1949); GOCKE & STALLINGS, POLICE SERGEANTS MANUAL 110-12 (4th ed. 1955). For a discussion of "superior" internal control procedures, see WILSON, POLICE ADMINISTRATION 58-79 (1950). See generally APPENDIX II, *A Note on Holding the Police Accountable for "Neglect of Duty," infra* at 592; notes 26-27 *infra*.

19. The low visibility of these decisions must in a sense be preserved because of the author's obligation not to identify informants or the police department involved by specific citations to American Bar Foundation, Pilot Project Report—The Survey of the Administration of Criminal Justice (1957), or to supporting field reports. To effectuate the Foundation's policy of maintaining the anonymity of the police department and its officers, no citations to statutes, case law, or legislative hearings of the state or local jurisdiction, as well as congressional hearings, will be given when such citations would compromise confidentiality.

20. The phrase "official pronouncements of the prosecutor" is intended to exclude prosecutor orders or suggestions which are not a matter of record. Note, however, that

applicable due-process restrictions on such police procedures as arrest, search, seizure, and interrogation.[21] *Total enforcement* is further precluded by such

the police may be, and probably are, responsive to the prosecutor's concept of law enforcement, a concept, developing out of and communicated as part of an intimate working relationship, which is seldom reduced, so far as orders not to enforce are concerned, to documents of record. State v. Winne, 12 N.J. 152, 168-69, 96 A.2d 63 (1953). For a rare exception, see State *ex rel.* Wear v. Francis, 95 Mo. 44, 8 S.W. 1 (1888), authorizing the issuance of a writ vacating a prosecutor's order to the chief of police not to enforce the law against Sunday sales of wine and beer.

The type of official pronouncement contemplated may be represented by Memorandum From Attorney General William P. Rogers to United States Attorneys, reprinted in N.Y. Times, April 6, 1959, p. 19, col. 2:

> [N]o Federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the department. No such recommendation should be approved by the Assistant Attorney General . . . without having it first brought to my attention.

Compare the *Candelaria* cases, note 8 *supra*. See also Formal Opinion of the Attorney General No. 14, N.J., Sept. 29, 1958, advising the state police that issuance of warning citations for motor vehicle violations is "within their discretionary authority to promote the public safety on the highways."

If the police are to be held accountable for decisions not to enforce based on prosecutor policy, they ought to be entitled to insist that prosecutors place all nonenforcement orders on record.

> To evaluate the performance of a police organization without endeavoring to determine how it is influenced by the concurrent and sometimes conflicting activities of the prosecutor is to produce a picture which is out of focus and which can lead to more misunderstanding than if no study were attempted at all.

Olney, *What the American Bar Foundation's Survey of Criminal Justice Means to Law Enforcement*, THE POLICE YEARBOOK 85, 90 (1956). On prosecutor discretion, see note 28 *infra*.

21. See, *e.g.*, Screws v. United States, 325 U.S. 91, 106 (1945); Williams v. United States, 341 U.S. 97, 101 (1951); Pool v. United States, 260 F.2d 57, 58-63 (9th Cir. 1958), affirming conviction and sentence of the Chief of Police of North Las Vegas, Nevada, for violation of 18 U.S.C. § 242 (1958), which provides:

> Whoever, under color of any law, . . . or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be . . . imprisoned not more than one year . . . .

On "the abhorrence of society to the use of involuntary confessions," see Spano v. New York, 360 U.S. 315, 320-21 (1958), in which the Court stated:

> [This abhorrence] also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime.

See generally INTERNATIONAL CITY MANAGERS' ASS'N, MUNICIPAL POLICE ADMINISTRATION 493, 495 (4th ed. 1954); Barrett, *Exclusion of Evidence Obtained by Illegal Search—A*

specific procedural restrictions as prohibitions on invoking an adultery statute unless the spouse of one of the parties complains,[22] or an unlawful-possession-of-firearms statute if the offender surrenders his dangerous weapons during a statutory period of amnesty.[23] Such restrictions of general and specific application mark the bounds, often ambiguously,[24] of an area of *full enforcement* in which the police are not only authorized but expected to enforce fully the law of crimes.[25] An area of *no enforcement* lies, therefore, between the

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Comment on People v. Cahan, 43 CALIF. L. REV. 565 (1955); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1953); Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY 1014 (1934).

Such restrictions are reflected in considerable detail in police manuals. See, *e.g.*, with regard to confessions, DETROIT, MICH., REV. POLICE MANUAL ch. 10, § 81 (1958) which provides:

> Officers shall not use duress or mistreat an accused person in any way when endeavoring to obtain a confession. A confession made by a person who has not been given his rights can always be attacked by the accused in court and may lead to the acquittal of a guilty person.

See also Kennedy, *Keynote Address*, THE POLICE YEARBOOK 8 (1957):

> It is the primary duty of the police not only to cope with crime but to cope with it properly. The role of the police in a democratic society is to maintain the delicate balance between the liberty of the individual on one hand, and the demands of society for protection against crime on the other.
>
> To uphold such liberty the policeman must always be objective in the performance of his duties. He must be constantly mindful of the civil rights of all of the people. He should show neither fear nor favor in the discharge of his duties.

22. MODEL PENAL CODE § 207.1, comment (10) (Tent. Draft No. 4, 1955); see Perry v. State, 84 Okla. Crim. 211, 181 P.2d 280 (1947) (on power of prosecutor to seek dismissal of adultery proceeding despite objection of offended spouse). *Compare* Taylor v. State, 29 Okla. Crim. 160, 232 Pac. 963 (1925), *with* State v. Astin, 106 Wash. 336, 180 Pac. 394 (1919) (conflicting views on right of offended spouse to discontinue adultery prosecution which he or she instituted). The Model Penal Code also provides:

> No prosecution for theft may be maintained against a spouse or member of the household . . . unless the victim or someone acting on his behalf complains to public authority within six months after learning of the offense . . . .

MODEL PENAL CODE § 206.13(4) (Tent. Draft No. 4, 1955).

23. N.Y. PENAL LAW § 1899 (4) provides:

> Notwithstanding any other provision of law, no person shall be prosecuted for . . . the illegal possession of any pistol, . . . [or any other] dangerous weapon . . . if he surrenders such weapon to . . . [the police] . . . between the first and thirtieth days of June, nineteen hundred and fifty-nine.

Statutes of limitations may be either specific or general in application. See Note, 102 U. PA. L. REV. 630 (1954).

24. See PARKER, POLICE 103 (1951), where Los Angeles Police Chief Parker, commenting on due process boundaries are set by the courts, notes: ". . . the rules governing the actions of the police are indistinct, ill-defined, vague and uncertain . . . ." See also note 29 *infra*.

25. The police, in our legal tradition, are essentially ministerial officers. To them have been delegated relatively few grants of discretionary power which require interpretation of meaning before application. Thus a simple and logical hypothesis

perimeter of *total enforcement* and the outer limits of *full enforcement*. In this *no enforcement* area, the police have no authority to invoke the criminal process.

Within the area of *full enforcement*, the police have not been delegated discretion not to invoke the criminal process. On the contrary, those state statutes providing for municipal police departments which define the responsibility of police provide:

> It shall be the duty of the police . . . under the direction of the mayor and chief of police and in conformity with the ordinances of the city, and the laws of the state, . . . to pursue and arrest any persons fleeing from justice . . . to apprehend any and all persons in the act of committing any offense against the laws of the state . . . and to take the offender forthwith before the proper court or magistrate, to be dealt with for the offense; to make complaints to the proper officers and magistrates of any person known or believed by them to be guilty of the violation of the ordinances of the city or the penal laws of the state; and at all times diligently and faithfully to enforce all such laws . . . .[26]

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can be constructed: police are ministerial officials charged with the enforcement of laws; success in police administration is directly related to completeness and perfection in the performance of this task.

Parratt, *How Effective Is a Police Department?*, 199 ANNALS 153 (1938).

26. MICH. STAT. ANN. § 5.1752 (1949); *accord*, ALA. CODE ANN. tit. 54, § 5(4) (1941); ALASKA COMP. LAWS ANN. §§ 40-12-8 to -10 (cum. supp. 1958) (duties of territorial police); ARK. STAT. ANN. § 19-1705 (1956); COLO. REV. STAT. ANN. § 139-75-5 (1954); HAWAII REV. LAWS § 31-5 (1955) (duties of high sheriff as head of territorial police); ILL. REV. STAT., ch. 38, § 655 (1957); IND. STAT. ANN. §§ 48-6107, 48-6110 (1950); IOWA CODE ANN. § 748.4 (1950); ME. REV. STAT. ANN. ch. 15, § 2 (1954) (state police); MASS. LAWS ANN. ch. 41, § 98 (1952); MO. STAT. ANN. § 74.203 (1952) (duties of chief of police); NEB. REV. STAT. § 29-401 (1948); OHIO REV. CODE ANN. § 737.11 (Page 1954); TENN. CODE ANN. § 6-2129 (1955); UTAH CODE ANN. § 10-6-66 (1953); VA. CODE ANN. § 15-557 (1956); W. VA. CODE ANN. § 509 (1955); WIS. STAT. ANN. § 62.09(13) (1957); WYO. STAT. ANN. § 7-12 (1959). The *full enforcement* mandate is reinforced in such states by local police manuals. *E.g.*, BOSTON, MASS., POLICE DEP'T RULES & REGS. foreword, rules 10, § 2; 24 § 1; 35 § 5(d) (1950); CINCINNATI, OHIO, POLICE DIVISION MANUAL §§ 00.673(h), 01.09 (1959); DETROIT, MICH., REV. POLICE MANUAL ch. 1 § 9, ch. 2 § 1, ch. 3 § 142 (1958); MILWAUKEE, WIS., POLICE DEP'T RULES & REGS. introduction at VII, rules 1, § 3; 5, § 2; 6, § 2; 7, §§ 4, 8, 49; 11, § 1; 14, § 1; 28, §§ 3, 24 (1932); NASHVILLE, TENN., POLICE DEP'T RULES & REGS. 9; §§ 14, 33 (1955); NEW BEDFORD, MASS., POLICE DEP'T RULES & REGS. rules 1; 4, § 2; 14, § 11; 15, § 3 (1957); SALT LAKE CITY, UTAH, POLICE MANUAL foreword at 3; ch. III, §§ 3, 5, 7; ch. IV, §§ 3, 9; ch. VI, § 1 (1951); SIOUX CITY, IOWA, POLICE DEP'T MANUAL pp. 20, § 1; 24, § 2; 26, § 2; 29, § 2; 31, § 2; 42, § 1 (1956); WHEELING, W. VA., POLICE DEP'T RULES & REGS. §§ 3, 5 [undated].

An apparent exception is a New Mexico statute which provides that police must investigate all violations of the criminal laws which are called to their attention, but they appear to have a limited discretion as to enforcement. N.M. STAT. ANN. § 39-1-1 (1954) provides:

> It is hereby declared to be the duty of every sheriff, . . . and every other peace officer to investigate all violations of the criminal laws of the state of New Mexico which are called to the attention of any such officer or of which he is

Even in jurisdictions without such a specific statutory definition, declarations of the *full enforcement* mandate generally appear in municipal charters, ordinances or police manuals. Police manuals, for example, commonly provide, in sections detailing the duties at each level of the police hierarchy, that the captain, superintendent, lieutenant, or patrolman shall be responsible, so far as is in his power, for the prevention and detection of crime and the enforcement of all criminal laws and ordinances.[27] Illustrative of the spirit and policy

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aware, and it is also declared the duty of every such officer to diligently file a complaint or information, *if the circumstances are such as to indicate to a reasonably prudent person that such action should be taken,* and it is also declared his duty to cooperate with and assist the attorney general, district attorney, or other prosecutor, if any, in all reasonable ways. Failure to perform his duty in any material way shall subject such officer so failing to removal from office and payment of all costs of prosecution.

(Emphasis added.)

Other New Mexico statutes expressly provide in enumerated areas for rigorous police enforcement. See, *e.g.*, N.M. STAT. ANN. §§ 53-2-22 (duty to enforce game laws), 40-18-6 (duty to enforce forest fire laws), 39-1-4 (duty to arrest and detain escaped prisoners), 39-1-2 (duty to enforce livestock laws), 40-12-11 (duty to suppress riots) (1954).

Statutes of other jurisdictions authorize the municipality to define the responsibilities of the police. Typical of these enabling statutes is MISS. CODE ANN. § 3374-145 (1957), which provides: "The governing authorities of municipalities shall have the power and authority to employ, regulate and support a sufficient police force or night marshals to define the duties thereof, and to furnish and supply all suitable and necessary equipment therefore." For municipal ordinances and charters, see note 27 *infra.*

27. *E.g.*, ATLANTA, GA., POLICE DEP'T RULES & REGS. rules 23 (Police Chief), 44 (Super. of Detectives), 282 (Super. Traffic Div.), 297 (Traffic Capt.), 332 (Traffic Lt.), 372 (Traffic Patrolman), 400 (Super. Uniform Div.), 412 (Field Capt. Uniform Div.), 479 (Patrolman Uniform Div.) (1958); BERKELEY, CALIF., POLICE DEP'T REGS. introduction (Law Enforcement Code of Ethics), §§ 9.05 (functions of police dep't), 401 (all officers), 404 (responsibilities of police dep't), 408(b) (Special Investigations Div.) (1956); CHARLOTTE, N.C., POLICE DEP'T RULES & REGS. rules II-2, III-1, IV-2, V-22, VIII, §§ I-26, -36 (1948); MIAMI, FLA., POLICE MANUAL rules 2, § 4 (Commanding Officer); 3, § 2 (Chief of Police); 3, § 8 (Police chief promptly to investigate all reports of violation of law and follow with proper action); 5, § 4 (Inspectors); 10, § 1 (Policeman); 11, §§ 2, 6, 10 (Chief of Detectives); 15, § 5 (Detective); 26, § 1 (all members) (1956); NEW HAVEN, CONN., POLICE SERV. DEP'T MANUAL introduction; rules 1, § 1 (function of police dep't); 2, § 7 (Police Precinct); 2, § 15 (Div. of Traffic); 4, § 2 (Ass't Chief); 6, § 4 (Cap't); 7, § 1 (Traffic Div. Commander); 13, § 5 (Detectives); 14, § 1 (Patrolmen); 25, § 4 (License Div. Chief) (1953); NEW ORLEANS, LA., DEP'T POLICE RULES art. 53 (all members) (1957); NEW YORK CITY, N.Y., POLICE DEP'T RULES & PROCEDURES ch. 1, §§ 1.0 (duties of dep't), 12.0 (Chief Inspector), 14.2 (commanding officers), 31.3 (Burglary Squads), 31.4 (Youth Squads), 31.6 (Riverfront Squads), 42.0 (Narcotics Bureau), 45.0 (Traffic Div.), 48.0 (Motorcycle Div.), 58.0 (Aviation Bureau), 63.0 (Juvenile Aid Bureau), ch. 8, § 1.0 (gambling laws) (1956); OAKLAND, CAL., POLICE DEP'T MANUAL §§ 305.4 (Cap't of Inspectors), 354.4 (Division Commander) 401, 407 (all members), 408 (delegation of responsibility does not relieve all members from general responsibility of enforcing all laws) (1955); PHOENIX, ARIZ., POLICE MANUAL §§ 200.2 (Chief), 300.3 (Division of Patrol), 1202.14 (Lieutenant, Division of Patrol),

of *full enforcement* is this protestation from the introduction to the Rules and Regulations of the Atlanta, Georgia, Police Department:

> Enforcement of all Criminal Laws and City Ordinances, is my obligation. There are no specialties under the Law. My eyes must be open to traffic problems and disorders, though I move on other assignments, to slinking vice in back streets and dives though I have been directed elsewhere, to the suspicious appearance of evil wherever it is encountered . . . . I must be impartial because the Law surrounds, protects and applies to all alike, rich and poor, low and high, black and white . . . .

Minimally, then, *full enforcement*, so far as the police are concerned, means (1) the investigation of every disturbing event which is reported to or observed by them and which they have reason to suspect may be a violation of the criminal law; (2) following a determination that some crime has been committed, an effort to discover its perpetrators; and (3) the presentation of

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1204.1 (Patrolman) (1953); PROVIDENCE, R.I., POLICE DEP'T RULES & REGS. rules II, § 1 (Chief); V, § 1 (Director of Traffic); VII, § 13 (Capt.); IX, § 1 (Patrolmen) (1942); SAN FRANCISCO, CAL., POLICE DEP'T RULES & REGS. §§ 37 (Supervising Cap't), 60 (Chief Inspector), 106 (Director, Bureau of Special Services), 141 (Capt.), 171 (Lt.), 208, 212-14 (Patrolmen), 432, 511 (all members) (1951); SEATTLE, WASH., POLICE DEP'T RULES & REGS. §§ 1.4.2 (Chief), 4.1.1 (all members) (1958); WASHINGTON, D.C., METROPOLITAN POLICE DEP'T MANUAL acts §§ 4-119 (Bd. Comm'rs), 4-136 (all police) (1954).

The introductions to some police manuals contain a declaration that departmental rules and regulations do not cover every situation faced by a policeman so that in some instances the individual must exercise discretion. *E.g.*, MIAMI, FLA., POLICE MANUAL (1956); NEW HAVEN, CONN., POLICE SERV. DEP'T MANUAL 4 (1953); PHOENIX, ARIZ., POLICE MANUAL (1953); SALT LAKE CITY, UTAH, POLICE MANUAL 3 (1951); SIOUX CITY, IOWA, POLICE DEP'T MANUAL 4 (1956); WHEELING, W. VA., POLICE DEP'T RULES & REGS. 3 [undated].

In addition, some police manuals provide that departmental members have discretion to warn violators for "slight infractions of the law." *E.g.*, MILWAUKEE, WIS., POLICE DEP'T RULES & REGS. rules 14, § 60 (infraction of traffic regulations); 29, § 31 (a police officer should bear in mind that frequently a polite warning to persons guilty of minor offenses [undefined] will be sufficient and arrest in such cases should not be made unless the violations are willful and repeated") (1932); PROVIDENCE, R.I., POLICE DEP'T RULES & REGS. rule XI, § 35 (persons found peddling without a license) (1942).

For ordinances and charters providing for *full enforcement*, see, *e.g.*, CONCORD, N.H., ADMINISTRATIVE CODE § 13(b) (1950); DALLAS, TEX., CITY CODE tit. XXX, art. 107-4 (378) (92) (1941); HOUSTON, TEX., CITY CODE ch. 35, art. I, §§ 1636, 1639(b), 1649, 1650 (1942); NEWARK, N.J., REV. ORDINANCES § 2.132 (Cum. Supp. 1958); PONCA CITY, OKLA., CODE § 133-34 (1943); PORTLAND, ORE., ADMINISTRATIVE CODE § 3-403 (1942); READING, PA., DIGEST ch. 3, § 8571, ¶ 5(b) (1939); ST. PAUL, MINN., CITY CHARTER ch. XVIII, § 361 (1935); VALLEY CITY, N.D., REV. ORDINANCES § 4-104 (1940). For an ordinance silent on state-law enforcement obligations, see OKLAHOMA CITY, OKLA., GEN. ORDINANCES § 16-8 (1936) (policemen "are authorized and required to arrest all persons who may be detected violating any ordinance of the city and shall have and exercise such other and further powers and perform such other and further duties as the protection of life and property and preservation of peace and good order may require"). For a model ordinance which incorporates the *full-enforcement* mandate, see MATTHEWS, DRAFTING MUNICIPAL ORDINANCES 132 (1956).

all information collected by them to the prosecutor for his determination of the appropriateness of further invoking the criminal process.[28]

Full enforcement, however, is not a realistic expectation. In addition to ambiguities in the definitions of both substantive offenses and due-process boundaries,[29] countless limitations and pressures preclude the possibility of the

28. It is beyond the scope of this Article to examine the extent to which the prosecutor should have discretion not to invoke the criminal processes, and to determine what procedures should be established for making visible and reviewing the exercise of such discretion. On such prosecutor discretion and differing views on the limits of judicial control, see Wilbur v. Howard, 70 F. Supp. 930 (E.D. Ky. 1947), *rev'd on other grounds*, 166 F.2d 844 (6th Cir. 1948), Note, 57 YALE L.J. 125 (1947); United States v. Brokaw, 60 F. Supp. 100 (S.D. Ill. 1945); State v. Wallach, 353 Mo. 312, 322-24, 182 S.W.2d 313, 318-19 (1944); State v. Winne, 12 N.J. 152, 96 A.2d 63 (1953); Leone v. Fanelli, 194 Misc. 826, 87 N.Y.S.2d 850 (Sup. Ct. 1949); State v. Hicks, 213 Ore. 619, 325 P.2d 794 (1958); Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, (1948); Note, 103 U. PA. L. REV. 1057 (1955). On the policy of denying prosecutor power to delegate his discretionary authority, see McGarrah v. State, 10 Okla. Crim. 21, 23, 133 Pac. 260, 262 (1913).

On the prosecutor's obligation to pursue prosecution once having elected to prosecute, *compare* Galbraith v. Lachey, 340 P.2d 497, 502 (Okla. 1959), *with* People *ex rel.* Elliot v. Covelli, 415 Ill. 79, 112 N.E.2d 156 (1953). See also note 20 *supra*; Brief for Appellee, p. 3, Petite v. United States, 28 U.S.L. WEEK 3244 (U.S. Feb. 23, 1960) (Solicitor General on motion, granted by the Court, to vacate judgment and dismiss indictment):

> . . . the Department of Justice has responsibility for the control of Government litigation that is not confined to avoidance of legal error but extends to the formulation of enlightened and prosecutional policies.

For police views of their enforcement function in relation to the function of the prosecutor, see, *e.g.*, Police Academy, Oakland, Calif., Police Dep't, Instructors' Material Vol. 6, Bull. No. 35, Aug. 26, 1957, p. 8 (mimeo) ("we should . . . remember that it's our job to turn in the evidence and it's the Prosecuting Attorney's job to determine when a complaint will be issued"); Statement of Chief F.B.I. Agent for Chicago, Illinois, following his determination that a Miss Hart had falsely alleged that she had been kidnapped: "Asked whether the girl had committed a crime if her story was a hoax, Mr. Auerbach [the agent] said this was a problem for the United States Attorney. Lying to an F.B.I. agent under oath is a federal offense." N.Y. Times, July 25, 1959, p. 37, col. 4. "Mr. Auerbach said he had presented details of the situation to the United States Attorney's office. Mitchell S. Rieger, Chief Assistant to the United States Attorney in Chicago, said he had declined to authorize Miss Hart's prosecution in view of her medical history and her current physical and mental condition." *Id.*, July 26, 1959, p. 41, col. 3.

For a discussion of prosecutor discretion raising serious problems of separation of powers, see Statement of then Attorney General Jackson on his department's policy of not enforcing the criminal libel laws in *Hearings on the Nomination of Robert H. Jackson To Be an Associate Justice of the Supreme Court Before the Senate Committee on the Judiciary*, 77th Cong., 1st Sess. 67-69 (1941). For an assertion of presidential discretion not to enforce the criminal law, see 8 THE WRITINGS OF THOMAS JEFFERSON 308-11 (Ford ed. 1897).

29. Ambiguities in substantive definition, assuming no procedural ambiguities, may cause events actually within the *full enforcement* area to appear to be beyond the boundary of *total enforcement*. Ambiguities in procedural limitations, assuming no substantive ambiguities, may cause events actually within the *full enforcement* area to appear to be

police seeking or achieving *full enforcement.* Limitations of time, personnel, and investigative devices—all in part but not entirely functions of budget [30]—force the development, by plan or default, of priorities of enforcement.[31] Even if there were "enough police"[32] adequately equipped and trained, pressures from within and without the department,[33] which is after all a human institution, may force the police to invoke the criminal process selectively. By decisions not to invoke within the area of *full enforcement*, the police largely

within the *no enforcement* area between *total* and *full enforcement.* See diagram at 563 *infra,* in which these ambiguities are indicated by the wavy boundary lines dividing enforcement areas.

30. See, *e.g.,* Reiner v. Mayor & Council, 123 N.J.L. 563, 10 A.2d 160 (Sup. Ct. 1941) (upholding ordinance abolishing the police department apparently for reasons of economy); Message From the Mayor of New York City to the Board of Estimate and the City Council, Submitted With Executive Budget 1959-1960, reported in N.Y. Times, April 2, 1959, p. 22, col. 7.

31. There are too few police to detect and investigate all crimes and to search out and apprehend all suspects.

> It is difficult for persons confronted with an impossible workload to think in terms of what should be done in each case to produce a completed job of good quality. Their first thought is of how to cope with the impossible task . . . . This is the situation as it exists today. The investigator is no longer concerned with seeing that each case is processed to completion but is faced with deciding which cases will get the benefit of his situation.

LOS ANGELES, CAL., POLICE DEP'T, SURVEY OF POLICE OFFICER PERSONNEL REQUIREMENTS 22 (1958); see Hall, *Police and Law in a Democratic Society,* 28 IND. L.J. 133, 149 (1953); VOLLMER, THE POLICE AND MODERN SOCIETY 84 (1936). See also SMITH, POLICE SYSTEMS IN THE UNITED STATES 19-21 (rev. ed. 1949); Jackson, *The Federal Prosecutor,* 24 J. AM. JUD. SOC'Y 18, 19 (1940); SMITH, NEW ORLEANS POLICE SURVEY 8 (1946); SMITH & TIMNERMAN, THE BALTIMORE POLICE SURVEY 1, 13, 16, 149-50 (1941); N.Y. Times, Feb. 14, 1956, p. 1, col. 1 (report of police Commissioner Kennedy); *Editorial, More Police, Less Crime, id.,* Feb. 15, 1956, p. 30, col. 2; Kennedy, *Keynote Address,* THE POLICE YEARBOOK 8, 10, 11 (1957); Nichols, *Today's Challenges to Law Enforcement, id.* at 94-95; Swanson, *Police and Children,* The Police Chief, June 1958, p. 18.

32. No satisfactory formula has yet been designed to determine the number of police necessary to provide an "optimum" service. For a significant attempt to design such a formula and a realistic statement of the difficulties involved, see LOS ANGELES, CAL., POLICE DEP'T, SURVEY OF POLICE PERSONNEL REQUIREMENTS (1958); Parker, "How Much Is Enough," Address Before the Annual Conference of The International Association of Chiefs of Police, Oct. 27, 1958. See also Walton, *"Selective Distribution" of Police Patrol Force,* 49 J. CRIM. L., C. & P.S. 165 (1958); WILSON, POLICE PLANNING 46, 98, 115-116 (2d ed. 1957). For statistics on the number of police per 1000 persons for all United States cities of over 10,000 population, see INTERNATIONAL CITY MANAGERS ASS'N, THE MUNICIPAL YEARBOOK 400-16 (1957). For other complications in defining "workload," see text following note 90 *infra.*

33. On "system-maintenance" pressures operating within or on the department, see notes 65 & 67 *infra* and accompanying text. For a reflection of external pressures, see PORTLAND, ME., POLICE DEP'T RULES & REGS. § 2040.11, reprinted in WILSON, POLICE PLANNING 405 (2d ed. 1957):

> He [the Intelligence Officer] shall guard himself against being forced into ill-advised action against minor non-commercial violators that may result in arousing

determine the outer limits of *actual enforcement* throughout the criminal process. This relationship of the police to the total administration of criminal justice can be seen in the diagram opposite this page. They may reinforce, or they may undermine, the legislature's objectives in designating certain conduct "criminal" and in authorizing the imposition of certain sanctions following conviction. A police decision to ignore a felonious assault "because the victim will not sign a complaint," usually precludes the prosecutor or grand jury from deciding whether to accuse, judge or jury from determining guilt or innocence, judge from imposing the most "appropriate" sentence, probation or correctional authorities from instituting the most "appropriate" restraint and rehabilitation programs, and finally parole or pardon authorities from determining the offender's readiness for release to the community. This example is drawn from one of the three programs of nonenforcement about to be discussed.

III.

Trading enforcement against a narcotics suspect for information about another narcotics offense or offender may involve two types of police decisions not to invoke fully the criminal process.[34] First, there may be a decision to ask for the dismissal or reduction of the charge for which the informant is held; second, there may be a decision to overlook future violations while the suspect serves as an informer. The second type is an example of a relatively pure police decision not to invoke the criminal process while the first requires,

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public indignation; raids on church buildings, homes, and privately occupied hotel rooms not used for commercial purposes are occasionally examples.

See also GLUECK, FINAL REPORT OF THE N.Y. RESEARCH PROJECT FOR THE STUDY AND TREATMENT OF PERSONS CONVICTED OF CRIMES INVOLVING SEXUAL ABERRATIONS 3-4 (1956):

> One . . . variable [explaining in part differences in percentage of "sex offenders" in state prison populations] is the difference in enforcement of various laws in different jurisdictions. Police activity varies from community to community, and within the same community, depending on the number of men available for patrol duty, the amount of immediate public pressure to do something about sexual offenses, and the individual variable of the enforcement officer's own attitudes toward sexual behavior of all types. The variation in mores within a culture, which may be very rapid in periods of social tension, as have prevailed in this country for the past fifteen years, can produce abrupt shifts in attitude about sexual behavior, so that behavior that may be legally wrong becomes socially acceptable.

On the need to take into account pressure from the prosecutor's office, see note 20 *supra*, and text following note 34 *infra*.

34. For the view that "to 'trade' information for overlooking minor offenses" is within the ambit of police discretion as a law enforcement device, see KENNEY, A GUIDE FOR POLICE PLANNING: NARCOTICS OPERATIONS 10 (1954) (" 'trading' is a law enforcement practice that may not be accepted by persons not acquainted with police practices and the extremely complex problem of law enforcement"); PORTLAND, ME., POLICE DEP'T RULES & REGS. § 1123.08, reprinted in WILSON, POLICE PLANNING 365 (2d ed. 1957).

THE POLICE IN RELATION TO OTHER DECISIONMAKERS IN THE CRIMINAL PROCESS

at a minimum, tacit approval by prosecutor or judge. But examination of only the pure types of decisions would oversimplify the problem. They fail to illustrate the extent to which police nonenforcement decisions may permeate the process as well as influence, and be influenced by, prosecutor and court action in settings which fail to prompt appraisal of such decisions in light of the purposes of the criminal law. Both types of decisions, pure and conglomerate, are nonetheless primarily police decisions. They are distinguishable from a prosecutor's or court's decision to trade information for enforcement under an immunity statute,[35] and from such parliamentary decisions as the now-repealed seventeenth and eighteenth century English statutes which gave a convicted offender who secured the conviction of his accomplice an absolute right to pardon.[36] Such prosecutor and parliamentary decisions to trade information for enforcement, unlike the police decisions to be described, have not only been authorized by a legislative body, but have also been made sufficiently visible to permit review.[37]

In the municipality studied, regular uniformed officers, with general law enforcement duties on precinct assignments, and a special narcotics squad of detectives, with citywide jurisdiction, are responsible for enforcement of the state narcotics laws. The existence of the special squad acts as a pressure on the uniformed officer to be the first to discover any sale, possession, or use of narcotics in his precinct. Careful preparation of a case for prosecution may thus become secondary to this objective. Indeed, approximately eighty per cent of those apprehended for narcotics violations during one year were discharged. In the opinion of the special squad, which processes each arrested narcotics suspect, either the search was illegal or the evidence obtained inadequate.[38] The precinct officer's lack of interest in carefully developing a narcotics case for prosecution often amounts in effect to a police decision not to enforce but rather to harass.[39]

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35. See, *e.g.*, 18 U.S.C. § 3486 (1958); The Model State Witness Immunity Act, reprinted, with commentary, in 2 ABA, ORGANIZED CRIME AND LAW ENFORCEMENT 157-86 (1953). See also Nicosia, *Enforceability of Prosecutors' Agreement Not To Prosecute*, 24 J. CRIM. L. & CRIMINOLOGY 600, 601-02 (1934) (three methods of awarding immunity).

36. See RADIZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 33-56 (1956).

37. See note 48 *infra* and accompanying text.

38. Included in the total of arrests are those made by members of the special squad. Figures for another year in the same period presented by the Chief of the Narcotics Squad in congressional hearings indicate that squad members were responsible for approximately one-third of the arrests. That year approximately half of the arrestees were discharged.

The number of releases is particularly significant since the exclusionary rule in this jurisdiction does not apply to narcotics illegally obtained outside of a dwelling house.

39. For a discussion of harassment as a form of police decision not to invoke the criminal process see text accompanying notes 82-93 *infra*.

Another pure-form decision not to invoke the law against unlawful sales may result from a police decision that it is more important to preserve the anonymity of the informant than to proceed against a known offender. See, *e.g.*, People v. McMurray, 340 P.2d 335, 337, 339 (Cal. Dist. Ct. App. 1959).

But we are concerned here primarily with the decisions of the narcotics squad, which, like the Federal Narcotics Bureau, has established a policy of concentrating enforcement efforts against the "big supplier."[40] The chief of the squad claimed that informers must be utilized to implement that policy, and that in order to get informants it is necessary to trade "little ones for big ones." Informers are used to arrange and make purchases of narcotics, to elicit information from suspects, including persons in custody, and to recruit additional informants.

Following arrest, a suspect will generally offer to serve as an informer to "do himself some good." If an arrestee fails to initiate such negotiations, the interrogating officer will suggest that something may be gained by disclosing sources of supply and by serving as an informer. A high mandatory minimum sentence for selling, a high maximum sentence for possesion, and, where users are involved, a strong desire on their part to avoid the agonies of withdrawal, combine to place the police in an excellent bargaining position to recruit informers. To assure performance, each informer is charged with a narcotics violation, and final disposition is postponed until the defendant has fulfilled his part of the bargain. To protect the informer, the special squad seeks to camouflage him in the large body of releasees by not disclosing his identity even to the arresting precinct officer, who is given no explanation for release.[41] Thus persons encountered on the street by a uniformed patrolman the day after their arrest may have been discharged, or they may have been officially charged and then released on bail or personal recognizance to await trial or to serve as informers.

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40. See STAFF OF SUBCOMM. ON NARCOTICS, HOUSE COMM. ON WAYS AND MEANS, 84TH CONG., 2D SESS., ILLICIT TRAFFIC IN NARCOTICS, BARBITURATES, AND AMPHETAMINES IN THE UNITED STATES 11 (Comm. Print 1956).

Upon questioning individuals on the street, the police are frequently told "I'm working for the Bureau" or "I'm working for Sergeant --------'s crew." For example, the officers of a cruiser car stopped a car to question the occupants. The driver told the officers that he was working for the Narcotics Squad and was trying to make a purchase from the other person in the car. The other person, who was questioned separately, told the officers that he, too, was an informer—but for the Federal agency, and that he was associating with the driver in hopes that he would obtain some information relating to the sale of narcotics.

41. The informer is contacted by the police away from public view. Members of the Squad refrain from apprehending a suspect making a sale to an informer during a supervised purchase. See KENNEY, *op. cit. supra* note 34, at 10-11:

> A. How to cultivate narcotic informants.
>
> . . . .
>
> 2. Above all, do not make arrest with the informant present when said informant has introduced the officer to the peddler. This is called a "burn." Once an officer or unit secures the reputation of "burning" informants it will be hard pressed in securing information from informants.
>
> B. How to use narcotic informants for information on other crimes.
>
> . . . .
>
> 2. The officer should keep in mind that the disclosure of an informant's

While serving as informers, suspects are allowed to engage in illegal activity. Continued use of narcotics is condoned; the narcotics detective generally is not concerned with the problem of informants who make buys and use some of the evidence themselves.[42] Though informers are usually warned that their status does not give them a "license to peddle," possession of a substantial

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identity will in all probability result in serious injury or possibly death to the informant.

. . . .

D. How to properly use informants.

1. Informants must be protected at all times by not revealing identiy [*sic*] or disclosing the fact that they are giving information or assistance.

2. Avoid making arrests when informants are present, or so close after informant-officer-contact that informants are suspected by the violator of "burning him." This is called a "buy and a bust" with a "burn" of the informant.

3. Always build up in the informant's mind that the officer will never "burn" him.

For a case requiring that informer's name be disclosed if sought in a pretrial motion for bill of particulars, see Roviaro v. United States, 353 U.S. 53, 65 n.15 (1957).

42. In one case an informer, who had just made a buy handed the officer ten red capsules of heroin wrapped in tinfoil and stated that he was keeping two for his trouble. In no cases observed did the police directly furnish informers with narcotics.

In other jurisdictions, the supplying of addict informers with narcotics by the police apparently is not uncommon. DEUTSCH, THE TROUBLE WITH COPS 98 (2d ed. 1955), reports:

The chief of one of our best-policed cities gave me an elaborate rationalization for the practice:

"We don't hand out dope to an addict who supplies us with information. But if one comes in, desperate for want of the addicting drug that he can't obtain for one reason or another, and if he gives us information that we deem valuable, we send him to the public hospital where a doctor can administer an injection of the drug for medical reasons, to relieve his suffering."

This chief, along with others who defend the practice, claimed it is almost impossible to apprehend dope peddlers without the cooperation of their addict customers.

On quite the other hand, Deutsch reports:

Police Chief John Holstrom of Berkeley, California, makes this observation:

. . .

"In Berkeley, we don't trade immunity for information, in so far as toleration of continued violations is concerned. But we trade in another way. For instance, if a man is arrested for a petty theft and he tells us he will give us convicting information on a big narcotics operator if I recommend dismissal of the charge against him, I wouldn't hesitate to do it—if he comes through with the goods."

Id. at 97.

For a case in which the court takes judicial notice of the use of informer-addicts, see Taylor v. United States, 238 F.2d 409, 413 (9th Cir. 1956). For some evidence on the extent to which the courts may be involved with the police in the trading of enforcement for information, see Griffin v. Renkert, 121 N.E.2d 171 (Ohio C.P. 1954) (ordering reinstatement of police detective dismissed for obtaining modification of sentence and release of a person convicted on charge of possession of lottery slips in order to aid him in "his subversive" work in checking communism "in certain colored circles").

amount of narcotics may be excused. In one case, a defendant found guilty of possession of *marijuana* argued that she was entitled to be placed on probation since she had cooperated with the police by testifying against three persons charged with sale of narcotics. The sentencing judge denied her request because he discovered that her cooperation was related to the possession of a substantial amount of *heroin*, an offense for which she was arrested (but never charged) while on bail for the marijuana violation. A narcotics squad inspector, in response to an inquiry from the judge, revealed that the defendant had not been charged with possession of *heroin* because she had been cooperative with the police on that offense.[43]

In addition to granting such outright immunity for some violations, the police will recommend to the prosecutor either that an informer's case be *nolle prossed* or, more frequently, that the charge be reduced to a lesser offense. And, if the latter course is followed, the police usually recommend to the judge, either in response to his request for information or in the presentence report, that informers be placed on probation or given relatively light sentences. Both the prosecutor and judge willingly respond to police requests for reducing a charge of sale to a lesser offense because they consider the mandatory minimum too severe.[44] As a result, during a four year period in this jurisdiction, less than two and one-half per cent of all persons charged with the sale of narcotics were convicted of that offense.

The narcotics squad's policy of trading *full enforcement* for information is justified on the grounds that apprehension and prosecution of the "big supplier" is facilitated. The absence of any in the city is attributed to this policy. As one member of the squad said, "[The city] is too hot. There are too many informants." A basic, though untested, assumption of the policy is that ridding the city of the "big supplier" is the key to solving its narcotics problem. Even if this assumption were empirically validated, the desirability of continuing such a policy cannot be established without taking into account its total impact on the administration of criminal justice in the city, the state, and the

43. On imposing a sentence of two to ten years, the judge said that her cooperation in the heroin offense did not place any moral obligation on him or the police department as to her sentence for the marijuana charge. Had she been charged and convicted on both counts, the maximum could have been twenty years. A third conviction for possession would carry a mandatory twenty years minimum with a possible maximum of forty years.

In another case an informer for the Federal Bureau of Narcotics sold heroin capsules to an informer of the city narcotics squad. The Federal informer was arrested by the city police and charged. Following consultation with Federal agents the case was *nolle prossed*.

On the widespread use of informers and police protection of them, see Kooken, *Ethics in Police Service*, 38 J. CRIM. L. & CRIMINOLOGY 172, 174-75 (1947).

44. The police work under specific instructions from the judges to notify them of those cases in which they wish to have imposed the heavy mandatory sentences prescribed by statute. For an example of a trial court penalizing a defendant because of her failure to cooperate as an informant, see State v. Carter, Conn. L.J., Nov. 4, 1958, pp. 14, 15 (Sentence Rev. Div.) (sentence review decision reducing sentence).

nation. Yet no procedure has been designed to enable the police and other key administrators of criminal justice to obtain such an appraisal.[45] The extent and nature of the need for such a procedure can be illustrated, despite the limitations of available data,[46] by presenting in the form of a mock report some of the questions, some of the answers, and some of the proposals a Policy Appraisal and Review Board might consider.[47]

Following a description of the informer program, a report might ask:

To what extent, if at all, has the legislature delegated to the police the authority to grant, or obtain a grant of, complete or partial immunity from prosecution, in exchange for information about narcotics suppliers? No provisions of the general immunity or narcotics statutes authorize the police to exercise such discretion. The general immunity statute requires a high degree of visibility by providing that immunity be allowed only on a written motion by the prosecuting attorney to the court and that the information given be reduced to writing under the direction of the judge to preclude future prosecution for the traded offense or offenses.[48] The narcotics statutes, unlike comparable legislation concerning other specific crimes, make no provision for obtaining information by awarding immunity from prosecution. Nor is there any indication, other than possibly in the maximum sentences authorized,[49] that the legislature intended that certain narcotics offenses be given high priority or be enforced at the expense of other offenses. What evidence there is of legislative intent suggests the contrary; this fact is recognized by the local police manual. And nothing in the statute providing for the establishment of local police departments can be construed to authorize the policy of trading enforcement for information. That statute makes *full enforcement* a duty of the police. The narcotics squad has ignored this mandate and adopted an informer policy which appears to constitute a usurpation of legislative func-

45. Such tasks might, in part at least, be assumed by the department's "Research and Planning" unit. It has, however, been primarily concerned with collecting statistics and with such administrative considerations as geographic boundaries, patrol districts, and the use of one or two man squad cars.

46. This comment is not intended as a criticism of the work done by the American Bar Foundation. However, unlike such an overall survey, research initiated by a Policy Appraisal and Review Board would focus on a specific problem and be designed to answer questions formulated in the light of an articulated set of assumptions about the functions and purposes of the criminal law and the place of the police in its administration.

47. For an attempt to define the functions, location, and composition of a Policy Appraisal and Review Board, see text following note 98 *infra*.

48. For legislative recognition that information should not be compelled under an immunity statute where such information would subject the informant, as in most narcotics cases, to jeopardy in another jurisdiction, see CAL. PENAL CODE ANN. § 1324 (Supp.), which was amended to provide that immunity could not be ordered if the court finds "that to do so . . . could subject the witness to a criminal prosecution in another jurisdiction. . . ." See also United States v. Bonanno, 178 F. Supp. 62 (S.D.N.Y. 1959).

49. *Cf.* L---- v. M----, 326 S.W.2d 751, 756 & n.11 (Mo. Ct. App. 1959) (authorized punishment for perjury far more severe than for adultery, therefore perjury the greater offense).

tion. It does not follow that the police must discontinue employing informers,[50] but they ought to discontinue trading enforcement for information until the legislature, the court,[51] or the prosecutor [52] explicitly initiates such a program. Whether the police policy of trading enforcement for information should be proposed for legislative consideration would depend upon the answers to some of the questions which follow.

Does trading enforcement for information fulfill the retributive, restraining, and reformative functions of the state's narcotics laws? By in effect licensing the user-informer to satisfy his addiction and assuring the peddler-informer, who may also be a user, that he will obtain dismissal or reduction of the pending charge to a lesser offense, the police undermine, if not negate, the retributive and restraining functions of the narcotics laws. In addition, the community is deprived of an opportunity to subject these offenders, particularly the addicts, to treatment aimed at reformation. In fact, the police ironically acknowledge the inconsistency of their program with the goal of treatment; "cured" addicts are not used as informers for fear that exposure to narcotics might cause their relapse. A comparison of the addict-release policies of the police, sentencing judge, and probation and parole authorities demonstrates the extent to which the administration of criminal justice can be set awry by a police nonenforcement program. At one point on the continuum, the police release the addict to informer status so that he can maintain his association with peddlers and users. The addict accepts such status on the tacit condition that continued use will be condoned. At other points on the continuum, the judge and probation and parole authorities make treatment a condition of an addict's release and continued use or even association with narcotics users the basis for revoking probation or parole.[53] Thus the inherent conflict between basic purposes of the criminal law is compounded by conflicts among key decision-points in the process.

Does trading enforcement for information implement the deterrent function of criminal law administration? If deterrence depends—and little if any-

50. The role of the informer generally in the enforcement of the criminal law is beyond the scope of this Article, though it would be well within the scope of a Policy Appraisal and Review Board. For excellent discussions of many of the policies and problems involved in the employment of informers, see Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951). See also Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206 (1953).

51. See New Haven Evening Register, July 30, 1959, p. 7, col. 1 (state police seizure of pinball machines forbidden by superior court judge until question of legality settled by state supreme court).

52. See N.Y. Times, Dec. 24, 1957, p. 10, col. 1 (Attorney General Rogers: "Until Congress has had a chance to clarify this [whether Justice Department can prosecute state officers for wiretapping], we're not going to prosecute any state officials."). On prosecutor pronouncements being made part of an official record, and on prosecutor discretion not to invoke the criminal process, see notes 20 & 28 *supra*.

53. The United States also conditions release upon agreement by the releasee:

10. That I will not purchase, process, use, consume, or administer narcotic drugs

thing is really known about the deterrent impact of the criminal law—in part at least, upon the potential offender's perception of law enforcement, the informer policy can have only a negative effect.[54] In addition to the chance of nondetection which accompanies the commission of all crimes in varying degrees, the narcotics suspect has four-to-one odds that he will not be charged following detection and arrest. And he has a high expectation, even if charged, of obtaining a reduction or dismissal of an accurate charge. These figures reflect and reinforce the offender's view of the administration of criminal justice as a bargaining process initiated either by offering information "to do himself some good" or by a member of the narcotics squad advising the uninformed suspect, the "new offender," of the advantages of disclosing his narcotics "connections." Such law enforcement can have little, if any, deterrent impact.[55]

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or marihuana . . . or frequent places where such articles are unlawfully sold, dispensed, used, or given away. . . .

. . . .

12. That I will not associate with persons having a criminal background, bad reputation, or those engaged in questionable occupations.

Statement of the conditions under which certificate of conditional release is issued, in Letter From James V. Bennett, Director of Federal Prisons, Washington, D.C., to Joseph Goldstein, Sept. 6, 1957. See also MODEL PENAL CODE, § 305.17 *Conditions of Parole* (Tent. Draft No. 5, 1956).

54. It is recognized that no empirical studies adequately test the validity of the assumption that enforcement of the criminal law has a deterrent effect. But it seems clear that without *full enforcement* in practice for a substantial period of time, possibly even for generations, there can be no reliable basis for such studies. See Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., C. & P.S. 176 (1952). See also FLUGEL, MAN, MORALS AND SOCIETY 35 (1945), where discussion of the super-ego as a mechanism of control prompts the thought that before deterrent impact can be determined experiments would have to be conducted over several generations:

> The second source [of the super-ego] is from the process of "introjection" or incorporation into one's own mind of the precepts and moral attitudes of others, particularly of one's parents or of other persons *in loco parentis* in one's youth. As a result of this process, the attitudes of impressive persons in one's early environment (and to some extent throughout life) become a permanent part of one's own mental structure, become "second nature," as the popular expression has it. Through this process, too, moral standards and conventions become handed on from one generation to another, thus giving permanence and stability to the codes and traditions of society.

55. This statement, as most conclusions about deterrent effect, remains unverified. *E.g.*, BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 626 (3d ed. 1959):

> . . . there can be no doubt that certainty of apprehension and conviction for criminal behavior is the first and most indispensable item in securing the immediate reduction in the volume and variety of crime. An honest and expert police system is the only answer to efficient apprehension.

Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 144 (1953):

> On the concrete level of individual experience . . . , he [the policeman] is the living embodiment of domestic law. If he conforms to that law, he becomes the most important official in the entire hierarchy, able to facilitate the progressively greater realization of democratic values.

See Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

That the "big supplier," an undefined entity, has been discouraged from using the city as a headquarters was confirmed by a local federal agent and a United States attorney in testimony before a Senate committee investigating illicit narcotics traffic. They attributed the result, however, to the state's high mandatory minimum sentence for selling, not to the informer policy. In fact, that municipal police policy was not made visible at the hearings.[56] It was neither mentioned in their testimony nor in the testimony of the chief of police and the head of the narcotics squad. These local authorities may have reasoned that since the mandatory sentence facilitates the recruitment of informers who, in turn, are essential to keeping the "big supplier" outside city limits, the legislature's sentencing policy could be credited with the "achievement."

Whether the police informer program, the legislature's sentencing policy, both, or neither, caused the "big supplier" to locate elsewhere is not too significant; the traffic and use of narcotics in the city remain major problems.[57] Since user-demand is maintained, if not increased, by trading enforcement for information, potential and actual peddlers are encouraged to supply the city's addicts. Testimony before the Senate committee indicates that although the "big suppliers" have moved their headquarters to other cities, there are now in the city a large number of small peddlers serving a minimum of 1,500 and in all probability a total of 2,500 users, and that the annual expenditure for illicit narcotics in the city is estimated at not lower than ten and probably as high as eighteen million dollars. Evaluated in terms of deterrent effect, the program of trading enforcement for information to reach the "big supplier" has failed to implement locally the ultimate objective of the narcotics laws—reducing addiction. Furthermore, the business of the "big supplier" has not been effectively deterred.[58] At best suppliers have been discouraged from

56. But the supervisor of the Federal Bureau of Narcotics for this jurisdiction acknowledged his bureau's use of "special employees."

57. The following exchange took place in congressional hearings:

> Senator. You have gotten rid of your bigger peddlers, but now, it would seem to me, having listened through the whole day, you have reduced it here in [city] to a bunch of smaller peddlers, like the girl who testified a minute ago . . . .
>
> Mr. X. [U.S. Attorney for the District].
> That's right.
>
> Senator. And you have got the addicts on the street, and you are going to have plenty of drug addiction in this city, and in this State until there is some effective way of getting these addicts either into a hospital, or if that fails, if they won't take that treatment, into the jails or farms or colonies. Don't you think that's it?
>
> Mr. X. I very definitely agree.

58. For a characterization of the "big supplier," see Statement of Assistant Commissioner, U.S. Bureau of Narcotics, Harney, in *Hearings on H.R. 348 and H.R. 3490 Before the Subcommittee on Narcotics of the House Committee on Ways and Means*, 82d Cong., 1st Sess. 71 (1951):

> Narcotic commerce is no crime of accident or impulse or occasion. It is a carefully studied way of life. It depends on deliberate and calculated scheming

basing their operations in the city, which continues to be a lucrative market. Thus by maintaining the market, local policy, although a copy of national policy, may very well hinder the efforts of the Federal Narcotics Bureau.[59]

A report of a Policy Appraisal and Review Board might find: "Trading little ones for big ones" is outside the ambit of municipal police discretion and should continue to remain so because it conflicts with the basic objectives of the criminal law. Retribution, restraint, and reformation are subverted by a policy which condones the use and possession of narcotics. And deterrence cannot be enhanced by a police program which provides potential and actual suppliers and users with more illustrations of nonenforcement than enforcement.

A report might conclude by exploring and suggesting alternative programs for coping with the narcotics problem. No attempt will be made here to exhaust or detail all possible alternatives. An obvious one would be a rigorous program of *full enforcement* designed to dry up, or at least drastically reduce, local consumer and peddler demand for illicit narcotics. If information currently obtained from suspects is essential and worth a price, compensation might be given to informers, with payments deferred until a suspect's final release. Such a program would neither undermine the retributive and restraining objectives of the criminal law nor deprive the community of an opportunity to impose rehabilitation regimes on the offender. Funds provided by deferred payments might enhance an offender's chances of getting off to a good start upon release.[60] Moreover, changing the picture presently perceived

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and diligently developed sources of supply, on carefully cultivated outlets and customers. This is a degraded business where the attendant human misery is completely discounted for the profit consideration. That profit is alluring. A $1,000 investment may be doubled merely by crossing a street between a wholesaler and a waiting customer with a few ounces of heroin. Obviously the criminal will assume some risks in such an attractive business.

He calculates these risks exactly. His is such an easily hidden business that he knows that it might take officers of the law months to catch him at the exact moment when competent evidence is available against him. He knows the quality and amount of the narcotic law enforcement in the community; he knows whether narcotic cases move promptly on the criminal calendar or are stagnated for months; he knows the quality of prosecution; above all, he knows what is the likely payoff in the way of a sentence. These professionals do not just reckon sentences in the gross amount of time imposed. They can almost instantly figure the amount of good time and industrial good time which might be forthcoming on any kind of a sentence. They know under just what circumstances probation or parole is likely to be granted. Fear is the only consideration which will deter most of these people. We would like to see the risks enhanced in this dirty business.

59. To the extent that this is an international problem, it is clearly a problem for federal authorities. See Renborg, *International Control of Narcotics*, 22 LAW & CONTEMP. PROB. 86 (1957).

60. Such a device might facilitate the effectiveness of a *status elevation* ceremony. See APPENDIX I, at 590 *infra*. By adopting a deferred payment program for informers, the real inadequacies of release funds for offenders might be exposed and might, if successful, even prompt the payment of funds to anyone released from custody to enhance the opportunity for rehabilitation. See, *e.g.*, 18 U.S.C. § 4284 (1958).

by potential violators from nonenforcement to enforcement would at least not preclude the possibility of deterrence. Such a program might even facilitate the apprehension of "big suppliers" who, faced with decreasing demand, might either be forced to discontinue serving the city because sales would no longer be profitable or to adopt bolder sales methods which would expose them to easier detection.

Full enforcement will place the legislature in a position to evaluate its narcotics laws by providing a basis for answering such questions as: Will *full enforcement* increase the price of narcotics to the user? Will such inflation increase the frequency of crimes committed to finance narcotics purchases?[61] Or will *full enforcement* reduce the number of users and the frequency of connected crimes? Will too great or too costly an administrative burden be placed on the prosecutor's office and the courts by *full enforcement*? Will correctional institutions be filled beyond "effective" capacity? The answers to these questions are now buried or obscured by decisions not to invoke the criminal process.[62]

Failure of a *full enforcement* program might prompt a board recommendation to increase treatment or correctional personnel and facilities. Or a board, recognizing that *full enforcement* would be either too costly or inherently ineffective, might propose the repeal of statutes prohibiting the use and sale of narcotics and/or the enactment, as part of a treatment program, of legislation authorizing sales to users at a low price. Such legislative action would be designed to reduce use and connected offenses to a minimum. By taking profits out of sales it would lessen peddler incentive to create new addicts and eliminate the need to support the habit by the commission of crimes.

These then are the kinds of questions, answers, and proposals a Policy Appraisal and Review Board might explore in its report examining this particular type of police decision not to invoke the criminal process.

IV

Another low visibility situation which an Appraisal and Review Board might uncover in this municipality stems from police decisions not to invoke the felonious assault laws unless the victim signs a complaint.[63] Like the addict-informer, the potential complainant in an assault case is both the victim of an offense and a key source of information. But unlike him, the complain-

61. See Finestone, *Narcotics and Criminality*, 22 LAW & CONTEMP. PROB. 69 (1957); Harney, *The Police and Narcotics Enforcement*, THE POLICE YEARBOOK 95, 100 (1952) (Assistant Commissioner, U.S. Bureau of Narcotics).

62. To the extent that these and other questions reflect some of the real pressures behind nonenforcement, they may be made more readily visible by a board proposal to initiate a program of *full enforcement* against all narcotics violators and thus, even without implementation of the proposal, cause the legislature to reexamine existing legislation.

63. Police decisions not to invoke the criminal process in assault cases involving a willing or insistent complainant are not examined. The frustrated victim may make such decisions visible for example, by complaining to the prosecutor or grand jury or by seek-

ant, who is not a suspect, and whose initial contact with the police is generally self-imposed, is not placed under pressure to bargain. And in contrast with the informer program, the police assault program was clearly not designed, if designed at all, to effectuate an identifiable policy.

During one month under the nonenforcement program of a single precinct, thirty-eight out of forty-three felonious assault cases, the great majority involving stabbings and cuttings, were cleared "because the victim refused to prosecute."[64] This program, which is coupled with a practice of not encouraging victims to sign complaints, reduces the pressure of work by eliminating such tasks as apprehending and detaining suspects, writing detailed reports, applying for warrants to prefer charges and appearing in court at inconvenient times for long periods without adequate compensation.[65] As one officer ex-

ing to initiate newspaper or crime commission investigations. See 7 W. RES. L. REV. 203, 204-05 (1956); 1957 CHICAGO CRIME COMM. ANN. REP. 37-39.

The exercise of police discretion in misdemeanor assaults is not discussed. In such cases, the police similarly avoid what they view to be their problem by placing the burden of initiating criminal prosecution on the victim. Unless the assault occurs in the officer's presence, he does not have authority in this jurisdiction to arrest the offender without a warrant and can cite this lack of authority as a basis for his decision not to proceed. Of course, this does not fully explain his decision, for he might further investigate the case and obtain a warrant for arrest. The victim is usually referred to detectives who will assist in obtaining a warrant. Experience has indicated that the victim rarely will take the initiative necessary to contact the detectives in order to bring criminal charges.

64. The police are frequently made aware of the offense by victims apparently more anxious to obtain ambulance service to the hospital than to initiate apprehension and prosecution of an assailant. If hospitalization is required, the police arrest the offender even though the complainant may not wish to prosecute. When such arrests are made, the police conduct a "minimum type" investigation to assure that the basic facts will be available should the victim die and murder or manslaughter become the more appropriate charge for the state, as complainant, to lodge against the offender. The police decision to arrest, however, does not reflect any intention to further invoke the process because of the seriousness of the injury inflicted. For soon after the disturbing event, in an effort to close the case, the police will ask the hospitalized victim to decide whether prosecution should be initiated. Though his condition may cast doubt about his competence to understand and respond to such an inquiry, in at least one case the victim demonstrated complete awareness. Shortly before his death for which the assailant was subsequently charged with murder, he replied from his hospital bed, "I want to see whether or not I live first."

The police will also make arrests, even if the complainant does not wish to prosecute, if the suspect has offered to pay off the complainant or if the suspect is a "known criminal" whom the police wish to get off the street. The decision to invoke the process in these cases is equally a reflection of the private value system of the police. In these cases the state acts as complainant and the victim is subpoenaed to appear at trial. See Miller, *The Compromise of Criminal Cases*, 1 So. CAL. L. REV. 1, & nn.3-5 (1927) (on compounding crime as a separate offense).

65. A decision to arrest may be influenced by the time an offense occurs and the time the police officer is scheduled to go off and return to duty. An officer assigned to the vice squad explained, for example, that officers will not make an arrest on Saturday night if they can avoid it since court appearance is likely to be scheduled for their day off.

plained, "run-of-the-mill" felonious assaults are so common in his precinct that prosecution of each case would force patrolmen to spend too much time in court and leave too little time for investigating other offenses. This rationalization exposes the private value system of individual officers as another policy-shaping factor. Some policemen feel, for example, that assault is an acceptable means of settling disputes among Negroes, and that when both assailant and victim are Negro, there is no immediately discernible harm to the public which justifies a decision to invoke the criminal process.[66] Anticipation of dismissal by judge and district attorney of cases in which the victim is an uncooperative witness, the police claim, has been another operative factor in the development of the assault policy.[67] A Policy Appraisal and Review Board, whose investigators had been specifically directed to examine the assault policy, should be able to identify these or other policy-shaping factors more

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And no matter what the duration of his court appearance, the officer receives credit for only two hours work.

66. In such cases the police do not attribute their unwillingness to act on any legal restriction placed upon them or any particular difficulty which they may encounter in taking the case to court. Other expressions of private and possibly community value systems are found in police decisions, for example, not to proceed against an elderly gentleman for larceny of a ham ("You are 74 years old—for crying out loud we don't want to lock you up for something like that . . ." the lieutenant said), or to take home an upper class drunk while locking up a "drunken bum."

67. The courts dismiss or prosecutors decline to proceed with these cases possibly to reduce their workload as a means of "system maintenance." Commenting on similar prosecutor practices in another jurisdiction, a police officer with twenty-eight years of service reflected:

> The next weak link in the chain of justice is the prosecutor who fails to file on crooks because the "victim refuses to prosecute." It is the business of the prosecutor, not the victim, to conduct the prosecution. That's what he's elected and paid to do. If the victim shows a tendency to refuse to cooperate, the laws, if adequate, would take care of that situation. The lazy or timid prosecutor uses various excuses, such as illegal search, lack of evidence, etc., and too often he goes into the trial of a criminal without advance preparation, and the slick defense mouthpieces make a monkey of him.

Johnson, *Some Thoughts on Crime Prevention*, THE POLICE YEARBOOK 146, 147 (1953).

For a statute authorizing the court, in its discretion, to *nolle prosequi* cases involving certain specified offenses following a settlement by complainant and the offender, see PA. STAT. ANN. tit. 19, § 491 (1958). In contrast, see WASHINGTON, D.C., POLICE DEP'T MANUAL ch. 2, § 12 (1948); SAN FRANCISCO, CAL., POLICE DEP'T RULES & REGS. § 491 (1951) (prohibiting police officers from arranging or participating in compromises between victims and suspects).

Anticipated court responses manifest themselves in other police decisions to enforce or not to enforce. The police may decide not to enforce particular offenses if the judge assigned to the criminal docket is "known" to be lenient re the specific offense. Another view, on paper at least, is to be found in the following catechism from NEW BEDFORD, MASS., POLICE DEP'T RULES & REGS. 38, (1957): "Of what interest is it to a policeman if a complaint against a prisoner is dismissed by the court? None whatever; a policeman's duty is accomplished when he brings his prisoner to the station, and presents his case in court."

precisely. Yet on the basis of the data available, a board could tentatively conclude that court and prosecutor responses do not explain why the police have failed to adopt a policy of encouraging assault victims to sign complaints, and, therefore, that the private value system of department members, as reflected in their attitude toward workload and in a stereotypical view of the Negro, is of primary significance.

Once some of the major policy-shaping factors have been identified, an Appraisal and Review Board might formulate and attempt to answer the following or similar questions: Would it be consistent with any of the purposes of the criminal law to authorize police discretion in cases of felonious assaults as well as other specified offenses? Assuming that it would be consistent or at least more realistic to authorize police discretion in some cases, what limitations and guides, if any, should the legislature provide? Should legislation provide that factors such as workload, willingness of victims or certain victims to sign a complaint, the degree of violence and attitude of prosecutor and judge be taken into account in the exercise of police discretion? If workload is to be recognized, should the legislature establish priorities of enforcement designed to assist the police in deciding which offenses among equally pressing ones are to be ignored or enforced? If assaults are made criminal in order to reduce threats to community peace and individual security, should a victim's willingness to prosecute, if he happens to live,[68] be relevant to the exercise of police discretion? Does resting prosecution in the hands of the victim encourage him to "get even" with the assailant through retaliatory lawlessness? Or does such a policy place the decision in the hands of the assailant whose use of force has already demonstrated an ability and willingness to fulfill a threat?

Can the individual police officer, despite his own value system, sufficiently respond to officially articulated community values to be delegated broad powers of discretion?[69] If not, can or should procedures be designed to enable

68. See note 64 *supra*.

69. The police officer is confronted with a most difficult task . . . . He must bring under control his personal sentiments and prejudices and subordinate them in a truly professional spirit . . . . He must refrain from expressing private notions in discharging the duties of office. This entails a capacity to distinguish between his own right as a private citizen to his private convictions and his responsibilities as a police officer.

LOHMAN, THE POLICE AND MINORITY GROUPS 5 (1947) (manual prepared for use in the Chicago Park District Training School).

> The Negro is aware of "the law" only as an agent of the white community. The police act directly upon the Negro to keep him "in his place." The effect has been that many southern Negroes . . . continue to regard the policeman as a natural enemy. The only manner in which the confidence of all groups can be won is by impartial and vigorous enforcement of the law. Absolute impartiality requires that the law be enforced against all violators. The idea that race, creed, or nationality are extenuating factors, permitting of different applications of the law, must be abandoned . . . . The police officer who is tempted to vary his role according

the police department to translate these values into rules and regulations for individual policemen? Can police officers or the department be trained to evaluate the extent to which current practice undermines a major criminal law objective of imposing upon all persons officially recognized minimum standards of human behavior? For example, can the individual officer of the department be trained to evaluate the effect of decisions in cases of felonious assault among Negroes on local programs for implementing national or state policies of integration in school, employment, and housing, and to determine the extent to which current policy weakens or reinforces stereotypes which are used to justify not only police policy, but more importantly, opposition to desegregation programs?[70] Or should legislation provide that the police invoke the process in all felonious assault cases unless the prosecutor or court publicly provide them in recorded documents with authority and guides for exercising discretion, and thus make visible both the policy of nonenforcement and the agency or agencies responsible for it?

Some of these issues were considered and resolved by the Oakland, California, Police Department in 1957 when, after consultation with prosecutors and judges, it decided to abandon a similar assault policy and seek *full enforcement*.[71] Chief of Police W. W. Vernon, describing Oakland's new program, wrote:

> to personal notions as to the worth of various groups is himself in violation of the law. An officer has a capacity for delivering equal justice only to the extent that he has this problem under control.

Id. at 100.

70. See generally Riddleberger & Motz, *Prejudice and Perception*, 62 AM. J. SOCIOLOGY 498 (1957); Yarrow, Campbell, & Yarrow, *Interpersonal Dynamics in Racial Integration*, in MACOBY, NEWCOMB & HARTLEY, READINGS IN SOCIAL PSYCHOLOGY 623, 632-34 (3d ed. 1958); Johnson, *The Stereotype of the American Negro*, in KLINEBERG, CHARACTERISTICS OF THE AMERICAN NEGRO 3 (1944); KEPHART, RACIAL FACTORS AND URBAN LAW ENFORCEMENT 69, 75-107 (1957); Bastide & Van den Berghe, *Stereotypes, Norms and Interracial Behavior in São Paulo, Brazil*, 22 AM. SOCIOLOGICAL REV. 689, 691 (1957).

Query: To what extent should the customs of an identifiable subcultural group or a person's membership in that group be taken into account as a mitigating or aggravating factor in the imposition of sanctions or as a defense to a crime? For some of the problems and difficulties involved in attempting to formulate a policy which defines and takes into account subcultural differences, see charge to the jury in Regina v. Muddarubba, Austl. N. Terr. Sup. Ct., Feb. 2, 1956, reprinted in Donnelly, Goldstein & Schwartz, Cases on Problems Arising in the Promulgation, Administration and Enforcement of a Law of Crimes, 2d tent. ed., Jan. 1959, ch. III, at 619 (mimeo on file in Yale Law Library); Regina v. Macekequnake, 28 Ont. 309 (1897).

71. Police Academy, Oakland, Cal., Police Dep't, Instructors' Material, Vol. 6, Bull. No. 35, Aug. 26, 1957, p. 2. For a statement of a similar policy, see NEW YORK CITY, N.Y., POLICE DEP'T RULES & PROCEDURES ch. 12, § 12.0 (1956) ("When an arrest is made and the complainant is reluctant to prosecute, a subpoena will be obtained from the magistrate having jurisdiction, to secure the attendance of the complainant, so that the ends of justice may not be defeated.") Another manual urges police education of the public "with a view toward soliciting cooperation of all persons in reporting violations." SALT LAKE CITY, UTAH, POLICE MANUAL ch. XI, § 19 (1951).

> In our assault cases for years we had followed this policy of releasing the defendant if the complainant did not feel aggrieved to the point of being willing to testify. . . . [Since] World War II . . . our assault cases increased tremendously to the point where we decided to do something about the increase . . . .[72]

Training materials prepared by the Oakland Police Academy disclose that between 1952 and 1956, while the decision to prosecute was vested in the victim, the rate of reported felonious assaults rose from 93 to 161 per 100,000 population and the annual number of misdemeanor assaults rose from 618 to 2,630.[73] The materials emphasize that these statistics mean a workload of "nearly 10 assault reports a day every day of the year." But they stress:

> The important point about these figures is not so much that they represent a substantial police workload, which they do, but more important, that they indicate an increasing lack of respect for the laws of society by a measurable segment of our population, and a corresponding threat to the rest of the citizens of our city. The police have a clear responsibility to develop respect for the law among those who disregard it in order to insure the physical safety and well-being of those who do.
>
> . . . .
>
> We recognize that the problem exists mainly because the injured person has refused to sign a complaint against the perpetrator. The injured person has usually refused to sign for two reasons: first, because of threats of future bodily harm or other action by the perpetrator and, secondly, because it has been a way of life among some people to adjust grievances by physical assaults and not by the recognized laws of society which are available to them.
>
> We, the police, have condoned these practices to some extent by not taking advantage of the means at our disposal; that is, by not gathering sufficient evidence and signing complaints on information and belief in those cases where the complainant refuses to prosecute. The policy and procedure of gathering sufficient evidence and signing complaints on information and belief should instill in these groups the realization that the laws of society must be resorted to in settling disputes. When it is realized by many of these people that we will sign complaints ourselves and will

72. Letter From W. W. Vernon to Joseph Goldstein, Sept. 24, 1958.

73. Police Academy, Oakland, Cal., Police Dep't, *op. cit. supra* note 71, at 3:

Felony Assaults	*Reported to Police*	*Arrests*	*Charged*
(For year 1956)	618	350	67
(1st 6 mos. of 1957)	394	197	62
Misdemeanor Assaults			
(For year 1956)	2631	941	454
(1st 6 mos. of 1957)	1322	522	not available

(Note the difference between the number arrested and the number charged. *The difference is attributed to the fact that the type of people involved do not prosecute in physical assault cases.*)

(Emphasis added.)

not condone fighting and cuttings, many of them will stop such practices.[74]

Following conferences with the police, the local prosecutors and judges pledged their support for the new assault program.[75] The district attorney's office will deny a complainant's request that a case be dropped and suggest that it be addressed to the judge in open court. The judge, in turn, will advise the complainant that the case cannot be dismissed, and that a perjury, contempt, or false-report complaint will be issued in "appropriate cases"[76] against the victim who denies facts originally alleged.[77] The police have been advised that the court and prosecutor will actively cooperate in the implementation of the new program, but that every case will not result in a complaint since it is the "job [of the police] to turn in the evidence and it's the Prosecuting Attorney's job to determine when a complaint will be issued."[78] Thus the role of each of the key decisionmaking agencies with preconviction invoking authority is clearly delineated and integrated.

With the inauguration of a new assault policy, an Appraisal and Review Board might establish procedures for determining how effectively the objectives of the policy are fulfilled in practice. A board might design intelligence retrieving devices which would provide more complete data than the following termed by Chief Vernon "the best evidence that our program is accomplishing the purpose for which it was developed . . . ."[79] Prior to the adoption of the new policy, eighty per cent of the felonious assault cases "cleared" were cleared because "Complainant Refuses To Prosecute," while only thirty-two and two-tenths per cent of the clearances made during the first three months

74. *Id.* at 3-4; see Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 153 (1953):

> Discriminatory law enforcement, including the failure to protect Negroes from the aggression of other Negroes, aggravates tendencies toward criminal behavior. Equal enforcement of law by the police would have a curative, morale building effect which would be of the greatest value in critical situations.

75. In commenting on this procedure our courts and prosecutors have said:

> Since battery, assault, disturbing the peace and similar offenses are public offenses under our State laws, the public has a right to see such offenders brought before the courts, even though the victim or complainant is reluctant or indifferent. When the police are called upon to investigate and arrest such offenders and the ensuing judicial processes are set in motion, the public has a right to have these processes given meaning, without being frustrated or rendered useless at the whim of the complaining witness.

Letter From W. W. Vernon to Herman Goldstein, then Assistant Director, Governmental Research Institute, Hartford, Connecticut, July 3, 1958, copy on file in author's office; *accord*, Taylor v. State, 214 Md. 156, 133 A.2d 414 (1957) (consent of prosecuting witness no defense to charge of assault with intent to commit sodomy).

76. Police Academy, Oakland, Cal., Police Dep't, *op. cit. supra* note 71.

77. CAL. PENAL CODE ANN. §§ 118, 118a (perjury), 166(6) (contempt), 148.5 (false report of criminal offense) (Supp.).

78. Policy Academy, Oakland, Cal., Police Dep't, *op. cit. supra* note 71.

79. Chief W.W. Vernon, Assault Cases Memorandum to All Line-Ups, May 9, 1958.

in 1958 were for that reason, even though the overall clearance rate rose during that period.[80] And "during the first quarter of this year Felony Assaults dropped 11.1 per cent below the same period last year, and in March they were 35.6 per cent below March of last year. Battery cases were down 19.0 per cent for the first three months of 1958."[81] An Appraisal and Review Board might attempt to determine the extent to which the police in cases formerly dropped because "Complainant Refused To Testify" have consciously or otherwise substituted another reason for "case cleared." And it might estimate the extent to which the decrease in assaults *reported* reflects, if it does, a decrease in the *actual* number of assaults or only a decrease in the number of victims willing to report assaults. Such followup investigations and what actually took place in Oakland on an informal basis between police, prosecutor, and judge illustrate some of the functions an Appraisal and Review Board might regularly perform.

V.

Police decisions to harass, though generally perceived as overzealous enforcement, constitute another body of nonenforcement activities meriting investigation by an Appraisal and Review Board. Harassment is the imposition by the police, acting under color of law, of sanctions prior to conviction as a means of ultimate punishment, rather than as a device for the invocation of criminal proceedings. Characteristic of harassment are efforts to annoy certain "offenders" both by temporarily detaining or arresting them without intention to seek prosecution and by destroying or illegally seizing their property without any intention to use it as evidence.[82] Like other police decisions not to in-

80. *Ibid.* "In 1956 86.5% of the reported Misdemeanor Assaults were cleared, and 53.4% of these Clearances were on the basis of non-cooperation of complainants. In the first quarter of 1958 the Clearance Rate was up to 92.9% and only 15.9% of these cases were cleared as Complainant Refuses to Prosecute." *Ibid.*

81. *Ibid.*

82. This definition of harassment excludes, therefore, the lawful arrests of "golden rule" drunks whom the police intend to release the next morning, the apprehension and detention of material witnesses, arrests or searches of doubtful legality engaged in to determine the limits of due process, and finally "letter of the law" enforcement which is frequently mislabled harassment. For an account of the development of the Golden Rule Police Policy in late nineteenth century, see Bremner, *Police, Penal and Parole Policies in Cleveland and Toledo: The Civic Revival in Ohio*, 14 AM. J. ECONOMICS & SOCIOLOGY 387 (1955).

On "letter of the law" enforcement as "harassment," see N.Y. Times, June 29, 1958, p. 54, cols. 5-6:

> A farmer has asked Governor Harriman to call an immediate session of the legislature, if necessary, to stop state troopers from "harassing" him and other farmers with vehicle and traffic law technicalities.
>
> . . . He predicted that enforcement of certain statutes, if applied to the movement of agriculture equipment from one part of a farm to another on state highways, "will mean the end of farming in New York State."
>
> He said he was challenging strict interpretation of . . . the new section of the law, 1164 (b), which after next Monday will require stop-and-turn signal lamps

voke the criminal process, harassment is generally of extremely low visibility,[83] probably because the police ordinarily restrict such activity to persons who are unable to afford the costs of litigation, who would, or think they would, command little respect even if they were to complain, or who wish to keep themselves out of public view in order to continue their illicit activities.[84] Like the informer program, harassment is conducted by the police in an atmosphere of cooperation with other administrators of criminal justice. Since harassment, by definition, is outside the rule of law, any benefits attributed to such police activity cannot justify its continuation. An Appraisal and Review Board, however, would not limit its investigations to making such a finding. It would be expected to identify and analyze factors underlying harassment and to formulate proposals for replacing harassment—lawless nonenforcement—with enforcement of the criminal law.[85]

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on such motor-drawn vehicles as manure spreaders, Mr. Berol offered to rest on a pronouncement by Justice of the Peace Alvin Jordan of Lewisboro.

"I will take judicial cognizance," the court held, "that a manure spreader signals itself for a good half mile." Judge Jordan was once a Maine farm boy.

83. "We have little valid data on the extent of this [harassment] practice." Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 34 (1957).

A high degree of visibility occasionally results from public statements by the police department. See, *e.g.*, N.Y. Times, June 16, 1957, p. 67, col. 1.

Low visibility may in part be attributed to the inadequacy of remedies for the harassee or penalities for the harasser or the difficulties of establishing the tort. On false imprisonment and false arrest, see RESTATEMENT, TORTS §§ 35, 127 (1934). On the duty to enforce as a defense to the action, see Dussault v. Condon, 339 P.2d 896, 897 (Cal. Dist. Ct. App. 1959). However, an action for false imprisonment may succeed, though the damages awarded may make it a Pyrrhic victory, if police intent not to invoke further the criminal process results in failing to take the prisoner before a magistrate without delay or in releasing the arrestee without taking him before a judicial officer at any time. See Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 354-63 (1936); 1 HARPER & JAMES, TORTS §§ 3.6-.9, 4.11-.12 (1956). And see, *e.g.*, KY. CRIM. CODE § 46(1) (Carroll Supp. 1953); CONN. GEN. STAT. § 6-49 (1958).

In addition to these "civil remedies" many jurisdictions have a criminal "remedy" on the books for the offense of "false imprisonment." See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 494 (1955).

For harassment as a ground for suspension or dismissal from the police force, see, *e.g.*, ATLANTA, GA., POLICE DEP'T RULES & REGS. rule 511 (1958) which provides that "any Policeman who shall be convicted of using his office with malice to oppress or persecute, or *annoy any person* or persons, may be suspended or dismissed from the Force." (Emphasis added.)

84. See Foote, *supra* note 83, at 500-02, 504-08. *But see* Thompson v. City of Louisville, *cert. granted*, 360 U.S. 916 (1959) (No. 884, 1958 Term; renumbered No. 59, 1959 Term), N.Y. Times, Jan. 13, 1960, p. 14, col. 1 (Supreme Court hears allegations of police harassment on appeal from $10 Police Court convictions; no right of state court review because of size of fine, or action for false arrest unless acquitted under state law).

85. By viewing harassment as "lawlessness in law enforcement," see 4 NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, SER. 2, REPORT 11, LAWLESSNESS IN LAW ENFORCEMENT (1931), rather than as a failure to enforce the law, exposure of many of the secondary implications of such activity is hindered. As a result, effective methods for exerting pressure on the police to curtail such activity have been overlooked. See text following note 90 *infra*.

Investigators for an Appraisal and Review Board in this jurisdiction would discover, for example, a mixture of enforcement and harassment in a police program designed to regulate the gambling operations of mutual-numbers syndicates.[86] The enforcement phase is conducted by a highly trained unit of less than a dozen men who diligently gather evidence in order to prosecute and convict syndicate operators of conspiracy to violate the gambling laws. This specialized unit, which operates independently of and without the knowledge of other officers, conducts all its work within the due-process boundaries of *full enforcement*. Consequently, the conviction rate is high for charges based upon its investigations. The harassment phase is conducted by approximately sixty officers who tour the city and search on sight, because of prior information, or such telltale actions as carrying a paper bag, a symbol of the trade, persons who they suspect are collecting bets. They question the "suspect" and proceed to search him, his car, or home without first making a valid arrest to legalize the search. If gambling paraphernalia are found, the police, fully aware that the exclusionary rule prohibits its use as evidence in this jurisdiction, confiscate the "contraband" and arrest the individual without any intention of seeking application of the criminal law.[87]

Gambling operators treat the harassment program as a cost of doing business, "a risk of the trade." Each syndicate retains a bonding firm and an

86. Betting on the numbers is a poor man's hobby. Wagers are for small amounts—may be for as low as a nickel or a dime, although occasionally an affluent player may invest $100 on a number .... [T]he player places his bet on any combination of three numbers. He wins if the three numbers he has chosen correspond to three numbers appearing in the same order in a previously designated portion of the day's parimutuel betting total at a selected race track.

. . . .

The usual payoff is at 600 to 1. However, the player usually gets only 500 to 1, the remaining 100 being kept as commission by the man who took his bet. In addition, the policy operators lower the odds further on the most popular numbers and those that have won most frequently. Actually, the player should receive 999 to 1 odds, because that represents the number of possible winning combinations.

There is a business hierarchy in the conduct of numbers gambling. Low man in the operation is the "runner," often an elevator operator, a doorman, an orderly in a large hospital, a worker in a factory or office, a housewife or just a plain out-of-work guy who picks up bets from customers on his beat. Players also can make their wagers in candy stores, bars, restaurants and other retail establishments, known as "drops."

Bets made with runners and at drops are picked up by an employe called a collector. He brings the slips with their bets to a controller, who can be likened to the branch manager of a bank. The controller in turn delivers the slips to the "bank," which is headquarters of the betting ring.

N.Y. Times, Jan. 10, 1960, § 4, p. 6, cols. 5-6 (description of current practices in New York).

For a description of the numbers racket during another era and its relation to bribery and corruption of the police, see Whyte, *The Social Structure of Racketeering*, in PRINCIPLES OF SOCIOLOGY 494 (Freedman, Hawley, Landecker, Lenski & Miner rev. ed. 1956).

87. If the searchers uncover only one or two numbers slips, no one is taken into custody. If an individual attempts to dispose of gambling paraphernalia which he has

attorney to service members who are arrested. When a "runner" or "bagman" is absent from his scheduled rounds, routine release procedures are initiated. The bondsman, sometimes prematurely, checks with the police to determine if a syndicate man has been detained. If the missing man is in custody, the syndicate's attorney files an application for a writ of habeas corpus and appears before a magistrate who usually sets bail at a nominal amount and adjourns hearing the writ, at the request of the police, until the following day. Prior to the scheduled hearing, the police usually advise the court that they have no intention of proceeding, and the case is closed. Despite the harassee's release, the police retain the money and gambling paraphernalia. If the items seized are found in a car, the car is confiscated, with the cooperation of the prosecutor, under a nuisance abatement statute. Cars are returned, however, after the harassee signs a "consent decree" and, pursuant to it, pays "court costs" —a fee which is based on the car's value and which the prosecutor calls "the real meat of the harassment program."[88] The "decree," entered under a procedure devised by the court and prosecutor's office, enjoins the defendant from engaging in illegal activity and, on paper, frees the police from any tort liability by an acknowledgment that seizure of the vehicle was lawful and justified—even though one prosecutor has estimated that approximately eighty per cent of the searches and seizures were illegal. A prosecuting attorney responsible for car confiscation initially felt that such procedures "in the ordinary practice of law would be unethical, revolting, and shameful," but explained that he now understands why he acted as he did:

> To begin with . . . the laws in . . . [this state] with respect to gambling are most inadequate. This is equally true of the punishment feature of the law. To illustrate . . . a well-organized and productive gambling house or numbers racket would take in one quarter of a million dollars each week. If, after a long and vigorous period of investigation and observation, the defendant was charged with violating the gambling laws and convicted therefore, the resulting punishment is so obviously weak and unprohibitive that the defendants are willing to shell out a relatively small fine or serve a relatively short time in prison. The . . . [city's] gamblers and numbers men confidently feel that the odds are in their favor. If they operate for six months or a year, and accumulate untold thousands of dollars from the illegal activity, then the meager punishment imposed upon them if they are caught is well worth it. Then, too, because of the

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on his person within the presence of the officers, the police may then proceed to effect a legal arrest and the evidence may be introduced at trial.

Though the bulk of arrests are labeled "investigative arrests" by the police, there is no indication that harassment is a device for recruiting informants. Though a "runner" or "bagman," as the collector of bets is called, may not know that his rights have been violated or that he is entitled to immediate release, he does know that his syndicate will arrange an early release and that he will gain nothing by incriminating his "benevolent" and powerful associates.

88. For example, "court costs" may be $120 for a 1957 car or $70 for a 1953 model. Assessments are made even though actual court costs have been estimated at approximately $20, although the legality of such retribution is in doubt in this state.

> search and seizure laws in . . . [this state], especially in regard to gambling and the number rackets, the hands of the police are tied. Unless a search can be made prior to an arrest so that the defendant can be caught in the act of violating the gambling laws, or a search warrant issued, there is no other earthly way of apprehending such people along with evidence sufficient to convict them that is admissible in court.
>
> Because of these two inadequacies of the law (slight punishment and conservative search and seizure laws with regard to gambling) the prosecutor's office and the police department are forced to find other means of punishing, harassing and generally making life uneasy for gamblers.

This position, fantastic as it is to be that of law-trained official, a guardian of the rule of law, illustrates how extensively only one of many police harassment programs in this jurisdiction can permeate the process and be tolerated by other decisionmakers in a system of criminal administration where decisions not to enforce are of extremely low visibility.[89]

Having uncovered such a gambling-control program, an Appraisal and Review Board should recommend that the police abandon such harassment activities because they are antagonistic to the rule of law. In addition, the board might advance secondary reasons for eliminating harassment by exposing the inconsistencies between this program and departmental justifications for its narcotics and assault policies. While unnecessary to the condemnation of what is fundamentally lawless nonenforcement, such exposure might cause the police to question the wisdom of actions based on a personal or depart-

89. Some indication of the extensiveness of police harassment in this jurisdiction can be gleaned from a single precinct's arrest and release statistics on "prostitutes" and "gamblers." During a six-month period criminal prosecutions were initiated against only 75 out of 3000 women arrested for prostitution and against only 25 out of 600 persons arrested for gambling. During that same period eighty raids on alleged gambling operations were staged accounting for more than 580 of the 600 gambling arrests and the confiscation of approximately $9,000 in "gambling money." As for harassment of narcotics suspects, see text at note 39 *supra*.

In raids, called "tipovers," the police enter premises, search, seize, and arrest illegally, fully aware that by resorting to such techniques they are forfeiting a court case. This harassment policy may partially explain why fewer than thirty search warrants have been issued annually by the courts in recent years to the police of the more than dozen precincts in the city, not just to the police of the precinct described. A member of the prosecutor's office explained the small number of warrants issued by noting that (1) in cases involving deadly weapons and narcotics found outside a dwelling place the exclusionary rule does not apply—though criteria of lawful searches and seizures continue to have in theory general application; (2) officers wait until they have sufficient evidence to substantiate an arrest and to conduct a lawful search pursuant to an arrest without a warrant; (3) by avoiding a search warrant, officers minimize the chances of leaking information about a raid; (4) "probable cause" is difficult to prove; and (5) it is useless to go to the trouble, time, and expense of obtaining a warrant since it is so easy to conduct a search without a warrant. Compare Henry v. United States, 80 Sup. Ct. 168, 170 (1959) ("[in the 18th century] police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required").

On a harassment program initiated by a district attorney, as a "campaign of attrition, bent on routing the goons out of the Bronx," see FRANK, DIARY OF A D.A. 92 (1960).

mental belief that the legislature has authorized excessively lenient sanctions and restrictive enforcement procedures. The comparison might emphasize the inconsistencies of police policy toward organized crime by exposing the clash between an informer program designed to rid the city of the "big supplier" and a harassment program which tends to consolidate control of the numbers racket in a few syndicates "big" enough to sustain the legal, bonding, and other "business" costs of continued interruptions and the confiscation of property.[90] More importantly, it should cause a reexamination and redefinition of "workload" which was so significant in the rationalization of the assault policy. A cost accounting would no doubt reveal that a significant part of "workload," as presently defined by the police, includes expenditures of public funds for personnel and equipment employed in unlawful activities. Once harassment is perceived by municipal officials concerned with budgets as an unauthorized expenditure of public funds, consideration for increased awards to the police department might be conditioned upon a showing that existing resources are now deployed for authorized purposes. Such action should stimulate police cooperation in implementing the board's proposal for curtailing harassment.

Further to effectuate its recommendation, the board might attempt to clarify and redefine the duties of the police by a reclassification of crimes which would emphasize the mandate that no more than *full enforcement* of the existing criminal law as defined by the legislature is expected. For many crimes, this may mean little or no *actual enforcement* because the values protected by procedural limitations are more important than the values which may be infringed by a particular offense. A board might propose, for example, that crimes be classified not only as felonies and misdemeanors,[91] but in terms of active and passive police enforcement. An *active-enforcement* designation for an offense would mean that individual police officers or specialized squads are to be assigned the task of ferreting out and even triggering violations.[92] *Pas-*

90. See also 2 COMM'N ON ORGANIZED CRIME, ABA, ORGANIZED CRIME AND LAW ENFORCEMENT 8 (1953) ("The numbers racket [in another state] is said to have continued unchanged, still with the participation of interstate racketeers, under the constant harassment of local police and prosecutors.").

A member of the special squad, in the jurisdiction studied, which is responsible for developing conspiracy cases against the syndicate believes, however, that harassment diverts the attention of syndicate members away from the activities of the conspiracy squad, and thus facilitates its "lawful" operations.

91. The desirability of retaining the felony-misdemeanor classification is beyond the scope of this Article. For a decision, following a reexamination, to retain this classification, see MODEL PENAL CODE §§ 1.04 (Tent. Draft No. 4, 1955), 1.05, comment (Tent. Draft No. 2, 1954).

92. The outer limits on "triggering" would, of course, be determined by judicial construction of the requirements of due process, particularly in relation to entrapment. See Sherman v. United States, 356 U.S. 369 (1958); McDermett v. United States, 98 A.2d 287, 290 (D.C. Mun. Ct. App. 1953) (reversing assault conviction):

> . . . An officer of the law . . . has the duty of preventing not encouraging

sive enforcement would mean that the police are to assume a sit-back-and-wait posture, *i.e.*, that they invoke the criminal process only when the disturbing event is brought to their attention by personal observation during a routine tour of duty or by someone outside the police force registering a complaint.[93] Designation of gambling, for example, as a *passive-enforcement* offense would officially apprise the police that substantial expenditures of personnel and equipment for enforcement are not contemplated unless the local community expresses a low tolerance for such disturbing events by constantly bringing them to police attention. The adoption of this or a similar classification scheme might not only aid in training the police to understand that harassment is unlawful, but it may also provide the legislature with a device for officially allowing local differences in attitude toward certain offenses to be reflected in police practice and for testing the desirability of removing criminal sanctions from certain kinds of currently proscribed behavior.

VI

The mandate of *full enforcement*, under circumstances which compel selective enforcement, has placed the municipal police in an intolerable position. As a result, nonenforcement programs have developed undercover, in a hit-or-miss fashion, and without regard to impact on the overall administration of justice or the basic objectives of the criminal law. Legislatures, therefore, ought to reconsider what discretion, if any, the police must or should have in invoking the criminal process, and what devices, if any, should be designed to increase visibility and hence reviewability of these police decisions.

The ultimate answer is that the police should not be delegated discretion not to invoke the criminal law. It is recognized, of course, that the exercise of discretion cannot be completely eliminated where human beings are involved. The frailties of human language and human perception will always admit of borderline cases (although none of the situations analyzed in this Article are "borderline"). But nonetheless, outside this margin of ambiguity, the police should operate in an atmosphere which exhorts and commands them to invoke impartially all criminal laws within the bounds of *full enforcement*.[94] If a

crime. . . . [He] should not be permitted to "torment and tease weak men beyond their power to resist."

We do not say the police officer was guilty of entrapment. But the evidence may be tested as if entrapment were claimed. . . . When . . . the police officer . . . has by his own insidious conduct, by patient and clever encouragement, and by setting the stage for a furtive homosexual gesture, placed himself in the position of consenting, he should not be heard to say of the accused, "He assaulted me."

93. Certain crimes such as homicide and rape would by their very nature require *passive-enforcement* designations. On the other hand, gambling, prostitution, narcotics, and homosexual offenses, for example, could be given either enforcement designation.

94. This, of course, does not mean that the police must *arrest* every violator. On the meaning of *full enforcement*, see notes 27-28 *supra* and accompanying text.

For an example of a statute under which *full enforcement* might mean no more than the issuance of a warning to the offender, see Street Offences Act, 1959, 7 & 8 Eliz. 2, c.

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.[95] 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,[96] but retained where it belongs in a democracy—with elected representatives.[97]

Equating *actual enforcement* with *full enforcement*, however, would be

57, § 2. In accord with this section the Home Office issued a circular stating the procedure to be adopted by the Metropolitan Police, which provides, *inter alia*:

> On the first occasion when a woman who has not previously been convicted of loitering or soliciting for the purpose of prostitution is seen loitering or soliciting in a street or public place for that purpose, the officer seeing her will obtain the assistance of a second officer as a witness, and when both officers, after having kept the woman under observation, are satisfied by her demeanour and conduct that she is in fact loitering or soliciting for the purpose of prostitution, they will tell her what they have seen and caution her. Details of the caution will subsequently be recorded at the police station and in a central register for the Metropolitan Police District. The two officers, after administering the caution, will ask the woman if she is willing to be put in touch with a moral welfare organization or a probation officer, and invite her to call at the police station at a convenient time to see a woman police officer for these arrangements to be made, unless she prefers her name and address to be given to a welfare organization or a probation officer without going to the station. If the woman continues to loiter or solicit for the purpose of prostitution, a second formal caution will be given in the street and recorded and a second offer will be made to put her in touch with a welfare officer or probation officer. She will not be arrested until she is seen loitering or soliciting on the third occasion.

G.B. Home Office Circular No. 109/1959, Aug. 13, 1959, reprinted in 23 J. CRIM. LAW (Eng.) 299 (1959).

95. Essentially this position was taken and the result achieved by New York City's police commissioner when in 1955 he declared that bingo would be treated as a violation of the state's gambling laws, that "anyone who goes ahead with bingo in this city does so at his peril . . . . If people do not like it they should take the necessary steps to repeal it. But while it is on the books, we [policemen] must enforce it." N.Y. Times, Sept. 26, 1955, p. 25, col. 8. The New York legislature responded by legalizing bingo conducted by religious, charitable, veterans, volunteer firemen, and similar nonprofit organizations. N.Y. MUNIC. LAW §§ 477-99. On the stringent set of rules promulgated for the conduct of legalized bingo by the State Lottery Control Commission to keep the game out of the hands of racketeers, see N.Y. Times, Sept. 23, 1958, p. 35, cols. 1-2.

Pressures for the repeal of obsolete laws, however, may not develop, for they may, as suggested in ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (1935), "survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals." A program of *full enforcement* of existing statutes would alter this equation, unless such laws were reclassified as *passive* enforcement offenses.

96. As presently organized many police departments have forces of several hundred men or more. In fact, some fifteen cities have more than 1,000 men, with New York City's force of nearly 23,000 at the top of the list. See 27 U.S. FBI, DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 25-30 (1956). Size alone indicates the unlikelihood of the uniform application of the criminal law were the police to be granted discretion. When this fact is coupled with the caliber of men attracted to police service and the quality of

neither workable nor humane nor humanly possible under present conditions in most, if not all, jurisdictions. Even if there were "enough police" (and there are not) to enforce all of the criminal laws, too many people have come to rely on the nonenforcement of too many "obsolete" laws to justify the embarrassment, discomfort, and misery which would follow implementation of *full enforcement* programs for every crime. *Full enforcement* is a program for the future, a program which could be initiated with the least hardship when the states, perhaps stimulated by the work of the American Law Institute, enact new criminal codes clearing the books of obsolete offenses.[98]

In the interim, legislatures should establish Policy Appraisal and Review Boards not only to facilitate coordination of municipal police policies with those of other key criminal law administrators, but also to assist commissions drafting new codes in reappraising basic objectives of the criminal law and in identifying laws which have become obsolete. To ensure that board appraisals and recommendations facilitate the integration of police policies with overall state policies and to ensure the cooperation of local authorities, board membership might include the state's attorney general, the chief justice of the supreme court, the chairman of the department of correction, the chairman of the board of parole and the chief of parole supervision, the chairman of the department of probation, the chairmen of the judiciary committees of the legislature, the chief of the state police, the local chief of police, the local prosecutor, and the chief judge of each of the local trial courts.[99] In order regularly and systematically to cull and retrieve information, the board should be assisted by a full-time director who has a staff of investigators well-trained

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their training, any expectation that their exercise of discretion would adequately take into account the impact of their decisions throughout the process would be unwarranted.

Conceivably, a department could be organized, free of such duties as traffic regulation, whose sole function would be criminal law enforcement. Such a police force might be sufficiently small and well-trained so that each of its members could develop an expertise which would justify a delegation of discretion. Were such a force constituted provision would still have to be made for reviewing its activities, as is desirable at all points in the process where discretion is exercised.

97. See District of Columbia v. John R. Thompson Co., 346 U.S. 100, 113-14 (1953) ("The failure of the executive branch to enforce a law does not result in its modification or repeal . . . . The repeal of laws is as much a legislative function as their enactment.")

98. Within the last few years Louisiana and Wisconsin enacted new criminal codes, LA. REV. STAT. ANN. §§ 14:1-:402 (1950); WIS. STAT. ANN. §§ 939.01-953.00 (1958). Illinois and Puerto Rico, for example, have set up commissions to draft new criminal codes and other jurisdictions no doubt will be encouraged to reexamine their criminal laws, as the Model Penal Code of the American Law Institute nears completion.

99. The composition of the board might vary in size and personnel to meet local needs. It is beyond the scope of this Article to attempt to detail the table of organization of such a Board and its staff.

Conceivably, without further legislative action such a board might be constituted in California:

> The Attorney-General may, from time to time, and as often as occasion may require, call into conference the district attorneys and sheriffs of the several counties and the chiefs of police of the several municipalities of this State, or such of them as he may deem advisable, for the purpose of discussing the duties of their re-

in social science research techniques. It should be given power to subpoena persons and records and to assign investigators to observe all phases of police activity including routine patrols, bookings, raids, and contacts with both the courts and the prosecutor's office.[100] To clarify its functions, develop procedures, determine personnel requirements and test the idea itself, the board's jurisdiction should initially be restricted to one or two major municipalities in the state. The board would review, appraise, and make recommendations concerning municipal police nonenforcement policies as well as follow up and review the consequences of implemented proposals. In order to make its job both manageable and less subject to attack by those who cherish local autonomy and who may see the establishment of a board as a step toward centralization,[101] it would have solely an advisory function and limit its investigations to the enforcement of state laws, not municipal ordinances. And to ensure that board activity will not compromise current enforcement campaigns or place offenders on notice of new techniques of detection or sources of information, boards should be authorized, with court approval, to withhold specified reports from general publication for a limited and fixed time.

Like other administrative agencies, a Policy Appraisal and Review Board will in time no doubt suffer from marasmus and outlive its usefulness. But while viable, such a board has an enormous potential for uncovering in a very dramatic fashion basic inadequacies in the administration of criminal justice and for prompting a thorough community reexamination of the why of a law of crimes.

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spective offices, with the view of uniform and adequate enforcement of the laws of this state . . . .

CAL. GOV'T CODE ANN. § 12523.

For various suggestions for the establishment of administrative agencies for the supervision of criminal law enforcement, see GLUECK, CRIME AND JUSTICE 248-53 (1936); Model Department of Justice Act and Commentary, in 2 COMM'N ON ORGANIZED CRIME, ABA, ORGANIZED CRIME AND LAW ENFORCEMENT app. 2, at 93-133 (1953); Model Police Council Act and Commentary, in 2 *id.* app. 3, at 135-56.

100. See, *e.g.*, the investigative authority of the Temporary State Commission of Invesitgation, N.Y. UNCONSOL. LAWS §§ 7051-57 (McKinney 1953, Supp. 1959).

101. "Any attempt to centralize the law enforcement agencies of the state is confronted at the outset by a long held public sentiment that puts great store by a local law enforcement system close to the people." AUMANN & WALKER, THE GOVERNMENT AND ADMINISTRATION OF OHIO 219 (1956). See Address of Welcome by [Then] Governor Warren to the International Association of Chiefs of Police, in THE POLICE YEARBOOK 3, 5-6 (1953); MacNamara, *American Police Administration at Mid-Century*, 10 PUB. ADMIN. REV. 181, 184 (1950). See also Hoy, The Police Specialist in District Stations, June 1958, ch. III.

APPENDIX I

A NOTE ON STIGMA, STATUS DEGRADATION, AND STATUS ELEVATION CEREMONIES IN THE CRIMINAL PROCESS

The criminal process, from arrest through release, is comprised of a series of "status degradation ceremonies." A status degradation ceremony is "any communicative work between persons whereby the public entity of an actor is transformed into something looked on as lower in the social scheme of social types." Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIOLOGY 420 (1956). As a result of the redefinition of individual status which accompanies being labelled "accused," "convict," or "ex-convict," many releasees pay the penalty for their offenses and suspected offenses on a never ending installment plan.

> Many men on their release carry their prison about with them into the air, and hide it as a secret disgrace in their hearts, and at length, like poor poisoned things, creep into some hold and die. It is wretched that they should have to do so . . . . Society takes upon itself the right to inflict appalling punishment on the individual, but it also has the supreme vice of shallowness, and fails to realize what it has done. When a man's punishment is over, it leaves him to himself; that is to say, it abandons him at the very moment when its highest duty towards him begins. It is really ashamed of its own actions, and shuns those whom it has punished, as people shun a creditor whose debt they cannot pay, or one on whom they have inflicted an irreparable, an irredeemable wrong.

WILDE, DE PROFUNDIS 26-27 (1905). Employers are reluctant to hire persons with arrest or conviction records. See Williams v. New York, 8 Misc. 2d 390, 391-92, 168 N.Y.S.2d 163, 165-66 (Ct. Cl. 1957), *aff'd*, 5 App. Div. 2d 936, 172 N.Y.S.2d 206 (1958) (mem.):

> The claimant is entitled to an award for the unlawful detention beyond the 5-year maximum period, i.e., 1 year, 6 months, and 24 days served in prison; 7 months and 25 days served as parole.
>
> In fixing the amount of the award it is necessary to look into *his earning capacity at the times when he was free on parole, taking into consideration the fact that employment is neither plentiful nor lucrative for a parolee as it is for others.* Also in fixing the award consideration must be given for loss of liberty and for the humiliation and the indignity suffered while in prison and the restriction of unlawful parole. In granting an award on these intangibles the conduct of the claimant on parole and his desire to remain at large must be reviewed and evaluated.

(Emphasis added.) *Accord*, Frym, *The Treatment of Recidivists*, 47 J. CRIM. L., C. & P.S. 1 (1956); Lykke, *Attitude of Bonding Companies Toward Probationers and Parolees*, Federal Probation, Dec. 1957, p. 36. Persons convicted of certain crimes may not hold union office. Labor-Management Reporting & Disclosure Act of 1959, § 504, 73 Stat. 536, 29 U.S.C.A. § 504 (Supp. 1959). For congressional focusing on the arrest records of union officials, see, *e.g.*, *Hearings Before the Senate Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong., 1st Sess., pt. 13, at 4981-82 (1957).

On the stigma which attaches to the label "juvenile delinquent," see Jones v. Commonwealth, 185 Va. 335, 341-42, 38 S.E.2d 444, 447 (1946):

> The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellowman.

Accord, McKay, *The Neighborhood and Child Conduct*, in PRINCIPLES OF SOCIOLOGY 486, 492 (Freedman, Hawley, Landecker, Lenski & Miner rev. ed. 1956). On the stigmatic

freight of the ascription "convict" to an offender on probation, see United States v. Pendergast, 28 F. Supp. 601, 608 (W.D. Mo. 1939). On the increased stigma accompanying multiple convictions and its impact on the length of sentence imposed for any one sentence, even though the sentences are to run concurrently, see United States v. Hines, 256 F.2d 561, 563 (2d Cir. 1958). On the forfeiture of a variety of civil rights which may attend conviction see, *e.g.*, Kelly v. Municipal Court, 160 Cal. App. 2d 38, 324 P.2d 990 (Dist. Ct. App. 1958); Widdifield, The State Convict, 1951 (unpublished graduate thesis in Yale Law Library).

Police manuals frequently reflect or reenforce the stigma which attaches to the releasee by instructing (a) patrolmen to

> observe the conduct of all known criminals and bad characters, making such observations as will enable him to identify them at any time [and] . . . in particular [to observe] their actions and the places they frequent . . . and report all pertinent facts to his commanding officer.

SAN FRANCISCO, CAL., POLICE DEP'T RULES & REGS. § 206, at 43 (1951); or (b) the Sergeant to

> give particular attention to beer taverns, pool halls, rooming houses, bowling alleys, dance halls and other places where bootleggers, gamblers, prostitutes, thieves and narcotic addicts may congregate, and shall use every lawful means to suppress, imprison, or drive them from the City.

SIOUX CITY, IOWA, POLICE DEP'T MANUAL p. 54, § 3 (1956).

However, some manuals provide that

> Members shall not taunt or persecute ex-convicts. When a convicted man has paid his penalty for his offense, he is entitled to start life anew and should receive encouragement and cooperation from the police in his efforts to live a law-abiding life.

PORTLAND, ME., POLICE DEP'T RULES & REGS. § 1135.03 (reprinted in WILSON, POLICE PLANNING 375 (2d ed. 1957)). One manual, the SALT LAKE CITY, UTAH, POLICE MANUAL §§ 32, at 34; 38, at 86-87 (1951), contains both the San Francisco and the Portland types of instruction.

One of the crucial problems facing the administration of criminal justice is how to establish release procedures which in practice become *status-elevation* ceremonies. Discharge from parole or from prison should carry with it, in appropriate situations, the kinds of redefinitions upward that are associated, for example, with graduation from high school or college, honorable discharge from the armed services, successful completion of apprenticeship in a trade or admission to a profession. Some ceremony or series of ceremonies must be devised to redefine the social status of releasees so that the public will begin to entertain a presumption that a person honorably discharged (as opposed to neutrally discharged or possibly even dishonorably discharged) from the correctional service is ready to take his place as a law-abiding citizen in the community. Were such a ceremony or ceremonies created, effective pressure might be placed on correctional authorities to test and carry out rehabilitation programs and to develop a meaningful system of communication with the public. The late Professor Dession, in his draft of the Puerto Rican Correction Code, recognized this problem, but his solution was the elimination of status-degradation ceremonies entirely from the criminal process. He proposed the "discard of the nomenclature of punishment" because, *inter alia*,

> Designation as a "criminal" pursuant to the former law carried a stigma compounded of an accretion through time of forgotten as well as recorded rationalizations for the expression of unconscious as well as conscious psychological drives and practices involving the venting of hatred, the release of tensions engendered by feelings of fear, guilt and anxiety, and a frequently unrational selection of scapegoats for those purposes.

Proposed Puerto Rico Code of Correction, pt. 1, § 5(2)(d) (Dession draft mimeo [undated]) *Query*: Does Dession's proposal overemphasize the extent to which the unconscious can or should be taken into account by the law?

Among existing criminal procedures, the pardon seems to come closest, at times, to function at least in theory as a *status-elevation* ceremony. For a recent case where pardon was sought and granted to remove stigma, see Pa. Bd. Pardons, *Recommendation in re Application of Jacob Mezey*, [1957] 4 PA. LEGISLATIVE J. app. 4011:

> Because he has turned from his criminal activity and has turned to a legitimate activity [associated with a real estate company] for more than four and one-half years, we feel that he should not be further burdened with his prior conduct. [To become wholly successful, it is necessary for him to have a real estate license for which the conviction makes him ineligible.] He is married and has two children and he desires a pardon in order to clear his name for their benefit. He lives in a fine residential section . . . and this offense would carry a certain stigma with it.

See also CAL. PENAL CODE ANN. § 1203.4, which provides in pertinent part:

> Every defendant who has fulfilled the conditions of his probation . . . , shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. . . . provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

Probation, however, may not be granted to *inter alia*, any defendant

> . . . convicted of robbery, burglary, burglary with explosives, rape with force or violence, arson, murder, assault with intent to commit murder, attempt to commit murder, train wrecking, kidnaping, escape from a state prison, conspiracy to commit any one or more of the aforementioned felonies . . . .

CAL. PENAL CODE ANN. § 1203. This "pardon" statute, furthermore, has been very narrowly construed. See, *e.g.*, Kelly v. Municipal Court, *supra*.

APPENDIX II

A NOTE ON HOLDING THE POLICE ACCOUNTABLE FOR "NEGLECT OF DUTY"

Police manuals commonly contain sections providing for departmental disciplinary action against its members for "neglect of duty." See, *e.g.*, BERKELEY, CAL., POLICE DEP'T REGS. app. at 1 (1956); BOSTON, MASS., POLICE DEP'T RULES & REGS. rule 54, § 2(a) & n. (1950); DETROIT, MICH., REV. POLICE MANUAL ch. 10, §§ 106, 129 (1958). Manuals ordinarily expressly require department members to report facts or information relative to a criminal offense. See, *e.g.*, ATLANTA, GA., POLICE DEP'T RULES & REGS. rule 564 (1958); DES MOINES, IOWA, POLICE DEP'T RULES & REGS. ch. 2, § 209 [undated]; MIAMI, FLA., POLICE MANUAL rule 29, § 3 (1956). Failure to report a known violation of law or information useful to the department may be presumptive neglect of duty. *E.g.*, NEW BEDFORD, MASS., POLICE DEP'T RULES & REGS. rule 15, § 3 (1957); WHEELING, W. VA., POLICE DEP'T RULES & REGS. § 28 [undated]. Some police manuals designate failure to detect a violation of laws within a policeman's area of responsibility presumptive neglect of duty or a separate offense. *E.g.*, NEW HAVEN, CONN., POLICE SERV. DEP'T MANUAL rule 33, § 1 (n) (1953) (separate offense); PROVIDENCE, R.I., POLICE DEP'T RULES & REGS. rule I, § 1 (24) (1942) (separate offense).

Other police manuals designate failure of a department member to detect and/or prevent repeated violations of laws within his area of responsibility as a departmental offense. *E.g.*, MILWAUKEE, WIS., POLICE DEP'T RULES & REGS. rule 14, § 12 (1932); PROVIDENCE, R.I., POLICE DEP'T RULES & REGS. rule IX, § 42 (1942).

For a series of cases defining the "permissible scope" of judicial review of civil service commission decisions to discharge police officers for neglect of duty, accepting bribes, etc., see Nolting v. Civil Serv. Comm'n, 7 Ill. App. 2d 147, 129 N.E.2d 236 (1955); Foreman v. Civil Serv. Comm'n, 7 Ill. App. 2d 122, 129 N.E.2d 245 (1955); Martin v. Civil Serv. Comm'n, 7 Ill. App. 2d 128, 129 N.E.2d 248 (1955); Watkins v. Civil Serv. Comm'n, 7 Ill. App. 2d 140, 129 N.E.2d 254 (1955); McCaffery v. Civil Serv. Bd., 7 Ill. App. 2d 164, 129 N.E.2d 257 (1955).

On neglect of duty as a common law and statutory crime and as a basis for discharge from office, see 4 U. FLA. L. REV. 264 (1951); Note, 20 N.C.L. REV. 110 (1941). On failure to arrest for an offense committed in a police officer's presence as a misdemeanor, see, *e.g.*, D.C. CODE ANN. § 4-143 (1952), McDermett v. United States, 98 A.2d 287, 289 (D.C. Mun. Ct. App. 1953). Most of the reported cases, whether they involve a criminal indictment, discharge, or a petition for writ of mandamus to enforce, illustrate the difficulty of establishing neglect and the inadequacy of departmental as well as judicial control of the police even if the failures to enforce are gross and highly visible. For a sampling of reported cases in this area see Sullivan v. Leatherman, 48 So. 2d 836 (Fla. 1950) (sheriff indicted for neglect of duty, knowingly permitting gambling laws of state to be violated in open and notorious manner, indictment held void); People *ex rel.* Churchill v. Greene, 104 App. Div. 496, 93 N.Y. Supp. 720 (1905) (discharge upheld for failure to report and close some thirty houses of prostitution in one precinct, many of "a notorious character"); People *ex rel.* Jansen v. City of Park Ridge, 7 Ill. App. 2d 331, 129 N.E.2d 438 (1955), in which a taxpayer's petition for writ of mandamus to compel mayor and chief of police to enforce parking ordinances was dismissed, for

> . . . the duty . . . is not of such a character that the court can prescribe a definite act or series of acts which will constitute a performance of that duty . . . . Mandamus will not lie where to issue the writ would put into the hands of the court the control and regulation of the general course of official conduct or enforcement or enforce the performance of official duties generally.

Id. at 332-33, 129 N.E.2d at 439. Concerning writs of mandamus to compel police action, see State *ex rel.* Beardslee v. Landes, 149 Wash. 570, 271 Pac. 829 (1928) (mandamus not available to compel police to enforce parking regulations); State v. McFeeley, 136 N.J.L. 102, 54 A.2d 797 (Sup. Ct. 1947); State v. Jenkins, 136 N.J.L. 112, 54 A.2d 804 (Sup. Ct. 1947); State v. McGovern, 136 N.J.L. 115, 54 A.2d 812 (Sup. Ct. 1947).

For cases reviewing police decisions of low visibility see, *e.g.*, Armbruster v. City of Middletown, 74 Ohio App. 321, 58 N.E.2d 778 (1944) (upholding discharge of patrolman who, contrary to regulations, failed to file written report of suspicious incident); In the Matter of Schuppe, 1 App. Div. 2d 912, 149 N.Y.S.2d 535 (1956) (mem.) (affirming dismissal of police officer who was "active moving party in the sale" of stolen property and who failed to report information concerning the offense and to arrest persons with whom he participated in the crime); Mullen v. Ziegener, 134 N.J.L. 207, 46 A.2d 783 (Sup. Ct. 1946) (similar charge, patrolman reinstated because his decision was consistent with honest judgment and disciplinary action was apparently spite-motivated). The small number of reported cases may in part be attributed to the difficult evidentiary problems of establishing the police officer's knowledge of the criminal activity neglected. See, *e.g.*, State v. Orecchio, 16 N.J. 125, 106 A.2d 541 (1954) (insufficient evidence to establish knowledge); State v. Marchese, 14 N.J. 16, 101 A.2d 13 (1953) (sufficient evidence); State v. Witte, 13 N.J. 598, 100 A.2d 754 (1953), *cert. denied*, 347 U.S. 951 (1954) (sufficient evidence). In any event, this sparsity of cases is consistent with the view expressed in SMITH, POLICE SYSTEMS IN THE UNITED STATES 146-57, 204-32 (rev. ed.

1949), that internal departmental controls, whether under civil service or not, are not fully implemented. There is need for a full scale study of departmental trials and the extent to which disciplinary action follows, for example, a court's finding that an arrest or a search was unlawful. See note 14 *supra*. For a general discussion of disciplinary proceedings, see RHYNE, MUNICIPAL LAW §§ 6-4, 8-36 to 42 (1957).

The California constitution empowers the attorney general to supervise enforcement of all state laws and to order local law enforcement officers to report, whenever he deems advisable, on the investigation, detection, prosecution and punishment of crime.

> Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction . . . .

CAL. CONST. art. 5, § 21. The attorney general has apparently used these powers sparingly. DEUTSCH, THE TROUBLE WITH COPS 198-201 (1955). On the power and limitations of state attorneys general to supervise law enforcement activities, see COUNCIL OF STATE GOVERNMENTS, THE POWERS, DUTIES, AND OPERATIONS OF THE ATTORNEYS' GENERAL OFFICE 8 (1951); Comment, *Disorganization of Metropolitan Law Enforcement and Some Proposed Solutions*, 43 J. CRIM. L., C. & P.S. 63, 72 (1952).

Legislative investigations, grand jury presentments, police surveys, crime commissions and newspaper reports are additional hit-and-miss devices for exposing or reviewing police decisions not to invoke the criminal process. On legislative investigations, see, *e.g.*, STAFF OF SUBCOMM. ON INVESTIGATIONS, SENATE COMM. ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, 81ST CONG., 2D SESS., INTERIM REPORT ON EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT (Comm. Print 1950):

> It was also discovered that most of the homosexuals apprehended by the police in the District of Columbia were booked on charges of disorderly conduct. In most cases they were never brought to trial but were allowed to make forefeitures of small cash collateral at police stations. This slipshod method of disposing of these cases *with little or no review by the prosecutive or judicial authorities* was corrected after the subcommittee brought this situation to the attention of the judge of the municipal court in August 1950.

(Emphasis added.)

On duty of police to testify before grand jury see Christal v. Police Comm'n, 33 Cal. App. 2d 564, 92 P.2d 416 (Dist. Ct. App. 1939). On report of Hudson County, N.J., grand jury presentment charging West New York, N.J., police department with ineffective detection of violators, see N.Y. Times, April 8, 1958, p. 23, col. 3. On community sentiment as a means of police control, see WILSON, POLICE PLANNING 48 (2d ed. 1957). On newspaper disclosures, see note 15 *supra*.

In towns and small cities police decisions not to invoke or enforce the criminal law are likely to be made visible because knowledge of disturbing events which are of lower frequency than in large cities is likely to be more widespread and the local newspapers, always searching for a local story, "have a pressing daily need for fresh news." See Gleason, *Policing the Smaller Cities*, 291 ANNALS 14, 17 (1954).