

REVIEW

Discretionary Justice: A Preliminary Inquiry. KENNETH CULP DAVIS.
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We live in a day of increasing mistrust of government particularly by the young, the poor, and the black. Much of this mistrust may reflect no more than dissatisfaction with the failure of government to end the war, to reduce racial discrimination, or to deal effectively with poverty. But there is reason to believe that war, racial discrimination, and poverty, important as they obviously are, may only be symptoms of a more basic difficulty. Where dissatisfaction is deeply felt, the increasingly common assumption is that constructive change can only come from confrontation and reallocation of power. Confrontation and crises do often produce social change and if widespread enough can compel a rethinking of governmental priorities. A reallocation of power can force changes in the treatment of the young, the black, and the poor. But it is less clear that crises, confrontation, and power reallocation can pro-

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1 In the treatment of individuals it has long been apparent that punishment for improper conduct without reward for proper conduct often produces frustration in the individual rather than positive personality development. Yet, in dealing with some government agencies, such as the police, there has been almost total reliance upon the negative—the exclusionary rule of evidence, civil liability, criminal prosecution—in the apparent view that this would produce good police work. The Davis book is one of the few constructive proposals for rethinking the ways available to encourage proper governmental decision-making. For a discussion of the limitations on the effectiveness of the exclusionary rule, see LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965). The need for a more adequate response to the control of police practices is made apparent in a series of studies prepared under the auspices of the American Bar Foundation as part of its Survey of the Administration of Criminal Justice in the United States. See especially L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* (1967), and W. LAFAVE, *ARREST* (1965). There is a helpful discussion of the need for a more adequate approach to law enforcement decision-making in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967), and THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE POLICE* (1967).

duce a workable governmental and social system. It is not necessarily true that persistent opposition to what is conceived to be bad, important though that is, will necessarily produce a good system.¹ The persistent application of negative sanctions, without also rewarding appropriate governmental responses, often produces more frustration and increasing reliance upon force and repression rather than producing constructive change.²

Much of today's obvious dissatisfaction with government relates to the way government responds to the concerns of its citizens. This is reflected in the increasing popularity of proposals for civilian review boards or an ombudsman, some system of making government more responsive to the needs and desires of those who lack the power to make their demands effective through the elective process. Although courts have served this role to a large degree, there is a limited power in courts resulting from the fact that only some of the important social issues of major current concern come before them.

To the extent that dissatisfaction with governmental processes on the part of the young, the poor, and the black is legitimate, there is obvious need for change. Change can be achieved in various ways. One way—the easiest—is to go from crisis to crisis, trying to settle each one as it arises, making only those changes necessary to resolve the immediate crisis. However, crises are likely to produce constructive change only when there is a goal or a blueprint setting forth the pattern of change which is desired. For a time it was generally assumed that those who complained, who brought about confrontation, had a goal, an alternative system, clearly in mind and were trying to achieve the change necessary to attain that goal. It has become increasingly clear that being convinced that change is necessary does not necessarily imply that the person dissatisfied either has an alternative in mind or is really capable of suggesting what the alternative should be.³ The development of better alternatives ought to be the task—the responsibility—of the

² The frustration resulting from the Johnson Administration's apparent failure to develop adequate positive approaches to the problems of the young, the poor, and the black has undoubtedly created pressures on the Nixon Administration to use repressive measures. Thus one of the programs of the new Administration is to call for the repeal of some Supreme Court decisions. Just as courts have been largely ineffective in controlling police practices, so also will repeal of court decisions be largely ineffective in improving police performance or effectiveness. It is Davis' point that we overstress judicial review; this is illustrated by the federal government's attributing to the present judicial review of police practices major responsibility for crime and for the ineffectiveness of law enforcement.

³ What has been said to be an objective of anarchy by some young students may instead reflect the fact that they know the reasons for their dissatisfaction but lack the ability to devise a better system.

architects of government, those whose interest and commitment are in orderly governmental processes which command the respect and support of a broad segment of the community.

Certainly this is a challenge for the lawyer, the professional who has been looked to as a person skilled in the development of procedures and systems to structure government's response to the problems of its citizens.⁴ Unfortunately, too often the lawyer, like the citizen generally, has responded out of emotional commitment, either for or against a given governmental practice; the police conduct at the national Democratic convention, for example. Or, the response has been traditional, assuming that the principal path of constructive change is through the formal process of court litigation; the "test case" approach to change, for example.⁵ As a consequence much time has been spent trying either to determine who was most at fault in a riot situation or in reliance upon the process of judicial review. Significant as both of these may be, it has long been apparent that fault-finding inquiries and formal litigation are not, in themselves, adequate responses to the critical social and governmental problems of the day. At best they may redress past wrongs and serve as a stimulus to change. Seldom are they adequate in themselves both to chart and implement a program of constructive change.

This is why the contribution of Kenneth Culp Davis is, in my judgment, so significant. He makes an important proposal for reevaluating the method by which governmental power is exercised today, particularly by agencies most concerned with the important social problems of the day. His objective is better "discretionary justice" and he has definite proposals as to how this objective can be achieved. It is obviously too much to expect any proposal to be a panacea for the complex

⁴ Perhaps this is an overstatement. Certainly most lawyers, the academic lawyer particularly, have devoted most of their efforts to being critical of the current system rather than to devising new and better systems to replace the old. Perhaps this is characteristic of most higher education and may explain why the young person is better at opposition than at the development of positive proposals. What makes the Davis book so refreshing is that he couples criticism of existing practice with a positive proposal for change. Unfortunately this is rare. See *e.g.*, ADVISORY COMMITTEE ON THE POLICE FUNCTION, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE (1968), which came out with standards relating to electronic surveillance, when the great need is for lawyers to direct their attention to the kind of decision-making responsibility which police should have and the kind of system which needs to be developed to obtain effective and responsible law enforcement.

⁵ The Davis approach suggests that the reliance upon legal services as a principal means of social change may be a mistake. See *especially* p. 182. Valuable though the efforts of the American Civil Liberties Union have been in redressing citizen grievances against police, there is no reason to believe that bringing law suits against police officers is an effective vehicle for constructive change in law enforcement.

problems which exist. It is enough that it holds potential for achieving major improvement.

I

Kenneth Davis, in conversation, describes *Discretionary Justice: A Preliminary Inquiry*, as some "three-quarter-thought-out-ideas" in contrast to some "half-thought-out-ideas" expressed in the chapter on discretionary power in his previously published casebook.⁶ His self-characterization seems unduly modest. Whatever the limitations of the book, it is apparent, in reading it, that Kenneth Davis has thought more about how governmental power is exercised today and has more sensible suggestions as to how current practices should be changed than does anyone else who has expressed his views in writing. This is high praise and it is intended to be.

Although Kenneth Davis is a distinguished legal scholar, author of a multi-volume text on administrative law, this latest book of his is no ordinary law book. Ordinary administrative law books confine their attention to prestigious administrative agencies such as the Interstate Commerce Commission and the Federal Trade Commission, agencies which have substantial responsibility for the maintenance of economic order. *Discretionary Justice* deals with these, but it deals also with less prestigious agencies such as police, prosecutors, and parole boards, agencies which have substantial responsibility for the maintenance of the social order.

The background of the author is impressive, and he demonstrates the wide reach of his interest, his knowledge, and his experience. His current interest is in the exercise of discretionary power whatever the nature of the governmental agency, whatever the subject matter with which it deals. He has a unique ability to view the exercise of discretionary power across a wide spectrum of governmental activity which results in a book "relevant" to the Federal Trade Commission and to the police and the correctional, welfare, mental health, and educational administrators.

Though Professor Davis' interest is in *discretionary justice* whatever the governmental agency involved, his ideas are, for me at least, most stimulating when applied to social regulatory agencies such as the police; agencies which have been largely neglected by lawyers and other students of government; and agencies which are, as a consequence,

⁶ K.C. DAVIS, *ADMINISTRATIVE LAW, CASES-TEXTS-PROBLEMS* ch. 4, 70-103 (1965). See *id.* at 82-84 where Davis lists 18 ways to control discretion. In doing so he provides a thought-provoking way of rethinking the way discretion is exercised.

ill-equipped to respond to the major social crises which confront them today.⁷

The book is written in such an informal, readable, and stimulating style that the really profound contribution it makes can easily be overlooked. As is the case with many important contributions to thought, the central message of the book seems, once read, to be both obvious and obviously right. It is simply that the exercise of discretionary power by governmental agencies is more important than the formal process of adjudication and formal rules of law and, as a consequence, the exercise of discretionary power ought to be given much greater attention than it has in the past to insure that it is properly confined, structured, and checked.

In his concluding chapter Professor Davis puts the need in this way:

[S]ignificant progress is unlikely if . . . we focus only on the superior agencies that deal with large economic interests, such as the federal regulatory agencies and the Internal Revenue Service, where the quality of justice is usually reasonably high, and neglect the generally inferior agencies which deal with mixtures that seem more human than economic, such as police, prosecutors, welfare agencies, selective service boards, parole boards, prison administrators, and the Immigration Service, where the usual quality of justice is relatively low. Unlike the bar groups, we must dig into the kinds of injustice that can be neither cured nor alleviated by either formal hearings or judicial review.

The strongest need and the greatest promise for improving the quality of justice to individual parties in the entire legal and governmental system are in the areas where decisions necessarily depend more upon discretion than upon rules and

⁷ Because I think the "social regulatory" agencies have been neglected, I stress social issues in this review though I know that Davis intends the book to be one on discretionary justice generally, and he does not emphasize its significance to police, educators, and welfare administrators as much as I do. The apparent fact is that lawyers have given constructive attention to the economic regulatory agencies, probably because the economics of the profession made it feasible to do so. The social regulatory agencies have been neglected, and we are, in my judgment, in the 1960's with regard to regulation of social conduct where we were in the 1930's with regard to the regulation of economic conduct. Lawyers in the 1930's and since have thought it professionally appropriate to staff economic regulatory agencies. Doesn't the same need exist today with regard to social regulatory agencies? Former New York Police Commissioner Michael Murphy once told me that he thought that to head a large city police department requires the abilities and training of a good lawyer. If required for the Federal Trade Commission, doesn't it follow that Commissioner Murphy is right? Unfortunately the American Bar Association's Advisory Committee on the Police Function, see note 4 *supra*, did not come to grips with this kind of basic and as yet unresolved issue.

*principles and where formal hearings and judicial review are mostly irrelevant.*⁸

The assertion that the study of the exercise of discretionary power be given highest priority is in a sense obvious, yet it is developed by Professor Davis in a way which has at least the following significant implications:

(1) The governmental agency which it is important to study is that which exercises the greatest amount of discretionary power, rather than the agency which is the subject of the greatest number of formal rules of law and most often the subject of formal judicial review.

(2) For every governmental decision there is an optimum point on the scale between rule-of-law at one end and total discretion at the other end. The task of research is to find that optimum point and to confine discretion to the degree which is feasible.

(3) Where discretionary power is exercised, it ought to be confined, structured, and checked in order to achieve the greatest amount of discretionary justice and the least amount of discretionary injustice. Unconfined, unstructured, and unchecked discretion holds great potential for injustice. In deciding how best to confine, structure, and check discretion, the relatively extensive experience with the economic regulatory agencies is revelant.

Each of these fairly simple, but important, assertions deserves further elaboration.

A. The Importance of Agencies Which Exercise the Broadest Discretionary Power

Even today many lawyers will be surprised to hear an administrative lawyer say:

The police are among the most important policy-makers of our entire society. And they make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.⁹

Despite the fact that this is obviously right, it has only been recently that there has been any study of the exercise of discretion by police.¹⁰

⁸ Pp. 215-6 (*italics in original*).

⁹ P. 222.

¹⁰ The first systematic study of police discretion took place in the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. Stimulated in large part by that research, there has been an increasing number of books and articles dealing with police discretion including the following: M. BANTON, *THE POLICEMAN IN THE COMMUNITY* (1964); W. LAFAVE, *ARREST* 61-161, 490-527 (1965); R. MYREN

Many assert that it would be better if police merely "enforced the law fully" and even today there is no police department in the United States which is equipped to give the kind of consideration an administrative agency should give to the making of important discretionary decisions. Adequate recognition of the seemingly simple point made by Kenneth Davis would constitute a much needed first step toward a fundamental reevaluation of our conception of the police function.

What is said about police can also be said about welfare, mental health, correctional, and educational administrators, all of whom exercise immense discretionary power which has important effect upon lives of citizens, particularly the young and the poor who are today most vocal in their complaints about the lack of sufficient concern about *justice* in the exercise of discretion. The failure to give adequate attention to the social regulatory agency reflects a number of traditional assumptions which seem no longer adequate in the time of current crisis. For some agencies, welfare and educational, for example, it was assumed that the fact that the administration was motivated by a desire to help the welfare recipient or the student was an adequate safeguard against injustice. Though it has long been apparent that this was not necessarily so,¹¹ it has taken the current confrontation by the poor and the young to compel reconsideration of this traditional assumption. For some agencies, correctional, for example, it was assumed that their decisions involved only "privileges and not rights," and therefore that ordinary considerations of justice did not

& L. SWANSON, *POLICE WORK WITH CHILDREN* 27-32 (1962); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 157-69 (1968); J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966); J.Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* (1968); Abernathy, *Police Discretion and Equal Protection*, 14 S.C.L.Q. 472 (1962); Bittner, *Police Discretion in Emergency Apprehension of Mentally Ill Persons*, 14 SOC. PROB. 278 (1967); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); H. Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L.C. & P.S. 160 (1967); H. Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. AD. REV. 140 (1963); J. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962); LaFave, *Improving Police Performance Through the Exclusionary Rule* (pts. 1-2), 30 MO. L. REV. 391, 566 (1965); LaFave, *The Police and Nonenforcement of the Law* (pts. 1-2), 1962 WIS. L. REV. 104, 179; Osborough, *Police Discretion Not to Prosecute Juveniles*, 28 MOD. L. REV. 421 (1965); Remington, *The Role of Police in a Democratic Society*, 56 J. CRIM. L.C. & P.S. 361 (1965); Remington & Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481; Comment, *Police Discretion and Traffic Law Enforcement*, 39 WASH. L. REV. 840 (1964); Note, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968).

¹¹ This point was most effectively made a decade ago in Allen, *The Borderline of the Criminal Law: Problems of "Socializing" Criminal Justice*, 32 SOC. SERV. REV. 107 (1958).

apply.¹² Professor Davis asks whether a parole decision, unaccompanied by reasons for the denial of parole, is either good justice or good rehabilitation. The answer seems quite obviously to be no, and no amount of discussion of the difference between "privilege" and "right" will change this. For some agencies, police, for example, it has traditionally been assumed that they merely "enforce the law" and thus did not exercise discretionary power. Even the most casual observation of police practice demonstrates that this is not so. Rather, as Professor Davis points out, police probably exercise more discretionary power than all economic regulatory agencies combined. Finally, as to some agencies, the prosecutor, for example, it has traditionally been assumed that it is neither feasible nor desirable to attempt to confine, structure, or check the wide discretion which he can exercise. Professor Davis asks why this is so. And there seems no satisfactory answer, aside from tradition, to his question.

B. *The Desirability of Confining Discretion*

A couple of decades ago, a leading student of criminal justice administration, Herbert Wechsler, said:

Whatever one would hold as to the need for discretion of this order in a proper system or the wisdom of attempting regulation of its exercise, it is quite clear that its existence cannot be accepted as a substitute for a sufficient law. Indeed, one of the major consequences of the state of penal law today is that administration has so largely come to dominate the field without effective guidance from the law. This is to say that to a large extent we have, in this important sense, abandoned law—and this within an area where our fundamental teaching calls most strongly for its vigorous supremacy.¹³

His subsequent preparation of the Model Penal Code and its influence on state legislation has, to some extent, confined and given greater guidance to the exercise of discretion in the administration of the criminal law. But even as ambitious a project as the Model Penal Code can only slightly limit the need to exercise administrative discretion.¹⁴

¹² This issue is helpfully dealt with in F. COHEN, *THE LEGAL CHALLENGE TO CORRECTIONS* (1969).

¹³ Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952).

¹⁴ We have had a fair test of the proposition that revision of the criminal code will effectively limit the need to exercise discretion. This assertion was most effectively put by Joseph Goldstein in *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960). But neither the American Law Institute's Model Penal Code nor the major revisions in states such as Illinois, Minnesota, New York, and Michigan have effectively limited the necessity of

The Code deals practically not at all with police or prosecutor discretion, and its interesting effort to limit and guide correctional decision-making still leaves room for the making of crucially important administrative decisions.

Despite our adherence to the principle that ours is a government of law *not* men, it is perfectly apparent, as Davis points out, that ours is and always must be a government of law *and* men.¹⁵ However, this does not mean that discretion should not be confined by formal rule and its exercise subject to legislative or judicial criteria. It does mean that however ambitious the efforts to confine discretion may be, there will remain wide opportunity for agencies such as police, welfare, correctional, and educational agencies to exercise discretion, and it is important to recognize this fact and to try to find, for each important governmental decision, the optimum point on the scale between rule at the one end and unlimited discretion on the other. Too often in the past it has been assumed that the only choice was between no discretion (*e.g.*, for police) and unlimited discretion (*e.g.*, for the prosecutor).

C. *The Need to Structure and Check Discretion*

Where discretion exists, Davis asserts that it should be exercised openly, except where there are overriding reasons for confidentiality. Secrecy also holds high potential for injustice. When decisions are made, reasons should be given for the decision and, whenever possible, the community should be allowed to react to the decision and the reasons. Justice is best served if people know why they are treated as they are and what, if anything, they can do to change the treatment they dislike. This is not only good justice—it is also good education when students are involved; good treatment when sick people are involved; and good rehabilitation when social deviants are involved.¹⁶ There ought to be opportunity to challenge decisions and have effective review, if not judicial, at least careful administrative review. An administrative agency should strive for consistency. Unexplained disparity of treatment is unjust. Whenever feasible, individual decisions should be

exercising discretion in administration. Though a persuasive argument can be made that we should rethink the use of the criminal justice process to deal with behavior such as drunkenness, narcotics, gambling, and the like, even the removal of these offenses would still leave the necessity of selective application of the criminal law. And even drunkenness is likely to remain criminal until we develop better alternatives. *See* Remington, *The Limits and Possibilities of the Criminal Law*, 43 NOTRE DAME LAW. 865 (1968).

¹⁵ P. 17.

¹⁶ Even professional parole board members and highly qualified clinical therapists differ as to whether an inmate should be told why he is denied parole. However, among younger clinical personnel there is a tendency to favor a maximum of disclosure in the interest of both fairness and good therapy.

guided by general administrative policies formulated by the agency on the basis of its decision-making experience.¹⁷ The best way to accomplish all of these things is to use the administrative rule-making process whenever possible, which Davis looks upon as one of the great inventions of government¹⁸ but one too little used, particularly by police, educators, and welfare, mental health, and correctional administrators.

II

How significant are the Davis proposals? One test is in the effect they will have, if followed, upon the handling of current, difficult social situations to which government is called upon to respond. For most government agencies, mayors, police, and educators, the current student disorders present a most perplexing challenge and thus present a good test.

For example, there was in early May 1969 in Madison, Wisconsin a series of very serious student disorders. The precipitating factor was the refusal to allow a large group of students to have a street dance in the 500 block of West Mifflin Street. It is important to understand some of the background events which led up to the West Mifflin Street disorders.

In 1961, the Chief of Police explained that he had instructed his officers to enforce the curfew ordinance only when there was reason to believe that the young person did not have some legitimate reason for being on the street after the curfew hour. This public statement of the Chief produced the following editorial comment in the local newspaper with a liberal reputation:

A strange philosophy of law enforcement has been expounded by Madison Police Chief Wilbur H. Emery. The

¹⁷ A proposal favoring police policy-making is found in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE ch. 2, 13-41 (1967); it is also recommended in the Kerner Commission Report, *see* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 164-5 (1968). The suggestion is also contained, as Davis points out, in the ALI MODEL CODE OF PREARRAIGNMENT PROCEDURE § 1.03 (Tent. Draft No. 1, 1966). *See* p. 92. The issue of policy-making in criminal justice administration at both the police and correctional stages is dealt with in some detail in F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION pt. IV, ch. 18, 1171-1214 (1969). *See also* the helpful discussion in Ruth, *Promoting Consistent Policy in the Criminal Justice Process*, 53 VA. L. REV. 1489 (1967). There is indication that police and correctional administrators are becoming more sensitive to the need for giving more attention to the development of more adequate departmental policies to guide and control important law enforcement decisions. It is not unlikely that this will be more common in the future if, but only if, there is increasing recognition of the important public policy-making function which police agencies do and must inevitably perform.

¹⁸ P. 92.

Chief says his officers cannot enforce the letter of the law setting a curfew of 10 p.m. on city streets for children under 17 who are not accompanied by a parent.

Chief Emery says he does not think the public would stand for strict enforcement of the letter of the law. The courts, too, he feels, would take a dim view of overly strict enforcement.

Since when, we feel compelled to inquire, is it the function of the police chief to decide which laws can or cannot be enforced? By what authority does he claim the right to interpret what the "public" will or will not stand for in law enforcement?

In a representative government the will of the people is expressed through their elected public bodies. The curfew law is an official city ordinance, duly passed by the city council, and as such is open to no other interpretation but that it is the will of the people. The essence of our system of government is that we are governed by law, not by whim or decree. It is the function of the police to enforce these laws. If the law needs revision or repeal that is for the people to decide through the city council. Meantime, the Chief is legally and morally obliged to carry out the letter of the law.

.....

This, we repeat, is a strange philosophy of law enforcement. If the curfew law may be violated with impunity why should not other citizens violate other laws which they might find irksome? This is the road to anarchy.¹⁹

Some time later the city council passed an additional ordinance prohibiting persons from being in public parks after 10:00 p.m. It was apparent that the ordinance was prompted by concern over rising vandalism in the parks at night. When the Chief of Police inquired as to whether he should enforce the law literally, he was told by council members that he should use "common sense."

During the fall of 1967, a disturbance occurred on the Wisconsin campus growing out of efforts by students to block recruiting by the Dow Chemical Company. Madison police were criticized by much of the university community for their use of force in removing demonstrators instead of using alternative methods of dealing with the "sit-in."

In the period between 1967 and the spring of 1969 there was an acceleration of public interest in police (paralleling national attention given the police). On the one hand, the state legislature had under

¹⁹ The Capital Times, Sept. 9, 1961. This editorial is used as part of the material dealing with "The Decision Whether to Enforce the Law" in F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, *CRIMINAL JUSTICE ADMINISTRATION* 276-326 (1969).

active consideration a bill which would place responsibility for policing the Madison campus on the Madison City Police Department (rather than the campus police) because the Madison city police would presumably "enforce the law." Student government was at the same time supporting the Madison firemen's claim of the right to pay-parity with police, a position which obviously depreciates the social policy responsibility which the police have. Both sides—legislature and student—in effect, took the position that the police role was largely ministerial, not one involving a broad responsibility for exercising discretionary power.

Late in April, 1969, there was a large-scale demonstration at the State Capitol led by the controversial Father James Groppi of Milwaukee. A large number of black, Spanish-speaking, and white persons from Milwaukee came, in caravan style, to the State Capitol to protest the cut in funds by the legislature for assistance to the poor in Milwaukee. When the caravan arrived in Madison, most of the vehicles were double parked around the Capitol square in violation of city ordinance. The Chief of Police ordered a moratorium in the giving of parking tickets and concentrated the police efforts on the protection of persons and property. For this, he came under substantial criticism which he responded to, in an appearance before the city council, by saying that it was his responsibility to exercise discretion and he did so by deciding that the protection of persons and property was of greater importance than the enforcement of the double parking ordinance. After a debate during which one motion would have had the Chief enforce the law 100 per cent of the time, the city council finally commended the Chief for the handling of the matter. However, most critical public discussion proceeded on the assumption that if there is a law it should be enforced. Those who spoke in support of the Chief reflected more sympathy for the Father Groppi group than they did for the open exercise of discretion by the Chief and the willingness on his part to explain publicly what his decision was and his reasons for making it.

About a week later, there was a street dance on Gilman Street which the police officers present on the scene did nothing to prevent, but rather blocked off the street and redirected traffic. After the dance the students complimented the police for allowing the dance to be held.

Some weeks later a group, largely students, decided to hold a dance on West Mifflin Street. The police attempted to prevent the street from being blocked off. The police intervention was met by resistance and, in consequence, a serious three-day riot was precipitated.

The effort of police to prevent the holding of the dance was explained on the basis that such use of the street was prohibited by city ordinance. Adherence to the conception that ours is a government of law, not men, lends respectability to this kind of explanation. It has not since been made clear whether a decision was made at all and, if so, whether it was made by the police inspector on the scene, the Chief, or the Mayor. Of course, strict adherence to the "government of law" objective would lead to the conclusion that the decision was made by the city council when the ordinance was passed leaving no room for the exercise of administrative discretion. The earlier decision to allow the street dance on Gilman Street was subsequently explained in a traditionally acceptable way on the ground that there was insufficient police manpower then available to handle the situation.

Although there is no way of identifying precisely what caused the widespread disorder on West Mifflin Street, there are some likely explanations. There is a segment of the student body which deliberately creates disorder as a political device for achieving change. But, for the vast majority of students, the explanation of their frustration may well lie in the way the decision was made. They knew of the prior street dance on Gilman Street, and the explanation of lack of manpower as a reason for allowing it was not convincing. What is more important, students were aware that streets had—in higher income areas—been blocked off for all kinds of purposes such as soap box derbies, sledding in winter, and even block parties.

Following the disorder, the general consensus of the university community has been that it is important to determine whose fault the disorder was. The Mayor has appointed a committee to make a fact-finding inquiry.

But it seems apparent that the finding of fault will serve no objective other than to reinforce the views of one opposing side or another. Instead of concern for fixing blame, the need is to make changes in the way government responds to issues such as whether a block party can be held on Mifflin Street in order to minimize, insofar as it is possible to do so, the risk that disorder will be relied upon as the way to resolve the issue. In my view, the approach which Kenneth Davis suggests is the most constructive which has as yet been advanced. It would recognize the situation as it exists (*i.e.*, police do make important policy decisions, do so in situations where it is unclear whether the statute or ordinance contemplates that police discretion is properly to be exercised, and many important decisions are left to subordinates who are little supervised by superiors). Changes are necessary to better confine, structure, and check police discretion (*i.e.*, by revising statutes

and ordinances to better confine discretion, afford criteria to guide its exercise when policy-making responsibility is left to police, require police to make policy through rule-making procedures whenever feasible, with less delegation to subordinates and with as much public participation as is possible).

Applied to the Mifflin Street situation, the Davis suggestion could result in important changes. If the conclusion is reached that presently police are called upon to exercise too much discretion, there would then be need to give more careful legislative attention to the drafting of statutes or ordinances than is now the case. Where narrowly drawn legislation is not feasible, it may be desirable to provide legislative criteria to guide the enforcement of the particular ordinance or statute or criteria to guide the exercise of discretion generally. For example, it may be desirable to provide legislatively that the primary responsibility of police is to maintain public order and to provide further the authority to refrain from enforcing a statute or ordinance when in the judgment of the law enforcement administrator enforcement would create an undue risk of public disorder.

Where the responsibility for exercising discretion is left to police, the need to make a law enforcement decision would be explicitly recognized, the decision should be made openly, reasons given, public debate encouraged, perhaps there should be review by the mayor and city council, and either reaffirmation or change in the policy decided upon by the law enforcement agency.²⁰ The statement of the Madison

²⁰ For a similar suggestion applied to juvenile proceedings, see Remington, *Due Process in Juvenile Proceedings*, 11 WAYNE L. REV. 688, 693-4 (1965):

In my opinion, police, social workers, prosecutors and judges do have an obligation to fashion a sensible adult or juvenile enforcement policy within the limits prescribed by the legislature. This is not only necessary, it is clearly expected by the legislature. One confronted with a difficult drafting problem often resolves it by overgeneralization and the statement that "common sense" will be used in administration. In my view "common sense" in this situation is an essential of "due process."

To achieve what I advocate, juvenile justice agencies should try to do the following:

1. Formulate policies at the arrest, detention, referral, adjudication and disposition stages that are, insofar as possible, known to the community and subject to community discussion. Rather than criticize, I would commend the Madison police chief for announcing publicly his curfew policy. If it appears that existing policies, as to what will be considered delinquent conduct, lack public support, perhaps they should be changed by the agency or by legislation or a change in public attitude ought to be sought by an educational campaign. Juvenile justice agencies ought to resist the temptation to use ambiguity as a method of avoiding controversy over important policy decisions.

2. The effectiveness of the policies should be constantly reevaluated to insure that they are consistent with the general purposes of the legislation. If some persons falling within the broad definition of delinquency are placed in detention while others are released, there is an obligation to those detained to insure that their basis of selection is a sensible one and in fact related to the objective of the program. Agency research of this kind is not only desirable but an essential of "due process."

3. The policies should be consistently applied without regard to factors not

Police Chief with respect to the curfew and with respect to the Father Groppi demonstration should be applauded rather than condemned as a violation of a basic principle of American government. Responsible student concern for police performance should recognize the important social responsibility which police are called upon to exercise and use efforts to improve the ability and responsibility of police rather than to attempt to hold police to pay-parity with firemen. On the Davis scale measuring the need to exercise discretionary power, the police would rank very high, the firemen very low.

III

Although this makes good sense, there are a number of philosophical and practical problems which are likely to cause many to hesitate to recognize that the exercise of discretionary power by police is inevitable and even desirable if properly confined, structured, and checked.

(1) There is a surprisingly strong commitment to the preeminence of the rule of law, that rule not discretion should control the decisions which are made. Even Davis speaks longingly of the day when legislative revisions of the substantive criminal law will drastically reduce the necessity for the exercise of discretion by the police and characterizes Chicago Police Superintendent O. W. Wilson's nonenforcement of the jaywalking ordinances as "police illegality."²¹ One would have thought that Davis, more than others, would accept the inevitability and, in some situations, even desirability of broad legislative standards, leaving to the enforcement agency not only the power but the responsibility to exercise discretion and to do so whenever possible through the utilization of an administrative rule-making procedure. And one would have thought that Davis would look upon the enactment of a jaywalking ordinance as authority to arrest persons who cross in the middle of the street when the circumstances indicate that to make arrests would significantly contribute to traffic safety and where the utilization of police resources for that purpose would accomplish a greater public good than utilizing those resources for other purposes. The assumption, shared by Davis, is that the legislative mandate to police is "to enforce the law" when it is at least arguable that the primary objective today ought to be the maintenance of community order, and

relevant to the basic objectives of the policies. Flexibility is not grounds for indiscriminate differentiation in the handling of individuals.

4. The juvenile involved ought to be made aware of the policy applicable to him and the reasons for it. The full achievement of "due process" requires a system which is not only in fact fair but one which, to the extent possible, impresses the juvenile as being fair.

²¹ P. 86.

"the law" ought not to be enforced when to do so may actually produce more disorder and thus sacrifice a greater community value.²² Certainly in Madison the riot was a greater loss than the value achieved by the prevention of the dance. But even Professor Davis has difficulty in concluding that police ought to have so broad an authority and would, if I understand him, move the criminal law as far along the scale to the rule end and as far away from the discretion end as is possible.²³ This may arguably be desirable. If so, strenuous efforts should

²² Davis does cite a Chicago ordinance which states that it is the "duty of the traffic bureau . . . to make arrests for traffic violations" (p. 85) and concludes from this that the legislative purpose was full enforcement of the law. Pp. 87-88. This was a position ably presented some years ago by Joseph Goldstein in *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960). See note 14 *supra*. The difficulty with the position is that it is unreal. There is overwhelming evidence that legislative bodies do not *expect* or *desire* full enforcement. Professor Davis also uses social gambling as an example citing the failure of the Chicago police fully to enforce the law as an illustration of "the flagrance of the illegality." P. 84. Legislative history in most states is conclusive that overgeneralization of the gambling statutes is not a mandate to full enforcement but a delegation of discretion to use selective enforcement against commercial gambling with a broad statute designed to prevent the commercial gambler from finding "loopholes." See Remington & Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481. Why is it flagrant police "illegality" to do what the legislature expects and desires? The inference is that police are at fault. If the point is that legislatures should narrow the scope of the gambling statute (p. 93: "The best solution would be for the legislative body to answer all the major questions with clarity and precision . . ."), the experience is that this has been carefully considered and rejected by legislatures. Is the consequence of that legislative judgment, "police illegality"? Or does the "illegality" follow from a failure of police to follow Davis' second choice (p. 93: ". . . failing that, the next best solution is for the police through rule-making procedure to give systematic and clear answers to all the major questions . . ."). I hope I have made clear that my quarrel is not with Professor Davis' objective of more adequate police, policy-making procedures. Quite the contrary. See especially THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE ch. 2, 13-41 (1967) (written by Herman Goldstein and myself, see Katzenbach, *Forward* to *id.* at iv). My quarrel is as to whether expecting the legislative bodies "to answer all the major questions with clarity and precision" is realistic or necessarily desirable in situations such as gambling. Why is legislative resolution of higher priority than administrative resolution through proper rule-making procedures? Even if legislative precision is of highest priority, how does *legislative failure* result in *police illegality* when police engage in the kind of selective enforcement desired by the legislative body? I think it ridiculous to say, "But when Chicago police arrested a group of prominent citizens who were playing a friendly game of poker, the superintendent of police announced on the front pages that he was sorry; his policy, he said, was not to arrest for gambling in absence of a commercial element. What the Illinois legislature had enacted was partly nullified by the police chief. The law for Chicago is not what the legislature enacts; it is what the police chief says to the newspapers." Pp. 84-85. This was used to illustrate "the flagrance of the [police] illegality." P. 84. My point (to repeat for emphasis) is that O. W. Wilson should be complimented for his openness, not cited as an illustration of police illegality. Indeed I would hope the Chicago police would make the Wilson statement a formal policy of the department, using the rule-making procedure suggested by Professor Davis.

²³ I recognize that Professor Davis' basic point is that there is an optimum point for

be made to revise and limit not only federal and state criminal laws, but also a wide variety of local ordinances, most of which are drafted in terms too broad to be applied literally in an unthinking manner. But years of experience, including major efforts at legislative revision, indicate clearly that even if desirable this kind of legislative preciseness is not feasible. And, even in theory, it seems probable that a greater protection against arbitrariness will result if the generality of legislation is recognized as inevitable; there is effort to incorporate legislative criteria, such as those suggested in the correctional provision of the Model Penal Code; and, most importantly, the enforcement agency is mandated to make enforcement decisions openly, giving reasons and utilizing, whenever possible, the administrative rule-making process. One would have thought this would be the preference of Davis and I do not believe he would greatly resist it, but so strong is the traditional mistrust of police, so tempting is it to view police conduct in black and white terms, either legal or illegal, that the aspiration for a rule-dominated system continues. The danger is compromise: the achievement of neither the values of rule nor of discretion; the maintenance of the illusion of a rule-dominated system, ignored in practice by the exercise of discretion, commonly by the least qualified officer on the beat. The consequence of this is more rather than less discretion, less rather than more openness, and less rather than more structuring and control of the discretion which is exercised.

(2) The refusal to recognize the inevitability and desirability of the exercise of discretion by police may perhaps be thought to be itself a form of control over the abuse of police power. Since most police conduct which involves nonenforcement of the law (*e.g.*, failure to enforce fully the jaywalking ordinance) can be called—as Davis calls it—illegal, it is not difficult to place the label of illegality upon any police conduct thought by any group to be unwise. Thus there is always available the claim that what police did (*i.e.*, in not enforcing the double parking ordinance) is illegal and thus wrong. This is an easier argument to sustain than it is to grant the propriety of exercising discretion but to argue the impropriety of the particular decision (*e.g.*, that it was unwise to give priority to protection of persons and places during the Father Groppi demonstration rather than enforce the double parking ordinance).

(3) Recognition of the fact that agencies such as police do make

each decision on the rule-to-discretion scale. With this I agree. Perhaps I read too much into his statement at 93: "The best solution would be for the legislative body to answer all the major questions with clarity and precision . . ." Compare Remington & Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481 n.2.

important decisions affecting important community values and the insistence that these be made openly and reasons given, would result in there having to be some painful reappraisal by the community and its elected representatives. Thus most of the academic community would support a resolution condemning police use of improper methods of dealing with student disorders. Those same persons, however, might find it much more difficult to conclude that consistency and adherence to principle require the same condemnation of the use of unlawful enforcement methods to make the streets safe around a university located in a high crime area of a large city.²⁴ The difficulty with the latter is that it puts a hard choice—illegality or suspicious persons left on the street under circumstances which strike fear in the minds of the law-abiding. Other alternatives are difficult and costly so that the temptation is to tolerate, without admitting support for, police "lawlessness." Put another way, requiring police to be open and consistent in the decisions they make would require the community also to be consistent or openly admit support for illegality. This is a tough issue, difficult and expensive to resolve.

(4) Recognition of the importance and desirability of the exercise of discretion by police would almost inevitably lead to a radical rethinking of the nature of the police function. Equating police and firemen's pay scales would become obviously inappropriate. It would become clear that the police administrator's job is more important and more difficult than that of the prosecutor, judge, or probation or parole agent, and one would have to ask why the latter requires six or seven years of university education while the police administrator is commonly a high school graduate. It would also be apparent that the police task is more difficult and complicated than is the task of the economic regulatory agency, and one would have to ask why the one is staffed with lawyers and others apparently skilled in making policy decisions and the police agency not so staffed. Recognizing police as important government administrators would be very expensive, and the temptation is strong, perhaps inevitable, to search for simple solutions to the problems of social disorder: better equipment; psychological testing of police applicants; a few more hours of training; a few college credits; a civilian review board; the prosecution and conviction of a few errant policemen, usually of low rank; public condemnation of police brutality; and other simple and inexpensive but unfortunately ineffective

²⁴ For example, a high-ranking administrator in the Chicago Police Department has said that the greatest pressure to use whatever methods are necessary to clear the area of suspicious and otherwise undesirable persons came from the University of Chicago community.

ways of approaching perhaps the most important issue facing this nation today—the development of a system for achieving social order by means which command widespread community respect and support.

IV

The achievement of a high level of discretionary justice is essential if government is to maintain social and economic stability by means which command the respect and support of the vast majority of its citizens. Some things are clear.

Concentration on courts and judicial processes to achieve justice cannot be sufficient, and the proper current interest in legal services and the test case as a means of social reform ought not to obscure that fact. Courts have relatively little impact upon the amount of discretionary justice or injustice.

The need is to give more careful and constructive attention to the practices of government agencies, particularly the social regulatory agencies which have been so badly neglected in the past, especially by lawyers. In doing so there should be a reevaluation of the decision-making process to insure that there is an optimum balance *for that decision* on the rule-to-discretion scale and where discretion is to be properly exercised, careful attention to insure that the decision is made openly, with reasons given, criteria consistently applied, and, when possible, rule-making procedures utilized.

This kind of honest, constructive, and, for the governmental agency, painful reevaluation of the decision-making process is what Kenneth Culp Davis proposes. Its popularity will be limited by the fact that it is bound to be difficult and expensive. But, taken seriously, the Davis proposal would result in basic changes in social regulatory agencies, particularly the police, and change is badly needed.