

## Patterns of Use of Police Discretion

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### Abstract

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*This literature review examines patterns of use of police discretion in the context of certain populations and/or scenarios. It reveals that juveniles, minorities, domestic violence, the mentally ill, and protestors represent populations/scenarios in which police discretion is most often used and is potentially problematic. It reveals that policies which attempt to curtail police discretion tend to be counterproductive and interfere with the ability of the police to support victims. Implications for justice are discussed, as well as missing elements in the literature.*

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### Introduction

The law is often regarded in two ways. There is the *letter* of the law, which is the literal word of the law. The letter of the law outlines a necessary sequence of cause and effect – if an individual commits an A crime, then a B punishment must follow. However, there is another side of the law – the *spirit* of the law. The spirit of the law is less literal, less concrete. It is in and from the spirit of the law that different interpretations emerge which sometime complicate the straightforward administration and execution of the law. Because of the imprecision that emerges from the spirit of the law, those charged with maintaining and administering the law must often use *discretion* in the course of their duties.

In the context of criminal justice, discretion is usually defined as the “official actions [made] by criminal justice officials, based on individuals’ judgments about the best course of action” (as cited in Rynard Law Firm, n.d.).

In their daily duties, police officers (POs) often find themselves faced with many decisions regarding the administration of the law. In fact, the very nature of police work and the environments in which they work necessitate the use of discretion (Rynard Law Firm, n.d.). Officers frequently find themselves in circumstances in which they alone must determine how to proceed, often without input, advice, and/or supervision, which is at “the heart of police discretion” (Rynard Law Firm, n.d.). Unfortunately this can put police in delicate situations – their decisions may result in negative outcomes, are ethically questionable, or may not represent the most efficient or appropriate course of action.

Nevertheless, POs, out of necessity, continue to use discretion in their daily duties. Many factors influence the use of discretion on the part of POs (Schulenberg, 2010). After all, though the letter of the law may be clear, the spirit may also influence the officers in question. Furthermore, as Schulenberg (2010) points out, “the degree of formal social control used and the decision-making processes involved can vary” (pp. 109-110). Because of this variety of influences as well as scenarios and outcomes, it is important to examine patterns of use of police discretion in order to understand how and when officers use discretion, how their discretion is influenced, and how negative outcomes, questionable ethics, and debatable efficiency can be avoided or mitigated. It is the purpose of this literature review to examine police discretion and patterns of use associated with police discretion.

### Literature Review

Patterns of use may be associated with certain offenders and offenses. While searching for resources it became clear that certain populations are more associated with discretion than others.

One such population is juveniles. One study on dedicated juvenile officers and the impact such specialization has on discretion asserts that because the police serve as “gatekeepers to the formal criminal justice system” they often react to situations involving juvenile offenders differently than they would to adult offenders (Schulenberg & Warren, 2009, p. 3). In fact, Schulenberg and Warren (2009) contend that police respond to juveniles with “a greater use of discretion” as well as “individualized treatment” (p. 3). Schulenberg and Warren (2009) found in their study that specialized officers were more inclined to refer juveniles to external agencies and other interventions prior to filing charges; were less likely to file charges against juveniles, though if the juvenile were charged, they were more likely to detain them; and were more inclined to take into consideration “situational factors” (gang affiliations) and the offense in question as compared to patrol officers.

Another study of youth offenders in the context of police discretion also found that situational factors played a significant role. Of course, the most critical element is the seriousness of the crime, whether or not a weapon was used (especially a firearm), and the degree of harm done to property or victim (Carrington & Schulenberg, 2003). In other words, a severe crime is a severe crime, and regardless of an officer’s personal feelings on the matter (which can influence discretion) the officer will have to defer to the letter of the law. The juvenile’s prior police contact and/or criminal history also have a bearing on how an officer may use their discretion (Carrington & Schulenberg, 2003). Another critical factor which has significant bearing on police discretion is the juvenile’s behavior or attitude; youth who have shown remorse, respect, and/or a willingness to accept responsibility for their actions were more likely to receive intervention measures and less likely to be charged (Carrington & Schulenberg, 2003). This echoes other research which supports the notion that situational factors have significant bearing on police discretion with regard to youth (Schulenberg, 2010).

Another population, which actually represents several populations, which seems particularly subject to police attention and therefore discretion is minorities. In a study of police stops and police decision making in the context of race/ethnicity, the authors discovered that Blacks and Hispanics were more likely to be searched than Whites (Fallik & Novak, 2011). Fallik & Novak (2011) report that the “legal authority for searches varies and the government has the burden to support the initiation and scope of all searches,” which has direct bearing on the level of discretion an officer may use in the context of the search (p. 148). However, once the variables were adjusted, it became less obvious that race was a meaningful predictor of police search. What emerged was that situational factors had more bearing than race, though the element of race revealed that Blacks were overrepresented in the samples studied (Fallik & Novak, 2011). These findings suggest that the simple factor of race or ethnicity would not alone have bearing on the use of police discretion – that *context* appears to have more bearing.

Tillyer & Klahm (2011) also found that Blacks were overrepresented in terms of searches as well, namely discretionary searches. In their examination of contraband seizure rates for both discretionary and mandatory searches during officer-initiated traffic stops, much like Fallik and Novak’s (2011) focus on traffic stops and ethnicity, Tillyer and Klahm (2011) found that Blacks were more likely to be in possession of contraband than other races/ethnicities in the context of discretionary searches. This raises questions about the efficiency or success of officers when searching Whites, though the study revealed that Whites are “searched more often without discovering contraband” (Tillyer & Klahm, 2011, p. 180). The authors conclude that police justification for searching Blacks was quite legitimate as “evidenced by the higher rate of contraband discovery” (Tillyer & Klahm, 2011, p. 180). Unfortunately, this suggests that race-related patterns of police discretion have some basis in reality. Though, again, it appears that these searches happen in a particular context, which hearkens back to the notion that the context of police discretion is most significant. Tillyer and Klahm (2011) also found that “discovery during discretionary searches is also, at least partially, a product of officer experience” (p. 180). In other words, officer experience with a certain population has bearing on the level of discretion used in that context.

Officer experience comes into play with a population which is as much a context as it is a group: domestic violence. Cross and Newbold (2010) report that starting in the early 1980s zero tolerance policies and presumptive arrest strategies in domestic assault cases became the norm. The presumptive arrest strategies, unlike the zero tolerance tactics which often required mandatory arrests in such cases and could be considered more in line with a letter of the law approach, allow – if not outright necessitate – a certain degree of discretion on the part of attending officers. Cross and Newbold (2010) indicate that while pro-arrest policies, in line with legislation, have increased domestic assault-related arrests, the fact remains that “in the field” officers “continue to exercise consideration discretion” (p. 56), which reflects a spirit of the law approach. ‘

Unfortunately, this use of discretion, though discouraged by the pro-arrest policies, causes inconsistencies in applications of those policies and “insufficient monitoring,” meaning that rates of arrest begin to vary after the initial implementation of the policies (Cross & Newbold, 2010, p. 70). However, the authors argue, any policy which attempts to limit police discretion, like the pro-arrest policies in the case of domestic violence, is impractical and limits the ability of the police to be efficient in the field, especially when pro-arrest policies required officers to consult with superior officers (Cross & Newbold, 2010). This suggests that discretion plays a role in domestic violence scenarios and how they are handled by police. However, how big of a role that discretion plays in these scenarios remains unclear (Cross & Newbold, 2010).

Çelik (2013) also looks at police discretion in the context of domestic violence. The author observes that in these situations, the reason charges usually aren't filed is that officers fear that “an arrest will hurt future family relations” and therefore “use their discretionary power in favor of non-arrest” (Çelik, 2013, p. 1504). The article connects police discretion with victim preference for how these situations might be handled. Çelik (2013) notes that policy regarding mandatory arrest in domestic violence cases does not take into consideration victim preference in the way that police discretion can and does. Research suggests that in most cases, the victims mainly want attending officers to “calm the tension and stop the abuse, but not to arrest the offender” (Çelik, 2013, p. 1505). Çelik (2013) observes, like Cross and Newbold (2010), that policies which attempt to restrict police discretion in domestic violence cases make the officers' jobs more difficult, since such policies “take away police officers' discretion any arrest decision, which is the most important element of policing” (Çelik, 2013, p. 1505). These findings suggest that normal patterns of police discretion can be influenced by mandatory arrest policies which attempt to restrict that discretion. This raises the question of whether this same pattern of restriction can be seen in other types of crime or is unique to domestic violence, given the unique factors which shape domestic violence cases.

Another population in which police discretion comes strongly into play is with the mentally ill. In a study of POs and their responses to situations which may involve the mentally ill and how they should respond, the officers were shown videos of police encounters with individuals who were mentally ill, not ill, or who exhibited unclear or uncertain mental state (Godfredson, Ogloff, Thomas, & Luebbers, 2010). The officers were then asked how they would respond to the situation, both in terms of likelihood and ideally (Godfredson et al., 2010). Based on their responses to an attitudes questionnaire, the authors determined that two factors influenced the officers' reactions: (1) the severity of the individual's symptoms at the time of the encounter and (2) the officers' pre-existing attitudes towards the mentally ill. The authors also determined that the disparity between officers' likely and ideal responses emerge as a result of the many factors actually involved in encounters with the mentally ill (Godfredson et al., 2010). Encounters with the mentally ill represent a situation in which police often have to react quickly and do not have time to consult with colleagues or superiors in order to either calm the individual, diffuse the tension (much like in domestic violence cases), and secure the scene (Rynard Law Firm, n.d.). These encounters also highlight an aspect of police discretion which may require further development. That is to say, the authors insist that providing officers with “training, resources, and interagency support” may be more immediately useful in the moment (Godfredson et al., 2010) and positively influence their decision-making and discretion.

Another population often discussed in the context of police discretion is protestors. Burke (2013) uses the “Occupy Wall Street” movement as a starting point for an examination of discretion in the context of protests. In particular, Burke (2013) considers the issue of police discretion in the context of “enforcing criminal law against protestors, assuming that criminal law has been violated” and whether police involvement in such a context “would be lawful, both substantively and procedurally” (p. 1002). Burke (2013) argues that in the case of protests, procedural justice and community policing theories are required because they “look beyond formal law to other normative values, and both look specifically to the voices of citizens who are affected by police decision making to effectuate these values” (p. 1012). Much like with domestic violence which supports the victim's preferences, police discretion in the case of protestors allows police to cooperate with the public and “to give suspects a voice and by treating them without bias, with respect and dignity, and with a sense of caring and benevolence” (Burke, 2013, p. 1012). This social cooperation is not necessarily possible under the letter of the law or in the context of mandatory arrest policies, which can compromise the police's relationship with the public. Burke (2013) suggests including protestors in discussions of police discretion and response.

This approach is intended to minimize conflict between police and the public and/or protestors by promoting transparency and cooperation and communicating guidelines and concerns clearly (Burke, 2013). After all, the police are not there to “police the protestors, but to be protectors and peacekeepers for everyone present” (Burke, 2013, p. 1021).

## Discussion

Several themes emerge from the reviewed literature. First, discretion is a critical tool in the daily function of police duties, and that efforts to curtail police discretion – even with the best of intentions – can backfire and interfere. Furthermore, it becomes clear that police discretion is critical in dealing with certain populations and scenarios, such as domestic violence and protest situations. In these cases, protecting victims and giving them voice may be more important than the execution of justice. Unfortunately, protecting victims may result in criminals getting a pass, which raises the question of who justice actually serves. However, police are charged with serving and *protecting*, and in these cases *protection* is the critical element.

Moreover, it appears that context or situational factors have the most bearing on the use of police discretion, rather than individuals themselves, though the age of an offender can be influential, especially if the offender is a juvenile. What seems to be missing from the literature, in spite of these definitive indications, is a way of predicting when and where what types of influences may work on an officer’s discretion. Nor did the literature seem to yield much information regarding characteristics of officers themselves in terms of discretion. But the implications for policy are clear: policy must acknowledge the importance of discretion in daily policing activities and that efforts to curtail discretion may thwart the effectiveness of policy.

## Summary/Conclusions

It is clear from the literature that certain populations and scenarios involve the use of police discretion more so than others. These include juveniles, minorities, domestic violence, the mentally ill, and protestors. The use of discretion in these contexts reveals that discretion is linked to context rather than individuals, and efforts to curb discretion can be counterproductive. However, more research is needed to better understand how certain characteristics of the officers themselves play into those situational factors. Furthermore, research following the immediate and real world use of discretion could be useful in better understanding patterns of use of police discretion versus scenarios in which the officers are asked to anticipate their decisions. In this way, a better understanding of the patterns of use may emerge from real world applications.

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