
IN THE LITERATURE

Review Essay / Privatizing or Civilizing Public Spaces?

*Richard Neely, Take Back Your Neighborhood
New York: Donald I. Fine, Inc., 1990, 224pp.*

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Introduction

In *Take Back Your Neighborhood*, Chief Justice Richard Neely of the West Virginia Supreme Court has written a passionate, provocative, and stimulating call to arms to the citizens of America.¹ Observing that the formal institutions of the criminal justice system have been so hamstrung by conflicting purposes and special interests that "for every \$100 worth of police man hours we purchase with our tax dollars, only about \$2 or \$3 will be spent on active patrolling to prevent crime," [85]² he insists that the only plausible way society can now produce security in its neighborhoods is for citizens to "take the law into their own hands." [18]

Moreover, while he understands that the very idea of "vigilanteism" stirs anxieties and worries among "limousine liberals," he argues that private and community self-defense has long had the sanction of law and tradition, and that the only reason we private citizens have given over our "ancient power" to enforce the law is our "cupidity, pusillanimity, and sloth." [30]

Finally, he argues that such efforts can be effective in controlling crime, reducing drug abuse, stilling fears, even preventing a further decay in racial hostilities, without necessarily interfering with anyone's civil liberties.

Indeed, he believes that greater reliance on "commu-

nity policing" (by which he means citizens patrolling their own neighborhoods) can increase the overall fairness of the criminal justice system by allowing the "working poor" living "close to areas dominated by an underclass predisposed to crime" [21] to have the same response to crime that is available to wealthier people. Since the wealthy people can "hire vigilantes," why shouldn't poorer people be allowed to act as vigilantes themselves?

His goal in writing this book, then, is to provide an "historical, sociological, political, and economic justification for a community's taking the law into its own hands," [22] and to "explain . . . how citizen law enforcement can be organized legally and effectively, with no unacceptable intrusions into our civil liberties." [18] He wants to give America, and particularly the "predominantly blue-collar communities . . . threatened by violent crime . . . and by the specter of their own children slipping into the underclass, criminal world . . . [who] can't pay to send their children to private schools; . . . can't pay to move to the suburbs; and can't expect the already overwhelmed public law-enforcement apparatus to protect them," [21-22] some new place to stand, and some new methods to apply in dealing with crime, fear, and disorder.

This is an important and timely purpose. It is true that society has, quite reasonably, become less confident in the ability of the criminal justice system to protect it. Indeed, even those who lead the criminal justice system have begun to speak out about their limited capacities to

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description in the criminal code is an explication of general intent, i.e., of CODE 2.02 (2) (a), part of the "General Requirement of Culpability" within the CODE.

49 This view is often called the "desire-belief model." It is closely related to Davidson's own view, but is most clearly described in Mackie, *The Grounds of Responsibility*, in LAW, MORALITY AND SOCIETY 175-88 (P. Hacker & J. Raz, eds. 1977). See also M. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 1-18 (1987) for a critical review of the theory. We would note that the regnant contemporary view is that an intention is not *merely* a desire-belief set. It requires something more, though that something more is not central to our concerns. Moreover, there is argument over *the role* that the desire-belief set plays. Mackie represents a long tradition which sees it as *the cause* of action. Hart, on the other hand, sees it as an *accompanying mental state*. See H.L.A. HART, *supra* note 9, at 90-112. For criticisms of the view that a desire-belief set fully exhausts the notion of intention, see M. BRATMAN, *id.* at 18-20 & *passim*, and Davidson's later theory of intention, *supra* note 20, Essay 5, 83-102. Nonetheless, virtually all action theorists believe that something like a desire and a belief are both constituents of any intention.

50 I do not intend, here, to broach the issue of the freedom of the will. Most action theorists believe that much worthwhile can be said about the will and willing things without dealing with the metaphysical issue of freedom vs. causal determinism. The position that choice, responsibility, and the will are ultimately consistent with causal determinism is called *compatibilism* or sometimes *soft determinism*. The view claims that issues of the freedom of the will are really about control of one's action in just the way we have been discussing it, *not* whether that control itself is causally determined by brain chemistry or whatever else. That is the position I take here. As particularly authoritative statements of the position, see Frankfurt, *Freedom of the Will and the Concept of the Person*, in FREE WILL 81-95 (G. Watson ed. 1982); D. DENNETT, ELBOW ROOM: VARIETIES OF FREE WILL WORTH WANTING (1981); W. LYCAN, CONSCIOUSNESS Ch. 9 (1987).

51 See E. ANSCOMBE, *supra* note 19, at 11-12. One does not know everything about one's action and often is not aware of it under every description that applies to it. I may, for ex-

ample, know I am paddling a canoe (one description). I may know I am paddling north (another description) and yet not know I am paddling toward a falls (a third description), i.e., I fail to recognize my action under that description. But, if it is an action, it is intentional under some description (in our example, under the first two descriptions, at least). And, if it is intentional under any description, I must "know what I am doing" when I so act. Thus, in Davidson's words "... what the agent does is known to him under some description," *supra* note 20, at 50.

52 See E. ANSCOMBE, *supra* note 19, at 13-15 & 49-63.

53 Some commentators emphasize the controllability character of action to the complete exclusion of its knowability. See, e.g., D. HUSAK, *supra* note 5, at 96-111 & MODEL PENAL CODE AND COMMENTARIES, *supra* note 28, at 215. While control may be central, knowability is a necessary condition of control and an independent element upon which liability can fail. See the CODE'S definition of insanity *infra* note 54.

54 See MODEL PENAL CODE AND COMMENTARIES, Part I, §3.01 to §5.07. Another standard treatment setting out the various "tests" or "rules" is W. LAFAVE & A. SCOTT, CRIMINAL LAW 274-95 (1972).

Obviously, there is a vast literature on the insanity defense, a full bibliography of which would constitute a project in itself. However, the treatments combining the legal and the philosophical issues are H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY (1972) and M. MOORE, LAW AND PSYCHIATRY, PART II (1984).

55 O.W. Holmes, *The Eliza Lines*, 199 U.S. 119, 130 (1905).

56 *Id.* at 180-81.

57 *Id.* at 54.

58 Holmes, *supra* note 55.

59 See H.L.A. HART, *supra* notes 9, 10, & 11.

60 *But see* *Lambert vs. California*, 355 U.S. 225 (1957).

make a difference, and to make an appeal for increased support from citizens.

It is also true that the overall level of private or community self-defense seems to be increasing. Stories in newspapers of neighborhood drug fighters are but the most visible tip of the iceberg; the rest consists of dramatic increases in expenditures for private security, and increases in the number of private security guards.³

And, while it is true that academics have long been considering whether and how community crime prevention efforts can be successful, it is also true that they have not really worked out the philosophical and legal arguments for the forms of aggressive citizen patrolling that Justice Neely recommends, and that seem to be increasing in the United States.⁴ So, Justice Neely has directed our attention to an important phenomenon, and to a potentially important instrument to grasp in seeking to control crime and enhance security.

A harder question is whether Justice Neely has framed this issue well enough for the society to consider, or whether he has rushed too soon to a conclusion that cannot be wholeheartedly supported, at least with the explicit and implicit values he espouses as justifications, and on the evidence now available about effects.

I hardly consider myself a "limousine liberal." Indeed,

I am quite sympathetic to many of the views that Neely holds. For example, like Neely, I am convinced that (1) it is important that citizens assume more responsibility for self-defense; (2) it is both legitimate and valuable to attack disorder and the "signs of crime" as well as crime itself; (3) aggressive patrolling and sustained vigilance by citizens can control crime, reduce disorder and calm fears; (4) the value of such efforts in controlling street-level drug markets is particularly high; and (5) there is a special need for all this in those communities that are struggling to keep themselves viable, or trying valiantly to emerge from an embattled state. So, there is much in his argument that would cause others' hackles to rise but that leaves mine unruffled.

Even so, I find Justice Neely's unbridled enthusiasm for "vigilantes" somewhat disconcerting, and his bland assurances about the overall efficacy and propriety of the efforts he recommends dissatisfying. Justice Neely is onto an important subject. That much I grant him. But in setting up the issue for public discussion, in helping the society see which forms of community self-defense are worthy and make sense and which are dangerous, and in thinking how the community self-defense efforts might be linked to the public justice system, he misses the mark by a wide and potentially dangerous margin.

The Proposal: "Modern-Day Vigilantes"

The first problem is to get clear about what Justice Neely is proposing. The broadest answer is that he is proposing an increased reliance on citizens' self-defense as an effective and just response to the nation's crime problem. But citizens' self-defense could take many different forms.

For example, citizens' self-defense could refer to the special efforts taken by citizens to make themselves more useful to the public police. These include "block watch" groups committed to remaining vigilant and calling the police when suspected crimes occur. Or, they include programs in which citizens mark their property to help the police establish strong cases against burglars, and thereby deter these activities and facilitate the return of reclaimed property to their rightful owners.

Citizens' self-defense could also refer to individual self-defense efforts. Many of these turn out to be valuable to the individuals who employ them but dangerous for their neighbors. For example, citizens could stay off the streets to avoid being victimized, leaving the streets

more dangerous than they now are because less widely surveilled and used. Or, they could buy locks, burglar alarms, dogs, and guns to defend personal property thereby increasing the possibility that crime would be displaced onto others, or that accidents involving suspected crimes would occur.

Self-defense could also include individuals combining together in associations to finance privately purchased security patrols. Indeed, as Neely points out, these are the responses that wealthier private citizens have made to the weaknesses of public crime control. These "vigilantes for the rich" [51] provide powerful evidence of the efficacy of patrolling methods but also point to the ultimate unfairness of these approaches if their use is limited to wealthier people in the community.

But none of these forms of self-defense is Justice Neely's main concern. What interests him is a "modern-day vigilanteism," [13] that is, community patrols organized, staffed, and implemented by ordinary citizens. He is at pains to distinguish these "active" citizen patrols

from the "passive" forms of citizen self-defense, such as block watch groups. He also seeks to distinguish his community patrols from the "reactive" response of traditional police patrols which, in his view, are rarely focused on important crime and disorder problems in the community. Unlike the passive citizen roles of the recent past, and the fecklessness of modern police patrols, then, Neely's modern-day vigilantes are to be engaged in "active" and "preventive" patrols.

The rhetoric is persuasive, but one still wants to know more concretely what he has in mind, and why one would think that this particular form of community self-defense would be plausibly effective. Here is Neely's explanation:

Community crime control groups. . . attempt to monitor the comings and goings of undesirable intruders and residents. Patrols closely follow pimps, prostitutes, drug dealers and panhandlers, so that their market is destroyed, and any

implied threat to passers-by is eliminated. Inevitably, the undesirables leave for more hospitable climes, and the crime is eliminated." [20]

Further on, we learn that "the essence" of community law enforcement (a phrase he seems to use interchangeably with "community policing," "community patrolling," and "modern-day vigilanteism") is "enforcing the standards of the community within that community and keeping out strangers who are up to no good." [146] In short, what he has in mind is a program of active harassment and "rousts" of undesirables carried out by citizen patrols rather than the public police.

This, then, is his proposal for community self-defense. Two questions inevitably arise. First, is there any reason to believe that such methods could be effective in controlling crime and enhancing security? Second, are such methods legally permissible or philosophically desirable?

The Efficacy of "Modern-Day Vigilanteism"

In assessing the potential efficacy of Neely's "modern-day vigilanteism" one must first consider the aim. The most obvious objective, of course, is to reduce crime and victimization. But there are other objectives towards which these methods could be directed: namely, reducing disorder that is thought to lead to crime, or reducing the fear that is one of the most important adverse consequences of crime.⁵

Now, one might reasonably think of crime, disorder, and fear as three separate problems—each with its own claims to make on public consciousness and the public purse, and each with its own solution. Indeed, that is what society, guided by experts and the courts, did throughout the 1960s and 1970s. They reasoned that law and the institutions of the criminal justice system were most properly and effectively used in dealing with the most concrete and serious part of the problem—serious crime and actual criminal victimization. They were much less properly used in dealing with the less serious and more subjective aspects of the problem, such as disorder, and the fear that both crime and disorder engendered. Indeed, it was precisely in these areas that abuses of official discretion were most common. Therefore, to economize on scarce criminal justice resources, to minimize the intrusiveness of the law, and to eliminate the potential for corruption and abuses of authority, it made sense to focus virtually all of criminal justice system's

attention on the most serious and most unambiguous offenses.

More recently, however, arguments have been made that these problems are more closely intertwined causally, and nearer to one another in social importance than was once thought. In a very influential article in *Atlantic Monthly* subtitled "Broken Windows," James Q. Wilson and George Kelling argued that the minor offenses associated with disorder—vandalized property, drunks on street corners, noisy and threatening teenagers, aggressive panhandlers, and so on—created two important problems that increased their importance as targets of crime control efforts.⁶

First, minor offenses might actually cause more serious crimes to be committed in the areas where the offenses occurred. This could come about because offenders would be attracted to areas that looked disorganized, and commit more serious crimes there; or because the disorder could breed conflicts that escalated into serious crimes; or because the disorder could undermine neighborhood morale, and consequently its capacities for self-defense and informal social control. Second, the instances of disorder frightened citizens as much as or more than the actual rates of criminal victimization in the community. This was significant because fear itself was an important social cost of crime, and because, in some circumstances, fear could undermine the community's

capacity for self-defense.

In any case, Wilson and Kelling's observations established a new justification for being concerned about "disorder offenses" as well as "serious crime." This justification gained additional weight with the publication of Wesley Skogan's book *Disorder and Decline*, which presented a more sustained empirical argument for the mechanisms that Wilson and Kelling had suggested.⁷ But the greatest impetus for embracing their views came from the emergence of the crack epidemic. There, right before America's eyes, the concepts associated with the "Broken Windows" argument were played out. When drug dealers showed up in a neighborhood, crime, disorder, and fear all increased, and did so together. The only solution seemed to be to drive the drug dealers and customers from the neighborhood.

However, the new concern with disorder (including open drug markets) and the widespread enthusiasm for enforcing against it could not long escape prior criticism focusing on wasted resources and the invitation to corruption. Efforts to combat disorder inevitably make heavy claims on public police departments, burdened not just by traffic enforcement and paperwork as Neely would have it, but also by the need to respond to high levels of serious offending. Moreover, the legitimacy of such efforts remained suspect because there was no bloody victim to give the clear, urgent, and precise justification for state intervention, and no guarantee that whatever laws existed to regulate such ambiguous conduct would be enforced equally across a city.

What is interesting, however, is that these criticisms can be weakened if *citizens* rather than public police do the patrolling. If citizens are involved, the claim that public resources are too scarce to allow this diversion from the crucial task of guarding against serious crimes is blunted. Moreover, since they are voluntarily contributed, and not publicly owned, there is no need to offer a public justification for this particular use of resources against others.

Similarly, if citizens are involved, the community patrols have a different kind of legitimacy. They are *politically* rather than legally justified, and that either strengthens the legal justifications for such efforts or overwhelms legal quibbles about whether such actions are appropriate. All this becomes particularly powerful when the neighborhood efforts can be cast as self-help by struggling communities that have few private resources and limited capacities to make claims on public resources.

Thus, community patrols against disorder and disorderly persons can be made to appear much more appro-

priate and legitimate than public enforcement directed against similar offenses. Still, the question remains whether patrols like these are effective in controlling crime, reducing disorder, and stilling fears, and whether they can be justified even when (or perhaps especially when) they are mounted by citizens rather than the public police.

As to the question of efficacy, Neely offers the following. First, he describes the effectiveness of citizen patrols in exclusive residential areas, and attributes the low crime rates in those areas (without further observation and analysis) to the effectiveness of the patrols in keeping unknowns and undesirables out of the community. Second, he repeats (uncritically and without additional evidence) the arguments made by Wilson and Kelling that explain why disorder leads to crime. Third, he notes some studies that have shown that higher levels and more aggressive patrolling have, in fact, reduced levels of crime (but ignores studies that have found such efforts to be ineffective).

I don't want to be too much of a purist and say that there is no case here for claiming that there is some potential crime control value to be claimed by relying more on "modern-day vigilantes." Indeed, as I have

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said, I tend to agree with Neely's assessment of the potential value. But the evidence now available hardly establishes an unassailable case for efficacy. At best, it would establish a justification for further experimentation. And that limited recommendation could be enthusiastically endorsed only if there were no other reasons to be concerned about "modern-day vigilanteism."

But the problem is that there are some additional reasons to be concerned about community patrols. These have to do with the legal and philosophical justification for such efforts. And it is here, even more than in the arguments about efficacy that Neely's reassurances seem much too superficial. Before turning to these, however, it is worth pausing for a moment to examine Neely's own theory about how community patrols can be expected to control crime and enhance security.

Neely's Theory of Crime and Crime Control

Neely's theory of how community patrols work to control crime has two somewhat different strands. The dominant strand is that the patrols succeed because they exclude from the community outsiders who are up to no good and who are recognized as such. As long as outside troublemakers can't get in, the neighborhood can be safe. That theme is reinforced by his stories of walled towns in the Middle Ages, and exclusive communities in modern America.

A lesser strand, more like the theory offered by Wilson, Kelling, and Skogan, is that the patrols succeed in controlling disorderly conduct that occurs within the community. Of course, to the extent that that control succeeds by driving the disorderly conduct and disorderly persons from the community, and makes the people who were previously insiders outsiders, it acts exactly like the first model. And, again, that seems to be the dominant idea in Neely's mind.

But from time to time, Neely seems to see a somewhat different set of possibilities. For example, he observes:

Much of the crime that annoys us is not committed by professionals, nor by armed and savage members of the underclass. Rather, it is committed by young men—often, but not even usually, minority young men—who have few prospects for making honest livings. . . . Community intervention with failing adolescents . . . is an integral part of community patrolling, and it can prevent things from going too far along in the development of potential criminals. [103-04]⁸

He also observes that:

[A] person living in a housing project probably has a slightly different mix of friends from a person living on Kiawah Island, and that presents problems. It is difficult for peace-loving, law-abiding poor people not to have friends and relatives who are criminals. [119]

I may be making too much of these observations and asides in his basic argument, but I do so because it helps to make two points that are important. First, Neely seems to believe that community patrols may succeed by controlling the conduct and development of people *inside* the wall as well as by keeping those who are suspect out. Second, he seems to understand that it is both unfeasible and undesirable to have the walls between the community and non-residents completely impenetrable. Some communities may *have* to include some "undesirables," and many others could also include such people without

undue harm. For example, with 25 percent of the young black male population now under one form of criminal justice supervision, many minority areas of the city will have to learn to live with convicted felons in their midst. Similarly, with drug use as prevalent as it now is in workplaces and high schools, co-workers, parents, and school children must work at some relationship with those who have dealt or used drugs. This, too, he feels, need not expose the community to irreparable damage.

If these are, in fact, possibilities, then the emphasis that Neely places on exclusion from the community is not necessary, and many of the problems that he creates for himself in emphasizing the exclusion of undesirables can be avoided.

For example, if we read Neely to be suggesting that there is a fixed number of criminal offenders, and that the only way we can be protected from them is to banish them from our streets, then the best that can be done with community patrols is to displace crime from one place to another until the only victims are other offenders—a specter that Neely in fact holds out for us. On the other hand, if unruly teenagers can be deflected from lives of crime, and if otherwise unruly people can be made to behave well while in the midst of the community through the use of community patrols, then there is the potential for reducing the overall level of crime as well as simply displacing its occurrence.

Similarly, if we read Neely to be saying that only those communities that can successfully exclude troublesome people can be crime-free and secure, and we recognize, along with Neely, that some communities will not be able to achieve this result because they are economically and socially tied to those who would in other contexts be viewed as undesirables, then Neely's advice can be taken only by a limited number of communities in the society. On the other hand, if communities can somehow hold undesirables in their midst without becoming vulnerable to them, then all communities can benefit from Neely's advice.

Finally (and most importantly), if we read Neely to be saying that the walls around communities must be very high, with limited entry, then we must be concerned about the extent to which public spaces have disappeared, and with their disappearance the freedom to move about the society. If, on the other hand, communities can admit undesirables into their midst and control

their conduct reasonably effectively, then the walls need not be so high, or so rarely breached. Private spaces can be widened to make them more public.

I suspect that the foregoing efforts to read into Neely's theory an image of community patrols that can help to shape the development of unruly teenagers, and that can keep a community feeling secure even when it has undesirables in its midst (and therefore increase both the overall tolerance of the community and the freedom available to the undesirables), are ultimately unsuccessful. His dominant image remains one of sharp dichotomies: of people who have become unredeemably undesirable and dangerous, and can be reliably distinguished from those who are safe; of spaces that can be walled off from the rest of the society and given over to local communities that can establish and enforce their own norms of civility with little concern for the interests of those who have different views of proper conduct; and

of a self-defense capacity that consists of nothing more than excluding those deemed undesirable rather than one that builds the capacity of the community to deal with its internal problems, and to hold within it some problems without falling apart.

It is that view of community crime control that I think is dangerous. I find it far more philosophically appealing to imagine greater similarities and finer gradations among people, and to imagine a self-defense capacity that includes the ability to prevent the descent to lawlessness, to control misconduct even among those who have in the past committed crimes, and to enlarge rather than shrink the tolerance of local communities by equipping them with the capacity for self-defense and effective control through devices other than exclusion. And it is in this view of crime and the role of community patrols that the greatest hazards to civil liberties, and the greatest philosophical objections to Neely's theories, lie.

The Propriety of "Modern-Day Vigilanteism"

The crucial weakness in Neely's position lies in his bland assurances that the benefits of modern-day vigilanteism can be had without any risk to civil liberties. He develops this argument by establishing the legal rights of citizens to make arrests, by trying to draw a bright line between his "modern-day vigilantes" and the bad kind of vigilantes that have given the honorable tradition of community self-defense a bad name, and finally, by offering some concrete suggestions about how the "modern-day vigilantes" should be recruited, trained, equipped, and deployed.

While there is much to be discussed here, I would like to concentrate on his efforts to draw the bright line between proper "modern-day vigilantes" and the other bad kinds of vigilantes. Neely draws the line in two places. First, the powers of citizens to arrest or question others never rise higher than those of the police. Second, the powers of citizens never extend to punishment of the offender. As long as citizens remain within these basic rules, they are behaving properly. As Neely explains:

[T]he real problem with vigilantes is usually inartfully expressed: It is not that they will 'take the law into their own hands'; rather, it is that they will act *outside* the law. [46]

So far, so good. But immediately a whole host of questions arises. It is obvious, for example, that in detaining someone or making an arrest, it may sometimes be necessary to use force, and that use of force may

be seen as something that crosses the line from the force necessary to effect an arrest to something that looks like adjudication and punishment.

Neely is aware of this difficulty. Indeed, this forms the basis of many of his practical recommendations about staffing, training, and equipping community patrol forces. But it is by no means clear that one could live up to all his recommendations in establishing a community patrol force. Or, put somewhat differently, if communities had to live up to all the standards he proposes, there would be many fewer community patrol forces than at first seemed possible. Moreover, given that even his stringent standards fall well short of the sort of training that is given to public police officers, and that that level of training has not always been adequate to protect the rights of citizens, it is not at all clear that individual rights would not be put at jeopardy by citizens' patrols.⁹ Indeed, it is perhaps a measure of his own uncertainty about the efficacy of his proposals that he also recommends that community patrols acquire insurance against civil liability suits before going into the field!

Much more central to Neely's argument is the question of what kinds of legal powers citizens have to engage in the kinds of active, preventive patrols that he seems to have in mind. In discussing the historical development of crime control methods from a system that relied almost exclusively on private crime control efforts to one that gave over some of the functions to public agencies,

Neely makes the following observations:

Protection from criminal violence, however, has three aspects: prevention (when possible), apprehension and punishment. Of the three, punishment has the lowest social utility, while protection [*sic*] has the highest. And with regard to both protection [*sic*] and apprehension, early English law relied on the community at large. [32]

I assume that Neely means to say "prevention" where he has in fact written "protection"; otherwise the construct that establishes "protection" as the larger set composed of three sub-elements makes no sense. And I also assume that by "prevention" Neely means the kind of aggressive patrol directed at disorder and the signs of crime that is described as the essence of modern day vigilanteism.

If I am right in both assumptions, then the important question that Neely must address is what particular kinds of legal rights citizens and police officers have, not simply with respect to making arrests, but also with respect to the kinds of activities that are associated with Neely's style of "prevention": following pimps and prostitutes and drug dealers and harassing them in ways that destroy their markets; or finding some basis for keeping undesirables out of a community.

I think it is fair to say that Neely offers relatively little guidance as to the law on these matters. And, if I understand the laws regulating the conduct of public police officers in these areas, the laws are much more confining than Neely implies. For example, it is quite possible that a "pimp" could bring a suit against a citizen vigilante who followed him around the neighborhood asking questions. This question is not answered by referring to the laws governing citizens' arrests.

I worry that the reason these issues are not addressed is that Neely knows that the success of such efforts may, in fact, depend on citizens' seizing some extra-legal powers in these areas. Moreover, he knows that such actions could be successful for precisely the same reasons that the public police are successful in doing this, namely, that the person whose civil rights are being violated is in a weak moral, economic, and political position to press his or her claim. Neely observes at one point that no law can be enforced without community support. That is certainly true. But the more interesting question in this context is whether local vigilante groups will be able to resist enforcing "laws" that do not really exist except in the normative enthusiasm of the local community. In short, the worry is that in the crucial area of preventive patrol, community patrols may reach for the kind of extra-legal power that, while it will make

them effective, will also cause them to cross the line that transforms them into the bad kinds of vigilantes.

While these problems are bad enough, I think Neely's analysis comes a cropper most fatally in his analysis of "private spaces." It is clear that he believes that community patrols will work only in a world of private spaces. As he says: "The proper model for law enforcement is widespread privatization of space combined with active community patrolling." [116] It is only the sense of ownership that motivates the volunteer citizen to take responsibility. It is only the consensus about community norms that authorizes, sustains, and directs the collective action.

The difficulty, however, is that something that is a public space cannot be made a private space simply by the decision of some collectivity to begin patrolling it as though it were a private space. One of the glories of a liberal society is that many spaces that were previously "private," and within which grave injustices could be perpetrated without the victim's having any recourse, have become public in the sense that individuals being oppressed within those private spaces are legally empowered to call on the state to have their rights vindicated. In effect, liberal society has evolved not only to ensure that citizens can have their rights defended against despised criminal offenders but also against the powerful lords who otherwise could hold them in thrall.

Of course, it may well be that in the pursuit of individual liberties and *Gesellschaft* we have cut too deeply into the private spheres and relationships that once constituted a valuable *Gemeinschaft*. And it may also be that we have grossly under-regulated the wider public spaces we have created—leaving them arid and dangerous. And these may be the reasons that Justice Neely is not too concerned about reversing this tide and reclaiming for private community uses some spaces that were formerly wholly public.

But it seems to me that the proper challenge to take on in restoring civility to the society is not simply to encourage citizens to form communities around their own deeply held values and then to patrol aggressively within their communities to make sure that all comply with the standards. The far harder but more valuable challenge is to remember and invigorate the codes of conduct to which liberal communities commit themselves—as communities, not as atomistic individuals. Those values are not quite the same as the ones we would choose unconstrained for ourselves, but they are the ones that define us as a liberal community.

As Neely would almost certainly remind us, and too many others in the world frequently forget, individual

members of liberal communities do morally commit themselves to abiding by the criminal law, on pain of punishment if they transgress. They also commit themselves, as Justice Neely does usefully and repeatedly remind us, to rallying to the defense of their neighbors when their neighbors have been truly offended against. It is these commitments that help make us a community, and that rally us to defend our communities against law-breakers. But as members of a *liberal* community, we also commit ourselves to *not taking offense easily*. It is through that commitment to tolerance and forbearance that we can create the spaces within which others can act, move,

express themselves, and enjoy privacy.

In short, the challenge is not just to create communities but to create *liberal* communities that can be policed by citizens in accord with the foregoing principles. That means not only not offending, as well as rallying to the defense of, others, but also not taking offense easily. It also means having a very broad definition of who is in one's community, and of not surrendering an assumed equal relationship easily. These are the claims that citizenship in a broader liberal society makes on our efforts to form smaller, more intimate communities.

Conclusion

Justice Neely is quite right to be examining the opportunities and challenges of citizens' self-defense. Like him, I do not believe that the public agencies of the criminal justice system can do the job without the active assistance of individuals joined together in communities.

Unlike Justice Neely, however, I think the challenge is to rally local communities around traditional liberal values that include a deep concern for individual rights and liberty, a sense of equality, and a hope for redemption as well as the right and the obligation to develop and express one's own values within a congenial community, and to condemn those who violate the public's laws. In this sense, I hope to *civilize* public spaces rather than to abandon them to those who feel entitled to use them for their private, communal purposes, ignoring the values and standards of the broader society.

In this effort, I think the agencies of the public criminal justice system—including, in particular, local police departments—have a much more important role to play than Justice Neely assigns them. They can help powerful community groups emerge by giving them proper support and assistance. Joined to community enforcement efforts, community-oriented police departments, prosecutors and judges can increase the legitimacy and power of the actions that citizens initiate. But most importantly, the close association with the public justice system can help remind citizens that they are not free to violate the rights of other citizens even if it is in the name of community, for that violates the principles of the liberal community of which we are all, fortunately, still a part.

NOTES

1 Actually, to be entirely accurate, Justice Neely does not issue a call to *arms*. Indeed, he is quite explicit that citizens who patrol their neighborhoods should not be armed with guns. He does, however, seek to mobilize otherwise passive citizens, and it is in this metaphoric sense that he issues a call to arms.

2 Bracketed numbers in the text refer to pages in Neely's book.

3 W. CUNNINGHAM & T. TAYLOR, *THE HILLCREST REPORT: PRIVATE SECURITY AND POLICE* (1985).

4 *COMMUNITY PREVENTION: DOES IT WORK?* (D. Rosenbaum ed. 1986).

5 Neely discusses these other objectives in Chapter 6. It would have been more valuable to give these other objectives earlier prominence in the book since he is, I think, on much

firmer grounds arguing for the effectiveness of modern-day vigilanteism in dealing with these issues than in dealing with serious crime.

6 Wilson and Kelling, *Police and Neighborhood Safety: Broken Windows*, *ATLANTIC MONTHLY*, Mar. 1982, at 29-38.

7 W. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICA'S NEIGHBORHOODS* (1990). Incidentally, there is a sentence in this passage that is apparently garbled by the omission of some phrase, so I may not have understood Neely correctly.

8 It is worth mentioning that Neely's discussion of a citizen's legal rights to use force in self-defense is not nearly as elegant or detailed as George P. Fletcher's treatment of the subject in *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1990). But this issue is not essential to Neely's argument.

Review Essay / Empowering and Restraining the Police: How to Accomplish Both

Howard S. Cohen and Michael Feldberg,
Power and Restraint: The Moral Dimension of Police Work,
New York: Praeger, 1991; xvii + 166 pp.

JAMES F. DOYLE

Howard Cohen and Michael Feldberg are pioneers in the study and application of police ethics. They have collaborated for more than a decade in developing programs for training police in philosophical ethics, and their programs have been used in several different regions of the country. They have also collaborated with many police officers and agencies in trying to devise an ethical theory which will unify and illuminate the whole range of moral issues encountered by police in their work. Their book, *Power and Restraint: The Moral Dimension of Police Work*, is a result of this scholarly and practical collaboration.

In this book Cohen and Feldberg have chosen to focus on the moral issues most often encountered by municipal police performing patrol work. Their explanation for this narrow focus is that most police resources, public and private, are dedicated to peacekeeping and protection rather than to more technical forms of law enforcement and undercover work. However, they advocate an ethical theory which can be applied more broadly to all the moral issues that may arise in the exercise of power by police, by other agents of criminal justice, and by governmental officials generally. Cohen and Feldberg contend that the ethical theory which has proven to be most nearly adequate for this purpose is one they have adapted from the social contract theory of John Locke.¹ They consider Locke's theory all the more appropriate because of its powerful influence on the Declaration of Independence and the Constitution and thus on the moral, political, and legal values of the United States. One of the merits of this social contract theory, they

argue, is that it leads us to ask: "What responsibilities do governmental officials incur in consequence of accepting the authority to govern?"[xv]²

Cohen and Feldberg devote the first half of their book to answering this question by expounding their social contract theory of the ethical standards governing responsibilities of police. The title of their book is an acknowledgment and reminder of the extraordinary power typically granted to police, and of the need to hold police to demanding ethical standards for exercising this power. Cohen and Feldberg appear to assume, with good reason, that formal legal restraint can never be more than a reinforcement for making police morally responsible for the power they exercise in their work. An important reason for the limitations of formal legal restraint is that empowerment of police must involve the granting of both extraordinary power and extraordinary discretion in the exercise of this power. To their credit, Cohen and Feldberg emphasize the need for discretionary freedom, judgment, and even creativity, which cannot be effectively restrained by rules and codes of conduct without also being stifled.[4] At the same time they recognize the unusual authority exercised by police: "Police have considerably more authority over others than most people in society and, consequently, have more opportunities to use that authority in impermissible ways." [7] These considerations make it all the more imperative for both the police and the public to subscribe to ethical standards that can effectively restrain the discretionary power of the police while also encouraging their justified exercise of it.

How can this restraint and encouragement be achieved? Are there ethical standards to which police and the public can subscribe, and how may these standards serve both to restrain and to encourage police in the

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