

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

There is perhaps no area of public policy which has received as much attention in recent years as that dealing with the enforcement practices and policies of law enforcement agencies. Despite—or, perhaps, as a result of—the intensity of the inquiry into these matters, it has become increasingly clear that some very fundamental questions remain unresolved. One issue of this nature involves the increasingly articulated demand for the establishment of mechanisms to increase police accountability for enforcement practices. The area of dispute on this question has only been refined to a recognition that there is considerable, but by no means universal, dissatisfaction with the manner in which the police fulfill their function.

The debate concerning the need for increased accountability has not been purely theoretical. A wide range of approaches from the past and the present are available for scrutiny. For example, there is considerable historical evidence, particularly from the early part of this century, of the effects of resorting to direct political control of the police. That experience, reflected in the recommendations of the Wickersham Commission, provides a heavy underscoring of the potential for abuse which exists in a system which places substantial control over departmental personnel and enforcement policies in the hands of elected officials. While the reaction to that earlier experience produced some desirable innovations such as the introduction of civil service criteria in personnel matters, it paved the way for the evolution of highly autonomous enforcement units. After the reforms, the institutional structure at the local government level often did not provide, as a matter of either practice or law, a mechanism for the input of corrective influences. Although some corrupting political controls continued in this stage, the defect which, in the view of critics of the police, has become predominate is the insensitivity of departments in effectuating enforcement policies. Because those subjected to these policies were typically quite impotent to raise a collective challenge, critics contend, we have experienced a lengthy period of improperly conceived police efforts.

The bitter experiences of the prior era of political control undoubtedly creates a substantial dilemma for many of those who perceive a need for reform. While some outside inputs into the department appear to be desirable, any reform aimed toward that end raises the spectre of political corruption. Innovations in several

forms have been attempted, but none has yet proved to have the durability or acceptability which could be expected to produce universal adoption.

When a response was not forthcoming from other institutions, the United States Supreme Court initiated the refinement and expansion of the exclusionary rule. The rule seemed justifiable on the basis of a number of practical and legal considerations, but one of its primary foundations was the apparent absence of alternative means to control police insensitivity to the need to observe basic freedoms. Other doctrinal shifts by the Court insured that questions of police practices became a central concern to courts at all levels. These in turn resulted in increased attention being given to other remedies for police misconduct such as injunction and damages suits. The expanded role of the judiciary in this area, now supported by several years of recent experiences, raises a fundamental question: is the judiciary equipped to play the predominate role in ensuring police accountability? Upon examination of that question, a number of limitations on the judicial capacity appear. First, there are significant limitations on the types of sanctions which the judiciary can invoke against the police. While the increased use of injunctive and damages remedies represents an important innovation, there is presently very little the judiciary can do to affect particular routine departmental decisions in areas such as those involving enforcement policy and personnel matters. Second, and relatedly, an effective system of accountability seemingly requires that supervision be administrative in nature to insure that inputs are both consistent and readily available. While the judiciary has increasingly assumed administrative functions—as in the area of school desegregation—continued attempts to impose such duties will eventually confront the limitations inherent in the institutional structure of the judiciary. Finally, it can be expected that in the long run the judiciary would not be as responsive in effectuating community demands for accountability as would other institutions, for it is questionable whether the judiciary can provide a continually accurate reading of shifts in popular and professional concerns. Thus, while the necessity of a continuing role for the judiciary is apparent, it is a much different matter to place sole reliance on that institution.

One source for ensuring increased accountability which has received increasing attention is the law enforcement agency itself. An increase in departmental policy-making offers an alternative to reliance on other institutional forms. The innovations at the departmental level include the development of policy-making organs which are both more clearly defined and more broadly based than in the past. In addition, the scope of departmental decision-making has assumed new dimensions, particularly with the emphasis on the formulation of rules to guide the conduct of field personnel.

The significance of these efforts can be easily undervalued. Some will argue that enforcement units have always engaged in policy-making and, if past experience serves as a guide, their approach cannot be expected to produce satisfactory solutions.

An appropriate rejoinder is that past experience may not be particularly reliable in this instance, for departments presently operate under incentives markedly different from those of the past. Decision-making is presently made in a context which includes a judiciary more willing to assert control over police practices. Similarly, concern from those outside the department about the way the department is run is more generalized as well as more vocal than in the past. Because departmental decisions are now more apt to be subjected to public scrutiny, the decision-making process is likely to take account of this factor.

But even if the departments themselves can be expected to assume a more affirmative role, two important questions remain. The first is whether our experience in the early part of this century will continue to dictate substantial limitations on resort to control mechanisms of a popular—or political—nature. The second issue is whether the role of the judiciary will be redirected to any meaningful extent. This latter issue can be approached quite indirectly. Some would continue to support efforts to lessen the judicial role through either the legislative or executive appointment process. It seems, however, that a proper allocation of effort would not invoke such controls, but would nonetheless result in the *de facto* realignment of the role of the judiciary. As institutions other than the judiciary—including political institutions as well as the departments themselves—assume a more active posture in providing for accountability, the position of the judiciary will necessarily change. While it can be hoped the judiciary would continue to offer an avenue for review of certain varieties of police conduct, it would no longer exclusively bear the weight of policy judgments—and public controversy.

Because it is extremely difficult to secure a dispassionate debate on the desirability of political mechanisms for securing police responsiveness, considerable credit must be given to the Advisory Committee of the Police Functions of the American Bar Association Project on Standards for Criminal Justice. The Committee approached all facets of the issue of police accountability and recommended a number of standards which attempt to encourage a rethinking of the present role of the police while accommodating a range of diverse points of view. One recommendation, Standard 2.5, deals with the relationship of the police to the local government officials. The conclusion reached is that “the chief executive of a municipality should be recognized as having the ultimate responsibility for his department” and should participate in departmental decision-making. The Committee’s commentary on this standard reflects due regard for the dangers of political influence. The philosophical position adopted is cautious in its terms: while ultimate civilian control is endorsed, it is made clear that the local chief executive should also operate to insulate the police from improper influences from other sources. The recommendation does, however, accept that a complete isolation of enforcement agencies from the local government will not likely produce substantial progress toward lessening the controversy surrounding the police.

The overall model discussed in the Standards is quite laudable. In addition to recognizing the desirability of civilian influences, the Standards both accept a continuing role for the judiciary and encourage expansion of departmental policy-making. The Standards stand as an emphatic statement that increased accountability will not be achieved through a single institution and that instead, we must recognize—and accommodate—the respective roles of several different institutions.

It is too much to expect, of course, that the Standards will provide a focal point for consensus in an area which has been typified by disagreement. It is likely that the area of police practices will never be one in which approaches receive generalized approval. The police pursue objectives which are inherently conflicting as they seek, on one hand, to secure property and persons and, on the other, to preserve our ideals of fundamental constitutional rights. Shifts in notions of appropriateness in one category will confront resistance from those who promote the other. And given the normative nature of the underpinnings of both, such adjustments are likely to be perpetual. Thus, the process of striving for societal satisfaction with the operation of the police must be regarded as evolutionary. The only relevant goal then is not achievement of universally agreeable states of development but rather better definition of the area of disagreement and increased responsiveness to changing perceptions of the police function.

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