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Criminal Jumping on and Off the Curb

– discretion and the idea of an impartial and independent police force*

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* a fully documented version of this commentary is published in Margaret E. Beare and Tonita Murray, eds., *Police and Government Relations: Who's Calling the Shots?* (University of Toronto Press, 2007)

Two incidents help to frame the idea of police independence:

- During Premiership of Joh Bjelke Peterson, Queensland state police assigned significant resources to raid Brisbane's three universities, removing condom vending machines from the campuses.
- In a British proceeding observed by criminologist Doreen McBarnet a young man was tried on the charge of jumping on and off a curb in a disorderly fashion.

While the first illustrates the absurdity of misdirecting police resources, the second reveals the degree to which discretion gives life to criminal law. The rights of citizens turn significantly on the discretion of police officers, Crown attorney's or judges to intervene, arrest, charge, prosecute, convict – or not.

Dr. Sossin's contribution to this symposium usefully locates police issues within wider frameworks of thought about the legal regulation of discretion. This helpfully corrects a common tendency to divorce questions relating to the police-politics interface from larger issues of constitutional governance, reducing complexly nuanced matters to the misleadingly simple questions of "who should be in charge" or "who should have the final say". Put so bluntly and in disregard of the larger constitutional background, it provokes responses that flow directly from the questioner's assumptions as to whether "police" or "politicians" are most likely to produce substantively agreeable outcomes. In reinserting constitutional principle into this otherwise starkly pragmatic calculation Professor Sossin provides valuable service. "Independence", it turns out, is an ancient legal term of art that suffuses the entire field of common law constitutionalism.

Though it is also helpful, Professor Sossin's emphasis on the rule of law is discomfiting. The idea of law sits ill at ease with a criminal justice system so shot-through with discretionary powers as to seemingly vanish into a mere "rule of persons". The awkwardness associated with personal exercises of discretion is accentuated in our era when the background ideology of managerialism vies mightily with the rule of law for our loyalty. From the second we inherit the notion, famously articulated by Dicey, that no person is to be punished in body or in goods except for a distinct breach of law, established before the ordinary courts in the ordinary way. Though much criticized, this idea remains, as E.P. Thompson put it, "an unqualified human good". Managerialism's predilection for efficiency over the values of fairness, propriety, rights, duties, constitutionalism or "law's" proceduralist values reflects a culture that prizes "getting things done". The two live in inevitable tension. They always have.

"Getting things done" is not, however, the whole story when it comes to the management of a domestic armed force denoted as "police". It bears emphasis that police-government relations ought always to be constrained within the parameters of legality. This is so *not* because efficiency in any managerial sense demands it but because the *grundnorm* of our civil society requires it. No *unlawful* executive direction of police is acceptable. It matters not how or by whom it is communicated, to whom it is addressed, or whether it is analytically "operational" or "policy" in nature. No argument derived from efficiency concerns can justify unlawful instructions, orders, deployment or actions.

Discretion muddies even these analytically clear waters. Unlawfulness typically arises in one of several ways. Police actions such as the arrest of law-abiding individuals, harassment of political opponents of the government, the use of unnecessary force, or turning a blind eye to the crimes of well connected individuals, would be clearly unlawful. Even in such clear cases, however, the reality that police need to make choices as to the allocation of their resources,

cannot prosecute all wrong-doers, must exercise discretion, and sometimes make thoroughly honest mistakes, renders assessment of particular circumstances a complex, multi-faceted matter. What is essential is that fear or favour must never flow from political connection or influence. The “playing field” of law enforcement discretion must remain level.

Beyond the realm of the blatantly unlawful, one can imagine situations in which the executive branch of government would wish to direct the use of otherwise lawful powers in situations where constitutional propriety would dictate otherwise. It can be extraordinarily difficult to mark precisely where one constitutional right – freedom of expression or aboriginal entitlement, for example - must give way to another – the preservation of the peace, perhaps. Such boundaries fuzzily demarcate the frontier between lawful and unlawful police conduct. But, for all their “fuzziness” they define the character of our democracy. The “playing field” tilts strongly in the direction of political command any time police forces lack access to independent legal advice.

Finally, a police power used in pursuit of *improper goals* is unlawful even if the same power, used in pursuit of proper goals and in closely similar circumstances, would be appropriate. The pretense of proper motivation should not serve to uphold state action that is in substance directed to improper ends. The intent or effect of state action can render it “colourable” and, hence, ultra vires, and unlawful.

Though the principle of colourability is clear enough, its application is less so. If mundane police wrong-doing is notoriously well concealed behind an all-but-impenetrable blue curtain, the problem is compounded where possibly inappropriate police-politician relations are concerned. Institutional inertia weighs heavily against those who would challenge high level impropriety. Direct evidence of what was said or done in the course of government communications with police is often lacking, quite possibly by design. Witnesses can be hard to identify - and harder to compel. There are few incentives encouraging willing testimony that runs contrary to the interest of either police or government hierarchies - that way career suicide lies. The evidentiary bar to be overcome in proving the colourability of state actions in court is extraordinarily high and judicial habits of deference to officialdom have become well entrenched during the past half century. Difficult questions are rarely put, the executive commands effectively infinite resources in protecting itself from effective inquiry. Government officials often have more or less unreviewable ability to restrict access to precisely the evidence most likely to prove their colourable intent and presumptions of constitutional propriety conveniently prevent the drawing of logical inference in any circumstances falling short of admitted impropriety.

Human nature being what it is, it seems inevitable that influential persons will wish to improperly influence the police. They will want to do so for reasons of “corruption” (often no more ill-intended than “don’t put so-and-so through a prosecution; he’s a good guy”) or for reasons related to political grandstanding ranging from a sort of orchestrated “photo-op-by-cop” through to the tough-guy peacock displays of politicians seeking electoral advantage through displays of “law and order” machismo. If the police as individuals or organizations are to rise above partisanship they must be demonstrably impartial (committed to Joseph’s “Queen’s Peace”) and enjoy a degree of structural independence that is up to the task of sustaining impartiality over the long term. We should not confuse the two. Institutional integrity can survive human failing but the converse is not true. The conditions under which impartiality can exist is a central concern of administrative law and this too points to the need for a broad-based analysis of just the sort that Professor Sossins seeks to develop.

Finally, it bears noting that Kim Murray's remarks at this symposium emphasized the importance of recognizing that the "law in the books" is often at variance with what *actually* happens. This is a centrally important insight. "Rights" solemnly declared at the rarefied levels of the Supreme Court of Canada or trial courts in Snow Drift, Northwest Territories (*all* courts are at a rarefied level) mean little if not respected in daily practice. It is there that police – politician propriety is most likely to go off the rails. To Sossin's public law insight, then, must be added Murray's measure of legal realism. Combining the two leads, in turn, to two observations. First, if they are to be effective, schemes derived from sophisticated legal analysis need to be translated into language *both* readily intelligible to politicians and constables alike *and* capable of being rendered operational in real life. A finely expounded doctrine has little worth in real life if it is unintelligible to those called upon to put it into practice. Secondly, in developing rules to govern the police-politician relationship, attention needs to be directed to procedural law, the law of evidence, and to the institutional capacities of the courts. A legal structure incapable of identifying colourable intrusions upon rights that it purportedly protects has limited worth. A system organized around deference to occupants of high office can hardly qualify as "legal".

Little in the history of police-government relations over the past three decades justifies complacency in these respects. And *that*, as Professor Sossin's emphasizes gives cause for concern about the integrity of both police and the democratic apparatus itself.