

THE POLICE AND SUBSTANTIVE RULEMAKING:  
A BRIEF REJOINDER

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I am honored that a man of Professor Davis' stature would respond to my Article. Professor Davis' achievements in the field of administrative law need no recital here, and his attempts to apply administrative law concepts to the administration of criminal justice often have been very fruitful. Nevertheless, I think that there are some limits to the usefulness of those concepts when applied outside the realm of the typical administrative agency, and the crux of our disagreement is over the nature of those limits when particular administrative law notions are applied in the police context.

Certain problems are posed by an attempt to discover the limits of those concepts of course. In the first place, there probably is no such creature as the "typical administrative agency,"<sup>1</sup> and thus it is somewhat difficult, regardless of the point one is attempting to make, to compare the police to this nonexistent entity in an attempt to evaluate the wisdom of engrafting various administrative procedures onto the police. Still, some general unifying characteristics of administrative agencies do exist, and with the help of a lively imagination, seasoned with a touch of oversimplification, a picture of the "typical administrative agency" does emerge, which can be usefully compared to the police.<sup>2</sup> What results from this comparison is the conclusion that the police perform a role very different from that of the garden-variety agency. Moreover, the police are structured differently, staffed differently, and, most important of all, possess a relationship with their respective governments that is very different from the corresponding relationship of the agencies. In short, the differences between the police and the "typical ad-

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<sup>1</sup> See, e.g., Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607, 612-13 (1959).

<sup>2</sup> See, e.g., Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 87-98 (1976).

ministrative agency" greatly outweigh their similarities. Accordingly, one who argues by analogy from administrative agencies to the police, as Professor Davis does,<sup>3</sup> should at some point pause to examine the strength of the analogy—an examination that is absent from *Police Discretion*. The purpose of my Article was to demonstrate that such an examination may lead one, as it led me, to the conclusion that certain procedures designed to regulate administrative agencies may not be appropriate in the police context.

But these are matters that are best left to the judgment of the reader. Professor Davis' book and my Article present very dissimilar ways of viewing the police, and the reader can form his own opinion of the merits of our respective positions. I shall restrict myself here to a few brief counterpoints to Professor Davis' response that are necessary to ensure that no misunderstandings are inadvertently fostered.

First, the parameters of our disagreement must be kept well in mind. This is particularly important because Professor Davis' response has touched on a number of independent issues, not all of which are relevant to the thesis of my Article. Professor Davis has taken the position that the police possess the inherent power to issue rules stipulating that certain penal statutes categorically will not be enforced, or at least will not be enforced as written by the legislature. For example, he apparently thinks that the police may lawfully decide not to arrest anyone discovered possessing less than a certain amount of a contraband drug even though the statutory prohibition contains no minimum. I call such rules "substantive rules," and I call their promulgation "substantive rulemaking."<sup>4</sup> Our entire dispute centers on the power of the police to issue substantive rules; other forms of "selective enforcement" are not directly involved in this exchange.

Because Professor Davis has not grasped this basic aspect of my argument, much of his reply is not responsive. Although it does seem to me that a substantive rule is the functional equiva-

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<sup>3</sup> K. DAVIS, *Preface* to POLICE DISCRETION at vi (1975):

My basic approach is to try to apply to the police the thinking about administrative law, in which I have specialized for thirty-five years, and especially to transfer some of the know-how that has developed around our most advanced administrative agencies to the police, who seem to me not at all advanced.

For an extended analysis of "administrative crimes" and the separation of powers doctrine, see Abrahams & Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 S. ILL. U.L.J. 1 (1976).

<sup>4</sup> Allen, *supra* note 2, at 67 n.26.

lent of amending or repealing the relevant statute,<sup>5</sup> not all nonenforcement stems from substantive rulemaking. Thus, Professor Davis' suggestion that I have taken the position that "non-enforcement is 'repeal' of a legislative enactment and that partial enforcement is 'amendment' "<sup>6</sup> is simply mistaken. My point is that nonenforcement *as a result of substantive rulemaking* is the functional equivalent of amendment or repeal; my point is not that each case of nonenforcement for *whatever reason* has that effect. For example, most police departments are understaffed and therefore must make resource allocation decisions. These decisions very likely will influence "who or what crimes shall be prosecuted."<sup>7</sup> The fact that allocation decisions necessarily must be made, and that they may influence the relative incidence of enforcement of certain statutes, does not mean, however, that those statutes have been modified by the allocation decisions. By contrast, the effect of a substantive rule is not to influence the incidence of enforcement of a particular statute; rather, the effect is to state publicly that within the parameters of the rule the statute will not be enforced *at all*. The two situations are quite different, and I have no objection to rational resource allocation so long as resource allocation does not become a smoke screen that hides the effective nullification of statutes by the police.<sup>8</sup> As I stated in my Article: "Although resources must be allocated, it is one thing to allocate them over the entire range of authority granted to an enforcement agency; it is quite another effectively to repeal part of that authority by institutionally refusing to exercise it."<sup>9</sup> Thus, a rule that an officer, if forced to choose, should pursue a robber rather than an illegal expectorator is perfectly permissible,<sup>10</sup> but a rule that illegal expectorators are *never* to be pursued quite clearly goes too far.

Professor Davis' belief that substantive rulemaking is permissible rests largely on his unwillingness to discriminate among the various reasons for nonenforcement by the police. He is correct in observing that "nonenforcement" in certain circumstances is "legal." No one, for example, would hold the police

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<sup>5</sup> *Id.* 79-81.

<sup>6</sup> Davis, *Police Rulemaking on Selective Enforcement: A Reply*, 125 U. PA. L. REV. 1167, 1168 (1977).

<sup>7</sup> Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 431 (1960).

<sup>8</sup> See Allen, *supra* note 2, at 112-14.

<sup>9</sup> *Id.* 113.

<sup>10</sup> See Davis, *supra* note 6, at 1169.

responsible for not enforcing a particular statute in a situation in which an offense never became known to the police and would not have become known to them on the basis of the most diligent inquiry. This kind of "legal" nonenforcement, however, simply does not accord the police the power to decide not to enforce particular statutes that they think are unwise or unjust. Nor does the fact that allocation decisions must be made, or that a patrolman might have to decide which of two offenders to arrest, or that individual officers are violating the full enforcement mandate,<sup>11</sup> require the conclusion that the police may institutionally decide not to enforce selected penal prohibitions. In essence, Professor Davis' argument amounts to no more than the assertion that because nonenforcement is "legal" in certain circumstances, it is legal in all circumstances (barring constitutional limitation). Obviously, the legality of nonenforcement is more complex than that.<sup>12</sup>

Apart from refusing to discriminate among the sources of nonenforcement, Professor Davis attempts to buttress his position by invoking some appealing hypotheticals. He then administers the coup de grace by asserting that the rules he advocates "will be interpretative rules, not substantive or legislative rules;" they will be "guides, not inexorable commands."<sup>13</sup> Neither approach, however, is enough to carry the day.

Professor Davis' hypotheticals are designed to show the absurdity of advocating enforcement according to the letter of the law of the statutes the legislature enacts. They are designed to make the reader think: "Does Allen really wish to see 'innocent twelve-year-olds' thrown in the slammer for riding bicycles on sidewalks, and does he really think that the police should squander precious resources, and perhaps assign undercover agents, to enforce the smoking ban in elevators?" Of course I do not think such things, and I would often applaud the refusal of a police officer to enforce the law in appealing circumstances; but the fact that a police officer, Professor Davis and I may happen to agree that a particular law ought not to be enforced in a particular instance hardly forces the conclusion that substantive

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<sup>11</sup> See Jensen, Book Review, 13 Hous. L. Rev. 800, 807 n.43 (1976) (Police "disregard of the full enforcement legislation . . . can hardly serve as a bootstrap for the department itself, through its own rulemaking, to effect formal rules for such disregard.').

<sup>12</sup> See Allen, *supra* note 2, at 74-109.

<sup>13</sup> Davis, *supra* note 6, at 1171.

rulemaking with respect to that statute is permissible, or that a police officer should be excused from enforcing a statute because he, Professor Davis, and I agree that the law makes no sense at all. More importantly, our happy concurrence does not support the conclusion that empowering the police to enact substantive rules mandating nonenforcement would be wise.

In the final analysis, these hypotheticals do not support substantive rulemaking because they merely demonstrate the absurdity of certain statutes as written, rather than the absurdity of mandating enforcement of those statutes. Professor Davis appears to take the position that if the legislature refuses to repeal a silly law on the books, then the police through substantive rulemaking should nullify the enactment. What this view fails to consider, as I pointed out in my Article,<sup>14</sup> is the possible costs of granting the police this power, and I will not repeat my arguments here. I will summarize them, however, in my own hypothetical that presents many of the issues that Professor Davis has not considered.

Consider a police chief of a small town—a hardened veteran who has “come up the ranks” and who has just been informed by Professor Davis that he can choose not to enforce those statutes that he thinks are unwise or unjust. What if he happens to believe that enforcing the “no riding on sidewalks” ban is not nearly as troublesome as enforcing the rape law? What if he also thinks that, as a rule, only those women who “ask for it” are raped, and that enforcing the stiff rape law against men whose only crime, in our hypothetical police chief’s view, is that of obliging these immoral women is a tremendous waste of valuable resources—resources that could better be used to stop twelve-year-olds from harrasing elderly ladies with their kamikaze activities on bicycles? Can the chief “lawfully” decide not to enforce the rape law? If he can lawfully decide not to enforce the cohabitation law and certain drug laws, as Professor Davis intimates,<sup>15</sup> why not the rape law, or, for that matter, the bribery law, the extortion law, or the robbery law?<sup>16</sup> Where, in short, is the line

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<sup>14</sup> Allen, *supra* note 2, at 98-109.

<sup>15</sup> K. DAVIS, *supra* note 3, at 91-92; Davis, *supra* note 6, at 1169-70.

<sup>16</sup> Professor Davis’ reliance on public participation in the rulemaking process is not an adequate response to this question. See Allen, *supra* note 2, at 102-03.

A related problem that Professor Davis fails to consider is the lack of uniformity in the law that would result from his proposal. Consider a state with a statute that forbids drinking alcoholic beverages in public parks and another provision that prohibits smoking marijuana. What if there were two contiguous towns in that state, and one decided

to be drawn in this process of independent evaluation by the police of the wisdom of legislative actions? It is not enough to point to what he and I might think are silly or overly broad statutes.<sup>17</sup> Others may disagree with our assessment, which is precisely why we have legislative bodies. And even if there is general agreement regarding what "silly laws" should not be on the books, Professor Davis fails to indicate how substantive rulemaking would be limited to such laws and why, if there is such universal agreement, the legislative process is an inadequate mechanism for reform.<sup>18</sup>

In sum, then, I remain unconvinced that the police should be empowered to engage in substantive rulemaking notwithstanding that I share Professor Davis' view of the lack of wisdom of certain legislative enactments. The role of the police is not to assess independently whether a particular statute is wise or just; their role is to enforce to the best of their abilities whatever statutes the legislature enacts.

Professor Davis' attempt to characterize the type of rules he proposes as "guides, not inexorable commands," as "interpretative rules, not substantive or legislative rules,"<sup>19</sup> is equally unconvincing. Although some of the rules that he favors may be within this characterization, the ones that concern me are not. Consider Professor Davis' proposed rule that the police not arrest any sixteen-year-olds caught smoking marijuana. Consider also his proposed rules that the cohabitation statute not be enforced and that a statute prohibiting drinking in the park only be enforced if there is "drunkenness, noise or the disturbance of others." Are

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not to enforce the drinking statute while the other decided not to enforce the marijuana statute? Should that state of affairs be tolerated? If not, how are the towns' choices to be reconciled? If the courts are expected to provide the reconciliation, then the answer is clear—both rules will be invalidated. See Allen, *supra* note 2, at 81-86. See also Friendly, Book Review, 44 U. CHI. L. REV. 255, 256-58 (1976).

<sup>17</sup> It is also inadequate to hypothesize a prosecutor who refuses to prosecute certain laws. Davis, *supra* note 6, at 1170. The answer to this hypothetical is that the prosecutor is, and should be, no more empowered to nullify legislative enactments than are the police. Thus, Professor Davis' point is misdirected. It seems to me that we should expend our efforts in attempting to eliminate lawless action by both entities, rather than arguing that the police may act lawlessly because the prosecutor does so. I recognize, of course, that we have long operated under the myth that the prosecutor's discretion is, and ought to be, unreviewable. Suffice it to say for now that I do not share that view. Prosecutors are just as capable of abusing their discretion as anyone else; and when that occurs, there should be a mechanism to correct it, as a few courts are beginning to perceive. See, e.g., *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Falk*, 472 F.2d 1101 (7th Cir. 1972), *rev'd en banc*, 479 F.2d 616 (7th Cir. 1973).

<sup>18</sup> See Allen, *supra* note 2, at 100-05.

<sup>19</sup> Davis, *supra* note 6, at 1171.

these "guides" or "inexorable commands?" Presumably, police officers would be instructed not to arrest under such circumstances,<sup>20</sup> and that is not the meaning of the word "guide," at least as distinguished from "command."

Similarly, characterizing these rules as "interpretative" is of little consequence. They are "interpretative rules" only in the peculiar sense in which Professor Davis uses the phrase,<sup>21</sup> which has little to do with the substance of the rules he proposes.<sup>22</sup> Whether the police possess the power to issue an "interpretative" rule that interprets a statute right out of existence is a question independent of the label affixed to the process. Moreover, as my Article demonstrates, the police do not possess this power.<sup>23</sup>

So far, I have elaborated only specific problems that I have with Professor Davis' proposal, and I think a few words concerning my own views on the control of police discretion are in order.<sup>24</sup> It seems to me that we should give the cop on the beat as much guidance as we can on how to spend his time in order to maximize his effectiveness, and we should also give him guidance on which course of action he should choose if faced with alternative possibilities. We should make crystal clear, however, that we expect him to enforce the law as provided by the legislature, and that he will be sanctioned if discovered not doing so. As I pointed out in my Article, "I suffer from no delusions"<sup>25</sup> that this "solution" will eliminate discretionary behavior on the part of the police. Of course individual officers in "low visibility"<sup>26</sup> situations will continue on occasion to decide for themselves what statutes to enforce against whom. Still, I think we should attempt to eliminate such practices by the police rather than institutionalize them as Professor Davis apparently prefers.

<sup>20</sup> How these instructions could be enforced is not clear. See Friendly, *supra* note 16, at 258.

<sup>21</sup> See K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 150-63 (1976).

<sup>22</sup> See Allen, *supra* note 2, at 85 n.106. See also Morton v. Ruiz, 415 U.S. 199 (1974).

<sup>23</sup> See Allen, *supra* note 2, at 81-98. Even the Model Rules on which Professor Davis relies, Davis, *supra* note 6, at 1170-71, do not attempt to promulgate specific policies. As Administrative Law Judge William Jensen has observed, this may be due to "a recognition . . . that any such effort would be futile absent appropriate modification by the Texas legislature of its full enforcement statute." Jensen, *supra* note 11, at 808.

<sup>24</sup> Professor Davis states that he is unsure "what [I] favor" and that I "advance no proposed solution." Davis, *supra* note 6, at 1168-69. I leave it to the reader to decide whether my views were clearly presented in my Article. I merely intend here to reiterate my position.

<sup>25</sup> Allen, *supra* note 2, at 117.

<sup>26</sup> See Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543 (1960).

Even if discretionary decisionmaking is inevitable, our efforts to eliminate such behavior should at least serve to restrict it.<sup>27</sup>

More should be done, however, than merely exhorting police officers to do their duty and threatening them with sanctions if they swerve from the tight and narrow. I will not address revising the substantive criminal law to eliminate overly broad provisions and sumptuary prohibitions, which is theoretically the most promising means of reducing police discretion, because there seems to be agreement that the chance of major legislative effort in those directions is small. Even without major substantive revision, though, there is much the legislature can do to reduce the incidence of lawless discretionary action by the police. One of the most significant sources of lawless police decisions not to invoke the criminal process surely must be the lack of a set of flexible responses to the widely varying situations the police often face.<sup>28</sup> To use one of Professor Davis' hypotheticals, if an officer is forced to choose between arresting an "innocent" twelve-year-old for riding his bicycle on the sidewalk or letting him go free, what is he going to do? The answer is obvious, assuming that the chief of police and the mayor are nowhere in sight. Yet why should the officer be forced to choose between an asinine but legal alternative and a more reasonable but unlawful response? Instead of placing the officer in this dilemma, the legislature should explicitly provide him with the power to explain to the child his mistake, coupled with a warning that if the behavior does not cease, the child's parents, and, if necessary, the juvenile authorities, will be contacted.

The kind of legislative response I am suggesting can be generalized to include practically any offense to which a legislature would care to extend it. Consider, for example, an ordinance forbidding the posting of signs on city property. The goal of this ordinance would probably be facilitated by empowering the police to order anyone caught illegally posting signs to remove

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<sup>27</sup> Quite possibly, formal adherence to the full enforcement statutes, *see* Allen, *supra* note 2, at 71-76, may have the effect of limiting police discretion to minor crimes for which some hidden ameliorative action is in everyone's best interest. I would not defend our present system on this basis, because I think the necessary ameliorative possibilities can, and should, be provided by legislative enactment, but still this point should be noted in any evaluation of our present system. Another point that should be noted is that Professor Davis' proposal probably would not achieve its goals. *See* Allen, *supra* note 2, at 106-08.

<sup>28</sup> Apart from resource allocation, this is probably the most significant source of police discretion.

them, and providing for arrest if the particular individual failed to comply with the order or if he previously had been informed by the police that the activity he was engaging in was against the law.<sup>29</sup> In short, our legislatures should begin to consider explicitly providing the police with a set of flexible responses to certain illegal conduct<sup>30</sup> that would be designed to further statutory objectives while concomitantly facilitating the optimal utilization of police resources.<sup>31</sup>

Regardless of whether our legislatures embrace the notion of providing the police some flexibility in dealing with certain offenses, it is quite clear that substantive rulemaking by the police should play no part in the effort to reduce the incidence of arbitrary police action. Moreover, regardless of the recommendations of prestigious bodies, the police will not likely rush to embrace substantive rulemaking;<sup>32</sup> and even if this prediction should prove erroneous, it is even more unlikely that the state courts will permit the police to engage in substantive rulemaking.<sup>33</sup> This is largely because there is general recognition that our principles of government ought not to be so easily sacrificed to beguiling expedients as substantive rulemaking would

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<sup>29</sup> Provision would obviously have to be made for obtaining, recording, storing, and retrieving the names of people warned; this would require some expenditure of resources, but no insurmountable barriers seem to be posed by my suggestion.

<sup>30</sup> The importance of *Walters v. Hampton*, 14 Wash. App. 548, 543 P.2d 648 (1975), discussed in *Davis*, *supra* note 6, at 1169 n.10, is its oblique indication that in Washington the police may have the common law power to fashion their own set of flexible responses in the absence of legislative authorization. The case cannot be read as serious authority for that point, however, and it provides no support for the proposition that the police have the inherent power to engage in substantive rulemaking. I have no objections to state courts' concluding that the common law of their states accords the police the power to develop alternatives to arrest in enforcing the criminal law. This development parallels the legislative development that I have proposed; and should any state legislature disagree with the common law as so articulated in its state, the common law rule could easily be changed by legislation. I must say, however, that the chance of the common law being interpreted in this fashion in states with explicit provisions mandating the arrest of offenders must be small indeed. Washington has a full enforcement statute, but, as noted above, only an extremely optimistic reading of *Walters v. Hampton* allows the conclusion that the case accords the police the power not to arrest, notwithstanding the full enforcement statute.

<sup>31</sup> One promising possibility is to make more liberal use of the appearance ticket, as is permitted in New York. See N.Y. CRIM. PROC. LAW §§ 150.10-70 (McKinney 1971).

<sup>32</sup> See *Allen*, *supra* note 2, at 106-08.

<sup>33</sup> The only case of which I am aware that has dealt with a publicly announced substantive rule invalidated it. *Bargain City U.S.A., Inc. v. Dilworth*, 29 U.S.L.W. 2002 (Pa. C.P., Phila. County, June 10, 1960), *injunction dissolved*, No. 1411 (Pa. C.P., Phila. County, Sept. 13, 1961), *aff'd on other grounds*, 407 Pa. 129, 179 A.2d 439 (1962). The reason there are essentially no cases on the topic is that no police departments have attempted to engage in substantive rulemaking.

require. In short, the solution to arbitrary police decisionmaking should be provided, at least in the first instance, by our various legislative bodies.<sup>34</sup> I realize that this is not an entirely satisfactory answer. Still, I think it is the best answer. There are very good reasons why separation of powers exists in our state governments, and substantive rulemaking—which involves legislative decisionmaking—does not adequately respect those policies. Thus, although I am as anxious as Professor Davis to reduce arbitrary action by the police, and although I fully appreciate the difficulties that occasionally beset attempts to obtain legislative action, I think the answer to our problems lies initially in the legislature. After all, we have no one to blame but ourselves if the legislature refuses to act responsibly.

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<sup>34</sup> Moreover, the police are not recruited or trained for the purpose of making the fine legislative judgments that substantive rulemaking would require. For an excellent discussion of the appropriate role of the police in our society, see L. WEINREB, *DENIAL OF JUSTICE* 13-43 (1977).