

# University of Pennsylvania Law Review

FOUNDED 1852

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Formerly  
American Law Register

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VOLUME 125

JUNE 1977

NUMBER 6

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## DIALOGUE ON POLICE RULEMAKING

### POLICE RULEMAKING ON SELECTIVE ENFORCEMENT: A REPLY

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The Editors have invited me to respond to Professor Allen's Article, the thesis of which is that "the use of rulemaking by the police to limit the scope of the substantive criminal law . . . is inconsistent with our theory of government . . ." <sup>1</sup> I have accepted the invitation, because I strongly believe that police rulemaking on selective enforcement is desirable, and I want to present my reasons for rejecting Professor Allen's thesis.

The problem, as I see it after 300 interviews with Chicago police, is that most selective enforcement policies are now made by patrolmen with insufficient guidance from top officers, that the unevenness of the policies causes unequal justice that the policies should be mostly open instead of generally secret, that they should be based on studies by qualified professionals, and that they should be coordinated with policies of prosecutors and judges. <sup>2</sup>

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<sup>1</sup> Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 69 (1976).

<sup>2</sup> See K. DAVIS, *POLICE DISCRETION* (1975).

For the present maladies, Professor Allen advances no affirmative solution. After forty-seven pages, he says: "Thus far I have only articulated the weaknesses of one proposed method of controlling police behavior. That alone is an inadequate treatment of this troublesome area."<sup>3</sup> I agree. But in his remaining eight pages, he still advances no proposed solution.

He says that "the most effective way to restrict police discretion would be to revise the criminal law to eliminate vague and overly broad statutes."<sup>4</sup> I agree. But he adds: "This revision, however, is not likely to occur on any great scale."<sup>5</sup> Again I agree. That would be an ideal solution, but I see no likelihood that we can change the basic nature of our legislators.

Professor Allen seems to me clearly right in saying "full enforcement of the criminal law is impossible,"<sup>6</sup> and he is also clearly right in saying that "[e]ven without statutory authorization, the police probably possess an inherent power to allocate their resources pursuant to departmental priorities."<sup>7</sup> Indeed, these propositions are mainstays of my thinking in trying to work out an affirmative solution. I think the police should develop "departmental priorities."

If "departmental priorities" are necessary because "full enforcement . . . is impossible," then does not some law have to be unenforced or partly enforced? He says no. He says nonenforcement is "repeal" of a legislative enactment and that partial enforcement is "amendment."<sup>8</sup> He specifically objects to limiting enforcement of an ordinance prohibiting drinking in the park to cases of "drunkenness, noise or the disturbance of others" on the ground that "so reducing the scope of a statute amends it."<sup>9</sup>

My view is the rather obvious one, which he rejects, that because "full enforcement is impossible," some law must be wholly or partially unenforced even if the result is what he considers to be repeal or amendment of enacted law.

Because "full enforcement is impossible" and "departmental priorities" are necessary, I think any solution probably has to involve a choice between two main courses of action (or some

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<sup>3</sup> Allen, *supra* note 1, at 110.

<sup>4</sup> *Id.* 110 n.201.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* 74.

<sup>7</sup> *Id.* 111.

<sup>8</sup> *Id.* 80.

<sup>9</sup> *Id.*

mixture of the two): (1) the present system of allowing selective enforcement policies to be made primarily by patrolmen, with some significant but unsystematic instructions from top officers, or (2) something along the line of my proposal that top officers should make the main selective enforcement policies through systematic studies and rulemaking proceedings. Professor Allen strongly opposes the second course, but he does not make clear whether he favors the first; if he does not, I do not know what he does favor.

In advancing his thesis that police rules on selective enforcement are "inconsistent with our theory of government," Professor Allen apparently does not realize that the police have always had such rules. Selective enforcement in the Anglo-American system goes all the way back to the early English constables. American police organizations have always had some rules about selective enforcement. No court has ever held such rules invalid, and no court is likely to do so.<sup>10</sup>

A rookie patrolman asks his sergeant: "When I'm hurrying to my beat and I find someone smoking in the elevator, do I have to arrest him?" The sergeant says: "Hell no." Thus is created a rule on selective enforcement.

While the men stand at attention on Monday morning, the chief expresses his anger about what one of the neophytes has done: "When you're after a robber, for God's sake don't stop to make an arrest for spitting on the sidewalk or drinking in the park." That is a rule on selective enforcement.

A patrolman brings in a sixteen-year-old for smoking marijuana. After the booking, the watch commander says to the patrolman: "Why did you waste your time on that? Don't you know

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<sup>10</sup> A court has interpreted a statute that "The chief of police shall prosecute . . . all violations . . . which come to his knowledge," WASH. REV. CODE § 35.24.160 (1965), to mean that the chief has "basic policy discretion" in deciding not to prosecute a violation that came to his knowledge. *Walters v. Hampton*, 14 Wash. App. 548, 543 P.2d 648 (1975). In not being at all troubled by the kind of problems that Professor Allen emphasizes, the court may have been typical.

Judge Henry Friendly has expressed himself extrajudicially: "Full enforcement is unattainable as a practical matter not only because the legislature has failed by a wide margin to provide the necessary funds, but because no one could really want it. If the Chicago police arrested all unmarried adults of opposite sex who were living together, or all boys riding bicycles on sidewalks, or all families drinking beer while picnicking in public parks, they would not only wreck the prosecutors' offices and the criminal court system but would create a public outcry." 44 U. CHI. L. REV. 255, 255 (1976).

Despite Professor Allen's earnest arguments about separation of powers, I think nearly all judges would agree with Judge Friendly.

the state's attorney's office won't prosecute?" The result is a rule on selective enforcement for that patrolman, and he will spread the word to his colleagues.

No patrolman would arrest a twelve-year-old who gets a new bicycle and innocently rides it on the sidewalk. Even if the unspoken rule that the boy first should be warned is inconsistent with what the legislative body has said and, in Professor Allen's view, is an "amendment" of the ordinance and therefore a violation of the theory of separation of powers, we may all be thankful that the common sense of the patrolman supersedes that kind of legal thinking.

The reader can make his own guess as to whether any department in the country is likely to be without a rule on selective enforcement along the following line: "When you can arrest only one of two offenders, ordinarily you should choose the one who has committed the more serious offense." Such a rule is a rule on selective enforcement. It need not be made explicit. Any intelligent officer, without instruction, is likely under his own power to arrive at some such rule.

The Allen thesis that rules on selective enforcement are "inconsistent with our theory of government" fails to take into account that some rules are written, some are oral, some are tacit, and some are unarticulated habits. Rules that are sensible, that the community has long accepted, and that courts have never invalidated are a part of our longstanding "theory of government" and are likely to continue to be.

I favor not only continuing such rules but expanding them so that they will be more systematic and so that they will have a more democratic base. My position is not iconoclastic. The broad lines of what I want are favored by such organizations as the American Bar Association's Project on Standards for Criminal Justice (especially standard 4.3),<sup>11</sup> the National Advisory Commission on Criminal Justice Standards and Goals (especially standard 1.3),<sup>12</sup> and the International Association of Chiefs of Police, which has not only approved the American Bar Association Standards but has sponsored a set of Model Rules for Law Enforcement Officers.<sup>13</sup> Also, the Texas Model Rules, in the

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<sup>11</sup> ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE URBAN POLICE FUNCTION (1972).

<sup>12</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: POLICE (1973).

<sup>13</sup> MODEL RULES FOR LAW ENFORCEMENT OFFICERS: A MANUAL ON POLICE DISCRETION (1974).

face of a full enforcement statute, specifically provide for non-enforcement of some statutes.<sup>14</sup> The movement is a strong one and is gaining momentum.

I do not propose rules on all aspects of selective enforcement. Most of the rules I advocate will be guides, not inexorable commands. They will be interpretative rules, not substantive or legislative rules.<sup>15</sup> The procedure of notice and written comments seems to me appropriate for much rulemaking on selective enforcement, but not all. Especially important is my key proposition that rules should not cut into needed individualizing.

The quality of justice administered by the police can be much improved, in my opinion, if the present rules on selective enforcement are gradually expanded. I predict that that will happen.

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<sup>14</sup> TEXAS MODEL RULES ch. 5 § 6.01 (1975).

<sup>15</sup> The worst error Professor Allen makes, in my opinion, is one that goes to the heart of his thesis. He asserts, and then repeats in his rejoinder, that I favor "substantive rules" on selective enforcement. If that were my position, he would surely be right that what I advocate is "inconsistent with our theory of government."

At pages 108-11 of *Police Discretion* I discuss my reasons for favoring police "interpretative rules" and my reasons against "legislative rules," which courts often call "substantive rules." Statutes do not customarily confer rulemaking authority on the police. Therefore, they have no power to make "legislative" or "substantive" rules. But when Congress in 1938 debated the question whether to confer a rulemaking power on the Wage and Hour Division and deliberately decided not to, the Supreme Court held that the Administrator had authority to issue what the Court called "interpretative rules." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The holding in that leading case is not "inconsistent with our theory of government." The principle the Court enunciated applies to all administrative agencies, including police departments.