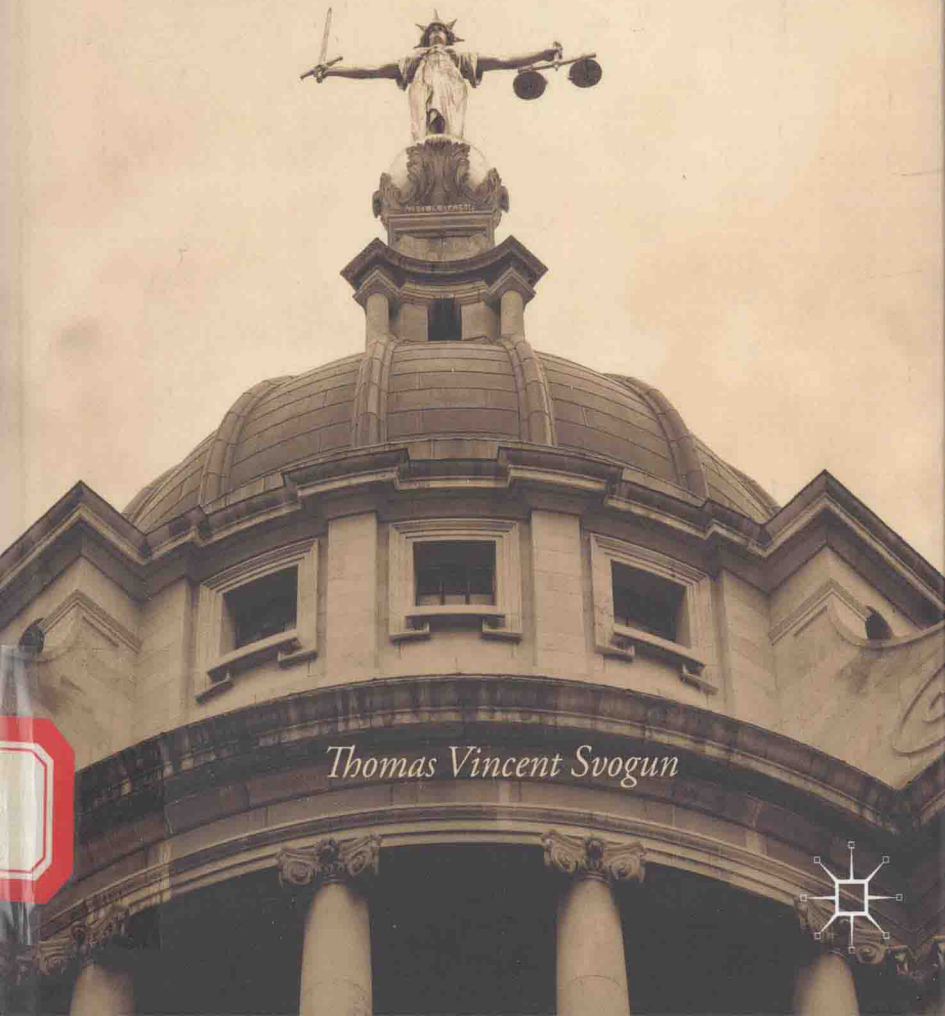
The JURISPRUDENCE *of* POLICE

Toward a General Unified Theory of Law



Thomas Vincent Svogun

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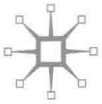

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Preface

Daniel Bell observed that wisdom is "the bridge of experience and imagination over time."[1] In the two decades or more that I have been engaged in the higher education of police, I have found that while police are intelligent and experienced, they often lack the kind of imagination on which wisdom must draw to reach insights needed by municipal administrators, lawyers, judges, legislators, social scientists, and most importantly the communities they serve. Without the cultivation and refinement of that imaginative faculty, disciplined by the habits of mind and heart in which law abides, the judgment the police profession brings to bear on its experience is compromised.

The kind of imagination to which I refer enlarges vision and mind. When these are coupled with heart and conviction, they fire vocation. Focused as they are on the narrow details, however, police often miss the forest for the trees. Having expended considerable resources in the development of professional technique, they have, for the most part, neglected the subject of police philosophy. Bereft of a larger vision addressed to ultimate ends (which would inform the work of police as a whole and help unify it under a common professional vision), the police remain mired in a highly fragmented practice that fails to fulfill the promise of vocation.

As a profession (and there has been debate over whether police rise to the level of a profession), the police are not alone in this. The nineteenth century, which saw the creation of formal police departments, first in metropolitan London, witnessed as well the emergence of modern professions and the establishment of a professional ethos that bracketed questions of ultimate ends, or *teloi*, and focused instead on means. The new professions came to be evaluated by criteria developed by the new positivist social sciences, focused as well on means. Law itself, largely through the influence of legal positivism, was reduced to a set of techniques for enforcing the sovereign's will, contributing to what the late Harold Berman called "a crisis in our legal tradition" and contributing as well to the declining standards of the legal profession.[2]

As for the police in America, what emerged by the mid-twentieth century was a "professional law enforcement" based on a mobile yet rootless "professionalism" that centered on technique and specialized skills acquired through a system of training, as distinguished from education. Police focused on present concerns or incidents, not on how things should be,nor did they see law enforcement as part of an enterprise that tied practice to a larger social and historical whole. Police lacked a vision that took in the past and the future.

These deficiencies were accompanied by a deficiency of aspiration, indicated by the profession's limited response to the call of higher education. While in various states police have been provided inducements such as tuition remission and/or incentive pay to pursue college degrees, surprisingly many have not enrolled, preferring instead to accumulate overtime pay and/or additional income derived from detail work at road construction sites, etc. In some instances, officers were discouraged by their departments from entering college. While the former American Police Association and its successor the Police Association for College Education have worked diligently to realize the goal of a four-year college degree as an entry-level requirement for policing, relatively few police agencies have adopted it. While the number of college-educated officers has risen in recent years, as a whole in this area and others, police have set their sights too low.

During World War II, Robert Wherring of Nebraska rose in the Senate of the United States to declare that after the war America should aid China, so that "Shanghai can be raised up and up until it is just like Kansas City" (qtd. in Brinkley xii). Apparently, no one laughed. What would the Chinese even then have thought of Kansas City as the aspiration for a rebuilt Shanghai? There are police who suffer from limits of imagination not unlike those afflicting the Nebraska senator, limits that stem from their parochialism and the poverty of their education. How many could articulate a vision of law's *telos* in a justly ordered city governed by a historically rooted law—a vision that inspired their professional work?

This book is in part an invitation to the police to raise their sights and enlarge their vision. To do this, they must undertake the necessary humane education in law and its enforcement that will supplement their training. The liberally educated police will then be equipped for the expanded role required of them in the twenty-first century. An enlarged vision, informed by an enhanced experience coupled with wisdom and expertise, would be the source of distinctive contributions that police can and need to make to the legal enterprise—an enterprise whose end commits practitioners not merely to the enforcement of

rules but to the establishment and preservation of a just order. I do not know how many will respond to this invitation. Yet, there clearly are in policing individuals of large vision and heart who would be prepared to take up these broader ends of vocation. I have had the honor to meet many of them in my classes over the years. They and those like them are the hope of the profession. This book is addressed to these talented visionaries and to those aspiring to be like them.

This book is also an invitation to the legal profession and in particular the legal academy to broaden the scope of jurisprudence (beyond the principal focus that has been on what judges do) to include the study of what the police do and how it informs our understanding of what law is. The recent success of problem-oriented/community policing and the often compelling nature of "Broken Windows"[3] analysis suggest the limits of legal positivism as a lens through which to study law and the potential rewards of focusing on the implications of social context for law's historicity specifically and for law generally. Overall, the success of the new policing signals the promise of an integrative jurisprudence. It also suggests the limits of much contemporary "natural law" theorizing, where the natural law is misconceived as a set of metaphysical principles from which to draw criticism of the positive law, but abstracted from facts on the ground. Indeed, the conflict between positive law and the moral principles of a natural law (the conflict that jurisprudence has almost exclusively focused on in recent years) cannot be properly analyzed and resolved without consideration of the customs, conventions, and traditions of the community—the substratum of a historically rooted law. It is through the medium of shared experiences and shared norms that form the basis of a customary law that the limits of both the positive law and the natural law are to be found. A jurisprudence of police provides an integration of this local organic law with the positive and natural law.

While legal philosophy over the past decades has been quite active, this book is a general call now for more systematic examination of the implications of theorizing about law for law enforcement, as well as a general call for the examination of the implications of police philosophy and practice for theorizing about the legal enterprise in general. Indeed, jurisprudence as a science cannot be considered complete—nor for that matter can a unified general theory of law be produced—until legal science has grasped and assimilated into its account of law's general nature, the account of the nature of law's material enforcement in particular circumstances, and this requires integration of the perspective of policing.[4] It is the intention of this book to elaborate the theoretical framework underlying an integrative jurisprudence of

police that provides the basis for a new philosophy of police, which integrates professional law enforcement and community policing in a broader analysis. An integrative jurisprudence provides the theoretical and practical basis for a learned profession of police as it illuminates the path to that elusive general unified theory of law that transcends the binary positivist and natural law jurisprudence dominating current thinking.

This broadening of perspective has sociological implications beyond drawing police and their communities into a close partnership. It requires the integration of scholarly and professional communities, bringing police into closer professional association with lawyers, legislators, and judges, and their allied academic communities. An educated police profession deserves a seat at the table of the legal profession. The legal profession (not to mention academe) very much needs its insight and point of view.

Finally, this book is addressed to the general reader who is prepared to do some philosophical digging into how law is better understood and better enforced in our times, troubled as they are by the threat of crime and other disorders. Each one of us, after all, has a responsibility to partner with justice professionals to realize the promise of our law.

Acknowledgments

A considerable debt is acknowledged to the late Patrick V. Murphy, distinguished commissioner of the New York City Police Department and president of the Police Foundation, and the late Louis Mayo, executive director of the Police Association for College Education (PACE), and member of the founding staff at the National Institute of Justice. Both men were national leaders in the promotion of best practices in policing. I have had the opportunity to learn much from them about the police profession and have enjoyed formal association with both on the Board of the American Police Association and with Dr. Mayo on the Board of PACE. In the summer of 2002, Patrick Murphy joined me in teaching a graduate course where we explored the philosophy of police in a preliminary way with a small but talented group of police graduate students. The course further inspired me to write this book.

I owe much to the countless police officers and justice professionals, many of them now leaders of their departments, whom I have had the privilege to teach as graduate students in administration of justice over two decades. I have learned a great deal from them about the practice of policing, both its rewards and its frustrations. I am also very grateful for the encouragement and stimulation of academic colleagues, especially Lubomir Gleiman.

By far the greatest debt I owe is to Margaret, Daniel, and Nathaniel—my wife and our sons—whose love and support sustain me. A special thanks to Margaret for expert assistance with editing and to Daniel, our in-house computer wizard, who solved technical problems during the course of this project.

Contents

Introduction

"And to make an end is to make a beginning. The end is where we start from."[1]

T. S. Eliot

In the spring of 2009, a man rushed to the hospital but arrived at his mother-in-law's bedside a few minutes too late; she had just passed away. A most unfortunate scenario, but what brought it to national attention was that the son-in-law's lateness was due to his being detained in the hospital parking lot by a Dallas police officer, who had stopped him for speeding. Even though he explained the urgency of his situation, the officer held him. The media pounced on the case as it turned out that the son-in-law was an NBA basketball player. The Dallas police chief said he was appalled by what happened and the officer was suspended with pay pending review of the incident. The motorist happened to be an African American and suspicion circulated—was the white officer's handling of the case affected by race? The officer, who had been on the force for several years, said he was "just doing his job."

An incident such as this calls into question what police conceive their proper work to be. This book pursues the pressing inquiry through examination of the nature of the polic function and various theories that have been offered to explain it. A survey of the literature reveals that considerable work needs to be done.

Much theorizing about the police today is stuck on a number of persistent problems. There is difficulty defining the police function. On the one hand, there are those who adhere to a simplistic view that policing in its essence is making arrests for violations of the criminal and traffic codes, and that may have been the Dallas police officer's view. After an extensive multiyear American Bar Foundation Survey of the criminal justice system,[2] however, this view is untenable as a description of what they do, although it has been offered alternatively as a prescription about what they should be doing. Some police

regard the investigation and apprehension of criminals as the "meat" of the profession and other tasks, such as maintenance of order and the provision of various "social services," as "garbage work," better avoided. One can provide a philosophical rationale for the former job description. Certain libertarian theorists have argued for the narrower description of the law enforcement function as a way to limit police power and to preserve individual liberty. The Professional Law Enforcement Model that embraces this more limited conception of the police function arose partly because of the influence of this liberal individualist philosophy. Communitarians, on the other hand, who adhere to a philosophy that places increased value on social goods such as community, allocate to government increased responsibility for the welfare of citizens. From this a conception of the police function is derived that commits police to fostering social goods and "enhancing quality of life." This expanded role presupposes far broader police discretion. The trend toward community policing is in part stimulated by this philosophy. The description of the role, then, is highly contested as it bears on issues of political philosophy and public policy. The prevalent view today acknowledges that police perform a myriad of tasks, although there is no consensus about how these may be best explained, let alone justified.

Can these tasks be organized around a unifying end or set of ends? John Kleinig has argued that the end of "social keeping" (as opposed to law enforcement) is broad enough to do the necessary organizing (*The Ethics of Policing*). On the other hand, Egon Bittner and those who adopted the lens of social science positivism had rejected teleology on grounds that police can be described as pursuing almost any end and that police practice is not coherent but incongruous. Police shoot people and they administer CPR; they are nurses packing heat, walking oxymorons. Bittner, who rejected normative-based analysis could only find a "thematic unity" in the distinctive means of police—their use of coercive force (Bittner, *Aspects* 127).

Related to this debate over what police do or should do is the controversy concerning the nature, scope, and limits of police discretion. One issue that has received attention is whether the discretion exercised by police in enforcing law is consistent with their duty to "fully enforce the laws." Do police have discretion whether or not to make an arrest when they have probable cause to believe that a crime has been committed? Is police discretion consistent with the rule of law? Is it consistent with our constitutional order?

There is also debate over "models of policing" and talk about shifts in paradigms in the course of police history. Is police history in the

United States "incoherent," a comment made by Kelling and Moore in "The Evolving Strategy of Policing" (2), or in some sense coherent? Does the periodization of American police history in terms of a "political era," a "professional era," and a "community policing era" make any developmental sense or can it be said to reflect phenomena natural to the police function? It is said in some quarters that "professional reform era policing" is today being supplanted by a "community policing/problem solving era." With respect to the latter, however, there seems to be no definitive account of what it is. Usage reveals a diffuse or at least highly plastic concept. Norman Inkster, a commissioner of the Royal Canadian Mounted Police, remarked: "I think the essence of community-based policing still eludes some of us and many of our efforts do not yield results because we have not properly understood the concept we are trying to apply" (28).

Is community policing an "organizational strategy," a "professional ethos," or a "philosophy?" A considerable literature refers to it as a "philosophy." Mark Harrison Moore has referred to community policing using as all these expressions and there is considerable imprecision here.[3] Moore's main focus is on the concept "organizational strategy"; however, he does not clarify how a "philosophy" or an "ethos" is different from a strategy, or how a philosophy may require an analytical framework different from his managerial one.

Recently, it has been suggested that police theorizing would benefit from a closer study of jurisprudence. Nigel Fielding, for example, has written that in the philosophy of the common law and its promise of "a system of enforcement finely tuned to the prevailing local standards" (210), one may find a solution to the "imprecise specification" (207), of community policing today. Some police writers have crossed over to the field of legal philosophy and the literature pertaining to judicial discretion to address the issue of police discretion—an example is John Kleinig (*Handled with Discretion*). Some have raised important questions with jurisprudential implications. In "Police, Discretion, and Professions," Michael Davis asks: "How much the problem of [police] discretion...is derived from legal positivism?" (34). Joan MacGregor in "From Mayberry to the State of Nature" queries whether in the police function "there is no unified theory of discretion at work...whether there is not some meta-principle that makes sense of the police function" (55). While these questions point in the right general direction, satisfactory answers have not been provided.

George Kelling and other advocates of community policing might have observed that the critique of "Professional Law Enforcement"

is by itself an implicit critique of positivist jurisprudence necessitating a new jurisprudence. Is it Ronald Dworkin's? Dworkin's "Model of Rules" is usually the reference made when making an attack on positivism's account of discretion and searching for an account of police discretion. (Both Kleinig and MacGregor cite to it.) While Dworkin's work is worthwhile, it is of limited value. It does not develop the empirical/historical jurisprudence that addresses what may be referred to as the living law that police enforce on the streets. (Dworkin's account of judicial discretion emerged from the jurisprudential debates between natural law and legal positivism and is somewhat narrowed by the parameters of that debate. It is also narrowed by its political morality, which de-emphasizes the requirements of the common good when compared to the individual's autonomy.) It is the overlooked sociological/historical perspective that has the potential to supplement the other perspectives and thereby illuminate the field of problem-solving/community policing, not to mention "Fixing Broken Windows" analysis. Lon Fuller's work on the interaction of law and social context merits particular attention, as well as literature in sociological and historical jurisprudence.

Heuristic parallels may be drawn among the accounts of the law offered by natural law, legal positivism, historical and sociological jurisprudence, and the movements in police theory and practice—parallels between positivist jurisprudence and professional law enforcement, parallels between historical jurisprudence and community policing, and parallels between natural law jurisprudence and literature focusing on normative policing and police ethics.

While there is no model of policing that is explicitly naturalist, Kleinig's theory of police ethics is in part naturalist, though it is also in part historical. Kleinig organizes the police role around the normative end of "social peacekeeping." His emphasis on the value of human flourishing may be further illuminated by John Finnis's natural law theory in *Natural Law and Natural Rights.* Finnis's work, as well as Robert George's work on the development of a theory of pluralistic perfectionism (sketched in *Making Men Moral*), deserves attention on the issue of law's *telos.* Kleinig's discussion of authority as in part derived from tradition rather than formally from consent alone is an implicit critique of liberal positivism. His use of the metaphor of Theseus's ship to account for how law over time evolves and yet remains the same recalls to mind that Sir Edward Coke, one of the great theorists of the English common law and one of the originators of historical jurisprudence, used this very metaphor to describe law.[4] The common law theorists characterized

law as both a constant and a dynamic phenomenon, as "changing changelessness." Meriting attention in historical jurisprudence is the work of the three great theorists of the common law in England: Coke, John Selden, and Sir Matthew Hale, as well as the work of Edmund Burke, and on the continent, Karl Freidrich von Savigny. In sociological jurisprudence, there is the work of Emile Durkheim and Eugen Ehrlich and other more recent authors who have stressed the importance of social context to law. Integrating these jurisprudential perspectives assists in the effort to develop a unified theory of the police function. Harold Berman's work in integrative jurisprudence is of great value here.[5]

I

This book is divided into two parts. In Part I, I engage the literature and tradition of thinking about police. Chapter 1 defines the jurisprudence of police and argues that jurisprudence is not only germane to the study of police but also that police officials require a jurisprudence if they are to fulfill those duties entailed by the police function.

In chapter 2, I provide a critique of positivist police science, which until recently constituted the most dominant approach to the study of police. I focus principally on the work of Egon Bittner, one of the most influential social scientists to direct his attention to the subject. By rejecting teleology, prescinding discussion of police from the goods sought by policing, and focusing instead on their use of coercive force, his theory and positivist theory generally distort our conception of police and undermine the moral analysis that must form an integral part of any study of the police profession.

Chapter 3 addresses normative police theory, an alternative to positivism. I center on John Kleinig's work and provide a critique of it. While an improvement on positivist police theory, Kleinig's teleological theory defines police in terms of the end of social peacekeeping rather than law enforcement. I conclude that his theory, by failing to shed a positivist conception of law, falls short in capturing the breadth and depth of the legal enterprise and, derivatively, the law enforcement function. By failing to subsume police discretion under legal authorization, he also fails to provide a theory that limits police authority by the rule of law.

Chapter 4 examines the rise and the limits of formal positive police, focusing on the establishment of the London Metropolitan Police. I examine the social conditions that gave rise to formal bureaucratic policing and argue that modern society still contains within it social

conditions analogous to those that required the more informal police that had been the prevailing method of policing before the "Met". Furthermore, today, the restoration of the public order requires the rehabilitation of social conditions linked to informal policing. Contemporary solutions, therefore, must fuse modern and classical methods of policing.

Chapter 5 addresses the American police experience, providing an overview of the widely adopted periodization of police history into three eras: a political era, a reform era, and a community policing era. The chapter is principally concerned with evaluating the management-oriented model that dominates the discussion. While acknowledging the major contributions to the field made by George Kelling and Mark Moore, I argue that their analytical framework may be improved when modified and subordinated to a framework derived from integrative jurisprudence rather than management analysis.

Part II follows the general critique of the discipline undertaken in part I. Using the current paradigm shift from professional law enforcement to problem-oriented community policing as the point of departure, part II elaborates the theoretical framework that accounts for the integrative nature of law, law enforcement, and the new police. The analysis exposes the implications of the new policing for our conception of law, law enforcement, and the values underlying our law. By drawing from the perspective of the police, generally overlooked in the jurisprudential literature, the analysis affords one step in the direction of a general unified theory of law that reconciles what the legislatures and courts do, with what the police do.

Part II addresses the following subjects. Chapter 6 focuses on the implications of the new police for the conception of law, arguing that the former requires an expanded conception of law that accommodates law's teleological and prescriptive character. Chapter 7 defines integrative jurisprudence and examines law's three dimensions, describing their axial structure and normative architecture. I identify and describe the different species of law's formality and the variety of reasons employed in legal argument. Chapter 8 traces the relativity of justice, law, and police to variations in the social bond and considers the implications of that analysis for contemporary social reality, accounting for why policing today must be protean in form. One salient point to emerge is that if police are to adequately enforce law in the various contexts to which they are called, they must have access to a variety of ordering mechanisms, not adequately accounted for by current theory. Chapter 9 provides a summation and closing reflections.

II

In this book, I introduce a fundamentally new perspective on the police role, one that is derived from an integrative jurisprudence. It is intended to replace the positivist methodology that dominates discussion with a normative analysis that is integrative. It introduces to police and legal theory a new vocabulary giving centrality to terms such as "prudence," "integrity," "justice," "prescription," "*telos*," "formality," and "historicity." It redefines familiar terms such as law, law enforcement, and police. In particular, the theory isolates various kinds of formality generated by the legal enterprise and traces the interaction of law's axial principles with variations in social contexts.

Integrative jurisprudence asserts that law is best understood when seen from the combined (as opposed to the individual) perspectives of the traditional schools of legal theory: natural law, legal positivism, and historical/sociological jurisprudence. The dominance of legal positivism over the others in the last two centuries has impoverished accounts of law and correspondingly narrowed our conception of what it means "to enforce law." To enforce law from the perspective advanced in this book means to animate law, seen not as an externally imposed structure of "posited" norms but as an enterprise for establishing a just order having distinct formal, social/historical, and teleological dimensions. To enforce law is not necessarily to make a formal arrest for violation of some "enacted" legal norm (giving rise to the celebrated ceremonies of due process such as the criminal trial), although that is a common conception implicit in most accounts. In fact, in the instance of an unjust positive law, the formal arrest sought by the civilly disobedient is one step toward what is hoped will be the rejection of the positive law, and the reaffirmation of justice in law, by the courts, as well as the broader court of public conscience. Rather, to enforce law is to make it an active internal principle of volition determining the actions of private citizens and public officials including the police. To enforce law is to make it an enduring material principle regulating the order of society over time—either or both of which may demand more informal or discretionary acts (in lieu of arrest) by officials who seek to do justice according to law.

The benefits of such an expanded jurisprudential perspective for police theory are multiple. The perspective provides a solution to the problems of disjunction and subsumption in present accounts of the police function. It is said, for example, that police are either "peace officers" or "law officers"; rather they are both. Or it has been said that police authority may be legitimated on the basis of appeal to

some overarching concept external to law, under which all police work (including law work) is unified. An example is Kleinig's "social peacekeeping," but that concept is plagued by problems—vagueness in the concept, the problem of determining whose "peace" is to be enforced, and the problem of reconciling the "peace" kept to the rule of law. Availing itself of the Aristotelian concept of the pros hen (the idea that a phenomenon should be defined not in terms of those factors it has in common with other phenomena sharing its name, but in terms of its central case or core normative meaning), an integrative jurisprudence of police finds coherence in the conception of police as "social peacekeepers," "law enforcers," "maintainers of order," and "enhancers of community." They are or rather should be all of these and more. The theory derives the authority of police practice, however, from law itself (applying a triune theory of authority grounded on law's formal, teleological, and social/historical axes), resolving the problems of legitimating police actions beyond the sphere of formal law enforcement in the restricted positivist sense, while at the same time upholding the tradition of the rule of law. In exercising discretion, in taking affirmative steps to advance the peace (as suggested by the conception of the "king's peace," rich in tradition and history) in enhancing "community" or in "solving problems," police remain subject to law's normative structure. The "order" they invigorate, the "peace" they keep, and the "community" they enhance is an "order," a "peace," and a "community" achieved through law. The theory reconciles the expanded conception of the police function, as well as the expanded role of the community in police practice, with the vital tradition of the rule of law. The police in their official action remain subject to law and the requirements of respecting the rights of individuals. The theory supports the view strongly held by police that they are law enforcement officials, while reconciling professional law enforcement with community policing in a new synthesis. To be competent agents of law requires that the police develop a jurisprudence that informs their conception of the role. This book provides an elaboration of the theoretical framework of that jurisprudence applied to the police function.

In chapter 1, I make the case for an integrative jurisprudence of police arguing that the substantial discretion necessitated by the police role requires that police cultivate a practical wisdom about law. Jurisprudence should not be the exclusive province of judges or legislators. I maintain that current police theory suffers from disintegrative jurisprudence, the limitations imposed by our fragmented understanding of what law is. In particular, it has suffered from the long-standing