

Expert Report

prepared for

**The Joint Federal/Provincial Commission
into the April 2020 Nova Scotia Mass Casualty**

**Exercising Judgment:
Understanding Police Discretion
in Canada**

Benjamin J. Goold
University of British Columbia

May 2022

masscasualtycommission.ca

EXERCISING JUDGMENT: Understanding Police Discretion in Canada

Report for the Mass Causality Commission

May 2022

Benjamin J. Goold
Peter A. Allard School of Law
University of British Columbia

Table of Contents

I. INTRODUCTION	1
II. DEFINING POLICE DISCRETION	3
A. Police Discretion as the Capacity to Choose	4
B. Police Discretion as a Privilege and Resource	9
C. Why Defining Police Discretion Matters	11
III. POLICE DISCRETION AND POLICE DUTIES	14
A. Statutory Duties and the Police	15
B. Duties to Protect, Warn, and Investigate	19
C. The Role of the <i>Charter</i>	24
D. Revisiting Questions of Definition	25
IV. FACTORS INFLUENCING POLICE DISCRETION	27
A. The Factors Influencing Police Discretion	34
B. Recent Research on Police Discretion in Canada	41
V. RECONSIDERING POLICE DISCRETION IN CANADA	49
REFERENCES	55

I. Introduction

Discretion is central to policing in Canada. Every day, the police make thousands of decisions that affect the lives of Canadians across the country, determining when the law should (or should not) be enforced, how public complaints and crimes are investigated, and what happens to those suspected of breaking the law. In many cases, these decisions are made by police officers in direct contact with members of the public and play a crucial role in shaping the relationship between those individuals and the state. While public officials in many capacities have discretion to make decisions in the ordinary course of their work, the decisions made by police officers are underpinned by their unique ability to use force in the execution of their duties, accompanied by extensive powers with respect to arrest, detention, search and seizure, and the gathering of evidence.

This report aims to shed light on several key aspects of police discretion and decision-making, beginning with the fundamental issue of the relationship between discretion, law, and the legal duties of the police. The report is not a comprehensive overview of the extensive literature on police discretion in Canada and elsewhere but instead looks to provide a foundation for broader discussions about the scope of police discretion, the factors that influence its exercise, and whether it needs to be subject to more extensive and effective limitations. Fundamentally, the report considers whether the role of the police as a public institution and the demands placed on police officers as individuals are compatible with the notion of discretion as traditionally conceived. Given the many challenges facing the police in Canada today, there is a pressing need for a serious and structured discussion about the nature and scope of their discretion and whether it should continue to be regarded as an inescapable aspect of modern policing.

This report is divided into four substantive sections. The first focuses on the challenges of defining police discretion and presents two contrasting accounts of discretion from the literature on policing: one that regards officer discretion as a freedom arising from the absence of effective limits on police authority; and another that views that same discretion as a form of privilege or resource granted to the police. Defining police discretion is central to this report for two reasons. First, it is a necessary precondition to engaging in wide-ranging and principled discussions about how discretion does and, more importantly, should operate. Where police discretion derives from and its relationship to law are fundamentally connected to questions of oversight and regulation. This leads to the second reason that defining police discretion is so important: doing so forces us to think carefully about the function of the police in Canadian society – in particular whether officer discretion is an inevitable consequence of the way in which contemporary forms of policing are currently structured. Being upfront about the normative conceptualizations of discretion thus allows for more clear-sighted consideration of police reform more broadly.

Building on the discussion in section II, section III examines the relationship between police discretion and police duties in Canada, arguing that regardless of whether we view police discretion as a freedom or a privilege, it remains the case that this discretion must be exercised in accordance with various established statutory and common law duties. Here, the aim is to draw attention to the fact that police discretion – even when exercised in low-visibility environments and free from substantial and effective oversight – is nonetheless bounded by our understanding of the policing function and the duties that derive from it. This section also considers the way in which these duties have evolved in Canada, particularly since the introduction of the *Charter of Rights and Freedoms* and, as will be discussed, a growing willingness on the part of courts to allow private law actions in negligence against the police.

Section IV provides an overview of the research literature on the use of police discretion and, with it, a typology of the different factors that influence the exercise of that discretion. After a brief examination of the key characteristics of police institutions and the organizational settings in which discretion operates – frequently referred to as “low policing” and “high policing”¹ – the section goes on to discuss how the character and attitudes of officers, suspects, and victims of crime can influence the exercise of discretion. The section then considers how these situational factors interact with other variables that determine the use of discretion, including the nature and location of the offence and the type of police service involved.

The final section of the report returns to the challenges associated with reforming police discretion and argues that there is a pressing need for legislatures at the provincial and federal levels to provide a clear legal basis for the exercise of that discretion – along with a coherent set of statutory rules that govern and limit its use. The report then concludes by highlighting the lack of independent research on police discretion and calls for greater engagement on the part of police services at all levels with academic lawyers, sociologists, criminologists, and police scholars in Canada.

II. Defining Police Discretion

There are many competing definitions of discretion in law. Common to almost all of them, however, is an emphasis on the opportunities created by rules for individual judgment and the exercise of authority. For Westen, discretion is the “area within which the discretion-holder has the authority to adopt, or not adopt, whatever rule he [sic] deems fit.”² For Galligan, it is “a

¹ Brodeur, JP. (1983) “High Policing and Low Policing: Remarks about the Policing of Political Activities” *Social Problems* 30(5): 507–20.

² Westen, P. (1982) “The Meaning of Equality in Law, Science, Math, and Morals: A Reply” *Michigan Law Review* 81: 604–63, 642.

sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment.”³ For Christie, the essence of discretion lies with “choice in the context of power relationships.”⁴ These recurring ideas – of discretion as both the ability to choose and the capacity to exercise power – were perhaps best captured by Pratt and Sossin in 2009:

Discretion arises when an official is empowered to exercise public authority and afforded scope to decide how that authority should be exercised in particular circumstances. At root, discretion is about power and judgment.⁵

As Pratt and Sossin went on to note, law and discretion are also inevitably bound together: “more law means less discretion, and less discretion means more law.”⁶ In other words, as Dworkin once observed, discretion is like the “hole in the donut” – it does not exist except as a space created by law, and its scope is limited by the law that surrounds and produces it.⁷

A. Police Discretion as the Capacity to Choose

In the context of policing, one of the most influential definitions of discretion can be found in the work of the American legal scholar Kenneth Culp Davis. Writing in the late 1960s, Davis observed that “a public officer has discretion whenever the effective limits of his [sic] power leave him free to make a choice among possible courses of action or inaction.”⁸ Where that

³ Galligan, DJ. (1990) *Discretionary Powers: A Legal Study of Official Discretion*. Oxford: Oxford University Press, 8.

⁴ Christie, GC. (1986) “An Essay on Discretion” *Duke Law Journal* 5: 747–78, 778.

⁵ Pratt, A & Sossin, L. (2009) “A Brief Introduction of the Puzzle of Discretion” *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société* 24(3): 301–12, 301.

⁶ Pratt & Sossin (2009), 302.

⁷ Dworkin, R. (1977) *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 77.

⁸ Davis, KC. (1969) *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press, 4. For a discussion of the influence of Davis' work on police discretion, see Nickels, EL. (2007) “A Note on the Status of Discretion in Police Research” *Journal of Criminal Justice* 35(5): 573–78.

public official is a police officer, this discretion translates into the power to make policy with regards to individuals:

The police are among the most important policy makers of our society, and it is high time that the public should realize this reality. They make more discretionary determinations in individual cases than any other class of administrators; I know of no close second... Although the police constantly make policy, they pretend not to, and they try to keep the public from realizing that they make policy.⁹

It is important to note that Davis was alive to the possibility that his definition of discretion could be seen as overly broad. As such, he also stressed that officials like police officers are often subject to guidelines and policies that set out criteria for the acceptable use of their discretion.¹⁰ The question for Davis, however, was whether such guidelines and policies were sufficient to prevent the misuse of discretion and the very real harms that stem from what he referred to as “discretionary injustice”:

[B]y and large, injustice results far more from exercise of discretionary power than from application of rules. The greatest and most frequent injustice occurs in discretionary action, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made.¹¹

This early attempt to define the discretion exercised by public officials like the police was significant because it came at a time of growing academic interest in policing and law enforcement. As Bronitt and Stenning have observed, much of this interest can be traced to the work of several prominent US scholars, most notably the criminologist and legal academic Herman Goldstein.¹² Writing in early 1960s, Goldstein argued that the police – contrary to the

⁹ Davis, KC. (1970) “Discretionary Justice” *Journal of Legal Education* 23(1): 56–62, 61.

¹⁰ See Bronitt, SH. & Stenning, P. (2011) “Understanding Discretion in Modern Policing” *Criminal Law Journal* 35(6): 319–32, 321.

¹¹ Davis (1970), 56–57.

¹² Bronitt & Stenning (2011), 320. See Goldstein, H. (1963) “Police Discretion: The Ideal versus the Real” *Public Administration Review* 23(3): 140–48, 148.

prevailing view at the time¹³ – do not in reality pursue policies of “full enforcement.” Instead, they are constantly called on to exercise discretion and make decisions about which laws should be enforced and whose conduct requires their attention.¹⁴ As Goldstein acknowledged at the time, this stems in part from the fact that the police do not have the resources to respond to every violation of the law they encounter. Whether or not the police choose to admit it, the widespread use of discretion is central to the pragmatic execution of their work and the effective functioning of police organizations:

The real choice for a police administrator is not between “full enforcement” and “discretion” but rather more precisely between the ideal and reality... An essential first step [to improving policing] will then be to inform the public, to challenge some of our basic concepts, to take stock of the total responsibilities of the police, to recognize the limitations under which the police operate, and to acknowledge the need for the exercise of discretion. It is then likely that a new atmosphere will be created which will foster some new thinking and some new developments to aid in the improvement of the total system for the administration of criminal justice.¹⁵

Although Goldstein had significant concerns about the use of police discretion, he also believed that denying its existence was a mistake. Instead, he argued that openly recognizing the central role played by discretion was vital, both to the police’s desire to be seen as professionals and the public’s need to have confidence in them:

The police have sought professional status. But professional status does not normally accrue to individuals performing ministerial functions. One of the marks of a true profession is the inherent need for making value judgments and for exercising discretion based upon professional competence. To deny that discretion is exercised gives support to those citizens who maintain that the job of a police officer is a simple one, that it requires little judgment, and that it is not worthy of professional status. By

¹³ See Scott, MS. (2004) “Police Discretion” in LE Sullivan, MS Rosen, DM Schulz, and MR Haberfeld (eds), *Encyclopedia of Law Enforcement*. Thousand Oaks, CA: Sage.

¹⁴ This practice would later be referred to as “selective enforcement.” See: Klockars, CB. (1985) *The Idea of Police*. Beverly Hills: Sage, 93. As Ericson observed in 2007, in Canada, the idea that the police exercise discretion began to be discussed openly only in the 1960s. See Ericson, RV. (2007) “Rules in Policing: Five Perspectives” *Theoretical Criminology* 11(3): 367–400, 368.

¹⁵ H Goldstein (1963), 148.

acknowledging the discretionary role the police do fulfill, the drive toward a higher degree of respect and recognition for law enforcement personnel is given impetus.¹⁶

Crucially, Goldstein's reflections on the impossibility of full enforcement and the inevitability of discretion were published only three years after another important work on police discretion. Appearing in the *Yale Law Journal* in 1960, Joseph Goldstein's article "Police Discretion Not to Invoke the Criminal Process" contained two key insights into the nature of police discretion that were to become focal points for much of the scholarship on policing that followed.¹⁷ First, Joseph Goldstein noted that a great deal of police discretion is exercised in what he referred to as "low-visibility" environments, such as the street.¹⁸ As a consequence, it is difficult to subject police decision-making to meaningful scrutiny or establish effective systems of oversight. Second, Goldstein drew attention to the fact that police discretion also encompasses the decision *not to act* when faced with an event or situation that might warrant intervention. Non-action on the part of the police can in fact play as much if not more of a role in shaping the character of law enforcement as does direct action.

As significant as these observations about low visibility and action/inaction were at the time, even more important was Joseph Goldstein's insight that they were inextricably related. Going further, Goldstein noted that the exercise of police discretion not to act is harder to subject to oversight and review than an exercise of police discretion to act, yet it nonetheless has a potentially greater impact on the administration of criminal justice:

Police decisions not to invoke the criminal process largely determine the outer limits of law enforcement. By such decisions, the police define the ambit of discretion throughout

¹⁶ H Goldstein (1963), 148.

¹⁷ Goldstein, J. (1960) "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice" *Yale Law Journal* 69(4): 543–94.

¹⁸ Although the distinction between "low-visibility" and "high-visibility" environments may no longer be as stark as when Goldstein was writing – in part due to the prevalence of public area CCTV and the ubiquity of cellphone cameras – it remains the case that a great deal of routine police work is carried out in environments where there is no direct supervision or possibility of formal oversight.

the process of other decisionmakers-prosecutor, grand and petit jury, judge, probation officer, correction authority, and parole and pardon boards. These police decisions, unlike their decisions to invoke the law, are generally of extremely low visibility and consequently are seldom the subject of review. Yet an opportunity for review and appraisal of non-enforcement decisions is essential to the functioning of the rule of law in our system of criminal justice.¹⁹

Taken together, the writings of Joseph and Herman Goldstein can be seen as the beginnings of an important shift in the study of policing and police decision-making. By openly rejecting the “myth” of full enforcement and observing that police discretion encompasses inaction as well as action, they played a central role in what Nickels has referred to as the “discovery” of discretion.²⁰ Their work – and the many critical studies of policing that emerged in the decade that followed – also had a direct influence on efforts to arrive at a definition of police discretion that addressed growing concerns about how discretion operates within the criminal justice system – and in particular how its exercise can lead to the differential treatment of marginalized communities and problems of systemic bias and discrimination. Although some have argued that Davis’ definition of police discretion was intended to be purely descriptive, it is hard not to see his reference to “effective” limits as an acknowledgement of the fact that the exercise of police discretion often takes place outside of the constraints imposed by law. Indeed, Davis explicitly noted that his definition necessarily includes “a good deal of discretion [that is] illegal or of questionable legality.”²¹ According to Ericson, researchers who subscribe to the idea of “police discretion-as-deviance” tend to fall into one of two categories: those who see the exercise of such discretion as a benign practice aimed at ensuring legal rules do not “get in the way of efficient criminal investigations and desirable outcomes”; and those who view it as a

¹⁹ J Goldstein (1960), 543.

²⁰ Nickels (2007), 570. See also Beckett, K. (2016) “The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing” *Harvard Law and Policy Review* 10(1): 77–100.

²¹ Davis (1969), 4.

form of noble cause corruption, with the police favouring crime control over a commitment to due process.²²

B. Police Discretion as a Privilege and Resource

Davis' writing on police discretion has proved to be enduring – so much so that the influence of his work is “readily discernible in even the most rudimentary introductions to the subject.”²³

Having said this, helpful alternatives to Davis' definition do exist. According to Kleinig, for example, it is a mistake to describe police discretion as the ability to make decisions in the space created by the absence of legal rules or other restrictions. In Kleinig's view, when police officers act outside the scope of their legal authority – or in ways that are fundamentally at odds with their role and responsibilities – they cannot be said to be using their discretion. An officer who uses excessive and unjustified force against a member of the public is obviously making a decision, but in Kleinig's view, they are not exercising discretion.²⁴ Building on this observation, Kleinig has argued instead that police discretion is akin to a *permission* or *privilege* to make decisions in certain circumstances:

Police discretion is a normative resource that police possess, one that authorizes them to use their considered judgment in certain ways in certain situations. It may be that they are authorized to determine whether a situation should have their intervention or whether to respond to some demand that is made. In other words, whether or not a particular situation falls within the ambit of their social peacekeeping powers may be a matter of discretion.²⁵

As Kleinig himself has noted, this view of discretion stands in direct contrast to the one offered by Davis. Where Davis saw police discretion as a *capacity* – a “decision-making power

²² Ericson (2007), 370.

²³ Nickels (2007), 573.

²⁴ Kleinig, J. (1996) *The Ethics of Policing*. Cambridge: Cambridge University Press, 83.

²⁵ Kleinig (1996), 86.

that is not completely covered by rules”²⁶ – Kleinig instead sees a *prerogative*: an authority to “use one’s own judgment about how to make a practical determination.”²⁷ Importantly, Kleinig has noted that the use of discretion is more acceptable when the person exercising it is seen “as possessing special knowledge and expertise in relation to their sphere of service.”²⁸ In the case of the police, this raises the question of whether policing is seen and treated as a profession. If it is – and police officers are professionals – then the exercise of police discretion is more likely to be regarded as legitimate: not just by others within the criminal justice system but also by those who are subject to that discretion.²⁹

These divergent accounts of police discretion represent two fundamentally different understandings of police action/inaction and ultimately two different conceptualizations of the policing function more generally. Although Davis and Kleinig both recognize that the police have discretion, for one that discretion exists largely because the unsupervised character of police work – and the ineffectiveness of legal and other controls – gives officers the freedom to make choices. For the other, discretion is something that the police are granted in response to their role and in recognition of their expertise. Moreover, the police are expected to exercise this authorized prerogative *with discretion*.³⁰

Although work by Davis and Kleinig has helped to frame debates about the nature and scope of police discretion, it remains the case that a widely accepted definition of police discretion has remained elusive. Looking at recent writing on policing in Canada, for example,

²⁶ Kleinig (1996), 83 (referring to Davis). Davis himself did not use the term “capacity” in his account of discretion.

²⁷ Kleinig (1996), 83.

²⁸ Kleinig (1996), 83.

²⁹ Kleinig (1996), 83.

³⁰ Kleinig (1996), 83.

many discussions of police discretion avoid the issue of definition altogether and move directly to the question of how that discretion is exercised. A notable exception to this approach, however, can be found in Schulenberg's 2015 article on discretion and non-arrest decisions.³¹ Although she refers to both Davis' and Kleinig's accounts of police discretion and concedes that the term remains ambiguous, Schulenberg has helpfully explained why this is the case:

Specifically, the problem is that we continue to lack a comprehensive understanding of decisions invoking less police authority and social control than an arrest... [But] to focus on the decision to arrest is overly simplistic for two reasons. First, current mandates emphasize community policing, which by definition involves working with citizens to resolve problems and the use of nonarrest actions to resolve problems. Second, arrests occur less frequently than other dispositional alternatives, providing a strong rationale for developing a better understanding of other types of police authority, such as the decision to request a particular behavioural change.³²

The point made here is an important one. To be meaningful, any definition of police discretion must reflect the fact that such discretion extends well beyond discrete and quantifiable matters that are directly related to arrest, investigation, and the prosecution of crime. Although it may be going too far to argue – as Moskos has – that “every interaction between the police and the public involves discretion,”³³ Schulenberg is right to suggest that many accounts of police discretion – and accompanying efforts to understand how it is exercised – have been too narrow.

C. Why Defining Police Discretion Matters

It would be a mistake to see disagreements over the definition of police discretion as examples of rarefied academic debates that have little to do with the realities of policing. The question of whether discretion is something that arises out of the necessities of police or instead is a power

³¹ Schulenberg, J.L. (2015) “Moving beyond Arrest and Reconceptualizing Police Discretion: An Investigation into the Factors Affecting Conversation, Assistance, and Criminal Charges” *Police Quarterly* 18(3): 244–71, 247.

³² Schulenberg (2015), 247–48.

³³ Moskos, P. (2012) “Damned if You Don’t: The Dilemma of Police Discretion” *ACJS Today: Academy of Criminal Justice Sciences* 37(2): 19–21.

that is expressly granted to the police, is a fundamentally important one. If we take the view that discretion is an inevitable consequence of the realities of policing and the problem of imposing “effective limits” on police officers’ authority, then our key question is most likely to be: what is the best way to ensure that this discretion is used appropriately and effectively? If, however, we regard discretion as a privilege or prerogative given to the police, then our question may be a different one: are there aspects of their work that merit the granting of discretion and, conversely, other aspects that should *not* be subject to discretion?

The issue of definition is particularly important in the Canadian context. Prior to the introduction of the *Charter of Rights and Freedoms*, the prevailing view of police discretion and the approach taken by Canadian courts were very much aligned with Davis’ definition. As Stribopoulos has noted,

Before the *Charter*, gaps in the patchwork of statutory and common law rules relating to police powers were rarely of any practical concern to law enforcement. In circumstances where the legal limits on police authority were unclear, the police had discretion in deciding how to act.³⁴

However, by opening the door to constitutional claims in the context of criminal proceedings, the *Charter* has brought with it a greater focus on the nature and extent of police discretion in Canada. Combined with growing public concern over abuses of police power,³⁵ this has led to a situation in which the courts are now routinely asked to consider whether an exercise of police discretion has violated a suspect’s *Charter* rights, exposing many of the “serious deficiencies in

³⁴ Stribopoulos, J. (2005) “In Search of Dialogue: The Supreme Court, Police Powers and the Charter” *Queen’s Law Journal* 31: 1–74, 4.

³⁵ See Ibrahim, D. (2020) “Public Perceptions of the Police in Canada’s Provinces, 2019” Juristat, Canadian Centre for Justice Statistics (25 November 2020).

the scattered collection of statutory and common law rules that make up the law of police powers in Canada.”³⁶

Although Stribopoulos has made use of Davis’ definition in his analysis of the Supreme Court’s approach to police powers in light of the *Charter*, in many respects his call for Parliament to better regulate these powers – and provide meaningful safeguards around the use of police discretion – lines up better with Kleinig’s view of police discretion as a privilege. Quoting Davis, Stribopoulos has observed that “[s]ometimes the proper course may be to make legal the illegal official practices that have long been a part of our system,” before going on to note that bringing such practices out into the open is an important first step towards regulating them.³⁷ This argument is stronger, however, if one starts from the position that discretion is something that is given to the police – a “normative resource” – rather than something that is taken by them. Returning to Kleinig:

[P]olice discretion is not simply a decision-making power that police possess in virtue of the relatively unsupervised nature of their work. It is a normative resource that we grant them or recognize that they have. As such we should expect this authority or prerogative to be grounded in certain justifying considerations.³⁸

If the “we” here is the public that the police ultimately exist to serve, then it is for Parliament – and not the courts – to decide on these justifying considerations and lay them out in the sort of comprehensive scheme of legislated police powers and procedures envisaged by Stribopoulos.³⁹ This approach is also more consistent with the principle of “policing by consent,” which is foundational to the idea of policing in Canada.⁴⁰

³⁶ Stribopoulos (2005), 4.

³⁷ Stribopoulos (2005), 73, quoting Davis (1969), 12.

³⁸ Kleinig (1996), 83.

³⁹ Stribopoulos (2005), 71.

⁴⁰ Goold, B.J. (2016) “Policing and Human Rights” in B Bradford, B Jauregui, I Loader, and J Steinberg (eds), *SAGE Handbook of Global Policing*. London: Sage, 232.

As a final point, regardless of whether we favour Davis' or Kleinig's definition, it is important not to lose sight of the shared understanding of police discretion that has emerged over the last sixty years. While a definitive, overarching formulation of police discretion has yet to be established in Canada or elsewhere, many common features of police discretion have been identified. These include the fact that discretion tends to be concentrated in the lower levels of police organizations, is routinely exercised by relatively inexperienced officers, and is largely unsupervised.⁴¹ These are all aspects of policing that will be considered in sections IV and V below.

III. Police Discretion and Police Duties

As has been noted, in the United States the “discovery of police discretion” occurred against the backdrop of a longstanding public commitment – on the part of the police as well as legislators and policy-makers – to the principle of full enforcement.⁴² Importantly, however, full enforcement has never been a stated policy or guiding principle in Canada.⁴³ Because the legal and institutional foundations of policing in Canada are based on Peelian principles developed in the United Kingdom during the-nineteenth century,⁴⁴ the role of the police has instead been framed in terms of common law duties, as well as statutory mandates and responsibilities, rather than idealized notions of full enforcement.

⁴¹ Lundman, R.J. (1979) “Organizational Norms and Police Discretion: An Observational Study of Police Work with Traffic Law Violators” *Criminology* 17(2): 159–71, 160.

⁴² Ericson (2007), 369.

⁴³ Schulenberg (2015), 246. See also Carrington, PJ & Schulenberg, JL. (2008) “Structuring Police Discretion: The Effect on Referrals to Youth Court” *Criminal Justice Policy Review*, 19(3): 349–67.

⁴⁴ Robertson, N. (2012) “Policing: Fundamental Principles in a Canadian Context” *Canadian Public Administration* 55(3): 343–63.

A key question that follows from this is whether these mandates give rise to legally enforceable duties that compel the police to act in particular ways or otherwise limit their discretion. As will be discussed in this section, to date Canadian courts have recognized a number of interrelated duties that can give rise to a private law action in negligence against the police, as well as remedies under the *Charter of Rights and Freedoms*. This stands in contrast to many other jurisdictions such as Australia, New Zealand, and the United Kingdom, where the courts have been far more reluctant to hold the police accountable for harms arising out of the exercise of their discretion.⁴⁵ However, as progressive as the Canadian judicial approach may appear, the case law on statutory duties has developed in the absence of a clear legislative foundation or framework for the exercise of police discretion. In this regard, police discretion in Canada appears to fit the Dworkinian model, with the duties established by statute being the “donut” and police discretion being the “hole.” As will be examined more closely in the next section, this approach has resulted in a situation whereby police discretion – at least in terms of its legal meaning – is understood as a set of practices and behaviours that are defined by the limits placed on them (by duties) rather than as emanating from any clear legal foundation.

A. Statutory Duties and the Police

Policing services in Canada are provided at the federal, provincial, and municipal levels of government, with the duties of the police being set out in a range of federal and provincial statutes. The Royal Canadian Mounted Police, who provide policing services at all three levels, are governed by the RCMP Act.⁴⁶ According to sections 18 and 37 of the Act, RCMP officers have duties to preserve the peace, prevent crime, and apprehend criminals, all of which must be

⁴⁵ Bronitt & Stenning (2011), 326.

⁴⁶ Royal Canadian Mounted Police Act, RSC 1985, c. R-10.

performed promptly, impartially, diligently, and with respect for the rights of all persons and the importance of “maintaining the integrity of the law, law enforcement and the administration of justice.”⁴⁷ Notably, the word “discretion” – at least as it pertains to police officers – appears only once in the entire Act, and then only in reference to the removal and storage of goods seized under warrant.⁴⁸

Turning to provincial police legislation, there is considerable variation when it comes to statutory descriptions of the role and responsibilities of provincial and municipal police.⁴⁹ In some instances, the relevant language is both general and expansive. In British Columbia, for example, section 7(2) of the Police Act 1996 states that the provincial police:

[M]ust perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the commissioner, under the director's standards or under this Act or any other enactment.⁵⁰

In other provinces, however, the legislation is more detailed. Entitled “Duties of Police Officers,” section 42(1) of the Ontario Police Services Act 1990 sets out a list of nine separate police responsibilities, the first six of which are:

- (a) preserving the peace;
- (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
- (c) assisting victims of crime;
- (d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
- (e) laying charges and participating in prosecutions; and

⁴⁷ RCMP Act, s 18(1) and s 37(a)–(c). Note that section 18 contains a number of other duties, including the duty to execute all warrants and escort “convicts and other persons in custody to or from any courts.”

⁴⁸ RCMP Act, s 40.2(10).

⁴⁹ For a detailed survey of provincial police statutes, see Long, K and Hollands, A. (2014) “Memorandum: Murdered and Missing Indigenous Women Legal Strategies.” Legal Strategy Coalition on Violence Against Indigenous Women (July 2014), <https://www.leaf.ca/wp-content/uploads/2015/06/2014-07-14-LSC-Memo-re-MMIW-Legal-Strategies.pdf> (accessed 6 April 2022).

⁵⁰ Similar language with regards to the duties and functions of municipal police departments can be found in section 34(2) of the Act.

- (f) executing warrants that are to be executed by police officers and performing related duties

In addition to this list, section 42(3) of the Act also states that police officers in Ontario have “the powers and duties ascribed to a constable at common law.”⁵¹ In Nova Scotia, the Police Act 2004 strikes something of a middle ground between these two approaches. While Section 30(1) sets out the duties of the provincial police, the list is less extensive than that found in the Ontario legislation and uses language that is more general than its equivalent in British Columbia:

A member of the Provincial Police is charged with the enforcement of

- (a) the penal provisions of all the laws of the Province;
- (b) any penal laws in force in the Province, other than laws of a municipality; and
- (c) the laws of a municipality, where specified by the Minister.

In the following section, however, the Act goes on to state that the provincial police *shall* provide policing services that include: crime prevention; law enforcement; assistance to victims of crime; emergency and enhanced services; and public order maintenance.

While it is beyond the scope of this report to provide a detailed analysis of all police legislation in Canada, even a cursory review of the statutes that govern policing reveals a striking lack of detail when it comes to the powers and responsibilities of the police. The relevant legislation does not lay down clear rules designed to limit different forms of police decision-making (as Davis’ understanding of discretion might demand) or provide a principled basis for the conferral of discretionary power (in the sense anticipated by Kleinig). Returning to Dworkin’s metaphor, the statutes may go some way to outlining the donut (the duties imposed on the police), but they say next to nothing about the hole (police discretion).

⁵¹ The BC Police Act 1996 also states in s 38(1)(a) that municipal constables and special municipal constables have “all of the powers, duties and immunities of a peace officer and constable at common law or under any Act.”

Looking beyond statutes to the various administrative rules produced by the police themselves, the situation is not much better. As Ericson observed, throughout the 1970s and 1980s, police organizations in Canada and elsewhere produced a staggering volume of administrative rules, many of which purported to promote consistency and accountability in police decision-making and the exercise of discretion.⁵² According to Ericson, however, researchers have found little evidence that such rules have any meaningful impact on police decision-making or accountability:

Analysts were quick to point out that administrative rule proliferation seemed to be largely a self-referential exercise in the management culture of police organizations. Most rules “died” as the ink dried on the paper on which they were printed. Again, the police do not simply follow the rules. Indeed, in most cases they are not even aware of them... Clearly, it cannot be contended that administrative rules control police decisions in any direct manner. Indeed, in recent years some police organizations have reduced or even scrapped their administrative rule manuals.⁵³

The fact that neither the legislation nor police regulations meaningfully account for discretion means that Canadian courts have been left with the difficult task of determining whether the police are under a positive obligation to act in certain contexts and how their powers and duties should be understood against the backdrop of both private law and the *Charter*. In response, there is an emerging jurisprudence on police duties to protect, warn, and investigate, but as will be examined in the next section, the courts have so far struggled to provide a clear account of police discretion or a principled legal basis for its existence.

⁵² Ericson (2007), 379. According to Ericson, the RCMP had generated 8800 pages of such rules by the early 1990s. For a more general discussion of administrative rule-making in Canadian policing, see also Ericson, RV & Haggerty, KD. (1997) *Policing the Risk Society*. Toronto: University of Toronto Press.

⁵³ Ericson (2007), 371–72.

B. Duties to Protect, Warn, and Investigate⁵⁴

Although legislation across Canada makes extensive use of the word “duty” when referring to the role and responsibilities of the police, the case law on police duties is relatively limited. As Buckley noted in her report on police duties for the BC Missing Women Commission of Inquiry, this is partly because the Canadian system of police accountability relies on a system of complaint and discipline but also because the common law has traditionally set a “high threshold for suing the police or prosecution authorities for failure to investigate crimes or inadequately investigating crimes.”⁵⁵

Canadian courts have, however, held that the police have a general duty to protect, which can encompass similar duties to warn and investigate. The scope of this duty – and the question of whether a police officer can be said to have breached it as a result of a decision not to act – was considered by the Ontario Court (General Division) in *Jane Doe v Toronto (Metropolitan) Commissioners of Police* (1998).⁵⁶ In this case, the plaintiff was sexually assaulted by a man who entered her second-floor apartment from a balcony. Four similar assaults had occurred within the same area in the months leading up to the attack, and the police chose not to warn the public of the danger out of fear the assailant might escape apprehension. The plaintiff sued the Metropolitan Toronto Police for damages on the grounds that (1) the police conducted a negligent investigation and failed to warn women of the risk of an attack; and (2) the police had

⁵⁴ This report does not provide an analysis of the current law for use in legal submissions or legal proceedings, and the discussion in this section should be viewed exclusively as scholarly overview and assessment of the relevant case law.

⁵⁵ Buckley, M. (2012) “Violence against Women: Evolving Canadian and International Standards on Police Duties to Protect and Investigate.” Background research report for the British Columbia Missing Women Commission of Inquiry (June 2012), <https://missingwomen.library.uvic.ca/wp-content/uploads/2010/10/RESE-5-June-2012-MB-Violence-Against-Women-Evolving-Legal-Standards-on-Police-Duties-to-Protect-Investigate.pdf> (accessed 6 April 2022).

⁵⁶ *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* [1998] OJ No 2681 (QL).

violated the plaintiff's rights under sections 7 and 15 of the *Charter*. In what is widely regarded as a landmark decision, the court found in favour of the plaintiff on both counts. Speaking directly to the question of police duties and negligence, Justice MacFarlane was clear that the police could be held responsible in tort for their failure to protect the plaintiff and other victims:

In my view, the police failed utterly in their duty to protect these women and the plaintiff in particular from the serial rapist the police knew to be in their midst by failing to warn so that they may have had the opportunity to take steps to protect themselves... Here police were aware of a specific threat or risk to a specific group of women and they did nothing to warn those women of the danger they were in, nor did they take any measures to protect them.⁵⁷

In reaching this conclusion, the court observed that the “police are statutorily obligated to prevent crime and at common law they owe a duty to protect life and property,” citing as authority the decision of Schroeder JA in *Schacht v The Queen* some 25 years earlier:

The duties which I would lay upon them [the police] stem not only from the relevant statutes to which reference has been made, but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the state to protect the life, limb and property of the subject.⁵⁸

Although the decision in *Jane Doe v Toronto Police* refers to police discretion only once, in its discussion of the relevant *Charter* issues, the court noted that such discretion must be exercised in a manner that is consistent with the principles of fundamental justice. In this case, the use of that discretion was found to be both discriminatory and negligent. Significantly, the court also noted that a lawful exercise of discretion could provide the basis for a claim in negligence. On this point, Justice MacFarlane referred approvingly to the earlier decision of the Divisional Court in the same case. Responding to a motion to strike out the plaintiff's statement

⁵⁷ *Jane Doe v Toronto Police* [1998], 46.

⁵⁸ *Schacht v The Queen in right of the Province of Ontario et al* (1973), 1 OR 221, 231. Although the decision in *Schacht* is still authority for the proposition that the police owe a common law duty to protect, Bruce Feldthusen has suggested the case might not be decided the same way in light of recent Supreme Court decisions. See Feldthusen, B. (2017) “Bungled Police Emergency Calls and the Problems with Unique Duties of Care” *University of New Brunswick Law Journal* 68: 169–201, 187.

of claim, Moldaver J (as he then was) observed that simply because an exercise of police discretion is legitimate, it does not necessarily follow that the duty that discretion is being exercised in relation to has been discharged:

The law is clear that in certain circumstances, the police have a duty to warn citizens of foreseeable harm... I would add to this by saying that in some circumstances where foreseeable harm and a special relationship of proximity exist, the police might reasonably conclude that a warning ought not to be given... It would, however, be improper to suggest that a legitimate decision not to warn would excuse a failure to protect. The duty to protect would still remain. It would simply have to be accomplished by other means.⁵⁹

The question of whether the police can be held liable for failing in their duty to protect was also considered in *BM v British Columbia (Attorney General)*.⁶⁰ Here the plaintiff brought an action in negligence against the RCMP for their failure to investigate her complaint against a former common law partner despite his documented history of serious violence towards her and others. Seven weeks after an RCMP officer declined to investigate the plaintiff's complaint, which she made immediately after being threatened and chased by the defendant, the defendant broke into her home with a shotgun, murdered her friend, and shot her then twelve-year-old in the shoulder. After the plaintiff and her children managed to escape, the defendant burned down the house and committed suicide. Although the action failed on the grounds that the plaintiff was unable to establish a sufficient causal connection between the police decision not to investigate and the eventual attack, the trial judge held that the police clearly owed the plaintiff a private duty of care.

Although the decision in *BM v BC Attorney General* has been subjected to significant criticism,⁶¹ in confirming that the police could be held liable for a failure to discharge duties

⁵⁹ *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* [1990] OJ No 1584 (QL).

⁶⁰ *BM v British Columbia (Attorney General)* [2004] 10 WWR 286, 31 BCLR (4th) 61 (BCCA).

⁶¹ Sheehy, EA. (2005) "Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from *Jane Doe* to *Bonnie Mooney*" *Canadian*

imposed on them by law, the case built on judicial momentum established by *Jane Doe v Toronto Police* less than a decade earlier. This momentum culminated some three years later in a pair of decisions handed down by the Supreme Court – *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] and *R v Beaudry* [2007] – both of which dealt directly with the relationship between police discretion and police duties.⁶²

The decision in *Hill v Hamilton-Wentworth Police* is particularly significant on two fronts. First, the Supreme Court stressed that the inherently discretionary nature of police work did not insulate the police from liability in negligence. Instead, the Court noted that the police were required to exercise their discretion “in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.”⁶³ Going further, the Court also noted:

Police are not unlike other professionals in this respect. Many professional practitioners exercise similar levels of discretion. The practices of law and medicine, for example, involve discretion, intuition and occasionally hunch. Professionals in these fields are subject to a duty of care in tort nonetheless, and the courts routinely review their actions in negligence actions without apparent difficulty.⁶⁴

Secondly, the Court rejected any suggestion that recognizing the police owe a private law duty of care would have a chilling effect on policing. In addition to noting that there was no empirical evidence to support such a suggestion, the Court went on to observe that even if it was the case that exposing the police to liability in tort might alter their behaviour, this may in fact be desirable:

Journal of Women & Law 17(1): 87–116; Chamberlain, E. (2012) “Tort Claims for Failure to Protect: Reasons for (Cautious) Optimism since *Mooney*” *Saskatchewan Law Review* 75: 245.

⁶² *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129; *R v Beaudry* [2007] 1 SCR 190.

⁶³ *Hill v Hamilton-Wentworth Police* [2007], para 52.

⁶⁴ *Hill v Hamilton-Wentworth Police* [2007], para 53.

In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other. Files must be closed, life must move on, but care must also be taken. All of this is taken into account, not at the stage of determining whether police owe a duty of care to a particular suspect, but in determining what the standard of that care should be.⁶⁵

These ideas – that police discretion is not absolute and must be exercised according to standards – was echoed and then elaborated on further in *R v Beaudry*. Crucially, the Court held that any exercise of discretion must be capable of being justified on both subjective and objective grounds – that is, although officers are free to use their judgment when performing everyday duties, that same judgment must be exercised without bias and on the basis of legally relevant factors:

Far from having *carte blanche*, police officers must justify their decisions rationally. The required justification is essentially twofold. First, the exercise of the discretion must be justified subjectively, that is, the discretion must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds. Thus, a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion. However, the officer’s sincere belief that he properly exercised his discretion is not sufficient to justify his decision.⁶⁶

Taken together, these cases mark a significant shift in the approach taken by Canadian courts to the exercise of police discretion. As Bronitt and Stenning have rightly observed, they both “affirm the centrality and legitimacy of police discretion, and impose new duties, and potential civil and criminal liabilities, on police officers.”⁶⁷ They also mark a break from the approach taken in other common law jurisdictions, where courts remain reluctant to expose the police to actions in tort for failures to discharge statutory duties.⁶⁸ Having said this, a number of commentators have suggested that these decisions do not go far enough and provide limited

⁶⁵ *Hill v Hamilton-Wentworth Police* [2007], para 56.

⁶⁶ *R v Beaudry* [2007], paras 37–38.

⁶⁷ Bronitt & Stenning (2011), 329.

⁶⁸ Bronitt & Stenning (2011), 326.

remedies for harms arising from the misuse of police discretion.⁶⁹ As will be discussed below, this leaves open the question of whether legislators at the federal and provincial levels should take a more proactive role in regulating the exercise of police discretion and provide statutory remedies where the police have failed to discharge fundamental duties, including the duties to protect and warn.

C. The Role of the *Charter*

To date, there have been very few examples of the *Charter* being used as the basis of legal actions against the police – or broader efforts to hold police organizations accountable for harms arising out of investigative failures or operational decisions. One of the most notable remains *Jane Doe v Toronto Police*, where the court upheld the plaintiff’s claims in relation to sections 15(1) and 7 of the *Charter*. As has already been noted, the court made clear that police discretion must be exercised in accordance with principles of fundamental justice, and where the actions of the police lead to an infringement of a plaintiff’s *Charter* rights, they can be held accountable:

The police investigation was carried out in a way that denied the plaintiff equal protection and equal benefit of law as guaranteed to her by s 15(1) of the *Charter*. The conduct of the investigation and, in particular, the failure to warn was motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women, and about women who are raped. The plaintiff was discriminated against by reason of her gender. Women were treated differently because some members of the force adhered to sexist notions that, if warned, women would panic and scare off the attacker. Further, the defendants deprived the plaintiff of her right to security of the person under s 7 of the *Charter* by subjecting her to the very real risk of attack by a serial rapist. They were aware of the risk but deliberately failed to inform her of it. Because the defendants exercised their discretion in the investigation in a discriminatory and negligent way, their exercise of discretion was contrary to the principle of fundamental justice. The plaintiff was entitled to an award of damages as a remedy under s 24 of the *Charter*.⁷⁰

⁶⁹ Buckley (2012), 25. See also Sossin, L. (2007) “The Oversight of Executive Police Relations in Canada: The Constitution, the Court, Administrative Processes and Democratic Governance.” Research Paper Commissioned by the Ipperwash Inquiry, https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/meetings/pdf/Sossin.pdf (accessed 6 April 2022).

⁷⁰ *Jane Doe v Toronto Commissioners of Police* [1998], 3–4.

As significant as this decision was at the time, there is little evidence to suggest that it led to an increase in *Charter*-based actions against the police or more judicial scrutiny of police decision-making and discretion. As Buckley has pointed out, the willingness of the court to use constitutional remedies when dealing with claims against the police “underscores that civil liberties and fundamental human rights are always at stake in police decision-making,”⁷¹ but it nevertheless remains the case that the *Charter* jurisprudence on police duties and the role of discretion is underused and underdeveloped. This raises the question of whether *Charter* litigation can or should be regarded as a potential avenue for imposing limitations on the use of police discretion.

D. Revisiting Questions of Definition

In many respects, it is possible to see Kleinig’s view of police discretion – as a privilege granted by law – running through Canadian decisions like *Jane Doe v Toronto Police*, *BM v British Columbia*, *Hill v Hamilton-Wentworth Police*, and *R v Beaudry*. Certainly, the courts have acknowledged that the exercise of police discretion must be understood in the context of the duties imposed on the police by statute and common law. As will be discussed in the final section of this report, however, these cases also expose the limits of judicial oversight and regulation when it comes to police decision-making. The courts may be willing to hold the police accountable for failing to discharge various duties to protect, warn, and investigate, but they have been reluctant to address more fundamental questions about the nature and legal legitimacy of police discretion.

⁷¹ Buckley (2012), 27.

Before leaving questions of definition, it is worth pausing to consider another view of police discretion in the Canadian context. Writing in 2007, Ericson argued that it is a mistake to regard police discretion as something that exists outside of or in opposition to criminal law and procedure. Drawing on the work of an array of police scholars in Canada and the United Kingdom, Ericson instead suggested that such discretion should be understood as a *product* of criminal law and procedure, *enabled* in part by an adherence to the idea of policing by consent on the part of both the police and the policed:

Policing by consent is the usual way in which police work gets done. Having the subject of police investigation consent to routine information checks, searches and interrogations avoids statutory requirements. For example, a consenting suspect can be searched without reasonable and probable grounds for suspicion. Policing by consent also reduces the visibility of police discretion. Records are less likely to be kept and supervision is rendered more difficult. Researchers have observed that consent is usually sought even when police have obtained warrants that legally authorize their investigative activity because it is preferable to do business in a compliance mode.⁷²

Although Ericson did not attempt to define police discretion or to engage directly with either Davis' or Kleinig's contrasting approaches, his account can be seen as straddling the two positions. On the one hand, Ericson recognized (as Davis did) that police discretion arises out of the spaces created by law and the pragmatic demands of police work; on the other, he acknowledged (as Kleinig has) that police discretion is also a direct product of law and enabled by it. Notably, Ericson also drew attention to the fact that law can be used as a framework for rationalizing police decisions and exercises of discretion after the fact so as to render them legitimate and appear to be governed by rules. Police decisions are "routinized through the use of formulaic phrases that not only justify the decisions taken but also serve as a form of rhetoric," with this rhetoric crucially providing other actors (such as lawyers and judges) with the sort of

⁷² Ericson (2007), 373, citing Ericson, R.V. (1981) *Making Crime: A Study of Detective Work*. Toronto: Butterworths and Dixon, D. (1997) *Law in Policing*. Oxford: Clarendon Press

comprehensible rationale needed to ratify those decisions.⁷³ Tellingly, Ericson drew a connection between these processes of rationalization and the role of police culture – both in terms of how rules are understood and how actions are explained in relation to those rules.⁷⁴ Although it is well beyond the scope of this report to explore the relationship between police discretion and police culture, these complex dynamics should be front of mind in any broader discussion about police decision-making and accountability.

IV. Factors Influencing Police Discretion

Discretion plays a central role in almost every aspect of policing in Canada. Regardless of whether we view police discretion as a capacity or a resource, the fact remains that the use of this discretion determines not only how and when the law is (or is not) enforced but also how policing policies and priorities are determined, how police resources are allocated and deployed, and how the police engage with other state agencies, private organizations, and the public at large. Put simply, it is impossible to understand policing in Canada without also understanding how police discretion operates and, more importantly, what factors influence the exercise of this discretion.

Unsurprisingly then, there is a vast body of academic literature on how police discretion is exercised.⁷⁵ Building on the early insights of scholars like Herman and Joseph Goldstein, as well as criminologists such as Herbert Packer, Jerome Skolnick, and Egon Bittner,⁷⁶ hundreds of

⁷³ Ericson (2007), 373.

⁷⁴ Ericson (2007).

⁷⁵ For a brief overview of research on police discretion in the United States, see Beckett (2016).

⁷⁶ Skolnick, JH. (1966) *Justice without Trial: Law Enforcement in Democratic Society*. New York: Wiley; Bittner, E. (1967) “The Police on Skid-Row: A Study of Peace Keeping” *American Sociological Review* 32(5): 699–715; Bittner, E. (1970) *The Functions of the Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models*. Chevy Chase, MD: National Institute of Mental Health; Packer, HL. (1964) “Two Models of the Criminal Process” *University of Pennsylvania Law Review* 113(1): 1–68.

studies of police discretion have been published over the last 50 years, many of which focus on understanding how discretion operates in particular contexts and the role it plays in police organizations and police working culture. Although this literature is extensive, it is also limited in a number of important ways. As has already been noted, with few exceptions, most scholars have either explicitly or implicitly been content to take Davis' definition as their starting point and treat police discretion as something that is somehow extra-legal, used by the police to fill the gaps apparently left by law. As a result, critiques of police discretion have tended to concentrate on the consequences that flow from its use rather than on the more fundamental question of whether the police should be permitted to have discretion in certain contexts in the first place.

To some extent, this lack of focus on the definitional question can be seen as a consequence of the low-visibility problem identified by Joseph Goldstein in the 1960s. If police discretion is something that is exercised out of sight and is not easily eliminated, then the question understandably becomes: what are the observable outcomes of police discretion and how should we respond to apparent abuses of it? And when attention has been directed to the question of how to regulate and limit police discretion, the focus has been not so much on law and the legal basis of discretion but rather on police attitudes and behaviour. As a consequence, police recruitment, police training, police discipline, and external oversight have all taken centre stage, with the result that the question of whether it is possible to eliminate police discretion via law in certain key contexts is rarely seriously considered.

Another limitation of the research on police discretion has been its relatively narrow focus, most notably on decisions to stop and arrest. This is in part because decisions to stop and arrest are among the more visible examples of police discretion. Often taken in full view of the public, the decision to stop and arrest an individual is particularly significant because it marks a

crucial moment at which the individual comes into direct contact with the power of the criminal justice system and the state – and open to the prospect of charge, detention, prosecution, and punishment. In this respect, the decision to stop and arrest (or not) is a gateway decision, determining not only how an individual suspected of a crime will be dealt with (or not) but also the contours of the criminal justice system itself. As such, the decision to stop and arrest has the potential to embody the sorts of “discretionary injustices” highlighted by Davis in his examination of police power.

The other main reason why the practice of stop and arrest – and the role played by police discretion in those decisions – has attracted so much attention is due to concerns about the factors influencing that discretion. There is an abundance of evidence that decisions to stop and arrest are subject to various forms of bias based on the race, appearance, and demeanour of suspects, with the result that certain groups are radically over-represented when it comes to arrest and charging rates.⁷⁷ Since the 1960s, concerns over racial profiling and other forms of selective policing and law enforcement have led to multiple studies aimed at identifying and mitigating the factors that influence the decision to stop and arrest. Although the majority of these studies have been carried out in the United States, research in Canada has also produced compelling evidence of racial bias when it comes to the decision to stop and arrest. As Professor Kanika Samuels-

⁷⁷ For a discussion of the role of race in police decision-making in Canada, see Wortley, S and Owusu-Bempah, A. (2016) “Crime and Justice: The Experiences of Black Canadians” in B Perry (ed) *Diversity, Crime and Justice in Canada*, 2nd edn, pp. 140–67. New York: Oxford University Press; Unnever, J, Owusu-Bempah, A, and Deryul, R. (2017) “A Test of the Differential Involvement Hypothesis” *Race and Justice* 9(2): 197–224; Wortley, S. (2018) “A Double-Edged Sword: Street Checks, Public Safety and the Impact of Racialized Policing” in L Foster, L Jacobs, B Siu, and S Azmi (eds), *Racial Profiling and Human Rights Policy in Canada: The New Legal Landscape*, pp. 238–52. Toronto: Irwin Law; Wortley, S and Jung, M. (2020) “Racial Disparity in Arrests and Charges: An Analysis of Arrest and Charge Data from the Toronto Police Service.” Ontario Human Rights Commission (July 2020), <https://www.ohrc.on.ca/sites/default/files/Racial%20Disparity%20in%20Arrests%20and%20Charges%20TPS.pdf> (accessed 6 April 2022).

Wortley explained in her evidence to the Standing Committee on Public Safety and National Security:

[R]acial differences with respect to police contact remain even after controlling for other relevant factors including gender, social class, neighbourhood characteristics and criminal behaviour... In other words, racial differences in police contact cannot be explained away by poverty or involvement in crime. Race matters. If you're a Black man in Canada, the question is not if you will be stopped, but when.⁷⁸

These findings are significant because they shed light not simply on how discretion operates in the context of stop and arrest but also on larger problems of systemic racism in Canadian policing and the criminal justice system more broadly. Yet as important as decisions to stop and arrest are, the lack of research on how discretion operates in other contexts has resulted in an incomplete picture of police decision-making. As Smith et al have observed:

Research on police decision-making during encounters with citizens addresses only a very small portion of what officers do during the course of their work. Because these behaviors are examined within the context of police–citizen interactions, they largely ignore activities taken outside the presence of citizens. As such, questions remain about what explains officer discretionary behavior when they are not in contact with citizens... There remains a dearth of research addressing officer choices beyond police–citizen encounters and unrelated to the invocation of police authority. This shortcoming is exacerbated by the relative lack of research since the advent of community policing.⁷⁹

This is a point that has also been made by Jennifer Schulenberg, who has argued that research on police discretion needs to move beyond the narrow focus on the decision to arrest.⁸⁰ After noting that we lack a comprehensive understanding of police decision-making as it relates to less significant exercises of power than an arrest, Schulenberg has referred to work by Worden, who has argued that we need to exercise caution when drawing general lessons about police behaviour from research on arrest alone:

⁷⁸ Standing Committee on Public Safety and National Security (Canada). (2021) “Systemic Racism in Policing in Canada.” House of Commons, 43rd Parliament, 2nd session, <https://www.ourcommons.ca/Committees/en/SECU/StudyActivity?studyActivityId=10959882> (accessed 6 April 2022), 58.

⁷⁹ Smith, BW, Novak, KJ, Frank, J, & Lowenkamp, C. (2005) “Explaining Police Officer Discretionary Activity” *Criminal Justice Review* 30(3): 325–46, 326–27.

⁸⁰ Schulenberg (2015), 248.

[I]t appears that the arrest decision is unique in that it is based to a significant degree on situational cues that officers interpret in similar ways. Consequently, while analyses using arrests as a dependent variable might be useful for some analytic purposes, they are quite limited as vehicles for the development of a broader theory of police behavior... [S]ituational explanations of the arrest decision probably cannot be successfully applied to the other choices that police officers make on the street; continued research on the situational determinants of police behavior, to the exclusion of other factors, may be of limited theoretical value.⁸¹

Building on this point, it is also important to note that there are other, deeper methodological problems associated with the research on police discretion. As Nickels has noted, the absence of a clear and coherent definition of police discretion – combined with the fact that exercises of discretion are rarely capable of being observed directly – means that much of the research literature on police discretion is essentially inferential in nature:

Nowhere within this vast body of research is “discretion” itself directly operated, measured, or associated with any cause or effect. The status of the term is entirely ambiguous. It seems implied that discretion refers to either the observed behavior of police or its variability, or to the measured influence of extralegal factors on such behavior. At the same time, it seems to refer to some unobserved (perhaps unobservable) process through which explanatory models bridge extralegal factors to behavioral outputs—some “black box” of the subject’s consciousness... None of this research can properly be understood as studying discretion, per se. Instead, it is the examination of police behavior as determined by a number of causal variables, among which one finds no specific variable labeled “discretion.”⁸²

In many respects, Nickels’ analysis of this fundamental lacuna resembles the critique levelled above, namely that policing legislation and regulation fail to adequately account for police discretion per se.

It is against this general background and with these important limitations in mind that this section provides a summary of the factors that influence police discretion. Far from attempting to present a comprehensive overview of the research on police discretion in Canada and elsewhere, the aim is instead to provide a broad typology of factors that influence the exercise of that

⁸¹ Worden, RE. (1989) “Situational and Attitudinal Explanations of Police Behavior: A Theoretical Reappraisal and Empirical Assessment” *Law and Society Review* 23: 667–711, 702 (quoted in part in Schulenberg (2015), 247).

⁸² Nickels (2007), 571.

discretion, focusing on the distinction between individual and situational factors, as well as the role of environment and place. This overview will then be used as the basis for the discussion of paths to reform in section V.

Before proceeding, however, it is important to note that any discussion of the factors that influence police discretion needs to be sensitive to the unique organizational contexts of policing. Although police services in Canada conform to a standard bureaucratic arrangement – with seniority and managerial responsibility being concentrated at the top of the organization – in contrast to many other public agencies, a great degree of discretionary power rests with those at the bottom of the hierarchy, most notably frontline police officers. It is these officers who are routinely called on to make decisions about when to enforce the law, respond to complaints, and investigate possible crimes. When coupled with the fact that much of this discretion is typically exercised in low-visibility environments (for example, on the street or in police vehicles), this leads to the least senior members of the organization wielding significant amounts of unsupervised authority. As Johnson et al have observed:

Police organizations fit very well with Weber's classical model of organization. The mandate of police organizations as the coercive arm of the state inherently requires strict control and formal structure. The adoption of a paramilitaristic structure has traditionally been applied to police organizations as the organizational model to provide such regimentation. However, the paramilitaristic structure, with its strict formality and chain of command, is in conflict with the devolution of authority necessary for responsive street-level decision-making supported by a rational-legal organizational structure.⁸³

⁸³ Johnson, AD & Vaughn, MS. (2016) "Decoupling and Police Organizational Structure" *Administrative Theory & Praxis* 38(3): 157–67, 158–59, citing Terpstra, J. (2011) "Two Theories on the Police: The Relevance of Max Weber and Emile Durkheim to the Study of the Police" *International Journal of Law, Crime, and Justice* 39: 1–11; Weber, M. (1947) *The Theory of Social and Economic Organization*, AM Henderson and T Parsons (trans). New York: Oxford University Press; Gilbert, MJ. (1997) "The Illusion of Structure: A Critique of the Classical Model of Organization and the Discretionary Power of Correctional Officers" *Criminal Justice Review* 22(1): 49–64; Brown, MK. (1981) *Working the Street: Police Discretion and the Dilemmas of Reform*. New York: Russell Sage Foundation, 70.

Acknowledging this institutionally embedded conflict between an outward, formal adherence to chains of command and the day-to-day realities of ordinary police work is essential if we are to understand the role played by police discretion in Canada. Regardless of whether we view discretion as a capacity or a resource, the fact remains that efforts to control the exercise of that discretion will depend in large part on the ability of police services – or external bodies – to control the behaviour and change the working practices of frontline officers.

As a final point, it is also important to note that many of the studies referred to in this report focus almost exclusively on large metropolitan or urban police services, and there is a very limited body of research on the use of police discretion in rural police departments. As Fyfe observed over twenty years ago, the problem is compounded by the fact that many of the police departments that have been the subject of extensive study may not themselves be especially representative, even of large urban forces:

The extant research on police discretion is biased in a number of ways regarding the types of agencies that are included. The vast majority of studies focus on relatively large municipal police forces, leaving mostly unexplored small urban departments, sheriff's departments, rural agencies, special police agencies, and large but geographically dispersed state police agencies. There are reasons to expect some different patterns in the exercise of police discretion from the usually studied agencies, thus undoubtedly restricting the possibility of new insights about what influences police discretion under what circumstances. And perhaps most telling, except for the occasional research compelled by legal process, research on police discretion tends to occur at the more progressive agencies that have less discomfort in exposing themselves to scrutiny by outsiders.⁸⁴

Despite these various caveats and qualifications, it is important not to lose sight of the fact that there is a broad consensus in the research literature on the types of factors that do influence police discretion. While we must exercise caution when talking about particular contexts – and especially specific police services in Canada and elsewhere – there is now over

⁸⁴ Mastrofski, SD. (2004) "Controlling Street-Level Police Discretion" *Annals of the American Academy of Political and Social Science* 593(1): 100–18, 107, citing Fyfe, JJ. (2002) "Too Many Missing Cases: Holes in Our Knowledge about Police Use of Force" *Justice Research and Policy* 4(1–2): 87–102.

sixty years of research on police discretion, much of it focused on the central question of how officers make decisions and what affects their exercise of discretion.

A. The Factors Influencing Police Discretion

One of the key questions that has faced researchers seeking to understand the phenomenon of police discretion is how to distinguish between the different variables and factors that influence the exercise of this discretion. Writing in 1980, the US criminologist Lawrence W. Sherman suggested that police behaviour is best understood as being dependent on variables that fall into one of five broad categories: individual, situation, organization, community, and legal. Given how influential Sherman's typology has been in terms of structuring subsequent discussions of police discretion over the last forty years, his classification is worth noting in full:

The approaches to explaining the variation in these aspects of police behavior can be classified into five levels of analysis: individual, situational, organizational, community, and legal. The individual approach attempts to explain variation in the behavior of police officers with the characteristics of the officers themselves, such as length of service, race, and sex. The situational approach attempts to explain the outcomes of citizen–police encounters with the characteristics of the situation, such as relationship between complainant and suspect, number of police officers present, whether the encounter was initiated by a citizen request or a police decision to intervene, and demeanor, race, class, and other characteristics of the suspect and complainant. The organizational approach attempts to explain rates of police behavior across either suborganizational units or entire police organizations with such characteristics as patrol strategy or percentage of college graduates in a police department. The community approach attempts to explain rates of police behavior across municipal police departments with the characteristics of the communities they police, such as economic and demographic composition, political ethos, or structure of government. Finally, the legal approach attempts to explain police behavior at various levels with the constraints of procedural and substantive law that the written legal system attempts to impose on the police.⁸⁵

As Sherman went on to note, none of these five approaches amounts to a “substantive theory of police behaviour.” Instead, they provide limited empirical support for claims about the influence of particular variables on police decision-making. Significantly, Sherman stressed that

⁸⁵ Sherman, L.W. (1980) “Causes of Police Behavior: The Current State of Quantitative Research” *Journal of Research in Crime and Delinquency* 17(1): 69–100, 70.

much of the research on policing he surveyed in producing his five categories was focused on “bivariate assertions” – that is, they considered the impact of a single variable (such as suspect demeanour) on police behaviour. Multivariate studies were at the time few and far between, something Sherman argued was a shortcoming that needed to be addressed in order to develop a comprehensive and useful theory of police behaviour.

In the years following Sherman’s article, a number of writers have sought to refine and build on his initial classifications. According to Worden, for example, it is possible to divide research on the factors that influence police discretion into two broad categories: situational and attitudinal:

Situational explanations hold that officers’ behavior in police–citizen encounters is influenced by structural characteristics of the immediate situation: the nature of the problem, the attributes and actions of the citizens, and contextual variables. Research of this genre has led to the conclusion that officers’ behavior is largely a response to situational cues (Berk and Loseke, 1980–81). The second approach is to examine the behavioral patterns of individual officers to explain variation in terms of officers’ attitudes. Attitudinal explanations hold that officers develop distinctive “styles” of performing their duties, and that the development of their behavioral styles is shaped by their attitudes and values.⁸⁶

Although Worden cited Sherman before presenting his own classification scheme – with the implication that it represents a condensed version of Sherman’s approach rather than a departure from it – Worden’s focus on these two broad categories marked a significant step forward in the study of police discretion. By explicitly drawing out the notion of policing “styles,” Worden drew a clear distinction between the impact of what might be regarded as internal and external factors when it comes to the exercise of police discretion. Put another way, we can understand situational factors as encompassing things external to an officer (and police organization), while

⁸⁶ Worden (1989), 668, citing Berk, SF & Loseke, DR. (1980) “‘Handling’ Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances” *Law and Society Review* 15: 317–46; White, SO. (1972) “A Perspective on Police Professionalization” *Law and Society Review* 7: 61–85; Muir, WK. (1979) *Police: Streetcorner Politicians*. Chicago: University of Chicago Press; Broderick, JJ. (1977) *Police in a Time of Change* (Morristown, NJ: General Learning Press; and Brown (1981).

attitudinal factors relate to the characteristics of the officers and organizations themselves. This distinction provides a simple but powerful way of distinguishing between factors for the purpose of reform. While it may, for example, be possible to change the way in which situational factors affect police decision-making through policies, guidelines, legal rules, and other such formalized mechanisms, attempts to affect attitudinal variables are more likely to be aimed at recruitment, training, oversight, and discipline.

In his review of the research on police discretion, Worden also made a number of observations that continue to resonate. First, he drew attention to the fact that the emphasis on arrest decisions is problematic, not just for the reasons identified above but also because it impedes “further theoretical progress.”⁸⁷ Second, Worden drew attention to the fact that many accounts of police discretion start from the assumption that the boundaries of an officer’s authority – and the objectives that the officer is expected to pursue – are “clearly defined and well understood.” This is in fact rarely the case, and something that needs to be accounted for in our efforts to understand how discretion is exercised in practice:

[A] theory of police behavior must also reflect the ambiguity and uncertainty of the task environment in which officers work, where formal and informal rules and procedures are in many cases vague and may even conflict, characteristics of the incidents into which they intervene may be variously interpreted, causal connections between actions and outcomes may be unclear, and the objectives toward which they are expected to direct their efforts are stated in general terms (if at all) and may be inconsistent. Officers must interpret these features of the task environment as they choose their courses of action. This ambiguity and uncertainty, I shall argue, can be expected to attenuate the relationships between situational factors and officers’ attitudes on the one hand and officers’ behavior on the other.⁸⁸

Finally, Worden also acknowledged the need for theories of police behaviour and discretion to pay greater attention to the structural features of police organizations, either by

⁸⁷ Worden (1989), 668.

⁸⁸ Worden (1989), 671.

comparing officer behaviour across different types of police departments or through incorporating structural variables into future studies. Unfortunately, Worden's call for more research on the organizational determinants of police discretion went largely unheeded. Writing some seventeen years later in 2006, Chappell et al observed that only a few studies – most notably by Smith in 1984 and then Mastrofski, Ritti and Hoffmaster in 1987 – had examined the influence of police organizational structures on the decision to arrest.⁸⁹ Despite the fact that these studies suggested that “variations in departmental management styles and culture [could] explain a significant amount of variation in the proclivity of police officers to exercise their arrest powers,” Chappell et al noted that their continued relevance was limited due to a reliance on historical data and changes in the policing landscape since the 1980s – changes that saw many police departments in the United States move to problem-oriented strategies and a greater emphasis on community policing.⁹⁰ For their part, Chappell et al suggested that the organizational typology first developed by Wilson in 1968 – which categorized police agencies according to whether the officers within those agencies adhered to a “watchman,” “legalistic,” or “service” style⁹¹ – was of “limited use” when it came to contemporary discussions about the influence of organizational structure and working culture on police discretion. Instead, they argued that organizational factors may not be that important at all:

The findings from this study suggest that the policing literature and conventional wisdom on controlling police discretion may place too much emphasis on the influence of organizational context. Officers may be more driven by the situational exigencies that vary from community to community – many of which are beyond the direct control of police bureaucrats.⁹²

⁸⁹ Chappell, AT, MacDonald, JM, & Manz, PW. (2006) “The Organizational Determinants of Police Arrest Decisions” *Crime & Delinquency* 52(2): 287–306, 288.

⁹⁰ Chappell, MacDonald, & Manz (2006), 288.

⁹¹ Wilson, JQ. (1968) *Varieties of Police Behavior*. New York: Atheneum

⁹² Chappell, MacDonald, & Manz (2006), 302–3.

Returning to the question of classification, in a recent multivariate study of police arrest decisions, Jessica Huff has suggested that much of the work on police discretion to date can be seen as contributing to two broad theoretical frameworks. The first of these frameworks, which Huff has referred to as “officer-oriented theories of police discretion and arrest decisions,” maintains that the exercise of police discretion depends largely on the attitudes of individual police officers and their demographic characteristics, as well as the attitudes, demeanour, and characteristics of the suspects, victims, and members of the public with whom the police interact. Into this category she places work by DJ Black, whose early sociolegal account of police discretion has remained highly influential.⁹³ Black argued that the use of police discretion in any given situation will vary according to the relative social positions of those involved, most notably the officer, the suspect, and the victim.⁹⁴ As Huff has noted, Black also drew attention to the fact that certain discretionary decisions necessarily involved “more law” than others, which could have an impact on the relevant power dynamics that underpin the decision-making process:

One of the major contributions of [Black’s] work is the proposition that law varies in quantity, with some actions constituting more law than others... This means that those of higher social standing are more able to invoke the law, that law enforcers are more likely to apply the law against those of lower social standing than themselves, and that laws will be more strictly enforced in low status neighborhoods.⁹⁵

Into this same category, Huff has also placed work by Steve Herbert on the importance of normative ordering in policing, as well as a range of studies that have examined the potential role played by various officer characteristics in the use of discretion, including an officer’s race or

⁹³ Black, DJ. (1971) “The Social Organization of Arrest” *Stanford Law Review* 23(6): 1087–111; Black, DJ. (1976) *The Behavior of Law*. New York: Academic Press; Black, DJ. (1980) *The Manners and Customs of the Police*. New York: Academic Press.

⁹⁴ Huff, J. (2021) “Understanding Police Decisions to Arrest: The Impact of Situational, Officer, and Neighborhood Characteristics on Police Discretion” *Journal of Criminal Justice* 75: 101829 at 7.

⁹⁵ Huff (2021), 7.

membership of a particular ethnic group; their gender; their level of education; and their length of service.⁹⁶

The second theoretical framework identified by Huff, which she has referred to as “social-ecological theories of police discretion and influences on arrest,” includes research that explores the relationship between discretion and neighbourhood characteristics, including crime rates, socioeconomic factors, and racial heterogeneity. As Huff notes, much of this work has focused specifically on identifying the sources of racial bias in policing:

An enduring debate in the policing research is whether identified racial/ethnic disparities in discretionary outcomes are due to biased decision-making (whether implicit or explicit) or to differential concentrations of crime and police resource deployment. This has resulted in examinations of the influence of neighborhood characteristics on variation in officer use of discretion across different social-ecological contexts.

Importantly, Huff has also included various social control theories in this second framework, including early work by Blalock and others that suggest the police use law – and the power to arrest – as a means of controlling minority populations.⁹⁷ Research on the role of place – in particular, the socio-economic characteristics of neighbourhoods – is also included in this category, with Huff noting that it provides “mixed support” for social-ecological theories of police discretion.⁹⁸

⁹⁶ Herbert, SK. (1997) *Policing Space: Territoriality and the Los Angeles Police Department*. Minneapolis: University of Minnesota Press. Some of the key studies cited by Huff include Brown, RA, Novak, KJ, & Frank, J. (2009) “Identifying Variation in Police Officer Behavior between Juveniles and Adults” *Journal of Criminal Justice* 37: 200–8; Donohue III, JJ & Levitt, SD. (2001) “The Impact of Race on Policing and Arrests” *Journal of Law and Economics* 44(2): 367–94; and Novak, KJ, Brown, RA, & Frank, J. (2011) “Women on Patrol: An Analysis of Differences in Officer Arrest Behavior” *Policing: An International Journal of Police Strategies & Management* 34(4): 565–87.

⁹⁷ Blalock, HM. (1967) *A Theory of Minority-Group Relations*. New York: John Wiley; Suttles, GD & Suttles, GD (1972) *The Social Construction of Communities*, Vol. 111. Chicago: University of Chicago Press.

⁹⁸ Huff (2021). Some of the more recent studies referred to include: Johnson, RR & Olschansky, EL. (2010) “The Ecological Theory of Police Response: A State Police Agency Test” *Criminal Justice Studies* 23(2): 119–31; Lum, C. (2011) “The Influence of Places on Police Decision Pathways: From Call for Service to Arrest” *Justice Quarterly* 28(4): 631–65; Kane, RJ, Gustafson, JL, & Bruell, C. (2013) “Racial Encroachment and the Formal Control of Space: Minority Group-Threat and Misdemeanor Arrests in Urban Communities” *Justice Quarterly*

Although Huff has not purported to provide a comprehensive overview of the research on police discretion, her theoretical frameworks allow for the easier identification of particular currents in what is a vast body of literature. Notably, she has also acknowledged that – regardless of whether the research in question falls into the category of officer-oriented theories or social-ecological theories of police discretion – it is generally accepted in the literature that situational factors play a significant role when it comes to police decision-making. As Huff has noted, for example, multiple studies have suggested that offence seriousness is a key factor in the decision to arrest. Similarly, the question of whether an arrest resulted from a public complaint (or was instead police-initiated) can also have an impact on the exercise of police discretion.⁹⁹

As this brief overview of efforts to classify the factors affecting police discretion has demonstrated, there is no comprehensive theory of police behaviour that can provide a clear account of how the police exercise their decision-making powers. As Huff has rightly observed, this is due in part to the challenges associated with developing multivariate models of police behaviour. While researchers might agree that direct observation of officer behaviour and decision-making would provide the clearest insight into the operation of police discretion – what Huff has referred to as “systematic social observation” – in most instances, this is simply too expensive and time-consuming (and requires significant access by researchers to the police, which in many cases is difficult to obtain).

It is with these limitations in mind that the next section provides an overview of recent research on police discretion carried out in Canada, identifying significant gaps in our understanding of how police discretion currently operates at the municipal, provincial, and

30(6): 957–82; Sobol, JJ, Wu, Y, & Sun, IY. (2013) “Neighborhood Context and Police Vigor: A Multilevel Analysis” *Crime & Delinquency* 59(3): 344–68.

⁹⁹ Huff (2021).

federal levels, and highlighting major areas of interest and concern for police researchers, as well as possible avenues for future work.

B. Recent Research on Police Discretion in Canada

It is important to note that empirical research on policing in Canada – and on police discretion in particular – is much less extensive than that to be found in countries like the United States or the United Kingdom. Even when compared to countries with a similar population size such as Australia, it remains the case that independent studies of Canadian police behaviour and discretion are few and far between. This report does not consider in detail the reasons for the dearth of Canadian research in this area. However, a combination of factors no doubt play a role, including the relative lack of government and charitable foundation funding for large-scale qualitative research on policing, as well as the difficulties that face researchers seeking access to policing organizations at all levels in Canada.¹⁰⁰ Moreover, much like in other jurisdictions, what research there is on police discretion in Canada has focused almost exclusively on the decision to arrest. But as has already been noted, the “social intervention” aspect of policing involves many forms of formal and informal decision-making, and caution therefore needs to be exercised when extrapolating conclusions about the exercise of police discretion from only the specific context of arrest.¹⁰¹

In terms of the research itself, in Canada the focus has been primarily on the role of discretion in the policing of minorities and young people. Although a number of independent

¹⁰⁰ See Ricciardelli, R & Griffiths, CT. (2017) “North of 49: The Dynamics of Canadian Policing” *Police Practice and Research* 18(6): 524–27; Huey, L & Ricciardelli, R. (2016) “From Seeds to Orchards: Using Evidence-Based Policing to Address Canada’s Policing Research Needs” *Canadian Journal of Criminology and Criminal Justice* 58: 119–31; Standing Committee on Public Safety and National Security. (2014) “Economics of Policing: Report.” House of Commons, 41st Parliament, 2nd Session.

¹⁰¹ Schulenberg (2015), 248.

inquiries have investigated the under- and over-policing of Indigenous communities and systemic problems with respect to the police response to violence against Indigenous women and girls,¹⁰² very few empirical studies have directly examined the operation of discretion with respect to the policing of Indigenous people.¹⁰³ This presents a significant problem when it comes to discussions about the role of police discretion in Canada, particularly given that it is now generally accepted that many municipal and provincial police services – as well as the RCMP – suffer from longstanding problems of systemic racism. As Chief Bryan Larkin observed in his Presentation to the Standing Committee on Public Safety and National Security in 2020, we have “study after study, including government commissioned reports, that demonstrate we have an issue with systemic racism throughout our justice system, which includes our legal system, our courts, and our police services.”¹⁰⁴ Given this, there is clearly a pressing need for

¹⁰² Linden, SB. (2007) “Report of the Ipperwash Inquiry, Volumes 1–4.” Ontario Ministry of the Attorney General (May 2007), <https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html> (accessed 6 April 2022); Oppal, WT. (2012) “Forsaken: The Report of the Missing Women Commission of Inquiry, Volumes I–VI.” British Columbia (November 2012), <https://missingwomen.library.uvic.ca/index.html%3Fp=30.html> (accessed 6 April 2022); National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada). (2019) “Reclaiming Power and Place: Final Report of the National Inquiry into MMIWG, Volumes 1a and 1b” (June 2019), <https://www.mmiwg-ffada.ca/final-report/> (accessed 6 April 2022).

¹⁰³ Owusu-Bempah, A & Luscombe, A. (2021) “Race, Cannabis and the Canadian War on Drugs: An Examination of Cannabis Arrest Data by Race in Five Cities” *International Journal of Drug Policy* 91: 102937. To date, much of the academic research on the relationships between policing and Indigenous communities in Canada has focused on police violence towards Indigenous people, the failure of the police to provide services to Indigenous communities, or Indigenous attitudes to the police. See Rudin, J. (2006) “Aboriginal Peoples and the Criminal Justice System.” Research paper prepared for the Ipperwash Inquiry, http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf (accessed 6 April 2022); Comack, E. (2012) *Racialized Policing: Aboriginal People’s Encounters with the Police*. Halifax: Fernwood; Cao, L. (2014) “Aboriginal People and Confidence in the Police” *Canadian Journal of Criminology and Criminal Justice* 56(5): 499–526; Palmater, P. (2016) “Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence against Indigenous Women and Girls in the National Inquiry” *Canadian Journal of Women and the Law* 28(2): 253–84; Alberton, AM, Gorey, KM, Angell, GB, & McCue, HA. (2019) “Intersection of Indigenous Peoples and Police: Questions about Contact and Confidence” *Canadian Journal of Criminology and Criminal Justice* 61(4): 101–19; and Samuels-Wortley, K. (2021) “To Serve and Protect Whom? Using Composite Counter-storytelling to Explore Black and Indigenous Youth Experiences and Perceptions of the Police in Canada” *Crime & Delinquency* 67(8): 1137–64.

¹⁰⁴ Evidence, 1st Session, 43rd Parliament, Meeting 12, 14 August 2020, 1215 (Chief Bryan Larkin, Chief of Police, Waterloo Regional Police Service, and member of the Drug Advisory Committee, Canadian Association of Chiefs of Police). See also Standing Committee on Public Safety and National Security (2021), cited above. Speaking in a similar vein, former Vancouver Police Board Chair Kennedy Stewart acknowledged “the existence

more independent research on the role that police discretion plays in systemic racism with respect to Indigenous people in Canada – not just in relation to the decision to arrest but also with regard to operational decision-making, the development of policing strategies, and resource deployment.

Turning to the policing of minority communities more generally and Black communities in particular, commentators have drawn attention to a lack of Canadian research on the relationship between race and police practices,¹⁰⁵ but there is evidence that race plays a significant role in the decision to stop, search, and arrest in Canada. Drawing on extensive interview data collected in 2007, for example, Wortley and Owusu-Bempah have found that when it comes to “street-level” interactions with the police – which frequently involve the use of discretion – Black people are far more likely to be stopped and searched (which also increases their likelihood of being arrested and drawn into the criminal justice system):

According to our results, blacks are over three times more likely to experience multiple police stops than whites or Asians and are three times more likely to report being searched during these police encounters. Black males appear to be particularly vulnerable to police stop and search practices. Black respondents are also six times more likely than respondents from other racial backgrounds to report that they have close friends or family members who had been a recent victim of racial profiling. Importantly, racial differences with respect to both direct and indirect police contact remain statistically significant after controlling for other relevant variables including age, income, education, driving habits, community-level crime, alcohol and marijuana use and criminal history. These findings suggest that race matters.¹⁰⁶

of systemic racism in all our public and private institutions, including police services.” See Vancouver Police Board. (2020) “Statement from the Vancouver Police Board regarding Police Reform.” Media release (22 June 2020), <https://vancouverpoliceboard.ca/police/policeboard/documents/2020-06-22-Board-Statement-Provincial-Review.pdf> (accessed 6 April 2022). Furthermore, RCMP Commissioner Brenda Lucki also acknowledged in June 2020 that “systemic racism exists in the RCMP” and that there had been a failure to treat “racialized and Indigenous people fairly.” See Royal Canadian Mounted Police (RCMP). (2020) “Statement by Commissioner Brenda Lucki.” Media release (12 June 2020), <https://www.rcmp-grc.gc.ca/en/news/2020/statement-commissioner-brenda-lucki> (accessed 6 April 2022).

¹⁰⁵ Wortley & Jung (2020), 7.

¹⁰⁶ Wortley, S & Owusu-Bempah, A. (2011) “The Usual Suspects: Police Stop-and-Search Practices in Canada” *Policing and Society* 21(4): 395–407.

Writing some ten years later, Wortley and Jung noted in their 2020 report to the Ontario Human Rights Commission that a series of other Canadian studies have also suggested that Black people are “highly over-represented with respect to certain discretionary offences.”¹⁰⁷ Although they prefaced their review of the research literature by noting that “studies that examine the impact of both offender and victim race on arrest decisions have rarely been conducted in Canada,” Wortley and Jung have pointed to the fact that Black people in Canada are more likely to be subjected to racially biased police decisions – particularly the decision to stop and search – than white people, with the result that they are also more likely to be charged with drug possession and related offences. Summarizing their own work on the role of race in the decision to arrest and charge, Wortley and Jung also have noted that their findings with respect to the Toronto Police Service (TPS) are consistent with those from similar studies across Canada:

The data presented in this report expose dramatic racial disparities with respect to TPS charge practices. In the past when faced with such statistics, police services and associations have often argued that disparity does not prove discrimination. However, in our opinion, the gross racial disparities documented by this inquiry strongly support the argument that racial bias exists and must be taken seriously.¹⁰⁸

The relative lack of independent research studies is not the only barrier to a better understanding of the relationship between race and police discretion in Canada. As Wortley and Jung have pointed out, historically, the police and governments in Canada “have not responded well to academic and community requests for data collection and data analysis frameworks that

¹⁰⁷ Wortley & Jung (2020), 7. A number of studies on the relationship between race and policing practices in Canada are cited in Wortley and Jung’s submission to the Commission, including: Wortley, S & Tanner, J. (2005) “Inflammatory Rhetoric? Baseless Accusations? Responding to Gabor’s Critique of Racial Profiling Research in Canada” *Canadian Journal of Criminology and Criminal Justice* 47(3): 581–609; Wortley & Owusu-Bempah. (2016); Wortley (2018); Wortley, S & Kellough, G. (2004) “Racializing Risk: Police and Crown Discretion and the Over-representation of Black People in the Ontario Criminal Justice System” in A Harriott, F Braithwaite, and S Wortley (eds), *Crime and Criminal Justice in the Caribbean and among Caribbean Peoples*, 173–205. Kingston: Arak Publications.

¹⁰⁸ Wortley & Jung (2020), 109.

would better address allegations of racial bias.”¹⁰⁹ This problem has been compounded by the fact that many police services in Canada do not collect racially disaggregated arrest data. This problem has been highlighted repeatedly by police researchers in Canada, with Millar and Owusu-Bempah arguing that it can be viewed as tantamount to the “whitewashing” of police racism via data suppression.¹¹⁰ Problems related to the transparency of policing data were also recently highlighted as part of an inquiry into the use of street checks in Nova Scotia.¹¹¹

In addition to this research on discretionary charging and racism, a number of Canadian studies have examined the operation of police discretion in relation to young people. Fitzgerald and Carrington, for example, have noted that there is a considerable body of evidence to suggest that personal characteristics such as age and gender play a significant role when it comes to how the police make decisions with regards to juveniles in Canada.¹¹² In particular, they have pointed to Canadian studies that suggest that the police are more likely to treat younger individuals more leniently, with demeanour also being a strong additional predictor when it comes to how police discretion is used. On the specific question of the relationship between age and race, Fitzgerald and Carrington have noted that the research in this area suggests the two variables interact in complex ways:

Some research supports the suggestion that the effect of race on police decision-making may in fact be “conditional” or “interactive” in that it is “dependent on the level of other variables.” For example, in Wortley and Tanner’s (2005) study of Canadian young people, low-risk black youth were more likely to receive police attention than low-risk

¹⁰⁹ Wortley & Jung (2020), 114.

¹¹⁰ Millar, P & Owusu-Bempah, A. (2011) “Whitewashing Criminal Justice in Canada: Preventing Research through Data Suppression” *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société* 26(3): 653–61.

¹¹¹ See Wortley, S. (2019) “Halifax, Nova Scotia: Street Checks Report.” Nova Scotia Human Rights Commission, available at <https://humanrights.novascotia.ca/streetchecks> (accessed 18 May 2022); MacDonald, JM & Taylor, J. (2019) “Independent Legal Opinion on Street Checks Halifax.” Nova Scotia Human Rights Commission, available at <https://humanrights.novascotia.ca/news-events/news/2019/street-checks-legal-opinion> (accessed 18 May 2022).

¹¹² Fitzgerald, RT & Carrington, PJ. (2011) “Disproportionate Minority Contact in Canada: Police and Visible Minority Youth” *Canadian Journal of Criminology and Criminal Justice* 53(4): 449–86, 454–55.

white youth, but this relationship did not hold among high-risk youth. Thus, the level of DMC [disproportionate minority contact] had a negative association with the level of deviance of the juvenile. Wortley and Tanner found that similar proportions of black and white high deviance youth reported being stopped by police in the past two years (83% of blacks and 82% of whites); but among low-deviance youth, the racial difference in police stops was large and statistically significant (49% of black youth versus 17% of whites). They argued that this finding suggests there are racial differences in the extent to which “good behaviour” protects youth from police attention.¹¹³

More recently, a number of other studies in Canada have confirmed that young Black people are more likely to be the subject of police attention and receive less favourable treatment when it comes to the exercise of officer discretion.¹¹⁴ For example, in her study of youth diversion programs in Canada, Samuels-Wortley has found that Black youth are more likely to be charged than their white counterparts, particularly when it comes to drug possession offences.¹¹⁵ In addition, she has also found that young Black and other minority females are less likely to be cautioned than white females. After noting that “the decision to divert youth away from the justice system is based primarily on the discretion of individual police officers,” Samuels-Wortley has concluded that selection bias plays a significant role in police decision-making, leading to less favorable outcomes for minority youth:

Ultimately, racial bias may play a sufficient role in the Canadian youth criminal justice system. This study highlights that in particular, bias within policing can have a specific impact on racialized youth in Canada. Police discretion plays a significant role in who enters the court system, thus any biases may influence arrest decisions. Police should

¹¹³ Fitzgerald & Carrington (2011), 456, citing Bishop, DM. (2005) “The Role of Race and Ethnicity in Juvenile Justice Processing” in DF Hawkins and K Kempf-Leonard (eds), *Our Children, Their Children: Confronting Racial and Ethnic Difference in American Juvenile Justice*. Chicago: University of Chicago Press, 28; and Wortley, S & Tanner, J. (2005) “Inflammatory Rhetoric? Baseless Accusations? Responding to Gabor’s Critique of Racial Profiling Research in Canada” *Canadian Journal of Criminology and Criminal Justice* 47(3): 581–609, 596.

¹¹⁴ Owusu-Bempah, A & Wortley, S. (2014) “Race, Crime, and Criminal Justice in Canada” in S Bucerius & M Tonry (eds), *Oxford Handbook of Ethnicity, Crime, and Immigration*, pp. 281–320. Oxford: Oxford University Press.

¹¹⁵ Samuels-Wortley, K. (2022) “Youthful Discretion: Police Selection Bias in Access to Pre-charge Diversion Programs in Canada” *Race and Justice* 12(2): 387–410.

acknowledge the role they may play in the overrepresentation of Black and Indigenous peoples in the Canadian youth criminal justice system.¹¹⁶

Returning to Fitzgerald and Carrington's overview of the research literature, they have also drawn attention to a number of Canadian studies that suggest police in metropolitan areas are more likely to choose a formal response when dealing with juveniles.¹¹⁷ In one of the studies referred to, for example, Jennifer Schulenberg attempted to test four prominent ecological theories of crime – urbanization theory, social disorganization theory, opportunity theory, and the overload hypothesis – with a view to better understanding how police discretion is exercised with respect to young people in Canada. Although Schulenberg has acknowledged that her study was limited in a number of important ways – particularly in terms of measuring how different theories of policing are operationalized – she has noted,

[T]he use of formal action with youth by Canadian police forces does seem to be affected by the size of the community and its level of social disorganization but not by the opportunity for crime, the actual crime rate, or the workload of the police.¹¹⁸

Interestingly, other studies have also suggested that the use of police discretion in relation to young people may vary between metropolitan and rural areas. For example, Schulenberg and Warren have noted that community relationships are more likely to play a role when it comes to police decision-making in rural areas:

The factors considered important by officers working in metropolitan areas suggest an offense orientation by placing more weight on the characteristics of the offense and not a victim's preference or a youth's personal situation. In contrast, officers in rural, small-town jurisdictions display a stronger focus on offenders and victims as these officers are

¹¹⁶ Samuels-Wortley (2022), 406.

¹¹⁷ Schulenberg, JL. (2003) "The Social Context of Police Discretion with Young Offenders: An Ecological Analysis" *Canadian Journal of Criminology and Criminal Justice* 45: 127–58; Schulenberg, JL, Jacob, JC, and Carrington, PJ. (2007) "Ecological Analysis of Crime Rates and Police Discretion with Young Persons: A Replication" *Canadian Journal of Criminology and Criminal Justice* 49: 261–77.

¹¹⁸ Schulenberg (2003), 149.

the most likely to consider victim preference and the relationship between the victim and offender as a factor when compared to other officers in other community types.¹¹⁹

While these findings have been confirmed by subsequent studies, more recent research has shed additional light on how various personal and context specific factors influence how police discretion is exercised with respect to young Canadians in non-metropolitan areas. Based on a study of police interactions with young people in three municipalities in British Columbia, Card et al have concluded that age, gender identity, and race have a significant impact on how police discretion is exercised:

Notably, we found that gender non-binary and Indigenous participants were more likely to experience punitive measures (i.e., being handcuffed or arrested), even after adjusting for histories of drug dealing, past police encounters, and contextual factors. Younger participants were also more likely to be searched or frisked by police regardless of illegal activity or being suspected of a crime at the time of the encounter. These findings indicate that outcomes of encounters between young people and police may be discriminatory – predicated on individual’s visible characteristics, such as race, gender, and age.¹²⁰

Before concluding this brief overview of the research on factors influencing police discretion in Canada, it is important to note that new lines of inquiry have begun to emerge in recent years. Notably, a number of prominent researchers have now turned their attention to the question of how police discretion is exercised in relation to persons with issues regarding mental health.¹²¹ In addition, various studies and reports have also examined the role played by police discretion in the criminal justice system’s response to gender-based and intimate partner violence

¹¹⁹ Schulenberg, JL. (2010) “Patterns in Police Decision-Making with Youth: An Application of Black’s Theory of Law” *Crime, Law and Social Change* 53(2): 109–29, 126. See also Schulenberg, JL & Warren, D. (2009) “Police Discretion with Apprehended Youth: Assessing the Impact of Juvenile Specialization” *Police Practice and Research: An International Journal* 10(1): 3–16.

¹²⁰ Card, KG, Selfridge, M, Greer, AM, Hepburn, KJ, Fournier, AB, Sorge, J, & Macdonald, S. (2021) “Event-Level Outcomes of Police Interactions with Young People in Three Non-metropolitan Cities across British Columbia, Canada” *International Journal of Drug Policy* 91: 102824.

¹²¹ See, for example, Schulenberg, JL. (2016) “Police Decision-Making in the Gray Zone: The Dynamics of Police–Citizen Encounters with Mentally Ill Persons” *Criminal Justice and Behavior* 43(4): 459–82; and Shore, K & La Voie, JA. (2019) “Exploring Mental Health-Related Calls for Police Service: A Canadian Study of Police Officers as ‘Frontline Mental Health Workers’” *Policing: A Journal of Policy and Practice* 13(2): 157–71.

and sexual assault in Canada.¹²² Unfortunately, however, it remains the case that there have been few Canadian-specific studies of the operation of police discretion in these contexts.

Considering the challenges that have faced researchers in Canada who have sought to study the role of discretion in the policing of Indigenous people, racial minorities, and young people, this is hardly surprising. It does, however, point to a persistent problem when it comes to discussions about the nature and function of police discretion in Canada: they have largely taken place against the backdrop of a profound and longstanding dearth of independent research on police behaviour at the municipal, provincial, and federal levels. When compared to countries like the United States and the United Kingdom, it is no exaggeration to say that Canada lags behind when it comes to police research, with the result that it is difficult to ensure that the development of policing practices and policies in Canada are sufficiently driven by evidence. This is a point that will be further developed in the next and concluding section.

V. Reconsidering Police Discretion in Canada

This report has attempted to provide insight into the meaning and operation of police discretion in Canada. As is apparent from the previous sections, discretion lies at the heart of almost every aspect of policing at the municipal, provincial, and federal levels in Canada, and as a result, it is difficult to distinguish between the many factors that influence how it is exercised or how its use determines how suspects, victims, and members of the public are treated by the criminal justice system. In the Canadian context, debates about the proper role and limits of police discretion are

¹²² Salerno-Ferraro, AC & Jung, S. (2021) “To Charge or Not to Charge? Police Decisions in Canadian Sexual Assault Cases and the Relevance of Rape Myths” *Police Practice and Research* 1–14; Fagerlund, M. (2021) “Gender and Police Response to Domestic Violence” *Police Practice and Research* 22(1): 90–108; Ryan, C, Silvio, D, Borden, T, & Ross, NM. (2022) “A Review of Pro-arrest, Pro-charge, and Pro-prosecution Policies as a Response to Domestic Violence” *Journal of Social Work* 22(1): 211–38; Gill, C, Campbell, MA, & Ballucci, D. (2021) “Police Officers’ Definitions and Understandings of Intimate Partner Violence in New Brunswick, Canada” *Police Journal: Theory, Practice and Principles* 94(1): 1–20.

also constrained by a shortage of independent academic research on how police discretion functions in different contexts and on how the day-to-day decisions of the police impact the lives of the individuals and communities they come into contact with and serve.

Faced with these challenges, it is tempting to conclude that there is little that can be said about police discretion in Canada *generally* and that calls for reforming the way in which police discretion operates should be narrow and focused on particular contexts – such as stop, search, and arrest, or on the experience of particular groups, such as Indigenous people and their communities, racial minorities, and young people. Although there is obvious value in taking such an approach – not least because it allows us to prioritize efforts at reforming police discretion with a view to minimizing its negative impacts on already vulnerable and marginalized individuals – it would be a mistake to assume that a broader discussion of the nature of police discretion in Canada is not possible or desirable.

As section II of this report highlighted, although police discretion was first “discovered” by sociologists and criminologists over 60 years ago, our understanding of that discretion remains plagued by a lack of clarity about the source and nature of that discretion. Returning to the contrasting accounts offered by Davis and Kleinig, it should be apparent that definition matters. How we view police discretion – whether as a product of the limits of rules or as a resource granted to the police – has significant implications for the question of how we should respond to it. More significantly, clarity about the nature and operation of police discretion can help us to address fundamental questions of regulation and reform.

Writing in 2005, James Stribopoulos presented a powerful argument in favour of greater parliamentary regulation of police discretion, based in part on a critique of judicial attempts to impose effective restraints on the exercise of police powers in Canada. According to

Stribopoulos, the police perception that “the law is only remotely related to the realities of their work” was reinforced by what he referred to as a “free floating legal structure” propped up in part by a series of decisions by the Supreme Court:

[J]udicially created rules, no matter how clear they may be, cannot effectively regulate police power. Enforcement of judicially created rules depends on judicial censure, usually through the exclusionary remedy. Redress in cases where innocent individuals are unjustifiably detained, searched or arrested is quite unlikely. The fatal flaw with the Court’s use of law-making devices lies in the fact that they cannot produce the sort of procedures most needed if low-level exercises of police discretion are going to be effectively checked. In fact, by forestalling a dialogue on the subject of police powers between the Court and Parliament, judicial lawmaking actually has the unfortunate tendency of aggravating the low visibility of police–citizen abuses.¹²³

Later in the same article, Stribopoulos went on to argue that, given the inability of judicially created rules to effectively regulate police power, Parliament must step in and enact clear rules and procedures that set appropriate limits on the exercise of police discretion:

[O]ne of the major challenges in effectively regulating police authority is the low visibility of most police–citizen encounters. Clear and prospective rules will undoubtedly help to confine and structure police discretion but will do little to actually “check” police authority. What is needed most are administrative procedures that serve to check low-level and routine exercises of police discretion—procedures such as reporting requirements, approval by senior officers for certain investigative activities or procedures, and even more independent checks (for example, where feasible, through the warrants process). Even though the Court can insist on express and legislated rules, its options seem limited where the rules create a scheme that contains insufficient procedural checks and is therefore vulnerable to systematic evasion and abuse by those acting under it.¹²⁴

One of the strengths of Stribopoulos’ argument here is that it comes at the conclusion of a detailed and comprehensive analysis of the relevant Canadian case law on police powers, an analysis that highlights the institutional limits of the Supreme Court and its inconsistent approach to this issue – particularly since the introduction of the *Charter of Rights and Freedoms*.

Significantly, Stribopoulos has acknowledged that his analysis relies on Davis’ definition of

¹²³ Stribopoulos (2005), 61.

¹²⁴ Stribopoulos (2005), 72.

police discretion, and police discretion in Canada – at least in the days before the *Charter* – has risen to the fore in situations where the legal limits of police authority are unclear.

Although Stribopoulos has made a strong case for Parliament to step in and place police powers in Canada on a clear legal footing, it would be even more compelling if grounded in an understanding of discretion more aligned with that advanced by Kleinig. Put another way, if we view police discretion as a privilege or resource granted to the police – to be used “with discretion” – then it makes even more sense for Parliament, as the source of that privilege, to provide a clear basis for its exercise and for statutory rules and procedures that circumscribe its use. All of this is to say that in order to move forward in our consideration of the role of police discretion in Canada, we should look to abandon the idea that it is something extra-legal or outside the scope of rules.

Moving to this view of police discretion – one that sees it as a normative resource that is granted rather than a capacity that is assumed – also provides a more coherent basis for conversations about both oversight and limitations in certain contexts. If we start from the position that police discretion is conferred and is therefore a legitimate, legally bounded exercise of authority, then it becomes easier to justify efforts to subject that discretion to oversight and review. This model would also represent a fundamental challenge to the view often held by police officers that discretion is an unavoidable, extra-legal necessity that makes it possible for them to do their job (and as such, efforts to restrict it should be resisted). Police discretion may well be necessary and desirable but only insofar as it is granted by express mandate – and therefore subject to meaningful review. Returning to Kleinig’s analysis,

Discretionary authority may be granted in advance, within the limitations mandated by laws, regulations, and supervisory determinations. And particular exercises of that discretion, like exercises of judicial discretion, may be open to public review and discussion. As long as this is so, such discretion has every claim to be part of a democratic order. The “rule of law, not of men” is directed against arbitrary exertions of

power, not against discretion. Discretion, as a normative resource, is a form of decision-making power that is embedded in a rationale, and although that may not be sufficient to justify its every exercise, it is to be firmly distinguished from action based on personal preference. That authority may, as a result of public scrutiny, be broadened or narrowed via legislation, judicial review, or administrative rule making. As with the previous objection, the crucial issue regarding the democratic conformity of police discretionary authority will concern its limits rather than its general legitimacy.¹²⁵

Before concluding this report, it is important to draw attention to two fundamental problems that should be key considerations for any policymakers, legislators, or police managers tasked with reforming the operation of police discretion in Canada. The first of these is the vague and incomplete language around police powers contained in the majority of provincial and federal policing statutes. As discussed in section III, there is considerable variation in how the police role – and the powers and duties that go with it – is framed in different parts of Canada, which has only contributed to a lack of clarity about the nature and limits of police discretion. Finally, it cannot be over-emphasized how the lack of independent research on police discretion hampers informed debate about the future of that discretion. Despite the considerable efforts of a small number of academic lawyers, sociologists, criminologists, and police scholars in Canada, there are major and disturbing gaps in the research literature when it comes to how police discretion functions, particularly in relation to Indigenous communities and the police response to serious crimes of violence against women.

As has already been noted, some of these gaps can be attributed to a lack of funding and the difficulties associated with obtaining criminal justice data. However, in many respects the problem derives from a more fundamental problem – a lack of engagement on the part of police services in Canada with academic research. As many commentators have noted, gaining access to police organizations – for the purpose of interviewing and observing officers – is extremely

¹²⁵ Kleinig (1996), 89.

difficult in Canada. Speaking before the Standing Committee on Public Safety and National Security in 2013, Griffiths highlighted the particular challenge of developing ongoing research relationships with the police:

[O]ur research endeavours with respect to policing in Canada are scattered, and there is no coordinating effort. There are very few linkages among universities, governments, and police services. Research is often being done on a one-and-done basis, whether it's by private consulting companies such as KPMG or by university-based scholars who work on a single type of project and then move on. We really don't have a coordinating body. We really don't have a repository, if you will, for police research, and an organization, agency, or institute that could serve as a catalyst for facilitating these collaborative relationships, and equally as important, for the dissemination of information.¹²⁶

While this is a problem for the development of independent research on policing generally, it is particularly problematic when it comes to the study of police discretion. Studying arrest statistics and patterns of incarceration can only take us so far. If Canada wants to move to a position where decisions about how to regulate police discretion are driven by evidence – and a deeper understanding of how decisions are *actually* made – then researchers need to have access to officers. Going further, this access needs to be provided at all levels of our police services. Although a great deal of police power is exercised at “street level,” discretionary decisions are made at every level of the police organizational hierarchy. If we are to seriously address many of the issues concerning the exercise of police discretion identified in this report, then police services need to be willing – or possibly compelled – to engage with independent researchers. Moreover, government needs to be willing to properly fund this research – not just on a piecemeal basis but as part of a larger commitment to police accountability and ensuring that police powers are exercised in a manner that is consistent with the rights and values expressed in the *Canadian Charter of Rights and Freedoms*.

¹²⁶ Standing Committee on Public Safety and National Security (2014), 42. A number of prominent Canadian police scholars attempted to address this problem by establishing the Canadian Society of Evidence-Based Policing (CAN-SBP) in 2015. See the CAN-SBP website, <https://www.can-sebp.net/>.

References

- Alberton, AM, Gorey, KM, Angell, GB, & McCue, HA. (2019) “Intersection of Indigenous Peoples and Police: Questions about Contact and Confidence” *Canadian Journal of Criminology and Criminal Justice* 61(4): 101–19.
- Beckett, K. (2016) “The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing” *Harvard Law and Policy Review* 10(1): 77–100.
- Berk, SF & Loseke, DR. (1980) “‘Handling’ Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances” *Law and Society Review* 15: 317–46.
- Bishop, DM. (2005) “The Role of Race and Ethnicity in Juvenile Justice Processing” in DF Hawkins and K Kempf-Leonard (eds), *Our Children, Their Children: Confronting Racial and Ethnic Difference in American Juvenile Justice*. Chicago: University of Chicago Press.
- Bittner, E. (1967) “The Police on Skid-Row: A Study of Peace Keeping” *American Sociological Review* 32(5): 699–715.
- . (1970) *The Functions of the Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models*. Chevy Chase, MD: National Institute of Mental Health.
- Black, DJ. (1971) “The Social Organization of Arrest” *Stanford Law Review* 23(6): 1087–111.
- . (1976) *The Behavior of Law*. New York: Academic Press.
- . (1980) *The Manners and Customs of the Police*. New York: Academic Press.
- Blalock, HM. (1967) *A Theory of Minority-Group Relations*. New York: John Wiley.
- Broderick, JJ. (1977) *Police in a Time of Change* (Morristown, NJ: General Learning Press.
- Brodeur, JP. (1983) “High Policing and Low Policing: Remarks about the Policing of Political Activities” *Social Problems* 30(5): 507–20.
- Bronitt, SH & Stenning, P. (2011) “Understanding Discretion in Modern Policing” *Criminal Law Journal* 35(6): 319–32.
- Brown, MK. (1981) *Working the Street: Police Discretion and the Dilemmas of Reform*. New York: Russell Sage Foundation.
- Brown, RA, Novak, KJ, & Frank, J. (2009) “Identifying Variation in Police Officer Behavior between Juveniles and Adults” *Journal of Criminal Justice* 37: 200–8.
- Buckley, M. (2012) “Violence against Women: Evolving Canadian and International Standards on Police Duties to Protect and Investigate.” Background research report for the British Columbia Missing Women Commission of Inquiry (June 2012),

<https://missingwomen.library.uvic.ca/wp-content/uploads/2010/10/RESE-5-June-2012-MB-Violence-Against-Women-Evolving-Legal-Standards-on-Police-Duties-to-Protect-Investigate.pdf> (accessed 6 April 2022).

- Cao, L. (2014) “Aboriginal People and Confidence in the Police” *Canadian Journal of Criminology and Criminal Justice* 56(5): 499–526.
- Card, KG, Selfridge, M, Greer, AM, Hepburn, KJ, Fournier, AB, Sorge, J, & Macdonald, S. (2021) “Event-Level Outcomes of Police Interactions with Young People in Three Non-metropolitan Cities across British Columbia, Canada” *International Journal of Drug Policy* 91.
- Carrington, PJ & Schulenberg, JL. (2008) “Structuring Police Discretion: The Effect on Referrals to Youth Court” *Criminal Justice Policy Review*, 19(3): 349–67.
- Chamberlain, E. (2012) “Tort Claims for Failure to Protect: Reasons for (Cautious) Optimism since *Mooney*” *Saskatchewan Law Review* 75: 245.
- Chappell, AT, MacDonald, J M, & Manz, PW. (2006) “The Organizational Determinants of Police Arrest Decisions” *Crime & Delinquency* 52(2): 287–306.
- Christie, GC. (1986) “An Essay on Discretion” *Duke Law Journal* 5: 747–78.
- Comack, E. (2012) *Racialized Policing: Aboriginal People’s Encounters with the Police*. Halifax: Fernwood.
- Davis, KC. (1969) *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press.
- . (1970) “Discretionary Justice” *Journal of Legal Education* 23(1): 56–62.
- Dixon, D. (1997) *Law in Policing*. Oxford: Clarendon Press.
- Donohue III, JJ & Levitt, SD. (2001) “The Impact of Race on Policing and Arrests” *Journal of Law and Economics* 44(2): 367–94.
- Dworkin, R. (1977) *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.
- Ericson, RV. (1981) *Making Crime: A Study of Detective Work*. Toronto: Butterworths.
- . (2007) “Rules in Policing: Five Perspectives” *Theoretical Criminology* 11(3): 367–400.
- Ericson, RV & Haggerty, KD. (1997) *Policing the Risk Society*. Toronto: University of Toronto Press.
- Fagerlund, M. (2021) “Gender and Police Response to Domestic Violence” *Police Practice and Research* 22(1): 90–108.

- Feldthusen, B. (2017) “Bungled Police Emergency Calls and the Problems with Unique Duties of Care” *University of New Brunswick Law Journal* 68: 169–201.
- Fitzgerald, RT & Carrington, PJ. (2011) “Disproportionate Minority Contact in Canada: Police and Visible Minority Youth” *Canadian Journal of Criminology and Criminal Justice* 53(4): 449–86.
- Fyfe, JJ. (2002) “Too Many Missing Cases: Holes in Our Knowledge about Police Use of Force” *Justice Research and Policy* 4(1–2): 87–102.
- Galligan, DJ. (1990) *Discretionary Powers: A Legal Study of Official Discretion*. Oxford: Oxford University Press.
- Gilbert, MJ. (1997) “The Illusion of Structure: A Critique of the Classical Model of Organization and the Discretionary Power of Correctional Officers” *Criminal Justice Review* 22(1): 49–64.
- Gill, C, Campbell, MA, & Ballucci, D. (2021) “Police Officers’ Definitions and Understandings of Intimate Partner Violence in New Brunswick, Canada” *Police Journal: Theory, Practice and Principles* 94(1): 1–20.
- Goldstein, H. (1963) “Police Discretion: The Ideal versus the Real” *Public Administration Review* 23(3): 140–48.
- Goldstein, J. (1960) “Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice” *Yale Law Journal* 69(4): 543–94.
- Goold, BJ. (2016) “Policing and Human Rights” in B Bradford, B Jauregui, I Loader, and J Steinberg (eds), *SAGE Handbook of Global Policing*. London: Sage.
- Herbert, SK. (1997) *Policing Space: Territoriality and the Los Angeles Police Department*. Minneapolis: University of Minnesota Press.
- Huey, L & Ricciardelli, R. (2016) “From Seeds to Orchards: Using Evidence-Based Policing to Address Canada’s Policing Research Needs” *Canadian Journal of Criminology and Criminal Justice* 58: 119–31.
- Huff, J. (2021) “Understanding Police Decisions to Arrest: The Impact of Situational, Officer, and Neighborhood Characteristics on Police Discretion” *Journal of Criminal Justice* 75.
- Ibrahim, D. (2020) “Public Perceptions of the Police in Canada’s Provinces, 2019” Juristat, Canadian Centre for Justice Statistics (25 November 2020).
- Johnson, AD & Vaughn, MS. (2016) “Decoupling and Police Organizational Structure” *Administrative Theory & Praxis* 38(3): 157–67.
- Johnson, RR & Olschansky, EL. (2010) “The Ecological Theory of Police Response: A State Police Agency Test” *Criminal Justice Studies* 23(2): 119–31.

- Kane, RJ, Gustafson, JL, & Bruell, C. (2013) “Racial Encroachment and the Formal Control of Space: Minority Group-Threat and Misdemeanor Arrests in Urban Communities” *Justice Quarterly* 30(6): 957–82.
- Kleinig, J. (1996) *The Ethics of Policing*. Cambridge: Cambridge University Press.
- Klockars, CB. (1985) *The Idea of Police*. Beverly Hills: Sage.
- Linden, SB. (2007) “Report of the Ipperwash Inquiry, Volumes 1–4.” Ontario Ministry of the Attorney General (May 2007), <https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html> (accessed 6 April 2022).
- Long, K and Hollands, A. (2014) “Memorandum: Murdered and Missing Indigenous Women Legal Strategies.” Legal Strategy Coalition on Violence Against Indigenous Women (July 2014), <https://www.leaf.ca/wp-content/uploads/2015/06/2014-07-14-LSC-Memo-re-MMIW-Legal-Strategies.pdf> (accessed 6 April 2022).
- Lum, C. (2011) “The Influence of Places on Police Decision Pathways: From Call for Service to Arrest” *Justice Quarterly* 28(4): 631–65.
- Lundman, RJ. (1979) “Organizational Norms and Police Discretion: An Observational Study of Police Work with Traffic Law Violators” *Criminology* 17(2): 159–71.
- MacDonald, JM & Taylor, J. (2019) “Independent Legal Opinion on Street Checks Halifax.” Nova Scotia Human Rights Commission, available at <https://humanrights.novascotia.ca/news-events/news/2019/street-checks-legal-opinion> (accessed 18 May 2022).
- Mastrofski, SD. (2004) “Controlling Street-Level Police Discretion” *Annals of the American Academy of Political and Social Science* 593(1): 100–18.
- Millar, P & Owusu-Bempah, A. (2011) “Whitewashing Criminal Justice in Canada: Preventing Research through Data Suppression” *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société* 26(3): 653–61.
- Moskos, P. (2012) “Damned if You Don’t: The Dilemma of Police Discretion” *ACJS Today: Academy of Criminal Justice Sciences* 37(2): 19–21.
- Muir, WK. (1979) *Police: Streetcorner Politicians*. Chicago: University of Chicago Press.
- National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada). (2019) “Reclaiming Power and Place: Final Report of the National Inquiry into MMIWG, Volumes 1a and 1b” (June 2019), <https://www.mmiwg-ffada.ca/final-report/> (accessed 6 April 2022).
- Nickels, EL. (2007) “A Note on the Status of Discretion in Police Research” *Journal of Criminal Justice* 35(5): 573–78.

- Novak, KJ, Brown, RA, & Frank, J. (2011) “Women on Patrol: An Analysis of Differences in Officer Arrest Behavior” *Policing: An International Journal of Police Strategies & Management* 34(4): 565–87.
- Oppal, WT. (2012) “Forsaken: The Report of the Missing Women Commission of Inquiry, Volumes I–VI.” British Columbia (November 2012), <https://missingwomen.library.uvic.ca/index.html%3Fp=30.html> (accessed 6 April 2022).
- Owusu-Bempah, A & Luscombe, A. (2021) “Race, Cannabis and the Canadian War on Drugs: An Examination of Cannabis Arrest Data by Race in Five Cities” *International Journal of Drug Policy* 91: 102937.
- Owusu-Bempah, A & Wortley, S. (2014) “Race, Crime, and Criminal Justice in Canada” in S Bucarius & M Tonry (eds), *Oxford Handbook of Ethnicity, Crime, and Immigration*, pp. 281–320. Oxford: Oxford University Press.
- Packer, HL. (1964) “Two Models of the Criminal Process” *University of Pennsylvania Law Review* 113(1): 1–68.
- Palmater, P. (2016) “Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence against Indigenous Women and Girls in the National Inquiry” *Canadian Journal of Women and the Law* 28(2): 253–84.
- Pratt, A & Sossin, L. (2009) “A Brief Introduction of the Puzzle of Discretion” *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société* 24(3): 301–12.
- Ricciardelli, R & Griffiths, CT. (2017) “North of 49: The Dynamics of Canadian Policing” *Police Practice and Research* 18(6): 524–27.
- Robertson, N. (2012) “Policing: Fundamental Principles in a Canadian Context” *Canadian Public Administration* 55(3): 343–63.
- Royal Canadian Mounted Police (RCMP). (2020) “Statement by Commissioner Brenda Lucki.” Media release (12 June 2020), <https://www.rcmp-grc.gc.ca/en/news/2020/statement-commissioner-brenda-lucki> (accessed 6 April 2022).
- Rudin, J. (2006) “Aboriginal Peoples and the Criminal Justice System.” Research paper prepared for the Ipperwash Inquiry, http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf (accessed 6 April 2022).
- Ryan, C, Silvio, D, Borden, T, & Ross, NM. (2022) “A Review of Pro-arrest, Pro-charge, and Pro-prosecution Policies as a Response to Domestic Violence” *Journal of Social Work* 22(1): 211–38.
- Salerno-Ferraro, AC & Jung, S. (2021) “To Charge or Not to Charge? Police Decisions in Canadian Sexual Assault Cases and the Relevance of Rape Myths” *Police Practice and Research* 1–14.

- Samuels-Wortley, K. (2021) “To Serve and Protect Whom? Using Composite Counter-storytelling to Explore Black and Indigenous Youth Experiences and Perceptions of the Police in Canada” *Crime & Delinquency* 67(8): 1137–64.
- . (2022) “Youthful Discretion: Police Selection Bias in Access to Pre-charge Diversion Programs in Canada” *Race and Justice* 12(2): 387–410.
- Schulenberg, JL. (2003) “The Social Context of Police Discretion with Young Offenders: An Ecological Analysis” *Canadian Journal of Criminology and Criminal Justice* 45: 127–58.
- . (2010) “Patterns in Police Decision-Making with Youth: An Application of Black’s Theory of Law” *Crime, Law and Social Change* 53(2): 109–29.
- . (2015) “Moving beyond Arrest and Reconceptualizing Police Discretion: An Investigation into the Factors Affecting Conversation, Assistance, and Criminal Charges” *Police Quarterly* 18(3): 244–71.
- . (2016) “Police Decision-Making in the Gray Zone: The Dynamics of Police–Citizen Encounters with Mentally Ill Persons” *Criminal Justice and Behavior* 43(4): 459–82.
- Schulenberg, JL, Jacob, JC, and Carrington, PJ. (2007) “Ecological Analysis of Crime Rates and Police Discretion with Young Persons: A Replication” *Canadian Journal of Criminology and Criminal Justice* 49: 261–77.
- Schulenberg, JL & Warren, D. (2009) “Police Discretion with Apprehended Youth: Assessing the Impact of Juvenile Specialization” *Police Practice and Research: An International Journal* 10(1): 3–16.
- Scott, MS. (2004) “Police Discretion” in LE Sullivan, MS Rosen, DM Schulz, and MR Haberfeld (eds), *Encyclopedia of Law Enforcement*. Thousand Oaks, CA: Sage.
- Sheehy, EA. (2005) “Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from *Jane Doe* to *Bonnie Mooney*” *Canadian Journal of Women & Law* 17(1): 87–116.
- Sherman, LW. (1980) “Causes of Police Behavior: The Current State of Quantitative Research” *Journal of Research in Crime and Delinquency* 17(1): 69–100.
- Shore, K & Lavoie, JA. (2019) “Exploring Mental Health-Related Calls for Police Service: A Canadian Study of Police Officers as ‘Frontline Mental Health Workers’” *Policing: A Journal of Policy and Practice* 13(2): 157–71.
- Skolnick, JH. (1966) *Justice without Trial: Law Enforcement in Democratic Society*. New York: Wiley.
- Smith, BW, Novak, KJ, Frank, J, & Lowenkamp, C. (2005) “Explaining Police Officer Discretionary Activity” *Criminal Justice Review* 30(3): 325–46.

- Sobol, JJ, Wu, Y, & Sun, IY. (2013) “Neighborhood Context and Police Vigor: A Multilevel Analysis” *Crime & Delinquency* 59(3): 344–68.
- Sossin, L. (2007) “The Oversight of Executive Police Relations in Canada: The Constitution, the Court, Administrative Processes and Democratic Governance.” Research Paper Commissioned by the Ipperwash Inquiry, https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/meetings/pdf/Sossin.pdf (accessed 6 April 2022).
- Standing Committee on Public Safety and National Security (Canada). (2014) “Economics of Policing: Report.” House of Commons, 41st Parliament, 2nd Session.
- . (2021) “Systemic Racism in Policing in Canada.” House of Commons, 43rd Parliament, 2nd session, <https://www.ourcommons.ca/Committees/en/SECU/StudyActivity?studyActivityId=10959882> (accessed 6 April 2022).
- Stribopoulos, J. (2005) “In Search of Dialogue: The Supreme Court, Police Powers and the Charter” *Queen’s Law Journal* 31: 1–74.
- Suttles, GD & Suttles, GD (1972) *The Social Construction of Communities*, Vol. 111. Chicago: University of Chicago Press.
- Terpstra, J. (2011) “Two Theories on the Police: The Relevance of Max Weber and Emile Durkheim to the Study of the Police” *International Journal of Law, Crime, and Justice* 39: 1–11.
- Unnever, J, Owusu-Bempah, A, and Deryul, R. (2017) “A Test of the Differential Involvement Hypothesis” *Race and Justice* 9(2): 197–224.
- Vancouver Police Board. (2020) “Statement from the Vancouver Police Board regarding Police Reform.” Media release (22 June 2020), <https://vancouverpoliceboard.ca/police/policeboard/documents/2020-06-22-Board-Statement-Provincial-Review.pdf> (accessed 6 April 2022).
- Weber, M. (1947) *The Theory of Social and Economic Organization*, AM Henderson and T Parsons (trans). New York: Oxford University Press.
- Westen, P. (1982) “The Meaning of Equality in Law, Science, Math, and Morals: A Reply” *Michigan Law Review* 81: 604–63.
- White, SO. (1972) “A Perspective on Police Professionalization” *Law and Society Review* 7: 61–85.
- Wilson, JQ. (1968) *Varieties of Police Behavior*. New York: Atheneum.
- Worden, RE. (1989) “Situational and Attitudinal Explanations of Police Behavior: A Theoretical Reappraisal and Empirical Assessment” *Law and Society Review* 23: 667–711.

- Wortley, S. (2018) “A Double-Edged Sword: Street Checks, Public Safety and the Impact of Racialized Policing” in L Foster, L Jacobs, B Siu, and S Azmi (eds), *Racial Profiling and Human Rights Policy in Canada: The New Legal Landscape*, pp. 238–52. Toronto: Irwin Law.
- . (2019) “Halifax, Nova Scotia: Street Checks Report.” Nova Scotia Human Rights Commission, available at <https://humanrights.novascotia.ca/streetchecks> (accessed 18 May 2022).
- Wortley, S and Jung, M. (2020) “Racial Disparity in Arrests and Charges: An Analysis of Arrest and Charge Data from the Toronto Police Service.” Ontario Human Rights Commission (July 2020), <https://www.ohrc.on.ca/sites/default/files/Racial%20Disparity%20in%20Arrests%20and%20Charges%20TPS.pdf> (accessed 6 April 2022).
- Wortley, S & Kellough, G. (2004) “Racializing Risk: Police and Crown Discretion and the Overrepresentation of Black People in the Ontario Criminal Justice System” in A Harriott, F Brathwaite, and S Wortley (eds), *Crime and Criminal Justice in the Caribbean and among Caribbean Peoples*, 173–205. Kingston: Arawak Publications.
- Wortley, S & Owusu-Bempah, A. (2011) “The Usual Suspects: Police Stop-and-Search Practices in Canada” *Policing and Society* 21(4): 395–407.
- . (2016) “Crime and Justice: The Experiences of Black Canadians” in B Perry (ed) *Diversity, Crime and Justice in Canada*, 2nd edn, pp. 140–67. New York: Oxford University Press.
- Wortley, S & Tanner, J. (2005) “Inflammatory Rhetoric? Baseless Accusations? Responding to Gabor’s Critique of Racial Profiling Research in Canada” *Canadian Journal of Criminology and Criminal Justice* 47(3): 581–609.