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POLICE DISCRETION AND EQUAL PROTECTION*

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It would be tactless and perhaps even hazardous for a student of police administration to open an interview with a police chief with a hearty, "Well, Chief, what laws are you enforcing this week?" The myth of full enforcement has become so ingrained in our thinking that any implication that selective enforcement is consciously practiced by the police is enough to raise the official temperature several degrees. Yet anyone who stops for a moment to consider the responsibilities and limitations of the administration of the criminal law realizes that somewhere in the administration of the police function there must be lodged an authority to decide where the forces shall be deployed and how rigorously violators shall be dealt with. In shorthand, this means that the police have to decide which laws will be enforced and what exceptions will be made. Thus, while the opening approach is not recommended, it is surely a question which must be answered to gain a proper understanding of the actual character of law enforcement in any particular area. This paper is an attempt to determine the propriety of allowing to the police a discretion not to enforce certain laws and to enforce other laws only partially.

A. V. Dicey understood the rule of law to demand that the citizen be free from arbitrary power of the government.

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.[1]

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1. DICEY, *Introduction to the Study of the Law of the Constitution*, p. 202 (9th ed. rev. 1948).

And, certainly a discretion not to invoke the coercive powers of government may result in just as much arbitrary power as discretion to use extra-legal punishment.[2] A great deal of attention has been given to the latter kind of discretion. Concern with excesses of power is readily seen in the tremendous attention given to police brutality cases. The central thrust of many of our earlier crime surveys and even the recent Civil Rights Commission Report on Justice has been in the direction of pointing up unlawful official violence. Such a statement is not made with the intention in any way to minimize the gravity of those situations. However, it should be pointed out that under Dicey's "rule of law" standard there may also be perplexing problems presented in the fact that even without express statutory authorization, the police have the authority to decide *not* to enforce certain laws or not to enforce them against certain classes of persons. Serious equal protection questions might be presented by selective invocation of the law as well as by overzealous enforcement against unpopular groups.

In *Yick Wo v. Hopkins* the Supreme Court held unconstitutional an ordinance which made it unlawful to operate a laundry in other than a brick or stone building without securing the consent of the board of supervisors. In its application the law discriminated against Chinese laundry operators. The Court held that under these circumstances the equal protection clause was violated.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is . . . within the prohibition of the Constitution.[3]

It would seem that the same statement would be applicable in the circumstances where police arrest all out-of-town traffic violators and purposely fail to arrest local resident violators, or where certain laws are enforced against whites but not against Negroes, or vice versa. Thus far, however, the courts have not generally been receptive to equal protection

2. Hargrove, *Police Discretion*, 25 SOL 337 (1958).
3. 118 U. S. 356, 373, 30 L. Ed. 220, 227 (1886).

claims cast in this form. (A few exceptions will be noted later.) In a sense it does seem somewhat anomalous for one accused of crime to argue that despite the fact that he violated the law, he cannot be punished unless the police punish all other violators coming to their attention. To say, however, that the accused has no complaint if in fact he violated the law is no consolation to the victim who sees others in similar circumstances go unpunished. The ready response might be that the police should not be able to exercise any such discretion and all would be well. A closer examination of the problems of the police, however, might lead one to have serious reservations about so facile a solution. In his introduction to Dicey's work, E. C. S. Wade remarks that ". . . successful administration depends, not upon the illegal use of power, but the exercise of discretion by the administrator." And he quotes another author who states, "It is unfortunate that Dicey paid no attention to discretions, for it might fairly be said that they are the most important of all topics for the modern constitutional lawyer."[4]

There are many stages in the administration of criminal justice from commission of crime to terminal disposition. And discretion of one sort or another may be present at each stage. For the purposes of this paper, only that discretion exercised by the police will be considered, and within this segment, the discretion *not* to invoke the process, or to invoke it selectively. The questions to be answered are three: (1) To what extent do the police exercise discretion in enforcing the law? (2) To what extent *should* the police have such discretion? and (3) What kinds of controls can be placed on discretion which is considered improper?

Bases for Police Discretion

There is, in the minds of many, a sort of myth, model, or ideal of full enforcement of the criminal law, at least to the extent that violators can be apprehended. And the official directives of department, municipality, or state, often make clear that such is the duty of the policeman. An Oklahoma City ordinance states that policemen "are authorized and required to arrest all persons who may be detected violating any ordinance of the city." And in the introduction to the

4. DICEY, *Supra* Note 1 at lxxvii-lxxix.

Rules and Regulations of the Atlanta, Georgia, Police Department, it is stated, "Enforcement of all Criminal Laws and City Ordinances, is my obligation . . . . I must be impartial because the Law surrounds, protects and applies to all alike, rich and poor, low and high, black and white."[5]

Despite the exhortations for or belief in full enforcement, there are both practical and theoretical limitations upon its realization. These limitations become the bases for police decisions not to invoke the process.

1) Budget limitations. — As in any other aspect of administration, the allocation of scarce resources requires a policy decision concerning which laws shall be enforced vigorously and which in less intense fashion. This is tantamount to saying that although the policy-maker knows in advance that a number of violators will go unpunished, he nevertheless consciously sets up his resources to permit such non-enforcement in order to operate more effectively in coping with other crimes. This facet of police discretion is pointed up rather dramatically in a California police training bulletin:

> Finally, note must be made of one insurmountable obstacle to supervisory control which confronts every chief of police; the fact that it is absolutely impossible to enforce all laws . . . .
>
> A study of traffic violations at [one intersection in Berkeley, California] revealed that if conditions at other intersections were similar, three million violations of traffic regulations were occuring daily in Berkeley and that it would take more than fourteen thousand traffic officers to enforce the traffic laws in that city.[6]

Although the necessity for frugality in utilization of men and time would appear obvious, in 1960 the Philadelphia Court of Common Pleas held that selective enforcement of the Pennslyvania Sunday Blue Law was unconstitutional. The Philadelphia Police Commissioner, because of lack of funds and personnel, had adopted, and publicly announced, a policy

5. For a collection of such statutes and directives, see GOLDSTEIN, POLICE DISCRETION NOT TO INVOKE THE CRIMINAL PROCESS, 69 YALE L. J. 543, 558-559 (1960).

6. CALIFORNIA STATE DEPARTMENT OF EDUCATION, POLICE SUPERVISORY CONTROL, CALIFORNIA, POLICE OFFICERS' TRAINING BULL. NO. 71, 26-27 (1957), in LAFAVE, POLICE AND NON-ENFORCEMENT OF THE LAW, 1962 WIS. L. REV. 104, 114, n. 42.

of limiting enforcement of the law to large retail establishments. The court held that such a policy was a denial of equal protection and enjoined prosecution of a complaining defendant.[7] The United States Supreme Court, however, expressly recognized the dilemma of the enforcing agency and approved a similar selective enforcement order of the FTC. The Commission obtained a cease and desist order against one firm engaged in illegal price arrangements. The firm complained that several other business competitors were following the same practices, and that it was unfair to subject one to serious financial loss without at the same time punishing the others. The Court rejected the argument, and, after stressing the "specialized experienced judgement" of the Commission, concluded that "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."[8]

2) Priority Schedules of Enforcement. — Related to, although not identical with, the matter of budget limitations is the probability of the police chief's establishment of a scheme of priorities with respect to the criminal laws he is to enforce. He may set up a conscious policy of attempting full enforcement of certain laws, partial enforcement of others, and virtual non-enforcement of others. Three factors are of importance in the determination of such an arrangement: the need to stop developments in organized crime, maintenance of the integrity of and respect for the police force, and the enforcement demands of community opinion. Thus, all-out efforts might be made to apprehend syndicate gamblers and those who attempt to bribe police, while Blue Law offenders might be allowed to go unmolested. The result is that by design certain offenders get the full-dress treatment by the police, while offenders against other laws do not even have the process invoked against them.

3) The Sub-Legislative Functions of the Police. — It would seem that one of the most important bases of police discretion, as in other areas of administrative discretion, is the fact that in enforcing many laws the police are sub-legislators. Enforcement of a city ordinance requiring new business li-

7. Bargain City v. Dilworth, 407 Pa. 129, 179 A.2d 439.
8. Moog Indus. v. FTC, 355 US 411, 2 L. Ed. 2d 370 (1958).

censes by July 1st of each year is essentially a straight-forward matter requiring no discretionary interpretation. But there are other laws which present more formidable problems of draftsmanship and administration. The anti-gambling statutes are illustrations. In these areas the legislature may well draw up a broad policy and leave the delineation of detailed distinctions to the police. This is nothing more than to make the police a secondary partner in the legislative process. To speak of administrative action in terms of "rule-making" or "implementation of legislative policy" is to employ euphemisms to cover up the basic reality that the legislative process is more often than not a multi-stage process with administrators as key participants. It seems that it is impossible to draft an anti-gambling statute which will clearly prohibit organized commercial gambling and, at the same time, exempt from prosecution participants in a friendly Saturday night poker game or those who match for coffee at the corner drug store. The customary answer to the problem is for the legislature to adopt a broad prohibition against gambling and leave to the expert—the policeman—discretion in applying the law. He is expected to make the classifications which the legislature would like to make but cannot, for fear of leaving loopholes through which the commercial gambler could escape. The broad power in the police to make such classifications is clearly legislative in character, whatever term may be employed to describe it.[9] It is true that a refurbishing of the criminal codes could remove many ambiguities and define certain crimes with more precision, and to this extent the discretion of the police would be lessened in interpretation of the law. But there would still remain many broadly formulated statutes which would rest on discretionary classifications by the police.[10]

4) Individualized treatment of offenders "in the public interest." — The police on occasion will refuse to press an action simply on the grounds that the public interest doesn't, or shouldn't, demand penalties. This kind of discretion is

9. "It may help clarify the proper administrative function . . . to think of the legislation as unfinished law which the administrative body must complete before it is ready for application. In a very real sense the legislature does not bring to a close the making of the law." JAFFE, ADMINISTRATIVE LAW, 474-475 (1955).

10. For an excellent treatment of the problems facing the legislature in this area, see REMINGTON and ROSENBLUM, THE CRIMINAL LAW AND THE LEGISLATIVE PROCESS, 1960 U. ILL. L. F. 481.

formally allotted to the prosecutor, but the police exercise it as well. A few illustrations from the American Bar Foundation studies on the administration of criminal justice will indicate the situation. The decision to arrest a prostitute on a charge of accosting and soliciting must be based upon her having accosted the officer (in most states). "If the officer knows the accoster to be a common prostitute, he is likely to decide in favor of making an arrest more quickly than if the woman is unknown to him, appears to be of high social status, and is intoxicated at the time."

Age is a major consideration in other cases. A man had been accused of taking a small amount of ham from a store without paying for it, though he maintained that the difficulty arose out of confusion in making change. The lieutenant questioned him and found that he was 74 years old. He told the officer to make a report on larceny from a store and get the man's name and address. Turning to the accused, he stated, "Be quiet, like a nice fellow. We are trying to send you home. You are 74 years old—for crying out loud—we don't want to lock you up for something like that— one dollar's worth of boiled ham." He directed the man to go along with the officers to make a report and he would then be released on promise to return the following morning. Technically he had been arrested, but the decision was already made not to go through with the process except for some sort of warning.

In the special situation of extradition of non-support offenders, the police may well operate with a seemingly inverted standard of enforcement. In Detroit, after efforts have been made under the Uniform Support Act to force an absent defendant to support his family, if he seems content to remain in jail and has demonstrated that in all probability he will continue to refuse to carry out his family duties, it is felt that the expenditure of the taxpayer's money for extradition would accomplish little. In this particular case there is joint police-prosecutor discretion, rather than police discretion exclusively, but it is still illustrative of the fact that the prosecutor is not alone in exercising the authority not to invoke the process based on a public-interest standard.

A final illustration is that of the agreement not to enforce the narcotics laws against an offender in return for his services as an informer. The informer-user may, in some cases,

even be allowed to keep part of his "buy" for his trouble. Some police chiefs contend that it is almost impossible to apprehend dope peddlers without the cooperation of their addict customers.[11]

5) Personal prejudice or convenience. — Non-enforcement may result from the personal prejudices of the officer or even from a desire not to subject himself to undue inconvenience. The Detroit study indicated that there is some feeling in the department that it is beneath the dignity of an officer to arrest for a crime normally handled by an officer of lesser rank or inferior talent. For example, the 452 detectives in the Detroit Police Department brought six of the 10,513 arrests for drunkenness in 1955. Detectives arrested three of the 1,200 persons charged with driving while intoxicated. To leave such arrests to the uniformed force has certain practical values in not disclosing the identity of the detectives and avoiding confusion in the mind of the offender, but these factors alone do not seem to account for the virtual non-enforcement by detectives of minor offenses.

A decision not to arrest may be dictated by the time the officer is scheduled to go off duty. The officer also considers the necessity of appearing in court the following day. In one city, a vice bureau splits up days off, with half working Saturday and half working Monday. Both groups are off on Sunday. Thus official recognition seems to be accorded the practice referred to in the popular tune "Never on Sunday." Arrests are followed by an appearance in court on the following day (Sunday excepted). As a consequence, officers working Saturday night will not make an arrest if they can avoid it, since they will then have to appear in court on Monday morning—their day off.

A different basis for selective enforcement may lie in the police attitude toward certain classes or sub-groups in the community. Cases of police brutality or harassment of Negroes, for example, are well-known illustrations of this type of unequal treatment. Another aspect of the problem, and one not nearly so widely discussed, is failure to enforce certain laws against members of one group while maintaining fairly vigorous enforcement against all others. "This kind of unequal

11. See GOLDSTEIN, *supra*, note 5 at 566, N. 42; also LAFAVE, THE POLICE AND NONENFORCEMENT OF THE LAW, 1962 WIS. L. REV. 179, 222-224.

enforcement of law against Negroes resulted in such offenses as bigamy and open and notorious co-habitation being overlooked by law enforcement officials, and in arrests not being made for carrying knives or for robbery of other Negroes."[12] But it is in the area of felonious assault by a Negro upon spouse or friend that the unequal treatment is most strikingly illustrated. Many police apparently apply a double standard in such crimes without question. The white offender is far more likely to be arrested and prosecuted than the Negro. The police are apt to explain that such folkways are an established standard of behavior for Negroes and can't be changed. Two other factors seem to be present as well: first, the victim of felonious assault is less apt to pursue prosecution, and second, the Negro press is apt to accuse the police of discrimination in some cities solely because more Negro arrests are made than white.[13] In a Detroit case, the police, receiving a call for a disturbance, found a man bleeding from a knife wound in the shoulder. His common-law wife was standing over him and told the police that she had stabbed him with a paring knife after an argument. The victim had come home drunk and started attacking the wife with his hands and a chair. She said that this routine had been going on for some time and that she was tired of it. She had lost an eye as a result of a similar attack several months earlier. She struck him with the knife and he fell to the floor. He got up and collapsed again. She then went to his aid and was consoling him, telling him that she was sorry and that she loved him. The victim was asked whether he wished to prosecute the case. He said, "I want to see whether or not I live first." He didn't, and the wife was then charged with murder. It was clear, however, that unless the husband was willing to prosecute, nothing would have been done had he recovered. It has been apparent in many cities that the only reason that police are even called in by the victim of such assaults is so that he can get free police ambulance transportation to the hospital.

6) Non-enforcement on grounds that the law is merely an expression of a moral obligation rather than an outright prohibition. — Thurman Arnold has written:

Most unenforced criminal laws survive in order to satisfy

12. LAFAVE, *supra* at 208.
13. *Id.*, at 209.

> moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.[14]

In 1961, in *Poe v. Ullman*,[15] the United States Supreme Court refused to rule on the constitutionality of Connecticut criminal statutes prescribing penalties for the use of any contraceptive device or for being an accessory to such a use. Five of the court apparently felt that the fact that in the 75 years of the statutes' operation only one test case type of prosecution had been brought indicated that there was no danger of prosecution and therefore no justiciable controversy was presented. Repeated attempts to change the law, twelve since 1943, were unsuccesssful, but still there is no apparent change in the policy of police or prosecutors to allow open violations to go unchallenged.

Much consensual sexual misconduct is prohibited by statute.[16] But there is little enforcement in this area unless the conduct is substantial and notorious. On rare occasions, however, such laws have been invoked. For example, in Wisconsin a few years ago a woman was charged and convicted of fornication. According to one article, it appeared clearly that the prosecution resulted primarily because she had agreed, and then refused, to testify against her hoodlum boyfriend.[17]

Arnold's statement would seem to fit the case of complete non-enforcement, but doesn't really fit the situation of rare enforcement. Repeal of the latter kind of law is often opposed by the police on the ground that they like to have a full quiver of arrows to employ against the really undesirable types in the community against whom the ordinary criminal laws have proven ineffective for lack of required proof or evidence. Thus an Al Capone will be charged with income tax violation while the ordinary citizen may only face the civil penalties under the tax laws. It should be pointed out, too, that such policies can be strongly conditioned by jury behavior. Juries seem often to demand that the defendant in a tax fraud case in effect be proved guilty of tax fraud plus other serious crimes before they will return a guilty verdict.

14. ARNOLD, THE SYMBOLS OF GOVERNMENT, 160 (1935) in LAFAVE, *supra* at 198.
15. 367 U. S. 497, 6 L.Ed. 2d 989 (1961).
16. See BENSING, A COMPARATIVE STUDY OF AMERICAN SEX STATUTES, 42 J. CRIM. L., C. & P.S. 57, 69; also LAFAVE, *supra* at 199.
17. REMINGTON and ROSENBLUM, *supra*, Note 10, at 493-494.

The conclusion seems to be clear that the police do in fact exercise a vast amount of discretion not to invoke the criminal process—some dictated by budget limitations and much more based on a variety of other arguments. Having pointed out some of the areas in which the police do have discretion not to enforce, the next question is, to what extent is such discretion desirable in the system?

Desirability of Police Discretion to Enforce Selectively

Professor Joseph Goldstein, of the Yale Law School, states flatly that, "The ultimate answer is that the police should not be delegated discretion not to invoke the criminal law."[18] He admits that there will be borderline cases and also that budget problems will impose limitations on full enforcement of all criminal laws. But he urges that proper re-writing of the laws to reduce ambiguity and to repeal "obsolete" laws, and the establishment of a Policy Appraisal and Review Board to advise the police on enforcement policies until the new codes can be enacted, will solve most of the discretion problem.

It does not appear either that the legislature can be explicit and non-ambiguous in setting out a criminal code representative of the community's will or that it will respond with sufficient rapidity to the shifts in public opinion with respect to what that code should contain. If the community will cannot be accurately reflected in the code, then enforcement in accordance with that will demands that discretion be lodged somewhere in the system. One argument is that it should be in the prosecutor, who is by law given such authority. This program demands that the police arrest all violators and feed them into the process, while the prosecutor is given the sole authority to select out those cases which he does not wish to push on to formal trial. This proposal, however, does not properly take into account the degree to which arrest itself is punishment. In fact, the entire process can be viewed as a series of stages, each of which subjects the accused to successively greater penalty or degradation, called by one writer "status degradation ceremonies."[19] The administration of

18. GOLDSTEIN, *supra*, note 5 at 586. In fairness, it must be pointed out that the bald statement of conclusion here does not do justice to Professor Goldstein's excellent documentation and analysis leading up to it. Nonetheless, it is his conclusion.

19. GARFINKEL, CONDITIONS OF SUCCESSFUL DEGRADATION CEREMONIES, 61 AM. J. SOCIOLOGY 420 (1956).

criminal justice is not simply a matter of separating the guilty from the innocent, at least in terms of the consequences. As far as the community views the matter, arrest itself is punishment, even though the accused never be brought to trial. Even a police reprimand, as in the case of the patrol car visit to the home to request that a noisy party be toned down, is often damaging to the subject's pride and reputation. It would apear to be desirable that the police have the milder weapons of warning and reprimand at their disposal rather than require them to treat every infraction alike and force each violator through the process as far as the prosecutor's desk.

It seems, then, that both because of the inadequacies inherent in a criminal code and the nature of the consequences of criminal law administration the police must be accorded some degree of discretion not to invoke the process or to invoke it selectively. The regulatory commissions have discretion of this sort as do other administrators in the Internal Revenue Service or the Department of Agriculture. They, too, have sub-legislative functions which are in all probability unavoidable in most of the administrative process. The scope of judicial review of much, if not *most,* of this area of discretion is severely restricted, both by statute and by judicial acceptance of the necessity for such authority. Yet it is doubtful if public opinion is nearly as effective in controlling the policy of the regulatory commission as it is in determining the exercise of discretion by the police. In the matter of reflection of community will, then, a strong case might be made that the police are more directly responsive to democratic controls than many other administrators with broad discretionary powers. If one takes the view that the criminal law is to be enforced to the letter at the police level, let the chips fall where they will, then this argument is irrelevant. If, however, one feels that some flexibility in applying the law is necessary even at the invocation stage and that public opinion should play a substantial part in determining which sections of the code should be enforced and to what extent, then the responsiveness of the persons to whom discretion is to be given becomes a matter of importance. Regular but informal communication between the police and certain of the elected local policy officials could better serve this political function than

a formal Review Board made up predominately of officials at the state level, as suggested by Professor Goldstein.

What sort of non-enforcement or selective enforcement is undesirable? Basically, decisions not to enforce which are based on personal convenience or prejudice are those which should be condemned. It is in this area that the best case can be made that discretion is exercised arbitrarily or capriciously. If drunk drivers are arrested on Thursday but not on Friday merely because the Friday officers would lose part of their day off appearing in court, then the decision not to arrest is improper. It is this type of non-enforcement or selective enforcement which appears to raise a serious question of equal protection. Enforcement of felonious assault laws against whites but not against Negroes, where the victim is also a Negro, because of the prejudice that "that's the way those people settle their arguments" is in the same category. The knife of racial discrimination can cut both ways, and both types are improper.

This leads to the third question of what kinds of controls can be used to reduce police non-enforcement grounded on mere convenience or prejudice.

Controls on Improper Police Discretion

One of the most formidable and useful controls over police discretion not to enforce is public opinion. This may take the form of telephone calls to the police chief, letters to the editors of newspapers, or contacts with the mayor or council, who in turn call in the police for explanations and discussion. Thus consistent non-enforcement in the face of public opinion which demands enforcement normally can be expected to lead to strong political pressures to change the policy. Conversely, enforcement in opposition to public opinion will arouse strong objection. Selective non-enforcement may take longer to register public disapproval, but if the basis for selection runs counter to the public sentiment, then this too will engender a reaction. Police training schools in some areas, at least, and perhaps in all, stress to the rookie policeman that he must constantly keep in mind what the public demands in terms of enforcement policy. The police chief in one of the larger South Carolina cities told such a group that one of the key factors determining the success of a police

officer is his ability to guage the desires of the public in criminal law enforcement.

A second control which is becoming increasingly important is in the professionalization of the police function. Police training programs and in-service schooling and conferences are increasing both in number and in the range of the subject matter involved. With increasing frequency, higher administrative positions in police forces are being filled on a competitive basis, with applicants from out-of-city police forces often winning the positions. The combination of more intensive and extensive training plus the desire to build a reputation for efficient and intelligent enforcement which will carry outside the immediate community promises to be a strong barrier against irresponsible use of the discretion lodged in the police officer.

Finally, there are possibilities for judicial controls which are now latent, but which could usefully be brought to bear on the problem. At the present time the state courts are very reluctant to dismiss prosecutions or to enjoin prosecutions in response to claims that others in similar circumstances were not proceeded against. Some courts have at least been willing to consider such arguments but have stated that only classifications based upon "race, religion, color or the like" would violate the equal protection guarantee.[20] In other cases it has been required that the defendant show that he would be in a better position if the others were also subject to prosecution.[21] This would be the case, for example, where Blue Laws were not equally enforced. Finally, the defendant must by proper proof overcome the presumption that the police have acted in a regular and proper manner and show that discriminatory enforcement was intentional rather than accidental.[22] One writer states that control of police discretion by resort to the equal protection clause "seems likely to remain more a matter of theory than of practical relief . . . unless the courts exercise more flexibility in judging attempts to prove dis-

20. State v. Jourdain, 225 La. 1030, 74 So. 2d 203 (1954). See also People v. Oreck, 74 Cal. App. 2d 215, 168 P. 2d 186 (Dist. Ct. App. 1946), where this was the court's approach to the allegation by a bookie that other forms of gambling were not proceeded against.

21. People v. Darcy, 59 Cal. App. 2d 342, 139 P. 2d 118 (Dist. Ct. App. 1943).

22. People v. Winters, 171 Cal. App. 2d Supp. 876, 882, 342 P. 2d 538, 543 (Super. Ct. 1959).

criminatory enforcement."[23] It would surely seem possible for the courts to relax somewhat the present rigid requirements of proof under the equal protection claim in order to offer some protection against selective enforcement based on arbitrary or capricious classifications. Under such an approach considerable pressure could be brought to bear toward uniform enforcement policies. A white defendant in a bigamy case, for example, would have a strong chance of getting a dismissal by showing that persons of other races were consistently allowed to violate the statute with impunity.

In other situations as well, such an attack might prove effective in controlling improper selective enforcement. The speed trap towns may present a situation where police and local public opinion agree on a policy of supporting governmental functions by means of enforced contributions from out of town motorists. Such a classification of customers is arbitrary and unreasonable, and the admission of the equal protection argument in support of dismissal should be a useful means of attaining more uniform treatment of offenders. The door need not be opened so wide that the equal protection argument becomes the standard defense and undermines the enforcement process completely. It needs only to be established as a weapon against flagrant violations of fair judgment in policies of selective enforcement.

The conclusion here is that all these controls would work more effectively if the facts of police discretion were recognized openly rather than being hidden beneath the myth of a mandate of full enforcement. It appears that police and policy makers are largely foreclosed from intelligent discussion and analysis of law enforcement policies by the ever-present, though false, assumption of a requirement of full enforcement. In other words, it might be both appropriate and useful for the police chief and the city council to sit down and ask each other, "What laws should we enforce this week?"

Taken singly, the controls discussed here do not perhaps sound very imposing. Operating jointly, however, and complementing each other, there is evidence that they can present substantial protections against some of the more undesirable kinds of non-enforcement or selective enforcement.

23. Comment, 61 COLUM. L. REV. 1103, 1141 (1961).