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**Let'em Make It:
A Research Based Look at the Increased Use of Discretionary
Powers in Policing**

**A Leadership White Paper
Submitted in Partial Fulfillment
Required for Graduation from the
Leadership Command College**

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July 2015**

ABSTRACT

Most police officers use their discretionary powers daily during their tours of duty. However, this paper gives justification as to why more discretion should be used. The paper also explains how the use of discretion could benefit the officer, the department and the community. The thesis of this paper is: Law enforcement officers in America should use their discretionary powers more often when deciding whether to make an arrest or take action on a situation.

A combination of books, periodical journals and articles were used to obtain supporting empirical information that supports the views points given in the paper. This paper consists of introductory information about the use of discretion by police officers and uses two position points and two counter positions. As supported by the information provided within this research, it was found that the use discretionary power in law enforcement agencies is alive and well. It should be clear why law enforcement officers in America should exercise their discretionary powers more often when deciding whether to make an arrest or when taking action in a situation. Also, there was no direct correlation found between police corruption and the use of discretion. Likewise, the use of discretionary powers by law enforcement officers do not diminish the police-community relations.

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INTRODUCTION

The ultimate role of police in America is to improve the quality of life of the community they serve and enforcing the law is a tool used to assist in its accomplishment. However, the majority of police work does not involve cornering bank robbers and muggers on the street. A considerable amount of police duties are directed at the service function and other areas of activity, which entail a particularly high degree of discretionary judgment. Police officers have a tremendous amount of discretionary power in deciding who is arrested and who is not (Atkins & Pogrebin, 1978). According to Walker and Katz (2002), police discretion is defined as an official action taken by a police officer, which is based on the officer's individual judgment about the best course of action to a situation.

To further support this point, these decisions are usually made by patrol officers who, ironically, in most cases, are the lowest paid officers in the department with the least amount of authority, but have the greatest amount of discretionary power (Gaines & Miller, 2005). Peak (2000) stated that consistent and wise use of discretion, based on the office's professional competence, will go a long way in preserving relationships with the public and retain the confidence of the police. He continued by saying that it was important for officers to remember that giving a word of advice rather than arrest could be a more effective way of achieving the desired result. This use of police discretion is particularly important since the police are the first prong of the criminal justice wheel. Therefore, most often, the police is the deciding factor of who enters the criminal justice system.

Making arrests or taking action on all enforceable situations is not always the best course of action to take. In using their discretionary power, officers are often influenced by the seriousness of the crime, the strength of the evidence, the preference of the victim, the relationship between the victim and the suspect, and the demeanor of the suspect (Walker & Katz, 2002). Discretion is exercised throughout the criminal justice system and gives those in authority the flexibility to make decisions concerning the fate of criminal offenders within each section of the system. Discretionary decision-making in criminal justice poses substantial tensions and refers to situations where officials have the latitude to make authoritative choices not necessarily specified within the source of their decision-making. Discretion is rarely absolute and absent from the criminal justice system. Those using their discretionary power have a higher degree of discretion when he or she is guided only by vague standards such as “public interest” and being “fair and reasonable.”

However, discretionary power is low when a decision is limited by rules that do not allow much scope for interpretation. Davis (1969) stated that public officials have discretion whenever their power leaves them free to make choices among possible courses of action or inaction. He went on to say that it is especially important to understand that discretion is not limited to what is authorized legal by law but includes all that is within the official’s power as it relates to their effective limits (Davis, 1969). Because discretion works in the favor of one person, it may not work the same way for another. A criminal justice official who decides what and what not to do often find facts first, applies the law second, and thirdly, decides what is desirable in the circumstances

after the facts and the law is known. It is within the third function that is customarily known as the exercise of discretion (Davis, 1969).

There are a number of points that support why law enforcement officers should exercise the use of their discretionary powers more often. However, the scope of this paper will discuss how discretion allows officers to use their professional judgment, the difference in full and selective enforcement, and how the factors in the use of police discretion is not limited to making arrests. Two counterpoints that the opposition use to discredit the use of discretion are also disclosed, but justification is given as to why these counterpoints should carry a minimum amount of weight in the decision to exercise discretion. Law enforcement officers in America should use their discretionary powers more often when deciding whether to make an arrest or take action on a situation.

POSITION

Although police officers have the authority to make arrests or take actions on individuals who violate the norms of society, making the arrest or taking the action is not always the option to obtain the best outcome for the situation. While a police officer is deciding to apply a particular law, often the officer considers the nature of the crime, the attitude of the offender, and the department's policy concerning discretion (Gaines & Miller, 2005). This brings to mind a recent article published in the October 2013 issue of *Ebony Magazine* that was written by Nick Chiles. The article was staged with an African-American father talking with his son on how to deal with police officers and was written after the "not guilty" verdict of the George Zimmerman in the shooting death of Trayvon Martin. Although Martin was not killed by a police officer, much of black

America placed themselves in the shoes of Martin and said, "That could have been me," or, "I could be next." Everything in the article was not agreed with, but Chiles does make some valid points. From the very beginning, Chiles (2013) lays out that police have a long history of being hostile toward black males in America, and that some officers feel it is their job to find reason to make arrest. Alpert, Dunham, Stroshine, Bennett, and MacDonald (2006) gives validation to Chiles' claim by showing that 74% of the people stopped by officers in their study were males in minority groups. They also showed that African Americans represented 71% of all people that drew suspicions to the officers and 68.9% of those were actually stopped by the officers.

Chiles' (2013) article gave readers step by step instructions on how to act during their interaction with the police. It is unclear if Chiles (2013) read Grimes and Miller (2005) and Alpert et al. (2006) prior to writing his article. But, the three certainly fall in line when it comes to the attitude of the offender being a contributing factor in the use of discretion by officers. Throughout the article, Chiles (2013) consistently reminds the reader to be on their best behavior, not giving the officer a reason to take negative actions against them as a result of unnecessary behavior.

The numbers in Alpert et al. (2006) are alarming and may indicate that African-Americans receive less police discretion than other races. This conclusion is drawn from the numbers listed in data obtained from the Sabol, Couture & Harrison (2007) who wrote the Bureau of Justice Bulletin "*Prisoners in 2006*" for the U.S. Department of Justice. Sabol, Couture and Harrison (2007) showed that African-American males held the highest imprisoned percentages for all races and genders for 2005 at 37.5% and 2006 at 35.6%, which was around the same time period their study was conducted.

Sabol, Couture and Harrison (2007) also showed that of the African-American males incarcerated, age groups follow 25-29 and 30-34 made up 36% of the total African-American male population.

By no means is it being suggested that police officers give African-Americans, African-American males or any other race free passes on offenses they need to be arrested for. But, it is important for law enforcement officers at the lowest level to have knowledge and a clear understanding of what the statics show. Likewise, it is just as important for those the police are making contact with or those engaged in crime to know the statics. This will help, as Chiles (2013) suggested, for everyone, especially African-American males, to be on their best behavior while dealing with the police.

The Texas Motor Vehicle Safety Responsibility Act (1995) allows law enforcement officers to seize a driver's vehicle if the driver does not possess a valid driver's license or cannot provide proof that the vehicle is covered under an insurance policy. The statute does not require the officer to take this action, but leaves it to the discretion of the officer for enforcement. In this situation, the officer has several options he or she could take. First, the officer could write citations for not having a driver's license and the insurance violations, plus impound the offender's vehicle. This action would be what Bohm and Haley (2007) describes as "full enforcement," where the officer arrests or takes action for every violation of the law brought to their attention. Or, the officer could engage in "selective enforcement" where the officer relies on his or her judgment to decide which violations of the law to enforce (Bohm & Haley, 2007). In the given example, the officer could give the offender a verbal or written warning for the violation and allow the offender to keep the vehicle. On the other hand, the officer could

elect to do a combination of the options to achieve the desired result from the driver, which is for the driver to operate the vehicle with a valid driver's license and valid insurance. Dunham & Alpert (2001) gave strength to this by saying that doing nothing may be as important as doing something.

Consider the following scenario. A young adult is a first generation college student from an urban community and away from home for the very first time in his life. His family cannot afford to send him to college and he has never had anything of significance in his life. The student has been able to attend college through scholarships and grants only. The student has not allowed his assistance to go to waste, because he has maintained a grade point average of 3.5 for his first two years. However, one night, as the result of peer pressure, the student's friends talked him into experimenting with marijuana. That same night, a police officer made contact with the student and the officer found a usable amount on the marijuana in the student's possession. The student has never had any negative contact with law enforcement in the past and conveys that to the officer. In fact, the student shares his story with the officer. An arrest by the officer would definitely cause the student to lose his scholarships and the student would have to leave school. The scenario places the officer in a difficult situation and clearly gives the option for the officer to exercise discretion, which could be tough for younger officers. The scenario is almost picture perfect in setting up what could be a "selective enforcement" opportunity for the officer as described by Bohm and Haley (2007) and is classic to what officers find themselves in when having to apply their discretionary powers.

Most often for younger officers, daily tours of duty in police work turn into a need to show production. Looking back on the very first sentences in the introduction of this paper; the most important role of a law enforcement officer is to assist in improving quality of life. Therefore, police officers' work should not be tied to production. In a recent conversation held with a young police officer, the officer was concerned about how he would be proceeded by the department's leadership, because he had only made one arrest for the entire school year. The officer, who works for a large school district in Texas, explained that several things had occurred that he could have made an arrest on, but he chose to do something different. It is unclear if the officer consciously exercised his discretion, but he consistently said he wanted to do things different and that making an arrest was not the answer for everything.

The term police discretion is associated with the decision of a law enforcement officer to make an arrest. However, police discretion, in essence, is much more than making arrests and it encompasses a number of other areas within the duties of a law enforcement officer. According to Walker and Katz (2002), police officers will only spend about one-third of their time enforcing the law and that most of the duty can be described as peacekeeping, problem solving and maintaining order. Walker & Katz (2002) went on to say that it is the visible presence of an officer that assures law-abiding citizens that they are being protected from crime. Therefore, the deterring of crime will reduce the actual opportunity for successful misconduct. This is why the proper use of discretionary powers within law enforcement agencies can certainly help by keeping officers on the streets to deter crime. In its effective use, officers will not remove themselves for every minor arrest that could cause officers to be removed from

their sectors for several hours and which will calculate into the effective use of scarce resources.

COUNTER POSITION

An area of concern to increasing the use of discretion for police officers is that the added authority or increased usage would lead to police corruption. Supporters of this viewpoint justify their position by saying that selective enforcement of laws lends itself to an abuse of discretionary powers (Senna & Siegel, 2002). Also, those that believe in this counter position often give their beliefs justification based on the very nature of police work, which is to allow officers to perform their duties with minimum supervision (Walker & Katz, 2002). Senna and Siegel (2002) stated that police corruption has been around since the Eighteenth-Century, but over the past 30 years, the American police treat the public with more fairness and with less corruption. As it is with almost any profession, some “bad apples” within law enforcement manage to infiltrate the ranks of police agencies and eventually began some type of corruptive behavior. However, as Walker and Katz (2002) indicated, this is only a few officers throughout the profession. Peak (2004) agreed with Walker and Katz (2002), citing that over the long history of police officers exercising their discretionary powers, a small fraction of officers have violated their oath of office. Because of the power that police officers hold, society justifiably requires officers to have very high ethical standards (Gaines & Miller, 2005).

Another objection to the subject is that discretionary power will result in community relation problems with the law enforcement agency. Police and community relations refer to the relations between the police and ethnic minority communities. With

the growth of community policing efforts across the nation, scholars have taken serious looks at how police discretion may be influenced by the movement (Dunham & Alpert, 2001). Peak (2004) indicated that when police officers work closely with citizens in the community, it heightens the officer's visibility and trust with the citizenry. There has been a considerable amount of research conducted on the exercise of discretion. But, contrary to the belief of many, the majority of African-Americans and Hispanics give the police a favorable rating even though their ethnic groups are arrested more than white Americans, relative to their percentage in population (Walker & Katz, 2002).

In the idea of community policing, both the citizens and law enforcement take an equal responsibility in the safety of the neighborhood. Under this concept, there is a collective effort between the police and the citizens to identify problem areas, propose plans of action, implement the plans and evaluate the success (Bohm & Haley, 2007). Studies have found that in neighborhoods where community policing efforts were high, police officers were more likely to rely less on the legal variables, such as strength of evidence, seriousness of the offense and preference of the victim. The officer is more likely to rely on the extralegal variables such as suspect and victim characteristic. The reliance on the legal variables hinged on the attitude the officer had toward community police. If the officer was more supportive of community policing, the officer would use more discretion in deciding to make an arrest. For those officers who were not supportive of community policing, the officer relied more on the legal variables (Dunham & Alpert, 2001). For an officer to engage in "full enforcement" (Bohm & Haley 2007), which is considered a "zero tolerance" policy in community policing, goes against the

community empowerment of solving the communities problems and the exercise of discretion (Dunham & Alpert, 2001).

CONCLUSION

As supported by the information provided within this research, it can be found that the use discretionary power in law enforcement agencies is alive and well. It should be clear why law enforcement officers in America should exercise their discretionary powers more often when deciding whether to make an arrest or when taking action in a situation. Although there are those who disagree with its use, it appears to be very difficult to have a justice system within society without the use of discretion. There is no direct correlation between police corruption and the use of discretion. Nor does the use of discretionary powers by law enforcement officers diminish the police-community relations and result in hatred for the other on both sides. In fact, the research showed that the use of discretion, builds upon the community policing ideology, which often fosters good relationships.

As pointed out in the research, there are several opportunities for the law enforcement officers at every level and the community as a whole to encourage the increased use of discretionary powers by police officers. The bottom line is that law enforcement officers need to know the importance of the use of discretion in their line of work. The police and the community needs to understand that the use of discretion in police work is inevitable, but can be used for positive purposes. Although most professionals in the criminal justice system have and use discretionary powers, it is difficult to remove personal morals and biases from the decision to use or not use

discretion. Therefore, the use of discretionary powers are often the result of the users own convictions and tend to fall within the interest of the user.

REFERENCES

- Alpert, G., Dunham, R., Stroshine, M., Bennett, K. & MacDonald, J. (2006). Police officers' decision making and discretion: Forming suspicion and making a stop. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/213004.pdf>
- Atkins, B. & Pogrebin, M. (1978). *The invisible justice System: Discretion and the law*. Cincinnati: Anderson.
- Bohm, R. & Haley, K. (2007). *Introduction to criminal justice* (4th ed). Boston: McGraw Hill.
- Chiles, N. (2013, October). Talking to my son about the police. *Ebony*, 68(12), 126.
- Davis, K. (1969). *Discretionary justice: A preliminary inquiry*. Baton Rouge: Louisiana State University Press.
- Dunham, R. & Alpert, G. (2001). *Critical issues in policing*. (4th ed). Prospect Heights: Waveland Press.
- Gaines, L. & Miller, R. (2005). *Criminal justice in action* (3rd ed). Belmont: Thomson & Wadsworth.
- Peak, K. (2000). *Policing America: Methods, issues, challenges* (3rd ed). Upper Saddle River: Prentice Hall.
- Peak, K. (2004). *Justice administration: Police, courts, and correction management* (4th ed). Upper Saddle River: Pearson & Prentice Hall.
- Sabol, W., Couture, H. & Harrison, P. (2007). Prisoners in 2006. *Bureau of Justice Statistics Bulletin*. U.S. Department of Justice.
- Senna, J. & Siegel, L. (2002). *Introduction to criminal justice*. (9th ed). Belmont: Wadsworth.

Texas Motor Vehicle Safety Responsibility Act. 1995. 74th Leg. ch. 165, Sec 1 (1995).

Walker, S. & Katz, C. (2002). *The police in America*. (4th ed). Boston: McGraw Hill.