

REVIEW

Police Discretion, KENNETH CULP DAVIS. West Publishing Co., St. Paul, Minn., 1975. Pp. xii, 176. \$4.45.

Henry J. Friendly†

This little book is a sequel to Professor Davis's pioneering essay, *Discretionary Justice—A Preliminary Inquiry* (1969). It is a study of "selective enforcement"¹ of the criminal law by the Chicago police, mainly with respect to minor crimes. With his usual refreshing willingness to dirty his hands by grubby work on the facts, Professor Davis and five assistants interviewed three hundred police officers, five deputy superintendents, and the superintendent. While these interviews doubtless represent a reliable cross section of the Chicago police, it is unfortunate that similar investigations were not conducted in a few other places to see how typical the Chicago experience is. We must be grateful, however, for what Professor Davis has given us.

It is not too surprising to learn that, despite Illinois laws and Chicago ordinances demanding full enforcement of every criminal law, "[s]ome law is always or almost always enforced, some is never or almost never enforced, and some is sometimes enforced and sometimes not."² Full enforcement is unattainable as a practical matter not only because the legislature has failed by a wide margin to provide the necessary funds,³ but because no one could really want it. If the Chicago police arrested all unmarried adults of opposite sex who were living together, or all boys riding bicycles on sidewalks, or all families drinking beer while picnicking in public parks, they would not only wreck the prosecutors' offices and the criminal court system but would create a public outcry. Despite the enthusiasm of legislators for multitudinous penal statutes and ordinances, and laws subjecting policemen to discipline or even criminal punishment for failure to enforce them, the police are expected to exercise some judgment. The criticism concerns the administrative process, or more accurately the lack of process, by which this exercise of judgment is governed.

† Senior Judge, United States Court of Appeals for the Second Circuit; Presiding Judge, Special Court under the Regional Rail Reorganization Act.

¹ K. DAVIS, *POLICE DISCRETION* 173 (1975) [hereinafter cited as *POLICE DISCRETION*].

² *Id.* at 1.

³ *Id.* at 81.

The Chicago Police Department has promulgated no policies as to which, and to what extent, laws shall be enforced. The reason it has not done so is that the department heads indulge in "the pervasive system of falsely pretending that all statutes and ordinances are fully enforced."⁴ This leaves the making of policy to the patrolman on the beat. Some degree of uniformity, in fact more than might be expected, is achieved by the "bamboo wireless" operating among the officers. But the uniformity is incomplete, and is often based on erroneous notions of what prosecutors and judges will do. A notable instance is the general refusal to arrest, even for a serious crime committed in the presence of known witnesses, when the victim declines to sign a complaint.⁵

There can be no rational disagreement with many of Professor Davis's proposed remedies. The principles governing selective nonenforcement should be determined at the top, not at the bottom. Only the superintendent and his chief assistants know what the department's resources are in personnel and equipment. Only they have constant direct access to their prosecutorial counterparts and the judges and top administrative personnel of the criminal courts. Only they are in a position to commission studies by criminologists to determine whether partial or only occasional enforcement is worth the price and whether there are not better alternatives.⁶ The result would be a set of instructions or guidelines developed by those who are best rather than least qualified to prepare them. It is a necessity, not a shortcoming, that in many cases these guidelines will not be altogether precise.⁷ For in most instances the variety of circumstances is too great for a fixed formula; the objective is to confine police discretion, not to eliminate it.

Professor Davis would have such guidelines developed by rule-making following the notice-and-comment procedure described in section 4 of the Administrative Procedure Act.⁸ If he means to pro-

⁴ *Id.* at 52.

⁵ *Id.* at 7-12. In this instance most of the superior officers who were interviewed disapproved the practice, but there was no indication they intended to do anything about it.

⁶ *E.g.*, with respect to the control of prostitution. *Id.* at 20-27.

⁷ *E.g.*, a proposed rule with respect to social gambling, which uses such phrases as "in absence of special circumstances," "we do not ordinarily arrest," and "extraordinarily high stakes." *Id.* at 142.

⁸ 5 U.S.C. § 553. The rulemaking here considered is quite different in nature from that discussed by Judge McGowan in his Holmes Devise Lectures. McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972). The rules advocated by Judge McGowan are designed to help policemen perform their duties in a manner consistent with the constitutional rights of defendants and thereby relieve the pressure for exclusionary rules. The guidelines advocated by Professor Davis tell policemen when not to enforce penal laws and ordinances.

vide for public hearings when he advocates that “[t]hose affected [should] have a chance to express their preferences and to submit their arguments,”⁹ I have serious doubts. Take the questions how and how far the police should enforce the laws against, say, selling pornographic literature and displaying pornographic films. I agree entirely that the police should consult with their counterparts in other cities, as well as with prosecutors and judges, and should try to ascertain what procedures produce the optimum cost-benefit ratio. But I do not think it would be seemly, or conducive to good relations with legislative bodies, for the police to conduct public hearings at which civil libertarians or porno publishers or film makers would testify that there should be no enforcement and the Anthony Comstocks would clamor for full enforcement. Indeed, I believe that allowing such participants to enter the fray would be counterproductive since whatever the police did they would be accused of yielding to pressures that ought to be applied to legislative bodies.

A more important difficulty I have with respect to Professor Davis’s proposals is what seems to me a certain fuzziness about sanctions. In the first place, we are told that “[a] limited judicial review of the kind that is customary with respect to other administrative action is clearly desirable. Members of the bar are likely to be almost unanimous in that judgment.”¹⁰ The second sentence is certainly correct; members of the bar are attracted to judicial review with a fervor reminiscent of goats in rut. But review by what standards and at the suit of whom? In states with full enforcement statutes, the appropriate legal standard would seem to be full enforcement—which nobody wants. Even in states without such enactments, are the courts to tell the police, save in cases where the rules are racially or religiously discriminatory on their face, just how far the police shall enforce or not enforce admittedly governing and valid criminal statutes? *Quo warranto*? Furthermore, who has standing to invoke this strange exercise of judicial power? I know of no principle, absent a charge of discrimination on the basis of race or religion, that would entitle a person selected for enforcement to

* POLICE DISCRETION 106; see *id.* at 114-15. A question somewhat related to public participation in open rulemaking is whether the guidelines should be made public when adopted. This is in turn related to the question how far selective enforcement is permitted. Police organizations themselves seem to endorse publication, POLICE DISCRETION 101-03, 107, although the idea seemed anathema to a highly intelligent police chief with whom I talked briefly on the subject. Probably the clinching argument is that most of such rules will leak out anyway, perhaps in a garbled fashion; it is thus better to publish them.

¹⁰ *Id.* at 118.

complain that others equally guilty were not.¹¹ These are not "rules" governing the conduct of citizens; they are instructions from one policeman to others.

To move to a second problem, what sanctions should be afforded for violations of the instructions? If a policeman fails to arrest when the instructions tell him to do so, he should be subject to discipline and presumably would be if a complaint were made. But what of the opposite situation, where the policeman makes an otherwise lawful arrest which the instructions prohibit? We surely do not want to create yet another defense, unrelated to guilt, for those charged with crime. Indeed, we are told, with what seems to me excessive optimism, that rules for guiding police discretion can curtail rather than expand judicial use of exclusionary rules.¹² As for more direct sanctions through disciplinary measures, there is some doubt whether, save in aggravated circumstances of harassment, a police department would, or even should, discipline a patrolman for making an arrest permitted by statute but contrary to an instruction. All that remains is a suit for damages by the victim of an arrest in contravention of the guidelines. There is surely no federal right to such a remedy, and I would doubt that the states would provide one. Perhaps the best that can or should be expected is that the incident will go in the policeman's record and will affect his chances for promotion.

I must also express doubts that the Constitution requires a police department to issue instructions with respect to selective enforcement, as some passages in Chapter 6 might be deemed to imply. Apart from other considerations, the recent decision in *Rizzo v. Goode*¹³ gives scant comfort to this view.

The foregoing remarks represent, however, only minor disagreements with the author's major thesis. Nothing could be worse than leaving the individual patrolman to make ad hoc decisions in each case, decisions that at best are uninformed and at worst reflect personal value judgments not shared by the community and even

¹¹ Cf. *Oyler v. Boles*, 368 U.S. 448, 456 (1962) ("the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation"). Although the quoted remark was made only in a plurality opinion, there was no disagreement on this score. See also *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

¹² POLICE DISCRETION 117. Here again I would differentiate the guidelines proposed by Professor Davis from the kind of rules discussed by Judge McGowan. McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

¹³ 423 U.S. 362 (1976), *rev'g* 506 F.2d 542 (3d Cir. 1974), *aff'g* 357 F. Supp. 1289 (E.D. Pa. 1973). Professor Davis and many others regarded the district court decision as "quite inspiring." POLICE DISCRETION 130-31.

malice against individuals or groups. Professor Davis points us in the right direction as he so often has done.

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Since this issue is a tribute to Professor Davis, the editors have allowed me a final paragraph to express my personal indebtedness to him. Mr. Justice Jackson was wiser than he knew when he proclaimed that “[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.”¹⁴ That was said at a time when the term “administrative bodies” was generally equated with the independent federal regulatory agencies and their state counterparts, before the blossoming of the welfare state and the system of mass administrative justice. It would have been easy for Professor Davis, whose 1958 *Treatise*¹⁵ marked him as a master of traditional administrative law, to rest on his laurels and ignore these new developments. Instead he not only has recognized that the focus of interest has changed, but has revealed that in these new areas the host of cases which reach the level of reported agency determinations are only the tip of the iceberg. The greatest problem lies in the discretionary decisions that “number in the billions annually.”¹⁶ As illustrated by the book here reviewed and his remarkable *Administrative Law of the Seventies*,¹⁷ he is guiding us in these new areas with the same combination of a passion for justice and a recognition of the practicalities of government that has characterized all his writings. He has been a valued mentor to all members of the judiciary who have been willing to listen—and to this one also a friend.

¹⁴ *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (dissenting opinion).

¹⁵ K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958).

¹⁶ K. DAVIS, *DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY* 9 (1969).

¹⁷ K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* (1976 Supp. to *ADMINISTRATIVE LAW TREATISE*), reviewed in Leventhal, *Book Review*, 44 U. CHI. L. REV. 260 (1976).