DISCRETION IN CRIMINAL JUSTICE

The Tension Between Individualization and Uniformity

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CHAPTER 2

Confronting the Complexity
of the Policing Function

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INTRODUCTION

The police constitute one of the most important institutions of government. The quality of our lives, especially in congested urban areas, is heavily dependent on them. But important as they are, the police, until recently, have not been the subject of studied attention. Little effort has been devoted to gaining an in-depth understanding of their function, their relationship to the law, their capabilities, and their effectiveness. Contributing to this neglect has been the strongly held popular view that the police are engaged in a relatively simple, straightforward job of enforcing the criminal law in an aggressive fashion—an essentially unambiguous function that demands physical strength, integrity, and determination more than knowledge, sensitivity, and thought.

Against this background, the ambitious “American Bar Foundation Survey of Criminal Justice” in the late 1950s was an important milestone in the history of policing in this country. It reversed the long pattern of neglect by opening a window, through its unique research methodology, into the world of policing. By accompanying police officers as they went about their day-to-day activities—in squad cars, on the streets, in private homes, and at their headquarters—the survey’s field observers made visible the wide range of incidents that the police are expected to handle and the way in which they respond to them.
This new visibility, in turn, documented some of the complexities of policing. It raised difficult questions about, for example, the proper role of the police, the use of authority conferred on the police by the criminal law, the discretion exercised by individual police officers, and the relationship of policing to the rest of the criminal justice system.

Since the ABF survey, many studies have been completed that have added substantially to our understanding of policing. As a consequence, significant advances have been made in the quality of policing, especially in the past decade, due mainly to the increased awareness of the intricate nature of the police task. But efforts to recognize and confront the complexity of the police task constantly compete with the overwhelming, magnetic attraction of the simplistic model. Enormous pressures are constantly exerted on the police to conform their activities to the traditional, nondiscretionary, full-enforcement conception of what the police should do and how they should do it. These pressures grow more acute when problems for which the police are thought to be responsible, such as drugs, become more aggravated. When this occurs, little patience exists for using knowledge already acquired about the complexity of the police function and for confronting the perplexing issues that this new knowledge raises. And there is even less patience and support for new research.

This chapter is concerned with the growth in our understanding of the complexity of the police function over the past thirty-five years. It looks at the development of methods used to gain such understanding. And it looks at our ability to act on that understanding in an atmosphere in which there is constant tension between the need to face complexity and the pressures for simple responses. Since this volume takes the findings of the ABF survey as a point of reference, this chapter samples the larger picture of developments in policing by focusing on the experience and results of that survey and on the degree to which the police, legislatures, and others subsequently have addressed the issues initially identified by the survey.

THE STATE OF KNOWLEDGE BEFORE THE ABF SURVEY

In an effort to establish what was then known about the police, the planners of the ABF survey, which was launched in 1955,
turned quite naturally to the literature on policing. The results of that search produced a surprisingly meager number of relevant works, occupying no more than a few feet on a library shelf, that included relatively little evidence of serious scholarship and research. The major works fell into several distinct categories: (1) reports on investigations of specific police agencies, (2) treatises on the organization and staffing of the police, (3) autobiographical reflections on policing by several especially thoughtful police administrators, (4) reports on police performance that were part of the wave of crime surveys in the 1920s, and (5) two in-depth observational studies.

Most of the material fell into the first category, consisting of reports on investigations into alleged wrongdoing and corruption or into the circumstances that led to major crises, such as the Boston police strike in 1919\(^1\) or the police handling of the Chicago steel strike in 1937.\(^2\) These reports tended to focus on organizational deficiencies and the need for police to maintain a neutral position regarding the social problems of the day. This was exemplified by the best known study, conducted by the National Commission on Law observance and Enforcement (commonly known as the “Wickersham Commission”),\(^3\) which examined the breakdown of law and order throughout the country after the failure of prohibition. It focused on, as the most serious problems, the use of the third degree and the structural defects in police administration, highlighting such matters as incompetent leadership, insecure executive tenure, and the lack of competent, efficient police officers.

The leading treatises reflected this same concern with the weaknesses in the police structure. Raymond Fosdick, Bruce Smith, and O. W. Wilson dwelt on the organization, staffing, and equipping of police agencies; on the need for insulation from political pressures; and on the development of a more professional form of management.\(^4\) Wilson’s text, *Police Administration*, in particular, was heavily prescriptive. The standards he established for a quality police agency gained wide acceptance and set the model for “professional” policing. The combined work of Fosdick, Smith, and Wilson shaped police organizations and service for several decades. As the experts in the field, their concentration on the management of police agencies and the absence of alternative perspectives had an enormous influence in
defining those matters considered most important and deserving of the highest priority.

Three books, reflecting the views and experiences of two practitioners, were more thoughtful about the complexity and diversity of policing. Arthur Woods, the police commissioner of New York City from 1914 to 1918, first wrote *Crime Prevention* in which, departing from the traditional views of the time, he explored crime control as a problem of prevention—discussing poverty, mental illness, alcoholism, drugs, and public cooperation relating to crime and policing. Subsequently, in a series of lectures at Yale published in *Policeman and Public*, Woods examined the role of the police in society, the public conception of the police officer, and the policeman as judge and advocate of public interests against private intrusion.

August Vollmer, the chief of police of Berkeley, California, from 1905 to 1932, was the mentor of a whole generation of police administrators, including O. W. Wilson; and much of his contribution to policing is reflected in the work of others, like Wilson, and in reports such as that of the Wickersham Commission, of which he was a principal author. Vollmer, however, was by no means as narrowly oriented as is the professional model currently described as his legacy. In his major publication, *The Police and Modern Society*, written after his appointment to the faculty of the University of California, he identifies and openly struggles with many of the complexities in policing: the conflicts within the police role and the sensitive nature of that role, the uses and limitations of the criminal law, the interdependence of the police and the community, and how best to deal with the wide range of behaviors the police are expected to handle. Most important, he complains repeatedly about the widespread ignorance of the complex nature of the police job and the failure of the public to learn about the problems the police confront. In this regard, he takes the police to task, arguing that, based on their firsthand knowledge, they ought to do more to educate the community and to advocate for needed changes.

The writings of Woods and Vollmer were exceptions and apparently did little to stimulate further inquiry about the issues they raised. And provocative as they were, they did not raise questions about the police role in deciding whether to conduct an investigation, whether to arrest, and whom to arrest. They said little
about how police set their priorities, the role of the police in initiating a criminal prosecution, or the role of the police vis-à-vis that of the prosecutor, the trial judge, and those engaged in operating jails and prisons or in supervising those who were on probation or parole. More significantly, none of the above works described day-to-day police operations (except for Vollmer’s accounts of some of his street experiences) or reported in a systematic way what police officers on the streets did and how they did it.

The crime surveys of the 1920s contained the first efforts of independent observers to collect hard data about police operations. The three most famous surveys, conducted in Cleveland, Missouri, and Illinois, were heralded for being scientific.⁸ "They have provided for serious students of criminal law administration a body of information which it is possible to use in comparative studies and thus to remove from discussion of crime and its treatment some of the prejudices with which it is so full."⁹ Because the focus of these studies was on the total response to the crime problem, they looked at the police function within what has since come to be referred to as the "criminal justice system," analyzing thousands of criminal cases. But the inquiries were devoted almost exclusively to collecting data for the application of newly developed methods of statistical analysis. They attached great significance to the number of arrests made and especially the number that were not prosecuted. Because they did not explore in depth the explanations for why arrests did not always result in a successful prosecution, the disparity was seen as indicative of sloppiness or corruption of the process. The surveys then moved quickly to exploring remedial measures, which took the form of recommendations regarding the organization and operation of police departments—recommendations not unlike those contained in the reports and treatises that had been written without benefit of such field research.

In examining the publications gathered prior to the start of the ABF survey, two works were discovered that seemed especially relevant. The first was very modest—an unusual inquiry by Samuel Bass Warner, a Harvard law professor who set out to study the law of arrest in an effort to ascertain whether the police could operate within its limitations and, if not, what changes were necessary to make it both a practical standard of police conduct and a safeguard of personal liberty.¹⁰ He arranged
to accompany police officers as they went about their job and subsequently summarized his findings in what may have been the first reported empirical study of police operations as they occur on the street. His observations led him to conclude, in sharp contrast with the other types of surveys, that the elimination of improper practices might best be achieved by refinements in the law of arrest that recognized the complexity of the situations police were called on to handle.

The second was a study by William Westley, a doctoral student in sociology at the University of Chicago. Depending heavily on interviews of police in Gary, Indiana, Westley acquired much previously unavailable information about the day-to-day operations of police officers—about the informal procedures used, the factors that influenced decision making, and the development of a subculture that separates the police from the community they serve. Completed in 1951, Westley’s thesis got little attention for twenty years and was not published until 1970, when interest in police operations dramatically increased.11 Along with the short Warner piece, it stands out in the skimpy literature then available on the police for its value as a description of what the police actually do—a description that challenged the prevailing image of the police and thus was a beginning in documenting the complexities of policing.

In summary, the literature on the police available prior to the ABF survey reflected a preoccupation with the organization of police agencies, the qualifications of officers, and various other factors that were thought to contribute to corruption and the abuse of authority. It reflected little knowledge or insight regarding the decisions that police made in their day-to-day operations.

THE AMERICAN BAR FOUNDATION SURVEY

If the ABF survey had followed its original plan for that portion of its inquiry relating to the police, it would not have added much to the sparse knowledge then available. Like the police field itself, the plan was heavily influenced by the prevailing perception of what was important in policing—the technical and administrative aspects of running a police agency. The detailed agenda for inquiry identified fifteen different categories of information that were to be systematically acquired, with all but two
categories relating to the organization, administration, staffing, and equipping of a police agency. The product would have been an inventory of the degree to which the police agencies conformed with the then-prevalent standards for managing a police agency. The two exceptions in the outline for study were the last categories that called for inquiries about “miscellaneous considerations” and areas of activity where civil liberties might be jeopardized. These categories apparently were tacked on as a concession to staff members who viewed them as more central to the study than any of the preceding thirteen categories.

Methodology

The decisions made about research methodology, at the beginning of field work, turned the study around and ultimately accounted for its successes. The methodology that was adopted called for field observers knowledgeable about policing to accompany police officers as they went about their regular business, absorbing all that they could. Emphasis was placed on getting a picture of the work of officers at the lowest level of the organization, in contact with citizens on the streets and in their homes. The field staff was encouraged to “hang around”; to ask and subsequently observe what was “hot”; to identify “critical incidents” and follow the handling of those incidents. They were instructed to report their observations in a nonjudgmental manner. Practices, issues, and problems that surfaced from these open-ended observations were then used to shape subsequent observations. Thus the observations, rather than a set of questions that reflected a prejudgment of what was important, steered the inquiry.

The resulting reports dictated by the field observers are, to this day, remarkable documents. With sometimes overwhelming detail, the observers clinically recorded what they saw while accompanying officers who were patrolling in squad cars, responding to citizens’ calls for help, ferreting out criminal conduct, seeking to identify those responsible for committing crimes, conducting interrogations, arresting and jailing suspects, presenting cases to prosecutors, and testifying in court. No one previously had obtained such free access to a police agency and such graphic, candid accounts of the day-to-day operations of the police. This was all the more notable given the strong commitment to secrecy that Westley had discovered in his work.
Because of the richness of the original reports, using the detailed accounts requires a substantial investment of time. That is why those who have drawn on the results of the ABF survey have depended heavily on the two levels of analysis of the original data: the intermediate “Pilot Project Reports,” in which an effort was made to make maximum use of the original reports to compile a composite picture of how the criminal justice system operated in each of the three major urban areas in which field observations were conducted (with some coverage of state systems where that was relevant); and the series of five published volumes whose authors, at a more abstract and generalized level of analysis, used the survey data to describe how critical decisions in the criminal process were made and how the survey data related to the exploration of issues then current.13 Helpful as these publications have been, it is important to recognize that for the pure product of the ABF project, one must turn to the original reports of the field observers. Important, too, is the realization that the process of analysis and publication, which stretched over ten years, left much data “on the cutting room floor.” Fortunately, the substantial number of individuals who were involved in the ABF project have drawn on the residue in various ways to help in addressing policy questions that were not the subject of coverage in the published volumes.

Substantive Findings

No single document presents in crystallized form the findings of the ABF survey. That realization emphasizes the unique character of the survey, for the primary objective was to produce a mass of data descriptive of the operations of the criminal justice agencies in the jurisdictions studied. Analysts in the latter stages of the study and others interested in the reported observations were left to mine the data from their unique perspective and for differing policy implications.

Now, however, one can retrospectively highlight the principal findings or themes relating to the police that were given greater visibility by the survey and thereby contributed to the gradual increase in awareness of the complexity of police operations. This is made possible by the passage of time, the publication of numerous works that drew directly on the ABF data, and many citations to the study and its progeny. Such retrospective attribu-
tion would obviously be subject to criticism if one were to claim the survey as the exclusive source of the findings, since there is no way to trace, with any precision, the development of such knowledge. But that is not my objective. Rather it is to use, as a starting point, a selection of the findings of the ABF survey and, acknowledging that these findings may have been duplicated, developed, and more widely disseminated by subsequent studies, reflect on the aggregate response to them since they were first identified.

The Police Do Many Things Besides Investigate Crime and Arrest Offenders Given the initial impetus for the ABF survey and its focus on the increase in “crime,” field observers were initially troubled that the research method that committed observers to accompanying police officers resulted in so much time being spent observing activities that, at the time, seemed peripheral to the interests of the survey. The application of the prevailing standards used to evaluate police operations would have used this experience to confirm the belief that police were overly burdened with miscellaneous tasks; that they were unable to concentrate on serious crime and should therefore be freed of many of these responsibilities. With the survey’s unique research methodology, however, all the activities were faithfully recorded; their full significance was recognized in subsequent years.

What were police found to be doing? They were, for example, taking intoxicated persons into protective custody, clearing the streets of prostitutes, responding to a wide range of disputes, directing traffic and enforcing parking limits, checking alleged trespassers, investigating accidents, censoring movies and books, finding missing persons, checking suspicious circumstances, handling stray animals, providing first aid, and collecting overdue library books and the assessed fines. Aggregate data that the staff collected from sources like annual reports further confirmed the volume of such activities and their variety. The manner in which these incidents were categorized, frequently as “miscellaneous,” reflected the police attitudes toward handling them.

All of the police departments studied viewed these miscellaneous activities as a drain on their resources, as the “garbage of policing.” Special units within a department had a hierarchy of priorities that discounted the importance of categories of incidents, leaving them for regular patrol officers to handle. But, as
will be noted in the subsequent discussion of nonenforcement, even patrol officers at the bottom of the status hierarchy defined many routine matters that came to police attention, such as domestic disputes, as not really part of the central police task and therefore dealt with them perfunctorily.

The ABF data make it clear this somewhat cavalier setting of priorities, consistent with a more simplistic notion of policing, concealed important decisions that, on exposure, drew attention to the complexity of the police function in the context of public expectations. The observations of day-to-day operations identified numerous factors that influenced the police response. It was apparent, for example, that the public expected the police to handle the incredibly wide range of problems without regard to how the police perceived the problems and without regard to whether the police had the authority, resources, or training to handle them. The public continued to turn to the police despite the police attitude and the questionable value of their response, probably because they had no one else to whom to turn.

From the police perspective, the significance of the interrelationship between different aspects of their operations was not clear, but it was generally recognized that some relationships existed. The full dimensions of what initially appeared to be a minor incident, for example, were not always apparent until after an investigation was made. Contact with intoxicated persons, vagrants, and prostitutes was often used by the police to develop information and gain cooperation relating to the investigation of more serious offenses. The substantial police involvement in an activity like traffic control, through the arrests made and the searches conducted, was used in various ways to control serious crime. On the other hand, some problems the police routinely handled had no relationship to serious crime but, nevertheless, demanded high priority because they affected community order and the level of fear felt by the community. Most important, in the ABF observations, was the realization that the police, through their mere presence, brought authority—however ambiguous that authority—to bear on unpredictable, critical, but difficult-to-categorize situations that required some form of authority. In summary, not only did the field observations document police involvement in many matters unrelated to serious crime but they also documented a perplexing entanglement of public expectations,
pressures, limited definitions of authority, an interdependence of functions, and the realization that the police had to improvise their way through many situations. To assume that the criminal law alone defined the police function was clearly naive.

Even Within Conduct Labeled Criminal, the Incidents the Police Are Called on to Handle Are Infinite and Unpredictable, Requiring Flexibility in Responding to Them The ABF observations drew attention to the loose manner in which, in the interests of simplicity, *crime* and *criminal* are used both by the public and by those operating within the criminal justice system. The attraction in using these terms apparently stems from some assumptions about what will automatically follow: for example, that the behavior will be condemned, that the police will be responsible for handling the behavior, and that the police have the necessary authority to take action by making an arrest.

“Crime” obviously included homicide, burglary, and robbery. But it also included trespass, drunkenness, truancy, and the showing of movies containing nudity, because these forms of behavior were also clearly proscribed as criminal. And although “crime” was always used to describe the conduct on which the police were supposed to focus, the ABF research disclosed that police were in fact responsible for responding to a wide variety of community problems that, if they could be labeled criminal at all, came—often with some stretching—under such statutes as vagrancy and disorderly conduct. Authority to deal with this wide range of community problems was frequently conferred by making the conduct a violation of county or city ordinances, which, at least in Wisconsin, made such conduct, from the legal perspective, a civil forfeiture violation. Thus, problems commonly perceived by the community as criminal often involved behavior that was outside the conduct prohibited by the criminal law.

Because the ABF reports described in great detail the specific incidents that the police handled, they drew attention to the broad range of conduct commonly lumped under the umbrella of crime. Within categories of specific crime labels (like assault, burglary, and certainly disorderly conduct), they illustrated with unusual clarity the endless number of unpredictable variables that distinguished one incident that the police handled from another (e.g., the presence of mental illness, the involvement of alcohol, the relationship between the victim and the offender, the
The police were pressured to ignore these distinctions; to fit the incidents into categories for disposition that masked these important differences.

Despite these pressures, however, the ABF survey found that individual police officers, in many of the cases they handled, did distinguish between incidents. They often improvised in their responses to take note of the variables, using criteria that, depending on who reviewed them, might be praised or condemned and with results that were equally mixed. The varied responses, viewed neutrally, carried a strong message. They illustrated the need for flexibility in handling the infinite variety of situations that are brought to police attention. The distinctions that the police were crudely making in the handling of police business were clear indications of the complexity of the police job. And this complexity was compounded because there were so many pressures to ignore it. If officers responded to unique factors in an incident, as they often did, they were usually compelled to act in an informal, sub rosa manner.

Public outrage about specific incidents, about categories of behavior, and about crime rates, plus concern about lack of fairness in police decision making, frequently results in administrative controls and legislation that value uniform rather than more individualized responses. The ABF survey's microscopic description of police business and of the improvised responses to so much of the police workload identified one of the most fundamental dilemmas in policing: how to respond categorically to incidents that often require individualized treatment if one's concern is fairness and effectiveness.

The Police Use Their Authority to Arrest to Achieve Many Objectives Other Than the Initiation of a Criminal Prosecution

It is widely assumed that the primary—some would even argue the exclusive—purpose of arrest is to initiate a criminal prosecution. That assumption was strong at the time of the ABF survey. (It had been reinforced by the "mortality tables" of the 1920 crime surveys, which characterized as failures arrests that did not result in a prosecution and conviction.) The assumption remains strong today, buoyed by the additional argument that arrests made without the intent to prosecute constitute a misuse of the power and a possible violation of civil rights.
The ABF survey gave visibility to the wholesale practice of using arrest to achieve a wide range of objectives other than the initiation of a criminal prosecution. It found that persons were routinely taken into custody to conduct further investigations; for harassment, as a means of controlling a problem; to preserve testimony; and for safekeeping. For some categories of offenses, the arrests made for these purposes in Detroit far exceeded the number of arrests made with the limited objective of pursuing a prosecution.

The exposure of this practice—the routine manner in which arrests were carried out, the explanations candidly stated, and the absence of any pretense that prosecution was a goal—was the direct result of field observations. Statistical summaries of the arrests would have made no distinctions as to the purpose of the arrests had reliance been placed on them.

In some cases, the police had sufficient evidence of the offense for which the arrest was made (although their objective may have been to get at another offense) and therefore had the option of prosecuting if they chose to do so. But in the vast percentage of these cases, the practice was so wholesale that no effort was made to acquire the evidence to support an arrest and prosecution. And since the cases did not go forward in the system, the police decision to arrest was not subject to any review.

Avoiding a judgment regarding the legality and propriety of such arrests, the ABF survey's clinical documentation of them led to the exploration of a wide range of complex questions that had not previously been raised. How common was the practice in other police agencies? What needs were being met by this previously invisible practice? How strong were the arguments in support of the expressed needs? Should some of these needs, such as the down-and-out alcoholic's need for safekeeping, be met by a limited grant of authority to intervene and detain without prosecution? And if so, how can that be accomplished in a way that is both fair and effective? What were the consequences for the individuals subject to such practices? Were they abused? helped? Or were the detentions mutually accommodating for both the police and those arrested? What were the consequences for the community? How were the practices viewed? Were they seen as offensive to specific neighborhoods or groups of citizens and contributing to negative, hostile attitudes toward the police? Or
were they seen as helpful and responsive? And finally, what was the relationship between such practices and the broader role of the police in dealing with more serious crime, in maintaining order, and in creating a sense of security in a community?

The Police—and Especially Individual Police Officers—Exercise Enormous Discretion  The ABF observations painted a picture of police operations in which the discretion of individual officers was pervasive. In sharp contrast with widespread expectations and the image the police themselves sought to project, the survey recorded incident after incident in which officers at the lowest level in the organization were making extremely important decisions with little, if any, guidance. Police officers regularly decided, for example, whether to stop and question, whether to initiate an investigation, whether to use undercover methods, whether to arrest, whether an arrestee was to be physically detained, and what charges, if any, were to be included in the police report.

Documentation of this vast sea of discretion, found from the top to the bottom of a police agency, raised profound questions about fairness, accountability, and control. It created havoc with the professional image that reformers sought to give to the police, built as that image was on a foundation of neutrality to be maintained without “fear or favor.” It also created havoc in legal circles, with commentators appalled that the “rule of law” had been replaced by a police officer’s predilections, that such important decisions, assumed to be reserved for legislatures, elected officials, or judges—to be made in state capitols, city halls, or in courthouses—were in fact being made by police officers on the streets. The immediate reaction, in some quarters, was to press for arrangements that would require the police to adhere strictly to legislative mandates. Others, however, concluded that, despite the sensitive nature of their function, police inevitably exercise discretion, that this was the natural consequence of the police being called on to handle such a wide variety of situations, each characterized by different, unpredictable circumstances. They argued that the presence of discretion was symptomatic of the complexities in policing and in the use of the criminal justice process, that the challenge was in attempting to structure it in ways that made the police more accountable for its use. If this was indeed the challenge, how was it to be met? Who was to provide the guidance: the legislature, courts, local elected officials, or police admin-
istrators? What engagement, if any, was there to be with the community most directly affected? And what were the implications for defining the job of the police officer and for the supervision, training, and recruitment of police officers?

Although Evidence of a Crime May Be Present, the Police Often Decide Not to Arrest The discretion that police were found to exercise in deciding whether to arrest emerged as being of special import. In the traditional view of the police function, it was assumed that the police were mandated to make an arrest when evidence of a crime came to their attention. Much support existed for this assumption in state statutes, municipal ordinances, and police manuals. The view was reinforced by the professional movement within policing that, to avoid allegations of bias and corruption, placed a high value on full, objective application of the law.

The picture acquired by the ABF of police operations was in sharp contrast with this stated ideal and with the prevailing understanding of what was then police practice. In many situations, there was overwhelming evidence that a crime had been committed and no question as to who committed it, but arrests nevertheless were not made. This was especially common in cases involving an assault in which the victim and offender had some prior relationship and in all domestic situations.

Was this further evidence of inefficiency, corruption, and the negation by the police of legislative intent? Or was nonenforcement of some offenses a crude indicator of other problems and needs, such as limited police resources, the lack of clarity in statutory language, or the desire to be more discriminating in the treatment of individual incidents? Was the criminal law more like an arsenal that authorized the police to act when they needed to act than a mandate to the police? These were among the questions on which analysts with earliest access to the ABF data focused. These works, in turn, led to proposals for controlling the selective use of the criminal law, followed by a spirited debate regarding the legality of selective enforcement and nonenforcement. The exploration of these issues has added a whole new dimension to understanding the complexities of policing.

The Police Are a Part of the Criminal Justice System; Their Actions Heavily Influence Other Agencies in the System Whose
Actions, in Turn, Strongly Influence the Police  The ABF project's design reflected an awareness of the systemic nature of the criminal process. That is why observers were sent into police departments, probation and parole agencies, prosecutors' offices, and the courts. And that is why the commitment, from the outset, was to understand what happened to cases as they proceeded through the different agencies. Whether those who planned the project anticipated the extent to which the actions of one agency affected another is not clear. The magnitude of the influence, however, and the degree to which it was institutionalized were among the most significant observations made in the ABF survey.

It was found, for example, that a large police department would shift its enforcement priorities on the last day of the month in anticipation of a new judge taking the bench in the court handling initial appearances. Police officers would make decisions about arrests or about conducting searches based on what they interpreted as a judge's personal biases, rather than on the basis of relevant statutes and case law. And in like fashion, in adjudicating and sentencing, judges would take into consideration certain assumptions about the police practices that resulted in prosecution. The anticipation of being affected by policies attributed to prosecutors or judges resulted in the development of accommodations that terminated or modified the processing of cases at an earlier stage in the process or that resulted in the police developing an alternative response that did not involve prosecution.

These observations led quickly to the conclusion that it was imperative to view all operations by agencies in the criminal justice process as part of an intricate, albeit unmanaged, system. And from that point on, the personnel of the project incorporated "system" into the daily vocabulary of the study. This was to be one of the main legacies of the survey. The police could no longer be viewed in isolation; they did not operate in a vacuum. They were an integral part of the criminal justice system. Their effectiveness was heavily dependent on the operations of the rest of the system.

The concept of a system was helpful in analyzing the critical decision-making points. Analogizing to the flow of a river, the systemic concept created a greater awareness of the limitations of the system, most notably that narrowing the flow at any point, through more rigorous standards and restricting discretion,
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thereby building a “dam,” absent other measures, would create a backup and ultimately an overflow in the form of a new stream or accommodation. Such changes might shift the primary locus of decision making from one agency to another; for example, from the police to the prosecutor or from the prosecutor to the police. Yet the agency to which the shift occurred may not have been as well equipped to handle the processing as the agency from which the shift was made. The police, as the first agency in the system, responsible for intake, were making decisions that were critical—for their effect both on the system and on the individuals involved.

Widespread adoption of the criminal justice system as the framework for viewing the police and other agencies opened many vistas. It provided a vehicle for reflecting more intelligently on the impact of proposed changes in public policy relating to crime. It provided the unifying scheme for academic programs committed to education and research relating to crime. And it stimulated ideas about how better coordination could be achieved by local and state governments of the various agencies involved in the criminal process. But it also had some confining effects. It reinforced the notion that the primary function of the police was to deal with crime and that the primary means the police had for dealing with everything—both crime and noncriminal matters—was the process of arrest, prosecution, trial, and punishment.

DEVELOPMENTS SINCE THE ABF SURVEY

In contrast with the neglect of the pre-ABF era, a plethora of studies relating to the police have been conducted in the years since the ABF study, and policing itself has undergone major change. Both the studies and the actions taken have been stimulated in large measure by increased recognition of the important role that the police have been called on to play in dealing with racial tensions, urban riots, political conflict, increased personal violence, increases in other types of serious crime, disorder on our streets, and—as a parallel problem—the fear generated by all of these conditions.

From among all that has occurred, my limited goal here is to reflect on how the points previously identified as having been given visibility by the ABF survey have fared, with the ultimate objective—in summation—of assessing, through this sampling,
the degree to which the complexity of the police function is being recognized and understood and how this, in turn, is influencing the shaping of police operations.

*The Varied Nature of the Police Function*

When crime became a major domestic issue in the mid 1960s, President Johnson, echoing many of the concerns expressed by Justice Robert Jackson that led to the ABF survey, created his Commission on Law Enforcement and Administration of Justice. The commission funded much new research, including extensive observations of police activity, but mainly depended on a pulling together of then-available knowledge as a basis for informing public policy decisions and developing a consensus on an agenda for action. It drew heavily on the ABF survey.

In its efforts to present a coherent picture of the operations and needs of the police, the commission acknowledged repeatedly the varied character of the police function and that the police spent much of their time dealing with matters other than serious crime. It recognized the complexity of the issues these functions raise, examining the pros and cons of police continuing to be responsible for what it characterized as nonenforcement tasks. But it concluded that, on balance, “the performance of many of the nonenforcement duties by the police helps them to control crime, and that radically changing the traditional police role would create more problems than it would solve.” In addition to the focus on crime, the commission was also concerned with the need to improve relations with young people and minorities. The combination of these concerns led them to propose a three-step staffing concept for police departments, with the lowest level being a community service officer whose primary responsibilities would include performing nonenforcement duties and improving relationships with the community. Thus, by justifying involvement in nonenforcement duties based on the contribution this made to dealing with crime and by relieving police officers of such duties so that they could concentrate on crime, the commission lent support to the concept of the police as primarily crime fighters. But at the same time, it reversed the earlier movement to divest the police entirely of all nonenforcement tasks.

Bittner’s ethnographic work on the role of the police on skid row and on handling the mentally ill, among the best observa-
tional studies of the police, led him to highlight the inseparable nature of many of the functions performed by the police. He concluded that the potential, unpredictable need for force was the dominant factor that resulted in police involvement. The studies of police workloads and activities by Cumming, Skolnick, Wilson, Livermore, Rubinstein, and Muir added to a more comprehensive understanding of what the police did and to the realization that the capacity of the police to deal with crime depended, in some measure, on their involvement in many other activities and, in turn, that their ability to handle these other activities derived, in some measure, from their coercive authority to deal with crime. Reflecting on these and other studies, Punch, heralding the new visibility given to the "largely undocumented and thereby partly submerged aspect of policemen's work," observed that the studies had opened a Pandora's box. But he argued that because police work was so important, yet so diverse and diffused, it deserved much more study as a multifaceted social control agency serving multiple ends and various audiences.

By 1973, the thought given to the nature of the police function had developed to the point that the American Bar Association, with the endorsement of the International Association of Chiefs of Police, made this observation in its promulgation of standards relating to the urban police function:

To achieve optimum police effectiveness, the police should be recognized as having complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses. Such other police tasks include protection of certain rights such as to speak and to assemble, participation either directly or in conjunction with other public and social agencies in the prevention of criminal and delinquent behavior, maintenance of order and control of pedestrian and vehicular traffic, resolution of conflict, and assistance to citizens in need of help such as the person who is mentally ill, the chronic alcoholic, or the drug addict.

The widespread "hunch" that police services outside traditional law enforcement have positive value gained support, in a roundabout way, from the controlled experiments conducted in the 1970s and 1980s. They questioned the value of traditional methods of policing by testing specifically the value of motorized patrol, foot patrol, response time, and fear reduction strategies.
The studies documented the limited capacity of the police, using these methods, to control crime. They questioned the value of investing so heavily in reacting to citizen mobilizations. They surfaced the problem of fear as a concern separable from that of crime. And they gave further exposure to the activities in which the police were involved that did not fall into the category of "serious crime." Thus, collectively, the experiments made a major contribution toward stimulating more serious thought about the relative importance of the various tasks in which the police were involved.

Equally significant were the contributions that the controlled experiments made to the development of research methodology designed to better understand the complexities of policing. Whereas the ABF survey had moved freely across wider issues, these studies focused on specific police strategies. The ABF survey had opened the police to observation. The first of the controlled studies, the Kansas City Patrol Experiment, opened a police agency not only to observation, but also to manipulation of its operating practices so as to maintain experimental conditions subject to measurement. Of special importance was the involvement in the research of police officers and management. The partial ownership of the project by the police—especially rank-and-file officers—and the "scientific" character of the studies gave added weight to the results and marked an important advance in the meaning of professional policing.

On realizing (at a time of great concern about crime, fear, and hostility directed at the police) that the principal methods on which they had depended for dealing with crime were of questionable value, progressive police administrators began searching for new, more effective practices. The programs that emerged reflected several different emphases: (1) improving relationships with the young and minorities, with the primary objective to reduce tensions and with the secondary objective to increase the police capacity to deal with crime; (2) being more proactive rather than reactive as, for example, in setting up sting operations with the primary objective to more aggressively identify criminal conduct and acquire evidence; (3) enlisting the help of the community in preventing crime; (4) making more arrests for "quality of life" offenses, with the primary objective to reduce fear; and (5) responding more effectively to a broad range of common calls to
the police in the hope that doing so would improve relations with
the public, reduce fear, and indirectly improve the capacity of the
police to deal with crime. The latter was strongly reinforced by
the widely cited article “Broken Windows,”31 which developed
the nexus between the physical deterioration of an area, disorder-
liness, the police response to disorderliness, and crime.

These varied movements, in many jurisdictions, have merged
and are now characterized under the single umbrella of commu-
nity policing, fleshed out by supportive changes in organization,
staffing, and operations. They have given rise to a whole new
approach to providing police services that places heavy emphasis
on the importance of ties between individual officers and the
community to which they are assigned, engaging the community
in working with the police, and a proactive commitment on the
part of the officer. Emerging as a central feature of this approach
to police work is a strong commitment to deal effectively with
those varied matters that were formerly thought to have the low-
est priority in policing and to expand the police role to encom-
pass additional concerns not previously within the police ambit.

With greater acceptance of the multiple functions of the
police and an awareness of the limited value of depending on
criminal prosecutions, the focus shifts, not simply to identifying
more effective ways in which to deal with crime, but to identify-
ing more effective ways in which to carry out all aspects of the
broader police function. The concept of ‘problem-oriented polic-
ing’32 builds on what has been achieved under the community
policing label by going one step further: by proposing a radical
new perspective of the police function in which the police are
committed, first and foremost, to respond to a wide array of
community problems. In this scheme, decisions about police
practices, including the choice of enforcing the criminal law and
engaging the community, are made with a primary concern for
what is likely to be most effective and fair in responding to a spe-
cific problem. The approach elevates the specific problems police
are called on to handle to a preeminent position around which
all other organizing concepts revolve. To achieve this objective,
the concept calls for a commitment to identifying each problem;
to analyzing it in depth with the objective of understanding con-
tributing factors and the manner in which it is manifested; and to
searching broadly and without traditional limits for means by
which it can be eliminated or reduced, reaching far beyond the use of the criminal law.

Thus, in a major departure from the prevailing concepts at the time of the ABF survey in the 1950s, when it was assumed that the criminal process (as the prime means by which the police operated) fully defined the police function and when all but serious crime was thought to be unimportant, a forthright identification of all the problems police are expected to handle collectively defines the police function, with a commitment to thoughtful analysis of each problem in determining what constitutes the best response from among many responses. In this type of analysis, a high value is placed on working preventively to avoid or reduce problems and on the involvement of rank-and-file police officers in the thought processes and supportive research. A high value is also placed on candor, forthrightness, and honesty in confronting the need for appropriate resources and authority, in the uses made of the criminal law and in acknowledging the discretion police are required to exercise—thereby reducing the need to improvise or to squeeze everything into the mold of a criminal prosecution. The change in orientation attributes much more responsibility, latitude, and discretion to a police officer than is implied by the common practice of referring to the police as "law enforcement officers."

In summary, the greater visibility given to the various functions of the police, starting with the ABF survey, has revealed the enormous complexity of the police function—in sharp contrast with the simplistic notions of the past. Recognition of these complexities has led to some dramatic reconceptualizations of the role of the police. More important, substantial action has been taken in implementing these new concepts. Although many questions remain and most jurisdictions are still unaffected by these advances, and although there are occasional calls for "back to basics," the momentum of the changes that have occurred, propelled by some very pragmatic considerations, now appears irreversible. A strong commitment currently exists to both further action and the acquisition of additional knowledge.

The Infinite Variety of Situations Police Are Called on to Handle

When President Johnson issued his charge to his newly appointed Commission on Law Enforcement and Administration of Justice,
he stated "we have taken a pledge not only to reduce crime but to banish it." It is significant that, two years later, at the very outset of its report to the president, the commission observed:

A skid-row drunk lying in a gutter is crime. So is the killing of an unfaithful wife. A Cosa Nostra conspiracy to bribe public officials is crime. So is a strong-arm robbery by a 15-year-old boy. The embezzlement of a corporation's funds by an executive is crime. So is the possession of marijuana cigarettes by a student. These crimes can no more be lumped together for purposes of analysis than can measles and schizophrenia, or lung cancer and a broken ankle. As with disease, so with crime: if causes are to be understood, if risks are to be evaluated, and if preventive or remedial actions are to be taken, each kind must be looked at separately. Thinking of "crime" as a whole is futile.34

The advice of that commission still is not taken seriously, as political leaders and various interest groups, acting out of understandable frustration, continue to exhort the police and the public to war on "crime." All that has been learned compels a more discrete, systematic approach to the specific problems police handle and, within these problems, to giving appropriate consideration to the variables that surface in specific incidents.

In the 1970s, the pressure for a generic response was manifested most clearly in the demands for "law and order," which translated into a demand for "toughness" in dealing with everything from serious crime to political protest. Yet, amidst that climate were the beginnings of some significant experiments, hatched by the follow-up to the president's commission studies, that singled out specific aspects of police business for attention. Most notable was Morton Bard's initiative in bringing a new response to domestic violence.35

More recently, the pressure for categorical responses has been reflected in the desire to alter public attitudes regarding subcategories of offensive behavior. For example, the strong desire that the public take more seriously all forms of sexually motivated attacks on women resulted in the enactment of statutes that placed a wide range of conduct, previously defined separately, under the new, single umbrella of sexual assault. One of the prime objectives was to convince the police themselves to view such conduct as more serious. But for those police whose attitudes are now changed, or who
did not need convincing, the development of a rational program for preventing and responding to sexual assault requires that they think in terms of the different variables that distinguish one sexual assault from another. A sensible response to the sexual abuse of children obviously requires a different approach than a carefully thought through response to date rape or to an unidentified rapist who has attacked several women in a single neighborhood.

Problem-oriented policing stresses the need to disaggregate problems as a preliminary step in analyzing them. It criticizes, in particular, the tendency to use criminal law labels (like arson) to mask important distinctions that exist among various types of behavior—distinctions that have major implications in attempting to think through what constitutes the most effective response. At the same time, it rejects the notion that each incident the police handle is unlike any other incident. To the contrary, one of the major thrusts of problem-oriented policing is to elevate police thinking so that the police do not spend all their time responding to incidents but seek instead to collect incidents into clusters that make them more amenable to being analyzed and, subsequently, to being dealt with more effectively by the police.

In the resulting search for an appropriate level of categorization, the more advanced police efforts, as part of the process of analyzing specific problems, have identified important variables that ought to influence, though not dictate, their response. Thus, for example, building on Bard’s work relating to domestic violence, police agencies, with a commitment to being both fair and effective, identified factors (like age, the presence of mental illness, and the relative aggressiveness of the parties) that should be considered in determining the police action. This appeared to result in programs that succeeded in identifying abusers and in subjecting them to appropriate treatment within the criminal justice system. In some jurisdictions, however, reflecting impatience with police responses thought to be inadequate, legislatures have acted to mandate police arrest if probable cause exists to believe that a battery was committed. Forced to ignore all variables, police are now making large numbers of arrests. With available resources overwhelmed, prosecutors and their staffs must seek to filter out cases based on the same factors that the police previously were instructed to consider. It seems likely that the most awkward results of mandated arrests will ultimately lead to a
further refinement in which some discretion will be returned to
the police to enable them to deal differently with those situations
in which prosecution appears to do more harm than good, both
for the individuals involved and for getting a credible message
out regarding the seriousness of domestic violence.

Absent legislative action of the type taken regarding domestic
violence, the police have enormous opportunities to improve the
quality of their responses by thinking through the various prob-
lems they handle and, within each, the factors that ought to be
considered in deciding on an appropriate response. They have
the opportunity, also, to work at instilling a set of values that
gives officers residual guidance on which they can draw in deal-
ing with unpredictable situations to which no amount of
prethought can speak. From the experience of the past several
decades, it appears that the degree to which outside forces will
impose categorical responses on problems, without regard to the
variety of situations that compose these problems, will depend in
large measure on the degree to which the police proactively take
the initiative in refining their operations. But for this to be possi-
ble requires public and legislative support that recognizes the
futility of pressing the police to view their responsibilities as
dealing with a monolithic category of conduct, subject to a sin-
gle, simplistic response.

The Varied Uses of Arrest

If the job of the police is seen simply as defined by the criminal
law, it is understandable why so much dependence is placed on
arrest in getting the job done. It is also understandable why,
given what is expected of the police, arrest is adapted to meet so
many other needs. With recognition of the multifaceted nature of
the police function, the complexities that grow out of the varied
uses of arrest become apparent. This has resulted in facing up to
the need for forms of authority other than arrest.

In their standards for the Urban Police Function, the Ameri-
can Bar Association, with the approval of the International Asso-
ciation of Chiefs of Police, asserted:

The assumption that the use of an arrest and the criminal
process is the primary or even the exclusive method available
to police should be recognized as causing unnecessary distor-
tion of both the criminal law and the system of criminal justice.
There should be clarification of the authority of police to use methods other than arrest and prosecution to deal with the variety of behavioral and social problems which they confront.\(^4\)

The most significant advance in this regard has occurred regarding the use made of arrest for safekeeping of intoxicated persons, which once accounted for the greatest volume of arrests.\(^4\) The courts, in the 1960s, appeared to be moving in the direction of prohibiting the use of arrest and the criminal process as the primary means for responding to the person incapacitated by alcohol. But the United States Supreme Court reversed that trend, expressing reluctance to deny the police this traditional method for dealing with the “down and out drunk” in the absence of a clear indication that another alternative, less disruptive of the intoxicated person’s rights, was both available and effective.\(^4\) In response to concerns about civil rights, the criminal justice system, and the plight of homeless alcoholics, some states on their own then moved to grant the police specific authority to take an incapacitated person into custody for transport to a detoxification center, creating an elaborate system for review, release, or, if need be, commitment for treatment.\(^4\) It was made explicit that being intoxicated in public was not criminal; that custody was not to be considered an arrest. Twenty-two states have now adopted some form of this authority,\(^4\) thereby creating an alternative to arrest for a category of behavior that accounted for 40 percent of all nontraffic arrests made in the nation in 1965.\(^4\) In the latest national report on arrests, for 1988, only 17 percent of all nontraffic arrests were made for public drunkenness.\(^4\)

As the first breakthrough in authorizing the police to take a person into custody without arresting that person for a crime, the provisions, when initially proposed, met some skepticism, as one would expect for so radical a change, but no strong opposition. The lack of any significant challenge and the rapid adoption of the proposal appear due to several factors: the urging of those concerned about the ravages of alcohol and the attraction of what seemed like a more humane response; the desire of the criminal justice agencies (especially the courts and jails) to rid themselves, to the extent they could, of the burden of handling intoxicated persons; the powerlessness of those most directly affected—the chronic inebriates—if they did have some concerns; and the rec-
ognized absence of substantial resources for detoxification and treatment, which made it unlikely that the new system would pressure intoxicated persons to do more than they were previously coerced into doing. (The change actually brought on a new issue—the propriety of continuing to use the criminal justice process, despite the legislative resolve, for lack of adequate resources to support the new alternative.)

More than a decade since enactment, many questions remain about the effectiveness of the new process as a response to alcoholism. But few, if any, questions have been raised regarding what is perhaps the most novel aspect of the process—the use made by the police of their new authority to take incapacitated persons into custody without having to arrest them and charge them with a crime.

In a parallel development, as part of the overall revision of the laws relating to the mentally ill, the police were given explicit authority in many jurisdictions to make an emergency detention of a mentally ill person until a hearing could be held to determine if a commitment was warranted. This replaced the need to utilize the criminal process, which, in reference to this behavior, was generally considered especially inappropriate. But the new grant of authority was narrowly circumscribed, requiring, among other criteria, evidence of dangerousness. The test was thus much more rigid and more subjective than that prescribed for the person incapacitated by alcohol. The grant of authority is nevertheless unique, but its significance has been overshadowed by the enormous increase in street problems associated with the mentally ill. For substantial segments of the public, the limits on the authority newly conveyed to the police and the curtailment in the use of the criminal law have created the impression that the police are powerless, negligent, or both. But for those who are better informed, the fact that specific authority was carved out for the police and was so narrowly limited has helped to convey the complexity of trying to deal with one form of street disorder while protecting the rights of the mentally ill—a result that is preferable to the old practice of not facing the problem by simply stretching the use of the criminal law to deal with it.

Much less progress has been made in forthrightly working through the issues raised by the use of arrest to maintain street order (candidly labeled “harassment” in the ABF survey) involv-
ing behavior caused by other than alcohol or mental illness. When given visibility, the practice of harassing prostitutes, for example, was widely condemned in the courts and in the public forum. This condemnation was sometimes based on traditional grounds reminiscent of the crime surveys of the 1920s. Pointing to the large number of arrests that were dropped short of prosecution, critiques of the criminal justice system called on the prosecutor to account for the failure to prosecute or on the police to explain the absence of adequate grounds to support a prosecution. More often, however, the condemnation alleged violations of civil liberties. The practice of arresting specific categories of persons engaged in offensive behavior had become so wholesale in some jurisdictions that no effort was made to acquire probable cause before an arrest was made. The acknowledged objective was simply to harass those arrested. Persons caught in the net successfully challenged the practice in the courts. In one of the most publicized challenges, Chicago police were forced to stop their practice of arresting gang members as a primary means of controlling street gangs, when it was clearly established that the arresting officers had no intention to prosecute the cases; the obvious intention in jailing the arrestees was to disrupt their activities and administer a form of summary punishment.48

When the use of arrest in this manner to control street prostitution was challenged, initiatives were taken to deal more forthrightly with the problem of concern by the enactment of statutes and ordinances that established loitering for purposes of prostitution as an offense.49 This was an effort to define specifically the behavior that was of concern, thereby increasing the potential that the police could acquire sufficient evidence to justify an arrest, as compared with the difficulty in acquiring the evidence needed to support a charge of solicitation. More ambitiously, moving in a different direction, several analysts explored the feasibility of authorizing the police to intervene in a broad range of street order problems without becoming committed to a criminal prosecution.50 These inquiries, however, were not pursued to the point that they resulted in legislative proposals, let alone enactments.

The use of arrest to control and harass, suppressed for some years under challenge, has reemerged in the past several years because of the intensified problems of street sale of drugs and the violence of youth gangs. Faced with enormous pressures to “take
back the streets,” the police have reinstated the practice of conducting street “sweeps,” making hundreds of arrests that are not subsequently prosecuted. 31 Continued uncertainty exists regarding the legal basis for the arrests. But it is clearly now much easier to create a legal floor for such arrests with the recent line of court decisions that approve the use of an objective standard for determining legality when it is alleged that an arrest was made on a pretext. 32 Thus, even if an officer really wanted to check out a driver for possession of drugs, the officer’s contention that the driver was initially stopped for speeding will be accepted as justification for the stop and for whatever subsequent actions are taken. Another significant factor behind current practices is that they often have the enthusiastic endorsement of the same communities that severely criticized them when used in a different context in the past.

If it were possible to analyze all arrests made in some large urban areas, based on the intent of the arresting officer, it is likely, given the wholesale use now being made of “street sweeps,” that more arrests are made for this purpose than are made with the intention of initiating a criminal prosecution. Among the costs of this practice are the commitment it reflects to a form of summary punishment, the enormous potential for arbitrariness and abuse, the negative impact on those arrested and detained, and the degree to which the practice contributes to a rise in racial tensions. And yet the need for some form of authority and intervention appears to grow greater, as urban areas attempt to deal with the dramatic increase in the volume of street order problems involving not only drug sales and gang activities, but also the conflicts that arise from the use of the streets by the homeless, the intoxicated, the mentally ill, and the addicted.

Thus, the need is more critical today than it has ever been to confront the complexities in maintaining street order. And with the recognition of this set of complexities comes these questions. What is the specific nature of the need? Are alternative ways to maintain order available that do not require physical intervention? And if some form of physical intervention is required, is it possible to fashion an appropriate form of limited authority that would enable the police, for example, to remove individuals from a specific location without committing themselves to jailing and prosecuting those who are removed? Can a person be “unarrested” once the immediate need that led to taking the person into custody has
been met? And if such authority can be spelled out, how can its use be subject to review? The current tendency to avoid facing these questions attaches a positive value to improvising by the police and to their having to be less than honest in the majority of cases in which they make use of their awesome arrest power. This return to simplicity is at great cost to the credibility of police operations, to those who may be arrested and detained without adequate grounds or opportunity for review, and to the integrity of the criminal justice process.

The Prevalence of Discretion in Policing

Accounts of the discretion exercised by the police were among the first publications emanating from the ABF survey. They focused, for the most part, on the discretion used in determining whether to invoke the criminal process. The prevailing image of the police as a ministerial agency was so deeply imbedded, these accounts and especially the contention that discretion was inevitable were initially somewhat shocking to the police field. And yet police tended to accept the picture that was portrayed and to engage openly in discussion of police discretion. It was almost as if it were cathartic to talk about something that had been kept sub rosa for so long.

Although the term police discretion is now in common use, it carries many different meanings—primarily because there are so many different forms of discretion. The varied uses made of arrest (discussed above) is one such category. For some commentators, the primary category of concern is the decision not to arrest or, if arrests are to be made, the decision as to who from among a larger number of violators is to be arrested (discussed below). These categories of discretion receive special attention because they relate to what traditionally has been viewed as the most important decision-making aspect of policing—the making of an arrest—and because they pose some especially difficult questions. But many of the same questions are posed by other forms of discretion exercised by the police—in deciding, for example, on the priority to be given each function from among their many functions; whether to take the initiative in launching investigations or wait for complaints to be filed, and on the use made of different forms of investigation (e.g., informants, surveillance, undercover operations).
The documentation of these various forms of discretion, initially given visibility in the ABF survey, has vastly increased, stimulated largely by major controversies over police operations that have arisen in the past several decades. Challenges to police practices as violations of civil rights, as producing tensions in minority communities, or as wrongful responses to political protest and demonstrations all tended to focus on what were essentially discretionary decisions. A police decision in a given situation (e.g., to use force, to use an undercover operative, to conduct a surveillance, or to disperse a crowd) on review commonly raised difficult questions. Was a conscious decision made to take the action that was taken? By what standards? By what authority? And subject to what review? Who made the decision? An elected official to whom the police were responsible? The police chief? Or a police officer? Was it considered appropriate by superiors? Such questions could no longer be brushed aside or answered with the contention that the police had no discretion in the matter. The police could not resist open discussion of the tough policy questions that were raised. With these questions and a commitment to increased openness by police agencies came a recognition of the complexity and responsibility that the acknowledgment of discretion entailed.

Absent any agreement as to the best means for addressing the varied policy questions raised, there has been a flurry of activity. Legislatures have enacted statutes that curtail, clarify, guide, or mandate police actions (e.g., regarding stopping and questioning, strip searches, use of force). City councils have used their budgetary and legislative powers to set police priorities (e.g., marijuana enforcement, the decision to prosecute drug cases under federal law) and to control investigations (e.g., surveillance of political groups). The citizenry, through initiatives and referenda, have sought to provide more specific guidance to their police on issues of local concern (e.g., marijuana enforcement, use of force). Prosecutors have been more assertive in making policy decisions affecting police practices regarding matters that are subsequently of concern to them.

The most significant and sustained effort to guide police discretion has been made by the police themselves. This movement was given impetus by the president’s commission, which, echoing the ABF survey’s findings regarding discretion, gave great empha-
sis at an especially critical time to their recommendation that police agencies develop guidelines for all forms of police action. Their recommendation was supported by a detailed proposal for doing so, drawing heavily on adapting procedures commonly employed by government agencies in using administrative rule making to structure their discretion. The more advanced police departments responded enthusiastically to these urgings. Confronted with criticism or controversy or the desire to avoid it, these agencies turned to the articulation of their policies as one of the primary means for responding to concern about their operations in sensitive areas. The movement was endorsed by the American Bar Association in their standards relating to the police function, which received the approval of the International Association of Chiefs of Police. The desirability of articulating policies is now so firmly established that it is required regarding many sensitive aspects of operations by the standards for accrediting police agencies.

The response of the courts to this whole movement is more complex, especially with regard to police operations involving fourth amendment issues, as reflected in the detailed treatment of their position in the chapter by Wayne LaFave that appears in this book. The United States Supreme Court case that restricted the police use of deadly force against fleeing felons is often cited as the ultimate example of judicial endorsement of administrative policymaking in that the initiatives of police agencies, brought to the attention of the Court by the police, were commended and used by the Court to support the position it adopted.

This substantial effort to address the issues raised upon acknowledging the discretion exercised by the police stands out as one of the stronger examples of progress having been made in responding to complications inherent in the nature of policing. That is not to say, by any means, that the full dimensions of the complexity that was uncovered have been recognized, let alone addressed. As reflected in the chapters by LaFave and Parnas in this book, it is not yet at all settled who, among the various decision makers, can best make the important policy decisions that must be made in guiding the exercise of police discretion—the legislature, municipal officials, the courts, the prosecutor, or the police. Generally, police have been recognized as properly adopting policies that set down standards regarding their practices in
investigating conduct defined as criminal and in the processing of alleged offenders.\textsuperscript{41} Greater difficulty continues to be experienced in determining if the police should set the standards for deciding if a criminal statute should be enforced at all and, if so, if it should be enforced in only some of the situations it covers (see below).

Among continuing concerns is the status that should be given to written police policies. Are they to be viewed as controlling for establishing responsibility in disciplinary actions, in judging liability, or in deciding on the admissibility of evidence? The intent, on the part of the original proponents, was to view the development of policy as a way to encourage responsible thought about a difficult issue and to view the end product as a conclusion of this process—as a statement of the way in which a given police agency thinks about a problem—which can then serve as guidance for its personnel. The tendency in practice, however, is to treat anything that is written down as rules, which then are interpreted as edicts. When this occurs, the desired flexibility is lost, and any necessary diversion from the rules to meet the variety of situations the police confront returns the police to acting in a sub rosa manner.

Equally troubling is the tendency on the part of legislatures, courts, and the police to take comfort in the fact that a policy exists—that an agency has provided guidance in a discretionary area—without appropriate concern about its content. This may be based on an assumption that the willingness of an agency itself to articulate its stance achieves accountability, which is one of the primary objectives in encouraging policy development. But an equally important objective, in making the policy visible, is to subject it to a form of review that will ensure it is supported by a defensible rationale and reflects an appropriate concern with both fairness and effectiveness. The worst possible result would be to have the appearance of rules but the retention of practices that have not been thought through.

It has often been argued that policymaking cannot possibly address the infinite variety of unpredictable situations the police confront.\textsuperscript{42} Those most strongly supporting the articulation of policy would probably agree. At best, policymaking closes the gap. Recognizing this, progressive police administrators have invested substantial effort in instilling, through training and
supervision, a set of values that, in the absence of specific guidance, will serve as general standards for the discretionary decisions that must be made. If the administrators succeed, they will have taken a major step toward providing the basis for attributing to the police a new form of professionalism such as is commonly attributed to administrators in other areas of government—an attribution that has resulted in a willingness on the part of the courts to recognize the propriety of these administrators setting policy within broad legislative bounds.\(^{63}\)

**The Police Decision Not to Arrest**

In sharp contrast with the recognition of various forms of discretion exercised by the police and the significant advances in attempting to deal with this discretion, much less has been accomplished regarding the most troubling form of police discretion—the decision not to arrest, even though there is adequate basis for arrest, and the related decision to enforce a given law selectively. Police have taken the initiative to try to achieve some consistency in the enforcement of specific statutes through training and informal guidelines. Some agencies have set forth their recommended criteria in writing but restricted such documents to internal use. Rarely has a department publicly announced its intention not to enforce a given law or to enforce a law selectively and, if so, the criteria that would be employed in doing so.

Unlike the actions taken by legislatures in acknowledging the discretion exercised, for example, in stopping and questioning, in using force, and in conducting high-speed chases, they have, with one exception, avoided the reality that police engage in less than full enforcement. The exception relates to assaults by a person on another person living in the same household. Anxious to send a strong message that such assaults are as criminal as all other assaults, legislatures in some states have mandated that the police arrest whenever evidence of an assault is present.\(^{64}\) In a somewhat backward manner, these enactments probably did more to raise the full enforcement issue than was ever intended. The requirement that arrests be made in all cases has stimulated much discussion about the feasibility, fairness, and effectiveness of such a legislative policy. But more broadly, the enactment carries the implication that the police are not required to enforce all other statutes fully—an implication with ramifications that have yet to be explored.
Why the enormous reluctance on the part of the police to assert what they are already doing or intend to do? Quite simply, the potential costs are considered too high, in the absence of legislative support, with much uncertainty as to the benefits. The naive assumption that the police enforce all of the laws all of the time is so strong among legislators, elected officials, the courts, and the public generally, the police make themselves vulnerable to the charge that they are acting improperly in exercising discretion. Police administrators have been chastised, even when only alluding to the reality of less than full enforcement, for preempting the legislature, violating the "rule of law," and ignoring the separation of powers that gives legislatures the job of enacting laws and the executive branch the job of enforcing them. Police worry that open acknowledgment of partial or full nonenforcement will encourage conduct that they want to deter. They worry that published criteria will be used to challenge the legality of arrests when they do choose to arrest. And in some jurisdictions that have experienced problems of corruption in the past, they worry that any acknowledgment of less than full enforcement will increase the potential for corruption—the opportunity for officers to solicit bribes in exchange for exercising their newly recognized discretion not to make an arrest.

Each of these concerns has been aired. In rebuttal, it is argued that it is preferable to provide realistic guidance to police officers to achieve adherence to thoughtfully developed standards and to achieve uniformity and fairness; that it is preferable to share honestly with the public the criteria used in deciding whether to enforce the law and the rationale in developing those criteria; and that it is healthy to engage the community in an open discussion of the issues that arise in deciding on enforcement policies.

But whatever support has been expressed for greater openness has been dampened in recent years as the police have increasingly been held liable for their decision making in suits brought as tort actions in state courts and under the federal Civil Rights Act. Although the cases generally involve egregious police actions that a quality police department would not defend under any circumstances, the judgments have carried a broad, overpowering message that failure of the police to arrest if there was a basis for arrest was a major factor in establishing liability. A careful reading of the
cases would not lead one to conclude that police ought never to exercise discretion or, if they do, that they ought not acknowledge it. The effect, however, has been to all but stamp out whatever support existed for opening up the complex issues associated with the exercise of discretion in deciding whether an arrest should be made, because it is easier to defend a decision on the basis that the law requires it than to adequately defend even the sensible exercise of administrative discretion. As a result, most police continue to live with the widespread belief that they have a responsibility to enforce all laws fully. This means that, with regard to one of the most important aspects of their operations, they are precluded from taking those steps—through greater openness, honesty, and the development of rational policies—that could substantially improve the quality of their performance.

The Criminal Justice System as a System

"Criminal justice system" was used in the ABF survey to describe the systemic character of the intricate interrelationships and interdependence of the police, the prosecutor, the courts, and the correctional agencies. The survey made visible the important decisions in the criminal process and the way in which these decisions were affected by the actions of the several agencies.

The term—and the concept it conveyed—had enormous appeal. The president's commission made the term an indelible part of the vocabulary in thinking about the response to crime. The very organization of the commission study reflected an awareness of the importance of recognizing the systemic nature of the criminal process. And throughout its reports, the commission and its staff argued that it was imperative that the functions of each of the agencies in the criminal justice system be viewed as interrelated if there were to be progress in improving the apparatus for dealing with crime.

The emphasis on the system had its greatest and most lasting impact in academia. It not only dramatically changed what was being taught about crime and the response to crime but served as the organizing vehicle for texts, programs, and entire schools. The students in these programs would learn that several agencies are involved in the total response to crime. It is less clear how successful the programs have been in conveying and further exploring the complexities of the system—the interrelationships
of the various actors in the system and the effect that decision making at one point in the system has on operations at another point. Once brought under a single roof, the natural tendency has been to segregate studies relating to each of the agencies, usually reflecting the specialized interests of faculty members.

Another major consequence of the increased awareness of the systemic character of the response to crime was the creation, through the incentive and financing of the federal government, of coordinating councils on criminal justice in all of the states and in the larger cities. The objective was to require that states and cities, in their planning for improvement in the criminal justice area, coordinate changes so that the implications for each of the agencies would be taken into consideration. When the federal funds used to staff these efforts were eliminated, the majority of states moved to a slimmed-down institutional arrangement to supervise the funneling to localities of whatever remained of federal support—abandoning the emphasis on coordinating developments in the criminal justice agencies.

Though firmly established as part of our vocabulary, the original messages that “criminal justice system” was intended to convey, reflecting the complexity of the system, have been largely ignored in those quarters where an understanding of them is most important—in the development of public policies affecting crime. It was once suggested, for example, that, given what had been learned regarding the operations of the criminal justice system, all legislative proposals should have an “impact statement” attached to them that alerts legislators to the systemic implications of their proposals. What has happened, instead, is that legislators, in their desire to lash out at various forms of behavior, have mandated arrest, restricted plea bargaining, and enacted minimum sentences without any regard for what the likely effect of such actions might be. Likewise, state and municipal governments have increased the number of personnel at one point in the system, as with a greater number of police officers, without recognizing the need for comparable increases to handle the increased workload elsewhere.

Based on what is known about the complexity of the criminal justice system, it is predictable, with a high degree of certainty, that efforts to reduce discretion at one point in the system or to increase sanctions will cause accommodations elsewhere in the system and often produce results quite different from those
that are intended. The requirement that the police arrest in all alleged domestic abuse cases in which there is probable cause is bound to overload the rest of the system. It will also eliminate the opportunity for the police to respond to domestic violence cases in ways that give appropriate consideration to some factors, like age, that a commonsense response requires be considered. An increase in sanctions for drinking drivers is destined to reduce the number of arrests police will make. And the most recent tendency of legislators to lash out at truancy, drug possession and sale, and other nondriving offenses through the suspension or revocation of driving licenses will increase the number of drivers without licenses and insurance and load the police, prosecutors, courts, and jails with persons charged with driving after suspension or revocation. Legislation that fails to anticipate such predictable consequences ignores the most elementary insights acquired in the ABF survey. It is especially misleading if proposed as constituting an improvement in the operation of the criminal justice system. The use of the term in this loose manner strips it of all its meaning. It disregards the complex, intricate interrelationships that the emphasis on system was originally intended to convey. It ignores, for example, tough issues like the need to decide on the appropriate locus for the making of critical decisions or the need to strike a balance between achieving adequate control and achieving flexibility in responding to the infinite variety of situations the system is expected to handle.

CONCLUSION

The ABF survey was a novel undertaking. It experimented with new methods for inquiring into the operations of the police and other agencies in the criminal justice system. It identified critically important issues about the functioning of the police that had not previously received attention. And through subsequent analysis and dissemination, it made available a large amount of data and many new insights regarding these issues. By its accomplishments, the survey marked the beginning of a period in which the issues of importance in policing were redefined.

Some of this redefinition may be attributed directly to the survey. Much is due to the work of others in various forums, often totally independent of the survey. Whatever the source or the
influences, the combination of research, debate, and action in the years since the survey has raised to a much higher level efforts to improve police operations. And as a consequence, significant changes have occurred in the definition of the police function, the refinement of police authority, the structuring of discretion, and the establishment of new systems of accountability. These changes have special importance because they are of such a fundamental nature. Unlike many of the more technical and organizational changes that have been associated with police reform in the past, they confront basic problems in striving to create that form of policing that best meets the peculiar needs of policing in a free society. The changes ultimately enable the police to function in a more straightforward, forthright manner, thereby reducing both the need to operate sub rosa and the pressure to act improperly or even illegally. They have contributed to creating a healthier atmosphere within police agencies, in which atmosphere a premium is placed on openness rather than secrecy, on addressing issues rather than ignoring or suppressing them.

Much of the progress that has been realized stems from increased recognition of the complexity of the police task. The ABF survey was the first major research project that surfaced this complexity, due in large measure to the unique, penetrating and nonjudgmental nature of the inquiry. The survey demonstrated that it was essential, in research relating to the police, to observe directly the day-to-day operations of the police in the field. Although there obviously is a need, in any field of endeavor, to examine the lowest level of execution and the end product of one's work, that need had been largely ignored in the modest research efforts relating to the police, in part because of the impediments to doing such research—the strong commitment to secrecy that pervades policing, the sensitivity of the police to potential criticism, and the costly, time-consuming effort that is required. The ABF survey, since reinforced by the experience of other ethnographic studies, established a standard for the depth that is required in research relating to the police if one is to have confidence in one's findings.

If the primary product of the ABF survey, as it related to the police, can be characterized as an increase in understanding of the complexity of policing, it is important to recognize that the product was not presented in the form of a series of policy recommen-
dations or even a set of conclusions. The results of the survey, rather, were a somewhat amorphous collection of observations and insights that took shape only in the analysis of the data and in the developments that have occurred since the survey. Especially prominent among these new insights into the complexity of policing were the points described in this chapter: the multifaceted and often conflicting roles of the police, the endless array of variables present in the incidents police handle, the varied uses made of the authority conveyed to the police through the criminal law, the discretion exercised at the lowest levels in the organization (including the decision whether to arrest), and the manner in which the police affect and are affected by the different elements in the criminal justice system.

As one reflects on developments relating to these new insights since the ABF survey, summarized in this chapter, the picture that emerges is not neat and smooth. If examined closely or at any one point in time, it reflects uneven progress, frequent slippage, and occasionally even some retrenchment. When considered in its entirety and over a larger span of time, however, the cumulative picture reflects major advances—the results of a continuous and rather natural process of refinement. The reasons for the uneven progress are obvious. The new visibility acquired into policing—especially the gradual recognition of the need for discretion—was understandably disconcerting. It identified major vacuums in guidance, authority, and accountability. In a variety of different contexts, the new visibility aroused concern on the part of administrators, judges, legislators, civil rights advocates, and the public. It invited conflict over who should make important policy decisions, over how much discretion ought to be allowed and who should exercise it. It raised new concerns about controlling police conduct, and it led to attempts to control police decision making through new legislation and administrative rules. These reactions have led to the realization that the task of confronting complexity is itself complex and often frustrating to those engaged in it. Despite these difficulties, however, major progress has been realized in the past several decades toward achieving greater effectiveness and fairness—and ultimately in raising the quality of policing.

In examining this progress, one is prompted to ask what distinguishes those responses to complexity that appear to have been most productive from those that have led to dead ends or
that have encountered major difficulties. A partial answer, it appears, is in the extent to which the response—whether advanced by an academic, a legislature, or a court—takes note of the full range of complexities (i.e., the six “findings” described in this chapter) or engages with but one of them.

For example, Ronald Allen, in his often-cited dialogue with Kenneth Davis, confronts the complexity inherent in the exercise of discretion by the police. But his attack on proposals that the police use administrative rule making to indicate when they do not intend to enforce a criminal law is weakened because it ignores what has been learned about the complexity of the police function. In support of his arguments, Allen writes: “We do not say to the police: ‘Here is a problem. Deal with it.’ We say to the police: ‘Here is a detailed code. Enforce it.’” Consideration of all of the complexities surfaced by and since the ABF survey make it abundantly clear that we do, indeed, say to the police: “Here is a problem. Deal with it.” Likewise, the action of legislatures in mandating arrest in domestic violence situations also engages the issue of discretion, opting to eliminate it, but such legislation creates problems because it fails to deal with the infinite variety of factors that distinguish the cases police are required to handle and because it does not give adequate consideration to the capacity of the criminal justice system to process the greatly increased number of arrests likely to be made.

By contrast, one finds the rewards for more comprehensively confronting complexity in the optimism that pervades the current movement to implement a radically different model of policing that focuses on solving problems and on engaging the community. Problem-oriented policing and the more advanced forms of community policing engage with the full range of complex factors given visibility by the ABF survey and by subsequent research on the police. The movement acknowledges the multifaceted nature of the police function, recognizing that the job of the police is not simply to enforce the law but, more accurately, to respond effectively to a wide variety of community problems. It acknowledges that each such problem differs from every other and that the highly individualized character of the incidents that together constitute a problem require that the police be equipped with a broad range of appropriate responses, including new resources, authority, and skills. It recognizes the need for flexibility in choosing
from among these responses, including discretion in the use made of arrest and prosecution. It acknowledges the need to recognize the limited capacity of the criminal justice system and the need to engage problems in accord with public expectations that transcend the obligations for enforcement. Finally, it acknowledges the need to make discrete use of the criminal justice system when it appears to be the most effective means available for dealing with a problem.

Skeptics of change in policing tend to view all new initiatives as fads, not likely to take root and have a lasting impact. They can cite much in the recent history of efforts to improve policing to support their view. The major distinctive quality of problem-oriented policing and the more advanced forms of community policing is that they grow out of a recognition of all the complexities uncovered in policing and that they are designed to connect with these complexities. As a conceptual model for the future, they are in many respects the culmination of efforts to think through the implications of all of the insights that have been acquired into policing since the results of the ABF survey first became available. Resting on so solid a foundation, the enormous potential they hold should be an incentive to maintain their purity, to resist pressures to return to simplistic responses, and to support those efforts that continue to confront the complexity inherent in the policing of a democratic society.

NOTES


The American Bar Foundation published the results of its survey in a five-volume series. See p. 13.

14. For a comprehensive description of these findings, see Wayne R. LaFave, *Arrest: The Decision to Take a Suspect into Custody*, ed. Frank J. Remington (1965), 437–82.


19. The most valued results of these observations are available in Albert J. Reiss, Jr., *The Police and the Public* (New Haven: Yale University Press, 1971).

20. The connection between the ABF survey and the President’s Commission on Law Enforcement and Administration of Justice was, in some respects, a personal one. Lloyd E. Ohlin, who had been consultant on field research for the ABF survey, was associate director for
research for the commission. Frank J. Remington, who had been director of field research for the ABF survey and editor of the summary volumes, was a general consultant for the commission. And Herman Goldstein, who had been a field researcher for the ABF and had responsibility for some of the initial analysis, was a consultant on the police. Ohlin, Remington, and Goldstein met with James Vorenberg, director of the commission, in the planning stages of the commission’s work, and several memorandums were exchanged—especially regarding the direction of the commission’s inquiries relating to the police. Subsequently Remington and Goldstein wrote chapter 2 of the task force report on the role of the police in developing law enforcement policy.


22. Ibid., 108–9.


34. President's Commission on Law Enforcement and Administration of Justice, *Challenge of Crime* (see n. 21), 3.


39. As of 1988, two states had passed laws providing for mandatory


51. For example, in responding to gang violence, the Los Angeles Police Department in 1988 used one thousand officers in conducting "sweeps" that resulted in the arrest of as many as one thousand persons in a weekend. At least half the cases were dropped immediately for lack of evidence. *Criminal Justice Newsletter* 19, no. 19 (Oct. 3, 1988):2–3.

52. For a summary of these developments, see Danny Scott Ashby, "Fourth Amendment Pretexts: Are Two Reasons to Stop the Defendant One Too Many?," *Baylor Law Review* 41, no. 3 (1989):495–540.


54. J. Goldstein, "Police Discretion Not to Invoke" (see note 15); LaFave, "Police" (see note 53); Davis, *Discretionary Justice* (see note 17); Gregory H. Williams, *The Law and the Politics of Police Discretion* (Westport, Conn.: Greenwood Press, 1984).


57. American Bar Association, "Urban Police Function" (see note 28), 121–44.


59. See chapter by Wayne LaFave in this volume.

61. Strong support exists for the development of policies relating to, for example, the use of informants; conducting a surveillance; stopping and questioning suspects; the use of force in making an arrest; conducting a high-speed chase; deciding whether to issue a citation or make a physical arrest and detain; choosing, if the option exists, between charging a violation of a state statute or a city ordinance; conducting in-custody questioning; providing access to counsel; and conducting lineups.


63. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), for example, the Supreme Court declared that a prime factor in determining whether a state agency adequately protects the constitutional rights of retarded persons in its custody is the extent to which professional judgment has been exercised in treatment and other decisions affecting such persons. See also *Central School District v. Rowley*, 458 U.S. 176 (1982), and *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984). I am indebted to Prof. Victor G. Rosenblum for suggesting the analogy and for directing me to these cases.

64. See note 39, above.

65. Most often cited in this regard is *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), in which damages were awarded for the repeated failure of the police to respond appropriately to the plaintiff's request for help in protecting herself from an abusive spouse.

66. See chapter by Donald J. Newman in this volume.


68. Ronald Allen, "Police and Substantive Rulemaking: Reconciling Principle and Expediency" (see note 18), 62.

69. Ibid., 97.