

# Damned If You Don't

## *The Dilemma of Police Discretion*

### COP STOP



*Peter Moskos\**

The old maxim, “if you can’t count it, it doesn’t count” might get a few chuckles among the more statistically inclined. The problem is that nobody has figured out how to quantify police discretion, but boy, does it count. As a former police officer and as an academic researcher, police discretion has always fascinated me. Discretion is at the very core of policing, both good and bad. And yet the importance of discretion is often overlooked by social science researchers because of its slippery ability to elude quantitative statistical analysis. The SPSS set obsessed with statistically significant correlations often responds to this difficulty by looking exclusively at quantifiable variable or molding police work into a paperwork-producing box checkers. Resultant flaws in data reliability and validity are too often readily ignored. Discretion—how and why police choose to act or not act in any given circumstance—is, to be blunt, a bitch to count. We will never be able to quantify the unquantifiable, but to have any hope at a systematic understanding of policing, we need to understand and embrace the concept and study of police discretion. For much of the 20th century, people were more interested in controlling police officers than in figuring out ways to improve policing. Then-cutting-edge technology like the two-way radio—and the police cars needed to carry and power the early units—allowed the illusion of direct command-and-control of line officers and an answer to that age-old question from police supervisors toward patrol officers, “Where the hell are you!?”

In the academic world—with scattered exceptions, such as, Vollmer (1936) and Westley (1953)—early 20th century literature on police focused more on forensics and the science and technology of the day. William Whyte (1943) may have been the first academic to describe what we would now call police discretion. He noted that discretion changed in different environments. That is to say, an action punished in one neighborhood might be ignored in another. But twenty years later, by the time of Banton’s (1964) study of British and American police (which corroborated the findings of Whyte), discretion had become a dirty word. What happened? The legal community, inspired by the Civil Rights Movement, noted the inherent conflict between police discretion and the rule of law. Goldstein (1960), LaFave (1962), and Kadish (1962) all condemned the “problem” of police discretion as illegal, immoral, and in violation of a democratic ethos. Discretion was seen as *prima facie* evidence of racism and something to be identified and eliminated. Simultaneously, the Root Causes theory bubbled up from sociology, which essentially absolved police from any duty toward the prevention of crime. The job of the police officer was reduced to after-the-fact rapid response and the detention of criminal offenders. The first to cast a positive light on police discretion was Egon Bittner (1967), who described the learned on-the-job skills needed to police skid-row areas with high level of “non-normal” behavior and varying citizen expectations toward the role of the police. Discretion, noted Bittner, was particularly essential in areas with greater criminal activity.

In the following decades, researchers built on Bittner's concept of discretion, most often by introducing a plethora of independent variables vis-a-vis arrest decision. To very briefly summarize forty years of literature: Black and Reiss (1970) and later Mastrofski et al (2000), looked at the demands of the complainant (and reached opposite conclusions); Van Maanen (1978) focused on a suspect's demeanor; Wilson (1968) saw that police behavior varied based on the department's general approach to policing (the oft-quoted distinction between "watchman," "legalistic," and "service" styles of policing); Smith (1986) stressed the importance of the neighborhood; Klinger (1997) expanded on Smith neighborhood concept by focusing on the overall socioeconomic characteristics of the police district in which officers worked. Klinger accurately highlighted four factors affecting officer discretion: officer cynicism, police workload, the definition of "normal" crime, and the degree to which officers believe victims were responsible for their predicament; Engel et al. (2000) looked at the influence of officers' supervisors; Robinson and Chandek (2000), looking specifically at domestic violence, stressed the importance of situational variables such as the demographic characteristics of an officer, the victim's cooperativeness, the victim's injuries, and the time of shift. My own research (Moskos 2009) led me to emphasize an officer-centered variable—desire for court overtime pay—and the single best predictor of discretionary arrests.

Meanwhile, as all these papers and books were published, police officers on the street continued to exercise discretion just as they always had, each and every day since Robert Peel's Bobbies first patrolled the streets of London in 1829. Interestingly, the important of discretion was stressed in very first sentence of Peel's original Patrol Guide (Sanction of... 1829):

The following General Instructions ... are not to be understood as containing rules of conduct applicable to every variety of circumstances that may occur in the performance of their duty; something must necessarily be left to the intelligence and discretion of individuals.

And yet anti-discretion forces continue to push on police from all sides. Naturally if you don't trust police, you won't trust police discretion. More surprisingly, police departments continue to limit discretion to control officers while achieving arbitrary "productivity goals" (quotas, to you and me). From a research standpoint, one problem in measuring discretion is that it becomes most apparent only after a quantifiable action, usually an arrest or ticket. But *every* interaction between police and public involves discretion. The freeform nature of the actions and symbolic interaction between the police and public brings us to a particularly worrisome situation in which most the most important police work goes unmeasured, uncounted, and all too often unappreciated. And the officer who defuses a situation deserves far more kudos than one who loses control and locks everybody up. Researchers much expand their focus beyond the methodological ghetto of quantifiable statistically significant correlations. Police will be the first to tell you that the world ain't an ideal place. It's time for academic researchers not to be intimidated when the same applies to the best academic research.

## References

- Banton, Michael. 1964. *The Policeman in the Community*. New York: Basic Books.
- Bittner, Egon, 1967. "The Police on Skid Row." *American Sociological Review*. Vol. 32(5): 699-715.

- Engel, Robin Shepard, James J. Sobol, and Robert E. Worden. 2000. "Further Exploration Of The Demeanor Hypothesis: The Interaction Effects Of Suspects' Characteristics And Demeanor On Police Behavior." *Justice Quarterly*. Vol. 17(2): 235-258.
- Goldstein, Joseph. 1960. "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice." *Yale Law Journal*. Vol. 69: 543-594.
- Kadish, Sanford H. 1962. "Local Norms and Discretion in the Police and Sentencing Processes." *Harvard Law Review*. Vol. 75 (March): 904-931.
- Kelling, George L and Mark H. Moore. 1988. "The Evolving Strategy of Policing." *Perspectives on Policing*. U.S. Department of Justice, National Institute of Justice. November.
- Klinger, David A. 1997. "Negotiating Order in Patrol Work: An Ecological Theory of Police Response to Deviance." *Criminology*. Vol. 35(2): 277-306.
- LaFave, Wayne R. 1962. "The Police and Non-enforcement of the Law-Part I." *Wisconsin Law Review*. January: 104-137.
- Mastrofski, Stephen D., Jeffrey B. Snipes, Roger B. Parks, and Christopher D. Maxwell. 2000. "The Helping Hand Of The Law: Police Control Of Citizens On Request." *Criminology*. Vol. 38(2): 307-342.
- Moskos, Peter. 2009. *Cop in the Hood*. Princeton, NJ: Princeton University Press.
- Sanction of Establishment of Police. No 8 Augmentation*. 1829. London: Home Office.
- Robinson, Amanda L. and Meghan S. Chandek. 2000. "The Domestic Violence Arrest Decision: Examining Demographic, Attitudinal, And Situational Variables." *Crime & Delinquency*. Vol. 46(1): 18-37.
- Van Maanen, John, 1978. "The Asshole." *Policing: A View from the Streets* (Peter K. Manning and John Van Maanen, eds). Santa Monica, CA: Goodyear.
- Vollmer, August. 1936. *The Police and Modern Society*. Berkeley: University of California Press.
- Westley, William A. 1953 "Violence and the Police." *American Journal of Sociology*. Vol. 59: 34-41.
- Whyte, William Foote. 1943. *Street Corner Society*. Chicago: University of Chicago Press.
- Wilson, James Q. 1968. *Varieties of Police Behavior*. Cambridge: Harvard University Press.
- \*Peter Moskos is an associate professor in the Department of Law and Police Science at John Jay College of Criminal Justice and the City University of New York's Doctoral Program in Sociology. He also teaches at LaGuardia Community College in Queens. Moskos is a Harvard and Princeton trained sociologist and former police officer. He specializes in police culture, crime prevention, qualitative methods, and ending the war on drugs. His first book, *Cop in the Hood*, won the 2008 American Publishers Award for Professional and Scholarly Excellence, Best Book in Sociology. His second book, *In Defense of Flogging*, is a subversive attack on the prison-industrial complex. It was listed as a "Favorite Book of the Year" by Mother Jones and earned Moskos recognition as one of Atlantic Magazine's "Brave Thinkers of 2011." For more information, visit his blog, [Copinthehood.com](http://Copinthehood.com).**