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CONTROLS IN CRIMINAL LAW ENFORCEMENT*

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IF EVERY policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable. Living would be a sterile compliance with soul-killing rules and taboos. By comparison, a primitive tribal society would seem free, indeed.

Yet there are those who believe that the maximum substitution of rules of law for discretion is desirable. They believe that the improvement of crime control is away from larger to lesser areas of discretion, from less to more rules of law.

The thesis of this discussion is that the presence and expansion of discretion in crime control is both desirable and inevitable in a modern democratic society. The thesis is that discretion may not be eliminated, except at intolerable cost—and this is true at every level—police, prosecutor, grand jury, petty jury, court, probation, correction, and parole. The question then is not how to eliminate or reduce discretion, but how to control it so as to avoid the unequal, the arbitrary, the discriminatory, and the oppressive.

I. NATURE OF DISCRETION

By discretion, one refers, of course, to the power to consider all circumstances and then determine whether any legal action is to be taken. And if so taken, of what kind and degree, and to what conclusion.

The Anglo-American is accustomed to think of discretion as a power exercised by men, as indeed it is, and therefore a departure from the doctrine that ours should be a government of laws and not of men. In criminal law where the principles of strict construction, *ex post facto*, and *nullum crimen sine lege* have their rich hurgoning, the presence of broad discretionary power seems a negation of fundamental principle and a gross threat to individual freedom.

* Justice Breitel delivered this speech at the Third Dedicatory Conference, on Criminal Justice, January, 1960 in the New Law Buildings of the University of Chicago Law School.

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Be that as it may, discretion occupies a special place in the administration of criminal justice. There is more recognizable discretion in the field of crime control, including that part of its broad sweep which lawyers call "criminal law," than in any other field in which law regulates conduct. Moreover, that discretion exists at the inception of a criminal matter and persists to the end.

The police exercise discretion whether to arrest or not, whether to investigate or not. The prosecutor has, too, the discretion whether to initiate a prosecution or not, or whether to investigate or not. The grand jury, if there is one, has virtual discretion to indict or not, the contrary applicable statutes notwithstanding. The prosecutor, again, has a discretion whether to prosecute an indictment, or to nolle pros., or to accept a lesser plea. The court has a discretion in determining which counts to submit to a jury, the kind of charge to give to the jury, the lesser plea it may accept, or the sentence that will be imposed. The petty jury, of course, has, in the criminal case, a practically uncontrolled discretion to acquit. There is obvious discretion in the probation agency, if an offender is turned over to it. There is ever larger discretion reposed in correctional agencies. It is evident in classification, reception centers, modes of treatment, and the various rewards, including time credit for good behavior. Parole exercises the broadest discretion in releasing, conditioning release, supervising, and returning offenders for violation. There is even the capstone of absolute discretion involved in the executive pardoning power.

Compare that roster of discretions with those in private law, and the contrast is marked indeed. Not even the broad reaches of equity provide a comparable roster of discretion.

II. THE GRAND OBJECTION TO DISCRETION

There is a grand objection to substantial discretion in crime control. The objection, however, stems, in part, from a confusion. It ignores that the administration of criminal justice is only partially and slightly a field of law.

Dean Harno has put it very well. In a somewhat different context, he has said that it is a very questionable assumption that crime control is a question of law.¹ Pound, long ago, also pointed out that the criminal law is only a small part of a great social engine to provide peace and order in the community.² It is concerned with preserving the social fabric against invasion by the actor who does not or cannot conform. Essentially then, the problem is an administrative one. The core of administration is flexible discretion. Hence, crime control, in at least some of its phases, inevitably requires that discretion be exercised.

It is perhaps for this reason that the grand objection is leveled primarily at discretion exercised by police and prosecutor, and only less often to the dis-

¹ Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 CRIM. L., C. & P.S. 427, 440 (1951).

² POUND, CRIMINAL JUSTICE IN AMERICA 3-5 (1930).

cretion exercised by courts and the post-sentence agencies. This is so because in the former areas, that is, of police and prosecutor, it seems more readily apparent that discretion displaces the rule of law.

Jerome Hall's position and objection are so clear and so typical that his treatment of the role of the police is a good one to examine. He has said:

In the first place, so long as the police in a democratic society obey the law, they do not decide that an arrestee is guilty of any crime. That is not a policeman's job any more than it is the job of the lawyers who prosecute and defend the case. To be guilty of a crime means to have been found guilty beyond any reasonable doubt by a court of law. Indeed, the police are not permitted under law to refrain from arresting until they are convinced to that extent, or they would rarely act. They are bound to arrest when they have only reasonable grounds to believe that the arrestee committed a crime. The question of guilt is a judicial one.³

This, indeed, is an unexceptionable statement of what Professor Hall himself might call paper law. But it describes neither the function nor the practice of police or prosecutor. For one thing, it ignores the onset of discretion in choosing to investigate or not. But even beyond that, it ignores the selectivity by the police in handling the trivial offense, the minor accidental offense, the technical violation, the violation of the unpopular blue law, and even the offense that may be, or become, the instrument of a legal blackmail. It bars the selective process which, in our complex and highly regulated society, must operate to separate the inconsequential and the harmless from the consequential and harmful.

Actually, Professor Hall is too good an analyst to miss these implications. So, he would construct a framework of rules which would make legal the practices followed by the police and prosecutor which now may be illegal or unauthorized.⁴ For example, he would enact statutes which would authorize the police to interrogate and detain where "probable cause" under present standards does not exist. He would expressly authorize the law enforcement officer to engage in the selective process, but he would adopt a standard which would regulate, or at least purport to regulate, the exercise of discretion. But, of course, this does not eliminate or reduce discretion.

Surely, it must be conceded at the outset that illegal or unauthorized conduct by public officials is a net evil, regardless of offsetting advantages. It is that, if only because it breeds general disrespect for law. It is also that because it leads to the unbridled and oppressive. So, too, it must be conceded that discretion—even legally permissible discretion—involves great hazard. It makes easy the arbitrary, the discriminatory, and the oppressive. It produces inequality of treatment. It offers a fertile bed for corruption. It is conducive to the development of a police state—or, at least, a police-minded state.

³ Hall, *Police and Law in a Democratic Society*, 28 IND. L. J. 133, 155 (1953).

⁴ *Id.* at 156-59.

Nevertheless, the question remains whether discretion is an essential element in criminal administration, and also whether we are dealing with more than one kind of discretion.

III. DISCRETION UNDER RULES OF LAW

There is more than one kind of discretion. Put oversimply, discretion without floor or ceiling is a device for mischief and oppression. No imputed benevolence will justify it in a democratic society. This is the kind of discretion which results from broad penal statutes, as in Nazi Germany, Fascist Italy, or Soviet Russia, where social offenses of the widest definition unloose the uncontrolled power of officialdom.⁵ Sometimes, some such statutes find their way into the penal codes in the American states.⁶

But this is not the kind of discretion for which this discussion speaks. The discretion here justified is that which may ameliorate or avoid the effective application of the literal criminal rule. It is the discretion that the petty jury has: not to convict, but to acquit; that the policeman has—not to arrest, but to *not* arrest; that the prosecutor has—not to prosecute, but to *not* prosecute; that the court has—not to imprison, but to suspend sentence.

So, by all means, make acts criminal only by particularized statutes; limit, as we do, the powers of arrest (paradoxically, Professor Hall would broaden the powers of arrest so as to make "legal" the otherwise illegal acts of policemen);⁷ keep narrow the inquisitorial powers of the prosecutor, and hedge with standards the function of court and the post-sentence agency. But leave and authorize the discretion to ameliorate and qualify. Why does one rarely concern himself with the absolute discretion of executive pardon? Because it can only save; it can never kill.

Of course, there is involved a principle of moderation. If limits on the exercise of discretion are set too high, then there will be virtually arbitrary power. If the limits are set too low, there will be a strait-jacketing and mechanicalization of criminal law administration.

Pound says: "For centuries it has been sought to administer justice now by rules exclusively or chiefly, and now chiefly by discretion. Such attempts have never succeeded."⁸

IV. THE AREAS AND AGENTS OF DISCRETION

Thus far the reason for discretion has been discussed in rather general terms. It would be good to analyze more particularly the scope of discretion.

The purpose of modern penology is not to avenge or adjust every wrong or every violation. The purpose is to attain a measure of social protection and the

⁵ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 41-49 (1947).

⁶ See, e.g., N.Y. PENAL LAWS § 43

⁷ Hall, *supra* note 3, at 160-61.

⁸ POUND, *op. cit. supra* note 2, at 38. See also pp. 39-42.

rehabilitation of the wrongdoer. Woven into these purposes are elements of retribution and deterrence. But while every private debt, perhaps, ought to be paid, this is no analogue to the "public debt" as that phrase is glibly applied to the criminal wrongdoer. Criminal sanctions, typically, do not redress the criminal wrong to the injured, but serve general social purposes or the rehabilitation of the wrongdoer.

Yet criminal conduct must be described in generalized terms. The rules must sweep together identical acts with their markedly different actors amid infinitely variable circumstances.⁹ So, as the chancellor and the general verdict of the jury softened the impact of common law rules in the civil law field, so discretion functions to provide the selectivity needed in criminal law enforcement. Thus, the respectable businessman who inadvertently carries a pistol across state lines need not be treated as the gangster who is caught with an unlicensed revolver. Nor need the nurse who technically violates the narcotics law be treated as a criminal because she unwisely administered to a patient in excruciating pain.¹⁰

Discretion too must play its role very early—at the inception of a criminal matter. Criminal proceedings, by their very nature, are summary and often effected in immediate pursuit of the wrong and the wrongdoer. Mere arrest may destroy reputation, or cause the loss of a job, or visit grave injury upon a family. Hailing the arrestee promptly before a magistrate, though serving due process, may be no boon indeed, to the innocent or technical violator. A similar balancing of effects occurs throughout the other steps in the criminal prosecution.

The greatest play of discretion is expressed, however, in the general selectivity in criminal law enforcement. All crime could not be prosecuted, even if wished. The penal statutes are legion in number. They are an historical collection. They seem to include the panacea for every ill. If there is something wrong, someone will pass a law to correct it, and that law is just as likely to carry a criminal sanction. There are not enough agencies to handle every criminal violation. Nor would there be any justification for total coverage of the area of potential wrongdoing. A society can only pay so much for protection. It cannot put a policeman on every street corner.

So, forces of crime control are deployed. And the deployment changes from time to time, to meet conditions or public pressures. The discretion of deployment decides more than anything else who or what crimes shall be prosecuted.

Then, there are "crime waves," real or fancied. The citizenry and the press play their role in selecting who or what crimes shall be prosecuted. This stems from deep-seated social forces and it is difficult, sometimes, in the midst of such a wave, to determine the soundness of the selection. One day, bank robbery

⁹ *Id.* at 37-38.

¹⁰ Klein, *District Attorney's Discretion Not to Prosecute*, 32 L. A. BAR BULL. 323 (1958).

is the focus of prosecutorial and police concentration. Another day, it is the mugging robbery assault, or rape, or homosexuality. Still another day, it is subversive activity to the substantial exclusion of other interests. Or there may be a flurry of criminal antitrust prosecutions, or of prosecutions in the field of labor racketeering. Sometimes, the selection is given extra emphasis by the specially organized independent investigation. All of these are inescapable exercises of discretion determining who or what crimes shall be prosecuted.

Then, of course, there is the accidental offense. It is no surprising thing that in the family and juvenile courts criminal offenses, so many of which are in the category of the accidental, are handled with a discretion much wider than that in the regular criminal courts. The need for discretion elsewhere in crime control with respect to the accidental offense is essential if sterile justice is to be avoided.

Most controversial, perhaps, is the discretion exercised by prosecutors and courts in the handling of informers and accomplices who cooperate in prosecutions. This is, concededly, a price paid for valuable services rendered. It is another example of a balancing of values.

Lastly, there is the much-maligned, but almost universally used, discretion by prosecutors and courts in accepting lesser pleas. This serves many of the ameliorative purposes mentioned. It is also part of the deployment of prosecutorial forces. It is sometimes a finer adjustment to the particular crime and offender than the straight application of the rules of law would permit.

All of these areas of discretion reflect the simple fact that crime control is not so much a field of law as it is a great engine for social administration. Of that great engine the criminal law is but a part.

Most of us would not be willing to go the whole hog into socialized administration because it would impair the protection of the individual, as represented by the rules of law and, to a qualified extent, by the adversary system. In sentencing and post-sentence procedure, however, we have actually gone way over. Discretion reigns wider than ever and is on the increase.

Reception centers, reformatories, indeterminate sentences, the great and widening gaps between minimum and maximum sentences, the modes of probation and parole, are all substantial departures from the rule of law and invoke the substitution of discretion—and, for the most part, not even in the hands of lawyers. In this connection, consider, for example, the denial of right to counsel in parole release matters. Yet, we have learned not to shrink from these broad areas of discretion because they are all subsumed under the verbalization of "treatment."

The analysis is not that simple. All crime control, from investigation to termination of parole, is the management—or treatment, if you will—of the social offender.

V. THE CONTROLS ON DISCRETION

In the light of what has already been said it should be evident that the kind of controls which can be essayed in the area of discretion is the kind which

may assure soundness and honesty in its exercise. To do more is not to control discretion, but to dictate the manner in which it is to be exercised.

The paramount control, of course, is still the accurate, sensitive, and particularized definition of specific crimes. Cow-catcher clauses and blunderbuss statutes are productive of arbitrary power. Inaccurate statutes or those based on inadequate thinking require excessive interpretation and, therefore, lead to arbitrariness and perhaps uncontrolled discretion.

Next in importance is to subject those who exercise substantial discretion to centralized supervision. This is a problem of internal administration.

So, in the case of the police, it is not suggested that the individual uniformed policeman should alone exercise the great discretion thus far discussed. The police, as such, should have the great discretion. But the police consist of more than the uniformed policeman on the beat. They include the detective bureaus and the several layers of supervisory officers, such as captains, and headquarters staff. Of course, in smaller communities there will be less of such organization to control the exercise of discretion. But the problem is really one confined to the centers of larger populations, where generally there is sufficient organization.

There are other factors involved in better internal administration. It is essential that there be merit selection of personnel, training, and prompt and effective sanctions for abuse in the exercise of discretion.

Beyond the improvements in internal administration there is need for, at least, state-wide centralized administrative supervision and enforcement of standards. The separate principalities of local police forces and local prosecutors, as they now exist, do not lend to effective control. This has already been recognized as a factor in accomplishing effective law enforcement from the point of view of social protection. It is even more important as a factor in effecting protection of individual rights.

Perhaps the best device for controlling discretion is that of shared discretion by different agencies. This is nothing more than the familiar idea of checks and balances. It is used already in most jurisdictions in *nolle prosequi* and in the taking of lesser pleas. Both the prosecutor and the court must concur in the recommendation, and there must be a filed written statement of reasons for the action.

Similar but informal practices are used by police and prosecutors in important or difficult cases, namely, in deciding whether an arrest should be made or prosecution advanced. This should be lifted from the informal, and become a formal regulated practice. The use of filed statements explanatory of action taken is an obviously healthy check even on a shared discretion.

The information filing practices of prosecutors and the action of grand juries in not returning true bills generally, at least as a practical matter, involve the concurrence of two agencies, either of the grand jury and the prosecutor or the prosecutor and the court. Where such concurrence is not present it should be established.

Probation and courts now act concurrently. Perhaps the prosecutor should

be involved too. Parole is relatively free of court supervision. So long as parol discretion is as great as it is, and becoming greater, there is real basis for considering some sort of court concurrence. It is recognized that this would seem to most a backward step. Nevertheless, the growing significance of parole and the ever-increasing discretion involved requires re-evaluation of this view. This is especially true so long as most of us agree that parole discretion should not be hedged with the elements of the adversary system, such as the right to counsel, the making of a record, or the statement of findings, all devices that have been suggested and rejected thus far.

After all, to the offender, to be held an extra period of years by the parole board is no sweeter than to have had the added years placed upon his sentence by the judge, or to have the officer arrest him or the prosecutor prosecute him for the additional offense which occasions the added years. Yet in the one case, we accept the discretion as good, and, in the other, some sustain shock and rejection and fear that it is arbitrary.

The last discussion suggests some obvious reconsideration of the relative independence of correction and parole. This, of course, presents the greatest difficulties because of the great desire to keep correction independent of both the parole boards and the courts. But if there is value in shared discretion, the correctional agency should not be overlooked.

In addition to centralized supervision and enforcement of standards with respect to police and prosecutors on a state-wide basis, there is need for administrative machinery to correlate the thinking and operations of all the agencies of crime control: police, prosecutors, courts, probation, correction, and parole. Recognizing that each agency is a part of a whole, a major step in the way of integration is only logical.

At the present time there are the loosest contacts at local and state levels, and then largely through accidental or historical happenstance. The several responsibilities of each part to any other part and to the whole should be accepted.

Initially, by the process of interchange of information and the concurrent formulation of standards this unity will be furthered. Inevitably, there would be an evolution toward a centralized administrative machinery that would enforce those standards among all the agencies. This, indeed, could provide the greatest and most effective of controls over the ever-widening power of discretion in this field of social engineering.

There is recurrent suggestion for direct remedy by criminal prosecution and civil suit for misconduct in the areas of official action.¹¹ Such remedies are merely nominal. The criminal sanctions can rarely be invoked to control the errant police officer, the errant prosecutor, and never the oppressive judge. The civil damage suit is worthless, especially if the victim of oppression is a social misfit or an unsavory character. The direct civil remedy, in the nature of mandamus or injunction is equally ineffective, for the reasons already given.

¹¹ See, e.g., Note, *Nonfeasance: A Threat to the Prosecutors' Discretion*, 30 IND. L. J. 74 (1954).

The device of exclusionary rules of evidence, that is, the exclusion of proof illegally or oppressively obtained, covers only a part of the area. The device never avails those who have been mistreated only to be released or discharged before trial. Such persons—the ones who most likely have been innocent of anything—are, therefore, the ones most aggrieved. Even as to the guilty, the device is only narrowly effective at best. If oppression yields the clue to the crime or the lever to effect later confession or plea of guilty, that is usually good enough. In cases where it is not, the price paid may be the denial of social protection in order to achieve good and fair prosecutorial work.

There must be a better method for stopping police oppression than freeing the guilty. Still the device of excluding proof illegally or oppressively obtained is used in many jurisdictions. If the trend in the United States Supreme Court continues, it appears to be one that will be resorted to even more in the future.

A note of skepticism must be introduced. Those who have spent many years in different branches of government know only too well the limitations of any system, machinery, or paper plan. Always men are involved, their quality, and their capacity for imaginative leadership. Good men will use discretion wisely. Good men will control discretion wisely. Bad men will make a mess of discretion; they will also make a mess of rules of law.

VI. CONCLUSION

If there is any significance to what has been said, it is that the whole field of criminal law must be viewed from beginning to end; so viewed, discretion is everywhere—growing greater rather than less.

More important than any suggestions made is the recognition of the essentiality of discretion—that discretion, of itself, is good and not bad.

Pound has said, speaking of criminal law:

Law is something more than an aggregate of rules. Hence enforcement of law is much more than applying to definite detailed states of fact the pre-appointed detailed consequences. Law must govern life, and the very essence of life is change. No legislative omniscience can predict and appoint consequences for the infinite variety of detailed facts which human conduct continually presents. * * * Only the most primitive bodies of law are composed wholly of rules, and even in primitive codes there is a certain amount of traditional "interpretation" to be reckoned with.¹²

Recourse to rule of law in an effort to eliminate or reduce discretion is a natural reaction to the abuse of discretion; but it is, nevertheless, a naive reaction. For, in recognizing the place of discretion we perforce accept the limitations on verbalized law. Inherently, the guidance of discretion lends itself not to rigid particularized rules, but rather to the reason of the law operating sensitively in the "clutch of circumstance."

The real answer is to adopt practical administrative means for directing discretion, preferably by shared controls, and by reviewing its exercise internally. The search must be for the means.

¹² POUND, *op. cit. supra* note 2, at 36.