

The SAGE Dictionary of Policing

Discretion

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Definition

Discretion is defined as 'liberty of deciding as one thinks fit, absolutely or within limits' (*Concise Oxford Dictionary*). It is a central feature of every stage of the administration of criminal justice within common law jurisdictions (and in this respect may be contrasted with the 'principle of legality' which prevails in many European civil law systems). The legal authority of the police is a critical element of this system of discretionary justice. Most of the legislation from which police derive their most significant legal powers (of investigation, detention, arrest, surveillance, search and seizure, use of force, laying criminal charges, etc.) states that police 'may', rather than 'shall', do this or that when carrying out their duties. In exercising these powers, therefore, police are authorized to exercise discretion.

Distinctive Features

Because of the typical organizational arrangements of most police services, frontline officers in practice most frequently exercise power over citizens and spend most of their working hours either alone or in pairs. Because they are often out of direct communication with supervisors, effectively governing their exercise of discretion, and holding them effectively accountable for it, presents significant problems for police management.

Supervision is by necessity indirect and remote most of the time, and often the only witnesses to the exercise of coercive legal powers are those in relation to whom they are exercising them. The question of whether any given power has been exercised lawfully or in accordance with the service's policies, therefore, often comes down to the suspect's word against the officer's word (and commonly there will be more officers than suspect witnesses). This largely explains why such a high proportion of complaints against abuses of power by police officers are determined to be 'unfounded' or 'unsubstantiated' when investigated by police or external civilian bodies.

Both laws and police services (through policies and training), however, seek to place limits within which discretion is to be exercised by police officers in the execution of their duties. Such limits are said to ‘fetter’ discretion, and police officers and other criminal justice operatives are typically not (officially at least) recognized as enjoying ‘unfettered’ discretion. One of the common legal limits within which the discretionary power of arrest is usually required to be exercised, for instance, is that before exercising this power officers must have a ‘reasonable suspicion’ or belief that the suspect has committed, or is committing (or, in some circumstances, is about to commit) an offence. Court rulings have established criteria for determining what ‘reasonable suspicion’ entails and whether this requirement has been met in particular cases.

Of great concern in many jurisdictions in recent years have been allegations of discriminatory exercises of discretion by police officers against members of particular groups, such as racial and ethnic minorities, youth, members of particular religious groups, gays and lesbians, low-income and homeless people, etc. Sociologists of the police have long observed how police, in doing their patrolling and investigative work often seem to focus [p. 86 ↓] disproportionately on the activities of those whom they perceive to be the ‘usual suspects’, who frequently belong to such groups. In their most extreme and systematic form, these practices are known as ‘profiling’, whereby a person is particularly targeted for police attention solely because he or she belongs to such a group (the alleged ‘offence’ of ‘driving while black’ is a particularly controversial example of this).

While discretion may thus often be abused to the detriment of members of certain less powerful groups in society (referred to by some sociologists for this reason as ‘police property’), it may also be abused to inappropriately benefit members of other, typically more powerful, groups (including other police officers who are caught breaking the law). If such abuse becomes widespread, of course, it creates a reality, as well as public perceptions, that there is in practice ‘one law for the rich (or powerful) and one law for the poor (or disadvantaged)’.

Evaluation

Despite these problems with discretion, it is more or less universally accepted (and has been reflected in legal rulings) that discretion is an essential feature of the exercise of authority by police. There are two main reasons for this, one pragmatic, the other normative. The pragmatic reason arises from the reality that there would never be enough police and other criminal justice resources to enforce the law strictly against all violators at all times. This reality means that enforcement must inevitably be in some way selective, and the instrument for applying such selectivity is, of course, discretion. Discretion thus operates at two levels within police services. At the institutional level, a police service has to decide how to prioritize the deployment of its limited resources to enforce the law and perform other policing tasks. This will vary both from one police service to another and, within any one police service, from one area to another and from one time to another. This strategic discretion is exercised by police leaders and managers, often after consultation with their governing authorities and members of the communities that they police (so-called 'community policing'). It is implemented, and communicated to frontline officers, through line management, and provides the context within which frontline officers exercise their routine operational discretion in performing their duties, discussed above.

The normative justification for recognizing discretion as an essential (and desirable) feature of the exercise of police authority reflects concerns that overly rigid enforcement of the law, without appropriate compassion in suitable cases, will lead to injustice. Society may not feel that it is just, for instance, for a police officer to arrest or charge a man for speeding who is exceeding the posted speed limit in his car because he is desperately trying to get his wife to hospital in time to deliver her baby. Police officers frequently encounter such situations, in which they are expected to exercise good judgement and would be praised, rather than criticized, for exercising their discretion not to apply the law in situations where it is technically applicable. In the training that they receive, police officers are instructed about the kinds of situations in which such benign exercise of discretion is acceptable, and the kinds of situations in which it is not.

Another, more controversial, type of situation in which the benign exercise of discretion (that is, discretion not to invoke the law) is commonly considered acceptable, is when

such discretion is considered helpful to the police service itself in its efforts to enforce the law. A good example of this is when, in return for information about more serious offending or offenders which it could not otherwise easily obtain, a police service exercises its discretion not to charge an informant who may themselves have committed an offence. This kind of discretion is highly controversial because it can so easily lead to abuse and corruption, and for this reason police services typically have very detailed and strict protocols for the handling of informants.

By its very nature, the exercise of discretion by police will probably always be [p. 87 ↓] controversial. It is hard to imagine good police work without it, however, and the challenge for police leaders, and those responsible for governing police, is to train police officers to exercise it appropriately, effectively monitor how well they do so in the performance of their duties, hold them effectively accountable for their exercise of discretion, and take appropriate remedial or disciplinary action when it is alleged to have been abused. The appropriate exercise of discretion, however, also poses significant challenges for frontline police officers, which are well summed up by the following soliloquy of 'Officer Jim' in the 1999 American film *Magnolia*:

A lot of people think this is just a job that you go to take a lunch hour, job's over, something like that. But it's a twenty-four hour deal, no two ways about it. And what most people don't see, just how hard it is to do the right thing. People think if I make a judgement call that that's a judgement on them. But that's not what I do, and that's not what should be done. I have to take everything and play it as it lays. Sometimes people need a little help. Sometimes people need to be forgiven. And sometimes they need to go to jail. Now, it's a very tricky thing on my part, making that call. The law is the law, and heck if I'm gonna break it. You can forgive someone. Well, that's the tough part. What can we forgive? Tough part of the job. Tough part of walking down the street.

Philip C. Stenning

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Associated Concepts:

- [accountability](#)
- [arrest](#)
- [independence of the constable](#)
- [performance management](#)
- [police property](#)

Key Readings

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