POLICE DISCRETION: LAW AND EQUITY

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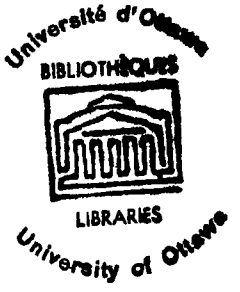

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INTRODUCTION

The maintenance of law and order is a function of the police who, in criminal or quasi-criminal violations, are responsible for taking the first action against the citizen-offender. This first contact with the citizen is crucial, for the manner in which he is dealt with by the police, may have a considerable bearing on his subsequent behavior and attitude toward the administration of justice. The increased mobility and communication of the modern community has brought about a corresponding increase in police-citizen contact. The complexities of today's society have increased the need for regulatory laws and a demand for more policemen to enforce them. The provincial traffic laws may be cited as an example serving to indicate the great growth in police-citizen confrontation. Most of the new laws are necessary for the orderly existence of the community, but at the same time, they may be considered by segments of the public to cover violations which are minor in nature and, consequently, do not call for vigorous enforcement.

The police must have the co-operation of the public if they are to maintain order and solve crimes; such co-operation usually comes through the public's respect for the law and those who are charged with enforcement. There is,

therefore, a heavy responsibility on the police to deal effectively and fairly with those citizens who violate the law. Policemen must use common sense and good judgment, which requires a sense of knowing the right thing to do, and when to do it. There are those who believe that the policeman is not required to think, or use his judgment in making decisions, for he is given a set of laws and entrusted with the duty of enforcing them to the letter. But then the established fact of violation is necessarily the result of a post-facto evaluation. There are others who take the opposite view, believing that indiscriminate enforcement violates the spirit of the law, engendering a feeling of persecution and destroying the feeling of justice it is required to foster. It is on this controversy that this thesis is focused.

Police discretion is not a new phenomenon. Policemen have made decisions on whether to arrest or charge offenders since the inception of the first organized police force. Yet, the established and apparently accepted fact of discretionary law enforcement has raised questions of its legal, ethical, and moral propriety. This generated the interest for this research. There was the knowledge that although the police do exercise discretion, there seemed to be present an air of controversy and uncertainty as to whether or not they have the right to do so. As well, it could not

be established whether those responsible for the administration of justice, the police, or the public were of the opinion that discretion should be exercised in the field of law enforcement. Police departments maintained that they used discretion, but there was no empirical evidence available to substantiate such a claim. It could be assumed that the public were in favour of discretionary law enforcement, but again, empirical evidence was lacking. As will be shown in the literature there appears to be no explicit authority for the exercise of police discretion. Consequently, the research was designed to attempt to provide answers to the following questions: What authority exists for the exercise of police discretion in Canada? Are the police expected to use discretion when enforcing the law? Are the police discharging their duties in a manner acceptable to the public when they follow policies of discretionary law enforcement? Do the public and the police share common attitudes toward the manner in which the law should be enforced?

CHAPTER I

LAW, EQUITY, AND DISCRETION

> I solemnly swear that I will faithfully, diligently, and impartially execute and perform the duties required of me as a member of the Royal Canadian Mounted Police, and will well and truly obey and perform all lawful orders and instructions that I will receive as such, without fear, favour or affection of or towards any person. So help me God (2, p.5)

This is the oath of office taken by all applicants who are sworn in as members of the Royal Canadian Mounted Police (R.C.M.P.). The new members swear that they will enforce the law with diligence and impartiality, and without fear, favour, or affection towards anyone. The oath is open to interpretation as to the manner in which the law is to be enforced. The following policy statements of the R.C.M.P. may give a more precise definition of how that force expects its members to enforce the law: (1) "A policy of firm enforcement should be followed but not so rigid as to suggest persecution" (5). (2) When enforcing traffic laws, "... written warnings may be issued for minor infractions in justifiable circumstances" (5). These two statements clearly infer, that to conform to the oath of office, it is not intended that the law be enforced each and every time that it is violated. They were quoted because they seem to imply

fairness, and a common-sense approach to the task of enforcing the law. There is an inference that the police are expected to exercise discretion when discharging their duties on behalf of the public.

Laws are not legislated to be violated; they are enacted to be obeyed. They represent rights and privileges which the public feel are necessary for the peaceful enjoyment of their lives, being of sufficient importance to be ensured continued existence. To encourage obedience, those who would disobey are threatened with punishment - a threat that gets clothed with meaning only when translated into action and becoming a fact. To produce this translation, the public chooses from among them, a group of fellow citizens to police the laws for them, granting that group powers to enforce the law and apprehend the violators.

Law enforcement, however, is not an easy task. Though people believe that the law specifies what a violation is, they seldom realize that the act which constitutes the violation becomes a violation only because of the interpretation placed on the act. The act does not come carrying a violation label. If every offence was committed under identical circumstances and those circumstances were spelled out in the law, the problem of identifying the violation would be a relatively simple matter. These conditions, however,

rarely, if ever, exist and therefore by necessity, the police must examine the circumstances of each case they are required to investigate to ascertain if the act is a violation.

The interpretation of the law evolves around its intent. The law seeks to preserve and guarantee the personal rights and freedom of the citizen and it is important to realize that this could not be achieved unless the fundamental rights and freedoms of all are respected. Hence, the law cannot be preserved as an absolute order, arbitrarily and blindly imposed, restraining and containing within the narrow limits of goodness; it must be looked upon as rules of conduct, designed to guide the people in their behavior so that their rights and freedoms may remain inviolate (3, p.14).

With this view of the law, the police function is not to sit back and wait for the rules of conduct to be violated and then seek out the offenders, although such is the common view of the main function of the police. The law is best enforced, its aim best achieved, when the prime responsibility of a police force is seen as the prevention of breaking of the laws. The following statement aptly describes the attitude of the modern, progressive police department as it relates to the manner in which its members approach their duties in law enforcement:

> There was a time when the number of convictions the policeman obtained was the criterion of his efficiency. Today the absence of crime in his area or on the beat, is the yardstick of his success. Prevention as it is studied, practised and lived, is already paying dividends, and while there is great need for active public support ... police forces are committed to this modern practice (3, p.100).

Dedication to programs designed to prevent crime does not mean that the investigation of crimes committed should be relegated to a position of secondary importance. Crime has to be investigated and where necessary, charges have to be laid, for to act otherwise would be a neglect of duty (4). The charging of the offender is seen as the last step available to the policeman, and if the ends of justice are best served by taking the offender to court, it would seem that the officer has no choice but to ensure that such action is instituted.

If one accepts the concept of the law being a set of rules to guide human conduct, and sees the role of the police as that of preventing crime as much as that of apprehending violators, thus ensuring that the spirit of the law, rather than its letter, remains inviolate, then the policeman must make decisions as to the best course of action to be taken in any given situation. In a nutshell, he must know the general intent and purpose of the law; look at the circumstances of each case as it comes before him, which requires

consideration of all the circumstances surrounding the violation, including not only the nature of the offence, but as well, the particular violator involved; then he must make a decision as to the course of action to follow that will likely best ensure that the rights and freedoms of the society (including the offender) remain inviolate.

Those who are aware of the amount of law that exists to control today's complex society, agree that it would be impossible to expect the police to charge everyone who violated the law, for as Jackson states:

> Policy about prosecution has in fact to keep within reasonable limits. A chief constable who decided to prosecute every ascertainable breach of the law would exhaust his force, overload officers of the courts, and be an appalling nuisance. If he decided not to prosecute any thieves at all, that would be so extreme as to be a dereliction of duty. It is a matter of degree (4, p.50).

This awareness that the police prosecutions have to be kept within reasonable limits, and the awareness that to do so requires a policy of discretionary law enforcement, creates the problem for this research. The situation that faces the police is explained by Jackson (4) and also by Cressey, who has the following to say:

> ...the power of discretion officially granted to the courts was not officially extended to the police when police systems were invented. It still has not been officially granted to them. Nevertheless, the police must constantly adjust criminal law, despite the fact that they also have a duty to enforce

> the law. The policeman is being just when he behaves in terms of his duty to invoke the penal process whenever he observes a violation... But he is also being just when he overlooks offences by using discretion, for in doing so he takes mitigating circumstances into account, thus attempting to maximize the consent of the governed (1, p.279).

The purpose of this study is to determine the status of discretionary law enforcement practices in Canada. When considering the scope of the research, the question arose as to whether it would be necessary to examine the development of the law and the origin of the police in Canada. It was decided that such an examination should be carried out in order to establish a sound basis for review of the literature. As well, an understanding of the administration of justice and the organization of the police, was looked upon as an essential prerequisite for a meaningful analysis of the research question. The next two chapters will be devoted to these two matters, after which, the study will return to a review of the literature and the problem of this research.

REFERENCES

1. CRESSEY, Donald R. (1969) "What Can be Done", in Gresham M. Sykes and Thomas E. Drabek, The Law and the Lawless. New York: Random House. 271-282.

2. CANADA (1959) Royal Canadian Mounted Police Act. Revised Statutes of Canada, C. 54.

3. CANADA (1952) Law and Order in a Canadian Democracy. Ottawa: The Queen's Printer.

4. JACKSON, R.M. (1967) Enforcing the Law. London: Macmillan Company.

5. R.C.M.P. Royal Canadian Mounted Police Policy Manual.

CHAPTER II

LAW AND ORDER IN CANADA

Development of the Law

Canadian criminal law traces its origins to the English common law and the English Draft Code. The first Canadian criminal code became law on July 1st, 1893 (2), and was based on Sir James Fitzjames Stephen's English Draft Code which was drafted in 1877 but never became law in England. It contained many common law defences and offences which were part of our Criminal Code until 1955. During that year the new Criminal Code of Canada (3) was published which excluded all common law offences except the offence of contempt of court. Common law defences may still be found in the Code, for example, Sections 17, 18 and 19.

The federal government is responsible for enacting criminal law by virtue of Section 91(27) of the British North America Act (B.N.A. Act) (10), the Criminal Code being an example of legislation contained in a federal statute. Federal laws extend into other areas, such as taxation, customs and excise. As only the federal government has jurisdiction over criminal matters, an offence against any federal statute is classified as a criminal offence. Section 92 of the B.N.A.

Act places the responsibility for the administration of justice, including the enforcement of the Criminal Code, on the provinces. It also gives the provinces powers to enact laws outside the realm of the criminal law, which are included in provincial statutes and municipal by-laws. The provinces are also responsible for organizing and maintaining the courts. Both the federal and the provincial governments are empowered to create police forces to enforce and maintain law and order.

It seems safe to assume that when the Fathers of Confederation divided the powers between the two levels of governments they had little idea of the vast amount of law which would be required to protect society one hundred years hence. Looking back to early times, one finds that the first laws were concerned with the basic rights and freedoms of the individual - which were minimal, and the protection of property - which were maximal. Man of that day had few rights and freedoms, and little property. His life was simple and so were the laws. It was a much simpler matter to say that "... the law ought to be enforced" (7, p.6). There was much less need for interpretation of the law and the use of discretion when enforcing it. Unlawful acts were of such a nature that if allowed, they would grossly interfere with the individual's freedom and peaceful enjoyment of his property. Consequently, the chances of good laws being respected were greater in

earlier days because the citizen knew that disobedience was a serious matter. There was considerable public pressure to obey the law because it represented the few basic, core values of that society.

Canadian Law To-day

What of the law of to-day? In a progressive state, those responsible for the administration of the law will attempt to ensure that laws are flexible and capable of amendment or repeal so that they will properly serve the needs of a changing society. The transition from a relatively placid, rural setting, to a highly complex urban setting, coupled with the rapid technological advances has created new community problems which demand new laws to regulate the changed styles of living:

> When society is in a stage of rapid transition, persons and groups encroach on each other in many ways - politically, socially, economically, morally and physically. The protection of life and property and social order in changing culture necessitates accommodation to a multitude of pressures, some conflicting, emerging from political, societal, economic and personal values (5, p.5).

Society has become so diversified that it has found itself bound up in rules and regulations deemed necessary to guide its daily activity, not only to ensure the protection of the individual and his property from the attacks of others,

but to ensure that the acts that the citizen commits do not harm himself. The conduct that these rules and regulations control is mostly of a non-criminal nature and therefore a provincial responsibility; the provinces enact appropriate laws and enforce them when necessary.

The classification of offences into criminal and non-criminal categories is important, for it distinguishes between serious and minor violations of the law. This distinction is perhaps the central point around which the entire system of law and the administration of justice is focused. As Jackson asks, the question is:

> Do all offences (from speed limits to murder) come within the single category of crime? If they do, are the problems of the enforcement of, for example, speed limits, any different from those of enforcing older and traditional criminal prohibitions against murder, robbery, burglary and so on? If they do not, so that we have separate categories of real crime and prohibitions that are not truly criminal, what effect may this have on the problem of enforcing the law? (7, p.6).

In Canada, offences do not come within a single category of crime because of the division of authority to enact laws being shared by two levels of government. It was explained at the beginning of this chapter[1] that criminal activity is controlled by criminal laws legislated by the federal government. Most of the criminal offences are considered to

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[1] See pp. 11-12.

be serious crimes. Non-criminal activity is controlled by laws enacted by the provincial governments and violations of these laws are not criminal offences, but merely offences, the majority considered to be of a minor nature.

Violations of the criminal law have increased with the population growth and urbanization, yet the number of infractions of provincial statutes and municipal by-laws far exceed the number of criminal offences. In 1967, there were a total of 257,025 Criminal Code offences disposed of by charge. In the same year there were 1,589,965 provincial traffic offences disposed of by charge; 365,183 charges under municipal traffic laws; and 4,669,881 charges for offences violating municipal parking laws (1, pp. 448-450). It can be readily seen that the multitude of laws governing the non-criminal conduct of society, spans the area of greatest contact between the public, the law and the police. Although most of these laws are broadly interpreted as covering minor offences, it is assumed that the majority of citizens would agree that they are necessary for orderly day-to-day living. The elimination of many of them would result in serious consequences and in that sense they are not, in fact, minor.

The seriousness of the offence determines the manner in which the offender will be dealt with by the police, pro-

cessed and punished by the courts and, if imprisoned, the institution to which he will be sent. There is evidence that, contrary to their attitude toward serious crimes, the police feel that they have some flexibility in relation to the enforcement of minor laws. Most policemen feel that they are obliged to use discretion when dealing with this category of offences. To confirm this attitude, some provincial acts provide for warnings where charges do not seem to be warranted; police forces may also have policy instructions stating that warnings may be issued under certain circumstances (9).

Frequently, a citizen will ask a judge or a policeman why there are so many laws. The more obvious reasons for the multitude of laws have already been discussed, but the fact that the citizen asks the question, indicates that he is quite likely confused by the extent of the law and the complex system of dispensing justice. Understanding the law has never been a simple matter, history shows that other organized societies have faced similar problems:

> Every society, in every age has experienced the perplexing problem of crime ... Crime cannot exist in an environment occupied by one person for there would be no victim. Crime can only be perpetuated where men join together forming a society ... the structure, relationship, and goals of organized society serve both to produce and to control criminal behavior (5, p.3).

It is unlikely that many would disagree with the above statement, for a well defined set of rules is the mark of any well organized institution. For the rules to be effective, however, those expected to obey them must be made aware of their existence. It does not seem necessary to justify the statement that the public today are not aware of all the laws which they are expected to adhere to. If allowed, ignorance of the law would be a much stronger defence than it would have been one hundred years ago.[2]

This study is concerned with the manner in which the distinction between serious and minor offences affects the public's attitude toward the law, and how it affects the enforcement practices of the police. The traditional offences described in the Criminal Code are generally considered to be serious crimes and almost without exception, contain the element of mens rea - intent, or a guilty mind on the part of the accused. The harm done by these offences being serious and the offenders presumably committing them with that specific intent, has led legislators of the law and law enforcement agencies to view them differently from the lesser offences. These latter offences violate provincial acts and do not necessarily involve the element of means rea. These pro-

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[2] Under Section 19 of the Criminal Code of Canada, ignorance of the law is no defence to the commission of an offence.

hibitions are, by and large, absolute, the intentions of the accused being immaterial. For example, most provincial liquor acts make it unlawful for a minor to have, consume, or purchase liquor, the intent not having to be proven, the prohibition is absolute. Because certain violations of these laws may possibly be committed unintentionally, the law permits those who violate them to be dealt with by a police warning when charges seem inappropriate. The traffic acts of several provinces have such provisions.

The public may not be aware of what constitutes a criminal or non-criminal offence, but they are aware that some offences are considered serious and others minor, and when they violate the law, they expect to be treated according to the nature of the offence they have committed. The police are aware of this distinction and the public's expectations as to treatment. They are faced with effectively enforcing the law (minor laws particularly creating problems) in a manner acceptable to the public. This is of vital importance, for to maintain law and order and to cope with the more serious crime, the police need the co-operation of the public. If they follow a policy of full enforcement of all minor laws, public support would soon be lost and a state of lawlessness would soon exist. While most minor laws are of importance to the safety of the citizen in his daily acti-

vity, there is a tendency on the part of the public to take a blanket approach to these laws, seeing them as frivilous and unnecessary, and too restrictive. Serious crimes, on the other hand, are looked upon as "real" crime. When a citizen has been charged with a minor offence, it is not uncommon to hear him complain about the amount of time the police spend on enforcing trivial offences, when they should be directing their efforts toward solving serious, or "real" crime.

When prevention of crime has failed - and in reality, no matter how efficient the police force, all crimes can never be prevented - investigation of the more serious crimes is given priority. From that level down, a procedure of selective enforcement is followed according to the need and public pressure for certain laws to be more rigidly enforced. The public may regard this as being evidence of permissiveness on the part of the police toward violation of the laws on the bottom of the scale. This may not be so, for the police are often in the position where they find it necessary to follow a policy of selective enforcement (concentrating on the more important laws) because of shortages in manpower and equipment. "With limited resources, administrators must choose which crimes and which offenders will be given the most attention and will be viewed as the most serious" (11, p.6).

That the public are aware that the police give priority to serious crime, provides further confirmation for their seeing the law as divided into two distinct classifications.

A growing and changing society creates the need for new laws and regulations, yet, too many laws will bring about the very situation they sought to prevent. "The existence of newly created crimes not only produces a larger population of criminals, but also brings about a feeling of crisis..." (8, p.236). Little documentation is needed to substantiate this statement. All laws are continually violated, therefore, an increase in the amount of law will bring about a natural increase in the amount of violations, and a time when law violation is a statistical normality.

Laws must not be ambiguous or outdated, and this, by no means, is an exclusive problem of modern society. For example, consider the following statement made of the English law around the middle of the nineteenth century:

> Peel realized what criminal law reformers had never done ... police could not function effectively until the criminal and other laws which they were to enforce had been made capable of being respected by the public, and administered with simplicity and clarity. He postponed for some years, his boldly announced plans for police and concentrated his energies on reform of the law (8, p.236).

It can hardly be expected that laws will be completely current with change, for it takes time for public opinion to

jell and reach the degree of consensus required to demonstrate the need for amendment or repeal. Nevertheless, those responsible for law reform should be aware that "We have on our books laws so seldom enforced that they merely put other laws to disrepute" (6, p.22). Considerable pressure for changes to the law and its administration has been exerted by civil liberty groups both in Canada and the United States, during the past two decades. That the Canadian government is aware of this is evident from the recent remarks of the Minister of Justice for Canada, the Honourable John Turner:

> We are witnesses today to a crisis between freedom and authority. The dynamics of rapid change in the values that our society chooses to honour, produce a conflict and a confrontation. While it is the legislator's role to reform the law to try to meet the needs of a changing society, it falls to the police ... to enforce the law as it exists. ...the policeman has become the man in the middle, caught between his duty to enforce the law and his social responsibility to be responsive to calls for personal liberty (12, p.3).

The Justice Minister's remarks to the effect that there exists a challenge to authority and law and order in Canada, seem to express the sentiments of many Canadians. His reference to the policeman being in the middle of the confrontation is directly related to the purpose of this research. The following chapters will deal more specifically with the police and the exercise of police discretion.

Donnelly's description of how he views the problems in law enforcement today, refers to matters directly related to the exercise of discretion by the police:

> The policeman's lot is a difficult one. He is charged with applying and enforcing a multitude of laws and ordinances in a degree or proportion and in a manner that maintains a delicate balance between liberty of the individual and a high degree of social protection ... He must enforce the law, yet he must also determine whether a particular violation should be handled by a warning or an arrest. There is very little data available as to how this discretion ... is exercised (4, p.379).

REFERENCES

1. CANADA (1969) Canada Year Book. Ottawa: The Queen's Printer.

2. CANADA (1927) Criminal Code of Canada. Statutes of Canada, C. 36 (repealed).

3. CANADA (1955) Criminal Code of Canada. Statutes of Canada 1953-54, C. 51.

4. DONNELLY, Richard R. (1964) "Police Authority and Practices", in David Dressler, Readings in Criminology. New York: University Press. 379-386.

5. ELDEFONSO, Edward, Richard C. Grace and Alan Coffey (1968) Principles of Law Enforcement. New York: John Wiley and Sons.

6. GRYGIER, Tadeusz (1965) "Crime and Society", in W.T. McGrath, Crime and Its Treatment in Canada. Toronto: Macmillan Company of Canada. 13-40.

7. JACKSON, R.M. (1967) Enforcing the Law. London: Macmillan Company.

8. REITH, Charles (1938) The Police Idea: Its History and Evaluation in the 18th Century and After. London: Oxford University Press.

9. R.C.M.P. Royal Canadian Mounted Police Policy Manual.

10. The British North America Act. 30 and 31, Victoria, C. 3 (U.K.).

11. TIFFANY, Lawrence P. (1969) "The Meaning of Crime", in Gresham M. Sykes and Thomas E. Drabek, The Law and the Lawless. New York: Random House. 3-12.

12. TURNER, John (1970) "The Police in a Confrontation Society". Royal Canadian Mounted Police Gazette, 32, 3-8.

CHAPTER III

THE POLICE IN CANADA

With both the federal and provincial governments having authority under the British North America Act to create police forces to enforce laws, there are in Canada today three main police bodies - federal, provincial and municipal - established at those three levels of government. The federal police force is the R.C.M.P. founded in 1873. At the provincial level are two police forces, the Ontario Provincial Police, and the Quebec Police Force, while at the municipal level there are a number of police forces, varying in size from large city police departments, to smaller agencies that police towns, villages and rural municipalities. There are other police agencies such as the railway police, Customs and Excise Officers and game wardens. These forces have limited responsibilities and perform in specialized areas and, while carrying out vital roles in the total enforcement picture, they will not be included in this discussion on policing in the general enforcement field because of their specialization.

It is the provinces' responsibility to provide police forces to enforce the criminal law and laws that the provinces

themselves enact. Section 20 of the Royal Canadian Mounted Police Act (2, p.7), however, provides the opportunity for the provinces to enter into agreement with the federal government to have the R.C.M.P. administer justice and carry into effect the criminal law and the laws of a particular province. Eight of the 10 provinces, the Yukon and Northwest Territories, have such contracts with the federal government and the R.C.M.P. The same section of the Act provides the authority for similar arrangements to be made with municipalities, and in eight of the provinces where the R.C.M.P. are the provincial police, they also police 140 municipalities. Under contract with a province, the R.C.M.P. enforces the criminal law, other federal statutes and provincial laws, whereas municipal laws will not be enforced by them unless there is a separate agreement with a municipality. The term "municipality" refers to a town, and if it is under fifteen hundred in population, the R.C.M.P. is required to police it under the terms of the contract with the province - if over that figure, the town is responsible to provide its own policing, often getting the R.C.M.P. to do the job.

The provincial police in Ontario and Quebec carry out provincial law enforcement duties in those two provinces in the same manner as the R.C.M.P. does in the remaining provinces. The two forces also contract for municipal

policing, but like the other provinces, Ontario and Quebec have municipal police departments that enforce most laws which the provincial police are not concerned with when not under municipal contract. The R.C.M.P. are responsible for enforcing most federal statutes in these two provinces (the Criminal Code exempted) and, over the years, have been particularly active in the enforcement of drug, taxation and customs and excise laws.

The independent municipal police forces comprise by far the largest body of men engaged in law enforcement in Canada, their total strength being in excess of twelve thousand in number (5, p.115). These departments enforce criminal law, provincial law, and municipal by-laws within the boundaries of the municipality (city, town, village) with which they are in contract.

Early law enforcement practices in Canada were based on the night-watch system (5, p.111). This system, seen by many as the forerunner to the organized police system, was set up in London in 1680 (10, p.273), as a response to the increasing need for protection stemming from the sudden, and rapid growth of towns caused by people migrating into areas where new industries were developing. Under this system, the citizens organized themselves to patrol the streets at night in order to maintain some semblance of peace. Later

supplementation with a day-watch system gave the town some form of twenty-four hour vigilance and protection. Citizen organization to maintain law and order had existed even earlier. In early Anglo-Saxon England, every citizen was responsible for enforcement of the King's Law in his own tything (a group of ten families), and had to report offences known to him to a shire-reeve (from whence the office of sheriff eventually evolved) who was appointed by the king to maintain law and order in the shire or county (3).[1] Annual delegation of law enforcement duties to tythings on a rotating basis followed, with paid substitution of one by another being permitted. The watchman system, however, proved inadequate to deal with problems of the day and Sir Robert Peel, looked upon as the founder of the modern day police force, persuaded parliament that the only effective method of enforcing the law was through community organized police forces. A consequence of his efforts was the passing of the Metropolitan Police Act of 1829, and the formation of the London Metropolitan Police on September 29th of the same year. This was the first completely organized police force and it began

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1 An excellent summary of the methods of enforcing early English law is given in this publication.

its operation with an establishment of one thousand men (10, p.274). The tradition of paying for the services and equipment for the keeping of the peace had been established by King George III, in 1777, with taxation designated for this purpose first levied by King George II, in 1737 (3).

The night-watch system of policing proved as much a failure in Canada - a new country struggling with the problem of settlement - as it did in England, and in 1835 Canada saw its first official police agency. Toronto organized a five man force under a chief of police who, was responsible to a bailiff and a city magistrate (5, p.111). By 1859, that force was a well organized unit with a strength of thirty-two members.

With the Peel conception of community organized police forces, came the Obligatory Act of 1856, requiring that every English county create its own police force. This concept of individual police forces has been carried over to North America, and it has resulted in one of the more difficult problems that have had to be dealt with in striving for uniformity in law enforcement policy. The presence of many independent police agencies results in general fragmented police services, which lack co-ordination of effort and purpose. The President's Commission on Law Enforcement and

Administration of Justice (11), believed that this was one of the major problems confronting those interested in improving the standards of law enforcement in the United States. For example, the 212 main metropolitan areas in that country comprise 313 counties and 4,144 cities, each of which has its own police department (12, p.119). To a considerably lesser degree, Canada experiences similar difficulties (5, p.134).

Canada, unlike the United States, has a federal criminal code of laws, and only ten politically defined boundaries (plus the Yukon and Northwest Territories). As well, the presence of a federal police force actively involved in general law enforcement in eight provinces, contributes considerably to the standardization and effectiveness of the police function. The organization of inter-police training, the existence of such organizations as the Canadian Association of Chiefs of Police[2], and the availability to all police forces of services such as those provided by the R.C.M.P. crime detection laboratory, have also

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2 The Canadian Association of Chiefs of Police is comprised of police chiefs of most of the police forces in Canada. Their purpose as an organization is to examine crime trends, police practices and law enforcement problems in general, to evaluate existing laws and proposed legislation, and to make appropriate recommendations to federal and provincial governments.

proved to be important factors. The provincial police of Ontario and Quebec, the R.C.M.P., and the police departments of the larger cities, have all assisted in raising the standards of law enforcement by offering their training facilities and other services to smaller departments.

Canada is indeed fortunate in having a relatively homogeneous police organization and code of laws, but the complexities of modern crime has increased the need for co-operation between police forces at a level heretofore not envisaged. As R.C.M.P. Deputy Commissioner W.H. Kelly (retired) states: "It is becoming increasingly evident that only the closest co-operation among police forces in Canada will enable them to cope with the methods of the modern criminal" (5, p.124).

In an address to members of the Canadian Association of Chiefs of Police at their convention in Edmonton, Alberta, in September, 1969, George J. McIlraith, then Solicitor General of Canada and Minister responsible for the administration of the R.C.M.P., stated:

> Being a policeman has never been easy. It is increasingly difficult in this age of rapid social and technological change. It is easy to state what the primary functions of the police are, but difficult for anyone to remain abreast of change in today's world. I take it that the main functions of the police are to prevent crime, to detect crime, to apprehend offenders, and to maintain order under the rule of law. Yet while this is easy to say, it is very difficult to do (7, p.4-5).

Most would agree that Mr. McIlraith clearly defined the police function but, more important, he recognized the presence of problems particularly related to the role of today's police.

Modern laws touch upon so many matters of concern to all citizens that the police find themselves in almost continual contact with the public. The day seems to have passed when the individual most in contact with the police was the "real criminal". "Contrary to popular belief, much less time is spent on crime detection and apprehension of offenders than on other phases of police work" (1, p.40). Much time is spent on maintaining order and in keeping the peace, which includes such duties as patrolling streets and highways; attending complaints of family squabbles; controlling crowds; settling a street quarrel; or directing traffic. In discussing the wide range of police duties of the Canadian Committee on Corrections (The Ouimet Committee), had this to say about the increased police-citizen contact:

> The vast increase in the number and kind of laws which they are required to enforce and the range of duties which the police are required to perform in present day society, especially in the control of highway traffic, brings the police officer in an authoritarian role, into ever-increasing contact with the citizen (1, p.42).

When carrying out duties not directly related to the enforcement of specific laws, the policeman may still be

preventing the commission of both serious and minor offences. It is significant to note that, in defining the functions of the police, Mr. McIlraith first mentioned the prevention of crime. The drafters of the Metropolitan Police Act of 1829, Colonel Charles Rowan and Richard Mayne, were also vitally concerned with the preventive aspect of policing (13, p.18). Their original instructions to the London Metropolitan Police are still used to explain the role of the police to recruits of many police departments. The following excerpt from those instructions is frequently quoted:

> The primary object of an efficient police is the prevention of crime; the next that of detection and punishment of offenders if crime is committed... It should be understood at the outset that the object to be attained is the prevention of crime. To this great end every effort of the police is directed (13, p.19).

Mr. McIlraith's definition of the role of the police is almost identical even though given over one hundred years later.[3]

The police are charged with protecting the person and his property and with enforcing the law. If they are too effective in enforcing the law they infringe upon the

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3 See p.7. This should not be taken as evidence that the police cling to the status quo and are against change. It does indicate that basic human attitudes do not change that much, including public attitude toward crime.

very principles that the law protects. The public expect the police to be efficient, but at the same time, rebel against authority and infringement of personal freedom. They display an attitude of wanting the law enforced, but not overly efficiently and, to obtain and maintain the respect of the public, the police must strike an acceptable balance. For example, consider the remarks made by Selznick in discussing this critical issue:

> Do we need or want agencies of control so efficient and so impartial that every actual offence has an equal chance of being known and processed? ...When considering this point we should bear in mind that offences of all kinds are probably very much more numerous in fact than in record. I am concerned that we do not respond too eagerly and too well to the apparent need for more effective mechanisms of social control. In the administration of justice, if anywhere, we need to guard human values and forestall the creation of mindless machines for handling cases according to set routines (8, p.84).

It is suggested that there is a positive and a negative aspect to law enforcement - the protection of person and property by mere police presence being non-restrictive and positive - the enforcement of the law by the police, including restraints brought about by them and the courts, being restrictive and negative. In other words, the "good" side of the police and the "bad" side. The pleasant part of police work is the positive things that the policeman can do, such as settling a family

quarrel without charges, finding a lost boy, and preventing crime in general. The unpleasant part of his duties are such things as investigating fatal accidents and charging those who caused them and in general, depriving citizens of their liberty and freedom through arrest and charge - the negative aspect of the law. This dual role of the police has always been a part of the police function, however, the enormous amount of legislation in the field of regulatory laws (usually classed as minor offences but, woefully, often with serious consequences) during the past forty years, has magnified police-citizen contact to such an extent that the positive and negative counterparts in law enforcement frequently become intertwined and create a dilemma for the policeman. These factors, plus the realization that the police require the co-operation of the public to maintain law and order, would seem to be fair support for the contention that the exercise of discretion by the police is fundamental to acceptable and effective law enforcement.

The growth in crime always creates a demand for more police and better police equipment, which are often not forthcoming because of the heavy demand on the tax dollar from various seemingly more important areas. Police forces that are under strength and not properly equipped are forced into policies of selective enforcement, something that must

be considered when analyzing police enforcement methods (6, p.102).

Other than the current problems with drugs, there is one area which has taxed the police very heavily in recent years, and has possibly created more problems than any other single law or group of laws that they have been called upon to enforce - the laws pertaining to vehicular traffic. The police enforce traffic laws as part of their responsibility in protecting life and property. These laws are difficult to enforce, for many citizens regard them as being minor in nature, and more or less a nuisance. The consequence is that enforcement alone does not bring about the desired results. The whole issue is dependent on the education of the public on the need for these laws.

> The principle aim of the police is to maintain law and order and this is best achieved by prevention. Part of the preventive task must be educating the public. For example, at present, society does not regard traffic laws seriously, yet they cause more loss of life and inconvenience to the general public than any other offence ... Some offenders will respond best to advice, while others will only learn by rigorous prosecution of their offences (9, p.32).

A recent public opinion survey involving telephone calls to 941 persons from all regions of Canada, revealed that while the majority were very supportive of the police, 56.3% were not happy with the traffic control duties of the police (4). Although this may be due partly to the manner in which the

police enforce these laws, there are apparently other more pertinent reasons for the public's dislike of these laws and their hostility toward the police who enforce them. Whitaker makes the following observation on the attitudes of many motorists:

> A car-driver who is angry at other motorists who exceed the speed limit when he himself is not doing so, is often equally indignant when positions are reversed. One in three of the complaints against the police arise out of their duties in connection with traffic (13, p.194).

Whitaker states that the London police relaxed minor traffic offences in an effort to reduce the hostility of the public toward the police (13, p.195). In Canada, police departments recognize that discretion should be used when dealing with the minor traffic offences, the law providing for the issuance of warnings, and the police taking advantage of that procedure in their programmes directed toward education of the public on the need for these types of laws.

Traffic laws have been used here to serve as an example of the problems that such regulatory laws may create for the police. Amongst these laws there are those that outwardly appear to be minor, but in fact cover acts which if allowed to go unchecked, may result in serious harm to not only the offender, but to other members of the public as well. This being said, it is admitted that there are other laws or regulations which do not produce such results,

but nevertheless seem necessary to the maintenance of public order. When enforcing these laws, the police have to consider the purpose of the law and the consequences of the violation under given circumstances. A particular law violated under one set of circumstances may be regarded as trivial, while under a different set of circumstances it may be seen as a serious infraction - the circumstances or consequences of the act determining its severity. This produces the dilemma for the police - knowing that an infraction of a law under one set of circumstances produces no harmful consequences and is looked upon by the public as being trivial while under different circumstances the same act produces harmful results and is regarded by the same public as a serious offence - what action should the police take? Should they sit back and not enforce the law when no harmful results ensue from the act, their apparent complacency perhaps encouraging further violations? Should they enforce the law every time it is violated, perhaps encouraging compliance, but at the same time arousing the hostility of the community to the extent that defiance of the law begins to show itself? In reality, it is impossible, and it is suggested, undesirable, for the police to charge everyone who violates every law. In short, the police are required to make judgments on the worth of the law, and on the circumstances surrounding the commission of an offence when deciding on

whether to charge an offender. There are differences of opinion as to whether or not the police should make these judgments - whether or not they should exercise discretion. This problem will be subject of the review of the literature in the following chapter.

In conclusion, the law itself often presents problems for the police. Good laws may have undesirable effects if they are poorly enforced, but poor laws cannot have favourable effects no matter how well they are enforced. The Justice Minister of Canada made the following statement in relation to the association between the law and the police:

> The two roles we play are clearly related. Legislative reform accomplishes nothing unless the practical problems of administrative reform and enforcement are solved. What we need is co-ordinated and combined efforts on the part of the legislatures and enforcement agencies to bring about enactment of credible laws that can be and are enforced in a credible manner...It is unfair to expect the police to enforce laws that have lost the respect of the public. For in doing so, the police become the butt of public criticism that should be directed toward the legislator (11, p.4).

The Minister has clearly recognized the problems created by the existence of poor laws that certain segments of the public may pressure the police to enforce. He suggested that to have acceptable laws enforced in an acceptable manner, the legislators and the police must have the support and respect of the public for law reform and understand the police role

in law enforcement, and that this could only be accomplished through public educational programmes. Finally, he said that Canada "... needs a more contemporary criminal law - credible, enforcable, flexible and compassionate" (11, p.4). He stated that any attempts at reform would be futile unless the law was applied by the police with "humanity, understanding and common sense" (11, p.4).

REFERENCES

1. CANADA (1969) Report of the Canadian Committee on Corrections. Ottawa: The Queen's Printer.

2. CANADA (1959) Royal Canadian Mounted Police Act. Revised Statutes of Canada, C. 54.

3. ELDEFONSO, Edward, Alan Coffey, Richard C. Grace (1968) Principles of Law Enforcement. New York: John Wiley and Sons.

4. GOLDFARB, Martin (1970) "Canadians Pleased with Their Police". The Ottawa Citizen, issue of 26 Dec. 1970. 7.

5. KELLY, W.H. (1965), "The Police", in W.T. McGrath, Crime and Its Treatment in Canada. Toronto: Macmillan Company of Canada. 109-135.

6. LaFAVE, Wayne R. (1965) Arrest: The Decision Not To Take a Suspect Into Custody. New York: Little, Brown and Company.

7. McILRAITH, George J. (1969) "The Role of the Police In the Community". Royal Canadian Mounted Police Gazette, 31, 4-7.

8. SELZNICK, Philip (1948) "Foundations of the Theory of Organization". American Sociological Review, 13, 82-92.

9. SMITH, C.R. (1970) "The Responsibility of Rank in the Service". Police Journal, 63, 283-292.

10. TAPPAN, Paul (1960) Crime, Justice and Corrections. New York: McGraw-Hill.

11. TURNER, John (1970) "The Police in a Confrontation Society". Royal Canadian Mounted Police Gazette, 32, 3-8.

REFERENCES

12. U.S.A. (1967) "The Challenge of Crime in a Free Society", A Report by the President's Commission on Law Enforcement and Administration of Justice. Washington, D.C.: Superintendent of Documents.

13. WHITAKER, Ben (1964) The Police. London: Eyre and Spottiswoode.

CHAPTER IV

REVIEW OF THE LITERATURE

Authority for the Exercise of Police Discretion.

> If every policeman, every prosecutor, every court and every post-sentence agency performed his or its responsibility in strict accordance with the rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable (11, p.72).

Discretion is the "ability to make decisions which represent a responsible choice for which an understanding of what is useful, right or wise may be presupposed" (21, p.647). This is a typical dictionary definition of the word "discretion". In relation to law, and law enforcement, Roscoe Pound defines discretion as:

> An authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgement and conscience. It is an idea of morals, belonging to the twilight zone between law and morals (15, pp. 925-926).

Both definitions indicate that the use of discretion involves the making of decisions in choices of alternate procedures. In relation to law enforcement, there are four main areas where the police can use discretion. First, the policeman may make a decision as to whether or not to arrest without warrant a person suspected of violating the law. The second decision relates to the function of enforcing laws and whether to

enforce a particular law under a given set of circumstances, as would be the case with antiquated laws, and selective enforcement practices necessitated by the need to concentrate on enforcement of particular laws, or the enforcement of certain laws and not others because of the shortages in police manpower and equipment. Third, in enforcing the law, the policeman may make a decision not to charge a particular violator after due consideration of the merits of that case. Finally, he makes a decision as to whether he should warn an offender who has violated the law, and whom he has decided not to charge.

Police discretion appears to have been given considerable attention in the United States of America, without any consensus being reached as to its legal propriety, or its moral desirability. On the one hand, there are the well documented studies dealing with the legal issues involved, expressing opinions favourable to the exercise of police discretion (10, 11, 16, 17). On the other hand, there are the equally well documented studies questioning the right of the police to exercise discretion (8, 9).

Little has been written on the subject of police discretion as it pertains to the Canadian scene. The Report of the Canadian Committee on Corrections (The Ouimet Report) has one full chapter pertaining to the various aspects of the

police function (4, pp. 39-90), and of the fifty-one pages in that chapter, only two are devoted to the exercise of discretion by the police (pp. 44-46), and that, in very broad terms. The Committee's study covered a period of three years with its terms of reference being:

> To study the broad field of corrections, in its widest sense, from the initial investigation of an offence through to the final discharge of a prisoner from imprisonment or parole, including such steps and measures as arrest... (4, p.1).

In view of the broad terms of reference, the nature and extent of the study, one may wonder why the Committee did not conduct a study of police discretion. The answer to this question is found in the first words of the Committee in the section relating to discretion:

> The question whether the police have any discretion with respect to invoking the criminal process, and if so, the nature and extent of that discretion, has been the subject of very little discussion by the courts in Canada or in the Canadian legal literature (4, p.44).

The Committee felt that the exercise of discretion on the part of the police officer is not subject to scrutiny because there may be no persons other than the police officer and the offender, aware of the incident that gave rise to the use of discretion (4, p.44). They go on to say that "The exercise of police discretion contains inherent dangers. It may result in inequality of treatment, since not all police officers will

act in the same way under similar circumstances" (4, p.44). Notwithstanding this statement, they do not totally rule out the use of police discretion, for they suggest that police departments should devise some means of control over the exercise of discretion by their members (4, p.46). It appears then, that lack of attention given to the subject of police discretion in the Ouimet Report was not due to a feeling on the part of the Committee that the matter was unimportant; they were interested in this aspect of the police function, acknowledging the use of discretion by Canadian policemen, and expressing an opinion favourable to such enforcement practices (4, pp. 45-46). They suggested that discretion in law enforcement is deserving of emphasis in police training (4. p.46).

In a study of the Metropolitan Toronto Police Department, Gandy (7) found that many policemen regard the exercise of discretion as an individual decision that must be taken by each policeman as he is confronted with the particular circumstances of each case. He found that:

> The stated goals of the department, as for most organizations, were very broad and inclusive. Senior officers in the department indicated that specific departmental goals for the handling of juveniles were unnecessary and not feasible. One of the reasons given was that in dealing with juveniles "every case is different" and that it is necessary to retain a great deal of flexibility in these questions (7, pp. 338-339).

Gandy failed to locate any clear policy on the use of discretion in general, and the manner in which a police agency expected its members to exercise their discretion.

The Ontario Police Act carries a section that states:

> The members of police forces ... are charged with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against by-laws of the municipality, and apprehending offenders, and laying informations before the proper tribunal, and aiding in the prosecuting of offenders ... and are liable to all duties and responsibilities that belong to constables (14, Section 47).

Watchorn sees this as a mandate for full enforcement of the law. He contends: "Nowhere have the police been delegated discretion not to invoke the criminal process in a situation which calls for its invocation" (21, p.50). The decision as to which situation "calls for its invocation" and which does not is, of course, discretionary.

If the police have not been delegated authority to make decisions involving the use of discretion, the need for such delegation becomes increasingly evident. The Ouimet Committee stated:

> ...the element of the exercise of police discretion cannot be separated from law enforcement and that its complete elimination would not advance the ends of justice. We think that the decision not to prosecute and merely give a warning may best advance the ends of justice in some circumstances (4, pp. 45-46).

Proposed amendments to the Criminal Code contained in Bill C-218, presently before Parliament, which deals with the arrest and release of an offender, have also provoked similar statements. The Minister of Justice for Canada recently made the following statement:

> Such decisions (arrest and release) involve the use of wise discretionary power and if the police officer is to be an effective decision-maker, he should receive training in the principles of discretionary action so that he is confident of his own ability in what may be, for many officers, a new undertaking (19, p.5).

The situation is no different in England, whose judicial practices influence Canadian judicial policy. The discretionary powers of the police have received recognition by the English courts on many occasions. For example, the Court of Appeal acknowledged that the police have a very wide discretionary power on whether or not to enforce the law, in a recent complaint of non-enforcement of the gambling laws in England (6). In that case, the Commissioner of the Metropolis (London Police) issued a confidential policy directive which stated that a certain section of the gaming laws was not to be enforced without his approval, and that officers were not to enter gaming houses for observational purposes. This instruction arose as a result of the ambiguities in the gaming laws, and a case was pending before the court at the time of issuance of the directive. A private citizen made a

complaint that illegal gambling was going unchecked, and failing to get satisfaction from the Commissioner, he applied for a writ of mandamus which would have revoked the policy instruction. In the decision of the Appeal Court, the matter of the police having authority not to enforce laws and not to prosecute offenders, was thoroughly investigated and discussed. The court held that it was the duty of the police to enforce the law, and then went on to say the following, concerning the authority of the Commissioner of Police:

> He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all things he is not the servant of anyone, save the law itself. No Minister of the Crown can tell him that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility of law enforcement lies on him. He is answerable to the law and to the law alone (6).

Continuing on the subject of police authority as to the manner in which the law shall be enforced, the court indicated that although, generally speaking, the police are answerable to the law, there are many fields in which they have discretion where the law will not interfere. They believed that it was for the Commissioner, or a chief of police to decide in a particular case, if enquiries should be pursued or a prosecution laid (6). In other words, it is the chief's responsibility to decide on the disposition of his men or

the action to take on a particular crime.

Recognizing the right of the police to exercise discretion, the presiding Lord Chief Justice nevertheless made it clear that there are some policy decisions in which the courts can interfere, as would be the case if a chief directed that no person should be prosecuted for theft, unless the amount exceeded a certain value. In such a case they believed the court could countermand the order as it constituted a failure to enforce the law.

In the case of Arrowsmith v. Jenkins (5), the police use of discretion in deciding on whether to prosecute was upheld by the English Court of Appeal. Miss Arrowsmith, an advocate of nuclear disarmament, was prosecuted under the highway act for obstructing the highway by allowing the audience she attracted to spill out onto the road. The police asked her to call the crowd closer so as to leave the road clear, which she did, but people still partially blocked the passageway. After a lapse of twenty minutes, the police charged her and she was subsequently convicted. On appeal, it was argued that in the past, the police had permitted partial obstruction of the road, and had been present to permit opening of the area to allow the passage of traffic as it came along. The Lord Chief Justice held that he could not concern himself with what had happened at other times, saying,

in effect, that the police could not prosecute every obstructor, and that it was proper for them to exercise a wise discretion when to prosecute.

The personal nature of the police-citizen contact in which discretion is exercised, makes verbalization of police policy on discretion almost impossible. In commenting on the problem of administrative control, Wilson makes the position clear, when he states:

> ...the administrator will have difficulty specifying in advance the circumstances under which a patrolman should intervene. To get the particular patrolman to do "the right thing" when he is making street stops in order to question persons, the administrator must first be able to tell him what the right thing is. This is seldom possible (23, p.64).

But to that, Wilson adds, "To say that discretion inevitably exists...and cannot be reduced to rule is not to say that the police administrator does not know what he wishes done" (23, p.66). Goldstein refers to decisions made by policemen on whether to use their discretion, as low visibility decisions in the administration of justice (8, pp.552-554). In other words, he is saying that the decisions the policeman makes out on the street, often on the spur of the moment, are not seen by other citizens, his supervisor or departmental head. The officer has to rely on his own good common sense based on a sound philosophy of law enforcement which has been

fostered by proper training provided by a police department which has established policy to guide the policeman in making the best decision. A police force may have the highest qualifications for recruitment, the most efficient training programme, the most detailed administrative policies, but in the end, like other police agencies, it must put the police officer out on the street trusting that he will perform his duties in a manner acceptable to the public.

What about administrative control of police discretion? The President's Commission on Law Enforcement and Administration of Justice in the United States, has stated:

> Proper and consistent exercise of discretion in a large organization, like a police department, will not result from the individual judgment of individual police officers in individual cases. Whatever the need for the exercise of judgment by an individual officer may be, certainly the development of overall law enforcement policies must be made at the departmental level and communicated to individual officers. This is necessary if the issues are to be adequately researched and adequately defined and if discretion is to be exercised consistently throughout the department (20, p.19).

The Canadian Committee on Corrections has made a similar statement, saying that

> ...departments should develop systems for recording the exercise of police discretion where a caution has been administered to a possible offender as an alternative to a prosecution. Moreover, guidelines with respect to the exercise of police discretion should be enunciated by senior officials in the police forces with a view to developing uniform practices (4, p.46).

A contrary view is expressed by Peter K. McWilliams, a former Crown Attorney in Ontario. He was critical of a report of the Metropolitan Toronto Police Commission on an enquiry upholding a discretion in senior officers to the laying of charges(12). McWilliams explained that the Commission's report supported the practice of senior officers dictating when, and under what circumstances, charges should be laid. This to him, was "... a misconception of the power and the authority of a senior police officer or chief constable over a police constable" (12). He went on to explain that the jurisdiction of a police constable is original jurisdiction which existed before the organization of disciplined police forces, expressing the opinion that:

> There is nothing in the Police Act (of Ontario) which empowers a senior police officer to order a constable to lay any particular charge. Unless the constable conscientiously believes on reasonable and probable grounds that an offence has been committed, he is under no obligation to lay a charge. Conversely, a senior police officer has no power to order a constable not to lay a charge if the latter believes that an offence has not been committed (12).

Arrest and Discretion

The authority of the police to arrest a citizen represents the maximum in legal power of one individual over another. In a democracy, freedom from restraint and restriction of movement is considered to be a fundamental right. Consequently, the power of arrest is not taken lightly by the citizen, the policeman, or the legislator.

Where a crime has been committed, or is suspected of having been committed, arrest may be looked at as the last step in the police investigation. Under certain circumstances, arrest may be considered a part of the investigation. Section 435 of the Criminal Code (2) gives the police officer authority to arrest without warrant, an individual whom he has reasonable and probable grounds to believe has committed, or is about to commit an indictable offence. The right to search the person after arrest may establish that he has already committed the offence, as would be the case if an offender was found in possession of narcotics or tools used for breaking and entering dwellings. Where an arrest has been made in relation to a specific offence believed to have been committed, it may still be followed by further important investigation of the circumstances surrounding the offence. While the police officer must have reasonable and probable grounds to believe that an offence has been committed or is about to be committed, this does not mean that he is required to have sufficient evidence to secure a conviction in court (4, p.55). Important procedures such as police identification line-ups, fingerprinting, record checks and interrogation may, and often does, provide additional evidence required to prove the case in court. These procedures after arrest just as often result in exoneration of the arrested person and his subsequent release without court

appearance.

Section 435 of the Criminal Code (2) reads as follows:

> 435. A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who on reasonable and probable grounds, he believes has committed, or is about to commit an indictable offence, or is about to commit suicide.
>
> (b) a person, whom he finds committing a criminal offence, or 1960-61, C.43, s.14
>
> (c) a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which that person is found. 1968-69, C.38, s.30.

The key phrase in this section is "a peace officer may arrest". To assist the police in the apprehension of offenders of the law, the legislators have given the police authority to arrest persons without warrants under the circumstances described in the above noted section of the Criminal Code. In doing so, they left the decision of whether or not to arrest, to the discretion of the police by the insertion of the phrase, "a peace officer may arrest" in the arrest section. The law as it is stated, forces the police officer to make a decision on whether or not to deprive the offender of his freedom through the medium of arrest. The officer knows <u>what he can do</u>, but yet he must exercise his discretion in considering <u>what he ought to do</u>.

The powers of arrest under the Criminal Code are supplemented by the authority for arrest contained in provincial statutes such as provincial traffic and liquor acts (13, Sec. 156(2)). No provincial legislation was located that said that the police shall arrest, but like the Criminal Code these statutes leave the decision to the police by stating that a police officer may arrest. Many federal statutes contain arrest sections with the same provisions (3, Sec. 140 (1)).

The proposed amendments to the Criminal Code contained in Bill C-218 (1), places the use of discretion by the police on a much more solid basis than does the interpretation placed on the term "may". The proposed amendment replacing the present Section 435 of the Criminal Code reads as follows:

> 436(2) A peace officer shall not arrest a person without warrant for an offence, other than an offence mentioned in section 445H, where he has reasonable and probable grounds to believe that the public interest may be secured by proceeding otherwise than by arrest without warrant(1).

If the provisions of the Bill become law, the police will not have authority to arrest unless thay have reasonable and probable grounds to believe that the public interest would be best served by an arrest. Although many policemen may have always taken the public interest into consideration, the proposed new legislation makes it mandatory

that all policemen consider such interests and in that sense, this legislation would seem to increase the discretionary powers of the police by forcing them to exercise a wise discretion in the matter of arrest through consideration of both the interests of the offender and the public.

Summary

A review of the literature has revealed that there exists controversy on the question of the use of police discretion when enforcing the law. None of the sources cited any empirical evidence available from which conclusions could be drawn as to the attitudes of the public and the police toward police discretion in Canada, an important omission if one accepts the tenet of the crucial character of the first contact of the policeman with the citizen in creating respect for the law. The review of the literature did reveal, however, that government officials in responsible positions in relation to legislation and administration of law, favoured discretionary enforcement practices by the police, as did the Committee (4) set up to study the field of the administration of justice in Canada. With respect to the use of discretion in the laying of charges, statutory authority for non-invocation of the criminal process does not exist. It may be concluded, however, that unwritten authority exists as a result of the stand taken

by the Minister of Justice for Canada and the Canadian Committee on Corrections. The power to arrest without warrant could be considered legal authority for the police to exercise discretion, because the decision of whether to arrest an offender has been left to the judgment of the police.

It is concluded, that by virtue of his office, the police officer has a dual responsibility to the public. In legalistic terms he is responsible for the enforcement of the laws within the confines of the jurisdiction of his office. In terms of his responsibility for rendering a social service to the community, he is charged with balancing the social forces at work within that community to the point of equilibrium where individual citizens are assured of that degree of order which will permit them to peacefully enjoy life, liberty and property. This latter function is without doubt, the prime function of the police. This seems to be supported by the definition of the policeman's occupation being that of a "peace officer", and designated as such in the oath of office taken at the time of recruitment. As well, the prevention of crime and the maintenance of peace was seen by Sir Robert Peel, founder of the modern police force, to be the main function of the police. Charles Rowan and Richard Mayne, were appointed by Peel to organize

the Metropolitan Police Force in London, England. That force came into being in 1829 and in their handbook of "General Instructions", Rowan and Mayne issued instructions to all ranks on the manner of carrying out their duties. In one section they stated that:

> It should be understood at the outset that the principle object to be attained is the prevention of crime. To that great and every effort of the police is to be directed. The security of property and person, the preservation of public tranquility and all other objects of a police establishment will thus be better effected than by detection of crime and punishment of the offender after he has succeeded in committing the crime. The absence of crime may be considered the best proof of the complete efficiency of the police (18, p.135).

Few should disagree with the contention that the police should have as their main objective, the prevention of crime. This is the very purpose for which the police were organized. It is through the prevention of crime that order is established and maintained.

If the first duty of the police is to maintain order, what of the law? Very simply, laws are enacted to protect certain values felt necessary for the existence of a particular style of living. Consequently, laws vary from one state to the next in relation to the degree of difference in each state's way of life. The law, then, was established just as were the police, to maintain order and

peace. It follows, therefore, that one obvious way of maintaining peace is to have the police enforce the law. Experience through history also makes it obvious that enforcement of the law does not always result in prevention of further crime and the existence of order. While the original intent of the rule of law and the function of the police are in harmony in that both see their objective as being the preservation of order, the concepts of legality and order will clash if the rule of law demands full enforcement of the law, while the police function would permit recourse to other means under circumstances where enforcement has either failed or is not likely to succeed.

Not to react in the usual way because one sees an alternate action which seems likely to enhance the possibility of attainment of a goal, involves a discretionary decision. If one is denied that choice, he is also denied discretion. In law enforcement the exercise of discretion is essentially the exercise of a power which results in the differential treatment of offenders. It may be exercised at a central administrative level, or at a peripheral field level with the same result in either case. There exists little or no legal authority for the exercise of this power, but it is nevertheless practiced and receives tacit approval of the law when the exercise is governed by practical considerations. The police may resort to the use of

discretion at different points in the legal process which may involve

1. non-enforcement of a particular law
2. non-recognition of a particular violation
3. non-arrest of a particular suspect
4. and non-charge of a particular offender.

It may also involve (a) the issuance of a warning rather than the laying of a charge and (b), the laying of one charge rather than another. At whatever point the discretion is exercised, the end result is always the same - differential treatment of the offender.

Both support for, and opposition to discretionary law enforcement receive justification from arguments that centre on the end result. Opponents of discretionary law enforcement appear to be oriented toward the position taken by those of the classical school who contend that equality and uniformity in enforcement are essential to the maintenance of law and order. On the other hand, those supporting discretion appear to favour the position taken by those in the neo-classical school which stresses equity rather than equality, individualization in application of the law rather than uniformity as the crucial elements. Whatever the doctrinaire position may be, the only justification for discretionary law enforcement in a democratic country is public support. It is with this orientation that this study was planned.

REFERENCES

1. CANADA (1970) Bill C-218, An Act to Amend the Provisions of the Criminal Code. Ottawa: The House of Commons of Canada.

2. CANADA (1955) Criminal Code of Canada. Statutes of Canada, 1953-54, C.51.

3. CANADA (1952) Customs Act. Revised Statutes of Canada, C.58.

4. CANADA (1969) Report of the Canadian Committee on Corrections. Ottawa: The Queen's Printer.

5. ENGLAND (1963) "Arrowsmith v. Jenkins", Queen's Bench Division. Police Review, 23 Aug. 1963.

6. ENGLAND (1968) "Regina v. The Commissioner of Police of the Metropolis, Ex parte Blackburn". The Weekly Law Reports, 2, 893-914.

7. GANDY, John M. (1967) The Exercise of Discretion by the Police in the Handling of Juveniles. Toronto: University of Toronto School of Social Work, Unpublished Ph.D. Dissertation.

8. GOLDSTEIN, Joseph (1960) "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice." Yale Law Review, 69, 543-594.

9. HALL, Jerome (1953) "Police and the Law in a Democratic Society". Indiana Law Journal, 28, 133-177.

10. LaFAVE, Wayne R. (1962) "The Police and Non-Enforcement of the Law". Wisconsin Law Review, Part 1, 104-137.

11. LaFAVE, Wayne R. (1965) Arrest: The Decision to Take a Suspect Into Custody. New York: Little, Brown and Co.

12. McWILLIAMS, Peter K. (1970) "The Need to Screen Charges by the Police". The Globe and Mail, Toronto. Commentary in issue of 6 Nov. 1970, cols. 1-4, 7.

13. ONTARIO (1960) The Highway Traffic Act. Revised Statutes of Ontario, C.172.

14. ONTARIO (1960) The Ontario Police Act. Revised Statutes of Ontario, C.298, Part 5.

15. POUND, Roscoe (1960) "Discretion, Dispensation and Mitigation: The Problem of the Individual Case". New York University Law Review, 35, 925-926.

16. REMINGTON, Frank J. (1960) "The Law Relating to On the Street Detention, Questioning and Frisking of Suspected Persons, and Police Arrest Privileges in General". Journal of Criminal Law, Criminology and Police Science, 51, 386-394.

17. REMINGTON, Frank J. and Victor ROSENBLUM (1960) "The Criminal Law and the Legislative Process". University of Illinois Law Forum, 12, 481-499.

18. REITH, Charles (1966) A New Study of Police History, Edinburgh: Oliver and Boyd.

19. TURNER, John (1970) "The Police in a Confrontation Society". Royal Canadian Mounted Police Gazette, 32, 3-8.

20. U.S.A. (1967) "Task Force Report: The Police" in The President's Commission on Law Enforcement and Administration of Justice. Washington, D.C.: Superintendent of Documents.

21. WATCHORN, D.J. (1966) "Abuse of Police Powers: Reasons, Effect and Control". Faculty of Law Review, University of Toronto, 24, 48-69.

22. Webster's Third International Dictionary of the English Language (1963). Springfield: G.& C. Merriam Company.

23. WILSON, James Q. (1968) Varieties of Police Behavior. Cambridge: Harvard University Press.

CHAPTER V

RESEARCH SETTING AND METHODOLOGY

The police use of discretion in law enforcement has been the subject of little empirical research, especially in the case of Canada. An air of controversy and indecisiveness surrounds the subject, and this is believed to stem from the lack of clear-cut authority for the police to use discretion. Police departments seem to advocate the exercise of discretion and claim (generally with hesitation) that they follow discretionary procedures in carrying out their law enforcement duties, but this, in the absence of any definition of policy statements on the matter. Statutory authority for non-invocation of the criminal process does not exist, but it may be concluded that authority exists in unwritten form. The public are thought to endorse a policy of discretionary law enforcement, yet there was no empirical evidence available to support the hypothesis, so the controversy on the police use of discretion continues on a purely theoretical basis. In a democracy, the police are servants of the public hired to enforce public laws. For law enforcement to be effective it must have the support of that public: the public and the police must share common attitudes toward the law and the manner in which

it should be enforced. The controversy must, therefore, be resolved in these terms.

This study, essentially an attitude survey, was designed to test the basic hypothesis that both the public and the police favour discretionary law enforcement by the police, and that the public attitude towards it is no different from that of the police. To test this hypothesis, the attitude of the police toward discretionary law enforcement had to be ascertained, the attitude of the public toward it had to be determined, and then the two attitudes had to be compared. Very basically, the mechanics involved comprised the preparation of a questionnaire, which was given to samples from the two populations, and the analysis of the responses obtained.

The preparation of the questionnaire necessitated the answering of a number of preliminary questions and, as well, required the existence of a definition of police discretion which could be used in conjunction with the discussion of the survey results. Discretion in relation to law enforcement is defined as non-pursuance of a practice of invariable charging which involves not merely the consideration of the evidence available for the justification of a charge, but also other circumstances connected with the offence which would endow a charge not only with justice but with equity. An endowment that is necessary if justice must

be done and at the same time appear to have been done. Four questions were essential to the research:

1. Should the police use discretion?
2. Should the police charge everyone who violates the law?
3. In charging, should the police consider only the evidence?
4. In charging, should the police consider other circumstances?

These questions, dealing basically with the police use of discretion, canvass attitudes in different aspects of the subject and afford an opportunity for the assessment of the strength of the attitude. As the issuance of a warning instead of laying a charge is in some cases an accepted police practice, a fifth question had to be asked relating to the propriety of this practice.

Also to be taken into consideration was the fact that violations of the law are conventionally described as minor and serious. This fact necessitated the documentation of the public and police attitudes, not just toward the broad subject of discretion, but in its more specific application to minor and serious offences, and as well, the determination of the awareness of this categorization of offences. Finally, it has been averred that individuals expect differential treatment for themselves when involved in violations of the law. This,

too, presented itself as an interesting area of investigation, and demanded its incorporation in the questions.

Another problem that had to be resolved before the questionnaire was prepared concerned the form the questions should take. There were four possible ways in which the questions could have been asked. The first, which could be described as the direct approach, was to ask the individual his view or opinion. The question would ask the individual what he thought of a particular action. The second, discernible as the indirect approach, would also ask the individual what he thought of a particular action, but the action on which the opinion was sought would be seemingly unrelated to the subject studied. From the opinion expressed, the attitude of the individual on an aspect of the subject studied, would be inferred. In the third, which could be described as the hypothetical approach, the individual would be asked what his reaction would be if he was placed in a particular situation - a situation obviously related to the subject under study; while in the fourth method, which could be called the realistic approach, the question would ask the individual what his actual reaction was when he was placed in a particular situation. All these approaches have been used in attitude surveys and each one has its own peculiar advantages and disadvantages.

For this study, the realistic approach was considered unsuitable. Asking an individual what his reaction was when he found himself in a particular situation could easily have evoked the answer, "I was never in that situation", especially when that situation dealt with contact with law enforcement agencies - a contact which many citizens in the community may not have made. For example, even the seemingly universal situation of problems in day-to-day living evoked in one survey the response "I have never had problems" (1). The hypothetical approach was judged unsuitable because the question usually evokes in the individual a thought process which could produce a response which would reflect the ideal, rather than the real (2,3). The direct approach was considered to be preferable to the indirect method because the latter involves an inference dependent on a series of connecting links, which would have to receive in this study, validation from the logic of theoretical arguments rather than from the association of empirical findings. It has been realized that the findings in this study, as in any study, could be no better than the nature of the data collected. It has also been realized, that the responses received may not be what the respondents actually feel. Nevertheless, the responses have to be taken at face value. To minimize the possibility of error, however, it was decided to repeat some questions, formulating them in such a way, and placing them in such a position,

as to reduce as much as possible the obviousness of the repetition.

The questionnaire was prepared with all these considerations in mind when the specific questions were formulated. The finalization of the questionnaire, however, involved the decision as to whether the questions should carry pre-coded answers or remain open-ended. As the study was designed not as an exploratory one, but as one to test a specific hypothesis, the interview schedule was prepared in the first mentioned form with the questions being most frequently framed in the form of statements with which the respondent could strongly agree, agree, disagree, strongly disagree, or be uncertain. Partly to relieve the monotony of questions formulated in the same way, and partly to minimize the number of questions used, some questions were formulated with the possible police reaction to a situation being the pre-coded answers. (See Questions, 3, 9, 13, 16 and 18 in Appendix I).

The selection of the sample also posed a number of problems. Ideally, a random sample of the Canadian population and a random sample of policemen in Canada, should have been obtained, but practical considerations demanded the limitation of the scene of activity to Ottawa. Several methods were considered in relation to the manner in which the public sample would be selected. In the end, it was decided to select random

addresses from the Ottawa-Hull telephone directory. This excluded from the sample those who did not have telephones. To determine the significance of this, Bell Canada (Bell Telephone Company) were asked if they could provide an estimate of the number of homes, or the percentage of homes, having telephones in the area of the survey. They advised that as of December 31, 1969, there were 100,670 family telephones in the survey area and that this figure represented approximately 99% of the homes. It is reasonable to assume, therefore, that the population sample was only minimally affected by the absence of telephones in some homes.

The following procedure was followed in selecting addresses from the telephone directory: (1) The pages in the directory which listed telephone numbers for the Ottawa-Hull area were listed between pages 22 to 500 inclusive. The numbers 22 to 500 inclusive were individually written on small tags and put into hat "A". (2) Each page in the directory contains approximately 400 telephone numbers and addresses, so numbers from 1 to 415 inclusive were individually written on small tags and placed in hat "B". The numbers went to 415 to ensure that all addresses on each page drawn, had the opportunity of being pulled from the hat. A test of several pages was made and no page was found to contain more than 405 telephone numbers. If when drawing addresses for the sample,

number 405 was drawn and if it happened that the page drawn included 402 addresses only, 405 was to be put back in the hat and a new number drawn. (3) When making draws for the population sample, a number was drawn from the hat "A" which gave the page number in the directory; a number was drawn from hat "B" which gave the address number. For example, if page 60 was drawn and address number 21, page 60 was located in the directory and counting down 21 telephone numbers, the address for that number was located and recorded. If a Hull address was drawn for a page it was to be put back in hat "B" and a new address would be drawn. Although the city of Hull, Quebec, is considered to be in the greater Ottawa area, it was not included in the population sample area because of its location in another province, and because of the possibility of language difficulties (many Hull residents speak French only). Business addresses were not used and, if drawn, the number was returned to hat "B" and a second number would be drawn for that page. (4) A total of one hundred addresses were drawn and recorded. This represented the random sample of the citizen population in the survey area - Ottawa. It comprised one person, sixteen years of age or over from each residence that was to be randomly selected, with the decision as to who would answer the questionnaire left to the residents of the particular address.

The police sample was also to constitute a random sample of policemen in the greater Ottawa area, but this presented certain difficulties. Operating in the Ottawa survey area were several municipal police departments and the R.C.M.P., and a representative sample should have included policemen from each of those forces. The Ottawa Police Department was the largest operational department, with the R.C.M.P. being next. The other police departments, Vanier City Police, Nepean, and Gloucester Township Police, were comparatively small forces which would have yielded only one or two respondents each for a random sample. As a consequence, it was decided to have the questionnaire completed by fifty members of the Ottawa Police Department and fifty members of the R.C.M.P.

The Chief of the Ottawa Police Department felt that meaningful responses could be obtained only from members of the morality and criminal investigation sections, who were those most concerned and acquainted with the use of discretion.[1] The necessity of complying with this contention meant the restricting of the population from which the R.C.M.P. sample was drawn. As it was members of "A" Division who were directly involved in operational law enforcement duties, the R.C.M.P. sample was drawn from that Division.

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1 They were also men of lengthy service and of considerable experience as peace officers.

The police sample posed yet another problem - possible bias from interviewer-interviewee acquaintance. There was the possibility that members of the police force could, in an interview conducted by another police officer, give not their personal opinion, but the opinion they thought reflected the official position of the police. They would perhaps give what they felt was the official opinion, not wanting to appear to be out of line in the presence of another policeman. There being no way in which the interviewer could conceal the fact that he was a member of a police force, it was thought more appropriate to have the police responses obtained not through an interview, but through the policemen completing the questionnaire, given and explained to them by a senior officer of his department who would be briefed on the procedure to be followed for its completion. The senior officer was to explain to the policeman respondent that the responses were sought for the purpose of research, and would be scrutinized only by the researcher who would not know the identity of the respondent. He would not reveal to the respondent the fact that the researcher was a member of a police force. It should be pointed out that for both the public and the police populations, the questionnaire did not request the name of the respondent, only his age, sex and occupation.

While the police responses were to be obtained under the direction of a senior officer from each of the police departments represented in the same population, the public responses were obtained through an interview, and here an additional problem arose. What was to be done in cases where the citizen refused to be interviewed, or was not available. Possible ways of handling such situations were considered, such as making an initial draw of 150 addresses and calling at each of those homes, perhaps ending up with less than the initial number drawn, but more than the one hundred. Another method would have been to draw 150 addresses and use the addresses in the sequence in which they were drawn. If for any reason an address proved negative, the next address in the order drawn would be used. Also, second calls could be made at homes where the residents were absent on the initial call. One of the reasons for using random addresses was to permit the opportunity of all locations in the survey area the equal chance of being included in the survey area sample. It was considered, therefore, that should residents of an address not be home, or refuse to complete the questionnaire, it would be justifiable to choose the residence on either the immediate left or right of the original address. This procedure was to be followed throughout the course of the interviews.

The co-operation received from those persons selected to complete the interview schedule was excellent - there were only five cases of refusals to complete the statements, and six instances where residents of the addresses were not available. A total of sixty-one interviews were conducted by the writer, the remaining 39 being completed by seven assistants, all of whom were members of the R.C.M.P. who were briefed beforehand on the nature and content of the schedule and the interview techniques to be used. The interviewer would not disclose the fact that he was a policeman; he would ask the questions as they were, with brief and relevant explanations if solicited, and record the answers as given. The interviews were conducted in the winter of 1970/71 - during December, 1970, and January, 1971, with the questionnaires being distributed at the time of the interview.

In the statistical analysis that followed, the Chi-Square test was used. Dependent as it is on the distribution of populations compared into various categories, the Chi-Square test revealed the presence or absence of significant differences when the responses compared were those of the public and the police, and the presence or absence of significant association when the responses compared were those of either the public or the police to different questions. As the distribution of responses sometimes resulted in either no

one, or only a few making a particular response, categories were sometimes collapsed for the Chi-Square test. When the negligible category happened to be the "undecided" one, this category was not included when said tests were performed. Because the responses to the questions were most frequently scaled, varying from strongly agree to strongly disagree, an alternate method of comparing public and police responses would be to obtain a score for the answers and make the comparisons on the basis of these scores, using the differences of the standard deviations. The scoring technique involves the assignment of category numbers by the experimenter in a way that is arbitrary, except for ordering, and though the scores thus obtained may well serve the function of revealing differences or similarities in the responses of the two populations, they carry the connotation of a measure which being of a subjective sensation, leaves one with the unanswered question - how meaningful is it? (4). After due consideration of each method, the Chi-Square test was selected as being the more appropriate method of dealing with the data gathered in this study.

REFERENCES

1. ABHAYARATNA, G.E.R. and C.H.S. Jayewardene (1967) Fertility Trends in Ceylon. Colombo: Colombo Apothecarces Co. Ltd.

2. HOPPE, F., Erfolg and Misserfolg (1930) "Psychol. Forsch.", 14, 1-62. (Quoted in 1. above).

3. LaPierre, R.T. (1934) "Attitudes vs. Action", Social Forces, 13, 230-237.

4. LUCE, R.D. and E. Galanter (1963) "Psychophysical Scaling", in R.D. Luce, R. Bush and E. Galanter's Handbook of Mathematical Psychology, New York: John Wiley and Sons, Ch. 5, p.1.

CHAPTER VI

DISCRETION IN LAW ENFORCEMENT - PUBLIC AND POLICE ATTITUDES

The basic hypothesis of this study states that the police and the public favour a policy of discretionary law enforcement. There are many ways in which the police can use discretion, yet whatever may be the point at which discretion is used, its use invariably gets reflected in the laying of charges. In deciding whether or not to invoke the legal process by the institution of formal charges, there are many aspects surrounding the offence which must be considered by the police. First and foremost, is the police officer's obligation to the public to maintain law and order. In considering non-invocation of the legal process, the policeman has to bear in mind the effect that such action may have on the offender's, as well as the public's respect not only for the particular law involved, but for the law in general. If he is properly discharging his obligation to citizens in the community he has to consider what action will best discharge that obligation, remembering that the offender is one of those citizens and a part of the community for whom he has taken oath to serve. In that sense, the policeman has a dual responsibility, and taking into consideration the continued respect for the law, interests

of the community and the offender, he has ultimately to ask himself the following question: Do the circumstances warrant a formal charge against the offender? To answer this question, the evidence surrounding the offence, as well as the offence itself, must be examined. The availability of the evidence and the severity of the offence are factors taken into consideration. In addition, the circumstances over and above the narrow scope of the evidence, such as the background of the offender, his past criminal record, his family setting, and the particular circumstances under which the offence was committed, are also factors that could make the laying of a charge appear just or unjust, and as such, are usually taken into consideration before the policeman makes his final decision.

In the survey of the public and police, respondents were asked if they were in favour of the police charging everyone who commits an offence, regardless of the nature of that offence or other circumstances surrounding the matter (Question 21). The responses (Table I) show that 82% of the public, and 83% of the police did not favour a policy of absolute enforcement of the law by way of charge. This implies that both populations would expect the police to look at the offence which has been committed, and after considering the nature of the violation (serious or minor), the

Table 1 - A comparison of the attitudes of the public and the police toward general enforcement of the law.

	Interview Schedule Question.		- Percent - Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
7.	The police should consider the seriousness of the offence committed before deciding on whether or not to lay a charge.	public	9	63	3	21	4
		police	8	58	4	24	6
10.	The police should have the right to issue a warning rather than lay a charge if they feel that a warning would best serve the purpose.	public	25	69	2	2	2
		police	42	46	3	5	4
11.	If a person has committed an offence, the police should not consider other circumstances surrounding the matter because one person may be charged while another person may not be charged. This would be unfair.	public	4	28	4	60	4
		police	11	20	5	47	17
21.	Are you in favour of the police charging everyone who commits an offence, regardless of the nature of that offence and other circumstances surrounding the matter?	public	1	14	3	67	15
		police	5	8	4	56	27

Police Sample: N = 100, X^2 = 51.91, significant at 1% level.
Public Sample: N = 100, X^2 = 44.87, significant at 1% level.
Question 7: Not significant, X^2 = 1.171.
Question 10: Significant at the 5% level, X^2 = 11.04.
Question 11: Significant at 1% level, X^2 = 14.28.
Question 21: Not significant, X^2 = 8.84.

offender involved, and the particular circumstances surrounding its commission, decide on what action to take. Attitudes expressed in responses to three other questions reflect similar feelings. Question 7 states that the police should consider the seriousness of the offence committed before deciding on whether or not to lay a charge. Agreeing with this statement were 72% of the public and 66% of the police, while 64% of both populations disagreed with the statement in Question 11 - the police should not consider other circumstances surrounding an offence because one person may be charged and the other not, and this would be unfair. Question 10 states that the police should have the right to issue a warning rather than lay a charge when they feel that a warning would best serve the purpose. Both populations supported this practice, 94% of the public, and 88% of the police giving positive replies.

Although the responses to all four questions reflect a similar attitude - the majority favouring the use of discretion - the proportions so responding to each of the questions varies. When the responses of each individual to all four questions are compared the differences are significant for both the public ($X^2 = 51.91$) at the 1% level. The observed differences are not due to variations in the direction of the responses. The choices of responses to these four questions were "strongly agree", "agree", "undecided", "disagree", and

"strongly disagree". If the responses by each population are grouped into three categories - undecided, agree, and disagree, the differences are no longer significant. This indicates that those differences are due to the intensity of feeling. The 84% of the public and 88% of the police agreeing with the statement that the police should have the right to issue a warning rather than lay a charge if they feel that a warning would best serve the purpose (Question 10), are divided 25-69 and 42-46 respectively, strongly agreeing and agreeing. The 82% of the public and 83% of the police disagreeing with the statement concerning the charging of everyone who commits an offence (Question 21), are divided 15-67 and 27-56 respectively, strongly disagreeing and disagreeing.

Analysis of the four questions also reveal a similarity of responses to Questions 10 and 21 on the one hand, and 7 and 11 on the other. The largest proportion favouring the police use of discretion are found in the responses to Question 10 (issuing of warnings) - 94% of the public and 88% of the police. A difference significant at the 5% level ($X^2 = 11.04$) was found when comparing the responses of the public and the police to this question. This difference is mainly due to the intensity of feeling - more of the police (42 out of 88) strongly agreeing with the statement than the

public (25 out of 94). The answers to Question 21 (concerning the police charging everyone who commits an offence) also show a similar difference - 82% of the public and 83% of the police responding favourably to the police use of discretion (split 67-15 and 56-27). The differences between the responses here, however, are not significant ($X^2 = 8.84$). The smallest proportion favouring the exercise of discretion by the police are found in replies to Question 11 (concerning the consideration of other circumstances about the offence) - 64% of both the public and the police. The two populations, however, differ in intensity of feelings: only 4 of the 64 public responses found in the strongly agree category, compared to 17 for the police. This is responsible for the responses differing significantly at the 1% level ($X^2 = 14.28$). In regard to Question 7 (concerning consideration of the seriousness of the offence prior to laying a charge), almost the same situation exists - 72% of the public and 66% of the police responding favourably to the police use of discretion. The differences here, however, are not significant ($X^2 = 1.71$).

The similarity of responses to Questions 10 and 21 on the one hand, and 7 and 11 on the other, suggest that although all the responses reflect an attitude favourable to the exercise of discretion, the questions deal with different aspects of that attitude. Perhaps the more general and non-restrictive

nature of Questions 10 and 21, may be seen as asking whether the police should use discretion without specifically tying down what they should consider when deciding whether or not to lay a charge. To disagree with these two questions leaves only one clear alternative - to charge everyone who commits an offence. Both the public and the police have expressed the view that the laying of a charge should not be the only reaction to an offence. They feel that the issuance of a warning could be an appropriate reaction in some cases. Disagreement with the sentiments expressed in questions 7 and 11 does not connote abregation of this position. These questions deal not with the police reaction to an offence, but with the conditions under which the reaction is acceptable. A smaller proportion of both the public and the police who do not want invariable charging, think variation in reaction should be promoted by the consideration of the seriousness of the offence, and even a smaller proportion, by the consideration of the circumstances surrounding the offence.

A difference that perhaps needs comment is the difference between the responses of the police and public. This difference, as has been pointed out, is due to a variation in the intensity of feelings of the two populations, rather than in the direction of the response. The public and police both agree that the use of discretion by the police is desirable;

that the police should have the right to issue a warning; that the police should not necessarily charge everyone who commits an offence; that the police should consider the seriousness of the offence when deciding on whether to lay a charge; and that the police should consider the circumstances surrounding the offence prior to instigating prosecution action by the laying of a charge. More policemen than members of the public, however, express strong sentiment in their agreement. The responses to Question 21 (charging everyone who commits an offence) show no significant difference. The difference is significant at 5% in responses to Question 10 (issuing warnings), the police expressing a stronger sentiment. Consideration of the circumstances surrounding the offence (Question 11) is another area where the police feel more strongly in their reactions than do the public, while no difference exists in the responses given by the public and the police to the question concerning the consideration of the seriousness of the offence (Question 7).

The differences in public and police responses could perhaps be explained in terms of understanding and experience. The public, more removed from the event than the police, appear less liberal than the police (based on attitudes expressed to the four questions discussed) in what they think should be done to the offender, possibly because the distance from

the event results in their being less aware of the likelihood of ill effects arising from indiscriminate reaction. The classical school of criminal law demands the indiscriminate reaction to an offence, with variation of the reaction dictated only by the seriousness of the offence. The apparent injustice generated by the operation of such a system made the neo-classical school demand variation of reaction on the basis of circumstances. If these two positions are looked upon not as polar positions, but as ends of a continuum reflecting the thinking on the manner in which equity could best be achieved, the police rather than the public are found nearer the neo-classical school end, suggesting a more theoretical view of equity on the part of the public and a more practical view on the part of the police.

An alternate explanation is a police-public conflict in the power supposedly conferred on the police by the use of discretion. This contention appears to receive support from the fact that the differences in attitudes expressed lies in the police and public responses to questions dealing with the issuance of warnings, and the consideration of circumstances surrounding offences. But then, the difference is only one of degree, and not of direction of opinion, the public and the police both agreeing that the police should have the right to issue warnings and that circumstances surrounding the offence

should be considered, but with policemen feeling more strongly toward the issues than the public. These facts do not make the alternate explanation viable.

On the basis of the responses to Questions 10 and 21, it is possible to divide the police and public "survey populations" into five groups:

1. Those who favour the issuance of warnings and not charging all offenders.
2. Those who do not favour the issuing of warnings and not charging all offenders.
3. Those who favour not charging all offenders but not the issuance of warnings.
4. Those who favour the issuing of warnings but not the non-charge of all offenders.
5. Those who are uncertain.

The distribution of the populations (Table 2) shows that the largest group is the one favouring the issuance of a warning and not charging all offenders who commit offences. The second largest category is that favouring the issuing of warnings but not the non-charge of all offenders. This latter group perhaps did not view the issue of warnings as an expression of discretion and therefore, could be against the police use of discretion. Together with those who did express disapproval of the use of discretion, however, they constitute a very small group in both populations. Those who favour non-charge of all but not the issuance of warnings - also possibly

Table 2 - Police and public attitudes toward discretion - responses to questions 10 and 21

	- Percent - Public	Police
1. Favouring non-charge and issuance of warnings.	80	76
2. Not favouring non-charge and issuance of warnings. (a)*	3	5
3. Favouring non-charge but not issuance of warnings. (b)*	2	7
4. Favouring issuance of warnings but not non-charge. (c)*	14	12
5. Uncertain.	1	0

* Note: (a) Includes those uncertain about either issuance of a warning or laying of a charge. (Public 2, Police 4)

(b) Includes those uncertain about issuance of warnings (Public 1, Police 1)

(c) Includes those uncertain about laying a charge (Public 1, Police 2).

considering the issuing of warnings not a discretionary act - also constitute a small group. It is interesting to note that the distribution of responses are such that a larger proportion of the public than the police (though small) favour the police use of discretion - a finding that does not lend support to the hypothesis which claims a police-public conflict over the power supposedly conferred on the police by the use of discretion.

The grouping of the responses to Questions 10 and 21 shows that those favouring the use of discretion drop from 94% and 82%, to 80% in the case of the public, and from 88% and 83%, to 76%, in the case of the police, when the two questions are combined (Table 3). This reduction does not result from an increase in the proportion against the police use of discretion. That proportion also dropped - from 4% and 15%, to 3% for the public, and from 9% and 13%, to 5% for the police. The proportions favouring the police use of discretion decrease further when responses to Questions 7 and 11 are combined with responses to Questions 10 and 21. Limitation of the category of those favouring the use of discretion to those supporting this view in their responses to Question 7 as well, causes a drop in the public survey population to 63%, and in the police to 55%. When the responses to Question 11 replace those of Question 7, the drop is to 57% and 55% respectively. When the

Table 3 - A comparison of individual attitudes of the public and the police toward the use of police discretion as expressed in responses to four different questions

Interview Schedule Question	- Percent - Public For	Public Against	Police For	Police Against
7.	72	25	66	30
10.	94	4	88	9
11.	64	32	64	31
21.	82	15	83	13
10 and 21.	80	3	76	5
10, 21 and 7.	63	3	55	2
10, 21 and 11.	57	1	55	5
10, 21, 11 and 7.	46	2	38	3

responses to all four questions are utilized, the proportion definitely favouring the use of discretion is 46% in the public sample, and 38% in the police sample. This reduction occurs in the category of those against the police use of discretion also. When responses to all four questions are taken into consideration, those definitely against police discretion constitute 2% of the public and 3% of the police samples.

The reduction in the proportions of the two populations both favouring and not favouring the discretionary enforcement of the law, produced by the combination of the responses to all four questions as compared with the proportions favouring and not favouring (police discretion) as reflected in the responses to any one question, indicates that each question deals - as suggested earlier - with a different aspect of discretion, support for or against which, does not necessarily imply support for or against, the general concept of discretion. It is interesting to note that a little less than half of each population favour the police use of discretion in all its aspects and with all its implications, while only a very small segment are unquestionably against it. Over half of the two populations are for discretionary law enforcement in some form. It is also interesting to note that the proportions favouring the use of discretion in law

enforcement is greater in the public sample than it is in the police sample.

In as far as human behaviour is influenced by the individual's conception of the behaviour expected and accepted by other members of society, there is a possibility that the views expressed were fashioned, or at least influenced by the respondents' conception of what the ideal situation was - what others think the situation should be. To test this hypothesis, the individual was asked his opinion on the statement (Question 22): "The public are in favour of the police charging everyone who commits an offence, regardless of the nature of that offence or other circumstances surrounding the matter". Agreeing with the statement were 11% of the public and the police, but with 5% of the police strongly agreeing and none of the public (Table 4). Disagreeing with it were 80% of the public (12% strongly disagreeing), and 85% of the police (27% strongly disagreeing). These differences are significant at the 1% level ($X^2 = 14.92$) and here again, the difference is due to the variation in the intensity of feeling, rather than to a difference of opinion. Policemen who agree or disagree, do so more strongly than do members of the public.

Question 22 is akin to Question 21, the first asking the individual's opinion on the public's attitude toward charging everyone who commits an offence, and the latter asking

the individual's personal opinion on the same point. The differences in responses to the two questions of both the public and the police are not significant (public - $X^2 = 5.29$, police - $X^2 = .32$). The results suggest that each population felt that their favourable attitudes toward the police use of discretion were shared by the public - they interpreted the public's attitude as being almost the same as their own.

The information that the comparison of responses to Questions 21 and 22 yields, is perhaps one of the most significant issues arising from this study. To effectively maintain law and order in a democracy, it is imparative that the police have the support of the public. To obtain, and maintain that support, police departments have to be aware of public attitudes and expectations toward the law and the methods used to enforce it. Public and police agreement on methods used by the police in law enforcement, is a vital part of the solid foundation necessary for an effective system of administering justice. In view of the significance of this issue, a further comparison of responses of the public and the police to Questions 21 and 22 was made. The response of each individual to Question 21 was compared to his response to Question 22. Tables 5 and 6 show that there is a very significant association between the individual's opinion and the opinion he feels the public hold, both for the public survey

Table 4 - A comparison of the personal attitudes of the public and police with their interpretation of the public's attitude toward the use of discretion in relation to the laying of charges

Interview Schedule Question	- Percent - Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	
21. Are you in favour of the police charging everyone who commits an offence, regardless of the nature of that offence or other circumstances surrounding the matter?	1	14	3	67	15	public
	5	8	4	56	27	police
22. The public are in favour of the police charging everyone who commits an offence, regardless of the nature of that offence or other circumstances surrounding the matter.	0	11	9	68	12	public
	5	6	4	58	27	police

Question 21 - Comparison of Public and Police Attitudes: $X^2 = 8.84$, not significant.
Question 22 - Comparison of Public and Police Attitudes: $X^2 = 14.92$, significant at the 1% level.
Question 21 v. question 22 - Public: $X^2 = 5.29$, not significant.
- Police: $X^2 = .32$, not significant.

Table 5 - A comparison of expressed opinions of the public on personal and public attitudes toward the police use of discretion

Personal Attitude - Q.21.	Public Attitude - Q.22.					
	Strongly favours discretion	Favours discretion	Undecided	Opposes discretion	Strongly opposes discretion	
	- percent -					Total
Strongly favours discretion.	10	3	2	0	0	15
Favours discretion.	2	56	5	4	0	67
Undecided.	0	2	0	1	0	3
Opposes discretion.	0	6	2	6	0	14
Strongly opposes discretion.	0	1	0	0	0	1
	12	68	9	11	0	100

N = 100, X^2 = 72.18, significant at the 1% level.

Table 6 - A comparison of expressed opinions of the police on personal and public attitudes toward the police use of discretion.

Personal Attitude - Q.21	Public Attitude - Q.22: Strongly favours discretion	Favours discretion	Undecided	Opposes discretion	Strongly opposes discretion	Total
	- Percent -					
Strongly favours discretion.	20	6	0	0	1	27
Favours discretion.	7	48	0	0	1	56
Undecided.	0	1	2	1	0	4
Opposes discretion.	0	1	2	5	0	8
Strongly opposes discretion.	0	2	0	0	3	5
	27	58	4	6	5	100

N = 100, X^2 = 158.40, significant at the 1% level.

population (X^2 = 72.18) and the police (X^2 = 158.40). According to the responses to both these questions, the individuals could be divided into nine categories as outlined in Table 7. As was the case when comparing group responses, individual responses to these two questions also reveal that the public and police both express opinions that they believe others hold. In respect to the public, 71% were in favour of the use of discretion themselves and felt that the general public shared the same view. When comparing their group responses to Questions 21 and 22, it may be recalled (Table 4) that 82% personally favoured the police use of discretion, while 80% believed that the public held that opinion. In the case of the police, 81% favoured the use of discretion and 85% were of the opinion that the public shared the same feelings. Against discretion were 15% of the public and 13% of the police, with 11% of the public and police feeling that the general public also held this view, but with only 6% of the former, and 8% of the latter feeling that their antipathy towards the police use of discretion was shared by the public as well. Holding views that may not be considered consonant with the public view, are only about 10% of the public and 5% of the police. This lack of consonance, however, is due to the expressed ignorance of the public attitude, rather than the belief that they (the public) held a contrary view. Responses show that

Table 7 - A comparison of expressed opinion of the police and public on personal and public attitudes toward the use of discretion by the police.

Interview Schedule Questions 21 and 22 - Response Classification.*	- Percent - Public	Police
1. Personally favours discretion and feels public does.	71	81
2. Personally favours discretion but feels public does not.	4	2
3. Personally against discretion and feels public are also against.	6	8
4. Personally against discretion but feels public favours discretion.	7	3
5. Personally favours discretion but uncertain as to public feeling.	7	0
6. Personally uncertain about discretion but feels public favours.	2	1
7. Personally against discretion but uncertain as to public feeling.	2	2
8. Personally uncertain about discretion but feels public are against its use.	1	1
9. Uncertain on both personal and public attitude toward discretion.	0	2

* Personal attitudes expressed in responses to question 21, interpretation of public attitude expressed in responses to question 22.

Public vs. Police Responses: $X^2 = 14.92$, not significant.

9% of the public and 4% of the police were uncertain of the public attitude. The figures also indicate, as is perhaps to be expected, a greater awareness of the public attitude by the police than by the public. Part of the police function is to interpret public opinion. A comprehensive assessment of public attitudes is required if they are to gain the public support necessary for effective law enforcement. The police must of necessity be mindful of public attitudes, while the public, on the other hand, not having the same obligations as the police, can afford to be less mindful of public opinion on the law and the manner in which the police enforce it. This does not mean that there is a total unconcern on the part of the public, but perhaps an unconcern until the police adopt methods of enforcement so distasteful that the public have no alternative but to voice their objections.

It is a commonly held view that when it comes to enforcing the law, the normal, "law abiding" citizen expects to be treated more liberally by the police than those other, "criminal types". He expects the so-called criminal type to be exposed to all the harshness that the law permits and, generally speaking, he tends to regard all others who violate the law as criminals deserving of punishment. This view stems from the extension of a theoretical position which claims that all wrong that an individual himself does, is frequently the solitary blot on an otherwise exemplary life, whereas the wrong

that anyone else does, is a symptom of a tendency - a position that stems from emotion (uncertainty) rather than from experience.

To test the hypothesis that the individual expects differential treatment for himself, three sets of questions were asked. In the first set (Questions 18 and 20) the individual was asked whether he thought it fair to be charged for theft of candy from a store, and how he expected John Doe to be treated for the same offence. In the second set (Questions 16 and 19), the same questions were asked in reference to the offence of intoxication in a public place, while the third set (Questions 3 and 14) involved the offence of exceeding the speed limit. The differences in the cagegories of responses to the sets of questions, with the exception of numbers 3 and 14, makes direct comparisons somewhat difficult, nevertheless, it is possible to compare similarities and differences.

Question 18 (Table 8) concerns the theft of candy from a store by John Doe. The public responses indicated that 10% felt charges were warranted; 58% thought a warning would suffice; 29% believed the type of action taken would depend on the circumstances; and 3% felt that no action at all should be taken. Question 20 (Table 8) involved the same offence but with John Doe replaced by the respondent as the offender, and the categories of responses requiring either agreement or disagreement

Table 8 - A comparison of attitudes of the public and the police on differential treatment for themselves and others in relation to the offence of theft.

Interview Schedule Question		- Percent - Public	Police
18. If John Doe stole a 10¢ candy bar from a store he should be			
	a) Warned	58	23
	b) Ignored	3	0
	c) Charged	10	13
	d) Depends on circumstances	29	64
20. You stole a 10¢ candy bar from a store, you have no previous record. The police lock you up and charge you. They say you have been treated fairly. How do you feel?			
	a) Strongly agree	3	9
	b) Agree	22	23
	c) Undecided	4	11
	d) Disagree	52	40
	e) Strongly disagree	19	17

Public v. Police Responses: Question 18, $X^2 = 31.68$, significant at the 1% level.
Question 20, $X^2 = 7.96$, not significant.

with the laying of a charge. 25% of the public were agreeable with being charged, 71% disagreed, with the remaining 4% being undecided. Comparing individual responses to Question 18 with those given to Question 20 (Table 9), 8 of the 10 who wanted John Doe charged, agreed to being charged themselves; the 3 who thought John Doe's charge should be ignored, did not think they should be charged; of the 58 who would have John Doe issued with a warning, 47 did not agree to being charged, 9 thought they should be, while the remaining 2 were uncertain; of those who held that the police action against Doe would depend on the circumstances (29%), 8 agreed with being charged, 19 disagreed, with 2 being uncertain as to how they should be treated. The agreement to the responses to the two questions is significant at the 1% level ($X^2 = 33.34$), lending no support to the hypothesis that the individual expects different treatment for himself than he does for others.

The responses to Question 18 by the police showed that 23% were in favour of issuing a warning to John Doe; 13% would charge him; while 64% were of the opinion that the action to be taken would depend on the circumstances. None of the police felt that the situation should be ignored. In regard to Question 20, 32% of the police thought they should be charged, 57% were against prosecution, with the remaining 11% being uncertain on the action to be taken against them. Comparing individual

Table 9 - A comparison of individual responses of the public and the police on differential treatment for themselves and others.

Interview Schedule of Questions 18 and 20 - Classification of Responses.*	- Percent - Public	Police
1. Warning for John Doe but charge for self.	9	3
2. Warning for John Doe and no charge for self.	47	19
3. Ignore offence against John Doe and no charge for self.	3	0
4. Charge John Doe and self.	8	12
5. Charge John Doe but not self.	2	1
6. Charge would depend on circumstances for John Doe, but charge self.	8	17
7. Charge would depend on circumstances for John Doe, and no charge for self.	19	37
8. Issue warning to John Doe but uncertain on action against self.	2	1
9. Charge would depend on circumstances for John Doe, uncertain on charge for self.	2	10

* Question 18 - John Doe is Offender.
Question 20 - Respondent is Offender.

Public Sample: $N = 100$, $X^2 = 33.34$, significant at the 1% level.
Police Sample: $N = 100$, $X^2 = 24.96$, significant at the 1% level.

Public v. Police Responses: $X^2 = 33.70$, significant at the 1% level.

responses to each question, 12 of the 13 policemen who felt John Doe should be charged agreed to the charge against themselves, one disagreed. There were 23 policemen who favoured warning John Doe and of these, 19 disagreed with the charge against themselves, 3 agreed to charges and one was uncertain on the matter. Of the 64 who indicated that the action to be taken in Question 18 depended on the circumstances, 17 agreed to being charged, 37 disagreed, and 10 were uncertain as to how they should be dealt with. The association between police responses to the two questions is significant at the 1% level ($X^2 = 24.96$), rejecting the hypothesis that as individual citizens, the police expect differential treatment when they violate the law. The police were considerably harsher on themselves than they were on John Doe (32% felt that they should be charged as compared to 13% favouring charges against Doe) and perhaps one could expect this. It is possible, that as policemen, they felt that there was an onus on them to be exemplary in their conduct as an example to the public, consequently, if they violated the law they would not want their fellow police officers to use the same discretion that they might normally exercise in similar situations involving John Doe citizen. Another observation worthy of comment, is the 11% of the police responding to the "undecided" category. In only one other question (Question 17, which will be discussed later)

did the police respond with a higher percentage of undecided responses, and it is suggested that the fact that they are policemen may be responsible. When a policeman commits a minor offence such as the one involved here, which may not involve a charge against a citizen, it is possible that the policeman too, would not have to face a criminal charge, but he certainly would be subject to disciplinary action by his police department, quite likely resulting in his dismissal. The eleven policemen giving the uncertain response may have been considering this aspect, and knowing that they could be punished in two ways, were undecided on how to respond to the question.

Questions 16 and 19 (Table 10) were designed to elicit the same information as Questions 18 and 20. The offence involved is intoxication in a public place (the street), the offender in Question 16 being the respondent, and in Question 19, the other citizen, John Doe. The public replies to Question 16 were: 4% thought they should be charged; 18% said they should be locked up and released when sober; 39% felt they should be taken home; and the remaining 39% believed that the action taken would depend on the circumstances. None felt they should be ignored. In respect to John Doe (Question 19), 8% agreed to his being charged and 87% disagreed, with the remaining 5% uncertain on what action to take.

Table 10 - A comparison of attitudes of the public and the police on differential treatment for themselves and others in relation to the offence of intoxication in a public place.

Interview Schedule Question		- Percent - Public	Police
16. If the police found you intoxicated on the street, you would be treated fairly if you were			
	a) Charged	4	12
	b) Locked up and let go when sober	18	20
	c) Taken home	39	12
	d) Ignored	0	2
	e) Depends on circumstances	39	54
19. John Doe is found intoxicated on the street, the police find that this is the first time that he has committed such an offence and that he is a good family man. Doe realizes that he has made a mistake and is co-operative. The police lock him up and charge him. What is your opinion on the police action?			
	a) Strongly agree	0	8
	b) Agree	8	21
	c) Undecided	5	6
	d) Disagree	54	46
	e) Strongly disagree	33	19

Public v. Police Responses: Question 16 - $X^2 = 22.83$, significant at the 1% level.
Question 19 - $X^2 = 18.30$, significant at the 1% level.

The response of each individual in the public population to Question 16 was compared to his response to Question 19 (Table 11), resulting in the following findings: 2 of the 4 who agreed to being charged, felt John Doe should also be charged, 2 disagreed; of the 18 who believed that they should be held and released when sober, 2 favoured charging John Doe and 16 disagreed to a charge; 36 of the 39 who thought they should be taken home, were against charging Doe, while the remaining 3 agreed to the charge; and lastly, 33 of the 39 who thought the action against themselves would depend on the circumstances, were against charging John Doe, one was in favour and 5 were undecided. The association in this comparison was significant at the 1% level ($X^2 = 21.69$), lending no support to the hypothesis of differential treatment. It is interesting to note, however, that 8% of the public would charge John Doe, while only 4% thought they themselves, should be charged. It is possible that the smaller percentage is due to the broader selection of responses given in Question 16.

The police responses to Question 16 show that 12% agreed to the charge against them; 20% held that they should be taken into custody and released when sober; 12% were in favour of being taken home; 2% thought they should be ignored; and 54% said the action to be taken would depend on the circumstances. In responding to Question 19, 29% agreed to the charge against

Table 11 - A comparison of individual responses of the public and the police on differential treatment for themselves and others.

Interview Schedule Questions 16 and 19 - Classification of Responses.*	- Percent - Public	Police
1. Charge self and John Doe.	2	9
2. Charge self but not John Doe.	2	2
3. Charge self but uncertain as to Doe.	0	1
4. Hold self and release when sober, but charge John Doe.	2	5
5. Hold self and release when sober, and don't charge Doe.	16	14
6. Hold self and release when sober, uncertain on action against Doe.	0	1
7. Allow self to go home, but charge Doe.	3	4
8. Allow self to go home, but uncertain on action against John Doe.	3	4
9. Allow self to go home and don't charge Doe.	36	7
10. Ignore offence by self and don't charge John Doe.	0	2
11. Action against self depends on circumstances, but charge Doe.	1	11
12. Action against self depends on circumstances, and don't charge Doe.	33	40
13. Action against self depends on circumstances, uncertain on action against John Doe.	5	3

*Question 16: Respondent is offender.
Question 19: John Doe is offender.
Public Sample: N = 100, X^2 = 21.69, significant at the 1% level.
Police Sample: N = 100, X^2 = 40.04, significant at the 1% level.
Public vs. Police Responses: X^2 = 39.54, significant at the 1% level.

Doe, 65% disagreed, and 6% were undecided. Individual responses of each policeman to the two questions showed that 9 of the 12 who agreed to the charge against themselves, also agreed to charging John Doe; 2 disagreed to charges and one was uncertain; of the 20 who opted for being held and released when sober, 5 were of the opinion that Doe should be charged, 14 felt he should not be, and one was uncertain on how Doe should be treated; there were 12 who thought they should be taken home and of that number, 4 favoured charging Doe, 7 were against such action and one was uncertain; and finally, of the 54 policemen who thought the action against them would depend on circumstances, 11 said Doe should be charged, 40 disagreed to charges with the remaining 3 undecided on the question of charging. These comparisons produce a significant association between the police responses to the two questions ($X^2 = 40.04$), again, rejecting the hypothesis of differential treatment. It should be noted, however, that while 12% of the police agree to a charge being laid against them, 29% agreed to the same action against John Doe. This is the reverse of the situation in Questions 18 and 20, where 29% of the police would have themselves charged, and 13% would charge John Doe. This difference could be due to the wording of the questions. Question 19 asks the respondents to judge the police action in charging John Doe. The charge against him cannot be considered unfair and it

is possible that the police may have focused their attention on the matter of the police action being proper, responding according to their judgment of what the police did in the situation described. This same reasoning could be applied to Question 20 where the respondents were asked whether the police action was fair - 29% of the police saying that it was. In other words, it is possible that some of the police may have been judging the police action rather than stating their opinions on whether Doe should, or should not be charged regardless of the fact that the availability of the evidence substantiates the charge.

Questions 3 and 14 concern the relatively minor offence of exceeding the speed limit by four miles per hour. The respondent is the offender in Question 3, John Doe in Question 14. The response choices in each question are "warned", "charged", and "not stopped" (Table 12).

The public responses indicate that 80% thought they should be warned, 8% agreed to being charged, and 12% felt that they should not be stopped. In Question 14, 68% were in favour of warning John Doe, 13% thought he should be charged, while 19% felt he should not be stopped. The differences here are not significant ($X^2 = 5.02$). Similar results were found when comparing individual responses to the two questions (Table 13). Of the 80 who felt they should be warned, 67 would have the

Table 12 - A comparison of attitudes of the public and the police on differential treatment for themselves and others in relation to the offence of speeding.

Interview Schedule Question		- Percent - Public	Police
3. If you were driving at 54 m.p.h. and the speed limit was 50, would you think you were treated fairly if you were			
	(a) Warned	80	67
	(b) Charged	8	9
	(c) Not stopped	12	24
14. If John Doe was driving at 54 m.p.h. in a 50 m.p.h. speed zone, do you think he should be			
	(a) Warned	68	63
	(b) Charged	13	3
	(c) Not stopped	19	34

Public v. Police Responses: Question 3 - X^2 = 5.20, not significant.
Question 14 - X^2 = 10.66, significant at the 1% level.

same action taken against John Doe, 4 thought he should be charged, while the remaining 9 would not have him stopped; the 8 individuals who believed they should be charged, favoured the same treatment for Doe; and finally, 10 of the 12 who thought the police should not stop them, agreed to the same action against Doe, and of the remaining 2, one thought Doe should be charged and the other favoured a warning. These findings support the group results, the association between the two questions being significant at the 1% level ($X^2 = 94.93$), the hypothesis of differential treatment continuing to receive no support. Individuals in the public population were again easier on themselves than they were on Doe when it came to the matter of charges (8% to 13% for Doe), although the difference was not significant.

The police responses to Question 3 show that 67% thought they should be warned, 9% said that they should be charged, while 24% believed the offence did not merit being stopped. The differences in responses of the public and the police to Question 3 were not significant ($X^2 = 5.20$). With respect to Doe, 63% of the police said he should be warned, 3% would have him charged, and 34% thought he should not be stopped. The grouped responses to these two questions by the police are not significantly different ($X^2 = 4.84$). Comparing their individual responses to each question, 56 of the 67 who favoured

Table 13: - A comparison of individual responses of the public and the police on differential treatment for themselves and others.

Interview Schedule Questions 3 and 14 - Classification of Responses.*	- Percent - Public	Police
1. Warn self and John Doe	67	56
2. Warn self but charge John Doe	4	0
3. Warn self but no action against Doe	9	11
4. Charge self and John Doe	8	3
5. Charge self but warn John Doe	0	6
6. No action against self but warn John Doe	1	1
7. No action against self but charge Doe	1	0
8. No action against self nor John Doe	10	23

*Question 3 - Respondent is the offender
Question 14 - John Doe is the offender

Public Sample, N = 100, X^2 = 94.93, significant at the 1% level.
Police Sample, N = 100, X^2 = 84.76, significant at the 1% level.

Public v. Police Responses: X^2 = 20.90, significant at the 1% level.

a warning for themselves in Question 3, agreed to Doe being treated in the same manner, while 11 thought he should not be stopped; of the 9 who believed they should be charged, 3 agreed to charging John Doe, while the remaining 6 thought he should be warned; and 23 of the 24 who held that the offence did not merit their being stopped, expressed the same opinion in John Doe's case, the one remaining policeman would have Doe warned. There was a significant association between the individual police responses to these two questions ($X^2 = 84.76$), the differential treatment hypothesis again being rejected, and the police continuing to be somewhat harsher with themselves than with John Doe citizen.

Comparisons of the public and police responses to the three sets of questions provide some interesting findings. The responses to Question 18 showed a difference significant at the 1% level ($X^2 = 31.68$), mainly because the public favoured the issuance of a warning to John Doe, while the police insisted on the consideration of the circumstances. This difference, however, does not place the public and police in polar positions regarding the police use of discretion: it rather reflects the earlier suggestion that if any differences exist, they centre on the manner in which discretion should be used. The significant difference in the responses to Question 19 ($X^2 = 18.30$), however, suggests the opposite situation, but here it is the

public and not the police that wants discretion exercised. The difference is due to a higher proportion of the police agreeing to a charge being laid against John Doe (29% as compared to 8% of the public). The responses to Question 14, significantly different at the 1% level ($X^2 = 10.66$), put the police and the public in reverse positions - a larger proportion of the public (13% as against 3%) would have John Doe charged, while the greater proportion of the police (34% as against 19%) would not even stop him. The responses to the questions where the respondent replaces the offender John Doe, show a significant difference ($X^2 = 22.83$) in the public and police responses only in Question 16, where the offence was that of being found intoxicated in the street. The difference here is due mainly to the greater proportion of the public (39% as against 12%) considering the appropriate action as just being taken home, while the greater proportion of the police (54% as against 39%) insisted that the action taken would depend on the circumstances. The sum total of these observed differences is not a difference in the attitude towards the police use of discretion - the one demanding the invariant adherence to the letter of the law and the other opposing it and leaning toward the spirit of the law. Both the public and the police oppose the former concept. The difference lies in the factors which underlie the variation in reaction to the

offence. The police appear to be more inclined to consider the circumstances of each individual case, while the nature of the offence appears to play the more predominant role in influencing the decisions of the public.

The analysis of the eleven questions discussed in this chapter show that both the public and the police populations were in favour of the police use of discretion, but with restrictions. Their general approval for the use of discretion was revealed in their responses to the question of charging everyone who commits an offence, and as well, by their support for issuing warnings in appropriate situations. The nature of the offence determines the extent to which policemen should use discretion according to both the public and the police. A mandate for police use of discretion was clearly given in relation to minor offences, while with respect to serious offences, opinion was almost evenly divided for and against its use. As there was the possibility that the two populations would respond to the question of discretion in charging, according to their conception of what the ideal situation was - what others thought the situation should be - rather than according to their own convictions, they were asked to interpret public opinion on the subject. The results show that there is a close association between their personal opinions and their interpretation of public opinion, yet with minor differences (such

as being uncertain of the public attitude) that indicated that responding to the two questions was not simply a matter of transfer of opinion from one question to the other. The significance of these findings to effective law enforcement, particularly in respect to the police, was discussed. As well, questions asked also revealed, perhaps contrary to what many would expect, that individuals in both the public and police populations did not expect differential treatment when they violated the law.

CHAPTER VII

EVIDENCE AND CIRCUMSTANCES - PUBLIC AND POLICE OPINIONS IN RELATION TO DISCRETION IN LAW ENFORCEMENT.

While the public and police populations in this survey were in agreement on the police use of discretion in relation to charging offenders of the law - not favouring invariable charging for themselves and others, nevertheless, there were differences in their responses in respect to the action that they would expect the police to take when dealing with offenders against whom charges did not seem to be warranted. In short, the public and the police were not in polar positions on the issue of police use of discretion, however, there were differences noted in the manner in which the two populations expected discretion to be used.

Seven of the 11 questions analyzed and discussed in the last chapter provided for an expression of opinion both on what the police should consider when deciding whether to exercise discretion, and on what type of action they should take against the offender who benefited from the application of discretion by not being charged. Three ingredients of discretion that were considered are worthy of further comment and consideration. The respondents were asked their opinion on (a) the right of the police to issue warnings in lieu of

charges under appropriate circumstances; (b) the fairness of considering the circumstances surrounding the offence, and on that basis, charging one offender and not the other when the same offence was involved in each instance; and (c) the police considering the seriousness of an offence committed before deciding to charge the offender. The responses to the questions concerning those issues showed that both the public and the police favoured the practice of issuing warnings, with a slightly higher percentage of the public when compared to the police, being in favour. Responses to the question which asked if the police should consider other circumstances were identical for each population, the degree of support, however, being considerably less than it was for issuing warnings. Both populations favoured consideration of the seriousness of the offence before deciding whether to lay charges, the percentages agreeing again being less than they were in favouring the issuance of warnings, but slightly higher than for consideration of the circumstances. It was significant that in responding to these questions, the police were considerably more intense in their attitudes than were the public.

The respondents were also presented with questions which dealt with situations that should have involved their considering the ingredients of discretion referred to above,

in arriving at their answers. In these questions the public showed a marked preference for the issuance of warnings, while the police were very noticeably much more in favour (or concerned) with the consideration of the circumstances surrounding the offence. The consequence of these attitudes would in reality result in members of the public population making a final decision by deciding to warn the offender, while the police, on the other hand, would be withholding their decision by indicating that their reaction would depend on the circumstances of the case - which could result in warning or charging the offender, or perhaps taking no action at all. This is an interesting outcome for two reasons. First, it is not uncommon to hear the remark that policemen think in terms of black and white, with no concern for consideration of the gray area in between - these results seem to refute that assumption. Secondly, in responding to the questions relating to what should be considered in using discretion, it was found that the police were more decisive than the public, therefore, it would not have been unreasonable to expect the police to take a more definite and precise stand, that is, to state that the offender should either be warned or charged. The public, on the other hand, being less decisive, could have been expected to show a preference for wanting more information on which to base their decision - a preference

for wanting to consider other circumstances.

The differences in the positions taken by the public and the police become intelligible when it is realized that the offences involved in Questions 3 and 14, 16 and 19, and 18 and 20, may be regarded as minor violations of the law in most instances, but that the circumstances surrounding their commission could be responsible for a shift in position which may cause them to be looked upon as serious offences. In other words, it may not always be possible to judge an offence as either serious or minor without first knowing the circumstances under which it was committed. For example, is driving five miles above the speed limit on a deserted highway in the dead of night, of the same order of seriousness as driving five miles above the speed limit in a built up area where children are playing on the street? The police appear to be more conscious than the public of the relevance of the circumstances in the evaluation of seriousness of the offences which one might normally categorize as minor violations. In this connection, it is perhaps worthy to note that 64% of the police expressed such an opinion when considering the action that should be taken against the offender who stole a 10¢ candy bar (which in itself does not seem to be a serious offence), while only 29% of the public did so.

The answers to the three sets of questions (3-14, 16-19, 18-20), while showing that the public and police populations did not expect different treatment for themselves than they would for others, reveal another interesting factor - the inconsistency of the appropriate reaction to the three situations. One would expect that a person who thought that the laying of a charge for drunkenness was a fair course of action, would also consider the laying of a charge for speeding and theft, an equally fair reaction. The three situations all constitute infractions of the law, which opponents of the police use of discretion contend should evoke in the police the one and only possible legal reaction - the laying of charges. These differences in responses suggest that the individual's opinion of the appropriate reaction is, in some way, related to the nature of the offence. Offences are categorized in law as minor and serious. The minor offences usually evoke a mild reaction, while the serious infractions will arouse the indignation of the public and perhaps the police as well.

It has been established that both the public and police populations in this study support the consideration of the circumstances surrounding an offence, although this was not in relation to any specific type of offence. They also supported the consideration of the seriousness of the

offence. It seems fair to state that the circumstances surrounding the offence should determine the nature of that offence, if one agrees that there are degrees of seriousness which are dependent on the act itself as well as on its possible consequences. To test this hypothesis, Question 15 states "The circumstances surrounding the commission of an offence may have a bearing on whether the offence is serious or minor (Table 14). Responses to this question indicated that 76% of the public agreed, 19% disagreed, and 5% were uncertain, as compared to 77%, 18% and 5% in that same order, for the police. Differences in responses were not significant ($X^2 = 9.48$), the agreement to the question thus supporting the hypothesis.

Attitudes toward various laws often determine whether conformity or violation can be expected. For this reason, a knowledge of both public and police attitudes toward laws is essential to the preservation of good laws and the discarding of poor ones, a prerequisite to an effective police programme of law enforcement. The classification of offences into serious and minor categories is one such area where a knowledge of attitudes is important.

To determine if the public and the police regard some offences as serious and others as minor, and if when

Table 14 - A comparison of public and police attitudes towards the circumstances of an offence determining its classification as serious or minor.

Interview Schedule Question		- Percent - Public	Police
15. The circumstances surrounding an offence may have a bearing on whether that offence is serious or minor.			
	a) Strongly agree	6	17
	b) Agree	70	60
	c) Undecided	5	5
	d) Disagree	18	13
	e) Strongly disagree	1	5

$X^2 = 9.48$, not significant.

classifying them as falling within either of these categories, the circumstances of the offence would affect their decisions, a list of twelve offences were given in Question 9 which the respondents were asked to classify as serious, minor, or depends on circumstances. Analysis of public and police responses shown in Table 15 reveals a consistent tendency on the part of the public to regard these offences as serious. In nine instances, a greater proportion of the public than the police felt that the offences were serious, while in only one case was the reverse true. Responses were identical for the offences of breaking and entering and careless driving (87% rating them serious). In declaring the offence to be minor, the police were the more prominent, although the distributions are fairly even except for the offences of fighting on the street, exceeding the speed limit on a city street, and being drunk on the street. With respect to the consideration of the circumstances, the police consistently outscored the public both in percentage strength of responses and in the number of instances (8 as compared to 4 for the public). The dependency of the police on consideration of the circumstances is in agreement with their responses to the questions discussed in the last chapter (16 and 18).

It would perhaps be beneficial to divert for a moment, and consider the ramifications of these responses to the

Table 15 - A comparison of public and police classifications of selected offences, showing the influence of circumstances.

Survey Question No. 9 Offence.	- Percent - Seriour	Minor	Depends on Crmstnces.	
Assault causing bodily harm	77	0	23	public
	71	1	28	police
Theft of property valued at over $100.00	85	10	5	public
	71	6	23	police
Exceed speed limit on open highway by 30 m.p.h.	71	16	13	public
	54	18	28	police
Being drunk on the street	11	66	23	public
	3	82	15	police
Theft of property valued at under $50.00	44	47	9	public
	32	46	22	police
Exceed speed limit on city street by 5 m.p.h.	13	58	29	public
	2	80	18	police
Drive a car with over .08 mgs. of alcohol in blood	75	4	21	public
	87	2	11	police
Fighting on the street	22	37	41	public
	14	54	32	police
Fail to stop at stop sign	42	40	18	public
	29	40	31	police
Breaking into a business premises	87	6	7	public
	87	3	10	police
Drive carelessly on a highway	87	3	10	public
	87	2	11	police
Stealing candy from a store	13	65	22	public
	8	66	26	police

classification of the offences. In Question 18 (Table 8, p. 101), which concerned the theft of candy from a store by John Doe, 64% of the police said that the action against him would depend on the circumstances (which were not given), while 13% said he should be charged. When classifying this offence in Question 9, 26% of the police said their decision would depend on the circumstances, while the majority (66%) said that the offence was minor. Turning to Question 20 where the circumstances were given 32% now favour charges for the same offence. Consider, however, the police classification of the offence, impaired driving (drive with over .08 mgs. of alcohol in the blood) to which 87% regarded as serious and 11% said its rating would depend on the circumstances. It may be concluded, therefore, that consideration of the circumstances is not always a prerequisite to declaring an offence either serious or minor. Where the likely consequences of the act are harmful to the offender or the public, the offence will most likely be regarded as serious before it is committed. In other cases, the act has first to be committed and the circumstances (including consequences) known before the offence can be meanfully classified. For example, consider the offence of failing to stop at a stop sign, committed at 4:00 a.m. on a deserted street of a small town, with the same offence committed at 4:00 p.m. at a busy city street

intersection. The police are more likely to enforce the law in the latter case than in the former. If they continually failed to enforce the latter offence and, as a result, accidents occurred, public pressure would demand enforcement measures. The controversy that can arise over these types of offences is apparent in both the public and police reactions in classifying this very offence - 42% of the public regarded failing to stop at a stop sign as a serious offence, 40% as minor, and 18% would base their decisions on the circumstances involved in the infraction. For the police, 29% thought it a serious offence, 40% declared it minor, and 31% would rely on the circumstances to dictate its placement. Comparing this to the careless driving offence, where the classifications given in the order noted above were 87-3-10 for the public, and 87-2-11 for the police, it is possible to appreciate the firmness in attitudes toward certain types of offences. Here both populations feel that the act which constitutes the offence is a serious one, regardless of the circumstances. It is suggested that this is so because of likelihood of the consequences being serious (based on known previous incidents where the consequences of the act have become generally known to result in serious harm to either life or property). It is possible to get a set attitude that tags the offence as serious even before its commission.

The responses to Question 9 suggest that the police and the public are aware of the classification of crimes into serious and minor categories. In discussing this matter in an early chapter it was contended that the citizen expects a different kind of treatment when he violates a minor law than he does when he commits a serious offence. This position is supported by both populations when they agreed to the police considering the seriousness of the offence before deciding to charge an offender (Question 7, Table 1). As a further test, two statements were included in the questionnaire which related to charging offenders in serious and minor cases. Question 1 states that the police should charge everyone who commits a serious offence, while question 4 makes the same assertion for minor offences (Table 16). Public responses to question 1 were: 36% strongly agreed; 55% agreed; 3% undecided; 5% disagreed; and 1% strongly disagreed as compared to the respective police responses: 51%; 39%; 2%; 6%; and 2%. While these differences in responses are not significant ($X^2 = 5.90$) it should be noted that the police continued the pattern of being considerably more intense in their attitude (51% strongly agreeing to 36% of the public). Replies to the question of charging for minor offences revealed that 1% of the public strongly agreed; 16% agreed; 11% were undecided; 65% disagreed; and 7% strongly disagreed to invariable

Table 16 - Public and police attitudes toward charging persons who commit offences.

Interview Schedule Question		- Percent - Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	
1.	The police should charge everyone who commits a serious offence.	36	55	3	5	1	public
		51	39	2	6	2	police
4.	The police should charge everyone who commits a minor offence.	1	16	11	65	7	public
		3	10	11	62	14	police

Question 1: $X^2 = 5.90$, not significant

Question 4: $X^2 = 4.78$, not significant

charging, compared to the respective responses of the police: 3%; 10%; 11%; 62% and 14%. There was no significant differences in these responses ($X^2 = 4.78$). The responses of each population lead strongly to the inference that they favour invariable charging of those committing serious offences (public 91%; police 90%), while the opposite position would apply with respect to those committing minor offences (only 17% of the public and 13% of the police agreeing). These responses are in agreement to the responses to Question 21 (Table 1) discussed in the previous chapter, where both the public and police expressed strong disagreement (public 82%, police 83%) to charging everyone who commits an offence, regardless of the nature of that offence, or other circumstances surrounding the matter. It may be concluded, then, that the seriousness of the offence very definitely affected the decisions of both populations on the question of charging the offender - a decision of whether to use discretion in relation to charging.

Questions discussed so far have indirectly supported the position that the police should use discretion in minor cases, but not serious cases. To obtain a more direct opinion on the police use of discretion, Questions 12 and 13 were included in the questionnaire. Question 12 states that the police should use discretion when dealing with serious

offences, while Question 13 makes the same statement in respect to minor offences (Table 17). Responding to Question 12, 6% of the public strongly agreed; 43% agreed; 6% were undecided; 41% disagreed; and 4% strongly disagreed to the police use of discretion in serious cases. The police responses were: 13% strongly agreeing; 36% agreeing; 4% undecided; 28% disagreeing; and 19% strongly disagreeing. The differences in the responses of the two populations were significant at the 1% level ($X^2 = 15.82$), resulting from the intensity of the police attitude, particularly in opposing discretion. The figures show that 49% of each population favoured the use of discretion in serious cases, while 45% of the public, and 47% of the police oppose it, denoting only a very slight preference for its use.

The public and police responses to Question 13, which states that the police should use discretion when dealing with minor offences, were as follows: 14% strongly agree; 74% agree; 4% undecided; 8% disagree, in the case of the public, and for the police: 26% strongly agree; 59% agree; 1% undecided; 10% disagree; and 4% strongly disagree. The differences here were significant at the 5% level ($X^2 = 11.30$), the intensity of the police attitude again being responsible. Contrary to the attitude depicted in the responses to Question 12, the responses to the question on minor offences

Table 17 - A comparison of public and police attitudes toward the use of police discretion when dealing with minor and serious offences

Interview Schedule Question		- Percent -				
		Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
12. The police should use discretion when dealing with serious offences.						
	public	6	43	6	41	4
	police	13	36	4	28	19
13. The police should use discretion when dealing with minor offences.						
	public	14	74	4	8	0
	police	26	59	1	10	4

Question 12: $X^2 = 15.82$, significant at the 1% level.

Question 13: $X^2 = 11.30$, significant at the 5% level.

show a strong preference for the use of discretion by the police (public 88%, police 85%). This supports the contention made earlier, that the public and the police are aware of the distinction between serious and minor offences, and that those who violate the law expect to be treated according to the nature (serious or minor) of the offence that they have violated.

To determine individual attitudes of members of each survey population toward the question of the use of discretion in serious and minor offences, the response of each individual to Question 12 was compared to his response to Question 13 (Table 18). A significant association at the 1% level was found for the public ($X^2 = 64.07$) and the police ($X^2 = 84.43$). It is interesting to note, however, that the responses divide each population into two main groups, differing solely on the use of discretion in serious cases. In the case of the public, 49% of the population agreed to the use of discretion in both serious and minor offences, while 47% of the police held that opinion. There were 36% in the public sample opposed to the use of discretion in serious cases, but favouring it in minor cases, as compared to 35% in the police sample. It is also significant to note that 7% of the public, and 12% of the police disagreed with the use of discretion in both classes

Table 18 - A comparison of individual public and police attitudes toward the use of discretion by the police in relation to serious and minor offences.

	- Percent - The Police Should Use Discretion in Minor Offences Question 13					
The Police Should Use Discretion in Serious Offences. Question 12	Strongly Favours	Favours	Undecided	Opposes	Strongly Opposes	
Strongly Favours	6					public
	13					police
Favours	4	39		0		public
	3	31		2		police
Undecided		3	2	1		public
		3	1	0		police
Opposes	4	29	2	6		public
	1	21	0	6		police
Strongly Opposes	0	3	1	0		public
	9	4	2	4		police

Public Sample: N = 100, Q. 12 vs. 13, X^2 = 64.07, significant at the 1% level.

Police Sample: N = 100, Q. 12 vs. 13, X^2 = 84.43, significant at the 1% level.

Public vs. Police Responses: X^2 = 29.94, significant at the 1% level.

of offences. Two policemen expressed disagreement to discretion in serious cases, but not in minor offences. There is a significant difference at the 1% level ($X^2 = 29.94$) between the individual responses of the public and the police to the two questions. This is caused by the intensity of the police attitude in their disagreement to the use of discretion in serious cases and their agreement to its use in minor offences (9% compared to none of the public).

The individual responses to Questions 12 and 13, confirm the findings of the group responses to them - that while the public and the police favour discretion in dealing with minor offences as well as serious offences, their opinions in the latter respect are divided. As was explained in the last paragraph above, this results in two opposing groups - one whose members would use discretion in both minor and serious offences, and the other, whose members would want the police to exercise discretion only in relation to minor offences.

The attitudes displayed in the responses of both populations to the questions just discussed, have produced an apparent paradoxical situation that requires some comment. While the responses to the question of charging everyone who commits a serious offence indicate both a public and police preference for such action (91% of the public and 90% of the

police favouring), the responses to the question on the use of discretion in serious offences show only a slight preference for its use. The paradox exists when the invariable charge is equated with the non-use of discretion. It can hardly be assumed that the public and the police regard the decision not to charge, as not coming within the definition and scope of the police use of discretion. Although there are other matters involved in law enforcement where discretion may be exercised, the preferring of charges has to be seen as the main forum for its use. Consequently, the responses to the questions of charging in serious cases and the use of discretion by the police when dealing with such offences cannot be looked upon as not being mutually exclusive. One possible explanation for the paradox is that the response to the question on discretion (Question 12) came after the individual had been primed to the subject, while his response to invariable charging (Question 1) came before much thought was given to the matter. An alternate explanation lies in the conclusion that the use of discretion and invariable charge are not seen as mutually exclusive. If individuals in the two populations adhere to this position, then to them, invariable charging may not preclude the use of discretion: discretion being viewed as having a broader scope.

The individual responses of the public and the police to Questions 1 and 12 were compared (Table 19) in an effort to further clarify the situation explained above. No significant association was noted with respect to individual attitudes expressed by the public to the two questions ($X^2 = 14.68$), while for the police, the association in responses was significant at the 1% level ($X^2 = 31.39$), indicating that to the police, rather than to the public, discretion is closely tied in with the act of charging the offender. The analysis reveals that, as was the case when comparing individual responses to Questions 12 and 13, the responses to Questions 1 and 12 result in formation of two main groups in each population - one apparently being inconsistent by favouring both the use of discretion and invariable charging in serious cases, and the other, being consistent, opposing discretion and favouring the invariable charge. There was no significant difference between the public and police responses ($X^2 = 22.42$). The following summary may assist in presenting a clearer picture of these results:

	Public	Police
Questions 12 and 13.		
1. Favours discretion in serious and minor offences.	49%	47%
2. Favours discretion in minor, but not in serious offences.	36%	35%

Table 19 - A comparison of individual attitudes of the public and the police toward invariable charging and the use of police discretion in relation to serious offences

Use discretion when dealing with serious offences - Question 12	- Percent - Charge everyone for serious offences - Question 1. Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	
Strongly agree	2	3	0		1	public
	8	3	1		1	police
Agree	13	25	1	4		public
	11	19	1	5		police
Undecided	4	2				public
	4	0				police
Disagree	13	25	2	1		public
	12	15	0	1		police
Strongly disagree	4	0			0	public
	16	2			1	police

Police Sample: $N = 100$, $X^2 = 31.39$, significant at the 1% level.
Public Sample: $N = 100$, $X^2 = 14.68$, not significant.

Public vs. Police Responses: $X^2 = 22.42$, not significant.

	Public	Police
Questions 1 and 12.		
1. Favours discretion and invariable charging in serious offences.	43%	41%
2. Opposes discretion and favours invariable charging in serious offences.	42%	45%

These comparisons shed a slightly different light on the matter. Whereas group responses to Questions 1 and 12 showed 91% of the public and 90% of the police favoured invariable charging for serious offences (6% and 8% opposed), and 49% of each population favoured the police use of discretion when dealing with serious offences (45% and 47% opposed), the individual responses reveal that 43% of the public and 41% of the police favour discretion and invariable charging, as compared to 42% and 45%, respectively, opposing discretion and favouring invariable charging. The public position still remains one of favouring discretion and invariable charging (however slightly, 43% to 42 against), while the police position has shifted from that position, to one of opposing discretion and favouring invariable charging (however slightly, 41% to 45% against).

The comparisons of individual responses of each population to Questions 4 and 13 present a more stable picture (Table 20). In the group responses (Table 18), 88% of

Table 20 - A comparison of individual attitudes of the public and the police toward invariable charging and the use of police discretion in relation to minor offences

	- Percent - Charge Everyone for Minor Offences - Question 4.					
	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	
Use discretion when dealing with minor offences - Question 13.						
Strongly agree	0	1	2	8	3	public
	1	2	3	12	8	police
Agree		11	6	54	3	public
		6	6	42	5	police
Undecided	1	1	1	1		public
	0	0	0	1		police
Disagree	0	3	2	2	1	public
	1	1	2	5	1	police
Strongly disagree	0	0		0		public
	1	1		2		police

Police Sample: $N = 100$, $X^2 = 22.77$, not significant.
Public Sample: $N = 100$, $X^2 = 39.65$, significant at the 1% level.

Public vs. Police Responses: $X^2 = 18.36$, not significant.

the public favoured the use of police discretion in minor offences, with 72% not agreeing to the practice of the invariable charging of offenders of minor laws. Comparing individual responses 71% gave like responses to both questions, 68% being for discretion and against invariable charging and 3% against discretion and for invariable charging. These responses show a significant association at the 1% level ($X^2 = 39.65$). For the police as a group, 85% favoured the use of discretion and 76% were against invariable charging in minor cases, while 71% expressed the same attitudes in their individual responses to both questions - 67% for discretion and against invariable charging, and 4% against discretion and for invariable charging. Analysis showed no significant association between their responses to the two questions ($X^2 = 22.77$), this being mainly due to the 8% who indicated that they were against discretion, but also against charging everyone (compared to 3% of the public whose responses showed association). However, there was no significant difference between attitudes expressed by the public and the police on this subject ($X^2 = 18.36$). These results clearly indicate that both populations are in majority agreement to the use of discretion by the police - including within its scope a discretion that allows for non-institution of a policy of invariable charging that demands full enforcement of the law, as it

pertains to minor offences.

The responses to the questions discussed to this point clearly substantiate the hypothesis that the public and the police favour the use of police discretion in relation to minor offences. In regard to serious offences, opinions are almost evenly divided, with a slight preference for its acceptance when discretion is taken without definition or limitation. When the use of discretion is interpreted as variable charging, however, it is strongly opposed by both populations in the case of serious offences. Responses to any single question show that opposition is greater in the public population than in the police, but when responses to questions are combined, the police are found to be more in opposition to the use of discretion than the public. These findings leave no doubt that the survey populations are very much aware of the distinction between serious and minor offences, and see it as demanding different treatment for offenders who commit different offences. This can produce no other conclusion than that the whole question of discretion rests on the classification of offences as being either serious or minor.

It was suggested that the attitudes portrayed in the responses to the questions on using discretion and invariable charging in serious offences, produced a paradoxical situation -

strong feelings toward full enforcement of the law through formal charges, while at the same time, favouring the use of discretion. The paradox exists if the definition of discretion is limited to the act of charging offenders. If, on the other hand, discretion also includes other areas in dealing with the offender, such as charging for a lesser offence when they had grounds for such action; or the police requesting the leniency of the court in respect to the sentencing of the offender when there is no obligation for them doing so; then it is possible to agree to invariable charging and at the same time, favour the use of discretion - discretion to be used in these other areas.

There is support for holding that the public and the police populations may be interpreting discretion in the broader sense. Their responses indicate that they believe the circumstances surrounding an offence may have a bearing on whether that offence is to be considered serious or minor, and that the seriousness of an offence should be considered in reaching a decision on whether or not to charge the offender. They also supported the consideration of other circumstances surrounding the offence by stating that they did not think it unfair to charge one person and not another, when the same offence was involved, but committed under different circumstances. In regard to charges, they have supported

discretion by not favouring invariable charging as a general practice (Question 21), and specifically, by not favouring such enforcement practices in relation to minor offences. This brings the study to its present position respecting the divided opinion on the use of discretion in serious cases. The support given to the positions noted would lead one to expect that both the public and the police populations would also favour the consideration of other circumstances surrounding the commission of both minor and serious offences and, consequently, would not want the police to base their decision to charge an offender exclusively on the evidence. In other words, while the evidence may support a formal charge, there may be some cases where the investigating officer may be expected to look to other circumstances which may, or may not, lead him to lay charges against the offender.

In view of what has been said above, and because it was found that in serious cases, 41% of the public, and 43% of the police (Table 19) expect everyone to be charged, but yet want the police to use discretion, while in minor offences, 12 of the 17 in the public population and 9 of 13 in the police sample who would charge everyone who committed a minor offence, yet still wanted the police to use discretion (Table 20), responses to Questions 5 and 6 and 2 and 8 were analyzed to determine if the populations wanted the police to consider

anything more than strictly the evidence when deciding the question of whether to charge offenders who commit serious and minor offences.

Question 5 states that the police should only consider the evidence when deciding whether to charge the offender who has committed a serious offence, while Question 6 states that the police should consider other circumstances when deciding whether to charge for a serious offence (Table 21). In responding to Question 5, 8% of the public strongly agreed; 43% agreed; 1% were undecided; 43% disagreed; and 5% strongly disagreed. This results in a 51-48 split favouring the consideration of the evidence only and a division into two opposing groups as was the case in previous questions examined. The public responses to Question 6 were almost exactly the reverse with 11% strongly agreeing to the consideration of other circumstances; 42% agreeing; 3% undecided; 43% disagreeing; and 1% strongly disagreeing, which is a 53-44 split favouring the consideration of other circumstances in serious cases - the opposite opinion to that expressed in Question 5. The group responses to these two questions by the public population were not significantly different ($X^2 = 7.08$). These two questions involve the same issue - whether the evidence only, or the evidence and other circumstances should be considered when deciding whether to charge an offender -

Table 21 - A comparison of public and police attitudes toward consideration of the evidence and other circumstances surrounding the commission of serious offences

Interview Schedule Question		- Percent -				
		Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
5. When deciding on whether to charge an offender who has committed a serious offence, the police should only consider the evidence surrounding the commission of the offence.						
	public	8	43	1	43	5
	police	23	38	3	30	6
6. When a person has committed a serious offence, the police should consider other circumstances surrounding the matter before deciding to charge the offender.						
	public	11	42	3	43	1
	police	13	33	1	42	11

Police Sample: $N = 100$, $X^2 = 8.16$, not significant.
Public Sample: $N = 100$, $X^2 = 7.08$, not significant.

Public vs. Police Responses: Question 5 - $X^2 = 10.96$, significant at the 5% level.
Question 6 - $X^2 = 10.56$, significant at the 5% level.

and to agree to consider the evidence only would deny consideration of the circumstances. If one holds to this contention, the public responses are contradictory, although the differences are not that significant (51-48 for the evidence only, and 53-44 for other circumstances). In responding to Question 5, 23% of the police strongly agreed to the evidence only; 38% agreed; 3% were undecided; 30% disagreed; and 6% strongly disagreed, resulting in a 61-36 split in favour of considering the evidence only. To considering the circumstances in Question 6, 13% of the police strongly agreed; 33% agreed; 1% were undecided; 42% disagreed; and 11% strongly disagreed - 46-53 split against the consideration of the circumstances. Unlike the public, the police responses to the two questions are in agreement - with a 61-36 division favouring the consideration of the evidence only, and a 46-53 split against consideration of the circumstances. The differences in the group responses by the police were not significant ($X^2 = 8.16$). There was a significant difference between public and police responses to both Questions 5 ($X^2 = 10.96$) and 6 ($X^2 = 10.56$) at the 5% level. The significance in both questions is due to the intensity of the police attitude, a noticeable occurrence throughout this survey.

The responses of each individual to Question 5 were compared to his response to Question 6 (Table 22). For the public, 13 of the 51 who agreed to the consideration of the evidence only, also agreed to consideration of other circumstances, 37 disagreed and one was undecided; of the 48 who disagreed to the police considering the evidence alone, 40 agreed to consideration of other circumstances, 7 disagreed and one was undecided. The division in responses here is similar to that found in the group responses, however, there is now a slight preference (40 to 37) for the use of discretion in relation to charging, accomplished through consideration of other circumstances and the non-consideration of the evidence only. Nevertheless, the two opposing positions on the issue of discretion continue to show themselves. The association between the responses to the two questions is significant at the 1% level (X^2 = 107.90). It is important to note, however, that 20% of the public have expressed contradictory opinions in responding to these questions - 13% agreeing to the consideration of the evidence alone and to the consideration of other circumstances, and 7% disagreeing to both statements.

The police responses Questions 5 and 6 show that 12 of the 61 who agreed to the evidence alone being considered, also agreed to the consideration of other circumstances, 48 disagreed and one was undecided. Of the 36 who disagreed to

Table 22 - A comparison of individual attitudes of the public toward consideration of the evidence, and other circumstances surrounding the commission of serious offences.

Consider the evidence only in relation to charging in serious cases - Q.5		- Percent - Consider the circumstances in relation to charging in serious cases - Q.6		
		Agree	Disagree	Undecided
Agree	public	13	37	1
	police	12	48	1
Disagree	public	40	7	1
	police	32	4	0
Undecided	public	0	0	1
	police	2	1	0

Police Sample: N = 100, X^2 = 78.54, significant at the 1% level
Public Sample: N = 100, X^2 = 107.90, significant at the 1% level
Public vs. Police Responses: X^2 = 8.16, not significant.

the consideration of the evidence only, 32 agreed to other circumstances being considered, while 4 disagreed. These responses support the group responses of the police to the two questions, 48 now disagreeing, and 32 agreeing to the use of discretion in relation to the decision to charge in serious offences. As was the case with the public, 16% of the police held opinions which may be looked upon as being contradictory (public figure 20%). Police responses to Questions 5 and 6 show a significant association at the 1% level ($X^2 = 78.54$).

In summary, the analysis of the individual responses of the public and police to Questions 5 and 6 show that they are divided in their opinions as to whether the evidence alone, or the evidence as well as the circumstances, should be considered by the police when deciding the question of charging for serious offences. In the public sample, 40% would not want the police to consider the evidence only, but would expect them to consider other circumstances surrounding the offence, along with the evidence. Holding the opposite view were 37%. There are 20% of the public whose responses to the two questions appear to be contradictory. While the public show a slight preference for the use of discretion by the police, the police hold a slightly stronger opinion in the opposite direction - 48% agreeing to consideration of the

evidence alone and disagreeing with other circumstances having any influence on the question of charges, as compared to 32% holding the opposite opinion; 16% of the police seem also to express conflicting opinions on the two questions. The differences in attitudes of individuals in the two populations is not significant ($X^2 = 8.16$).

Questions 5 and 6 pertain to the consideration of the evidence, as opposed to consideration of other circumstances, when deciding on whether to charge the offender who has committed a serious offence. To determine the association of opinions on that matter with the opinions expressed on the matter of the police use of discretion when dealing with serious offences, the individual responses of members of each population to Questions 5 and 6 were compared to their responses to Question 12 (Table 23). In responding to Question 12, there were 49 in the public sample who favoured the police use of discretion when dealing with serious cases, and of that number, 31 disagreed with looking at the evidence alone, while 18 agreed. Of the 45 who opposed discretion, 29 agreed to consideration of the evidence only, 15 disagreed and one was uncertain. This shows that the two opposing positions taken by the public continue to be maintained, with a very slight preference (31 to 29) still being shown for the use of discretion. The public responses to the two questions show

Table 23 - A comparison of public and police attitudes toward the police use of discretion, and the matter of consideration of the evidence in relation to charging for serious offences

Use discretion when dealing with serious cases - Q.12.	- Percent - Consider the evidence only in relation to charging for serious offences. - Q.5					
	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	
Strongly Agree	1	1		3	1	public
	4	6		2	1	police
Agree	0	16	0	26	1	public
	4	9	2	18	3	police
Undecided	2	2	2			public
	2	2	0			police
Disagree	4	23	1	12	1	public
	3	17	0	8	0	police
Strongly Disagree	1	1	0	0	2	public
	10	4	2	2	1	police

Police Sample: $N = 100$, $X^2 = 36.67$, significant at the 1% level.
Public Sample: $N = 100$, $X^2 = 40.98$, significant at the 1% level.
Public vs. Police Responses: $X^2 = 6.20$, not significant.

significant association at the 1% level ($X^2 = 40.98$). It is interesting to note, however, that 18% favour the use of discretion, but are of the opinion that only the evidence should be considered by the police when the decision to charge is being made. This infers that those holding to this position want the question of charges to be decided on the evidence alone, which does not deny discretion in charging, but rather requires that any discretion exercised, be decided on the evidence only. In practice, however, such a position seems almost unrealistic. Having to follow a policy which requires the consideration of the evidence alone in deciding whether to charge, and being faced with two situations which involve the same offence, the evidence in each instance being sufficient to substantiate charges, it would be most difficult for the policeman to justify his charging of one offender and not the other. It is those circumstances over and above the evidence which often leads the policeman to exercise his discretion. Nevertheless, while such a position may be considered by some to be compatible, it is considerably more difficult to say the same for the 15% who say use no discretion and at the same time, disagree with the evidence alone being considered by the police. If no discretion is to be used, there would be no need to consider other circumstances, for if the evidence is lacking a charge would not be laid,

while if the evidence is available to substantiate the charge, it would have to be laid - the position taken here, ruling out the use of discretion.

Police responses to Questions 5 and 12 show that 24 of the 49 who agreed to the use of discretion in Question 12, disagree to the consideration of the evidence only in Question 5, while 23 agree and 2 are undecided. Of the 47 who opposed discretion in serious cases, 34 agreed to the evidence alone being considered, 11 disagreed and 2 were undecided. The association between these responses is significant at the 1% level ($X^2 = 36.67$). Though the police continue to be in opposition to the use of discretion in serious cases, the proportion has dropped considerably, with the opposing views coming closer to an equal division (34 to 29). Like the public, 23% of the police agree to the use of discretion while holding that the evidence only should be considered, and 11% disagree to the police considering the evidence only, but also disagree to the police use of discretion. The differences in the individual opinions of the public and the police are not significant ($X^2 = 6.20$).

Turning to the comparisons of individual responses to Questions 6 and 12, the public responses reveal that of the 49 who agreed to the use of discretion, 33 also agreed to the consideration of other circumstances in respect to the

decision to charge, 15 disagreed, and one member was undecided. Of the 45 disagreeing with discretion in serious offences, 26 also disagreed with looking at other circumstances, while 17 agreed and 2 persons were undecided. The association is significant at the 1% level ($X^2 = 49.46$) as shown in Table 24. The results show the public coming out in favour of discretion in its broad sense (discretion when "dealing" with serious offences - Question 12, and in relation to charging by considering other circumstances - Question 6) by a margin of 33 to 26 - the split in opinion is still evident; 15% of the public agreed to the use of discretion but were against consideration of other circumstances in connection with the police decision on charges. This requires that the question of charge must be settled on the evidence alone, and if the evidence substantiates the charge and the police were not allowed to consider other extenuating circumstances, they would have no alternative but to charge the offender. Discretion in relation to the matter of laying charges is ruled out, therefore, the discretion that those in this group want the police to use can only be exercised in relation to some act <u>after</u> the charge has been laid. There were 17% of the public who disagreed with the use of discretion when dealing with serious offences, but agreed to the consideration of the other circumstances when deciding whether to charge the offender. These views can only

Table 24 - A comparison of public and police attitudes toward the police use of discretion, and the consideration of other circumstances in relation to charging for serious offences

Use discretion when dealing with serious cases. Question 12.	- Percent - Consider the circumstances in relation to charging in serious cases - Question 6					
	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	
Strongly Agree	1	4	0	1	0	public
	2	3	1	4	3	police
Agree	3	25	1	14	0	public
	4	21	0	10	1	police
Undecided	2	1		2	1	public
	0	0		4	0	police
Disagree	4	11	2	24	0	public
	3	8	0	16	1	police
Strongly Disagree	1	1		2	0	public
	4	1		8	6	police

Police Sample: $N = 100$, $X^2 = 28.11$, significant at the 1% level.
Public Sample: $N = 100$, $X^2 = 49.46$, significant at the 1% level.
Public vs. Police Responses: $X^2 = 6.02$, not significant.

be regarded as compatible if the consideration of other circumstances is not seen as an act of discretion, or if those holding to this position interpreted "other circumstances" as being evidence necessary to substantiate the charge.

The police responses to Questions 6 and 12 show that 30 of the 49, who believe the police should use discretion when dealing with serious offences, also want the police to consider other circumstances in regard to the question of charging, 18 disagree to the circumstances while one was undecided. Of the 47 who were against discretion, 31 were also against consideration of the circumstances, while the remaining 16 agreed to their being considered. The opposing views of the police have now levelled out to where they are almost evenly split between favouring and opposing discretion (30 to 31). For the police, 34% hold opinions that are not as clearly defined - 18% favouring discretion, but being opposed to consideration of other circumstances, and 16% being against discretion, but in favour of consideration of other circumstances (a total of 34% as compared to 32% of the public). The police responses to Questions 6 and 12 are significantly associated at the 1% level ($X^2 = 28.11$), while there is no significant difference in the public and police responses to these questions.

The analysis of questions dealing with the police use of discretion and the matter of charging those committing minor offences presents a very different picture than did the findings on those questions dealing with serious offences and the matter of charging offenders with such offences. The responses of the public population to Question 8 (Table 25) show that 1% (one person in the population of 100) strongly agreed to consideration of the evidence alone when deciding to charge in minor offences, 31% agreed; 3% were undecided; and 65% disagreed. In Question 2, which concerns the consideration of other circumstances in the decision to charge for minor offences, 18% strongly agreed; 70% agreed; 2% were undecided; 8% disagreed; and 2% strongly disagreed. As was mentioned when discussing these questions in respect to serious offences, the statements in each question represent opposing positions on the same issue, for to agree to the evidence only being considered, is to deny the consideration of other circumstances. It is interesting to note, that although there is a significant association at the 1% level between the responses to the two questions ($X^2 = 41.72$), 65% disagree to considering the evidence only, while 88% agree to the consideration of other circumstances. One might have expected the responses to be more closely related.

Table 25 - A comparison of public and police attitudes toward consideration of the evidence and other circumstances surrounding the commission of minor offences

Interview Schedule Question		- Percent - Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
2. When a person has committed a minor offence, the police should consider other circumstances surrounding the matter before deciding to charge the offender.	public	18	70	2	8	2
	police	31	55	5	6	3
8. When deciding on whether to charge an offender who has committed a minor offence, the police should only consider the evidence surrounding the commission of that offence.	public	1	31	3	65	0
	police	6	32	2	52	8

Police Sample: $N = 100$, $X^2 = 33.70$, significant at the 1% level.
Public Sample: $N = 100$, $X^2 = 41.72$, significant at the 1% level.

Public vs. Police Responses: Question 2 - $X^2 = 8.72$, not significant.
Question 8 - $X^2 = 13.24$, significant at the 5% level.

Police responses to Question 8 found 6% strongly agreeing to the evidence alone being considered in the police decision on charges; 32% agreeing; 2% undecided; 52% disagreeing; and 8% strongly disagreeing. In Question 2, 31% strongly agreed; 55% agreed; 5% were undecided; 6% disagreed; and 3% strongly disagreed to consideration of other circumstances when deciding whether to charge the offender. The association in the police responses to Questions 2 and 8 was significant at the 1% level ($X^2 = 33.70$). Again, one might have expected a greater relationship in responses to the two questions (60% against evidence alone, 86% for other circumstances). The difference between responses of the public and police to the two questions was significant at the 5% level ($X^2 = 13.24$) for Question 8, with no significant difference in the case of Question 2 ($X^2 = 8.72$). The significance in Question 8 is due to the intensity of the police attitude in disagreeing to the statement (8% strongly disagree to none of the public), a situation which has occurred several times in comparisons of previous questions in this research.

When the individual responses of the public to Questions 2 and 8 are combined (Table 26), 25% of the public agree to other circumstances being considered, but at the same time, agree to the consideration of the evidence only. 62% agree to other circumstances and disagree to the evidence only being

Table 26 - A comparison of individual attitudes of the public and the police toward consideration of the evidence, and other circumstances surrounding the commission of minor offences.

Consider the circumstances in relation to charging for minor offences. Question 2.		- Percent - Consider the evidence only in relation to charging for minor offences Question 8. Agree	Disagree	Undecided
Agree	public	25	62	1
	police	30	55	1
Disagree	public	7	2	1
	police	6	3	0
Undecided	public	0	1	1
	police	2	2	1

Public Sample: N = 100, X^2 = 28.35, significant at the 1% level.
Police Sample: N = 100, X^2 = 13.38, not significant.
Public vs. Police Responses: X^2 = 4.50, not significant.

considered, as compared to only 7% disagreeing and taking the opposite stand; 2% disagreed to both statements. The remaining 4% were undecided either on one question or the other, or both. The association in responses to the two questions is significant at the 1% level ($X^2 = 28.35$). As was the case in the public population, the 25% who agree to consideration of other circumstances, but also agree to consideration of the evidence only, seem to be expressing attitudes that are in opposition. This situation was discussed when dealing with the analysis of the responses related to serious offences. Such opinions are hardly reconcilable unless "other circumstances" are being looked upon as being a necessary part of the evidence. There are 2%, however, who disagree to both statements and this research cannot suggest any explanation for such a stance.

The responses given by each individual in the police population to Questions 2 and 8 show 61% concordant responses - 55 in favour of discretion and 6 against. Of the 33% discordant responses, 30 agreed to the consideration of the evidence only as well as to the consideration of other circumstances, while 3 disagreed to both statements. These responses of the police to the two questions showed no significant association ($X^2 = 13.38$). The implication of the controversial responses has already been discussed, but it is

somewhat surprising that the police would come on stronger in this respect than the public. One would expect that they would be more consistent than the public because of their occupational experience. Be that as it may, the differences in public and police responses were not significant ($X^2 = 4.50$). The results show that both populations favour the use of discretion in relation to the decision to charge for minor offences, and this is in agreement to their responses to Question 13 (Table 17), where strong support was given for the police use of discretion when dealing with this category of offences (public 88%, police 85%).

The combined responses of individuals in the public population to Questions 13 (use discretion when dealing with minor offences) and 8 (consider the evidence only when deciding on charges in minor offences) are shown in Table 27. In support of the police use of discretion, 61% agree to the use of discretion and disagree to the evidence only being considered, while only 5% hold the reverse opinion. There were 25% who agreed to the use of discretion, but would have the police consider only the evidence when deciding whether to charge for minor offences, and 3% disagree to both statements. These responses are significantly associated at the 5% level ($X^2 = 14.08$).

Table 27 - A comparison of public and police attitudes toward the police use of discretion, and the matter of considering the evidence in relation to charging for minor offences.

Use Discretion when dealing with minor offences. Q. 13		- Percent - Consider the evidence only in relation to charging for minor offences. Question 8.				
		Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
Strongly Agree.	public	0	2	0	12	0
	police	3	6	1	11	5
Agree.	public		23	2	49	0
	police		18	1	37	3
Undecided.	public	1	1	1	1	
	police	0	0	0	1	
Disagree.	public	0	5		3	
	police	2	5		3	
Strongly Disagree.	public	0	0			
	police	1	3			

Public Sample: $N = 100$, $X^2 = 14.08$, significant at the 5% level.
Police Sample: $N = 100$, $X^2 = 27.76$, significant at the 1% level.

Public vs. Police Responses: $X^2 = 9.30$, not significant.

The police responses to Questions 13 and 8 show that 56% favour the police use of discretion and disagree to the consideration of the evidence only, while 11% hold the opposite view. There were 27% agreeing to the police using discretion but would have them consider the evidence alone when deciding whether to charge for minor offences, while 3% disagreed to both statements. The association in responses to the two questions is significant at the 1% level ($X^2 = 27.76$). Differences in public and police responses to the two questions are not significant ($X^2 = 9.30$).

While it is clear from the public and police responses to Questions 8 and 13 that the majority of each population (public 61%, police 56%) want the police to use discretion when dealing with minor offences - including its use in relation to the decision on charges, it is not so clear what the 25% of the public, and the 27% of the police who agree to discretion while also agreeing to the consideration of the evidence only, expect the police to do. In holding to such a position, there are two possible avenues of reaction by the police - they can exercise discretion but not in relation to charges, or they can use discretion, including its use in respect to charges, their discretionary action being based on consideration of the evidence only. As was mentioned earlier, the latter course of action does not seem to be practical,

because if the police consider only the evidence and it substantiates a charge, not being permitted the opportunity of looking at other circumstances of the offence, they would have little excuse for not charging the offender. To use discretion under those conditions would in all probability lead to claims of discrimination which would seem to be justified in many cases.

Question 2 (Table 28) pertains to the consideration of other circumstances in relation to the decision to charge for minor offences. The combined responses of individuals in the public population to this question and Question 13, show that 82% favour consideration of those circumstances and the police use of discretion when dealing with minor offences, while only 4% are of the opposite opinion. Whereas 25% of the public favoured discretion, but wanted only the evidence considered (Questions 8 and 13), only 5% are in favour of discretion but against the police considering other circumstances. The public responses to these two questions show a significant association at the 1% level ($X^2 = 29.04$). It is worthwhile to note that while 61% disagreed to consideration of the evidence alone when agreeing to the use of discretion when dealing with minor offences, 82% favoured the police considering other circumstances and using discretion. Again, the issue in each instance being the same, it would not be presumptuous to have

Table 28 - A comparison of public and police attitudes toward the police use of discretion, and the consideration of other circumstances in relation to charging for minor offences.

Use discretion when dealing with minor offences. Q.13		- Percent - Consider other circumstances in relation to charging for minor offences. Q.2				
		Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
Strongly Agree.	public	5	9		0	
	police	15	10		1	
Agree.	public	12	56	1	5	
	police	13	38	4	4	
Undecided.	public	1	1	1		1
	police	0	1	0		0
Disagree.	public	0	4	0	3	1
	police	2	4	1	1	2
Strongly Disagree.	public	0	0			0
	police	1	2			1

Public Sample: $N = 100$, $X^2 = 29.04$, significant at the 1% level.
Police Sample: $N = 100$, $X^2 = 10.63$, not significant.

Public vs. Police Responses: $X^2 = 12.22$, not significant.

expected a closer similarity in responses.

The police responses to Questions 2 and 13 reveal that 76% agree to the use of discretion and consideration of other circumstances, and that 9% hold the opposite opinion. Only 5% agree to the use of discretion while at the same time being against the consideration of other circumstances, as compared to 27% who favoured discretion but wanted only the evidence considered by the police when deciding the question of charges in minor offences. The police responses fail to show a significant association ($X^2 = 10.63$).

Public and police responses to Questions 2 and 13 revealed no significant differences ($X^2 = 12.22$). A greater number in both populations favour the use of discretion in minor offences when responses to these two questions are combined (public 82%, police 76%), than when responses to Questions 8 and 13 are combined (public 61%, police 56%). This suggests that the populations do not regard the evidence and other circumstances as being mutually exclusive, but rather look upon them as issues which can coexist, each demanding separate consideration. If consideration of the evidence only is the opposite of consideration of other circumstances, then one would have expected a greater association in responses.

The attitudes expressed by the public and police populations on the subject of the police use of discretion in

serious and minor offences, including its use when considering the question of whether the evidence alone, or the evidence as well as the circumstances should be considered by the police when deciding whether or not to charge the offender, clearly show that in respect of minor offences, both populations expect the police to use discretion. The responses to the four questions dealing with the use of discretion in both minor and serious offences have to be interpreted as either support for, or opposition to its use. When the responses interpreted in this way are combined, each population falls into five categories depending on the number of questions to which supportive responses were given (Table 29). In the case of minor offences, 52% of the public and 48% of the police unquestionably support the police use of discretion, while 1% of the public and 3% of the police oppose it. Regarding its use in serious offences, however, the position appears to be just the reverse: 4% of both samples unquestionably support the police use of discretion, while 21% of the public and 28% of the police oppose it. The attitudes of both the public ($X^2 = 58.78$) and the police ($X^2 = 57.86$) toward the police use of discretion in serious offences are significantly different (at 1%) from that in minor offences, giving support to the hypothesis that attitudes toward discretion exercised by the police are influenced by the nature of the offence. The

Table 29 - Public and police attitudes toward the police use of discretion when dealing with serious and minor offences.

Responses Supportive of Discretion in: *	MINOR OFFENCES		SERIOUS OFFENCES	
	- Percent -			
	Public	Police	Public	Police
Four Questions	52	48	4	4
Three Questions	20	18	22	17
Two Questions	5	15	21	18
One Question	6	1	20	21
None of the Questions	1	3	21	28

* Questions Involved: Minor Offences, Questions 2, 4, 8, 13. Serious Offences, Questions 1, 5, 6, 12.

Public: Minor vs. Serious Offences, X^2 = 58.78, significant at the 1% level.

Police: Minor vs. Serious Offences, X^2 = 57.76, significant at the 1% level.

Public vs. Police Responses:

Minor Offences - X^2 = 9.82, significant at the 1% level.
Serious Offences - X^2 = 1.88, not significant.

public attitude is not significantly different from that of the police in respect to the police use of discretion in serious offences (X^2 = 1.88), there is, however, a significant difference in their attitudes at the 1% level (X^2 = 9.82) in the case of minor offences. As far as serious offences are concerned, both populations appear to be opposed to the police use of discretion, with support for its use mainly in relation to minor offences where the public express greater support for its use than do the police. It should be noted, however, that regardless of whether the offence considered is serious or minor, the public responses show more support for the police use of discretion than do those of the police. This directly questions the common belief, that while the police are in favour of using discretion, the public are opposed to it. Of course this belief seems to be widely expressed in the United States (2, 3, 4) and sometimes thought to reflect the position in Canada (1). There is hardly any empirical evidence to support this in the United States, and the evidence certainly does not support it in Canada.

Stemming partly from the belief that the police and the public are placed in polar positions on the subject of discretion, the police are in favour of its use and the public in opposition, is the contention that the police use of discretion in enforcement of the law, would in the final analysis,

amount to nothing more than discrimination. The logic behind this stand is that the policeman's discretion does result in one person being arrested and another not, one person being charged for the more serious offence and the other for the lesser offence, or one person being charged and another not, when both have committed the same offence, while they all should have been subjected to similar treatment. The dissimilar treatment, when the offence committed is similar, has been identified by the classical school of criminology as discriminatory (5, p.52). Discretion in law enforcement involves the policeman taking into consideration, not only the evidence, but other extenuating circumstances, and after considering all the factors involved both directly and indirectly in the case, determination of a course of action which best seems to serve the welfare of the offender and the public at large - the policeman reacting to the spirit of the law rather than to the letter of the law. His reaction may be to charge, to warn or to take no action at all.

Neither the public nor the police looked upon the polceman's use of discretion as constituting discrimination, for the survey revealed that they did not think it unfair to consider other circumstances and on that basis charge one and not another when the same offence was involved in each case (Question 11, Table 1). As a means of further testing the

attitudes of each population on this subject, they were asked in Question 17 (Table 30) if they would complain if they thought they were being discriminated against. Only 12% of each population said that they would not complain. It is interesting to note that while 18 in the public sample and 27 in the police sample strongly agreed that they would complain, not one in either population strongly disagreed to complaining. Also significant is the fact that 15% of the public and 18% of the police were uncertain as to what they would do. This is the highest percentage of responses to this category to any of the questions in the interview schedule. When respondents were being interviewed, there were a considerable number in each population who remarked that their reaction would depend on the extent of the discrimination that took place, and that they could not say how they would react until confronted with the situation. This, no doubt, is the reason for the high percentage in this category. The differences in public and police responses were not significant ($X^2 = 3.54$).

The combined responses of individuals in each population to Questions 12, 13 and 17 were analyzed (Table 31) and it was determined that of the 49% in the public population who said that they favoured the police use of discretion in both serious and minor offences, 35 said they would complain if they felt that they had been discriminated against, while 8

Table 30 - Public and police attitudes toward being discriminated against in relation to enforcement of the law.

Interview Schedule Question		- Percent - Public	Police
17. I would complain to the police or some other public official if I thought I was being discriminated against.			
	Strongly Agree	18	27
	Agree	55	43
	Undecided	15	18
	Disagree	12	12
	Strongly Disagree	0	0

Public Sample: N = 100, Police Sample: N = 100.

Public vs. Police Responses: $X^2 = 3.54$, not significant.

Table 31 - A comparison of public and police attitudes toward discrimination and its relation to the police use of discretion when dealing with serious and minor offences.

Use discretion when dealing with serious offences. Question 12. / Use discretion when dealing with minor offences. Question 13.	- Percent - Would complain if discriminated against. Question 17. Agree	Disagree	Undecided	
Use discretion in both minor and serious cases.	35	8	6	public
	35	6	6	police
Use discretion in minor, but not in serious cases.	28	2	6	public
	22	6	7	police
Use discretion in serious, but not in minor cases.			0	public
			2	police
No discretion in serious or minor cases.	5	1	1	public
	11	0	1	police
No discretion in serious cases, but uncertain in minor cases.	1		1	public
	0		0	police
Uncertain of discretion in both minor and serious cases.	2			public
	1			police
Use discretion in minor cases, but uncertain in serious cases.	2	1	0	public
	1	0	2	police
No discretion in minor cases, but uncertain in serious cases.			1	public
			0	police

Public Sample: $N = 100$, $X^2 = 14.76$, not significant.
Police Sample: $N = 100$, $X^2 = 21.85$, significant at the 5% level.
Public vs. Police Responses: $X^2 = 15.00$, not significant.

would not, and 6 were undecided. There were 28, in the 46% who said they favoured discretion in minor, but not in serious cases, who would complain, 2 would not and 6 were undecided. The 7% who were against discretion in both types of offences were divided, 5% agreeing to complain, 1% disagreeing and 1% undecided. The distribution of responses in the three questions showed no significant association ($X^2 = 14.76$). In the police population, of the 47% who favoured discretion being used in relation to both types of offences, 35 agreed to complain, 6 disagreed and 6 were undecided. Of the 12% who would not use discretion in either category of offence, 11 would complain and one was undecided as to what he would do. There were 35% who wanted discretion exercised in minor but not in serious offences, and of that number, 28 would complain, 2 would not, while 7 were undecided. The police responses showed a significant association at the 5% level ($X^2 = 21.85$). Nevertheless, the differences between public and police responses were not significant ($X^2 = 15.00$).

These findings (responses to Questions 12, 13 and 17) have interesting implications. If complaint on discrimination is viewed as a system of checks and balances on the methods of enforcement followed by the police, the significant association in the case of the police sample between responses on the use of discretion and complaint on discrimination

indicates that it is those policemen favouring the use of discretion that are the most aware of the possibility of it being discriminatory and are willing to react to restore the law to its proper position. The absence of any significant association in the responses of the public to the three questions suggests that the public reaction to discrimination is dependent on factors other than those leading them to support discretion. It also carries the suggestion of implicit trust in the police - a willingness to interpret an act they feel discriminatory as possibly discretionary rather than discriminatory when the police are known to engage in discretionary law enforcement.

REFERENCES

1. BARKER, B.M. (1966) "Police Discretion and the Principle of Legality". Criminal Law Quarterly, 8, 400-407.

2. GOLDSTEIN, Joseph (1960) "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice", Yale Law Review, 69, 543-594.

3. HALL, Jerome (1953) "Police and the Law in a Democratic Society". Indiana Law Journal, 28, 133-177.

4. LaFAVE, Wayne R. (1965) "Arrest: The Decision To Take a Suspect into Custody". Wisconsin Law Review, Part I, 106-107.

5. SUTHERLAND, Edwin H. and Donald R. CRESSEY (1955) Principles of Criminology, New York: J.P. Lippincott.

CHAPTER VIII

SUMMARY AND CONCLUSIONS

This study deals with the use of discretion by the police in law enforcement. Stated in simple terms with respect to enforcement of the law by way of formal charge, the policeman, confronted with the violator and the particular law violated, decides not to take such formal action. Although by virtue of his office the policeman is cognizant of his responsibility to enforce the law, he is also very much aware of his prime responsibility - the preservation of peace in the community - through the prevention of disorderly and unlawful conduct. His training and police service has shown him that this objective is not always met by way of full implementation of the law. He knows that under certain circumstances this end may best be accomplished by resorting to such measures, while under other circumstances the offender's observance of the law in the future is more likely to be encouraged by non-charge. In reaching his decision to exercise discretion the policeman is not concerned merely with the particular law violated. He is concerned about the effect that his decision may have on the offender's respect for the law in general. Experience has shown him that, for some offenders, respect for the law is enhanced by the issuance of

a warning while for others such a reaction would be regarded as a weakness in the law and an encouragement to commit further violations (6, p.32). While this study has shown that the policeman's discretion is governed by the nature of the offence, the circumstances surrounding it, the attitude of the offender, public attitudes and the need of public support for the law and law enforcement, it has not been able to state in any positive way the prerequisites to the exercise of discretion. Discretion, primarily exercised in relation to minor offences, always involves choice. In defining crime the law also defines the criminal and this, in turn, tells the policeman what he can do. But what he has to do, or ought to do, is a decision which he himself must make, guided by the spirit of the law rather than by its letter. Keeping the peace and protecting life and property involves much more than mere policies that call for full enforcement of the law. Reiss and Bordua in commenting on the police function have the following to say:

> Although the police are formally organized to enforce the law and maintain public order, it is apparent they are involved at the same time in enacting justice. It is important to note that three key terms, order, legality and justice - are ambiguous terms in any social system. But what philosophers, social scientists, and lawyers have argued over centuries, the police must do every day. The point requires little documentation. A policeman on duty, for example, when confronted with a situation of law enforcement

> or threat to public order must make decisions about the evidence and whether the act violates the law. Decisions to hold for investigation, to arrest or release, or to enforce order, likewise requires the extension of legality. His decision may, and often does, involve him at the same time in dispensing equity. Police in short, make important decisions that affect outcome (5, pp.32-33).

Although the exercise of the police officer's discretion is generally thought of in terms of his decision in respect of charging a particular offender, discretion can be used in other areas as well. As Reiss and Bordua point out, the policeman can use his discretion and not arrest the offender even though he has authority to do so. He may use his discretion and not enforce a certain law prior to its violation and without any particular offender in mind. This may occur in respect of outdated laws, laws that are ambiguous, or laws which are expected to be violated under circumstances which he feels would not merit formal charge. The policeman can also use his discretion in relation to the issuance of formal warnings and can decide to charge for a lesser offence even though the evidence may support the more serious charge.

Little in the way of empirical research has been carried out on the police use of discretion. In Britain the policeman's discretion has been recognized at law through decisions upholding its use, handed down by her high courts. In the United States the police use of discretion has been

subjected to theoretical debate and controversy, with no definite conclusions. In Canada the literature is almost barren of writings on the subject. There exists no legal or statutory authority for or against its use, and unlike in England, Canadian courts have not been presented with the opportunity to state their opinions on the subject. From time to time the subject has nevertheless received the attention of legal experts, which in the recent past has included the Minister of Justice for Canada, and the Canadian Committee on Corrections, whose terms of reference for studying the broad field of corrections included the arrest of offenders and the investigation of offences. The Minister of Justice and the Committee on Corrections have both recognized its use by the police, and reiterated the necessity for the continuance of discretionary enforcement practices in the future. At the same time, however, there are those who are opposed to such practices. Yet, unlike the situation in the United States, the whole area of discretion in law enforcement is not pervaded by controversy: it appears hidden, not talked about, leaving one with the impression that although it is proper for the police to use discretion, it should not be advertised for fear that the public might become aware of it. Police departments have been hesitant to admit that they advocate such practices, suggesting that

the use of discretion when enforcing the law was a personal matter between the individual officer and the offender.

The goal of effective law enforcement, it has been claimed, can only be achieved where there is uniformity in enforcement of the law, and equality in the police treatment of offenders. This cannot be achieved when individual police officers exercise discretion. Hence the position that either the police should not use discretion or, if they do, it should be a standardized discretion used under strict control, to ensure that uniformity and equality of treatment remained inviolate. But the very nature of discretion makes it the antonym of machine-like uniformity in policy enforcement methods, and adherence to one, by necessity, rules out the other. There is also the view that uniformity in police treatment of offenders results only in superficial and meaningless equality. Those holding to this view say that the law can be enforced with equity only when the police use discretion. The same offence under different circumstances may produce an entirely different situation which demands a different police reaction. Hence, though the law tells the policeman what he could do when a particular offence has been committed, what he actually should do is an individual decision based on consideration of the circumstances surrounding the offence.

Whatever the doctrinaire position may be, in a democratic country where the police are the agents of the people, entrusted with the sacred task of protecting the values of society (described in broad and general terms as maintenance of law and order), the justification for or against the police use of discretion must come from public support. It was with this assumption as the point of departure that this study was designed. The basic hypothesis stated that both the public and police favour a policy of discretionary law enforcement, and that there was no significant difference in their attitudes in this respect. The nature of the offence, it was hypothesized, would affect attitudes toward enforcement methods. Consequently, the research proceeded on the premise that laws are divided into two distinct categories - laws relating to serious offences, and laws relating to minor offences - with the treatment expected by offenders varying with the type of offence committed and, as must necessarily follow, the distinction flavouring the attitude toward the police use of discretion. What was expected was more support for discretionary law enforcement in the case of minor offences than in the case of serious ones. The circumstances surrounding the offence, the consideration of which forms the core of the police use of discretion, would, it was hypothesized, affect attitudes toward discretionary law enforcement through its

influence on the categorization of an offence as serious or minor. Finally, an attempt was made to test the hypothesis that discretionary law enforcement really meant differential treatment for the self.

This study, essentially an attitude survey, was designed to test the hypotheses which are stated above. This necessitated the procurance of two sample populations, one consisting of policemen, and the other of citizens representative of the general public. The empirical data were collected by means of an interview schedule which contained twenty-two questions relating to police enforcement methods, issues relating to the use of discretion, categorization of offences, and considerations that affect such classification.

To establish the broad outlook of the public and the police populations toward the use of discretion by the police, the respondents were asked if they were in favour of the police charging everyone who committed an offence, regardless of the nature of that offence or other circumstances surrounding the matter. In their responses, both populations showed strong support for the police use of discretion by disagreeing with that statement. That is, in the broad sense of law enforcement, they did not favour a policy of invariable charging. There is, however, the possibility that this opposition to invariable charging does not in fact, imply support for

discretion. It could display an expression of attitudes favouring a policy of enforcement which would prevent the police from charging everyone. This would presumably be accomplished through some sort of administrative guideline that would state when the police should charge and when they should not - a situation which in reality would deny the police the opportunity to exercise discretion. The responses to two other specific questions: (a) the police should charge everyone who commits a serious offence, and (b), the police should charge everyone who commits a minor offence, helped to clarify this situation. Both populations strongly supported the first statement, while strongly disapproving of the second. These results showed that they believed that the offender should be dealt with according to the nature of the offence he committed. When a serious offence is involved, the police should not exercise discretion: they should invariably charge, but if the offence is minor, discretion should be exercised. Again, these responses did not necessarily infer that the two populations wanted the police to use discretion. Such inference is only possible if the populations agreed that the question of charge was dependent on the police considering not only the seriousness of the offence, but other circumstances surrounding its commission as well. The responses to the questions that canvassed this

position were strongly in support of the police so doing when the offence was minor, but almost equally divided between support and non-support when the offence was serious. This left no doubt that the attitudes expressed toward invariable charging were not an expression of support for administrative policy which would prevent the police from charging under certain circumstances and not under others, but were attitudes which reflected the desire of having the police use discretion when considering the question of charges.

Confirmation that the public and the police populations favoured discretionary law enforcement practices was established through two additional questions. The interview schedule contained two direct statements with respect to the use of discretion when dealing with serious and minor offences - (a), the police should use discretion when dealing with serious offences, and (b), the police should use discretion when dealing with minor offences. In responding, the public and police were almost identical in expression of their attitudes. Just under half (49%) of each population favoured its use in serious cases, while slightly less were in opposition (public 45%, police 47%). Both populations gave strong support for the use of discretion when dealing with minor offences (public 88%, police 85%). The responses to these questions supported the basic hypothesis that both the public and the police

favoured a policy of discretionary law enforcement and that differences in their attitudes toward its use were insignificant. The results of the interview also provided support for the hypothesis that the exercise of discretion was expected in minor, but not in serious offences. Lending further support, were the responses from each population which favoured the police practice of issuing warnings in lieu of charges when such action seemed to best serve the purpose of the law - such a practice necessarily involving the police use of discretion. As well, both populations did not think it unfair for the police to consider the circumstances surrounding the commission of an offence, and on that basis, charge one offender and not the other, even though the same offence was involved in each instance.

The possibility of erroneous conclusions stemming from reliance on the responses to just one question, especially as the subject dealt with relates to a multi-faceted attitude, demanded the investigation of the various aspects of the subject. Thus, respondents were asked whether the police should exercise discretion, whether the police should charge everyone who committed a crime, whether the police should consider only the evidence before laying a charge, or whether they should consider the evidence along with other circumstances surrounding the commission of the offence. Support for the

police use of discretion with a positive answer to the first question, should be followed by a negative answer to the second, for invariable charging implies no use of discretion. Similarly, support for the police use of discretion should result in a negative answer to the third question and a positive answer to the fourth. The questionnaire contained three sets of such questions - one set dealing with discretion unspecified, the second with discretion in serious cases, and the third, with discretion in minor cases. The three sets, each containing four questions, were utilized with a double purpose in mind. First, providing indices of the same phenomenon in four different ways, it permitted a type of response validation which whether it resulted neither in the elimination of error nor the evaluation of them, permitted the identification of a chain of consistency. Second, providing the individual's response to almost the same question (although differently worded), four times it permitted an assessment of the consolidation of the attitude studied. The responses of both populations to each set of four questions were significantly associated, indicating that the responses to these questions would be a reasonably accurate portrayal of the actual situation. Analysis of the individual responses to the questions taken together, however, revealed a certain amount of discrepancy. Consistent answers to a set of

questions were found only in 25-50% of the cases. If consistent answers are interpreted as consolidated position, the responses reveal that 46% of the public and 38% of the police unquestionably support the police use of discretion, while 2% and 3%, respectively, oppose its use. In the case of serious offences, the support for its use comes from only 4% of each population, with 21% of the public, and 28% of the police unquestionably opposed to its use. In the case of minor offences, however, 52% of the public and 48% of the police unquestionably favour the use of discretion, while 1% and 3% respectively, are opposed to its use. These findings support the hypothesis that the nature of the offence affects attitudes toward enforcement methods of the police. They also support the hypothesis that both the public and the police favour discretionary law enforcement in minor, but not in serious cases.

A third set of hypotheses tested dealt with the circumstances surrounding the offence. If the nature of the offence influenced the attitude toward discretionary law enforcement, it must follow that the circumstances surrounding the offence should operate through its influence on the categorization of an offence as serious or minor. To test this hypothesis, a list of twelve offences were given the respondents to classify as serious or minor categorically, or

depending on circumstances. The responses showed that the categorical position was adopted more frequently by the public: the police more dependent on the circumstances determining their classification. This difference, however, is not difficult to comprehend. Where the immediate consequences of the act are blatantly harmful, the offence must be looked upon as being serious, even before it is committed. But where the harmful consequences are neither blatant nor immediate, the act has first to be committed and the circumstances (including the consequences) known, before the offence can be classified as serious or minor. Compelled to deal with the question hypothetically, the public would be more willing to consider only one possible outcome rather than a multitude, in classifying an offence as serious or minor. The responses of both populations support the hypothesis that the circumstances surrounding the offence affect attitudes toward discretionary law enforcement through influence in categorization of the offence as serious or minor. It was found that 76% of the public and 77% of the police agreed with the statement that the circumstances surrounding the commission of an offence may have a bearing on whether the violation is serious or minor. Further, where the offence is serious, neither the public nor the police wanted discretion used. It was only in the case of minor offences that both

populations favoured the use of discretion and even here, where the circumstances surrounding past offences have shown the acts to result in serious consequences, the use of discretion is not approved by either population. The only conclusion that is possible from these responses is that the public and police approval of discretion rests on the fact that the circumstances under which certain offences are committed make them serious at certain times and minor at others. In this connection it is interesting to note that 88% of the public and 86% of the police agreed that where a person has committed a minor offence, the police should consider other circumstances surrounding the matter when deciding the question of whether or not to charge. Where the offence was serious, the consideration of other circumstances in the decision of charges was approved by 53% of the public and 46% of the police.

The final hypothesis that was tested was that discretionary law enforcement really meant differential treatment for the self. This hypothesis was tested with a series of paired questions which first canvassed the respondents' opinion on the police action in a case where John Doe was the offender. Having established their reaction when someone else was the offender, they were then asked what they thought would be the appropriate action if they were the offenders.

The offences in the questions were relatively minor ones, such as exceeding the 50 m.p.h. speed limit by 4 miles, theft of a 10¢ candy bar from a store, and being found intoxicated in a public place. The responses to all these questions indicated that the individual, be he a member of the public or the police, did not expect to be treated more leniently than any other citizen. Actually, the responses were in just the opposite direction. The police, more than the public, thought that they should have been given the harsher treatment. This of course, is not surprising. Deviance is less tolerable among those who conceive of themselves as non-deviants, and more so among those who are the accepted controllers of it.

One of the problems inherent in a study such as this where a questionnaire is used to ascertain attitudes, is whether the responses represent the individual's personal opinion, or whether they reflect the individual's interpretation of the public attitude, In other words, is the individual responding in the way he thinks he should because of his awareness of others' opinions, or is he actually giving his personal opinion? In an attempt to determine which was the case, the respondents were not only asked their personal opinion, but were also asked to interpret public opinion on the same issue. Of the 82 in the public sample who personally favoured the use of discretion by the police, 71 were of the

opinion that the public also favoured its use. For the police the figure was 81 of 83. These responses suggest that it would not be unreasonable to conclude that the police believe that they are enforcing the law in a manner which is acceptable to the public. The fact that 9% of the public were unsure of public opinion, whereas only 4% of the police so responded, may be interpreted as an indication of police awareness of public attitudes toward methods of law enforcement. It was suggested earlier in this study that part of the police function is to interpret public opinion. If the police are to gain the public support necessary to prevent crime and to adequately enforce the law, they must be aware of public attitudes toward the law and the manner in which they feel it should be enforced. Thus the police by virtue of their office must be mindful of public attitudes while the public, not having the same obligations as the police, can afford to be less mindful of public opinion on the law and its enforcement. This is not meant to infer that there is a total unconcern on the part of the public, but perhaps an unconcern until the police enforcement methods become unbearable that the public has no other option but to complain.

This study produced two additional outcomes worthy of comment. First, the public were slightly more in favour of the use of discretion by the police than were the police

themselves. This finding is contrary to the popular belief that while the police favour discretionary law enforcement, the public are opposed to it. Not only was it found that the police and the public were not in polar positions with regard to this question, as is popularly believed, but it was also determined that the public were slightly more in favour of its use than the police. The second interesting outcome was the intensity of the attitudes displayed by the police in responding to the questions. Analysis of the responses of the two populations revealed that the police were consistently more intense in their attitudes, both in agreeing and in disagreeing with the statements in the questionnaire. In several instances this was responsible for significant differences in the responses of the two samples - a significance that was not related to the direction of the response. It was suggested that this sureness on the part of the police was probably a consequence of their operational experience in dealing with the issues raised in the questions. They may also be inclined to be more decisive once they feel they have all the facts upon which to make a decision.

The findings of this study may be briefly summarized as follows:

1. Those in Canada responsible for the administration of justice, favour discretionary law enforcement practices.

2. There is apparently no legal authority for the police use of discretion excepting the police powers of arrest under the Criminal Code.

3. Both the public and the police favour the use of discretion by the police in relation to minor offences. In the case of serious offences they are opposed to it.

4. Both the public and the police realize that the use of discretion necessarily discriminates in the type of treatment which will be afforded one offender as compared to another, yet both do not regard this as undesirable. It is considered the natural outcome of discretion rather than an act of discrimination.

5. The public were more in favour of the police use of discretion than were the police. Although the public's preference for its use was only slightly more pronounced than the preference shown by the police, this is nevertheless, an important finding. It directly questions the common belief that the police are in favour of using discretion, while the public are opposed to its use.

6. Individuals in the public and police populations did not expect differential treatment for themselves when in violation of the law. They were aware of the division of offences into minor and serious categories and expected offenders to be dealt with according to the nature of the

offence committed.

7. In cases where discretion was expected to be used both populations favoured the police looking beyond the narrow confines of the evidence to other circumstances surrounding the offence. They also felt that in many cases it was the circumstances surrounding the violation that made the offence serious or minor. The study showed, however, that the police appear to be more inclined to consider the circumstances of each individual case, while the nature of the offence appears to be of more importance in influencing the decisions of the public as to the manner of dealing with the offender. For example, given an offence and a minimum description of the circumstances surrounding its commission, the public showed a marked preference for the issuance of warnings whereas the police were noticeably in favour of stating that their decisions would depend on the circumstances. The public are making a final decision while the police are withholding their action until the circumstances are known. This is looked upon as an important finding, for it is not uncommon to hear the remark that policemen see things as either black or white and have no concern for the gray area in between. Police responses to various questions in this study seem to refute such an assumption.

It is an undisputed fact that the need for proper and acceptable methods in law enforcement which are attuned to public expectations, has never been of such paramount importance than at the present. There are reasons to believe that the demand for citizen-oriented law enforcement will show itself with even greater persistence as society advances into the future. A very considerable amount of the policeman's activity is related to the time spent in dealing with non-criminal matters and in enforcement of the great bulk of minor laws and regulations. In the long run, the officer will be judged good or bad according to the manner in which he handles these run-of-the-mill situations. In a recent survey carried out by the Centre of Criminology, University of Toronto (1), it was found that the characteristics such as forebearance, tact, tolerance and intelligence, were seen as the earmarks of a good policeman. These took precedence over other characteristics which are often associated with a good policeman, such as bravery and courage (1, p.66). The bad policeman, on the other hand, was seen as possessing such attributes as gruffness, officiousness, misuse of authority and over-aggressiveness (1, p.67), indicating that "...careful and tactful handling of the 'run-of-the-mill' face-to-face situations were highly salient..." (1, p.67) to members of the public. All this only underlines the need for discretionary law

enforcement.

It has been contended that a prerequisite to the police use of discretion is the establishment of administrative controls over such practices (2, p.46; 7, p.19). As the end result of discretionary law enforcement is the non-adherence to the strict provisions of the law in all cases, discretion has sometimes been equated with variable law enforcement. Control of discretionary enforcement calls for the prior determination of the violations which should or should not produce adherence to these strict provisions. But the exercise of discretion is both a personal, and unique act, which calls for a post facto evaluation of an event and consequently, discretion cannot be exercised when the evaluation is a priori. Administrative guidelines designed to control law enforcement can suggest to the individual policeman the types of cases in which discretion would generally be either appropriate or inappropriate, but they cannot tell him what his discretionary decision should be, without denying him the exercise of discretion. Discretionary law enforcement has to be accepted or rejected with the realization that in the final analysis, there is no one who can tell the individual officer when or when not to use his discretion. This being said, this study has shown that both the public and the police expect discretionary law enforcement practices to be

followed in respect to minor offences. It also supports the contention of Niederhoffer and others who hold to the view that when an officer "...clearly observes a serious violation of the law, his discretion is limited..." (3, p.60). He usually must arrest or proceed with a charge: his oath of office and responsibility to the public demands such a reaction. If the officer continued to act otherwise public pressure would intervene and demand rectification. It can be stated that such is not the case with minor offences for neither the police nor the public regard the exercise of wise discretion as a dereliction of duty on the part of the police. Discretion is seen as a means whereby the intent or purpose of the law (to maintain order and protect society) is able to be exemplified. When the law is looked upon as a set of rules to guide human conduct in a fashion that will provide a reasonable opportunity for peace and order in the community, it becomes unnecessary to see the power bestowed on the police being nothing but a mandate for full enforcement of the law. There are instances where the good of society and the respect for the rule of law can best be maintained through discretionary law enforcement practices. It is

> ...the individual policeman's responsibility to decide if and how the law should be applied, and he searches for the proper combination of cues on which to base his decision. These are derived from typical sociological variables: class, education,

> clarity of role prescriptions, reference groups, self-conception, and visibility. Because the application of the law depends to a large degree on the definition of the situation and the decision reached by the patrolman, he, in effect, makes the law; it is his decision that establishes the boundary between legal and illegal (3, p.60).

The abuse of discretionary powers and the deterioration of discretionary law enforcement into discriminatory enforcement, can be prevented not so much by a system of control, but by a system of training which tells the recruit how to use discretion and the power of his office judiciously. Controls and checks against abuse do exist and so effective are they that they need hardly to be supplemented. The police require public co-operation for the efficient performance of their duties. This co-operation will not be forthcoming if they resort to improper enforcement techniques. This is indeed a powerful weapon of control of which the police are ever mindful. The public do complain when they feel improperly treated by the police. The police are vividly aware of this. When the populations in this study were asked if they would complain if they felt they were being discriminated against, 73% of the public and 70% of the police said that they would (12% of each population said no, the remainder being undecided).

The subject of discretionary law enforcement is one deserving of much more attention than it has received in the past in Canada. Perhaps this study will encourage others to undertake more exhaustive research of the issues which have such far-reaching effects on the administration of justice. The findings of this study give evidence of public support for the police use of discretion in this country and show that the police themselves, along with others responsible for the administration of justice also support its use. The exercise of wise discretion by the police bridges the gap between the cold body of the law and the pulsating state of humanity for whom such laws were enacted to protect. Its use cloaks the law with humanitarian practicality, avoiding a situation in law enforcement that would otherwise be untenable. Quinney's conception of the intricacies of police discretion would seem to serve as appropriate remarks with which to conclude this study. They well inform those who would accept the challenge of further research, of the issues with which they must deal:

> To observe and explain police discretion is also to realize that enforcement of criminal law takes place within tenuous social control and legal regulation. Police practices tend to be affected minimally by legal considerations. The police, because of such factors as community expectations, bureaucratic organization, and occupational ideology, operate according to extralegal directives. At best, procedural law regulating

police activities is affected by the social role of the police. The police themselves bear part of the responsibility of safeguarding the rights of the citizen while at the same time maintaining order in the community (4, pp.11-12).

REFERENCES

1. COURTIS, M.C. (1970) Attitudes to Crime and the Police in Toronto: A Report on Some Survey Findings. University of Toronto, Centre of Criminology.

2. CANADA (1969) Report of the Canadian Committee on Corrections. Ottawa: The Queen's Printer.

3. NIEDERHOFFER, Arthur (1967) Behind the Shield, The Police in Urban Society. New York: Doubleday and Company.

4. QUINNEY, Richard (1969) Crime and Justice in Society. Boston: Little, Brown and Company.

5. REISS, Albert J. Jr. and David J. BORDUA (1967) "A Perspective on the Police", in David J. Bordua, ed., The Police: Six Sociological Essays. New York: John Wiley and Sons, 25-55.

6. SMITH, C.R. (1970) "The Responsibility of Rank in the Service". Police Journal, 63, 283-292.

7. U.S.A. (1967) "Task Force Report: The Police", in The President's Commission on Law Enforcement and Administration of Justice. Washington, D.C.: Superintendent of Documents.

BIBLIOGRAPHY

ABHAYARATNA, G.E.R. and C.H.S. JAYEWARDENE (1967) Fertility Trends in Ceylon. Colombo: Colombo Apothecarces Co. Ltd.

ADAMS, Thomas F. (1968) Law Enforcement: An Introduction to the Police Role in the Community. Englewood Cliffs, N.J., Prentice-Hall.

BANTON, Michael (1964) The Policeman in the Community. London: Tavistock Publications Ltd.

BARKER, B.M. (1966) "Police Discretion and the Principles of Legality". Criminal Law Quarterly, Vol. 8, 400-407.

BLACK, Algernon D. (1968) The Police and the People. New York: McGraw-Hill.

BORDUA, David J. (1967) The Police: Six Sociological Essays. New York: John Wiley and Sons.

CAIN, J.V. (1969) "Police Discretion". Royal Canadian Mounted Police Gazette, 31, 3-6.

CANADA (1952) Law and Order in a Canadian Democracy. Ottawa: The Queen's Printer.

CANADA (1969) Report of the Canadian Committee on Corrections. Ottawa: The Queen's Printer.

CANADA (1959) Royal Canadian Mounted Police Act. Revised Statutes of Canada. C.54.

CANADA (1969) Canada Year Book. Ottawa: The Queen's Printer.

CANADA (1927) Criminal Code of Canada. Statutes of Canada, C.36 (repealed).

CANADA (1955) Criminal Code of Canada. Statutes of Canada, 1953-54, C.51.

CANADA (1952) Customs Act. Revised Statutes of Canada, C.58.

CANADA (1970) Bill C-218, An Act to Amend the Provisions of the Criminal Code. Ottawa: The House of Commons of Canada.

COURTIS, M.C. (1970) Attitudes to Crime and the Police in Toronto: A Report on Some Survey Findings. University of Toronto, Centre of Criminology.

CRESSEY, Donald R. (1969) "What Can Be Done", in Gresham M. Sykes and Thomas E. Drabek, The Law and the Lawless. New York: Random House. 271-282.

DONNELLY, Richard C. (1964) "Police Authority and Practices", in David Dressler, Readings in Criminology. New York: University Press. 379-386.

ELDEFONSO, Edward, Richard C. GRACE and Alan COFFEY (1968) Principles of Law Enforcement. New York: John Wiley and Sons.

ENGLAND (1963) "Arrowsmith v. Jenkins", Queen's Bench Division. Police Review, 23 August 1963.

ENGLAND (1968) "Regina v. The Commissioner of Police of the Metropolis, Ex parte Blackburn". The Weekly Law Reports, 2, 893-914.

ENNIS, Philip H. (1967) "Crime, Victims, and the Police", Trans-action, 4, 36-44.

FRIEDLAND, Martin L. (1965) Detention Before Trial, A Study of Criminal Cases Tried in the Toronto Magistrates' Courts. Toronto: University of Toronto Press.

GANDY, John M. (1967) The Exercise of Discretion By the Police in the Handling of Juveniles. Toronto: University of Toronto School of Social Work, Unpublished Ph.D. Dissertation.

GOLDFARB, Martin (1970) "Canadians Pleased with Their Police". The Ottawa Citizen, issue of 26 December 1970, 7.

GOLDSTEIN, Joseph (1960) "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice". Yale Law Review, 69, 543-594.

GOLDSTEIN, Herman (1963) "Police Discretion: The Ideal versus the Real". Public Administration Review, Vol. 23, 140-148.

GRYGIER, Tadeusz (1965) "Crime and Society" in W.T. McGrath, Crime and Its Treatment in Canada. Toronto: Macmillan Company of Canada. 13-40.

HALL, Jerome (1953) "Police and the Law in a Democratic Society". Indiana Law Journal, 28, 133-177.

JACKSON, R.M. (1967) Enforcing the Law. London: Macmillan Company.

KELLY, W.H. (1965) "The Police", in W.T. McGrath, Crime and Its Treatment in Canada. Toronto: Macmillan Company of Canada. 109-135.

LaFAVE, Wayne R. (1962) "The Police and Non-Enforcement of the Law". Wisconsin Law Review, Part 1, 104-137.

LaFAVE, Wayne R. (1965) Arrest: The Decision Not To Take a Suspect Into Custody. Boston: Little, Brown and Company.

LaPIERRE, R.T. (1934) "Attitudes vs. Action". Social Forces, 13, 230-237.

LUCE, R.D. and E. GALANTER (1963) "Psychophysical Scaling", in R.D. Luce, R. Bush and E. Galanter's Handbook of Mathematical Psychology. New York: John Wiley and Sons. Ch. 5.

McILRAITH, George J. (1969) "The Role of the Police in the Community". Royal Canadian Mounted Police Gazette, 31, 4-7.

McWILLIAMS, Peter K. (1970) "The Need to Screen Charges by the Police". The Globe and Mail, Toronto. 6 Nov. 1970, Cols. 1-4, 7.

NIEDERHOFFER, Arthur (1967) Behind the Shield, The Police in Urban Society. New York: Doubleday and Co.

NEILL, W.J. (1970) "What is the Role of the Police?" Royal Canadian Mounted Police Gazette, 32, 3-8.

ONTARIO (1960) The Highway Traffic Act. Revised Statutes of Ontario, C.172.

ONTARIO (1960) The Ontario Police Act. Revised Statutes of Ontario, C.298, Part 5.

POUND, Roscoe (1960) "Discretion, Dispensation and Mitigation: The Problem of the Individual Case". New York University Law Review, 35, 925-926.

QUINNEY, Richard (1969) Crime and Justice in Society. Boston: Little, Brown and Company.

REED, G.W. (1970) "The Police Officer and His Authority". Royal Canadian Mounted Police Gazette, 32, 3-8.

REISS, Albert J. Jr., and David J. BORDUA (1967) "A Perspective on the Police", in David J. Bordua, ed., The Police: Six Sociological Essays. New York: John Wiley and Sons.

REITH, Charles (1938) The Police Idea: Its History and Evaluation in the 18th Century and After. London: Oxford University Press.

REITH, Charles (1966) A New Study of Police History. Edinburgh: Oliver and Boyd.

REMINGTON, Frank J. (1960) "The Law Relating to on the Street Detention, Questioning and Frisking of Suspected Persons, and Police Arrest Privileges in General". Journal of Criminal Law, Criminology and Police Science, 51, 386-394.

REMINGTON, Frank J. and Victor ROSENBLUM (1960) "The Criminal Law and the Legislative Process". University of Illinois Law Forum, 12, 481-499.

SELZNICK, Philip (1948) "Foundations of the Theory of Organization". American Sociological Review, 13, 82-92.

SKOLNICK, Jerome H. (1966) Justice Without Trial: Law Enforcement in a Democratic Society. New York: John Wiley and Sons.

SMITH, Bruce (1960) Police Systems in the United States. 2nd rev. ed. New York: Harper and Brothers.

SMITH, C.R. (1970) "The Responsibility of Rank in the Service". Police Journal, 63, 283-292.

SUTHERLAND, Edwin H. and Donald R. CRESSEY (1955). Principles of Criminology. New York: J.P. Lippincott.

SWABEY, Thomas Russel (1968) "Respect for Law". Royal Canadian Mounted Police Gazette, 30, 2-7.

TAPPAN, Paul (1960) Crime, Justice and Connections. New York: McGraw-Hill.

TIFFANY, Lawrence P. (1969) "The Meaning of Crime" in Gresham M. Sykes and Thomas E. Drabek, The Law and the Lawless. New York: Random House, 3-12.

THE British North American Act: 30 and 31, Victoria, C.3 (U.K.)

TURNER, John (1970) "The Police in a Confrontation Society". Royal Canadian Mounted Police Gazette, 32, 3-8.

U.S.A. (1967) "Task Force Report: The Police" in The President's Commission on Law Enforcement and Administration of Justice. Washington, D.C.: Superintendent of Documents.

U.S.A. (1967) "The Challenge of Crime in a Free Society", A Report by the President's Commission on Law Enforcement and Administration of Justice. Washington, D.C.: Superintendent of Documents.

VOLLMER, August (1936) The Police and Modern Society. Berkeley: University of California Press.

WATCHORN, D.J. (1966) "Abuse of Police Powers: Reasons, Effect and Control". Faculty of Law Review, University of Toronto, 24, 48-69.

WATSON, Nelson A. (1965) Police and the Changing Community. Washington, D.C.: International Association of Chiefs of Police.

WECHSLER, Herbert (1952) "The Challenge of a Model Penal Code". Harvard Law Review, 65, 1092-1133.

WHITAKER, Ben (1964) The Police. London: Eyre and Spottiswoode.

WILSON, James Q. (1968) Varieties of Police Behaviour. Cambridge: Harvard University Press.

APPENDIX A

CONFIDENTIAL QUESTIONNAIRE

I am a student at the Centre of Criminology, University of Ottawa. I am conducting a study of the practices followed by the police when enforcing the law. To assist me, I would sincerely appreciate your answers to the following questions. Please read the questions carefully and check (✓) the answers that best reflect your feelings on the subject of each question. Your answers will be considered strictly confidential.

Kindly show your age, sex and occupation.

Age:_____ Sex:_____Occupation:_____

1. The Police should charge everyone who commits a serious offence.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

2. When a person has committed a minor offence, the police should consider other circumstances surrounding the matter before deciding to charge the offender.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

3. If you were driving 54 miles per hour and were charged with exceeding the speed limit of 50 m.p.h., would you think you were treated fairly if you were:

(a) Warned_____(b) Charged_____(c) Not stopped_____.

4. The police should charge everyone who commits a minor offence.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

5. When deciding on whether to charge an offender who has committed a serious offence, the police should only consider the evidence surrounding the commission of that offence.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

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6. When a person has committed a serious offence, the police should consider other circumstances surrounding the matter before deciding to charge the offender.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

7. The police should consider the seriousness of the offence committed before deciding on whether or not to lay a charge.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

8. When deciding on whether to charge an offender who has committed a minor offence, the police should only consider the evidence surrounding the commission of that offence.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

9. Listed below are several offences. Place an "X" under the classification provided, according to your rating of each offence.

	Serious	Minor	Depends on Circumstances
Assault causing bodily harm			
Theft of property valued at over $100.00			
Exceeding the speed limit on open highway by 30 m.p.h.			
Being drunk on the street			
Theft of property valued at under $50.00			
Exceed speed limit on city street by 5 m.p.h.			
Drive a car with over .08 mgs. of alcohol in blood			
Fighting on the street			
Fail to stop at stop sign			
Breaking into a business premises			
Driving carelessly on a highway			
Stealing candy from a store			

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10. The police should have the right to issue a warning rather than lay a charge if they feel that a warning would best serve the purpose.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

11. If a person has committed an offence, the police should not consider other circumstances surrounding the matter because one person may be charged, while the other person may not be charged. This would be unfair.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

12. The police should use discretion when dealing with serious offences.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

13. The police should use discretion when dealing with minor offences.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

14. If John Doe was driving at 54 m.p.h. in a 50 m.p.h. speed zone, do you think he should be:

(a) warned_____(b) charged_____(c) not stopped_____

15. The circumstances surrounding the commission of an offence may have a bearing on whether the offence is serious or minor.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

16. If the police found you intoxicated on the street, you would be treated fairly if you were:

(a) charged__(b) locked up and let go when sober__(c) taken

home__(d) ignored__(e) depends on circumstances__.

17. I would complain to the police or some other public official if I thought I was being discriminated against.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

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18. If John Doe stole a 10¢ candy bar from a store, he should be:

(a) Warned__ (b) ignored__ (c) charged__ (d) depends on circumstances__.

19. John Doe is found intoxicated on the street, the police ascertain that this is the first time he has committed such an offence, and that he is a good family man. Doe realizes that he has made a mistake and is co-operative. The police lock him up and charge him. What is your opinion on the police action?

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

20. You stole a 10¢ candy bar from a store. You have no previous record. The police arrest you, lock you up and charge you. They say you have been treated fairly. How do you feel?

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

21. Are you in favour of the police charging everyone who commits an offence, regardless of the nature of that offence and other circumstances surrounding the matter?

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

22. The public are in favour of the police charging everyone who commits an offence, regardless of the nature of that offence and other circumstances surrounding the matter.

Strongly Agree__Agree__Undecided__Disagree__Strongly Disagree__

POLICE DISCRETION: LAW AND EQUITY

(Thesis Summary)

Problem and Theoretical Basis

As a policeman, the writer was aware that many police officers use discretion in carrying out the police function. He was also aware that the whole matter of discretionary law enforcement practices seemed shrowded in a veil of secrecy and uncertainty. It appeared to be a practice that was hidden and not talked about, leaving one with the impression that although it may be proper for the police to exercise discretion, its use should not be publicized for fear that the public might become aware of it. Police departments were known to be hesitant to admit that they advocated such enforcement practices, suggesting that the use of discretion in dealing with those who violate the law was a personal matter between the individual police officer and the offender.

A brief review of Canadian law and law enforcement methods, together with consideration of the British and American systems of law in relation to the use of discretion by the police, revealed the existence of doctrinaire positions both supporting and opposing discretionary law enforcement practices. Whatever the doctrinaire position may be, it was

realized that in a democratic country the ultimate justification for or against the use of discretion by the police lies in the public's approval or disapproval of it. This research was consequently designed to attempt to provide answers to the following questions:

1. What authority exists for the exercise of discretion by Canadian policemen?

2. Are Canadian policemen expected to exercise discretion when discharging the responsibilities of their office?

3. Are the police properly discharging their obligations to the Canadian people when they engage in discretionary law enforcement practices?

4. Do the public and the police share common attitudes toward the manner in which the police function should be carried out?

From these research questions, the following hypotheses were formulated:

1. Basic hypothesis - Both the public and the police favour police discretionary law enforcement practices, there being no significant differences in their attitudes toward the manner in which the law should be enforced.

2. Public and police attitudes toward the police use of discretion will be affected by the seriousness of the offence.

3. When violating the law, the individual expects differential treatment for himself.

4. The circumstances surrounding the commission of the offence will have a bearing on the public and police attitudes toward the police use of discretion.

This research proceeded on the premise that laws are divided into two distinct categories - laws relating to serious offences and law relating to minor offences - with the treatment expected by offenders varying with the type of offence committed and, as must necessarily follow, the distinction flavouring the attitudes toward the police use of discretion.

Methodology

This research was essentially in the form of an attitude survey designed to test the hypotheses noted above. This required two sample populations, one consisting of policemen, and the other of citizens representative of the general public. The empirical data were collected by means of an interview schedule which contained twenty-two questions relating to police enforcement methods; issues relating to the use of discretion; categorization of offences; and considerations that affect such classification. In formulating the questions it was decided that the direct approach (asking the individual his view or opinion) would best serve this research. The questions were most frequently framed in the form of statements with which the respondents could strongly agree, agree, disagree, strongly disagree or be uncertain. Partly to relieve the monotony of a series of questions formulated in the same way, and partly to inject a feeling of reality into the

interview schedule, some questions include the possible police reaction to a situation being found in pre-coded answers. The Chi-Square test was used in the statistical analysis of the data.

Main Findings

The main findings of this study may be briefly summarized as follows:

1. Those in Canada responsible for the administration of justice favour discretionary law enforcement practices.

2. There is no apparent legal authority for the police use of discretion, excepting the powers of arrest under the Criminal Code of Canada.

3. Both the public and the police favour the use of discretion by the police in relation to minor offences. In the case of serious offences, they are opposed to its use.

4. Both the public and the police realize that the use of discretion necessarily discriminates in the type of treatment which will be afforded one offender as compared to another, but this is not regarded as undesirable. It is considered the natural outcome of discretion rather than an act of discrimination.

5. The public were more in favour of the police use of discretion than were the police. Although the public's preference for its use was only slightly more pronounced than the preference shown by the police, this is nevertheless an important finding. It directly questions the common belief that the police are in favour of using discretion, while the public are opposed to its use.

6. Individuals in the public and police populations did not expect differential treatment for themselves when in violation of the law. They were

aware of the division of offences into minor and serious categories and expected offenders to be dealt with according to the nature of the offence committed.

7. In cases where discretion was expected to be used, both populations favoured the police looking beyond the narrow confines of the evidence to other circumstances surrounding the offence. They also felt that in the main cases it was the circumstances surrounding the violation that made the offence serious or minor.