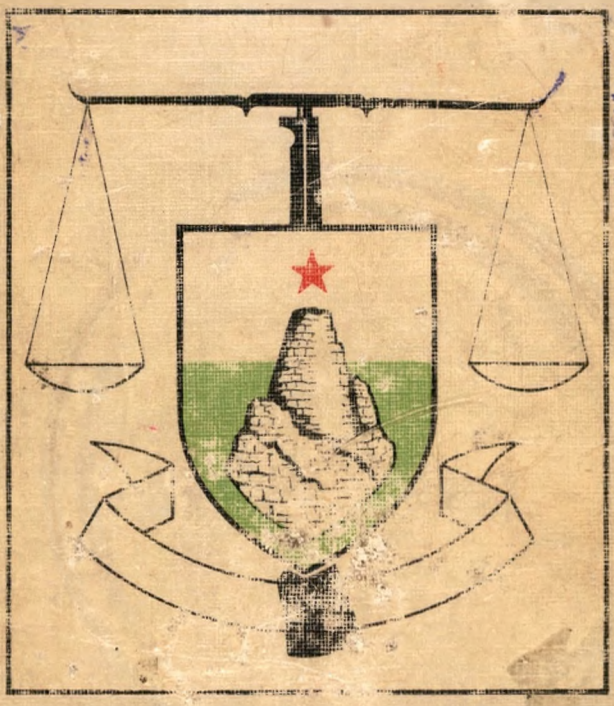

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Zimbabwe's Independence in April 1980, achieved as it was by a remarkable combination of revolutionary and legal activity, created a special challenge to Zimbabwean lawyers. Particularly significant for legal scholars at the University of Zimbabwe was the dramatic transformation resulting from the fact that a whole body of ideas and perspectives, unacceptable, unpopular or actually unlawful under the colonial state, suddenly became 'thinkable' and available to thinking Zimbabweans. Of these ideas, Marxism and Marxism-Leninism were only the most dramatic example, though by virtue of the election to government of a Party which proclaimed as its ultimate objective the achievement of a socialist order through Marxism-Leninism, they became especially relevant.

This new order was characterised then, as it remains today, five years later, by the basic elements of intellectual stimulation — contradiction, compromise, urgent demands for change and powerful claims for the retention of the *status quo*. Nowhere is this more evident than in the law, both within and around Zimbabwe, wherein is expressed in varying degrees of clarity, the tensions and tentative solutions generated by the material, social, economic and political realities of this ferment.

Thus Zimbabwean legal scholars face an agenda demanding, at a minimum, the study and awareness of the legal dimensions of, on the one hand — the articulated democratic demands of a liberated majority for justice, health, education, housing, employment and an end to poverty and dependence; and on the other hand — the equally articulate (if less rhetorical) claims of a powerful minority (as the first priority) for the retention or the minimum transformation of the capitalist economy. The legal dynamics of this contradiction must be analysed and understood in the light shed by scholars using a wide variety of perspectives.

The task also demands a thorough knowledge of the substantive elements that make up Zimbabwe's legal system. This must include a full awareness of the British-designed Lancaster House Constitution, replete with historic compromises, as well as of the inherited state machine, deeply imbued through both statute law and judicial practice, with authoritarian values and techniques. It demands the urgent study and exposition of the dense body of Zimbabwean Customary Law. Nor can it avoid a basic knowledge of Roman-Dutch Law and its deeper Romanist foundations. These provide a potential pathway to the conceptual treasury of one of the oldest legal system and to a richness of Romanist ideas developed throughout the modern world in both socialist and capitalist states which share with us this tradition. The paucity of serious scholastic exploration of Roman Law during the colonial period may be explained by the overriding imperial connection with the Anglo-Saxon Legal system. Such scholarship provides an avenue to a storehouse of knowledge and ideas, which Zimbabwean legal scholars may tread. A serious gap in our scholarship, perhaps understandable in the context of the final chauvinistic days of "Rhodesia", namely an awareness of the comparative experience

and legal knowledge of post-colonial Africa, needs to be remedied so that insights from this source can be added to the others that we must use in our efforts to make sense, for ourselves and others, of Zimbabwean legal developments at this challenging stage.

The Zimbabwe Law Review is intended as an indispensible means of meeting the above challenges. Early in 1983 the Board of the Law Department decided to work towards its publication. It also saw the *Review* as an important part of the work to evolve a contemporary and more relevant curriculum for Zimbabwean legal education. Thus readers will notice the particular emphasis given in this first issue to matters relating to Family Law, including a contribution on the subject from Tanzania, which the editors saw as requiring particular attention, The Department is also conscious of the important role the *Review* should play in an ongoing legal debate involving the Bench, the Profession, the Goverment and academics. This was one of the roles of the *Zimbabwe Law Journal* founded in 1961 as the *Rhodesia and Nyasaland Law Journal* by Professor R H Christie. The *Journal* ceased publication at the end of 1982.

As presently conceived the *Zimbabwe Law Review* will provide a vehicle not only for academics but also for students whose work merits publication. As the present volume shows, the pages of the *Review* are also open to non-Zimbabwean contributors, especially those writing on matters relevant to Africa and the Third World. This volume also demonstrates the editors' readiness to receive contributions from authors in Government and the profession, and we are particularly pleased to be able to publish here an article by the present Minister of Home Affairs. The *Review* will seek to encourage active debate on contemporary issues and thus the section entitled *Dialogue* seeks contributions on more immediate and controversial subjects in a style of presentation less rigorous than that required of other articles. It is hoped that the review of legal developments and the publication of relevant documentation will be a regular feature.

Thus the *Review* is seen as being launched in a new context, offering new opportunities and challenges to Zimbabwean and other legal writers. The objective is to respond with scholarship of the highest quality, regardless of its viewpoint. The Editors are conscious that by taking full advantage of this new intellectual freedom and opening the *Review* in this way to scholars from all ideologies they are making a fundamental break with the past. This however is not only consistent with the newly acquired academic freedom of the University of Zimbabwe, but also with the progressive order which is the national objective. Nor, it seems, will this new policy be inconstistent with the motto emblazoned on the facade of the Law Department: LEX EST ARS BONI ET AEQUI (THE LAW IS THE ART OF THE GOOD AND THE JUST)

Lastly we express the Department's gratitude to the Ford Foundation for it's assistance in the launching of the *Review*

Editor in Chief

Harare, 18th April, 1985.

POLICE DISCRETION

C.S. CANT*

1. INTRODUCTION

It is a well-documented fact, in most "Western" countries at least, that the police exercise considerable discretion in the performance of their functions. Rule enforcement is not automatic, and police discretion to a large extent controls the flow of people into the criminal justice system.

> "Police decisions not to invoke the criminal process largely determine the outer limits of law enforcement . . . These police decisions, unlike their decisions to invoke the law, are generally of extremely low visibility and consequently are seldom the subject of review. Yet an opportunity for review and appraisal of non-enforcement decisions is essential to the functioning of the rule of law in our system of criminal justice."[1]

The existence of such a large measure of discretionary power and the generally low visibility of the exercise of such power raises two important and interrelated questions: 1) How do the police exercise their discretion? and 2) Should the police continue to exercise discretion? A great deal of criminological theory and research is based on the analysis of official crime statistics.

> "The fact that criminal conduct must be socially perceived and socially processed before it becomes part of the official record has stimulated studies of the differential selection of offenders, particularly juveniles, for arrest and referral to court."[2]

The extent to which "extralegal" factors may influence the differential selection of offenders leads on to the second question. This question is of more fundamental importance and raises the whole issue of the role of the police in a democratic society. The goal of this article is to find some answers to these two important questions.

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1. Goldstein J. (1969) Police Discretion not to invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice", in Cressey and Ward, *Delinquency Crime and Social Process:* New York, Harper and Row p 166

2. Nettler, G (1978) *Explaining Crime* 2nd edition: New York, McGraw-Hill pp 64-70

2. HOW DO THE POLICE EXERCISE THEIR DISCRETION?

A number of studies relating to this question have been conducted in recent years. It is obviously dangerous to assume that the findings of a study into the activities of a particular police force can be applied directly to a different police force, especially a police force in another country. But, in the absence of empirical research in the local context, it is submitted that implications can be drawn from a review of the American research on this question. Where possible, the findings of the American studies will be compared with the writer's own limited observations of the activities and attitudes of the British South Africa Police (now Zimbabwe Republic Police) in Rhodesia (now Zimbabwe) and the Edmonton City Police in Canada.[3]

One of the most extensive studies relating to this question was conducted in selected precincts of Boston, Chicago, and Washington under the direction of Black and Reiss.[4] The principal finding of this study was that the police operate primarily in a "reactive" rather than a "proactive" manner. The majority of cases handled by the police originate with reports from the public rather than as a result of police surveillance. This finding accords with the writer's own observations of police-car patrols. Although the policemen were continually on the look-out for criminal activity, the majority of incidents attended to followed dispatches from the control-room to respond to complaints from the public. Black and Reiss found no evidence of racial or class discrimination in attending to reported crime, ** except that the police were observed to be more vigilant when complaints about serious offences were made by "white-collar" citizens than they were made by "blue-collar" citizens. The findings indicate that, in most cases, it is the public rather than the police who determine initial police involvement, and that it is the subsequent exercise of police discretion once on the scene that should be the main focus of attention.

It comes as no surprise, therefore, to find most of the existing studies of police discretion focus on the factors which influence police dispositions decisions rather than on the factors which operate at the level of surveillance and detection. But it is submitted that this latter aspect should not be ignored, nor should it be assumed that the factors will necessarily be the same as those operating at the disposition level. With regard to certain types of crime which the public has little or no interest in reporting to the police, for example crimes without victims such as possession of

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3. The writer has been on police-car patrol with former B.S.A.P. and the E.C.P. as an observer; has performed road-block duties with B.S.A.P. Reservists; has had a number of opportunities for unofficial observation of police activites; and has been acquainted with members of the B.S.A.P. and the E.C.P.

4. Black, D.J. and Reiss, A.J. Jr. "Patterns of behaviour in police and citizen transactions". Sec. I of *Studies of Crime and Law Enforcement in Major Metropolitan Areas* (Vol. II). Washington, D.C.: G.P.O.

** This is rather surprising since some studies reviewed below as well as the author's own assertion suggest and some cases establish categorically that race and class play a significant role in police work (Editors)

dangerous drugs, and many of the less serious offences such as traffic violations, most of the cases that do come to the attention of the police are likely to result from police surveillance and detection activities. In carrying out these activities, the police are evidently in a position to exercise discretion, for instance as to the areas in which to place their patrols; and the way in which this type of discretion is exercised could have a significant bearing on the statistics for these types of crime.

One study in which the findings were related to surveillance activities as well as disposition practices is that of Piliavin and Briar.[5] They observed the behaviour of policemen in the juvenile bureau of the department of an American industial city, in order to determine the factors which influenced disposition decisions. They found that in the majority of encounters where the offence was minor, youths whose "group affiliation, age, race, grooming, dress, and demeanor" fitted the delinquent stereotype tended to receive the more severe dispositions. Other than prior record, the most important factor was the youth's demeanour (that is, whether or not he manifested what were considered to be appropriate signs of respect towards the police). They also found that these factors of appearance and demeanour, in conjunction with police crime statistics, led the police to concentrate their surveillance activities in areas frequented or inhabited by Negros and to accost Negro youths more often than others. Nettler[6] correctly warns against generalizing Piliavin and Briar's finding that police patrolling may be "discriminatory" into a conclusion that prejudice on the part of the police significantly affects official crime rates, pointing out Black and Reiss's finding that most crimes come to the attention of the police as a result of citizens' complaints rather than as a result of police patrols. However, the possibility that the crime rates for those crimes that come to the attention of the police as a result of their surveillance and detection activities is affected by "discriminatory" practices cannot be ruled out. In fact, Hagan[7] suggests that this may be an implicit explanation for the high arrest rates among Canadian Indians.[8] The writer's own observations of police vehicle-check activities in (then) Rhodesia indicated the existence of "discriminatory" practices based on appearance. The police were more likely to stop and check the vehicles of Africans, juveniles, and persons driving older cars and they tended to "wave-through" adult Europeans driving newer cars. Furthermore, observation of both the B.S.A.P. and the E.C.P. tended to confirm the influence of demeanour in disposition decisions once a minor offence had been detected; offenders who were polite and apologetic were less likely to be ticketed than those who were recalcitrant.

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5. Piliavin, I and Briar, S. (1964) "Police Encounters with Juveniles": *American Journal of Sociology*, 70: 206-214,
6. Nettler, *supra* p 66.
7. Hagan, J. (1975) "Policing Delinquency" in Silverman *et al Crime in Canadian Society*: Toronto, Butterworth.
8. Various studies indicate that Canada's Native Peoples are arrested, mainly for minor crimes, in numbers far in excess of their proportions in the general population. See, for example, Bienvenue, R. and Latif, A.H. "Arrests, Dispositions, and Recidivism: A Comparison of Indians and Whites." *Canadian Journal of Criminology and Corrections* (16) 105 - 116. [Reprinted in Silverman and Teevan (1975) pp. 355-367].

The suggestion that the exercise of police discretion at the surveillance/detention level may be "discriminatory" should not be taken as an allegation of deliberate racial or class bias on the part of the police. With regard to the vehicle-check activities, for example, it was apparent that some sort of selectivity was necessary if the flow of traffic was to be maintained, and discussions with the people indicated that the "discrimination" was based on the perceived likelihood of commission of the offences which the police attempting to detect. Thus examples of justifications given were that Africans were more likely to be operating "pirate-taxis", juveniles were more likely to be driving without drivers' licences, and old vehicles were more likely to be unroadworthy. Although the "discriminatory" exercise of discretion may, therefore, be perfectly "legitimate" from the police perspective, the danger that such practices may have a self-fulfilling and self-perpetuating consequences and the potential effects of such practices on statistics for certain types of crime cannot be ignored. More research is needed in this field.

With regard to the exercise of discretion at the disposition level, the existing studies do not give evidence of any striking extralegal bias in police handling of juvenile offenders. Goldman[9] examined the arrest records for a number of juveniles from four communities in Alleghany County, Pennsylvania, to ascertain whether any extralegal factors influenced the police in deciding whether or not to refer these offenders to court. He found that the majority of police contacts with juveniles are handled informally without referral to court and that the seriousness of the crime was principal factor in determining a decision by the police to proceed with court action. Goldman did find ethnicity to be a factor which influenced the decision of the police in the disposition of minor offences, but as Nettler[10] points out, it is impossible to interpret this finding as evidence of extralegal discrimination because Goldman failed to control for the relation between ethnicity and previous convictions. In this respect it is interesting to note that Terry's[11] analysis of nine thousand juvenile offences committed in a midwestern American city over a five year period, revealed that the severity of treatment of juvenile offenders (by the police, probation department, and juvenile court) did not vary with race or socioeconomic status, when the seriousness of their offences and their records of previous offences were considered. Similarly, although McEachern and Bauzer,[12] in a study of police contacts with juveniles in Los Angeles, found a multiplicity of factors to be statistically related to police disposition decisions they too found ethnicity not be a significant

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9. Goldman, N. (1963) *The Differential Selection of Juvenile Offenders for Court Appearance.* New York: National Council on Crime and Delinquency, (See summary in Nettler, *supra)*
10. Nettler, *supra* p 65
11. Terry, R.M. (1967) "Discrimination in the handling of juvenile offenders by social control agencies". *Journal of Research in Crime and Delinquency,* 4 : 218-230, (See summary in Nettler, *supra).*
12. McEachern, A.W. and Bauzer, R. (1967) "Factors related to disposition in juvenile police contacts." In Klein, M.W. (ed). *Juvenile Gangs in Context: Theory, Research, and Action.* Englewood Cliffs, N.J. : Prentice Hall, (See summary in Nettler, *supra).*

variable. Hohenstein's[13] analysis of a ten percent sample of all serious delinquences committed in Philadelphia in 1960 revealed that the three major factors determining police disposition decisions were the victim's attitude, the juvenile's record and the gravity of the reported offence, the first such factor being the most important. He found that, when these factors were considered, race made no difference.

One recent study which challenges the general finding of the previous research that extralegal factors are not significant is that of Thornberry.[14] He analysed data on the disposition of juvenile offenders reported to the Philadelphia police and found that, although he controlled for the legal variables of gravity of offence and number of previous offences, the racial and socioeconomic differences did not disappear. Blacks and low socioeconomic status subjects were more likely than whites and high socioeconomic status subjects to receive severe dispositions. But he does acknowledge that he did not control for other variables that might have legal relevance in cases involving juveniles, such a demeanour of the youth, the quality of his home, and the attitude of the victim.

Viewing all of these studies together, it appears that, insofar as juveniles are concerned, in the exercise of discretion at the disposition level, the American police utilize criteria similar to those applied by the courts in determining sentence. Although a multiplicity of factors may influence the decision as to whether or not a juvenile should be subjected to the criminal process, the main factors appear to be seriousness of the offence, the juvenile's previous record, and the attitude of the complainant.

The implication that there is no strong extralegal bias in police disposition decisions, taken in conjunction with Black and Reiss's finding that most offences come to the attention of the police as a result of complaints from the public, leads Nettler to conclude that there is no evidence of any systematic bias in the official statistics.

> "The best answer seems to be that official records in democracies reflect the operation of a judicial sieve . . . In short, what counts is those crimes for which the public puts pressure on the police to make arrests."[15]

3. SHOULD THE POLICE CONTINUE TO EXERCISE DISCRETION?

The view has been expressed that the function of the police is merely to enforce the law and that they should not have the power to exercise any discretion. Williams, for example, argues

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13. Hohenstein, W.H. (1969) "Factors influencing the police disposition of juvenile offenders." In Sellin T. and Wolfgang, (eds.) *Delinquency: Selected Studies*. Toronto: Wiley. (See summary in Nettler, *supra).*

14. Thornberry, T.P. (1973) "Race socioeconomic status, and sentencing in the juvenile justice system". *Journal of Criminal Law and Criminology,* 64 : 90-98 (See summary in Nettler, *supra)*

15. Nettler, *supra* p 70

> "And so to demand that he (the policeman) should exercise some sort of discretion and refrain from enforcing certain laws is neither fair nor correct. In the first place, it demands of him a judgement and a sense of responsibility which is scarcely reflected in our treatment of him when we fix his salary in relation to that of other public officers. But, more important, such a process must inevitably subject all police activity to the personal likes and dislikes of individual policemen".[16]

Whilst there may be some merit in Williams' first point, it is submitted that the view that the police should uniformly and dispassionately enforce all laws overlooks the realities of the present and is based on a misconception of the role of the police in a democratic society.

Goldstein[17] makes the point that "total enforcement" of the substantive criminal law by the police is precluded by generally applicable restrictions on such police procedures as arrest, seizure and interrogation as well as by various specific procedural restrictions. Some such restrictions are obviously desirable and what is of greater concern is whether, outside this area of no enforcement, "full enforcement" should be expected from the police. This does not appear to be the theoretical expectation since the police unlike prosecutors and judges, ordinarily are not officially delegated discretion not to invoke the criminal process.

> "*Full enforcement,* however, is not a realistic expectation. In addition to ambiguities in the definitions of both substantive offences and due-process boundaries, countless limitations and pressures preclude the possibility of the police seeking or achieving *full enforcement.* Limitations of time, personnel and investigative devices . . . force the development, by plan or default, of priorities of enforcement. Even if there were 'enough police' adequately equipped and trained, pressures from within and without the department . . . may force the police to invoke the criminal process selectively."[18]

Lafave[19] asserts that there are not sufficient resources available to the police for them to proceed against all the conduct which is defined as criminal and that the exercise of discretion is an inevitable consequence. This results in decisions not to arrest apprehended offenders in particular circumstances. On the pragmatic level, a further factor that must be considered is the adequacy of the resources of the other agencies in the criminal justice system to cope with full enforcement by the police.

> "So great has been the proliferation of criminal statutes that arrest of all violators would cause a breakdown of the

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16. Williams, C. "Turning a Blind Eye". *Criminal Law Review* [1954], 271. Quoted by Cressey and Ward, *supra* p 126
17. Goldstein, *supra* p 171.
18. Goldstein, *supra* p 172
19. Lafave, W.R. "Nominovation of the Criminal Law of Police", in Cressey and Ward *supra* p 185

> criminal justice system. There must therefore be a limitation upon the number of persons subjected to the criminal process. As a practical matter, this limitation must take place, in large part, at the arrest stage since this is ordinarily the first official decision relating to the offender's conduct."[20]

Although Goldstein identifies the fact that full enforcement is not a realistic expectation in the present state of the law, he, in keeping with Williams, considers that the ultimate goal should be the elimination (as far as is humanly possible) of police discretion not to invoke the criminal law.[21] This view is based on the notion that the exercise of discretion by the police derogates from the democratic ideal of "government by law" and subjects police activities to the whim of each police officer or department. As has already been shown, this notion is not borne out by the empirical research that has been carried out; the indications are that, at least for the more serious crimes, the exercise of police discretion is based on legal rather than extralegal considerations. Of course, the possibility of "discriminatory" practices, particularly at the level of surveillance and detection, cannot be ruled out, but it is submitted that the complete elimination of police discretion is not the only or even the best, solution. As Cressey and Ward[22] point out, in Western democratic societies, not only do law-enforcement officials symbolize a system of justice stipulating uniform and dispassionate punishment of those who deviate but they also symbolize a system of justice stipulating individualization of punishment to suit the particluar circumstances of each case. A balance between these conflicting ideals is regarded as necessary both to achieve "justice" and to maximize conformity (that is, to secure and maintain the consent of the governed). Although the police do not themselves impose "punishment" as such, their decisions to invoke the criminal process effectively leads to the imposition of various pre-verdict sanctions (for example, anxiety, arrest, imprisonment pending trial, adverse publicity). It is submitted that the elimination of police discretion not to invoke the criminal law would produce an imbalance at this level of the justice process, resulting in greater "injustice" than may presently exist and in reduced conformity (flowing from loss of public respect). We are all aware of the sort of criticism levelled at the "hard-nosed" policeman who does not exercise discretion - "he would book his own grandmother for stealing sixpence!" It is submitted that the elimination of police discretion not to invoke the criminal law would result in injustices and loss of respect irrespective of what changes were made to the existing state of the law, because it would not be possible to legislate in such a way that individualized justice would automatically result in each case.

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20. Remington, F.J. (1962) "The Law Relating to 'On the Street' Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General". In Sowle, C.R. (ed.) *Police Power and Individual Freedom: The Quest of Balance.* Chicago: Aldine (Quoted by Cressy and Ward, *supra* p 127).

21. See Goldstein *supra* pp 183-184.

22. Cressey and Ward, *supra* pp 123 - 128.