[April 21, 2020](https://bscpolicingnetwork.com/2020/04/21/police-discretion-and-the-coronavirus-pandemic/%22%20%5Co%20%227%3A12%20pm) by [drsgrace](https://bscpolicingnetwork.com/author/drsgrace/)

**Police discretion and the coronavirus pandemic**

**Dr. Liz Turner and Dr. Mike Rowe**

The rapid and deadly spread of coronavirus disease (COVID-19) has led governments around the world to seek to curtail social interactions between citizens in order to slow the spread of the virus that causes it. The involvement of police in upholding stringent restrictions on citizens’ everyday freedoms has provoked fierce debate. Police in the UK lay claim to a long tradition of “policing by consent”[1], so police involvement in efforts to bring about widespread compliance with social-distancing regulations [2] is inherently controversial. Officers here will be acutely aware that the current crisis takes them into new territory. This blog piece provides some reflections on how the concept of “police discretion” can be helpful in understanding how the police respond.

**“Common sense and discretion”**

When they talk of the “discretion” of street-level workers, governments simultaneously disown the difficult work of choosing how to put law into action ([Hill and Varone, 2016](https://books.google.co.uk/books?id=M15uDQAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false)) and conjure the positive associations the word discretion has with notions of wisdom and good judgement (its original meaning). In relation to the current crisis, the word discretion is doing political work. Reference to “discretion” seems intended to reassure the public, in the face of a significant and potentially extremely intrusive expansion of police power, representing officers as skilful professionals, independently and rationally choosing the most appropriate action for every situation they encounter. The government has stressed that it expects the police to “[apply their common sense and discretion](https://www.gov.uk/government/news/police-given-new-powers-and-support-to-respond-to-coronavirus)” in utilising their strengthened powers of enforcement. Yet the fraught work of choosing how to put the new rules into practice has been left to the police themselves and, clearly, one police officer’s idea of common sense, may well be someone else’s idea of a [“police state”.](https://www.theguardian.com/uk-news/2020/mar/30/uk-police-guidelines-coronavirus-lockdown-enforcement-powers-following-criticism-lord-sumption)  As such, now seems an opportune moment to take a critical look at the concept of discretion.

**What are we talking about when we talk about police discretion?**

The dominant origin story of the concept of police discretion sees US-based researchers of the 1950s and 1960s cited as making the “discovery” that police officers, just like other criminal justice actors (prosecutors, judges), affect the law in practice. Discretion thus denotes the gap between the law in principle and the law on the streets ([Nickels, 2007](https://www.sciencedirect.com/science/article/pii/S0047235207000864)). However, on this side of the Atlantic, rather than being “discovered”, reference to police discretion has long been taken-for-granted, a part of our unwritten constitution ([Grimshaw and Jefferson 1987](https://books.google.co.uk/books/about/Interpreting_Policework.html?id=_EwVAAAAIAAJ)).

The legitimising role it plays ought to make the concept of discretion the object of critical analysis. Yet, whilst the concept features prominently in research about policing and is frequently invoked as underpinning discriminatory practices, it is rare to see the concept defined in any depth. Discretion does not have a clear and uncontroversial definition, but is often used in a taken-for-granted and ambiguous way with authors providing a few introductory paragraphs (or sentences) referring to the “classics”, before moving on to describe their own findings on how police officers *behave*. The object of study then is more often behaviour than discretion *per se.* The concept of discretion suffers from chronic imprecision, ambiguity and diversity of usage ([Nickels, 2007](https://www.sciencedirect.com/science/article/pii/S0047235207000864)).

The biggest issue we find with the concept of discretion is that it is commonly applied (sometimes simultaneously) to four different things, namely:

* The space within which police officers act, i.e. their freedom
* The authority that police officers have been granted, i.e. their lawful powers
* Police officers’ ability to use their authority wisely, i.e. their competence and integrity
* The actions that police officers take

No wonder Fletcher writes that the different senses in which the concept of discretion is applied renders the “discussion of discretionary processes virtually incomprehensible” ([Fletcher, 1984: 276](https://scholarship.law.columbia.edu/faculty_scholarship/1074/))!

**“Questions about what to do”**

The essence of “police discretion” is that when using the law police officers are *authorised* based on the presumption that they make *choices* (act as rational, independent, autonomous individuals). This is a political assumption that rests on dubious assumptions about the nature of human action and contradicts empirically grounded accounts of police work ([Campbell, 1999](https://www.sciencedirect.com/science/article/abs/pii/S0194659599900825)). Critical research on police discretion, then, ought to be concerned with exploring the extent to which the normative implications of the political concept of police discretion are reflected in the empirical realities of police work: Do police officers make choices (which is to say act as “autonomous” individuals), under what circumstances and with what effects?

To undertake this work, it may be useful to take a close interest in when and how *questions about what to do* arise for police officers and how they resolve them. Discretion can therefore be disaggregated as follows:

* *Discretionary spaces* are circumstances where “*questions about what to do”* arise and officers reach resolutions to those questions
* *Discretionary actions* are the actions (or non-actions) arising from the choices officers make when in those *discretionary spaces*

By disaggregating discretion in this way, it seems to us, more distinct objects for empirical analysis appear. These include:

* the range, type and prevalence of different questions about what to do;
* the situations in which such questions arise;
* the actions taken in response to different questions by different actors;
* the reasons given by actors for the actions they take;
* and the variety of boundaries within which actors appear (or claim) to be operating.

**Police discretion and the current crisis**

The current moment in history only makes the task we have outlined above more urgent. The new coronavirus regulations have created a new discretionary space for UK police officers, one in which they face a completely new set of questions about what to do. How they resolve those questions may have significant consequences for both public health and the relationship between the police and communities. Even before new legislation came into force, reports had begun to appear in the media about “heavy-handed” or “over-zealous” police responses to the coronavirus crisis. Since the social-distancing regulations entered into law there have been reports of police [claiming powers that they do not have](https://twitter.com/grandad1975/status/1248247686563631104), using the [wrong powers](https://www.independent.co.uk/news/uk/crime/coronavirus-fine-police-lockdown-travel-newcastle-marie-dinou-a9444186.html) and, of most interest for the purposes of this blog post, simply using the powers in a manner some people clearly see as inappropriate.

As Dr. Sara Grace pointed out on this blog on 2nd April [“there is no blueprint for policing the lockdown”](https://bscpolicingnetwork.com/2020/04/02/policing-the-coronavirus-lockdown-the-limits-of-on-the-spot-fines/). This situation is unlike any other our currently serving officers will have encountered (although as Sara notes there are some parallels with the use of penalty notices for disorder). The new legislation has made potential offences out of formerly mundane activities of everyday life like playing with your children in the sun, visiting family, going to the shops or just leaving the house.

The National Police Chiefs Council and College of Policing have produced [guidance](https://www.college.police.uk/News/College-news/Pages/Health-Protection-Guidelines.aspx) for officers on their new powers. These are based on a “four-phase approach” of:

1. Engage
2. Explain
3. Encourage
4. Enforce

They identify enforcement (including using reasonable force to remove a person to their home and issuing fixed penalty notices) as “a last resort”. However, the available guidance, as is usual in relation to police powers, offers no concrete examples of situations that unequivocally breach the regulations and where enforcement might be the most appropriate response.

One of the reasons why researchers have argued that police discretion is necessary (and indeed inevitable) is that the police simply cannot uphold all of the laws, all of the time: “full enforcement … is not a realistic expectation” ([Goldstein, 1960: 560-1](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3417&context=fss_papers)). What actually happens is “selective enforcement … Some law is always or almost always enforced, some is never or almost never enforced, and some is sometimes enforced and sometimes not” ([Davis, 1975: 1](https://books.google.co.uk/books/about/Police_discretion.html?id=dlgvAQAAIAAJ&redir_esc=y)). Unless politicians are highly prescriptive in their approach to governing police organisations (which they rarely are), it is the police themselves who ultimately determine which offences (and which offenders) are most likely to be on the receiving end of formal interventions. This is why we think it is important to engage with police officers who are working through this unprecedented period to try and understand how they are making sense of and responding to the situation.

We are only at the start of what may be a very long journey in relation to mitigating the impact of the current pandemic. It has already provided some significant challenges for police forces. Whilst support for the police approach currently seems quite strong, if the “lockdown” conditions are extended over a much longer period this support may fray. Things that the public are currently willing to accept may no longer be accepted. Voluntary compliance may weaken and there may be more conflict between the public and the police. This in turn may impact on officers’ willingness to take formal action, or even to intervene. Under these circumstances, a clearheaded understanding of what is at stake when politicians, and the police, invoke “police discretion” will be essential. Our work in this area is ongoing. We hope it will prove useful for shedding light on unfolding events.

**Notes**

[1] Although this “tradition” is, arguably, at least part of police mythology. It is certainly of more recent and aspirational origin in relation to Northern Ireland and the PSNI ([See Principles for Policing in Northern Ireland, 1998](https://cain.ulster.ac.uk/issues/law/docs/pol4398.htm)).

[2] [Coronavirus Act 2020](https://www.legislation.gov.uk/ukpga/2020/7/contents/enacted) and the [Health Protection (Coronavirus, Restrictions) Regulations 2020](http://www.legislation.gov.uk/uksi/2020/350/made).

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