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Jeannine Bell

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Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT
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Introduction

Around the world, the police are distinctive as an institution and can be identified by the fact that they are given the authority by the state to use force to maintain order (Bayley, 1985). Although the police may not always need to use physical force to control behaviour, the threat of force constitutes a crucial mechanism in the system of social control. In societies governed by the rule of law, in addition to the duty to maintain order – 'order maintenance' – police are also required to enforce the law. This means that the police are charged with apprehending suspects who appear to have violated the law's dictates, but they must do so in a manner that is lawful. Allegiance to order maintenance while respecting the law has been one of the central struggles of the police and perhaps best illustrates the delicate balance that the police are required to maintain in democratic societies. The difficulty that the police face is complicated by task-oriented ambiguity – vagueness in what the law dictates. This collection of essays explores the ways in which public police manage the job put to them and the extent to which the law figures in what they do.

In addition to a focus on the ways in which police officers approach the law, many of the essays in this collection fall squarely into the law and society or sociolegal tradition as empirical explorations of the ways in which law works 'on the ground'. In several essays in this book (see, for example, Leo, Chapter 4; LaFave, Chapter 7; Herbert, Chapter 11; Oberweis and Musheno, Chapter 10; Larsen, Chapter 13, Bell, Chapter 16; Lea *et al.*, Chapter 18), the authors' conclusions are based on data they have collected from police officers working in the field. In some cases, this involved observing and/or interviewing the police. In other cases, the data on which the scholarship is based was originally compiled by the police themselves – arrest records, for example – and is analysed to distill the police approach to real-world situations and to legal categories.

Police Research and the Socio-legal Tradition

There is a long tradition of sociolegal studies on the police. A prominent example includes a study conducted in the late 1950s by the American Bar Foundation (ABF) on the administration of justice. In a one oft-cited essay generated from the ABF data, Joseph Goldstein investigated police power to decide not to invoke the criminal process, even in cases when violation had occurred. Goldstein examined three police decisions: (1) not to enforce narcotic laws; (2) not to enforce felony assault laws when the victim does not sign a complaint; and (3) not to enforce gambling laws. One enduring lesson of this early work was that police decisions not to invoke the criminal process are very rarely publicized yet 'largely determine the outer limits of law enforcement' (Goldstein, 1960, p. 543).

Goldstein's work highlighted an issue that has been a theme in much of the police scholarship since its publication – the frequency with which and the myriad circumstances in which the criminal law is *not* followed. In other words, the very fact that the police are given the ability to decide whether the criminal law will be enforced means that we will not have

full enforcement of the law – the investigation of every violation of the law. In democratic societies, some measure of police discretion is a byproduct of the rule of law. For instance, the police are not required to enforce the substantive law unless they can conform to its procedural requirements. Ambiguities in the law itself, limitations of time, personnel and investigative duties also restrict them. Finally, the fact that the police have individualized discretion means that they may decide for their own reasons not to enforce the law. Such reasons may or may not be supported by the state's legislature. For instance, Goldstein found that narcotics officers adopted a policy of trading full enforcement of the narcotics laws for information regarding future drug deals – in other words, if the suspect becomes an informant then charges against him or her may be dismissed or reduced. This is not a harmless use of discretion. Ignoring particular types of behaviour, Goldstein suggests, has the potential to undermine legislative objectives in passing particular laws in the first place (Goldstein, 1960).

Jerome Skolnick's *Justice Without Trial*, appearing soon after Goldstein's essay, was another prominent early sociolegal work that analysed the ways in which the police use the law. Skolnick posited that there is an ideological conflict between norms which govern the maintenance of order and those which mandate accountability to the rule of law. This conflict forces the police to serve at various points as rule enforcer, father, friend, social servant, moralist, street fighter, marksman and an officer of the law (Skolnick, 1967, p. 17). Skolnick found that a number of features – the sociology of police work, officers' stake in maintaining their authority, their socialization, the pressure to produce, as well as the invisibility of the work – had the effect of weakening their ability to adhere to the rule of law (ibid., p. 231).

This collection contains one selection of this early group of foundational sociolegal scholarship on police officers' interaction with the law. Wayne LaFave's essay, 'The Police and the Nonenforcement of the Law – Part II' (Chapter 7), addresses some normative issues that arise when police are given discretion. The essay focuses on whether police officers should ever be entitled to exercise discretion in a way that leads them not to invoke the law. In it, LaFave finds that police officers use a variety of reasons to justify not invoking the law: because the criminal process would be inappropriate or ineffective; because doing so would prevent loss of public respect; and because not invoking the law provides more benefits than invoking the law. LaFave calls for greater recognition of the broad scope of police discretion and for legal principles on which it may be governed (p. 259).

In several studies over the last four decades, sociolegal scholars have tackled the question whether the race of either the officer or of the citizen involved affects the invocation of law. Sociolegal research conducted during the 1950s and 1960s found police officers, the vast majority of whom were white, to hold racial biases (see, for example, Westley, 1953; Skolnick, 1967; Wilson, 1973) While some researchers during this period found officers to invoke the law using objective criteria (Skolnick, 1967, p. 89), others, evaluating the impact of citizens' race on officers' behaviour found that officers applied the law differently in black and white communities (Wilson, 1973; Goldstein, 1960). In some cases this involved a greater tendency to enforce the law when racial and ethnic minorities were involved (Wilson, 1973). Contemporary explorations of the role of police officers' treatment of the law is further explored in Part IV of this volume on 'Discretion, Race and Gender'.

Police and the Law: Patrol, Arrest and Extralegal Decision-making

Police interaction with the law and their approach to following legal dictates are heavily bound to the circumstances in which police officers find themselves. Enforcing the law and maintaining order thrust police officers into several different roles – watchman, investigator, crime fighter, guardians of public safety, therapist and judge. Many of these roles offer different opportunities to interact with the law. It is important to acknowledge the difficulty inherent in fully compartmentalizing police officers' behaviour, since in the course of a single afternoon they may be called upon to fill a variety of different roles. In recognition of the complexity of officers' roles, Parts I, II and III of this volume focus primarily on some of the research that explores how police officers respond to the law in three different contexts – on patrol, as investigators and as law enforcers charged with the duty to arrest.

Maintaining Order versus Enforcing the Law

Police officers' work on patrol has been understood to be entirely different from that performed in their roles as law enforcers. On patrol, police officers' very presence may deter crime, with their actions as 'watchmen' or 'peace officers' consisting of surveillance, assistance to citizens and warning potential criminals. As long as they do not invoke the law, officers' behaviour in this order maintenance role has exceedingly low visibility. Thus, while they are functioning as peacekeepers, officers' behaviour is neither under judicial control nor regulated by executive or legislative mandates (Bittner, 1967). Egon Bittner's study of peacekeeping on 'skid row' found that patrol officers coped with the difficulty of maintaining order not by invoking the law, but rather by relying on a richly particularized knowledge of the people in the area and using an aggressively personal approach in scrutinizing individuals (Bittner, 1967, p. 708). At times, such behaviour may have conflicted with legal mandates – especially those imposed by civil liberties – but officers maintained that their behaviour was appropriate given the norms of skid row society (ibid.).

In police departments organized around reactive policing – which require police officers to spend most of their time in centralized stations waiting to respond to emergencies – patrolling by officers was relatively rare. Few areas were patrolled by the police working in watchman or peace officer modes. The development of community policing was designed to combat crime at least in part by using community-based police officers. This implementation of community policing has led to a reorientation of activities to emphasize the provision of services and also to involve citizens in the local community (Skolnick and Bayley, 1988).

Community policing was intended to be a return to the watchman ideal in which police officers and citizens become co-producers in the project of law enforcement. In reality, however, in some jurisdictions its implementation may have fallen short of the mark. In Chapter 2 John Crank identifies the myth inherent in the idea of the watchman. According to Crank, the myth was transformed with the publication of 'Broken Windows'. Published in the early 1980s, this much-cited essay by James Q. Wilson and George L. Kelling called for increasing neighbourhood safety with the return of police foot patrols in order to bolster residents' feelings of security, maintain order and decrease the number of low-level crimes – 'broken windows' (Wilson and Kelling, 1982). Crank suggests that the broken windows style of policing turned the watchman on its head. Rather than being hesitant to invoke the law,

police became aggressive 'superenforcers' of the law (p. 38). Crank points to organizational innovations in the Denver Police Department which, though appearing to manifest some of the qualities of community policing, in the end led to aggressive order maintenance – officers searching for minor violations (p. 40).

The Fourth and Fifth Amendments 'on the Ground' – Search, Seizure and Interrogation

In both proactive situations aimed at uncovering crime previously unknown to the police and reactive situations where the police officers find themselves responding to a crime, police must commence an investigation (LaFave *et al.*, 2000). The US Constitution provides explicit procedural protections that police officers engaging in criminal investigations are required to respect. The Fourth Amendment allows individuals the right to be secure 'in their persons, papers, and effects against unreasonable searches and seizures.' The Supreme Court has interpreted this to mean that, in most cases, prior to commencing a search or seizure police officers must have the requisite level of suspicion – either reasonable suspicion or probable cause, depending on the circumstances. The Supreme Court has also said that, in some cases, the Fourth Amendment requires police officers to have a warrant before commencing a search. As Wesley Skogan and Tracey Meares detail in Chapter 1, the cost of the police ignoring the law is high. In *Mapp* v. *Ohio*[1] the Supreme Court held that evidence obtained by the police in violation of the Fourth Amendment could not be used in a state court. In other words, any evidence obtained in violation of the Fourth Amendment was to be suppressed (p. 8).

In their essays in the book, Jeffrey Fagan and Garth Davies (Chapter 3), Craig Uchida and Timothy Bynum (Chapter 5) and Skogan and Meares (Chapter 1) describe how police officers have wrestled with the law in the Fourth Amendment context. Skogan and Meares describe several empirical studies which investigate how police officers conduct searches. In Chapter 5 Uchida and Bynum deal with a related issue, the cost of the Fourth Amendment exclusionary rule – how often evidence gets excluded from trial proceedings as a result of an illegal search or seizure. Their analysis of motions to suppress in several different cities suggests the exclusionary rule has a very slight cost. In other words, their results indicate that, at least in the contexts they studied, police officers tend to follow the limits imposed by the law.

When police investigation has progressed to the point that they begin interrogation, the Fifth Amendment is implicated, providing that individuals cannot be compelled testify against themselves. In *Miranda* v. *Arizona*[2] the Supreme Court considered what the privilege against self-incrimination meant for police interrogation. In making its decision, the Court looked to a variety of police practices outlined in interrogation manuals and decided that, since custodial interrogation was inherently compulsory, prophylactic measures were needed to ensure that confessions obtained during custodial interrogation were truly voluntary. The Court designed a set of warnings, including warnings of the right to silence and the right to counsel, which had to be given prior to interrogation in order to safeguard the privilege.

The Supreme Court's decision requiring warnings only matters if they are administered prior to interrogation. Richard Leo's groundbreaking essay (Chapter 4), based on observations of

[1] 377 US 643 (1961).
[2] 384 US 436 (1966).

interrogation in two jurisdictions, explicitly addresses the issue of whether the police actually administer the warning. Leo finds that the warning is given to suspects prior to interrogation in the vast majority of cases but also that the police have developed a variety of techniques which encourage suspects to speak despite having been warned that they have the right to remain silent.

Discretion in the Decision to Arrest

The law on the books provides limited control of police behaviour in the area of arrest. Police officers' ability to decline to arrest violators has routinely been considered part and parcel of police discretion. Studies have shown that police officers tend to use their discretion frequently, often declining to arrest for everyday violations (Bittner, 1967; Lafave, Chapter 7; Goldstein, 1960; Mastrofski *et al.*, Chapter 9).

A significant category of sociolegal scholarship on arrest has concentrated on the situations in which the police are most likely to make arrests. Early sociolegal scholarship on arrest, based on research conducted in the 1960s, suggested that most arrest situations are reactive – they arise through citizen, rather than police, initiative (Black, 1971). In other words, police officers' invocation of the law arose as a rule of ordinary citizens' desires to wield legal power. Essays published during the last 20 years confirm the reactive nature of arrest and have investigated the extent to which police officers respond to citizens' requests to invoke the law, especially at the high level of arrest. For instance, Mastrofski and his co-authors (Chapter 9) describe the cases in which citizens are able to mobilize the police to administer high level sanctions such as arrest. In contrast to earlier studies, their results show that the law has a strong effect. For instance, citizens who have evidence on their side are most likely to be able to get police officers to make an arrest.

Particular attention has been paid to the effect of extralegal variables on arrest (see, for example, Worden, 1989; Smith and Vischer, 1981) Richard Lundman's essay (Chapter 12) investigates the impact of demeanour – in particular, whether the suspect's hostility is likely to increase the chances that he or she will be arrested. Several of the essays in this volume consider other situational and community-level variables in officers' decisions to arrest. Politics is a situational variable that is briefly explored in Larsen's essay (Chapter 13). He reveals a class bias in the police approach to controlling prostitution in three Canadian cities. The police were much more responsive to middle-class concerns about prostitution than complaints voiced by poorer residents (Larsen, p. 407). In Chapter 8 Kenneth Novak and his co-authors consider whether officers' assignment as either community police officers or patrol officers affects their decisions to arrest. Fagan and Davies (Chapter 3) evaluate order maintenance policing under the 'broken windows' rationale, demonstrating that it has led to an increased number of low-level arrests, many of which are eventually dismissed.

Sociolegal scholarship has also explored police officers' own justifications for their behaviour. In the area of arrest, this has focused on how police officers' norms may lead them to justify making an arrest. In Chapter 10 Trish Oberweis and Michael Musheno explore officers' norms with respect to their identity as police officers. Similarly examining how ideological approaches may mediate officers' approaches to their task, Steve Herbert's essay on norms of officers in the Los Angeles Police Department concentrates on the interrelationship between legality and morality and officers' construction of their work. He finds that in particular

circumstances – such as those involving spousal abusers – morality may be used to justify officers' decisions to arrest a suspect.

Discretion, Race and Gender

Situational explanations of police behaviour posit that the likelihood of formal action is influenced by structural characteristics such as the characteristics of the suspect – that is, his or her sex, race, age, demeanour and social class (cf. Lundman, Chapter 12). With respect to gender, scholars have investigated police officers' behaviour in cases in which women are victims – particularly spousal abuse and rape cases. A number of studies in the area of male-on-female spousal violence have focused on evaluating the leniency thesis: police officers are reluctant to arrest men who batter their female partners (see Fyfe, Klinger and Flavin, Chapter 15; Hirschel and Hutchinson, 1992). Research has shown that officers may not wish to enforce the law in this context because they do not consider incidents of domestic violence to be serious violations of law (Hirschel and Hutchinson, 1992).

The essays in Part IV of this volume, evaluating officers' approaches to situations involving female domestic violence and rape victims, provide a nuanced picture of the ways in which gender interacts with the law. In Chapter 14 Loretta Stalans and Mary Finn analyse the differing normative frames used by novice and experienced officers responding to domestic violence cases and the ways in which experience affects their interaction with victims and their decision to arrest. In Chapter 15 James Fyfe and his co-authors provide a compelling re-evaluation of the leniency thesis. Their data compares police officers' responses to domestic violence assaults with officers' responses to other types of violence. In Chapter 18 Susan Lea, Ursula Lanvers and Steve Shaw turn their attention to police officers' approaches to rape cases, evaluating the role of police officers and the rest of the system in the disappearance of such cases from the system as a whole.

Contemporary research on the interaction of the police with minorities has concerned their approach to stopping vehicles, particularly in the context of traffic enforcement, arrest procedures and the use of force. The research has investigated whether police officers are engaging in racial profiling – targeting individuals for either investigation or ill-treatment because the officer concerned believes that persons of their race are more likely to commit crimes. The frequency with which officers have been said to stop African-American drivers has even led researchers to coin the term 'DWB' (driving while black) (Harris, 1999). Focusing on all the myriad behaviours that can occur during a traffic stop, Robin Shepard Engel and Jennifer Calnon (Chapter 17) investigate the contention that minority males are at the highest risk for citations, searches, arrests and use of force during traffic stops.

Two of the essays in the volume evaluate police use of the law when dealing with minorities outside of the context of traffic stops. David Jacobs' and Robert O'Brien's essay (Chapter 6) explores the police use of force and the extent to which theories of racial inequality can explain police killings of civilians. Jeannine Bell's essay (Chapter 16) explores police behaviour in the area of hate crimes – crimes motivated by prejudice on the basis of race, religion or sexual orientation. The police investigation of hate crime is a noteworthy context for two reasons. First, this context assesses police behaviour in cases in which studies have shown minorities to predominate as victims (Bell, 2002). Second, it deals with police officers' approach to higher or constitutional law – in this case the First Amendment.

Conclusion

Much of the recent scholarship on policing expresses broad scepticism regarding the ability of the police to obey the rule of law. The majority of essays in this volume reflect that general trend. In documenting how the law works 'on the ground', sociolegal scholars have documented a significant failure on the part of the police to obey the law. Sometimes the lack of obedience to the rule of law stems from the difficulty of the task – for example, the law's ambiguity (Goldstein, 1960) At other times, police violate the law's procedural constraints to pursue their own investigatory ends (Leo, Chapter 4) In the latter case, police may see such violations of the rule of law as minor given the importance of what they view as their primary task, catching criminals. The work of socio-legal scholars like David Bayley suggests otherwise (Bayley, 2002). There may be significant costs to violating the rule of law: one of these costs may be the law's very effectiveness.

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