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PROLEGOMENON TO A STUDY OF POLICE POWERS IN ENGLAND AND WALES

*Leonard H. Leigh**

I. Introduction

Historically, the official functions of the police can be described quite briefly. The original instructions to the Metropolitan Police provided:

The primary object of an efficient police is the prevention of crime; the next that of detection and punishment of offenders, if crime is committed. To these ends all the efforts of the police must be directed. The protection of life and property, the preservation of public tranquillity, and the absence of crime will alone prove whether those efforts have been successful and whether the objects for which the police were appointed have been obtained.¹

It scarcely requires reflection for the modern observer to conclude that this description of police functions is today quite inadequate. In addition to the functions noted above, the *Final Report* of the Royal Commission on the Police of 1962 points out that the police have a duty to control traffic, to advise local authorities on traffic questions, to conduct inquiries for other government departments, and to provide assistance in emergencies. Over and above these duties, the police, as the Royal Commission noted, have a long tradition of rendering public assistance.²

Yet this recital of the duties of the police does not precisely depict their role. It fails, for example, to take adequate notice of the vital element of discretion which the police exercise in fulfilling their duties and which, in effect, tends to shape the whole system. Thus, the creative functions which the exercise of discretion can serve, and the tensions and ambiguities which such exercise can produce, are alike ignored. Some of the creative functions exercised upon a basis of discretion relate to traditional police work. Others are only related to traditional functions in an indirect and, in some cases, a tenuous fashion. For example, it has been said by a senior police officer that the police service must follow the path into a social role. The police must:

. . . become one of the instruments of government woven into the fabric of the welfare state, giving a helping hand to youth and succour to the adult and elderly.³

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1 SIR J. MOYLAN, SCOTLAND YARD 40 (1929). There is even today no statute imposing general duties of law enforcement upon the police.

2 CMND. No. 1728, para. 59; see also *Haynes v. Harwood*, [1935] 1 K.B. 146, 162 (C.A. 1934).

3 Sir Eric St. Johnson, then H.M. Chief Inspector of Constabulary cited in *Dear, Coloured Immigrant Communities and the Police*, 45 POLICE JOURNAL 128-150 (1972). For accounts of police work with juveniles, see *Osborough, Police Discretion Not to Prosecute Juveniles*, 28 M.L.R. 421 (1965).

The adaptation of the police to this role can be seen in the area of race relations. The police may not be the immigrant's first point of contact with society, but they are a principal point of contact. The peaceful assimilation of an immigrant community may depend upon the wise exercise by the police of their powers. Thus it has been said:

Certainly the police must respond to the challenge for, whilst we are not alone in being challenged by the various demands of a multi-racial society, the consequences of our not responding are uniquely serious.⁴

This entire area is debatable. What discretion have the police in relation to law enforcement; in the light of what principles ought it be exercised; what controls exist over the exercise of discretion; and by whom are the controls exercised? Further, what functions do we wish the police to perform and how are their powers and the conditions of their exercise related to the performance of these functions? These questions relate to problems which are pervasive, and which exist not of course in England and Wales alone. Investigation into these problems in the United States is well advanced.⁵ This article represents an attempt to put police powers in England and Wales into a constitutional context, to indicate the stages at which the police may exercise legal powers, to say something about the use of discretion in the exercise of such powers, and finally to say something about the control of the police—the problem of accountability in a system which, in many ways, is unique. It is not the first attempt to do so. It will certainly not be the last.⁶

II. The Structure and Organization of the Police

The scope of this article does not encompass the history of the English police. A number of studies of police history exist.⁷ Some part of the history, however, explains certain aspects of modern law relating to the status of the police. The basic powers of the modern police officer flow from his status as a constable, and not from his membership in a police force. Indeed, certain members of police forces such as police cadets are not invested with the full panoply of police powers.⁸ A constable is a person invested by lawful authority, with powers to keep the peace. He need not belong to a defined force. The constable, while appointed locally and answerable to the justices of the peace, was originally

⁴ Dear, *supra* note 3, at 144. See also J. LAMBERT, *CRIME, POLICE AND RACE RELATIONS* ch. 6 (1970); Banton, *Role of the Police in a Changing Society*, *The Times* (London), Sep. 8, 1970, at 3, col. 3.

⁵ Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); La Fave, *The Police and Nonenforcement of the Law*, (1962) WIS. L. REV. 104 and 179; Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 914 (1962).

⁶ The leading account is G. MARSHALL, *POLICE AND GOVERNMENT* (1965). See also J. LAMBERT, *supra* note 4.

⁷ In particular, see T. A. CRITCHLEY, *A HISTORY OF THE POLICE IN ENGLAND AND WALES 900—1966* (1967); for a short account, J. Tobias, *Origins of the Police Role*, 4 THE CRIMINOLOGIST, 106-112 (1969).

⁸ Police Act 1964, §§ 17(1), 18, 19(1).

regarded as holding office under the Crown.⁹ He was not, historically, a member of a formed body. Professor Maitland indeed concluded that the first police force in the United Kingdom was not created until 1786, in Dublin.¹⁰ The constable's duties were wide, but his powers were limited. He was supervised by the justices who, until the Summary Jurisdiction Act 1848, took a much wider initiating role in the administration of criminal justice than do their modern counterparts. The constable's powers were not much greater than those of the ordinary citizen. He had somewhat more extensive powers of arrest, being authorized to arrest in cases of suspected felony.¹¹ He enjoyed no great immunities by law, though he was protected in the execution of a justice's warrant.¹²

When police forces were created, the powers enjoyed by police constables were, naturally, those which inhered in the office of constable together with such further powers as might from time to time be conferred upon constables by statute. The focus of supervision changed. It became more immediate. It was henceforth exercised by a hierarchy controlling a disciplined force. The general structure of constabulary powers did not change. No enlargement occurred. The dangers inherent in organized bodies of police were foreseeable and, in some quarters, the dangers were more clearly perceived than the benefits to be derived therefrom.¹³

The growth of police forces has been considered elsewhere.¹⁴ In England the Metropolitan Police Act was passed in 1829. The City of London police force was established in 1839. Provision was made for creation of police forces in the towns in 1835 and in the counties in 1839.¹⁵ Gradually, organized forces extended throughout county and borough areas. Police forces grew up on a local basis. Some forces were large; others were very small. But although forces were raised locally and were in theory responsible to local bodies (the Watch Committee in the borough and the Standing Joint Committee in the county), they were never under the operational control of bodies consisting of local elected representatives.¹⁶ Furthermore, the Home Secretary began to intervene

9 See Stat. Winchester, 13 Edw. 1 c.2, § 6; Canals Offences Act 1840, 3 & 4 Vict., c. 50, § 1, Vin. Abr. vol. 5 tit. *Constable* 1. "The Constable is the keeper of the peace, that is to say, the high constable for the hundred, and the petty constable in the town," Rex v. Wyatt, [1705] 2 Ld. Raym. 1189. For a similar American definition, see *Commonwealth v. Deacon*, 8 S. & R. 47, 49 (Pa. 1822).

10 F. W. MAITLAND, *JUSTICE AND POLICE* 108 (1885).

11 See *Walters v. W. H. Smith & Son Ltd.* [1914] 1 K.B. 595 (1913), 83 L.J.K.B. (n.s.) 335. For present law, see *Criminal Law Act 1967*, c.58, § 2(4).

12 *Constables Protection Act 1750*, 24 Geo. 2, c.44, § 6.

13 Thus a Parliamentary Committee Report, cited in T. A. CRITCHLEY, *supra* note 7, at 47 concluded that:

It is difficult to reconcile an effective system of police, with that perfect freedom of action and exemption from interference, which are the great privileges and blessings of society in this country; and your Committee think that the forfeiture or curtailment of such advantages would be too great a sacrifice for improvements in police, or facilities in detection of crime, however desirable in themselves if abstractedly considered.

14 T. A. CRITCHLEY, *supra* note 7.

15 *Id.* at 62-100.

16 The courts took the position that policing was a national, and indeed it was said, an Imperial function. *Coomber v. Justices of Berks*, [1883] 9 App. Cas. 61, 71. The operational autonomy of Chief Constables is stressed in *Glasbrook Brothers Limited v. Glamorgan County Council* [1925] A.C. 270. Several decisions which hold that the constable is not a

more and more in their affairs in the interests of efficiency. Police funds were made up in part from moneys provided by Parliament. Such funds were provided only for efficient forces, and a body of Her Majesty's Inspectors of Constabulary grew up, charged with reporting to the Home Secretary on the efficiency of local forces.¹⁷ In time these functions expanded to include such matters as the ensuring of efficient collaboration among neighboring forces, the promotion of coordinating machinery among them, and with the development of services best handled within a district rather than by a single force.¹⁸ Many aspects of police service were handled centrally. Even before the Police Act of 1964 which set the seal upon this development, an American writer could conclude that ". . . the functions of the Home Secretary may be limited, but his powers are vast."¹⁹

The present constitutional framework within which the police exercise their powers is composed of a number of elements.²⁰ The external framework discloses a system of responsibility which is shared between central and local government, with the position of central government predominant.²¹ In operational matters, control is vested in the Chief Constable whose authority is independent of central or local government control and, for the most part, of Parliamentary scrutiny.²² It is possible for the Home Secretary to exercise certain ultimate controls such as requesting the resignation of a Chief Constable or the initiation of a public inquiry—a step which sometimes follows representations by members of Parliament—but the invocation of such powers is rare.²³ The Parliamentary Commissioner for Administration cannot, at present, entertain complaints against the police.²⁴ External control is in addition to the

servant of the local authority or police authority derive from the same considerations. See also *Fisher v. Oldham Corporation* [1930] 2 K.B. 364; *Lewis v. Cattle*, [1938] 2 K.B. 454. The worst practical problem associated with this rule that a local authority was not liable for the torts of constables was removed by Police Act 1964, c.48, § 48, rendering the Chief Constable liable for the torts of constables under his direction and control.

17 T. A. CRITCHLEY, *supra* note 7, at 118-128.

18 ROYAL COMMISSION ON THE POLICE, FINAL REPORT, CMND. No. 172, paras. 245-46 (1962).

19 HEWITT, *BRITISH POLICE ADMINISTRATION* 61 (1965). For this we ought perhaps to be grateful. Booth, *Law Enforcement in Great Britain*, 1969 *CRIME AND DELINQUENCY* 407 remarks that the police are hampered by the government in such matters as the use of experimental tear and nerve gases.

20 Some forces fall under special legislation. Thus the British Transport Police fall under the Transport Acts 1962 and 1968, and airport police fall under the Airports Authority Act 1965.

21 Regan, *The Police Service: An Extreme Example of Central Control over Local Authority Staff*, [1966] P.L. 13.

22 Wade, *Note of the Constitutional Position of the Police*, ROYAL COMMISSION ON THE POLICE, CMND. No. 1728, appendix to Minutes of Evidence, Supplementary Evidence, at 28 (1962). See also Memorandum of Sir E. Fellowes, *id.*, citing 529 *PARL. DEB.*, H.C. (5th ser.) col. 590 (1953-54).

23 See Police Act 1964, §§ 5(4) and 6(5). Public inquiries have been conducted into several alleged cases of police brutality in recent years. For a relatively accessible example, and a commentary thereon, see M. GRIGG, *THE CHALLONER CASE* 1965.

24 Only in cases where the Home Secretary has power to call for an inquiry into a police force under § 32 of the Police Act 1964 and has been guilty of maladministration in failing to do so, can the Parliamentary Commissioner intervene and then only to determine whether there was maladministration in failing to hold an inquiry. *SECOND REPORT FROM THE SELECT COMMITTEE ON THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION*, Session 1967-68 (H.C. 350).

powers of the Home Secretary, to a degree, a matter for the courts, but their intervention has been too sporadic to be of much effect.

A further, and to Americans, a most striking feature of the English criminal process, is the absence of an independent system of prosecuting attorneys.²⁵ There is a central government office, that of the Director of Public Prosecutions, which is responsible for certain prosecutions (*i.e.*, murder, any case referred by a government department in which the Director considers that criminal proceedings should be instituted, in certain cases in which a statute expressly provides, and in cases the importance or difficulty of which renders his intervention advisable in the public interest), and which must be notified of certain other offenses (*i.e.*, manslaughter, offenses where the statute requires the prosecution to be conducted by or with the consent of the Director, which includes certain sexual offenses, offenses relating to obscene publications, etc., and indictable offenses the prosecutions of which were withdrawn or not proceeded with, within a reasonable time). Offenses falling within this latter category are usually dealt with at the local level by the Chief Constable. The Director of Public Prosecutions handles few prosecutions, of the order of about 2,000 annually.²⁶ Locally, many police forces can rely on the advice of a prosecuting solicitor; though in actuality only thirty-two of forty-five police authorities in England and Wales engage such assistance. Furthermore, such solicitors are employed by the local police authority or the local authority, and therefore lack complete independence. Prosecuting solicitors cannot exercise authority over the police who are free to accept or reject the solicitor's advice.²⁷ One institutional check upon the exercise of police powers which is common in America and other jurisdictions is therefore largely lacking in England and Wales.

The same comments apparently apply in relation to the Metropolitan Police for which the Home Secretary is the police authority. In *R. v. Commissioner of Police of the Metropolis, ex parte Blackburn*,²⁸ Lord Denning, M. R., stated categorically that the Commissioner is not subservient to the Home Secretary in operational matters. His position in such matters is independent. It has been argued, however, that the Metropolitan Police Commissioner stands in a different relation to the Home Secretary as police authority than do local Chief Constables to local police authorities.²⁹ It is true that the Home Secretary answers to Parliament for the Metropolitan Police and that he will inform the House of Commons of action taken by the police and even whether such action contravened the rules normally followed by the force.³⁰ The situation is, however,

25 There is a system of prosecutors in Scotland. See Mitchell, *Memorandum on the Constitutional Position of the Police in Scotland*, ROYAL COMMISSION ON THE POLICE, CMND. No. 1728, Minutes of Evidence, appendix 2, at 92-100 (1962); *The Prosecution Process in England and Wales*, JUSTICE paras. 11-14 (London 1970).

26 See generally J. EDWARDS, *THE LAW OFFICERS OF THE CROWN* ch. 17 (1964).

27 *The Prosecution Process in England and Wales*, *supra* note 25.

28 [1968] 2 Q.B. 118 (C.A.).

29 G. MARSHALL, *supra* note 6, at 29-32.

30 S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 383 (1971). For an example see 759 PARL. DEB., H.C. (5th ser.) cols. 403-04 (1966-67) in which, following a *cause celebre*, the Home Secretary outlined the practices followed by the Metropolitan Police in ensuring that adequate grounds existed for applying for warrants in drug cases.

ambiguous. Various Home Secretaries have stated that the Commissioner is not independent of their authority. The Home Secretary, it is sometimes said, should be responsible for the policy of the police.³¹ The most recent statement is that of Mr. (now Lord) Simon in 1957 who stated:

For the Metropolitan Police, it is a matter for the discretion of the Secretary of State as to how far, in discharging the duties placed upon him by Parliament, he should himself, through the Home Office, interfere with the executive action which is the responsibility of the Commissioner. In practice, in respect of administration and the maintenance of discipline, it is the Secretary of State's sphere to prescribe and enforce general principles, and the Commissioner's sphere to apply them to individual cases, subject only to his general accountability to the Secretary of State as the police authority. In matters of discipline it is also subject to the right of appeal to the Secretary of State provided by the Police [Appeals] Acts.³²

In practice, therefore, the Home Secretary intervenes in the limited areas of efficient administration and the maintenance of discipline. Whether he has wider legal powers to direct the police in the performance of their duties is doubtful, although much is in fact achieved by consultation. There is uncertainty concerning with what executive action, proper to the Commissioner, the Home Secretary may legally interfere.

The puzzle of the degree of supervision exercised by central authority is not entirely resolved by a perusal of the Metropolitan Police Act 1829 which authorized the creation of the force. This Act enabled His Majesty to establish a police office in the City of Westminster. He could appoint two fit persons to execute the duties of a justice of the peace at the office:

. . . together with such other duties as shall be herein-after specified or as shall be from time to time directed by one of His Majesty's principal secretaries of state for the more efficient administration of the police within the limits herein-after mentioned.³³

Section 4 enables the Secretary of State to appoint constables, such constables to obey the lawful commands of the justices. Section 5 enables the justices, subject to the approval of the Home Secretary, to make orders and regulations for preventing neglect or abuse and for rendering the force efficient in the discharge of its duties. It would appear that the oversight of the Home Secretary was to operate in such areas as establishments, administration, and disciplinary regulations, leaving the direction of policing, as such, in the hands of the justices, otherwise known as the Commissioners (now referred to as the Commissioner of the Metropolitan Police). This would not have seemed unusual. At that period the police were generally answerable to the justices who directed their operations. The justices had a primary duty to ensure that the peace was kept.³⁴

31 G. MARSHALL, *supra* note 6, at 31, citing Sir W. Harcourt.

32 571 PARL. DEB., H. C. (5th ser.) col. 574 (1956-57).

33 Metropolitan Police Act 1829, § 1.

34 S. A. DE SMITH, *supra* note 30, at 383. Regarding the duty of magistrates, see *R. v. Pinney*, [1832] 3 B. & Ad. 947.

A system in which the police were answerable to justices would not have seemed a system in which the police were constitutionally irresponsible. In the last resort, the Commissioners could be dismissed.³⁵ It is perhaps intentional that in operational matters, the Secretary of State was not explicitly or implicitly given the authority to direct police operations. If so, the practice of the Home Secretary in answering Parliamentary questions would not be premised on any responsibility imposed on him directly in respect of particular operational matters. He would however be answerable for the proper operation of the force and could no doubt be censured were he not to reprove or remove a Commissioner who proved to be tyrannical, corrupt, or incompetent so as to be unable to control his force properly.

The Police Act of 1964 does not deal with the exercise of police powers, though it does contain features which could conduce to greater uniformity in their exercise. Indeed, the Act sedulously fosters the independence of Chief Constables. Thus the local police authority which is obliged to secure the maintenance of an adequate and efficient police force for its area has limited powers to require information from the Chief Constable. An annual report is provided by the Chief Constable and also such further reports as the police authority may require in connection with policing. However, the Chief Constable may, if it appears to him that material in the report requested ought not to be disclosed in the public interest or is not needed for the functions of the police authority, request the police authority to refer the requirement to the Home Secretary, and ". . . in any such case the requirement . . . [is] of no effect until it is confirmed by the Secretary of State."³⁶ The relative weakness of the local police authorities in these respects reflects that it was never intended that such authorities should seek to control the police in the exercise of their functions. The Police Act, by investing the Chief Constable with such responsibilities,³⁷ responded to the very high value placed on the principle that the Chief Constable should be free from the conventional processes of democratic control and influence in relation to operational matters.³⁸

The role of central government in setting standards is more important. The powers of the Home Office are in part formal, and in part informal. There is no doubt that the Home Office achieves much. There may be doubt about whether it does enough in relation to enforcement matters. It is plain that governmental attempts to tell the police how to proceed in particular cases would be resented and could lead to abuse.³⁹ In general operational matters influence is now exercised, but could, no doubt, be exercised more extensively. The formal powers of the Home Secretary include two which are of great importance. The first is the power to make operational grants to local police authorities for expenses incurred for public purposes. This, coupled with the power to appoint

35 Thus Sir Charles Warren was removed as Commissioner by Sir W. Harcourt, then Home Secretary, following disputes between the two as to the appropriate methods for suppressing public disorder.

36 Police Act 1964, c. 48, § 12(3).

37 *Id.* § 5(1).

38 CMND. No. 1728, paras. 89 *et seq.* (1962). See also 2 POLICE 15 (1970).

39 See e.g. 1965 POLICE REVIEW 1 and Mark, *A Police Point of View*, 38 MEDICO-LEG. J. 4. (1970).

H. M. Inspectors of Constabulary to report to him on the efficiency of local forces enables the Home Secretary to achieve his desired results in a wide range of matters.⁴⁰ Even though the Inspectorate and indeed the Home Secretary lack executive authority over particular forces, their role is dominant and clearly perceived to be so throughout the police service. The Home Office has on occasion pointed out that the Home Secretary and his officials perform a wide variety of nonstatutory functions "with the objects of promoting uniformity of purpose and professional ability and of providing means for the exchange of ideas and police experience."⁴¹ Despite this fact, the Home Office avoids instructing or attempting to instruct police forces concerning what laws they are to enforce or how they are to do so. In matters of enforcement, the Home Office *does* suggest certain procedures which it thinks ought to be followed. For example, in relation both to interrogation and to lineups, Home Office circulars describe how such activities ought to be conducted.⁴² In both cases, circulars, drawn up with the advice of the Judges, list as their only explicit sanction for nonobservance the possible inadmissibility at trial of evidence obtained in defiance of the standards.⁴³ In matters which may not involve the differential enforcement of the law, such as ensuring that constables are instructed in matters of race relations, the Home Office indicates what steps it thinks might appropriately be taken, but the ultimate responsibility is placed, as an operational matter, within the jurisdiction of the Chief Constable.

There are valid constitutional reasons why the Home Office limits its activities to those indicated above. For the Home Office to indicate which laws ought to be enforced and which not, and the circumstances under which enforcement might be eschewed, could bring it into conflict with certain provisions of the Bill of Rights, which condemn the suspending power and provide "[t]hat the pretended power of dispensing with laws or the execution of laws by regall authoritie [*sic*], as it hath been assumed and exercised of late, is illegall [*sic*]."⁴⁴ The reference was to the assumed royal power to relieve particular offenders from statutory penalties which they had incurred.⁴⁵ It did not deprive the Crown of the power to grant a pardon after conviction, or even, it has been stated, before conviction, although of the latter case it has been said that "the line between pardon before conviction and the unlawful exercise of dispensing power is thin."⁴⁶ Equally, the line between permissible and impermissible non-enforcement must be thin, and one which an executive department must be

40 See Sir I. Jacob, *The Future of the Police*, 1967 POLICE JOURNAL 309-320.

41 SELECT COMMITTEE ON RACE RELATIONS AND IMMIGRATION, Minutes of Evidence, Wed. Dec. 1, 1971.

42 In relation to lineups, see Home Office Circular No. 9 (1969) and for interrogation, see Home Office Circular No. 31 (1964).

43 And in some cases even this sanction is lacking. Thus under the Judges Rules (H. O. Circular No. 31 1964), an arrested person is supposed to be allowed the use of a telephone to contact his solicitor. Under English Law failure to allow him to do so does not of itself render any statement which he may give inadmissible. For evidence of widespread police failure to let persons use the telephone see Zander, *Access to a Solicitor in the Police Station*, 1972 CRIM. L. REV. (Eng.) 342.

44 [1688] 1 W. & M., sess. 2 c.2.

45 F. W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 302-05 (1908); O. HOOD PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 45-46 (5th ed. 1965).

46 S.A. DE SMITH, *supra* note 30, at 128 n. 124.

unwilling to tread upon.⁴⁷ It may be noted that the same considerations appear to underlie the position of those Chief Constables who question the propriety of their exercising a large measure of discretion in determining not to prosecute certain persons for particular offenses.⁴⁸ It is generally conceded that a general suspension of any law in favor of any section of the community is improper. Police discretion, like executive discretion generally, must operate within the constitutional limitations imposed by statute and the courts.

III. Police Discretion

The courts have seldom grappled with the problem of police discretion. Cases abound in which courts have given an absolute discharge or awarded a nominal penalty because they thought that a particular prosecution should never have been brought.⁴⁹ Affirmative guidance is less often ventured. The police are under a general obligation to act fairly. It has been held that the police ought not to arrest on a holding charge where there is insufficient evidence to warrant their doing so.⁵⁰ It has also been said that the police ought not to prefer a lesser charge than the evidence warrants. Thus, in *Re Beresford*, Devlin, J., states:

The police can never be criticised if the jury thinks it right to reduce the charge, or even if the judge thinks it proper to withdraw it from the jury, but they can be criticised if they usurp the function of the proper tribunal by determining in advance what ought to be a triable issue. Similar considerations apply to the two charges of dangerous driving and careless driving. There are, I believe, too many cases where the justices are prevented from dealing with dangerous driving as such because the police have preferred the lesser charge.⁵¹

This is intelligible enough. It is, however, a conservative statement of the boundaries of police discretion with which not all courts would agree. Sometimes, courts invite the police to exercise discretion in order to mitigate cases where the infraction is minor and the applicable penalty disproportionate. Thus, under the Road Safety Act 1967 it is an offense to drive when a stated level of alcohol in the blood is exceeded. The penalty includes a mandatory disqualification from driving. It has been held that even where the blood alcohol level is exceeded only slightly, the court must disqualify. The court may not, but the police should, apply a *de minimis* principle and refrain from prosecuting.⁵²

47 Indeed, the Home Secretary, who is directly responsible for the Metropolitan Police and to whom the Commission of Metropolitan Police is directly responsible, insists that he does not review the Commissioner's discretion in matters of enforcement. This, even conceding the constitutional point, is surely remarkable.

48 See e.g. Williams, *Turning a Blind Eye*, 1954 CRIM. L. REV. (Eng.) 271.

49 LORD DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND*, 20 (1958).

50 Shaaban Bin Hussain v. Chong Fook Kam, [1969] 3 All E.R. 1626 (P.C.).

51 [1952] 36 Crim. App. 1.

52 *R. v. Anderson*, 1972 CRIM. L. REV. (Eng.) 245; *Delaroy-Hall v. Tadman*, [1969] 2 W.L.R. 92 (1968).

There are few statutory *de minimis* provisions in English law.⁵³ Courts rely on police discretion to fill the gap. Some of the difficulties are illustrated in the recent case of *R. v. Commissioner of Police of the Metropolis, ex parte Blackburn*.⁵⁴ The Commissioner, because of uncertainties in the Gaming Laws which had not been resolved by judicial interpretation, determined, in the light of the expense in money and manpower involved in keeping clubs under surveillance, not to prosecute unless there were complaints of cheating or there was a reason to suppose that a particular club had become a haven for criminals. The plaintiff moved for mandamus to require the Commissioner to enforce the Gaming Laws.⁵⁵ In respect of the central issue of discretion, Lord Denning, M. R., stated that the Chief Constable, while independent in enforcement matters, is answerable to the law for the due performance of his duties. After having charted the Chief Constable's independence from central or local government control in operational matters, Lord Denning proceeded, in unclear fashion, to indicate how discretion might properly be exercised. Thus, in particular cases, the Chief Constable would have a say as to whether to proceed, and in what fashion. He could make certain decisions in respect to general policy. For example, he could determine not to prosecute cases of attempted suicide. On the other hand, he could not decide to forbear from prosecuting all petty thieves. In this case, his policy decision would be considered wrong. Salmon, L. J., who also addressed himself to these issues, indicated that the police could decide not to prosecute in particular cases, but did not successfully resolve the question when, in such cases, forbearance was permissible. Thus, His Lordship distinguishes between gaming cases and cases where the police decline to prosecute a youth for having sexual intercourse with a girl under 16 on the ground that it is often the boy who needs protection.⁵⁶ Gaming legislation is alleged to be different, as intended to stop exploitation. Yet the purpose of both statutes is not fundamentally dissimilar and the line adopted by the Commissioner was such as to provide for prosecution in cases of dishonesty. Nor does Lord Denning's statement help as much as might have been expected. It would appear that it clearly assumes that the police cannot properly refuse to prosecute a criminal offense at all. It is more defensible to draw a distinction between individual cases than between classes of offenses.⁵⁷ These considerations might justify the court in giving guidance concerning enforcement policies to the police.⁵⁸ It is questionable

53 For an example see Offences Against the Person Act 1861, §§ 44-45, where, if the complainant proceeds against the assailant in a case of common assault via a prosecution, he cannot thereafter bring a tort action.

54 [1968] 2 Q.B. 118 (C.A.). See also Williams, *The Police and Law Enforcement*, 1968 CRIM. L. REV. (Eng.) 351.

55 Much of the case is concerned with special features of mandamus, including *locus standi* requirements. No account is given of these aspects here. See S. A. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION*, 569-74 (2d ed. 1968).

56 Criminal Law Amendment Act 1885, § 16 was referred to by the Court. Compare with Sexual Offences Act 1956, 4 & 5 Eliz. 2, c. 69, § 6 which indicates that a man under the age of 24 who believes on reasonable grounds that the girl is over the age of 16 is not to be convicted of the offense. *Quaere* whether this should not be exhaustive of leniency.

57 See SMITH & HOGAN, *CRIMINAL LAW* 237-38 (2d ed. 1969). Attempted suicide may present a special problem. It is true that suicide was not considered to be a serious crime, that attempted suicide may have been abolished, and that both suicide and attempted suicide were in any event common law offenses.

58 *Kirkland v. Cairns* [1951] J.C. 61; *Bego v. Gardner* [1933] J.C. 23.

whether the police could themselves properly decide not to enforce such offenses. Again, in *Buckoke v. Greater London Council*⁵⁹ the court of appeal held that an order given by the London Fire Service to its drivers instructing them to cross on a red light if it were safe to do so was held to be lawful. Lord Denning, M. R., referring to the Bill of Rights, nonetheless held that when the law had become a dead letter the police need not prosecute, and further that the Commissioner of Police might make a policy decision in proper cases directing his men not to prosecute. Such policy might direct that the police were not to prosecute in cases where a fire engine driver crossed a red light in safety while answering an emergency. That would be a justifiable policy decision to mitigate the strict rigor of the law. If a constable did prosecute in such cases, the magistrate would be expected to give an absolute discharge. Thus by administrative action, backed by judicial decision, an exception was grafted onto the law. And indeed, a chief fire officer could instruct drivers to proceed through red lights in answering an emergency, provided that they did so with care. It may be noted that the court did, nonetheless, call for amending legislation to engraft just such an exception into the traffic laws.

Buckoke's case looks like a signal application of common sense. It leaves large problems in its wake. It recognizes that discretion will primarily be exercised by the police and that this may ripen into an approved practice if sanctioned by the courts. Plainly, discretion should not be exercised in cases where it serves no purpose which the court would regard as redeeming. Yet this leaves a large area of uncertainty. The general discretion premised, if it is to be exercised in the first instance by the police, ought to be subject to some form of review with the aims of setting standards and of ensuring justice in the particular case. Provision for this is made elsewhere, notably in some Commonwealth Codes, but not in England.⁶⁰ In England, administrative review outside the police force itself is absent, and judicial review, at least in cases which are not prosecuted, is a matter largely of chance.

The extent to which the problems are real is disclosed in police writings on the subject.⁶¹ There is a general disinclination to prosecute trivial offenses. Such prosecutions can appear tyrannical and are wasteful of time and energy better employed elsewhere. Likewise, archaic offenses are not prosecuted. Often age is treated as important. Young persons are frequently cautioned for indictable offenses, though not all police officers are convinced that this is a desirable course to take.⁶² Senility may well be taken into account in determining whether to prosecute an elderly person for shoplifting.

The bad health of a person accused of a minor offense may also be a proper

59 [1971] 2 All E.R. 254.

60 See INDIAN CODE OF CRIMINAL PROCEDURE and SUDAN CODE OF CRIMINAL PROCEDURE under which if the police refuse to prosecute in noncognizable cases, the victim, if any, may apply to the magistrates to require the police to show cause why the offense should not be prosecuted.

61 Wilcox, *The Use of Discretion in Enforcing the Law*, 42 MEDICO-LEG. J. 3 (1972); Williams, *Turning a Blind Eye*, 1954 CRIM. L. REV. (Eng.) 271; Glissett, *The Exercise of Discretion in the Enforcement of Law*, 42 POLICE JOURNAL 564 (1969).

62 See Cain, *Role Conflict Among Police Juvenile Liaison Officers*, 1968 BRIT. J. OF CRIM. 366.

consideration. Furthermore, the circumstances of the offender are sometimes taken into account. Thus, it has been said that while back-street abortionists should be prosecuted, “. . . nothing is achieved by bringing before a criminal court a young woman in lodgings who, in lonely desperation, has attempted to terminate her own pregnancy.”⁶³ The facts that a regulation governing a trade or business has newly come into force, and the people thereby affected have not had sufficient opportunity to adjust, may also be taken into account. Moreover, there is a disinclination often felt to prosecute some cases of domestic assaults. In the case of “Peeping Toms” who commit no substantive offense but who are sometimes bound over, there is a marked variation in the procedures adopted by the police.

Some of these criteria would meet with universal assent. Others, especially with regard to youth or to those invidious class distinctions readily concealed within the disposition of domestic assaults, would not.⁶⁴ There is much discretion involved in deciding whether an offense is trivial, or whether the interest to be served by a prosecution ought to predominate over factors conducive to leniency. Rigid and detailed rules of conduct are no answer;⁶⁵ neither is unregulated discretion. The area is, after all, normative. It must be said at once that problems are well known to senior police officers, and that in guiding the constables under their command a real attempt is made to determine what the appropriate public policy is. An example can be seen in the reluctance of the police to prosecute for offenses committed by a truant from an approved school, where the charge of escape itself is dealt with by the manager of the school with the approval of the Home Secretary.⁶⁶

It is important to recognize that the problem of discretion arises at different levels, of which the decision whether or not to invoke the criminal process is only one. In England the police may simply decide not to proceed formally. In many cases, particularly traffic cases, the constable may simply advise and warn the offender. In cases where a simple warning is considered too lenient, the police may issue a formal caution. A caution is issued when prosecution is deemed inappropriate. It is a formal, recorded procedure, albeit one which is provided for neither by statute nor at common law. The caution is either an oral warning delivered by a senior police officer in uniform or, in the unusual case, a letter which is sent to a person who has been reported by a police constable to his superiors for an offense. It informs the person to whom it is addressed that he has been reported for an offense, that it is not intended to prosecute him, but that if he is again reported for an offense, the circumstances in which the caution

63 Wilcox, *supra* note 61, at 7.

64 The problem is analogous to the view of police in some American jurisdictions that assault is an acceptable means of settling disputes among Negroes. See Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

65 Wilcox, *supra* note 61. See also, Wilcox, *Police Cautions in Five Towns*, 1971 CRIM. L. REV. (Eng.) 515, a review of a booklet of the same title by David Steer. Wilcox indeed argues, or appears to argue, for flexibility without review, concluding that the police are best able to make decisions in such cases.

66 See J. D. DEVLIN, *POLICE CHARGES* 77 (3d ed. 1968).

was issued will be taken into account.⁶⁷ In general, it may be said that cautions are issued only when the police feel that they have enough evidence to proceed to trial. The Metropolitan Police adhere strictly to this view. In other police forces, cautions are occasionally issued where the offender did not admit the offense and where the police had insufficient evidence to prosecute. In the latter case the caution is said to be as to the offender's future conduct.⁶⁸

The reasons why cautions are issued in lieu of prosecution have been dealt with by Mr. Steer. These are summarized as follows: (1) complainant declined to prosecute; (2) victim a voluntary participant; (3) evidence insufficient; (4) offender's circumstances; (5) other reasons—which included some trivial cases, cases in which persons sought to use the criminal law for debt collection, or to fix paternity.⁶⁹ It will be noticed that the same criteria might have determined whether any action was to be taken at all. Apart from cases of insufficiency of evidence, the police issue a caution when a decision is taken not to prosecute. For practical purposes, the decision not to proceed and the decision to caution may be conflated.

The extent to which police discretion is involved in cautioning appears in Mr. Steer's work (*Police Cautions: A Study in the Exercise of Police Discretion*), in the *Criminal Statistics*, and in the *Reports of H.M. Inspectors of Constabulary*. In 1970 43,520 males and 12,166 females were cautioned for indictable offenses. Furthermore, 22,663 males and 7,103 females were cautioned for nonindictable offenses other than motoring offenses. The figure for females includes 4,153 females cautioned for loitering or soliciting for the purposes of prostitution.⁷⁰ Mr. Steer finds, and the *Criminal Statistics* amply confirm, that greater leniency is shown to juveniles and to female offenders.⁷¹ Thus, in 1970 only 4,084 males over 21 were cautioned for indictable offenses compared with a global total of 148,079 males aged 21 or over who were found guilty or cautioned. If, by contrast, one studies the figures for males between 14 and 17 years of age, it will be found that 14,317 were cautioned and that 59,473 were found guilty or cautioned. With women over 21 years of age, 3,258 were cautioned for indictable offenses, while 30,838 were found guilty or cautioned. The relevance of age and sex is thus apparent.⁷² In motoring cases, cautioning is widely used. In 1970, the Metropolitan Police issued 21,948 cautions and 285,764 verbal warnings.⁷³

67 A form of caution is reproduced as an appendix to D. STEER, *POLICE CAUTIONS: A STUDY IN THE EXERCISE OF POLICE DISCRETION* (Oxford 1970).

68 *Id.* at 34-35.

69 *Id.* at 26 *et seq.*

70 CRIMINAL STATISTICS, (E. & W.) 1970. The caution in relation to offenses of prostitution is *sui generis*. Before a woman can be charged with soliciting for the purposes of prostitution it is considered desirable that she should twice have been cautioned. The caution procedure is extra-statutory, but there is provision in the Street Offences Act 1959, 7 & 8 Eliz. 2, c. 57, § 2, for a woman to apply to have a caution expunged. For further details see 598 PARL. DEB. H. C. (5th ser.) cols. 1272 *et seq.*

71 D. STEER, *supra* note 67, at 5-8, where it is suggested that one reason for the phenomenon may be that women and juveniles tend to commit less serious offenses. In addition in the case of juveniles there is the hope that by not treating the juvenile as a delinquent, he may in future be turned from delinquency.

72 CRIMINAL STATISTICS (E. & W.), Tables 24 and 25 (1970).

73 REPORT OF THE COMMISSIONER OF POLICE FOR THE METROPOLIS at 49 *et seq.* (1970).

Similar figures exist for the country at large, and the picture has remained the same for some years.⁷⁴

One of the problems in this area is, however, a lack of uniformity in police practice.⁷⁵ Under recent legislation dealing with children, the desirability of a police caution has been recognized, and it is predictable that this will have an effect upon police policy.⁷⁶ Many police forces have operated juvenile liaison schemes for some time, and this practice has likewise affected policy in some areas. Such schemes are apparently more widespread in the north of England.⁷⁷ The extent to which cautions are used can vary markedly in juvenile cases between different police areas, reflecting the ideological preconceptions of Chief Constables. It can indeed, lead to quite severe swings in policy.⁷⁸ Even in relation to road traffic where the caution is a universally accepted device, it has been pointed out that "unfortunately there is a considerable divergence of policy as between one police force and another."⁷⁹ The Metropolitan Police have adopted fairly clear policies in this area. Cautions are often used in minor cases, but only rarely in cases of speeding, dangerous and careless driving, failing to conform to automatic light signals, and defective and dangerous vehicles.⁸⁰ Such clarity of policy does not seem to be universal. Unfortunately, no studies appear to have been carried out regarding cautioning policy in road traffic cases, and the extent to which there is a problem remains obscure. However, in the case of adult offenders in indictable cases, there *does* appear to be a considerable uniformity as between different police forces.

Cautioning is not the only area in which discretion is exercised. Once it has been decided to invoke the criminal process, the question then arises as to how this is to be done. Basically, the police may either arrest the person, obtain a summons to require him to attend court, or, in some cases, procure a warrant for his arrest. In cases involving firearms, drugs, or the illegal possession of certain wild bird eggs (a somewhat heterogeneous list), police may be able to exercise statutory powers to stop and search before determining to proceed farther.⁸¹ In many areas where private and local Acts of Parliament apply, power may exist to stop, to search, and to detain persons and conveyances where it is suspected that stolen goods may be found on the person or in the conveyance.⁸² The dangers in stop-and-search legislation are well known. The police may stop and search not because they have probable cause to do so, but because they are reacting in an authoritarian fashion to long hair, strange dress,

74 See e.g., the REPORTS OF THE COMMISSIONER OF POLICE FOR THE METROPOLIS for 1960 and 1970. No substantial variation is disclosed, although the global number of traffic offenses has plainly grown as motor vehicle ownership has become more widespread.

75 D. STEER, *supra* note 67, at 14-15, presents tables which illustrate the divergences in policy quite graphically.

76 Children and Young Persons Act 1969, c. 54, § 5.

77 D. STEER, *supra* note 67, at 7.

78 *Id.* at 17.

79 REPORT OF H. M. CHIEF INSPECTOR OF CONSTABULARY 53 (1964).

80 REPORT OF THE COMMISSIONER OF POLICE FOR THE METROPOLIS 80-81 (1959-60).

81 Firearms Act 1968, c. 27, § 47; Misuse of Drugs Act 1971, c. 38, § 23(2); Protection of Birds Act 1954, 2 & 3 Eliz. 2, c. 30, § 12(1).

82 See e.g., Metropolitan Police Act 1839, 2 & 3 Vict., c. 47, § 66. In POWERS OF ARREST AND SEARCH IN RELATION TO DRUG OFFENCES (H.M.S.O. 1970) para. 18 n. 1, twelve localities are identified in which such powers exist.

beads, and the like. This complaint has been voiced in relation to police powers in the field of drugs.⁸³ Certain figures have been published in relation to drug matters, but it is difficult to assess these.⁸⁴ A ratio of arrests to stops of two in seven or one in six was considered to be reasonable by the majority of a Drug Advisory Committee which studied the matter. The conclusion is one with which it is difficult either to quarrel, or assent to. The approach taken by the Committee was to compare the result of police successes and failures under other statutory powers with those under drug legislation.⁸⁵ The method may be thought to be somewhat inexact. The principal interest of the *Report* for the purposes of this article lies, however, in the indications of the dangers to personal liberty involved in stop-and-search powers and the types of administrative direction which the Committee considered ought to be given to the police.

Even the decision whether to arrest or to make application for summons may involve discretion. In such cases, there is a natural tendency for the police to arrest the suspect. In order to obtain a summons, application must be made to a justice of the peace.⁸⁶ Arrest without warrant involves no such step. From the police point of view it is therefore an administratively convenient method. In Metropolitan London where extensive powers of arrest are conferred on the police under the Metropolitan Police Act, arrest is used in virtually all indictable offenses.⁸⁷ In the country at large, some use is made of the summons in indictable offenses. There is data which suggests that the use of the summons in such cases is declining.⁸⁸ The reasons for this are obscure. The figures may reflect the fact that along with the process of substantive law reform has gone an extension of offenses for which the police may arrest without warrant, but this seems unlikely.⁸⁹ There seems to have been a slight but perceptible shift in police practices. Whatever be the reasons for the increased use of arrest and decreased use of

83 C. COON & R. HARRIS, *THE RELEASE REPORT ON DRUG OFFENDERS AND THE LAW* (1969).

84 *POWERS OF ARREST AND SEARCH IN RELATION TO DRUG OFFENCES supra* note 82, at paras. 55 and 119.

85 *Id.* at para. 119.

86 *Magistrates Courts Act 1952*, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 1.

87 *REPORT OF THE COMMISSIONER OF POLICE FOR THE METROPOLIS 46* (1947). The practice has remained unaltered.

88 In 1964 the percentage of persons summoned expressed as a percentage of the total of those apprehended and summoned in indictable cases stood at 40 per cent. In 1969, the figure was 36 per cent, and in 1970 35 per cent. *See CRIMINAL STATISTICS (E. & W.)* Table 10. Again, age and sex had an influence in determining whether the summons was used. Seemingly the ratio of summons to arrest was most favorable in the case of juveniles and female offenders. The figures herein are crude and much further research is needed. There does however seem to be a constant trend over all age groups and certainly in relation to class III offenses—those committed against property without violence. The author is grateful to Mr. T. C. Smith, LL.B., one of his graduate students, for bringing the phenomenon to his attention. A. K. Bottomley, *Prison Before Trial*, (London School of Economics Occasional Papers in Soc. Adm. No. 39) notes that the summons is more often used in rural courts and may have an effect on the outcome of a particular case. A person who appears on summons rather than arrest has for example a better chance of securing bail pending trial. He will probably keep his job. He may be less likely ultimately to face a prison sentence.

89 By *Criminal Law Act 1967*, an arrestable offense is defined as one in respect of which there is a maximum penalty of five years or more imprisonment. Under the *Theft Act 1968* c. 60, most offenses now are punishable by a maximum sentence of five years, and joyriding which under § 12 has a three-year maximum, is expressly made an arrestable offense. Most of the common offenses against property involving dishonesty were, however, formerly arrestable, especially theft and false pretenses.

summons, the development is one which again poses problems. Arrest is embarrassing. It may not be only inconvenient to the person arrested, but also gravely damaging. This has long been recognized in relation to the *manner* of arrest,⁹⁰ and *should* be recognized in relation to the fact of arrest. Furthermore, the detention which can follow arrest may, as is now recognized, prove detrimental in many ways to the person arrested. He may lose his job. He may find it more difficult to mount his defense.⁹¹ Undoubtedly the situation is reasonably healthy in England as compared to other foreign jurisdictions. Apart from driving offenses involving drink or drugs, driving offenses are usually dealt with by summons. Most summary offenses are dealt with by summons rather than arrest. Furthermore, where an arrest is made, for whatever offense, the police, if the offense be not in their view serious, may bail the offender themselves. This involves entering into a recognizance and not the deposit of cash.⁹² It is not known what percentage of arrested persons are in fact bailed by the police. A recent study, involving small areas and a relatively small number of offenders, found that about 18 per cent were bailed in rural, and 11 per cent in urban areas.⁹³ Metropolitan Police officers have suggested that in fact these figures are low and therefore atypical. Be that as it may, the use of arrest is a practice which must be watched. Certainly, there appear to be no directions to the police telling them when to arrest and when to summons. The natural inference would be that arrest is to be used in any case where the power exists. If this is so, then there is a need at least for administrative directions to ensure that arrest is not an automatic response in cases where there is no imperative need that it should be. In this respect, recently enacted Canadian legislation might be considered.⁹⁴

A further, and poorly documented area of discretion, relates to the choice of charge to be brought. The selection of the charge and the decision to oppose summary trial are again matters of police discretion.⁹⁵ Criticism of the police as a rule centers on the view that the charge brought was too lenient.⁹⁶ A person charged with obstruction will, it has been said, often have committed a far more serious offense, sometimes amounting to an assault or wounding. Two principal reasons have been advanced for the practice of preferring lesser charges. On the one hand, proceedings may in such cases be more certain and speedy. At the

90 REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE para. 84 (1929).

91 A. K. Bottomley, *supra* note 88, at 31-39. See also M. FRIEDLAND, DETENTION BEFORE TRIAL (1965) regarding Canada, and E. PUTTKAMER, ADMINISTRATION OF CRIMINAL LAW 68-70 (1953) for remarks on the American scene.

92 Magistrates Courts Act 1952 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 38(1).

93 A. K. Bottomley, *supra* note 88, at 64.

94 Bail Reform Act 1971 § 450(2) imposes a duty on the police not to arrest in summary conviction cases and in respect of lesser indictable offenses where the public interest, including the need to identify the person or to secure or preserve evidence of the offense or to prevent a repetition of the offense, may be satisfied without arrest particularly where the constable has no reason to believe that the person will not appear to stand his trial. For commentaries see C. POWELL, ARREST AND BAIL IN CANADA (Toronto 1972) and McWilliams, *Reform of Bail*, 19 CHITTY'S LAW JOURNAL 234 (1971). For the genesis of the Canadian legislation, see REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS 93-97 (1964). It may be of interest to note that in France, the Police judiciaire are empowered to arrest only in case of *crime* or *delit flagrant*. See G. LEVASSEUR & A. CHAVANNE, DROIT PENAL ET PROCEDURE PENALE paras. 20 and 321 (2d ed. 1972).

95 Hargrove, *Police Discretion*, 25 SOL. 337 (1958).

96 Re Beresford, (1952) 36 Cr. App. R. 1.

other extreme, the choice may reflect a bargain between the accused's solicitor and the police to drop the greater charge and accept a lesser one, with perhaps an understanding as to the giving of information to the police.⁹⁷ The importance of the criteria of certainty and speed in setting the charge can readily be documented. A standard police work thus notes that where there is a choice between charging the offense of occasioning actual bodily harm⁹⁸ or the graver charges of wounding or causing grievous bodily harm,⁹⁹ the actual bodily harm charge should be chosen because it is more easily proved. Similarly, the police do not usually charge persons with the common law offense of indecent exposure because the charge is one which is triable only on indictment. Instead, where possible, the police charge indecent exposure with intent to insult a female contrary to section 4 of the Vagrancy Act 1824. This summary charge carries a maximum penalty of £25.00 or three months' imprisonment. In the alternative, a charge with a rather lower penalty of indecent exposure to the annoyance of residents, contrary to section 28 of the Town Police Clauses Act 1847 may be used.¹⁰⁰

It is not argued that the bringing of a lesser charge for technical reasons of the sort outlined above is undesirable or corrupt. In the instances cited it would probably matter little in terms of the ultimate sentence which of the charges was brought. The matter of preferring lesser charges as a result of a bargain poses greater difficulty. The gravity with which conduct is to be viewed is, as the result of such a practice, determined primarily by the police. This is decidedly paradoxical in an English context because of the very tight control exercised by the courts over the practice of plea bargaining. English courts do not treat themselves as bound, in the matter of sentence, by any bargain struck between prosecution and defense, nor will the court take part in the bargaining process. The most that the court will do is to indicate the type of penalty which it regards as *prima facie* appropriate to the case.¹⁰¹ Thus, judicial control over the sentencing process is rigidly maintained. Yet the system may be undermined by the willingness of the police to proceed summarily, and such decision is only imperfectly reviewable.¹⁰²

97 Hargrove, *supra* note 95.

98 Offenses Against the Person Act 1861, 24 & 25 Vict., c. 100, § 47.

99 *Id.* §§ 18 and 20. For details of these offenses see SMITH and HOGAN, *CRIMINAL LAW* 264-68 (2d ed. 1969).

100 J. D. DEVLIN, *supra* note 66, at 53, 131-32.

101 *R. v. Turner*, [1970] 2 All E.R. 281; and see Davis, *Sentences for Sale: A New Look at Plea Bargaining in England and America*, 1971 CRIM. L. REV. (Eng.) 150; Gordon, *Plea Bargaining*, 1970 S.L.T. NEWS 153; 1970 ANN. SURVEY OF COMMONWEALTH LAW 173-74.

102 If after convicting a person not below the age of seventeen of an indictable offense, a Magistrates Court is of opinion that the offender's character and antecedents are such that greater punishment should be inflicted upon him than the court has power to inflict, the court may commit him to Quarter Sessions for sentence. Criminal Justice Act 1948, 11 & 12 Geo. 6, c. 58 § 29; Magistrates Courts Act 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 29; Criminal Justice Act 1967, c. 80, § 56. The matter of sentence may have been effectively compromised by an initial decision to bring proceedings summarily rather than on indictment. However, in *R. v. Coe* [1968] 53 Cr. App. R. 66 the court disapproved of the prosecution's bringing charges summarily where the offenses were serious. The court further points out that the magistrates' primary duty in indictable cases is to begin to inquire into the matter as examining justices and only to try the case summarily where, under the circumstances, their sentencing powers seem adequate. See Magistrates Courts Act 1952, 15 & 16 Geo. 6 & Eliz. 2, c. 55, § 19(2).

IV. Conclusion: The Proper Role of the Police

The areas with which we have dealt represent the main areas in which the police in England and Wales exercise discretion. They are, to borrow a phrase, "low-visibility" areas.¹⁰³ The problem of control is one of some difficulty. The first and most obvious point to be suggested is that there has been a failure to articulate standards which the police might apply. There is truth in the assertion that an unduly rigid code of rules would work badly.¹⁰⁴ Even conceding this, the statement of some customary platitudes might be of service to the constable in determining whether to exercise powers in a particular case. The differential nature of enforcement reveals that criteria are now imposed within police forces by the Chief Constable. These necessarily relate to both the criteria by which discretion is exercised and to the consistency with which it is exercised.¹⁰⁵ To externalize some of these criteria is surely not unthinkable, nor would it be unworkable. Thus, for example, it could be determined whether cautions ought ever to be issued in cases where guilt is not admitted and the police lack evidence upon which to prosecute. This would bring uniformity of practice between the Metropolitan Police and other forces. It would be helpful to indicate in certain circumstances whether a caution was appropriate or not; as for example in cases where the suspect appeared not to have committed a crime at all. One such circumstance mentioned by Mr. Steer is the case wherein a juvenile who might have a statutory defense to a charge of unlawful sexual intercourse is nonetheless cautioned.¹⁰⁶ The lead given in Canadian legislation regarding when not to arrest has already been noted and affords a drafting model. More broadly, there is the example of Scotland where the criteria employed in determining whether to bring a charge have been reduced to writing, albeit in an exceedingly general form.¹⁰⁷ Even general ethical criteria, doubtless of a negative nature, might be formulated to give some guidance on the question when a more or less serious charge should be brought.

The conditions upon which the criminal law *ought not* to be exercised is as much a matter of concern for society at large as the question when the criminal law *should* be invoked. The criteria by which the police act are not all of self-evident validity. They concern us all. There may of course be other reasons why some persons do not desire greater articulation of these matters. There might be a fear for example that persons would seek to set up rights to a caution and, ultimately, to judicialize the use of discretion to a point where its existence would be burdensome to enforcement agencies. These problems, given the present grace

103 Goldstein, *supra* note 64.

104 Wilcox, *supra* note 61.

105 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 19 (1967).

106 D. STEER, *supra* note 67, at 57-58. Mr. Steer favors the use of a caution in some cases where the police are technically able to proceed, remarking that ". . . it seems quite sensible that he should be warned that such behaviour is likely to be misunderstood and that he is treading in the borderland of crime." The caution should not however thereafter be referred to. Seemingly, such references have been made in social inquiry reports, a practice which Mr. Steer rightly condemns.

107 See RENTON & BROWN, CRIMINAL PROCEDURE 14 (3d ed. 1968) where the principles are set out, albeit without attribution of authority.

and favor approach, scarcely exist. This is a danger which it may simply be preferable to face.

If one assumes that the relevant criteria can be and have been articulated, the next step is to see how the due observance of these might best be secured. The first and most critical link in the chain lies in the hierarchical control within the force itself. In England this is a shared matter in that the code of discipline is propounded by the Home Office, but enforced by the Chief Constable.¹⁰⁸ In operational matters the Chief Constable is of course supreme. In a real sense responsibility is shared because as we have seen, the Home Secretary has a voice in deciding who may be appointed Chief Constable and who may be removed from that office, if necessary. But these are ultimate weapons. It is upon the intelligence and integrity of the Chief Constable that the proper performance of police duties primarily depends. The problem is to see how the Chief Constable may be guided and if necessary corrected without proceeding to extreme, disciplinary measures, which would probably be destructive and unnecessary.

Various methods of reconciling the competing demands of independence and control have been suggested. Of these, the most prominent, and to American eyes the most familiar, is to make the police answerable to a central body of prosecutors. Thus, *Justice*¹⁰⁹ has recommended that there should be established a Department of Public Prosecutions to be responsible both for the decision to prosecute and for the conduct of prosecutions. The Department would not handle trivial and routine cases, nor would it deal with cases presently prosecuted by other government departments. The Department, unlike the present police solicitors, would be independent of the police, and would be headed by a director who would be responsible to the Attorney General for his actions. The Attorney General would be responsible to Parliament for the conduct of the Department. The justification for the scheme is said to be that the officers of such a Department would be better able to take a detached view of cases than the police, and would be better able to weigh objectively the factors which should properly be taken into account in determining whether to prosecute. The proposal also seeks to overcome the present regional variations in prosecution policy which are said to derive from the differing attitudes of Chief Constables. This advantage might accrue. It may however be thought to be potentially rigid, workable only under conditions of extreme centralization or detailed rules capable of rigid enforcement. If the scheme allowed for flexibility and decentralization one might gain neither detachment, because the solicitors would necessarily be familiar with locally based police, nor any greater consistency than at present, since the views of locally based prosecutors might be given full expression.¹¹⁰ At the least, the problem of control within the new hierarchy needs to be more carefully considered. Furthermore, the question of who is to set the standards to be applied, even in a general form, needs to be solved. A variation on the theme suggests the formation of a National Legal Department to which the police could go to

108 See 1967 S.I. No. 185, 186.

109 *The Prosecution Process in England and Wales*, JUSTICE (London, 1970).

110 Mellett, *The Role of the Police in the Prosecution of Offenders*, 45 POLICE JOURNAL 128-150 (1972).

obtain legal representation and advice.¹¹¹ This idea may be thought to be insufficiently coercive, though the ability of the Department to take over any prosecution as of right would impose some safeguards against unregulated police discretion.

In all these schemes, there is the problem of achieving not only control within the hierarchy but control outside it.¹¹² The availability of parliamentary control, doubtless via a Select Committee, is one of the most attractive features of the *Justice* scheme.¹¹³ One might perhaps enter a plea for judicial control as well, to suit the exigencies of the particular case. *Justice*, to a point, recognizes the problem by providing for the continued existence of the private prosecution. The private prosecution is not, however, an efficient device for controlling discretion, nor is it always a realistic weapon to proffer to a victim anxious to employ the criminal law to vindicate a wrong done to him. Perhaps, assuming the existence of agreed standards, we might follow those Commonwealth countries which allow a summary application to a magistrate to have prosecutorial discretion reviewed.¹¹⁴

At the moment, such schemes as these are a topic of discussion, but not, it would seem, of governmental action. England remains a jurisdiction which, remarkably, vests enormous discretionary powers in the police, and in which, even more remarkably, control is left almost entirely to the invisible processes of advice and consultation.

111 *The Prosecution Process in England and Wales*, *supra* note 109, at 15 (minority report by Laurance Crossley).

112 A problem adverted to in relation to American prosecutors by Silkenat, *Limitations on Prosecutors' Discretionary Power to Initiate Criminal Suits: Movement Toward a New Era*, 5 OTTAWA L. REV. 104 (1971).

113 This might avoid the problem that prosecutorial discretion would still be unreviewable, as it appears to be, for example, in Scotland. *See* G. H. GORDON, CRIMINAL LAW 4-5 (Edinburgh 1967).

114 *See* Laws of the Sudan, Vol. 9 Title XXV Criminal Procedure, THE CODE OF CRIMINAL PROCEDURE, §§ 111(1), 135 and Schedule 1, col. 3; CODE OF CRIMINAL PROCEDURE (India) (Act V of 1898) §§ 154 and 157. *See* D. V. CHITALEY & S. APPU RAO, 1 THE CODE OF CRIMINAL PROCEDURE, 862 (1965) where it is pointed out that the police do not have an unrestricted discretion not to investigate a complaint, but can refuse to do so only in cases where no prima facie case for investigation has been made out, or where the report appears to be false or the dispute is of a civil nature.