

POLICE DISCRETION IN CONTEMPORARY AMERICA

A Thesis
submitted to the Faculty of
The School of Continuing Studies
and of
The Graduate School of Arts and Sciences
In partial fulfillment of the requirement for the
degree of
Master of Arts
In Liberal Studies

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Washington, D.C.
April 4, 2011

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ABSTRACT

Police officers legitimately have broad powers of discretion to enforce the law. Discretion is the capacity an individual police officer possesses to make a choice among a number of possible courses of actions. This thesis discusses police exercise of discretion and its relationship to the U.S. Constitution and the Criminal Justice field. It addresses the two most common interactions between police and citizens, the traffic stop and maintenance of order. It illustrates abuse of discretionary authority in the Rodney King case and the Kent State University shootings. This thesis will conclude by addressing the use of standards to help focus police training on proper use of discretion consistent with U.S. democratic values.

ACKNOWLEDGMENTS

I would like to thank Dr. Betty Duke, for being my mentor and support and for encouraging high standards in my work throughout this project. Her constructive criticism has enabled me to complete my research project. Without her help and guidance, I would not have accomplished a successful research product.

I am enormously grateful to Anne Ridder and Dr. Phyllis O'Callaghan for their genuine encouragement and for guiding me to the Liberal Studies Program. Special thanks to Dr. Anthony Tambasco for being an outstanding professor and having the sincere insight to understand diversity. His lectures provided a strong foundation for my research project. Special thanks also to Dr. Joseph Smaldone for helping me understand the importance of genealogy. Without his lectures, I would be devoid of family history. I would like to thank, Rory Quirk, J.D. for his profound wisdom and knowledge of Constitutional Law. His lectures helped me focus my research project topic. Thanks to Dr. Tod Linafeld for illuminating Job and wisdom. I would also like to thank Professors Nikki Krass Castle, Richard Duke, Jan Goldman, James Hershman, S. Anthony McCann, and Juliet Sablosky for their dedication to academia and excellence.

I would like to thank my family, friends, and church-family for all their wholehearted support. I thank my parents for instilling the importance of education and encouraging me to seek wisdom. Finally, I thank my son, Thomas, my late daughter, Tiersha, my granddaughters Nyia and Chanel, and Profula for their love and support throughout my academic endeavors. Thanks to the Lupus Foundation research efforts.

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CHAPTER ONE

INTRODUCTION

Discretion is a powerful and unpredictable tool police use to exercise their authority to maintain social order in society. It allows police officers legitimate powers to take away an individual's liberty or freedom. This thesis will discuss police officers' exercise of discretion in the decision-making process to show that a continuation of formal training in discretion is critically important to preventing police officers' inadvertent abuse of their authority.

The legitimacy of (law enforcement) activity is closely tied to police compliance with legal standards. The goal of ensuring lawfulness in police conduct finds expression in rules guarding individuals' rights to liberty and property, freedom from unreasonable intrusions, and fair and equal treatment. The Fourteenth Amendment to the United States Constitution forbids deprivations of life, liberty, property without due process of law. The "rule of law (means) . . . that the citizen should be free from arbitrary power."¹

Due process requires police organizations to confine and structure discretion to avoid unnecessary arbitrariness in the decision-making process. Unguided discretionary power violates due process in the absence of adherence to these requirements. This interpretation ". . . means that law enforcement organizations would be judicially required to do as much as feasible to guide police enforcement through rules."²

¹ W. LaFare, "The Decision to Take a Suspect into Custody," (1965), 64, quoted in Wesley Skogan and Kathleen Frydl, eds., *Fairness and Effectiveness in Policing: The Evidence* (Washington, D.C. The National Academies Press, 2004), 253.

² Kenneth Culp Davis, *Police Discretion* (St Paul, Minnesota: West Publishing Co, 1975), 122.

Kenneth Culp Davis argues that open rulemaking promotes equal justice by reducing ambiguous policy interpretation by police officers. The present system allows police officers the discretion to decide each case on their own, which causes unnecessary disparity. This leads to selective enforcement practices and may result in discrimination against victims. Davis concludes that an equal enforcement policy would avoid “unnecessary disparity. It is essential to establish rules that direct or guide police officers’ discretion.”³

George L. Kelling notes that unclear rules and regulations have unintended consequences:

First, they leave untouched a large area of necessary discretion and, second, they are perceived as irrelevant and unhelpful restrictions—as rules that “tell us what we shouldn’t do” and thus “give the brass plenty of rope with which to hang us,” but that “don’t tell us what we should do.”⁴

When police departments fail to develop clear policy guidelines about complex police work, the use of necessary discretion may have serious moral and legal ramifications.

When failing to wrestle with the complex moral and legal issues of social policies, departments risk litigation, the outcome of which can seriously jeopardize current and future departmental efforts to deal with serious problems. The U.S. Supreme Court’s inquiry into criminal investigation was the result of poor police practices

³ Davis, *Police Discretion*, 119.

⁴George I. Kelling, “‘Broken Windows’ and Police Discretion,” National Institute of Justice Research, <http://www.ncjrs.gov/tfiles1/nij/178259.txt> (accessed October 17, 2008).

and. . . management’s failure to rein in and control detectives (street officers’ behaviors).⁵

The U.S. Constitution gives state governments the authority to enforce laws in a manner consistent with the theme and spirit of the Judicial System and the Fourth and Fifth Amendments. That is, police officers must have probable cause to execute a lawful arrest of any citizens in violation of statutes or criminal laws. The language in these amendments is straightforward:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things be seized. [IV]⁶

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation. [V]⁷

In the following sections, this thesis will raise a number of issues about the use of discretion by police and put those questions in the context of our democratic political system.

⁵ Kelling, “Broken Windows,” 15.

⁶ U.S. Constitution, amend. 4, quoted in Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes*, 8th ed. (St. Paul, MN: Thomson/West, 2007), lxvii.

⁷ Ibid.

Discretionary authority represents one of the most critical and difficult exercises of power for law enforcement in America today. Police discretion in a democratic society is required to maintain social order. However, the exercise of discretion “poses an uncomfortable paradox in a democratic society.”⁸ Can the legal system confine police powers to legal duties and limit personal discretion in exercising authority given. What constitutes an acceptable or fair application of principles during police encounters with citizens? To what extent do ethical issues arise as a result of police discretion? Does inadequate training reduce the effectiveness of discretion? Is there sufficient research to provide recommendations to reform policy and to help formulate new practice guides? This thesis will address several of these issues in the following chapters.

Prior to the 1950s, policymakers and scholars had little conception of how police used discretion in the decision-making process. “Policymakers and scholars routinely assumed that police work, such as the decision to arrest, involved hardly any discretion at all.”⁹ After conceptualization of discretion by researchers at the American Bar Foundation (AFB) in the 1950s, this topic elicited the interest of policymakers and scholars. Later research dispelled old assumptions and generated explicit questions for scholarly dialogue. For example, how is discretion intricately linked to the decision-making process of arrest? What are the consequences of unfettered discretion? What

⁸ Elizabeth E. Joh, “Discretionless Policing: Technology and the Fourth Amendment,” *California Law Review* 95, no. 1 (2007): 205.

⁹ Ibid.

course of action constitutes an appropriate judgment in police discretion? Can law enforcement agencies be accountable or liable for insufficient discretion training of its police officers?

The nature of police work does much to obscure the complexities police officers face during the decision-making process. This has two dimensions: “the complexity of the situations presented to the police and the complexity of the police response to those situations.”¹⁰ In these complicated situations, police have to decide between proper and improper procedures. The difficulty is exacerbated when police officers’ actions on the street are subject to the scrutiny of a complex society and ambiguous departmental mandates. Citizens expect police officers to protect and serve the community, yet citizens often have no clear understanding about the realities of police work. This can result in conflict between police reality and the public’s misconception about police procedures.

Law enforcement entails more than dealing with just criminals. Police deal with other forms of behavior that are not necessarily criminal. For example, police officers are often dispatched to address citizen concerns, such as, lost children, lost animals, automobile accidents, neighborhood complaints, consumer disputes with retailers, children playing ball in the alley—the list is endless. For example, asking a homeless person to leave an area may subject police officers to legal or civil liberty reviews. Ultimately, these kinds of dilemmas are complicated for police officers because they

¹⁰Kelling, “Broken Windows,” 34.

demand an immediate answer to the question: When can police officers legitimately interfere with the activities and choices of citizens?

When performing their duties, a majority of police officers are sensitive to community perspectives. They know that responding to the community's needs is just as important as performing the task of dealing with criminal behavior. In order to get the job done, and be effective, police officers must exercise broad discretion in terms of deciding whether to make arrests in situations where the evidence of a criminal violation may exist, as contrasted to borderline situations that might merit a verbal reprimand or social intervention. Regardless of the sensitive nature of the job, police officers have no absolute autonomy because the political process requires accountability to the community.¹¹

In recent years, police departments throughout the United States have put more emphases on maintaining public order—order maintenance—as an essential aspect of police work. Police efforts to maintain public order have received extensive scrutiny from public and professional groups. Granting police officers an increasing amount of discretion to maintain order has the potential for abuse and has raised questions by many civil libertarians and advocates for under-privileged populations. To what extent is maintaining order productive of the current decline of crime in the United States? How proper is assertive police order maintenance? To what extent can police brutality be

¹¹ Herman Goldstein, *Problem-Oriented Policing* (New York: McGraw-Hill, 1990), 11.

explained by “turning the police loose”¹² to maintain order? To what extent do assertive police tactics infringe on the civil liberties of specific populations? For example:

Many civil libertarians and advocates for the homeless, oppose order maintenance because they believe it infringes on the liberties of selected populations (the poor, minorities, the homeless, and youths) and opens the door to abusive police practices.¹³

History of police abuse in order-maintenance has led to vigorous debates about standards. “Vagrancy and loitering laws, for example, have been used to deny minorities their rights and to abuse citizens, especially African-Americans.”¹⁴

Much of the frustration African-Americans and other minority groups experience is the result of abusive police practices. Minorities feel they lack power over police street practices. This group maintains the notion that the elite holds the power and control over the political system. This perception and its actual reality, described by Dye and Zeigler as the “Irony of Democracy,”¹⁵ are a challenge to the system.

Dye and Zeigler developed this idea:

Democracy is government “by the people,” but the responsibility for the survival . . . democracy rests on the shoulders of elites. This is the irony of democracy: Elites must govern wisely if government “by the people” is to survive. If the survival of the American system depended upon an active, informed, and enlightened citizenry, then democracy in American would have disappeared long ago; for the masses of America are apathetic and ill-informed about politics and

¹²Kelling, “Broken Windows,” 1.

¹³Ibid.

¹⁴ Ibid.

¹⁵ James G. Fisk, “The Police Officer’s Exercise of Discretion in the Decision to Arrest: Relationship to Organizational Goals and Societal Values,” *Institute of Government and Public Affairs*, no. 188 (1974): 51.

public policy, and they have a surprisingly weak commitment to democratic values—individual dignity, equality of opportunity, the right to dissent, freedom of speech and press, religious toleration, due process of law. But fortunately for these values and for American democracy, the American masses do not lead, they follow. They respond to the attitudes, proposals, and behavior of elites.¹⁶

Police actions and interactions with minority groups have caused enormous controversy, particularly during the investigations of Rodney King, Kent State, and Jackson State incidents, which this thesis will discuss in chapter three. Actions during those incidents gave rise to the question of whether institutional racism exists in law enforcement organizations. The concern is that racial stereotyping of minority groups by police leads to police bearing down more heavily on minorities than other groups. It may or may not be accurate to conclude that institutional racism is the impetus of police conduct toward minorities. However, minority groups perceive police actions toward them as racist.

Institutional Racism consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour, which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.¹⁷

¹⁶Thomas Dye and L. Harmon Ziegler, “The Irony of Democracy: An Uncommon Introduction to American Politics” (1970), 2, quoted in James G. Fisk, “The Police Officer’s Exercise of Discretion in Decision to Arrest: Relationship to Organizational Goals and Societal Values,” *Institute of Government and Public Affairs*, no. 188 (1974): 51.

¹⁷ P.A.J. Waddington, “Discretion, Respectability and Institutional Police Racism,” *Sociological Research Online* 4, no.1 (1999), <http://www.socresonline.org.uk/4/lawrence/waddington.html> (accessed August 4, 2010).

Researchers studying the Metropolitan Police Department in London concluded that racism was endemic in law enforcement across a broad spectrum of jurisdictions, not just in London. They said racism in law enforcement affected other law enforcement organizations around the world as well.

The danger is that racism comes to be seen as a parochial problem for the London Metropolitan Police, in particular, and the British police in general. It in no way mitigates responsibility for racism at either level to note the obvious and well-established fact that racism is endemic in policing across a broad spectrum of jurisdictions. Thus in the United States police have antagonistic relations with African-Americans and to a lesser extent Latinos; in Canada eastern Europeans occupy a similar niche; in Holland police come into conflict with Surinamers; Australian police have a long history of oppressing Aborigines; the Japanese enjoy poor relations with Koreans, Germany has long experienced conflict between the police and Turkish migrant labour, in France Algerians are the despised minority, in Finland the gypsies are discriminated against and in the Soviet Union it was the non-Russians population that felt the full weight militia oppression. Perhaps one of the most bizarre observations was made by Brewer (1990), who found that officers in Northern Ireland (where racial minorities are uncommon) were, nonetheless, hostile to black people.¹⁸

Charles Wheelan argues that at the heart of many discrimination-related problems is a lack of information. “Information matters, particularly when we do not have all that we need.”¹⁹ He concluded that there must be a balance of information in communication because an imbalance can break down the whole system.

It is not the intent of this thesis to debate issues of racist discrimination or imply that blacks are the only ones who have experienced racist discrimination in their

¹⁸ P.A.J. Waddington, “Discretion, Respectability and Institutional Police Racism, 2.

¹⁹ Charles Wheelan, *Naked Economics: Undressing the Dismal Science* (New York: W.W. Norton & Company, 2002), 84.

interactions with police officers. However, in a study on racial bias of police, Skolnick asks this fundamental question: “To what extent does racial prejudice influence the police officer’s discretionary judgment?”²⁰ Further, Wheelan suggests, discrimination-related issues can be avoided through effective communication and dialogue.

Drawing inference from Skolnick’s observation on the issues of race bias among police officers and Wheelan’s observation on discrimination-related issues raises the question of whether most police officers accept this negative attitude toward minorities as the norm rather than facing resentment from other officers. Recognizing that any form of race discrimination practice by police officers anywhere in the world is disturbing and incompatible with good law enforcement, how to remedy the situation becomes a central concern.

As we seek to address many of the questions raised, this thesis will define police deviance as a departure from accepted norms predicated on the principles of equal protection written in the Fourteenth Amendment to the U.S. Constitution. This social definition of deviance informs us that “many forms of police deviance have discriminatory undertones.”²¹

In 2002, police departments with 100 or more sworn police officers reportedly received more than 26,000 complaints from citizens about police officers use of force.

²⁰ Jerome H. Skolnick, *Justice without Trial: Law Enforcement in Democratic Society*, 3rd ed. (New York: Macmillan College Publishing Company, 1994), 78.

²¹ Victor E. Kappeler, Richard D. Sluder and Geoffrey P. Alpert, *Forces of Deviance: Understanding the Dark Side of Policing*, 2nd ed. (Prospect Heights: Waveland Press, 1998), 150.

This total figure indicates a rate of 33 complaints per agency and 6.6 complaints per 100 full-time sworn officers. This data is a requirement of the Violent Crime Control and Law Enforcement Act of 1994, which in part, addresses the use of excessive force by law enforcement officers. The following data were collected through the Police Public Contact Survey (PPCS), which asked citizens about their interactions with police over the last past 12months, including incidents of police use of force. This PPCS survey was conducted in 1999, 2002 and in 2005. The following data represent the 2002 survey:

- During 2002 a total of 26,556 citizen complaints about police use of force were received by large law enforcement agencies. This corresponds to overall rates of 6.6-per-100 full-time sworn officers and 10.9-per-100 full-time sworn officers responding to calls for service.
- The majority of force complaints (22,238), or 84% of all complaints, were received by large municipal police departments. Municipal departments also received the greatest number of force complaints on a per-officer basis (9.5 per 100) and per officer responding to calls for service (15.4 per 100).
- Sheriffs' offices received 2,815 force complaints (11% of all complaints) in 2002, and had rates of 3.4-per-100 full-time sworn officers and 7.1-per-100 officers responding to calls for service.
- County police departments received 763 force complaints (about 3% of all complaints) in 2002, and had corresponding rates of 2.9-per-100 officers and 4.5-per-100 officers responding to calls for service.
- Primary state law enforcement agencies received 740 force complaints in 2002 (about 3% of all complaints), and had the lowest rated per officer (1.3-per-100 officers, 1.7-per-100 officers responding to calls for services).²²

²²U.S. Department of Justice, *Citizens Complaints about Police Use of Force, 2006*, "The Bureau of Justice Statistics, <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/ccuf.pdf> (accessed December 21, 2009).

In the final disposition of these above complaints in the above statistics, 34% had insufficient evidence to sustain the allegations and 25% were un-factual reports of incidents by citizens. In other cases, while it was found that incidents occurred in 23% of the cases, the officers had legal grounds and acted properly. In 8% of the cases it was determined there were enough evidence to justify disciplinary action against the officers. In 9% of cases, some other disposition was found.²³

Efforts of American minority groups to motivate change have been positively received within the political system. The political system has legitimately accommodated input from minorities that has led to efforts to minimize police corruption and unnecessary discretion. Still, minority citizens recognized that politicians have no direct control over police organizations in the executive branch of the government and that police headquarters have limited control over the ability to shape police street practice. The experience of abusive police practices stimulates mistrust in the legal and political systems among Blacks and minorities.

Research on race and police legitimacy has yielded consistent and important results. When asked about the police, surveys reveal large differences among people of different races in the United States. Black Americans almost universally report the most negative views of the police...Whites are less inclined than are blacks to believe that police discriminate against minorities. Blacks are more likely to think that police racism is common and that police treat them more harshly than they do whites...People of different races also vary in report of their own experiences with the police...blacks are more likely than whites to report having involuntary, uncivil, or adversarial contacts with police; to be stopped,

²³ U.S. Department of Justice, *Citizens Complaints about Police Use of Force, 2006*, 3.

questioned and/or searched without due cause; and to personally experience verbal or physical abuse...In other surveys, blacks are also more likely to report in surveys that police have been discourteous to them and they have observed police wrongdoing.²⁴

Research revealed that blacks were twice as likely as whites to report improper treatment when stopped by the police, and they were more likely to question the legitimacy of police searches. While Hispanic respondents fell between black and white respondents, their results also manifested a “need for police to gain legitimacy among minority groups.”²⁵

As the consequences of improper police practices, tension between the criminal justice system and the public, particularly in minority communities, continues to fester. Abusive police practices that come under judicial and public scrutiny include arbitrary judgments, civil rights violations, use of excessive force; deviance, such as taking bribes, engaging in moral and political corruption, and promoting their own self-interest.

Police use of discretion continues to be problematic for law enforcement today, and the Justice Department and law enforcement organizations have begun to put forth efforts to:

... shape police work through the development of command and control organizations, recruitment, training, supervision, rules and regulations, rewards and punishment, specialization, and routinized tactics like preventive patrol and

²⁴ Wesley Skogan and Kathleen Frydl, eds., *Fairness and Effectiveness in Policing: The Evidence* (Washington, DC: National Research Council of the National Academies, 2004), 300.

²⁵ Ibid.

rapid response to calls for services...these efforts to control officers have powerfully influenced how American society is policed.²⁶

Wheelan argues that “a market economy is to economics what democracy is to government: a decent, if flawed, choice among many bad alternatives.”²⁷ In every decision, there is an economic cost. The benefits are weighed against loss, so the economic issues are always related to ethical standards. The consequences of unfettered discretion are economically costly when they produce negative effects for ethical conduct.

Although law enforcement is not a for-profit business, it still functions as a business aimed at providing efficient customer service to the community it serves. In other words, the management of a law enforcement organization is somewhat similar to that of a business.

A law enforcement organization is required to prepare a balanced annual budget to project future spending for its effective and efficient operation. Top management is required to make daily decisions and plans that raise economic and ethical issues and dilemmas for the organization. Unethical conduct is wrong per se, but it also has economic consequences for the agency and its personnel. However, “when considering

²⁶ Skogan and Frydl, eds., *Fairness and Effectiveness in Policing: The Evidence*, 300.

²⁷ Wheelan, *Naked Economics*, 21.

the short and long-term effect, there is a cost, especially when negativity bears out.”²⁸

Unethical conduct will cost the organization its credibility and could result in a reduction in its personnel and monetary resources. Law enforcement organizations pay a high price for unethical behavior. Ethics is the guiding factor in the ethos of a society.

Ethical administration and management of public law predate the Bible, yet the concerns addressed from the earliest times are relevant to the questions raised in contemporary America. For example, Ancient Babylonians wrote about the techniques of administering and managing ethical behavior toward its citizens. Modern concepts of these techniques can be traced to the Hammurabi Code and “Levitical Law”²⁹ in the Torah. For example, Hammurabi, King of Persia and Babylon, wrote over 200 laws regarding the ethical treatment of its citizens.

Hammurabi’s code sought to “. . . bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak.”³⁰

The Levitical laws parallel the Hammurabi Code in their basic principles of ethical behaviors. Similarly, Deuteronomy (1:16)³¹ established parameters for the

²⁸ Douglas F. Muldoon, “Ethics and Its Impact on Law Enforcement by the Year 2000,” Florida Department of Law Enforcement, <http://www.fdle.state.fl.us/Content/Florida-Criminal-Justice-Executive-Institute/Senior-Leadership-Program/Author.aspx> (accessed October 27, 2008).

²⁹“Holiness Code,” Lev. 17:1-26:46 (KJV Study Bible: New King James Version, 2nd ed.).

³⁰ L.W. King, trans., *The Code of Hammurabi: Hammurabi’s Code of Laws* (Internet Sacred Text Archive, [1915?], under “Preamble,” <http://www.sacred-texts.com/ane/ham/ham04.htm> (accessed March 26, 2008).

³¹ Deut., 16:18—17:13, 17:14-18:22, 19:1-21:14, and 21:15-25:19.

administration of justice; for the rule of war; and the leadership of people, the individual, and the community. It describes the fundamental object of administration and judicial and military tasks for creating unity and justice among the nations. It suggests that the genesis of ethical and moral judgment was instituted by God and reflects His moral nature. God loves justice and hates discrimination to the extent that He demands fairness regardless of age or social status in all aspects of life. Simply put, ethics and moral judgment are the absolute qualities of God in dealing with people fairly.³²

According to Delattre, deontological theory holds that the fundamental principle of ethics and justice is an obligation to treat people as oneself. Rational human beings must act on this principle not just to avoid the consequences of wrong behavior, but because it is right.³³ The underlining logic here is that everyone must learn how to decide what constitutes the right conduct and how to provide it. Biblical principles found in Ecclesiastes 3:1-8 demonstrate the importance of learning how to decide what specific conduct is justified:

For everything, there is a season, and a time for every matter under heaven: a time to be born, and a time to die...time to kill, and a time to heal...a time to love, and a time to hate; a time for war, and a time for peace.³⁴

³² Earl D. Radmacher, Th.D., Ronald B. Allen, Th.D., and H. Waynes, Th.D., commentary in *KNJV Study Bible: New King James Version*, 2nd ed. (Nashville: Thomas Nelson, 2007), 272.

³³ Edwin J. Delattre, *Character and Cops: Ethics in Policing* (Washington, DC: The American Enterprise Institute, 1996), 321.

³⁴ Eccles. 3:1-8 (New Revised Standard Version).

Many of the ancient and biblical principles of justice closely parallel the U.S. Constitution. The common theme is to administer fair justice. The book of Deuteronomy (16:18-20) says:

You shall appoint judges and officers in all your gates...and they shall judge the people with just judgment. You shall not pervert justice; you shall not show partiality...nor take a bribe, for a bribe blinds the eyes of the wise and twists the words of the righteous. You shall follow what is altogether just, that you may live. . . [in] the land.³⁵

When compared with the Fourteenth Amendment, it shows that ethical principles are explicitly expressed in the Fourteenth Amendment to the Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³⁶

These basic principles of liberty and justice in the Fourteenth Amendment guaranteeing the equal protection of citizens against unreasonable intrusions and unfair and unequal treatment by law enforcement officers have deep historical roots. Police officers must comply with the rules under the law. These rules of law ensure proper police conduct and guarantee “that the citizen should be free from arbitrary power of the police.”³⁷ Even the

³⁵ Deut. 16:18-20 (New Revised Standard Version).

³⁶U.S. Constitution, amend. 14, sec. 1, quoted in Ronald D. Rotunda, *Modern Constitutional Law* (St. Paul, MN: Thomas/West, 2007), lxix.

³⁷Skogan and Frydl, eds., *Fairness and Effectiveness*, 253.

ancient scholars understood the power of discretion and the dangers it posed for insuring unjust administration.

In terms of these ancient and biblical principles, it is quite possible to find most written into the modern ethical laws. The concern here is not with this prehistory of modern concepts of ethical behavior, but with ethical administration and management of discretion within police organizations today. Police discretionary powers have given rise to significant attention to issues of ethical decision making in law enforcement practices.

The Declaration of Independence and the U.S. Constitution reflect John Locke's concept of the social contract. It gives legitimacy to the role of police in society. In our society, the government guarantees liberty and security to all its citizens, thereby obligating police officers to protect them from harm without restricting their liberty or freedom of action.

The authority of police is derived from the people through the social contract. Briefly, social contract theory holds that the purpose of government is to better protect the rights that people already naturally possess: those of life, liberty and property.³⁸

Law enforcement is characterized by its integration of ethics, discretion, laws, policies, rules, and regulations that represent professional responsibility. They are the core values of the profession. While codes and guidelines provide directions for addressing many ethical and legal dilemmas, most situations will require police officers

³⁸Monica M. Moll, "Improving American Police Ethics Training: Focusing on Social Contract Theory and Constitutional Principles," *Forum on Public Policy* (2006), 5, www.forumonpublicpolicy.com/archivessum07/moll.pdf (accessed October 26, 2009).

to use discretion based on professional judgments and standards. For the most part, police officers possess good character, act responsibly, and are highly committed to the core values of the profession. Police officers have a duty and an obligation to serve the public with commitment and integrity. Ethical public service requires high moral and intellectual standards on- and off-duty. This study will address issues of professional police conduct.

Chapter two discusses discretionary authority under the U.S. Constitution and examines limits on police power. Specifically, this chapter will identify the problem focus of the study while also highlighting the guiding research questions. Subsequent chapters will each address the identified research questions and some efforts to articulate standards for modern, ethically based training, with special emphases on ethical use of discretionary authority to motivate improved police training and insure that police use of discretionary authority is consistent with our democratic values.

CHAPTER TWO

DISCRETIONARY AUTHORITY AND DEMOCRACY

Democracy arises out of the notion that we hold these truths to be self-evident, that God created all men equal with certain unalienable rights to life, liberty, and the pursuit of happiness.¹ The Founding Fathers of the United States believed that government and its agents must venerate and protect God's ordered plan for humanity. Today, we see this as meaning that all people possess the same rights to life, liberty, and property regardless of sex, religion or race or any other factor. Although the American government acts under this democratic concept, it confronts many challenges associated with a free society.

The Declaration of Independence and the U.S. Constitution and its Bill of Rights imply, that the greatest wealth of America is its people's liberty. Those documents reflect a desire to eliminate abuses of power and the arbitrary use of power by government.

Government has a necessary role in regulating people's behaviors. Even at the beginning of the American experience, the Framers of the Constitution and its Bill of Rights foresaw the potential tension between a free society and democracy. Therefore, to prevent the government's unreasonable intrusions, or unfair and unequal treatment of citizens, their goal was to ensure individual rights protected by the Constitution.

¹ U.S. Declaration of Independence.

Under most circumstances, a police officer's enforcement practices are scrutinized under the first 10 amendments to the Constitution. In theory and application, the constitution "established the concept of police power to ensure fair and impartial treatment of an accused"² person or persons stopped by police officers. Police power is the capacity of a state or its agents to regulate or constrain citizens' behaviors and enforce laws to maintain order within its jurisdiction by means of coercion or physical force.³

Street level bureaucrats are expected to treat all people in common circumstances alike. Paradoxically, many factors operate to make favoritism and unequal treatment characteristic of modern bureaucracies. These factors include the inherent subjectivity of required judgments, the difficulty of assessing street-level bureaucrats' work, the inadequacy of feedback as an influence on behavior, and ideological considerations that justify client differentiation.⁴

The vast majority of street-level police officers perform their highly complex and difficult duties in compliance with the law and treat individuals fairly. Even so, there are reported incidents in which police officers' practices contradict their expected conduct. Selective enforcement or client differentiation is when an officer imposes his or her personal concepts on certain social groups to enforce law.

² Rolando V. del Carmen, *Criminal Procedure: Law and Practice*, 2nd ed. (Pacific Grove, CA: Brooks/Cole Publishing, 1991), 11.

³ Police power "is the authority conferred by the Tenth Amendment, upon each state and delegated to local governments for the purposes of establishing a police department; that adopt laws for the prevention of fraud and crimes. The state has the capacity to place restraints on the personal freedom and property rights of individuals in order to safeguard public health, safety and morals. For example, police officers are employed to enforce the municipal laws and ordinances for preserving the peace, safety and good order of the community." *Black's Law Dictionary*, 5th ed., s.v. "Plus Petition, Policy of Insurance."

⁴ Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980), 151.

For example, police officers use their discretion “to do for some, what they are unable or unwilling to do for all.”⁵ Selective enforcement and client differentiation rationales diminish legitimate discretion and negate public trust. This pattern of practices conflicts with federal laws that seek to insure proper police conduct in criminal and civil cases.

The Justice Department and law enforcement agencies are struggling with many problems associated with the exercise of police power under discretionary authority. Police officers’ duties compel them to exercise discretion daily, sometimes making them arbiters of social order and social values. This binds them to use good judgment and insure that their actions are reasonable and taken in good faith.

The U.S. Constitution guarantees state governments the legal authority to make laws that require police officers to operate within the constitutional structures of the law. Exercise of police power is reserved to state governments under the Tenth Amendment, as states must regulate behaviors and enforce order within their boundaries to ensure social welfare, security, morality, and public safety.

Additionally, states have the constitutional power to legislate commands or prohibitions into law that compel their citizens, as long as such laws do not contradict the Constitution or other laws. Most importantly, states do not have unlimited powers over citizens, since some powers are reserved to the people.

⁵ Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Services*, 151.

In recent decades, concern about the exertion of arbitrary police power, as well as racial bias in the exercise of police power, has driven important developments in constitutional law. In *Brown v. Mississippi*, the Supreme Court invalidated the defendant's conviction by a Mississippi court because the conviction rested almost entirely on a confession extracted through torture. In overturning Brown's conviction, the Supreme Court articulated a constitutional standard of fundamental fairness for the evaluation of police practices—with regard to practices pertaining to integration—to be applied to states via the Fourteenth Amendment.⁶

This case was the first time the Supreme Court was willing to regulate police practices at the state level. This constitutional ruling set limitations on police use of force and the collection of evidence for trial. It said the language in the constitution sets the limits and legal standards for police powers.

The constitutional rules that prescribe the way police are allowed to legitimately carry out their tasks have their genesis not only in the Court's concerns about how much state authority is appropriate to use in the pursuit of law enforcement objectives, but also in the Court's continuing concern with the fairness of policing—in particular, with its efforts to guard against racial discrimination.⁷

The U.S. Supreme Court holds that police powers are limited within the separation of powers and are enforceable under constitutional law. The separation of powers provides checks and balances for each government agency by other agencies. This ensures no one agency becomes so powerful that it arbitrarily jeopardizes the liberty and security citizens.

⁶ *Brown v. Mississippi*, 297 U.S. 278 (1935), quoted in Skogan and Frydl, eds., *Fairness and Effectiveness*, 253.

⁷ Skogan and Frydl, *Fairness and Effectiveness*, 254.

“Separation of power helps assure that each citizen receives due process of law.”⁸ Due process clauses found in the Fifth Amendment and Fourteenth Amendment guarantee a fair judicial procedure that protects citizens from the federal government taking their property and protects them from state actions.

It is not just absolute power that the Founders sought to prevent. Implicit in its structure, in the very idea of ordered liberty, was a rejection of absolute truth, the infallibility of any idea or ideology or theology. . .⁹

The idea that the Constitution does not give government organizations absolute power or absolute discretion to enforce laws clearly demonstrates the Founders’ concerns and the reason why they rejected absolutism. The Founders were proactive in their thinking that absolute power would be abusive power, which would set the government and its officials on a perpetual course of destructive power.

In a government under the law it seems, there can be no such thing as an official discretion, which is absolute. Every official who holds office under the Government of the United States, for example, is bound at the very least to try to exercise his powers in such a way as to further the principles and policies set forth in the Preamble to the Constitution of the United States and in relevant and valid Acts of Congress. So of state officials with respect to state constitutions and statutes.¹⁰

⁸ Howard S. Cohen and Michael Feldberg, *Power and Restraint: The Moral Dimension of Police Work* (Westport, CT: Praeger Publishers, 1991), 56.

⁹ Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (New York: Three Rivers Press, 2006), 93.

¹⁰ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Chicago: University of Illinois Press, 1979), 154.

Understanding the relationship of the U.S. Constitution, official discretion, and state constitutions is important in analyzing how police officers use discretion in the decision-making processes. The U.S. Constitution and statutes, common law, public policy, rules, and regulations limit the powers of state constitutions and provide expressed boundaries on official discretion. Official discretion, when applied to the public functioning, is the “power or right conferred upon police officers by the law to act officially, in using their own judgment and conscience, uncontrolled by the judgment or conscience of others.”¹¹ When applied to police officers, this means that they should use this power to act in an official capacity in a manner that appears to be just and proper under the circumstances.¹²

When police officers take on oath to uphold the U.S. Constitution, they should have an understanding of this document’s basic principles. Police officers accept the awesome power that comes with the position of a public servant. Responsibility comes with having this awesome power and of using it in accordance with Constitutional principles. Serving in this capacity is an acknowledgment of a privilege and responsibility, which, when misunderstood, has the potential to subvert individual liberty. Davis pondered this issue and phrased it as: “Where law ends tyranny begins.”¹³ He said:

¹¹*Black’s Law Dictionary*, 5th ed., s.v. “Discontinuance, Discretionary Damages.”

¹²*Ibid.*, 419.

¹³ William Pitt, quoted in Davis, *Discretionary Justice*, 3.

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.¹⁴

Pepinsky elaborates on this definition when he says:

There is good discretion and bad discretion. If a police officer shot and killed a person for making a raspberry at the officer, the killing would be unexpected and hence discretionary. The killing would also constitute a tragic injustice to practically all of us. But it is crucial to recognize that, although discretion can be exercised unjustly, there can be no justice without discretion.¹⁵

The exercise of discretion is critical in the law enforcement field. Legally, police officers have the ability to make a choice of action based upon circumstances and facts. Police officers undergo many hours of academy training in anticipation of situations they may encounter on the street. Although the police academy's central focus is to prepare rookie police officers with a basic understanding of legitimate criminal enforcement practices, this training cannot address or cover every possible situation they may confront on the streets. Other factors that contribute to the dilemma of police discretion are the introduction of new laws and the constantly changing trends in diverse populations. Newly assigned and experienced officers may misinterpret or ignore certain aspects of new laws. Officers are at times unprepared to adapt to changing trends in diverse populations.

¹⁴Davis, *Discretionary Justice*, 4.

¹⁵ Harold E. Pepinsky, "Better Living through Police Discretion," *Law and Contemporary Problems* 47, no. 4 (1984): 253, <http://www.jstor.org/stable/1191692> (accessed April 4, 2010).

If the central task of the administration of criminal law is to balance the conflicting principles of order and of legality, the dilemma is epitomized in the question of police discretion. Whether one sees legality as being undermined for the sake of order, or vice versa, the issue reduces to whether there ought to be a loosening or a tightening of restraints on decisional latitude of police. The issue has recently been given increasing attention by legal scholars concerned primarily with how much discretion police ought to have and how this discretion may be controlled.¹⁶

When police encounter situations that they had no prior training in, and must rely on their own discretion to make decisions, questions often arise as to whether or not they followed policy and how to minimize the decisional latitude of police discretion.

Police discretionary power as defined in common law, state constitutions, local and municipal laws and department regulations is constrained by rules and express boundaries. Citizens' review boards, another means of restraint through an informal process, seek to balance and check discretionary power. Public opinion and public expectations of how police will exercise their discretionary power may provide barriers against the improper use of discretion.

John Locke's theory of the social contract as interpreted by Thomas Jefferson in the U.S. Declaration of Independence holds that government is the protector of life, liberty, and its people's pursuit of happiness. This theory gives legitimacy to the government's judicial system and the role of policing in American society. The power to arrest comes about by virtue of a sovereign government that acts in a manner consistent with the political and social ideals of its people. These ideals reflect trade-offs between

¹⁶Skolnick, *Justice Without Trial*, 69.

the people's trust and allegiance to the government and their desire to be secure in their rights for life, liberty, and property. Since the people enter into an agreement with government to give up their individual power, this bounds government to public trust. People feel very strongly about their personal security. Therefore, the government is obliged to adopt an effective and positive attitude toward their values. On the other hand, it is the expectation of government that the people comply with the social contract for order to pursue their personal and social goals.

As agents or representatives of government, police officers are expected to uphold the obligations of the social contract. Thus, "authority of police officers is derived from the people through the social contract. Their power is held as public trust."¹⁷

The criminal justice system consists of courts, law enforcement organizations, correctional agencies, and other agencies that carry out its mission and demonstrate a spirit that reflects the public trust. The concept of public trust is inherent in democratic government. It is the public or people "who are a party to the social contract and transferred their rights to perform law enforcement to the police."¹⁸ The public entrusts the police to use its power for the public's benefit, in its defense and on its behalf. Police are given the authority to enter places thought to be the scenes of crimes or other suspicious activity with and without warrants. They have the right to stop and search people who might be dangerous as long as they have probable cause to do so. Further,

¹⁷Moll, "Improving American Police Ethics," 5.

¹⁸Cohen and Feldberg, *Power and Restraint*, 49.

this trust grants police officers the right to restrain those who would inflict pain and harm on others.

Because they are authorized to use force or coerce citizens on behalf of all citizens who are prohibited from doing this for themselves, police officers—in fact, all agents of the criminal justice system—exercise powers in trust for the citizenry. Transferring their enforcement powers to the police is thus an act of trust on the part of the public: they trust that the police will act on their behalf, and have faith that, when they telephone for police assistance, someone will respond helpfully. As referee, the police must enforce the rules to protect all the players in the game.¹⁹

Since police are peace agents who take actions on behalf of the public, to maintain safety and security, citizens have no lawful right to resist the lawful commands of a police officer. Conversely, there are times when citizens choose to resist these demands, but police officers have the authority to counteract resistance with coercion or legitimate use of force. As Cohen and Feldberg observed:

It is their social function to exercise an authority, and to do so on behalf of all of us, that need not be justified in order for them to do their work. Because the point of police action is often the resolution of a conflict, we ought not to question their lawful decisions (although often we do exactly that), and they need not stop to explain to us why they have made a decision they consider within their authority and the public interest. Few if any persons in our society are as powerful as the police when they are handling an emergency or a crime.²⁰

Power, authority, and the public trust are connected to the idea that police authority was created to preserve our life, liberty, and pursuit of happiness. Abuse of this trust occurs when police officers use their powers for private or personal gain.

¹⁹Cohen and Feldberg, *Power and Restraint*, 49.

²⁰ *Ibid.*, 50.

One of the by-products of holding a position of public trust is the necessity to guard against even a suspicion of violating one's duties. The public is exposed to various reports of police misconduct as well as to stories that suggest impropriety. Police officers and police executives have an obligation to avoid the appearance of impropriety—it is critical that police leaders judge their own behavior on the following basis: “do my actions have the appearance of impropriety’ rather than ‘have I violated the law” [In]...the spirit of service...every official [police officer must] seek to deserve the public trust he or she may not actually possess. However effective the checks and balances of government, however extensive the prevention of abuses of power by government, the government itself will be less than trustworthy unless individual officials [police officers] try to be worthy of the trust they bear.²¹

Acts of, abuse of office, and dishonesty undermine the government's role and plant negative suspicion in the minds of its people. Ultimately, “in the face of the public, agents that engage in misconduct or deviance, diminish the integrity of law enforcement and the public's trust.”²²

Misconduct and corruption are used interchangeably for the purpose of identifying civil, procedural and criminal violations by police officers. Among the most critical and difficult common forms of police misconduct are the excessive physical or deadly force²³, discriminatory arrest, physical and verbal harassment and selective enforcement of the law.²⁴

²¹Delattre, *Character and Cops*, 36.

²²Kappeler, Sluder, and Alpert, *Forces of Deviance*, 57.

²³ The phrases “use of excessive force” and “excessive use of force” are sometimes used interchangeably but are quite different in meaning. According to the U.S. Justice Department, the “use of excessive force” refers to incidents in which police apply too much force and “excessive use of force” refers to police applying force legally in too many incidents. U.S. Department of Justice, *National Data Collection on Police Use of Force*, by Tom McEwan. Alexandria, VA: Institute for Law and Justice, 1996, www.ojo.usdoj.gov/bjs/abstrac.ndcopouf.htm (accessed December 12, 2009).

Police misconduct and corruption are abuses of police authority. Sometimes used interchangeably, the terms refer to a wide range of procedural, criminal, and civil violations. Misconduct is the broadest category. Misconduct is “procedural” when it refers to police who violate police department rules and regulations; “criminal” when it refers to police who violate state and federal laws/ “unconstitutional” when it refers to police who violate a citizen’s Civil Rights; or any combination thereof.²⁵

Local police often choose some priorities of enforcement over others, which leads to uneven enforcement practices.

The result of such uneven enforcement is often unequal justice for whenever the evidence of an offense is clear, the decisive point in the entire criminal process is usually whether or not an arrest is made; if it is, prosecution and conviction may automatically follow, and if it is not, the offense forever goes unpunished. The crucial decision in the entire criminal process thus often depends upon the unguided discretion of an individual policeman, who exercises his great power of selective enforcement, without guidance from headquarters, partly based on his emotions or even his whims of the moment, reacting to his own predilections and his own convenience, without regard to what his fellow officers do in similar cases or to what he himself has done in other such cases.²⁶

Davis holds that issues of uneven justice in the total system of police discretion point to problems of legitimacy and authority in policy. He argues that the primary reason for police discretion failure is the enactment of statutes that overreach the limits of

²⁴ Federal law specifically targets police misconduct, albeit criminal and civil. This law extends to all state, county, and local officers, including correctional facilities (Section 18 U.S. 241). Additionally, any police department receiving federal funding is covered by Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Office of Justice Programs statute (42 U.S.C. 3789d), which prohibits discrimination on the grounds of race, color, national origin, sex, and religion. These laws prohibit conduct ranging from racial slurs and unjustified arrest to law enforcement agencies’ refusal to respond to discrimination complaints. *Legal Dictionary Online*, s.v. “Police Corruption and Misconduct,” <http://legal-dictionary.thefreedictionary.com/Police+Corruption+and+Misconduct> (accessed May 8, 2009).

²⁵ *Legal Dictionary Online*, s.v. “Police Corruption and Misconduct,” <http://legal-dictionary.thefreedictionary.com/Police+Corruption+and+Misconduct> (accessed October 20, 2008).

²⁶ Davis, *Discretionary Justice*, 90.

effective law enforcement. This is the prime cause of avoidable injustice, misconduct, and deviance because a statute of that sort generally results in selective enforcement based on irrational grounds or bias. From this, he concludes that one major way to reduce injustice would be to eliminate unnecessary discretionary power to make decisions in individual cases. By tailoring criminal statutes to the level that police officers can enforce them fully and reasonably, will be avoided.

A well-known example of police injustice is police brutality, which constitutes physical misconduct against a person. Brutality is not the only way police engage in misconduct. Accepting bribes, improper search and seizure, harassment, and racism in law enforcement are also common forms of misconduct. Dishonesty, false statements, violence, threats or sexual misconduct are also considered as serious types of misconduct. These are all acts of abuse of power or discretionary authority. Police misconduct violates the police officer's oath of office and his/her responsibilities as a public servant. Victims of police misconduct are sometimes wrongfully convicted of crimes, lose property and freedom, and face social stigmatization. Police misconduct also creates distrust between police and the public they have sworn to protect.

Issues related to how police departments conduct their administrative investigation processes of the police officers involved in controversial police incidents are rarely the focus of the media. When an investigation confirms that police misconduct has occurred, the media and the public are not concerned with applicable laws or administrative standards for disciplining police officers. Many police and sheriffs'

departments may terminate an officer for misconduct after a determination that the officer has caused public harm.²⁷ “Harm to the public service” doctrine, is defined as misconduct committed by a public servant that is likely “to have a deleterious effect upon public service or that is likely to cause impairment or disruption of public service.”²⁸

Misconduct encourages risky behavior because most police departments do not consistently apply the “harm to public service” doctrine when imposing discipline in these serious cases. It remains unclear why police departments do not consistently apply the doctrine of harm to the public services when imposing discipline in serious misconduct cases. Some scholars have speculated that perhaps those who determine discipline “do not have the relevant legal background to apply this legal test as a “bright-light”²⁹ test.

Police misconduct often goes uncorrected because most people do not understand their rights as citizens and the measures police departments could use to discipline police misconduct. Prevention of police misconduct by an informed public can avert violence, wrongful convictions, and abuse of authority, but it is not usually challenged.

According to recent researchers, “police wrongdoing did not begin with contemporary policing but was inherited from England’s early settlers’ culture of the

²⁷Ray Jurado, “The Harm to Public Service Standard in Police Misconduct Cases,” *Los Angeles Lawyers* (July-August 2005): 24, www.laoir.com/harmtothepublicserviceslal.pdf (accessed October 22, 2008).

²⁸Blake v. State Pers. Bd., 25 Cal. App. 3rd 541, 550-51 (4th Dist. 1972), quoted in Jurado, “The Harm to Public Service,” 24.

²⁹Jurado, “The Harm to Public Service,” 24.

eighteenth century.”³⁰ During that time members of one’s family provided protection against unwanted intrusions by outsiders. This concept of protection was limited within the parameter of certain colonial households but would soon expand to other neighboring households as well. For Colonial America, protecting its territory was a local responsibility of the citizens to establish a night watch to guard colonies against fire, crime, and disorder.

As the American colonies grew, the citizens established an enforcement system that was similar to England’s law enforcement system around the same time. Police service before the early twentieth century was selective and extended only to wealthy citizens in six cities. The underclass such as the elderly, poor, and black citizens was not included in the list for police services. Many citizens protested against this police discrimination, but police officials resisted meddling from the outside.

By the 1920s, law enforcement had established considerable discretionary power and police corruption and moral judgment lapses posed major problems for U.S. police departments. By the mid-1920s, most police officials acknowledged the need to reform police policy but faced strong resistance from politicians. Cronyism and nepotism were widespread and training requirements were minimal.

Law enforcement was plagued with several forms of corruption, deviance and misconduct. Police behavior did not follow any set standards or regulations. Instead,

³⁰*The Free Dictionary*, <http://legaldictionary.thefreedictionary.com/Police=Corruption+and+Misconduct> (accessed October 20, 2008).

police conduct followed customs, traditions, and practices distinctive to a corruptive culture. Up to this point, police officials had little understanding about police discretion and its relationship to misconduct.

Within law enforcement's subculture, police officers were expected to follow two sets of values: one that governed its internal cultural system and the other that governed the external cultural system. Senior officers set parameters for newly recruited officer to follow traditional practices and doctrine in order to fit in. Recruited officers were admonished to never question or challenge this accepted traditional practice.

While it is important to understand the structural and organizational explanations of police deviance (misconduct), it is equally important to consider the processes that shape the character of police... Police learn a distinct orientation to their occupational role through formal or informal learning exchanges. In essence, police are selected, socialized, and placed into a working environment that instills within them an ideology and shared culture that bred unprecedented conformity to the traditional police norms and values.³¹

A fundamental assumption, a traditional police norms and enduring value was the requirement to protect the good reputation of the internal organization. The consequences of this tradition were exacerbated by a “Code of Silence” among police officers.

Many acts of police brutality were condoned, which undermined labor actions of the working class. Police departments across the nation have failed to deal effectively with increases in crime omit the rights of protestors in numerous civil rights demonstrations, as well as with racial conflicts, riots, and political protests. Some of their

³¹Kappeler, Sluder, and Alpert, *Forces of Deviance*, 84.

reactions threatened the integrity of law enforcement. As a result, there were demands to take the country in a new, progressive direction.

Five national studies assessed the practices of the police and the state of policing: The President's Commission of Law Enforcement and Administration of Justice (1967); the National Advisory Commission on Civil disorders (1968); the National Advisory Commission on the Causes and Prevention of Violence (1969); the President's Commission on Campus Unrest (1970); and the National Advisory Commission on Criminal Justice Standards and Goals (1973).³² Each of these studies offered recommendations to improve policy and helped to establish police studies as a recognized field of academic research and study.

Currently in the United States, professional researchers working in colleges and universities, nonprofit think tanks, and non-governmental organizations conduct scientific research on law enforcement.

³²Goldstein, *Problem-Oriented Policing*, 9.

The scientific study of police activity evolved after the President's Commission on Law Enforcement and the Administration of Justice published, *the Challenge of Crime in a Free Society*, evaluating police departments.³³ Specifically, this research serves as tool to help keep government and law enforcement officials abreast of recent court decisions and laws, trends in society and law enforcement, as well as patrol.

It was out of earlier research on police departments beginning in 1950's that led to the emphasis on the study of police officers' enormous amount of discretion. Researchers Jerome Skolnick³⁴ and Egon Bittner³⁵ confirmed this insight about police discretion, which led their attempts to describe police behavior by systematically detailing police encounters with the public.

According to a recent National Research Council finding, researchers in the 1960s began to conduct surveys of public and police opinions about the role of police officers in the community. This research also served as a tool to broaden the criteria used to evaluate

³³ Before 1967, only a few scholarly books were published. The three most-noted authors at that time were Raymond Fosdick (*American Police Systems*, 1920), Bruce Smith (*Police Systems in the United States*, 1949), and William Westley (*Violence and the Police*, 1953). Today, Northern University has one of the most complete collections of books on police in the United States, which lists 2,934 books published since 1967. Also, note that Dissertation Abstracts International holds that over 1,300 Ph.D. dissertations from 1861 on include the word "police" in their titles, with 69 written before 1967 and a little over 1,250 after 1967. Since then, the National Criminal Justice Reference Service of the U.S. Department of Justice lists approximately 31,000 references under the heading "police and enforcement." These documents constitute 20 percent of its total holdings, which include private researchers, federal, state, and local government reports, books, journal articles, and published/unpublished research reports. The estimated number of scientific researchers were between 300 and 400, and in 2000, 307 members of the American Society of Criminology "belonged to its special interest police section, while 187 members of the Academy of Criminal Justice Sciences identified themselves as police researchers. Notably, since 1967, police research has become a substantial industry." See Skogan and Frydl, eds., *Fairness and Effectiveness*, 2

³⁴ Skolnick, *Justice Without Trial*, 72.

³⁵ Moll, "Improving American Police Ethics, 1.

police performance going beyond narrowly focusing on crime and arrest rates. Instead, it focused more on public satisfaction, respect, legitimacy, and the perception of bias. Research indicates that studies on the exercise of police discretion focused almost exclusively on the behavior of individual police officers. Additionally, police research focused initially on evaluating the effectiveness of the standard strategies police used during motor and foot patrols. From this research emerged a new strategy of policing in the 1980s called community-oriented policing.³⁶

With the advent of community policing in the 1980s, police scholarship underwent a dramatic change and became explicitly prescriptive. Scholars became advocate as well as analysts. In the 1960s, by contrast, police scholars undertook research on police behavior, notably the exercise of discretion, in order to serve the implicit agenda of providing information about its fairness, but they were reluctant to prescribe programs of remedy. Furthermore, the advocacy of the 1980s focused on issues of community safety, not on the exercise of police powers in individual encounters with the public. A vast literature grew up that outlined, elaborated, and encouraged the philosophy of community policing.³⁷

Since the emergence of the community policing concept, research has provided a foundation of acceptance among both scholars and police to collaborate on progressive management and innovation. The result of this research influenced a change in police behavior and expanded police strategies on safety in the community. Notably, these police strategies “focused on drug crackdowns, community crime prevention, DARE

³⁶ Since the Federal Government invested \$8.8 billion in the Community Oriented Policing Program, perhaps its involvement also influenced researchers to pursue a more diverse agenda for the successful evaluation of this program.

³⁷ Skogan and Frydl, eds., *Fairness and Effectiveness*, 24.

(Drugs Abuse Resistance Education), beat patrols, crime prevention education and coordinated interagency crime prevention.”³⁸

Events in the 1990s influenced a renewed interest among researchers on the unequal and abusive treatment of minorities at the hands of the police and police accountability and discipline and most notably how police officers exercise discretion. This research led to changes in legislation, administrative policies, and record-keeping practices by police³⁹ departments across the nation. Because of this massive data collection, new knowledge about police enforcement has informed criminal justice, law enforcement, and community leaders to establish common ground in working together to attain fair and effective policing in the future.

Two specific fields of research are important to this study. First, research that investigates police accountability supports an effective and ethical delivery of service to maintain order while treating individuals equally, which will be discussed in this chapter. Second, research that focuses on improving police training by providing guidance and directions to prevent police from inadvertent abuse of their authority will be considered later in this thesis.

When the outcome of a police officer’s use of discretion is questionable, it often comes under scrutiny. Since laws are not always clear, police officers sometimes rely on their own judgment to decide what course of action to take.

³⁸Skogan and Frydl, eds., *Fairness and Effectiveness* 25.

³⁹ *Ibid.*, 26.

Yet just because certain powers (or rights) are delegated, does not entail that the agent is now the master. For according to agency law, the agent is to exercise those power only (a) “on behalf of” and (b) “subject to the control of” the master or principal. Of course, the principal does not literally control the behavior of the agent . . . And even when operating on his own, the agent must always exercise the powers delegated to him “on behalf” of the interests of the master or principal and can be held responsible for any breach of this fiduciary duty.⁴⁰

Although police officers may operate from a stance of autonomy, it is not justification for them to act on their own beliefs. Constitutional laws, rules of conduct, and regulatory restrictions set limits on their authority.

Edwin J. Delattre, Dean of the School of Education at Boston University, stresses that laws and regulations are not cynical but realistic when properly interpreted. “They set boundaries to discretion; they frequently say what divides rightful and wrongful uses of authority. But they leave broad domains within which to decide which alternative is the best.”⁴¹ Consequentially, the nature and dimensions of police discretion present complex issues that exact the need for continuous examination and regulations in policy guidelines.

Police accountability is the belief that both individual police officers, as well as law enforcement agencies, are responsible to deliver basic services of crime control and maintenance of order while treating individuals fairly and within the bounds of law. It is a

⁴⁰ Randy E. Barnett, “Squaring Undisclosed Agency Law with Contract Theory,” *California Law Review* 75 (1987): 1969, quoted in Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004), 72.

⁴¹Delattre, *Character and Cops*, 49.

fundamental issue for police officials and the Justice Department, since the government and society have authorized their use of force.

According to the Department of Justice, “police chiefs continuously are concerned over abuse of authority, brutality, misuse of force, deadly force; over-enforcement of the law; bribery; manufacture of evidence in the name of efficiency or success; failure to apply the law because of personal interest; and discrimination against particular individuals or groups.”⁴² The use of unfettered discretion leaves police officers open to criticism, liability claims, civil complaints, and criminal allegations.

People living in numerous communities have developed a dim view on the issues of police discretion. For instance, some citizens believe that there is no accountability for past and future bad practices of police officers; that police officers cannot be trusted; and that police officers’ exercise of discretion is inconsistent, particularly in minority neighborhoods. Because of these concerns, the media, civil rights groups, and lawyers persistently put pressure on law enforcement officials to develop strategies that ensure police accountability. The future survival of police departments’ good reputation is in jeopardy because of police officers’ abuse of their authority in the past.

Howard S. Cohen and Michael Feldberg argue that “with discretion comes responsibility, and police officers are, by and large, held responsible for their own

⁴²George L. Kelling, Robert Wasserman, and Hubert Williams, “Police Accountability and Community Policing,” *Perspectives on Policing* no. 7 (1988):1, <http://www.ncjrs.gov/pdffiles1/nij/114211.pdf> (accessed December 6, 2009).

actions.”⁴³ Davis describes “selective enforcement,”⁴⁴ which may or may not be just, depending on how the selections are made. Davis found that police officers make about half the discretionary decisions in the entire criminal system.⁴⁵ He points out that there are three main ways of creating discretionary power:

By legislative delegation, by legislative use of vague or under defined terms to which administrators must give meaning and by administrative assumption of power of selective enforcement of clear law; the three overlap and are often mixed up together...the third probably involves more power than the other two combined.⁴⁶

Davis concludes that since police officers are faced each day with a vast array of situations in which they must make unsupervised decisions. This places them among the most important policy makers of our entire legal system. Typically, it is out of these unsupervised decisions that police officers create street policy from their use of unauthorized discretion. When this happens, the police officer has made a judgment based on “private moral conception compatible with organizational goals or organizational principle.”⁴⁷

Michael Lipsky’s somewhat different concept of street policy is that police officers are the street-level bureaucrats who “exercise discretion in decisions about

⁴³Cohen and Feldberg, *Power and Restraint*, 5.

⁴⁴Davis, *Discretionary Justice*, 166.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷Skolnick, *Justice Without Trial*, 72.

citizens with whom they interact. Then, when taken in concert, their individual actions add up to agency behavior. In other words, police officers decide who to arrest and whose behavior to overlook”⁴⁸ based on their own personal perception and their understanding of organizational goals and objectives.

Furthermore, Jerome H. Skolnick, Professor of Law at the University of California, suggests, “unauthorized discretion intensifies the already existing problems associated with delegated discretion. Particularly when a police officer invents, claims, or usurps discretionary authority without it having been specifically delegated.”⁴⁹ Even then, in the exercise of clearly delegated authority, decisions made are complicated and pose problems for police officers because with the issues of race, social class or sex, “it is possible to exercise authoritative discretion unjustly.”⁵⁰

On the other hand, Yale Law Professor, Ronald Dworkin argues that the concept of “discretion is at home in only one sort of context: when someone is in general charged with making decisions subject to standards set by a particular authority.”⁵¹ Dworkin likens discretion to “the hole in the doughnut.”⁵² Police officers exercise discretion within this space. The surrounding boundary represents laws, regulations, standards, rules and

⁴⁸Lipsky, *Street-Level Bureaucracy*, 13.

⁴⁹Skolnick, *Justice Without Trial*, 70.

⁵⁰ Skolnick, *Justice Without Trial*, 71.

⁵¹ Ronald M. Dworkin, “The Model of Rules,” *The University of Chicago Law Review* 35, no. 1 (1967): 32, <http://.jstor.org> (accessed January 16, 2008).

⁵² Dworkin, “The Model of Rules,” 32.

policy which supposedly constrict and restrict discretion. Ambiguity and vagueness create cracks in the structure's boundary that causes policy failure. Thus, this allows discretion to seep outside the boundary of the restricted area and causes police officers to err. A police officer operating in this manner on the edge of law "inevitably leads to a chain of related events that end in a significant impact."⁵³ In other words, one minor action by a police officer begins a long chain of perceived logical relationships down a slippery slope, which can establish arbitrary behaviors.

Surely, this is slippery ground because these behavior patterns are signs of some other serious, underlying factors. Since the nature of police work is extremely dangerous and risky, police officers are potentially prone to suffer moral damages unconsciously. Where such circumstance exists, police officers must take new approaches and laws must be restated to bring awareness to the individual police officer's situation.

"Law is a set of rules specially selected to govern public order."⁵⁴ The laws and rules established by a society or community that directly/indirectly punish behavior or coerce behavior by the way of public power, legally obligate police officers to follow valid legal rules. In other words, "when police officers make decisions by exercising discretion, they...should be enforcing a legal obligation as to that behavior and not

⁵³ Eugene Volokh, "The Mechanisms of the Slippery Slope," *Harvard Law Review* 1026 (2003), <http://www.ucla.edu/volokh/slippery.htm> (accessed December 27, 2009).

⁵⁴ James P. Langan, S.J., "Moral Damage and the Justification of Intelligence Collection from Human Sources," quoted in Jan Goldman, ed., *Ethics of Spying: A Reader for the Intelligence Professional* (Lanham: The Scarecrow Press, 2006), 17-18.

according to their own personal beliefs.”⁵⁵ Then legal rules of a community are binding and hold all police officers accountable for their actions.

This chapter has dealt with the concept of—and some issues associated with—the exercise of discretionary authority. It has focused on issues of accountability for police use of discretionary power. When police officers base their decisions on unguided personal perceptions, with little formal training on ethics, complex problems follow and undermine public trust in government. The next chapter will look at specific situations that have raised concern about the abuse of discretion.

⁵⁵ Goldman, ed., *Ethics of Spying: A Reader for the Intelligence Professional* (Lanham: The Scarecrow Press, 2006), 18.

CHAPTER THREE

DILEMMAS OF EXCESSIVE DISCRETIONARY POWER

Police officers are official personnel who enforce laws and maintain social order. Police officers have discretionary power to carry-out the rule of law. It is not a simple matter when officers have the autonomy to choose one of several possible alternatives. Discretionary power should not be excessive or inadequate, but must seek balance. Lack of balance has the potential to perpetuate unnecessary, excessive, or improper discretion, which is dangerous and harmful to both law enforcement and society. However, it is possible for police officers to protect themselves and citizens while providing security for the public.

The exercising of discretion is necessary for law enforcement to maintain social control. This has become increasingly problematic for police officers. The challenge can produce negative consequences for police officers when they make incorrect decisions.

The challenge comes concerning indoctrinating line officers as to the differences of proper discretion and “unnecessary”, or improper discretion. Ironically, practitioners have used the term “common sense” to illustrate much of the discretionary behavior needed for police work; however, such a vague and ambiguous expression is inadequate for the true complexities involving such professional judgment.¹

To understand discretionary authority, this chapter will put in the context of how social, psychological, and social contract theory relate to police discretion. It will provide

¹ Richard F. Groeneveld, *Arrest Discretion of Police Officers: The Impact of Varying Organizational Structures* (El Paso, TX: LFB Scholarly Publishing, 2005), 4.

discussions of several cases of excessive discretion, inappropriate police behavior, and police misconduct. Legally, police have the authority to take away citizens' liberties through arrest and detention and can use physical or deadly force to obtain compliance. This chapter will look at cases of abuse of this authority.

On March 3, 1991, Rodney King of Los Angeles and two of his friends spent the evening together having some drinks and watching a basketball game. The three then got into a car, driven by King, and traveled at high rates of speed well beyond the legal limits.

Traffic police attempted to stop the King car. King refused to stop and led the police on a long chase. When King finally stopped, the two passengers exited and were handcuffed. King exited last. He was tased twice and then beaten by police batons 51 times, which resulted in multiple bone fractures, brain and kidney damage, and other physical harm.

A witness recorded the beating and gave it to the media. The white police officers were charged with "use of excessive force," tried in a non-Los Angeles venue, and found "not guilty" by a largely white jury. After the announcement of the verdict, there were riots for several days in the Watts area of Los Angeles, which resulted in over 50 deaths, thousands of injuries, and property destruction.

Two of the officers were later found guilty on federal charges of civil rights violations. All of the officers ultimately left the Los Angeles police force. King was awarded over \$3 million in a civil suit.

The problem of unfettered police discretion in the practice of traffic stops has led to concern and discussion from two groups of commentators. The impact of police discretion on minority communities was a major concern of these discussions. One group called for re-interpretation of the Fourth Amendment, while the other called for better guidelines. For example, Elizabeth Joh shows that, “Tracey Maclin and David Harris have called for the re-interpretation of the Fourth Amendment so that it provides a more detailed limitation on when, why, and how the police conduct stops, arrests, and searches.”² She contrasted this view to that of two earlier scholars, Davis and Goldstein, who demanded a revision in legal and administrative guidelines that would limit discretion and encourage more sensitive behavior. These scholars’ investigations have influenced many discussions and debates about police exercise of discretion in arrests, particularly in traffic stops and other infractions of the law.³

Almost all police officers make traffic stops, and it is the primary responsibility of officers assigned to specialized traffic units to enforce traffic laws. A 2002 national survey on contact between the police and the public reported that the “traffic stop was the most common form of contact between police officers and citizens.”⁴ It showed:

Approximately, 21% or about 45 Million U.S. residents aged sixteen or older had at least one face-to-face contact with the police. The traffic stop was the most common reason for police contact (39.8%) in the survey. Other kinds of contact

²Joh, “Discretionless Policing,” 201.

³ Ibid.

⁴Skogan and Frydl, eds., *Fairness and Effectiveness*, 72.

are much less common... (reporting non-traffic stop contacts included crime reporting (25.4%); traffic accidents (13%); assistance or services calls (7.2%); police investigation (5.8%) police suspicion (2.6%)... of those stopped 58.6% were issued tickets, and of those drivers stopped police carried out a search on 5%., handcuffed 2.8%, arrested 2.7%, used threatened force against 1.1% and used or threatened force considered excessive against 1%). The 2002 survey reported a lower number of traffic stops than that of the previous survey in 2001. It reported 52% of face-to-face contacts with police reported by this group took the form of a traffic stop.⁵

According to more recent data, police stopped white, black, and Hispanic drivers at similar rates. These findings were the results of a Police-Public Contact Survey conducted for the Bureau of Justice Statistics over a six-month period by the U.S. Census Bureau.

The 2002 and 2005 surveys found whites, blacks and Hispanics were stopped at similar rates. Male drivers were pulled over at higher rates than female drivers, and younger drivers were more likely than older drivers to be stopped.

Almost 18 million people said their most recent contact with police in 2005 was as a driver in a traffic stop. This represented about 8.8 percent of drivers in the United States in 2005, a percentage unchanged from 2002. In both years, the vast majority of stopped drivers said they were pulled over for a legitimate reason.

The most common reason for police contact in 2002 and 2005 was a driver in a traffic stop, accounting for about 40 percent of all contacts. The second most common reason for contact with police was to report a crime or a problem.⁶

⁵Joh, "Discretionary Policing," 204.

⁶U.S. Department of Justice, "Police Stop White, Black and Hispanic Drivers at Similar Rates According to Department of Justice Report," Office of Justice Programs, press release, April 29, 2007, <http://www.ojp.usdoj.gov/newsroom/pressreleases/2007/BJSO20.htm> (accessed October 18, 2010).

This survey concluded that while police are more likely to search black and Hispanic drivers than to search white drivers, this does not necessarily indicate police treat people differently based on race or other demographic characteristics.

Other data elaborate this statistical picture of traffic stops.

The most recent data show that fewer than 20% of citizens, 16 years of age or older, had personal interactions with the police during 2005. Of the 43.5 million citizens who had personal contact with the police, 70% had only a single contact. The most frequent reason for the contact is a traffic stop. The “routine” police–citizen contact is with a nonrandom citizen; that is, 60% of the contacts were initiated by the police. Roughly, 57% of drivers were ticketed by police and less than 3% were arrested. The threat or use of force was rare; less than 2% of citizens having face-to-face contact with the police reported this outcome. Although, this research gives us an idea of the types of persons with whom the police come into contact and the outcomes of those encounters, it does little to give us an understanding of how police become suspicious of persons and why they choose to intervene in their lives.⁷

Yet, for racial minorities some interactions with the police can escalate into a more serious offense—in some cases resulting in arrests based on how the driver responds to the police. The response weighs heavily on the decision of whether the stop will result in an admonished driver, a criminal defendant, or a civil rights litigant.

During 1999, police stopped about 10 percent of all licensed drivers and gave more than half of those drivers a traffic ticket. About 7 percent of those they stopped were searched (for a total of about 1.3 million searches) and about half of them were

⁷Meghan Stroshine, Geoffrey Alpert, and Roger G. Dunham, “The Influence of ‘Working Rules’ on Police Suspicion and Discretionary Decision Making,” *Police Quarterly* 11, no. 3 (2008): 316, <http://www.sagepublication.com> (accessed October 8, 2009).

handcuffed and arrested,⁸ often including the use of force. This complicates an already complex traffic enforcement scene, which leads to many citizen complaints about police conduct.

In 2002, police departments with 100 or more sworn police officers reportedly received more than 26,000 complaints from citizens about police officers use of force. This total figure indicates a rate of 33 complaints per agency and 6.6 complaints-per-100 full-time sworn officers. These data are a requirement of the Violent Crime Control and Law Enforcement Act of 1994, which included attention to the excessive force by law enforcement officers. The following data were collected through the Police Public Contact Survey which asked citizens about their interactions with police over the last past 12months, which included incidents of use of force by police.

- During 2002 a total of 26,556 citizen complaints about police use of force were received by large law enforcement agencies. This corresponds to overall rates of 6.6 per 100 full-time sworn officers and 10.9 per 100 full-time sworn officers responding to calls for service.
- The majority of force complaints (22,238) or 84% of all complaints were received by large municipal police departments. Municipal departments also received the greatest number of force complaints on a per officer basis (9.5 per 100) and per officer responding to calls service (15.4 per 100).
- Sheriffs' officers received 2,815 force complaints (11% of all complaints) in 2002, and had rates of 3.4 per 100 full-time sworn officers and 7.1 per 100 officers responding to calls for service.

⁸Skogan and Frydl, eds. , *Fairness and Effectiveness*, 72.

- County police departments received 763 force complaints (about 3% of all complaints) in 2002, and had corresponding rates of 2.9 per 100 officers and 4.5 per 100 officers responding to calls for service.
- The primary State law enforcement agencies received 740 force complaints in 2002 (about 3% of all complaints, and had the lowest rated per officer (1.3 per 100 officers, 1.7 per 100 officers responding to call for services).⁹

In the final disposition of these complaints in the above cases, 34% had insufficient evidence to sustain the allegations, 25% were un-factual reports of incidents by citizens, 23% were determined to be actual incidents but the conclusion was that the officers had legal grounds and acted properly. Another 8% were determined to justice disciplinary action against the officers and 9% were determined by some other administrative dispositions.¹⁰

Citizens' complaints often arise when suspects or bystanders question police legitimacy and perceive that the incident does not warrant law enforcement's intervention. In these cases, police officers are more likely to resort to physical force, which increases the risk of injury to all involved.

Reiss found that 73 percent of injuries to officers occur when the officers are interfered with, and interference most typically comes from people other than the parties involved in the immediate situation—for example, bystanders and family members...when such person questioned the legitimacy of police intervention, and a police officer reacts to control their behavior, more serious conflict may

⁹ Matthew J. Hickman, "Citizens Complaints About Police Use of Force," US Department of Justice, <http://bjs.ojp.usdoj.gov/content/pub/pdf/ccpuf.pdf> (accessed December 21, 2009), 2.

¹⁰ Ibid.

ensue as each party attempts to gain control of the situation. This results more often in injury to the officer.¹¹

Police officers have the discretion to either issue a traffic citation or give the traffic offender a verbal warning.

Discretion is integral to all aspects of a traffic stop: who will be stopped, how long the stop will last, who will be warned, who will be questioned, and who will be arrested...perhaps who will be mistreated?¹²

Discretion exists when officers have the autonomy to decide how to respond to a situation. In the traffic stop decision-making process, officers have more discretion and are subject to few rules. In the past three decades, there have been a growing number of instances in which an officer's management of discretion has violated a citizen's liberties in the arrest decision. The abuse of discretion during an arrest has a significant impact on the arrestees and the police organization as well. "Police executives' past efforts to control unnecessary discretion have had less than stellar results."¹³

Some may argue that discretion is not a problem of administration as much as it is an officer's interpretation of his or her discretionary limits in traffic stop situations. Others may argue that it is the failure of police management, which results in encouraging an officer's excessive use of discretion. The challenge comes when law enforcement officials and police officers dismiss their responsibility to re-examine their

¹¹Skogan and Frydl, eds., *Fairness and Effectiveness*, 298.

¹²Joh, "Discretionary Policing," 204.

¹³Groeneveld, *Arrest Discretion*, 3.

use of discretion on traffic stops or do not implement training on how to become more effective in managing social disturbances at such stops without negative consequences and repercussions.

Social disturbances have always been a major concern for law enforcement, because enforcement in these situations brings police to interact with hostile citizens and involves the need for rapid discretionary action in which they must disperse civil or social disturbances.

In many of these situations, acts by the police can violate citizens' rights if the acts violate constitutional or federally guaranteed rights. This has sometimes led to tragic events, such as those that took place during the Vietnam War era.

Tragic events took place in early May 1970 and left a chilling reminder to our nation that college students' disapproval and protests of the Vietnam War ended in bloodshed on the campus at Kent State University. On May 4, student protesters believed they had the First Amendment right of assemble and rally, but the event left four students dead, one paralyzed, and eight others wounded. This demonstration, meant to be one of many peaceful demonstrations against the war, ended abruptly and violently when the National Guard fired into the crowd for 13 seconds. The brief shootings ended the lives of students Jeffrey Miller, Allison Krause, William Schroeder, and Sandra Scheuer. The distances between the National Guard and these students ranged from 270 feet to 390 feet. Some of these students were not even directly involved in the rally.

The Guardsmen initially used tear gas in an attempt to break up the rally, but they quickly ran out cartridges. Part of the rally turned into a melee, in which some students began chasing the Guardsmen and throwing rocks. Some said the Guardsmen waved their guns towards the crowd as a warning to the students to disband. Other witnesses claimed the Guards never issued a warning.

Justified or not, the “massacre” sparked a nationwide student strike that closed many colleges and universities. In the same month, two African-American students were shot and killed at Jackson State University. This event did not receive nearly as much media attention as the shootings at Kent State University. On May 14, 1970, police fired for about 30 seconds on a group of angry students protesting the Kent State shootings and other socio-political issues at Jackson State in Mississippi, killing two students and wounding 12 others. After the gunfire stopped, Phillip Lafayette Gibbs and James Earl Green lay dead at the doors of two different college halls.

According to reports, this tragic event was the result of escalating friction between Jackson's students, local youth, and the police. Like Kent State, the event involved protesting students, but Jackson State at that time was a pre-dominantly Black college in the south.¹⁴

In the spring of 1970, higher education institutions across the nation experienced an increase of student protests and demonstrations on campuses. Educational institutions

¹⁴ Whitney Blair Wyckoff, “Jackson State: A Tragedy Widely Forgotten,” *National Public Radio*, May 3, 2010, <http://www.npr.org/templates/story.php?storyId=126426361> (accessed June 6, 2010).

and law enforcement officials were unprepared to handle unrests of this magnitude. Student protests and the police responses shocked the nation. Law enforcement and the National Guard confrontation with students manifested many loopholes in justifying the use of lethal force in self-defense against unarmed demonstrators. Discretion in the hands of untrained law enforcement officers became a life-threatening situation with outcomes that had far-reaching implications.

Moreover, the Kent State University killing of four students, the Jackson State University shooting, and the 1991 beating of Rodney King by several Los Angeles Police Department (LAPD) officers, are all incidents that captured the attention of the media and communities nationwide.

The media coverage of the associated trials and riots was extensive. It called particular attention to the fact that police disproportionately arrest minorities and student political demonstrators. Research suggested that police were less tolerant of people from those populations.

Incidents of this magnitude led media, politicians and the public to raise concerns about law-enforcement behavior. These high-profile incidents prompted public outrage about the police exercise of unfettered discretion, which violated the civil liberties of many citizens.

In both traffic stops and actions to contain social disturbances, social and psychological factors influence police officers' use of discretionary power. Despite a significant understanding of the necessity for police enforcement actions during political

or other social disturbances, there can be cultural misunderstandings and misinformation between law enforcement and society. To protect law enforcement's system of authority and its reputation, law enforcement officials sometimes cover-up the truth instead of facing public scrutiny.

The Kent State shootings, for example, symbolize that this cultural misinformation and misunderstanding clearly existed between law enforcement and citizens. The impact of the shooting was dramatic. It triggered nationwide student strikes that caused the closing of hundreds of college campuses.

“The shootings have certainly come to symbolize the deep political and social divisions that so sharply divided the country during the Vietnam War era.”¹⁵

A social analysis of the 1991 beating of Rodney King by Los Angeles police exemplifies how an attack perceived as unjust treatment of a minority citizen can trigger suspicion throughout a community. The minority community conceptualized the effect as an attack on all minorities. It is reasonable to say that the attack not only reflected adversely on the LAPD, but on police departments across the country. The attack, which was captured by an amateur videographer, exposed the reality of police brutality and shocked television viewers. This video showed King lying on the ground while three officers kicked and repeatedly struck him with their nightsticks.

¹⁵ Jerry M. Lewis and Thomas R. Hensley, “The May 4 Shootings at Kent State University: The Search for Historical Accuracy,” *The Ohio Council for the Social Studies Review* 34, no. 1 (Summer 1998): 9-21, <http://dept.kent.edu/sociology/lewis/lewihen.htm> (accessed July 20, 2010).

That kind of treatment and physical abuse was disturbing to watch and had some devastating consequences for law enforcement, especially LAPD. Night after night, it was shown in the media and played on television screens. This incident became synonymous with police brutality, as front page news. This broadcasting caused political leaders to decry the LAPD police actions, and many legal and citizen groups called for an immediate investigation of this horrendous incident of police brutality. The extensive media coverage and nationwide attention cast a light on the fact that abusive police action against minorities was disproportionate and problematic throughout American society. It also helped to further suspicion and mistrust of police.

The overreaction of those police officers in the King case and in the college disturbances showed a morass of confusion about the proper use of discretion. Overreaction based on fear and or anger led to horrendous consequences.

Research has shown that anger and fear are the two reasons why police officers overact when facing perceived threatening situations. Anger restricts self-control and fear-based assumptions increase adrenaline in the body. They trigger the amygdala in the temporal lobe of the brain, which regulate emotions and are especially triggered by fear and anxiety. Anger and fear, both amygdala-driven, amplify the destructiveness of bias.¹⁶

¹⁶Daniel Goleman, *Social Intelligence: The New Science of Human Relationships* (New York: Bantam Dell, 2007), 300.

Self-control is crucial for those in law enforcement. When facing someone who is in the throes of an amygdala hijack, like the abusive motorist, the odds of the encounter ending in violence will escalate rapidly if the officer involved gets hijacked by the amygdala, too.¹⁷

Goleman uses this term “Amygdala hijack”¹⁸ to describe emotional responses from people who lose sight of an actual threat because the amygdala has triggered an emotionally charged reaction. This means during heightened emotional encounters with emotionally charged opponents, an officer experiencing anxiety or fear may lose sight of any rational or reasonable thinking in order to respond to the immediate threat. In other words, neural responses within the brain or the amygdala immediately process information regarding danger and fear at the subconscious level in response to a perceived threat. Goleman concluded that the emotional brain is as much a part of reasoning as is the thinking brain. Reason and emotion work well together when one finds an intelligent balance of the two. To do well in decision making, police must understand the significance of using emotions intelligently to control the powerful mechanisms of fear and anger.

For the three officers in the King incident to jeopardize their careers and face criminal indictment and possible prison term suggests that heightened emotions of anger

¹⁷ Michael W. Quinn, *Walking with the Devil: The Police Code of Silence: What Bad Cops Don't Want You to Know and Good Cops Won't Tell You* (Minneapolis: Quinn and Associates, 2005), 43.

¹⁸ Daniel Goleman, *Emotional Intelligence: Why It Can Matter More Than IQ* (New York: Bantam Books, 2005),13-15.

and fear are highly destructive emotions. Rather than control their emotional impulses, these officers yielded because of their preconceived ideations about “them” against “us:”

When flooded by these strong emotions, the prefrontal area becomes incapacitated, as the low rod hijacks the high. This sabotages the ability to think clearly, thereby foiling a corrective answer to that essential question, does he really have all the bad traits, I ascribe to Them? And if a damning view of Them has already been accepted, even in the absence of anger or fear that question is no longer asked.¹⁹

In such situations, the research concludes, enforcement officers mentally justify their unjust actions with “unsound reasoning.”²⁰ Unfortunately, when confronted with aggression and resistance, police officers may respond without consequential thoughts about unjust practices. In times of danger, police officers rely on what they call their “sixth sense”²¹ without their being emotionally aware. The sixth sense, or gut reaction, is simply operating in a survival mode. As researcher, Joseph LeDoux points out the fear system is what triggers this reaction.

The system is not, strictly speaking, a system that results in the experience of fear. It is a system that detects danger and produces responses that maximize the probability of surviving a dangerous situation in the most beneficial way. It is in other words, a system of defensive behavior... We should, in other words, take defensive behaviors at face value—they represent the operation of brain systems that have been programmed by evolution to deal with danger in routine ways.

Although we can become conscious of the operation of the defense system, especially when it leads to behavioral expressions, the system operated

¹⁹Goleman, *Social Intelligence*, 300.

²⁰Davis, *Discretionary Justice*, 171.

²¹Quinn, *Walking with the Devil*, 27.

independently of consciousness—it is part of what we called the emotional unconsciousness. . . .²²

Police brutality became synonymous with the Rodney King incident. This incident demonstrates how police behavior can be inconsistent and problematic when encountering minority citizens during traffic stops.

After the television broadcast of the video, “Rodney King beating,” it became the most well-known case of police use of force in our country’s history, with serious adverse effects for the police. The reputation of the LAPD took a battering, as the force was widely perceived to be tolerant of brutality. There were vociferous calls for LAPD Chief Daryl Gates to resign. The four officers directly involved in the beating, were charged with assault and brought to trial. Media's attention was intense over the following months, with thousands of newspaper articles published as well as extensive coverage by electronic media. Morale in the LAPD was seriously damaged.²³

Police misconduct is more than an administrative problem for law enforcement agencies. It is criminal. Police officers do not engage in misconduct because of some expected reward but out of a psychological reaction to danger and sometimes “to meet obligations established by the department.”²⁴ Misconduct also generates distrust between the police and the public they swore to protect.

The emotional and physical trauma inflicted on King during the attack was without merit and unjust. Police brutality is the use any force exceeding what is

²² Joseph LeDoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (Simon and Shuster: New York, 1996), quoted in Quinn, *Walking with the Devil*, 27.

²³ Brian Martin, “The Beating of Rodney King: The Dynamics of Backfire,” *Critical Criminology* 13, no. 3 (2005): 2.

²⁴ Jonathan Rubinstein, *City Police* (New York: Ballantine Books, 1973), 377, quoted in Cohen and Feldberg, *Power and Restraint*, 14.

reasonably necessary to accomplish a lawful police arrest or purpose. Victims of police brutality are sometimes viciously beaten during an arrest, wrongfully convicted of a crime, lose freedom and property and suffer social stigmatization and may even face death, but often do not report the abuse.

Allegations of police brutality are rarely made through official channeling because of the conviction that they will not receive a sympathetic hearing from the officers who sit on the hearing boards. In Rochester, for example, where 102 complaints alleging “unnecessary” force were registered in a five to seven-year period after 1965, only two were upheld by the police internal inspection office; of the 368 alleging unnecessary force and other improper behavior, forty-six were sustained.²⁵

Binder and Scharf’s research revealed that many factors can contribute to a police officer’s use of physical force; however, two significant factors stand out most in their research literature. First is “the issue of an actual or perceived threat or danger and, second, citizens disrespect of police officers.”²⁶ These two issues can end in the use of force during an encounter.

It is the qualitatively significant moments in life that make a difference, that affect the policeman to the marrow of his bones just as such moments affect anyone deeply. Those significant moments for the policeman involve power, retaliation, fear and severe moral stress.²⁷

A major issue arises when a police officer perceives that a citizen is disrespectful and that officer takes a course of action necessary to gain what that officer believes to be

²⁵Lipsky, *Street-Level Bureaucracy*, 135.

²⁶ Arnold Binder and Peter Scharf, “The Violent Police-Citizen Encounter,” *Annals of the American Academy of Political and Social Science* 452 (1980): 114.

²⁷ *Ibid.*

an entitlement of respect. This action reflects the officer's personal values. These values help to establish an interactive course with citizens to retain a personal sense of worth and dignity or at least to establish his or her role of authority. Consequently, at such times a police officer's values may conflict with lawful requirements for the appropriate action to maintain social order. Officers frequently look for immediate solutions when involved in incidents with aggressive citizens. Flexibility and discretion provide the potential for "individualized justice, which is accompanied by the potential risk of injustice and abuse of power."²⁸

Discretionary flexibility can also lead police officers on the slippery slope of arbitrariness. For example, when officers feel victimized, in their own minds, they can rationalize and justify behaviors in which they may not normally engage. Since police officers are exposed to physical risks daily on the streets, they conceptualize the world as a potentially toxic and lethal work environment. This conceptualization often leads to arbitrary behavior, especially when black-white issues are involved.

A study of police shootings, "found that 61 percent of Black opponents carried handguns, rifles, machine guns or shotguns compared with 36 percent of white opponents."²⁹

These facts are at the forefront of police concerns. A police encounter of "physical force will likely be with Black or Hispanic males between the ages of 16 and

²⁸Fisk, "The Police Officer's Exercise," 79.

²⁹Binder and Scharf, "The Violent Police-Citizen Encounter," 115.

30. And more than half of police shootings of these opponents were under 24 years old and 81 percent were Black or Hispanic.”³⁰

That is not to imply that all police encounters of physical force are provoked by violent behaviors of the Black or Hispanic males or that only Black or Hispanic males demonstrate violent behaviors toward police officers, but it suggests that there is a critical dichotomy between police officers and Black or Hispanic males in maintaining social order. It leads to a police social perception that young Black and Hispanic males display more violent traits than other citizens do, which puts most police officers on the defensive during their interactions with males from those populations. This is not to justify the use of excessive discretionary powers or misconduct by police officers to maintain social control.

It (merely) points out... the dilemma of accountability in the rule of law... Social control is not new to mankind, and in America the problem is as old as our system of local government. Ever since the creation of the first precinct “houses” on this continent, the police problem has continued to grow in complexity as the years pass. As our society grows in diversity and integration... the flaws of police management of organization become more visible and open to scrutiny by an ever-demanding public. Increasingly, police executives and administrators are... asked to explain why orders, policies, and procedures were developed that resulted in people being killed or seriously injured as the result of a police action. How were such policies developed that led to tragic consequences, and what types of review were available to avoid such pitfalls?³¹

As our society becomes more diverse, the flaws of law enforcement policy and police officer’s misperceptions about the appropriate ways to interact with certain ethnic

³⁰Binder and Scharf, “The Violent Police-Citizen Encounter,” 114.

³¹Groeneveld, *Arrest Discretion*, 24.

groups will result in tragic consequences. Unless addressed by good policy, rigorous training and constant vigilance these consequences will continue to grow.

When police officers are called to maintain social order in crisis situations, the task compels them to operate in a survival mode. Those crisis conditions under which police are required to maintain social order necessitate that they focus on the immediate. In many incidents, the immediacy of the actual or perceived threat to the well-being of officers and involved citizens produces a demand for instant remedial actions. Often in crisis conditions, the remedial action may involve the use of some type of physical force. At the time of the crisis, police officers dealing with aggressive, combative, and non-compliant citizens may not necessarily focus on the Constitutional rights of those citizens.³²

In practice, “the relationship between police authority and power, on the one hand, and the need to maintain respect, on the other hand, by violent means if necessary, is considered by police officers as the appropriateness of force.”³³

It is in recognition of these factors, conscious or otherwise, that many persons are willing to sacrifice their own freedoms in the face of threats to their sense of security. Since a substantial majority of persons subscribe to the laws of their community and to the doctrine of law and order, they exert an influence on their law enforcers to be diligent, efficient, aggressive, and tactically oriented in providing a secure community.³⁴

³²Fisk, “The Police Officer’s Exercise,” 17.

³³Binder and Scharf, “The Violent Police-Citizen Encounter,” 114.

³⁴Fisk, “The Police Officer’s Exercise,” 17.

Fisk's research builds on these concerns as follows:

Seventy percent of citizens polled agreed that aggressive physical combative skills are necessary while only one-fifth percent police polled agreed with this position. Eighty-seven percent of citizens agreed that police need authority to order people's actions in contrast to the seventy-three percent of police officers polled. Citizens supported police having absolute authority over citizens to control social disorder of the citizens on four out of five measures. This exceeded the police support for those measures.³⁵

Based on this survey, Fisk concluded that the public is more concerned with police ability to maintain social order in a crisis than with police abuse of their authority.³⁶

Arrest is another dimension of control over citizens. Arrest is a core power police use to deter crime, and physical force is highly accepted by the community when police are not able to control or prevent crime by other means. To make the public safe, police officers must make arrests and stop potentially dangerous criminals, without disregarding due process while at the same protecting the public from presumptive guilt. Law enforcement is "obliged to do everything in their power to safeguard the public and to make government just, but their best efforts cannot always prevent failure."³⁷

As a consequence acute problems remain: identification of the nature of psychological change occurring with a police officer because of his or her daily exposure to emotionally and psychologically brutalizing experiences; communication of those insights to police officers so that they can interpret their own experience; motivation of police officers to deal with these debilitating influences; and the development of techniques of compensating for emotional and psychological fatigue so that there can be a constant renewal of a personal

³⁵Fisk, "The Police Officer's Exercise,"

³⁶ Ibid., 18.

³⁷ Delattre, *Character and Cops*, 191.

perspective that enables the police to work with citizens in an atmosphere...described as “reciprocated civility.” This civility is born of trust. The extent of trust and confidence the police and the public have in one another is of utmost importance for society.³⁸

One form of failure is selective enforcement. Some problems in selective enforcement, such as the Rodney King and Kent State University incidents, eroded public trust in law enforcement. With such extensive media coverage and nationwide attention, mistrust of law enforcement increased, police and community relations weakened, and the possibility for fair enforcement was questioned. In other words, from these incidents “the reputations of good, hardworking and ethical law enforcement professionals and their organization were tainted”³⁹ as well.

As a result of these high-profile cases and video documentation of citizen beatings that captured the nation’s attention, law enforcement agencies invested numerous hours investigating, disciplining, and prosecuting officers for other unethical and criminal incidents that were never publicized.

“Discretionary power can be either too broad or too narrow and justice may suffer from arbitrariness in the broad sense of inequality or justice may suffer from insufficient individualization in the narrow sense.”⁴⁰ Every law enforcement officer has the power to interpret and apply the law he or she is authorized to enforce. Sometimes this creates

³⁸Fisk, “The Police Officer’s Exercise,” 73.

³⁹Kevin M. Gilmartin and John J. Harris, eds., *Police Chief Magazine*, January 1998, www.rcmp-learning.org/docs/ecdd1222/htm (accessed November 8, 2009).

⁴⁰Davis, *Discretionary Justice*, 52.

failure in the total system of police discretion. This uneven enforcement happens when the rules are not clear to police officers.

Davis points out that the result of uneven enforcement leads to unequal justice, especially when rule making is ambiguous. He argues that the power to make policy belongs at the headquarters level, where leaders should set clear boundaries for officer discretion to prevent abuse. Headquarters also needs to provide relevant training consistent with its policies. The power to make policy as officers go along should be transferred to headquarters leaders, who are better qualified to advise officers appropriately. To set the boundaries for officers, departments need a “system of central policy determinant and limits on subjective judgment.”⁴¹

. . .in the total system of police discretion, one fundamental failure is the continued enactment of statutes. . .that go far beyond the limits of effective law enforcement. Criminal statutes. . . that overshoot are a prime cause of avoidable injustice, because such statutes inevitably result in selective enforcement, and cases are often, selected for enforcement on irrational grounds.⁴²

Steuart Rachels, proclaimed the fundamental relevant principle:

Every rational being exists as an end in himself and not merely as a means to be arbitrarily used. . . Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.⁴³

Police abuse of discretion is still a problem today. The problem is national, and every police department across the country has investigated complaints of police

⁴¹Davis, *Discretionary Justice*, 91

⁴²Ibid.

⁴³Steuart Rachels, *The Elements of Moral Philosophy* (New York: McGraw Hill, 2006), 130.

misconduct. “No police department in this country is known to be free of misconduct.”⁴⁴

Police must adhere to strict guidelines when using force. The next chapter will look at standards-based problem-solving and community-sensitive training as a means of improving police use of discretionary power.

⁴⁴ American Civil Liberties Union, <http://www.aclu.org> (accessed December 11, 2009).

CHAPTER FOUR

STANDARDS TO MOTIVATE RELEVANT POLICE TRAINING

According to Aristotle, excellence implies aiming for high standards through training by a recurring process of observing, practicing, and applying these standards to day-to-day activities. Aristotle believed in the importance of training and its habitual practice as necessary for establishing appropriate or trustworthy behavior. A conformance to moral principles or moral behaviors requires a combination of training and habit.

Aristotle's emphasis on habit does not mean he considers moral virtue a form of rote behavior. Habit is the first step in moral education. But if all goes well, the habit eventually takes, and we come to see the point of it... That's how Aristotle conceives moral virtue. Being steeped in virtuous behavior helps us acquire the disposition to act virtuously. It is common to think that acting morally means acting according to a precept or a rule. But Aristotle thinks this misses a distinctive feature of moral virtue. You could be equipped with the right rule and still not know how or when to apply it. Moral education is about learning to discern the particular features of situations that call for this rule rather than that one... If moral virtue is something we learn by doing, we have somehow to develop the right habits in the first place. For Aristotle, this is the primary purpose of law—to cultivate the habits that lead to good character.¹

While emphasizing the relationship between moral training and habit is important, it is equally important to examine the relationship between habits and good character as well. Good character consists of practicing good habits on a daily basis, which is a safeguard against wrong behavior. An important aspect of practicing good habits is not

¹ Michael J. Sandel, *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2009), 197-198.

just being right or wrong, but experiencing the relationship between the moral self and its association with others so that the individual “acquires and cultivates habits that lead to good character.”² Thus, an excellent character comes through learning and practicing moral behavior that conforms to accepted professional standards.

Furthermore, excellent habits and excellent reason are not innate to an individual. Rather, they are learned by associating with others through experiences and habits. “Ethics education seeks to make people worthy to bear the public’s trust. It must provide them the opportunities to make the best of themselves”³ through moral development.

Good police work comes through coordination, communication, cooperation and ethics education. Clearly articulated standards based on democratic principles is the impetus that leads to excellent character. Police officials have struggled over how to address ethical dilemmas.

With the current demands placed on police officers and the pervasive role discretion plays in policing, ensuring quality police work should be accomplished through a relevant training continuum throughout all levels of law enforcement. Continuous innovative and interactive ethics training to improve policing will help in managing serious ethical dilemmas police encounter daily. Much of police officer performance failure is associated with police departments’ failure to develop clear policy and training guidelines regarding ethics and the use of discretion.

² Michael J. Sandel, *Justice: What’s the Right Thing to Do?*, 198.

³ Delattre, *Character and Cops*, 145; 147-148.

The gaps in police training and guideline development that are so typical, however, retard the development of police knowledge, impede the development of genuine professionalism, diminish the quality of police services, invite the use of personal whim as the basis for discretionary judgments, and unnecessarily expose police officers and departments to liability suites.⁴

For example, Kelling's examination of one police department's training materials for recruits found ambiguous and/or conflicting guidelines outlined in the traffic stop section. Its introduction indicated that traffic stops were a safety measure to educate motorists rather than a mandate to give out tickets. One other section emphasized officer safety in traffic stops. In other sections, there were no guidelines on how police officers should use their discretion or how to issue or not to issue traffic tickets. Kelling concluded that the recruit training materials emphasized police safety rather than dealing with the challenge of police discretionary acts during the traffic stops.⁵

Kelling found that a majority of police departments' internal administrative materials discussed departmental rules, regulations, general orders, and were mostly concerned with, "hot issues: use of force, hot pursuit, lineup, and arrest procedures."⁶ He found that police departments continued to overlook the correlation between ethics training and discretion training.

⁴Kelling, *Broken Windows*, 14.

⁵ *Ibid.*, 17.

⁶ George L. Kelling and Catherine M. Coles, "Fixing Broken Windows: Restoring Order and Reducing Crime in our Communities," quoted in Kelling, *Broken Windows*, 16.

Police officers live and work in challenging situations and face ethical risks. For ethics training to be effective, it must be relevant to the criminal justice practitioners' real life experience, challenges and risks.

Without a clear understanding, adequate information and practical strategies, officers who are exposed to a risk-filled environment are more likely to engage in inappropriate behaviors that can destroy their professional and personal lives...as well as the reputation and credibility of their organizations...Officers live and work in a constantly changing and dynamically social context in which they are exposed to a myriad of ethical conflicts. When either unprepared or unaware, officers are more likely to "go with the flow" than they would be if they were adequately prepared to face potentially ethical risk...⁷

Training academies include a limited amount of training on discretion, which usually takes the form of reviewing ethical codes and criminal procedure. Traditionally, after new recruit officers left the police academy, additional ethics training was rare and never continued in advanced training programs. Rookie police officers mostly depended on informal and unstructured decision-making instructions from senior police officers.

Pollock's and Becker's research shows that ethics is difficult to teach.

Usually, the content of such courses consist of adopting one philosophical framework and discussing hypothetical, or researched ethical dilemmas within that framework...for example, ethical dilemmas for criminal justice students and practitioners can be gathered from newspapers, books in the field, and journal articles. These sources identify such irksome issues as gratuities, corruption, bribery, whistle blowing and loyalty, undercover tactics, use of deception, discretion, sex on duty and other misconduct, deadly force and brutality.⁸

⁷Gilmartin and Harris, "Emotional Survival," 1.

⁸Joycelyn M. Pollock and Ronald F. Becker, "Law Enforcement Ethics: Using Officers' Dilemmas As a Teaching Tool," *Journal of Criminal Education* 5, no. 1 (1996):1, <http://www.fbi.gov/publications/leb/1996/nov964.txt> (accessed November 8, 2008).

Delattre argues that such training ill prepares officers to handle real life dilemmas they face daily on the street.

Giving such hypothetical problems the central place in ethics is highly misleading. Complicated hypothetical questions may refine our thinking, but only after we have given due importance to commonplace morality. We should not obscure the importance of the ordinary by preoccupying ourselves, our colleagues, or police recruits with the extraordinary.⁹

What is crucial to developing excellent character is a formation of good habits within the power of every officer. Good training will emphasize safeguards that become second nature to police officers. Police officers should be trained to rely on “good practical judgment and will be able to tell what justice, courage, temperance,”¹⁰ would require of them on the job.

Moll concurs with Pagon who observed as follows:

. . . only properly educated and trained police officers are able to respond adequately to moral and ethical dilemmas of their profession. Only a police officer that is able to solve these dilemmas appropriately can perform his duties professionally and to the benefit of the community. In doing so, he cannot rely solely on his intuition and experience. Not only he has [sic] to be well acquainted with the principles of police ethics and trained in moral reasoning and ethical decision-making. He also needs clear standards of ethical conduct in his profession.¹¹

High standards and training based on these prepare officers for everyday dilemmas that police face and can guide the broad discretion given to them. The goal is

⁹Delattre, *Character and Cops*, 144-145.

¹⁰ *Ibid.*, 144.

¹¹ Milan Pagon, “Police Ethics and Integrity,” *Police Command Studies International*, September, (2003), quoted in Moll, *Improving American Police Ethics*, 9. <http://www.police-studies.com/papers/police-ethics-integrity.pdf> (accessed October 26, 2009).

that officers will learn through training and grow through experience in several areas:

- **Moral Sensitivity** – the ability to recognize the presence and nature of ethical issues; the awareness that a situation represents an ethical problem that requires an ethical decision.
- **Moral Judgment** – the ability to make the right ethical decision; to determine the morally correct and wisest course of action. This requires the use of critical-thinking skills and the ability to prioritize competing ethical principles and values.
- **Moral Motivation** – the desire to do the right thing and to be an ethical person.
- **Moral Character** – possessing the maturity, courage, and discipline to follow through and do what you know is right in situations of strong temptation and/or pressure from others.¹²

Delattre asserts that every police officer must be trained to examine his or her motives by asking these two important questions: What qualifies their actions and what will be the consequences of their final decision? Delattre believes that police work demands “higher standards not a double standard.”¹³ Double standards are not fair and can never be justified as legitimate standards of performance in law enforcement.

Police training based on these principles delivered with attention to the real dilemmas they will face on the street is the key to overcoming the challenges involved in their use of discretionary power. Not all training today meets these high standards. For example, a survey found that:

¹² James R. Rest, “The Moral Development Advances in Research and Theory” (Westport, CT: Praeger, 1986), 3, quoted in *Ethical Issues and Decisions in Law Enforcement* (St. Petersburg: St. Petersburg College, 2005), 2, <http://cop.spcollege.edu/training/ethics/en/ethicsinstruction> (accessed October 8, 2009).

¹³Delattre, *Character and Cops*, 68.

Almost a third (15 or 31%) received no discretion training and 17 or 35% received only 1-5 hours of discretion training. This means that only 16 or 33% had received more than five hours of training. . . Of those who reported receiving discretion training, respondents seemed to hold two somewhat contradictory views toward formal discretion training. First, they could use more—much more—case studies and practical exercises simulating street situations. Lessons and lecture were often criticized as being boring and irrelevant. “Too much paramilitary training. . . spit and polish, commented one patrolman, and not enough on how to handle tough situations.” . . . a group of respondents argued that no amount of schooling could prepare a policeman for the “real world”. These negative attitudes may be a commentary on the lack of realism of police academy training, combined with the brief courses that recruits experience. Much of the material seems to be covered in a superficial way. And in no instance did any respondent mention that the overwhelming emphasis was placed on discretion or decision-making.¹⁴

Research conducted by the Office of Community Oriented Policing Services (COPS) of the U.S. Department of Justice showed that post-academy field-training programs for law enforcement agencies had not changed in more than 30 years.¹⁵

In 1999, the COPS Office, in collaboration with the Reno, Nevada, police department, developed an alternative training model called the Police Training Officer, (PTO), which incorporates community policing and problem solving principles in field-training programs. The program was tested in six pilot sites, which led to the development of a PTO training manual to use in academy training of recruits and in advanced training for veterans and for senior training officers. It focuses on problem-based learning appropriate to training and evaluating police trainees. It can be used in

¹⁴ Alan Arcuri, Mary M. Quinn, and David Lester, *Some New Data on Police Discretion and Training* (New Jersey: Stockton State College, 1979), 18.

¹⁵ U.S. Department of Justice, *Police Training Officer, (PTO) Program*, Office of Community Oriented Policing Services, 1, <http://www.cops.usdoj.gov/print.asp?Item=461> (accessed February 28, 2011).

many different types of communities. It addresses the real duties of policing and challenges recruits to be creative in problem solving.

Problem-based learning is a method of teaching that presents trainees with a real-life, ill-structured problem that has no easy solution. The PTO model encourages the trainee to ask questions, hypothesize, research, and then solve the problem.¹⁶

It assumes that trainees understand procedures, rules, and law, but it goes further and also teaches trainees to look at problems in a community context. “The most tangible benefit of the model lies in its application to street situations that have neither easy answers nor obvious solutions.”¹⁷

The training addresses 15 core competencies, including such topics as conflict resolution, use of force, legal authority, individual rights and ethics, and others. It addresses those competency requirements under four substantive topic areas: emergency and non-emergency incident response, patrol activities and criminal investigations. By forming the competency requirements and the four substantive topics into a matrix, the training officer can develop specific, community-relevant training modules designed to provide problem-based training relevant to the types of situations officers meet on the street and to develop the skill sets required to address challenges professionally.¹⁸ The issues of proper use of discretion are addressed logically and frequently in the modules. It

¹⁶U.S. Department of Justice *A Problem-Based Learning Manual for Training and Evaluating Police Trainees*, (1999), 6, <http://www.cops.usdoj.gov/print.asp?Item+461> (accessed February 28, 2011).

¹⁷ Ibid.

¹⁸ Ibid.

supports the ideal that “life-long learning prepares new officers for the complexities of policing today and in the future.”¹⁹

The research of scholars, the surveys of official agencies, and the development of testing and implementation of standard-based training focused on street-level problem solving are important steps toward addressing the challenges involved in the use of discretionary power in modern policing.

¹⁹ U.S. Department of Justice, *A Problem-Based Learning Manual for Training and Evaluating*, 6.

CONCLUSION

In America, law enforcement is a highly distinguished and venerated profession, yet the management of police discretion within law enforcement agencies has rapidly become one of the most important challenges facing organizational leadership and police officers today. Managing discretion and assuring accountability for its use are very complex issues that have crystallized public opinion. With growing public awareness of police personnel at both the organizational and street level, managers must be diligent in maintaining their enforcement practices.

Government has a necessary role in regulating peoples' behavior, while at the same time it must protect its citizens from unreasonable intrusion, and unfair and unequal treatment by its agents or representatives. This authority to enforce laws, prevent fraud and crimes, protect citizens from safety, moral, and health hazards, and maintain social and public order, is limited by state and federal constitutions and the requirements of due process under the Fifth and Fourteenth Amendments of the Constitution. Therefore, arbitrary, police-made law or police street-policy has no statutory foundation.

In order for police officers to perform their jobs efficiently and effectively, they must establish trust and gain respect from the public. Trust and respect come when police adhere to their oath of office and codes of ethics and act responsibly in using discretion.

This thesis has identified many complex problems associated with police exercise of discretion in the decision-making process. Discretion is a powerful and unpredictable

tool that allows police officers to control and maintain social order in society. It challenges police officers to make the right decisions between proper and improper procedures, which sometimes cause tension in the criminal justice system and with the public. Unguided discretionary power leads to violations of due process of law guaranteed by the U.S. Constitution.

Due process requires police organizations to structure guidelines in such a way that police officers' exercise discretion to comply with legal and ethical standards. With this understanding of discretion to enforce law, citizens should be free from the arbitrary power of the police.

Police administrators must ensure that police officers practices are not arbitrary. This thesis revealed that police officers as street-level bureaucrats influence policy through exercising discretion. This thesis focused specifically on two types of police actions to understand the use and misuse of discretion: traffic stops and maintenance of order crisis situations. In the first instance, it used the cases of Rodney King's traffic stop, beating, arrest and the ensuing court decisions in the case and public riots that followed. In the second, it used police and National Guard use of discretion respectively in shooting into student protestors at Kent State and Jackson State universities, killing and injuring many in the crowd.

This thesis reported research into police practices that documented many of the challenges associated with police discretion in a democratic society, which aspires to the rule of law, not men. It reported attempts by scholars and practitioners to develop

standards to guide better training for police officers. It concluded by focusing on training to guide more professional, community-sensitive, law-based, problem-solving approaches to day-to-day police decision making to reduce excessive discretionary decision making. Standards-based, problem-solving-based training allows police officers to examine their actions and examine the possible consequences of their final decisions. When faced with two conflicting alternatives, modern training can equip officers to engage in honest examinations of alternative to reach decisions in compliance with professional standards. This training goes beyond the static training of the past to inspire right conduct based on theory, practice and example.

As a former law enforcement practitioner, I intended to shed light on and give insight into the world of law enforcement at the street level to show the problems associated with discretionary power and to identify standards-based training as a means to improve policing in our democracy. My attempt was to present this research in a way not to criticize or discredit police officers, but to express the importance of character and training in the exercise of discretion and to raise consciousness about the important challenges in the use of discretion in the decision-making process. Finally, the fundamental aim was to raise consciousness about the important challenges involved in the use of discretion in police decision-making and to express the importance of character and excellent training in guiding the exercise of discretion.

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