DEBATE

Should the Police Practice Discretion When Enforcing the Law?

Police Should Exercise Discretion in Deciding When to Arrest

Advocate: John Kleinig, Professor at John Jay College of Criminal Justice, City University of New York, and Professor at the Centre for Applied Philosophy and Public Ethics of the Australian National University; author of many books and articles, including *The Ethics of Policing* (New York: Cambridge University Press, 1996).

Source: "Selective Enforcement and the Rule of Law," *Journal of Social Philosophy*, Volume 29, Number 1 (Spring 1998): 117–131.

Police Discretion Has No Place in a Democracy

Advocate: Jeffrey Reiman, William Fraser McDowell Professor of Philosophy at American University; author of many books and articles, including *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*, 8th Edition (Needham, MA: Allyn & Bacon, 2007).

Source: "Against Police Discretion: Reply to John Kleinig," *Journal of Social Philosophy*, Volume 29, Number 1 (Spring 1998): 132–142.

When a police officer observes a violation of the law—someone not wearing a seatbelt or driving 10 miles over the speed limit, or an underage teenager smoking a cigarette, or a middle-aged man eating a sandwich and drinking wine in a municipal park where no alcoholic beverages are allowed—she has a decision to make: Should she arrest the lawbreaker? Warn him? Reprimand him severely, but not arrest him? Ignore the violation? Such decisions are required of police officers on a regular basis, and the decisions are typically made on their own, without supervision or public reporting.

As John Kleinig has noted, when a police officer chooses to beat up a homeless person in a dark alley, that is *not* a case of discretionary police behavior; rather, it is a clear *violation* of the rules and regulations that the police officer is under an obligation to follow and uphold. That a police officer may have the power and opportunity to commit such an offense does not make it discretionary. Genuinely *discretionary* police behavior falls within a range of allowed and legitimate choices. Thus, a police officer may have *discretion* over whether to ticket a driver who is exceeding the speed limit by 5 to 15 miles an hour; but giving a speeding ticket to a driver who is within the speed limit would fall outside the range of legitimate discretion.

Most of us have no objection when a police officer exercises her discretion, and chooses not to ticket us for driving 10 miles over the speed limit. But if blacks are routinely ticketed for driving over the speed limit, while similar behavior by whites is ignored, or if a noisy outside suburban party (perhaps involving some underage drinking) is ignored, while a similar party in a less affluent neighborhood draws police sanctions, then the police discretion becomes more troubling. Unfortunately, such discriminatory discretion—against young people, against minority races and ethnic groups, and against people of lower economic status—has occurred: "racial profiling" is the best known example, exemplified by complaints of minority youth that they received a ticket for "driving while black."

Points to Ponder

- When there are laws that do not enjoy popular support—such as laws against gambling, in a community where gambling is common—police officers often "exercise discretion" and ignore most violations. If you are a police officer in such an area, is it alright to look the other way when a high school chemistry teacher arranges a pool on the Super Bowl? When a local bar owner runs a small bookmaking operation for his customers? Is it alright to accept free drinks from the bar owner who keeps the small book? Football tickets? Super Bowl tickets?
- A major concern of allowing police *discretion* is the possibility that it leaves too much room for police *discrimination* against people (ethnic groups, protesters, gays) they don't like. Are there effective ways of preventing or at least minimizing such discrimination?
- If you favor zero-tolerance policing, does consistency require that you also *oppose* police discretion? That is, is there a basic conflict between zero-tolerance policing and the exercise of police discretion, or are they compatible?
- Jeffrey Reiman argues that laws giving discretion to police would be acceptable *only if* legislators explicitly built such discretion into the law. Would it be possible to write such a law? Could you write a law—for example, a traffic law—that builds in an element of police discretion? *If* it is possible to write such a law, would you consider that law better than our current law, which does not have police discretion built in?

- A key argument between Kleinig and Reiman concerns police professionalism. Both are strong advocates of well-trained, highly professional forces. But while Kleinig sees police discretion as a vital element of such professionalism (on the model of physicians and lawyers), Reiman argues that police discretion would be something entirely different from the discretion of other professionals, and would be *wrong*. Is there an important difference between police discretion and medical discretion?

Selective Enforcement and the Rule of Law

John Kleinig

"Is it justifiable in a free society to allow police officers freedom to determine whether or not to arrest someone when they legally and physically can make the arrest?" This is the question to which Jeffrey Reiman has recently answered an unambiguous "no." It is not the first time that the question has been answered this way, though Reiman's robust defense must once again give pause to those who, like myself, believe that some discretion in this regard ought to be allowable. . . .

Political authority as we now understand it is not primarily goal-oriented, but contractual. It does not authorize those in power to achieve some desirable end by whatever means they consider appropriate, but is a limited *authorization* to secure certain specified ends (as enshrined in law) by means that are limited. That being so, Reiman argues, any discretionary authority that police exercise can be justified in only two ways: either as an explicit grant by citizens or as the conclusion of an argument showing that it would be reasonable to make such a grant. He takes it that there is no basis for believing the former: police are "simply and explicitly authorized to enforce the law that the people's representatives enact, and no more."

Is there any good reason to think that people *should* give police some discretion about whether or not to enforce the law? Reiman offers four reasons for thinking that no good grounds exist for giving them that discretion: (1) it would render the laws "vague and uncertain"; (2) it would effectively give police the power to

John Kleinig, "Selective Enforcement and the Rule of Law," *Journal of Social Philosophy*, Volume 29, Number 1 (Spring 1998): 117–131. Reprinted with permission from Blackwell Publishing Ltd.

amend laws that the people's representatives had passed; (3) it would almost certainly be used discriminatorily; and (4) it would be used coercively as a form of leverage. In what follows I shall attempt to meet the challenge posed by Reiman's arguments, and shall argue that it is reasonable to allow to police a limited discretionary authority in regard to their enforcement of law. . . .

The Rule of Law

As Reiman rightly observes, the idea of "a government of laws, not men" is of ancient pedigree. Not only Plato but also Aristotle was convinced that "the rule of law is preferable to that of any individual." And in liberal democratic regimes, the rule of law has been appealed to as the main bulwark against tyranny. Any theoretical doubts that people have had about its appropriateness have usually been allayed by the spectacle of what happens in societies that have rejected it.

Nevertheless, appeals to the rule of law are neither as transparent nor as compelling as Reiman seems to believe. First of all, there is considerable debate about what is encompassed by the rule of law, and for this reason it can be questioned whether a rule of law excludes the recognition of limited discretionary authority; and second, there is a tension between the rule of law and democratic expectations.

The rule of law is a political ideal. Essentially, it sets forth conditions for government that are intended to preserve the governed from the tyranny of arbitrary power. For some writers this is understood *formalistically*, as requiring no more than the existence of and subscription to fixed and preannounced formal rules, rules that are articulated with sufficient clarity to enable exercises of governmental authority to be predicted with some certainty. But for other writers, the rule of law is interpreted more *substantively* to require that rules promulgated by governmental authority be broadly concordant with a particular conception of human entitlements. Thus "rule of law values"—the separation of powers, equality and formal justice, liberty and notice, substantive fairness, procedural fairness, and efficient administration—are intended to secure citizens not only against arbitrariness but also against oppressive rules.

Reiman does not explicitly joi this debate, though he is clearly concerned about both oppression and arbitrariness. He accepts that respect for human freedom and human equality need to be preserved in—indeed constitute the *raison d'être* for—civi society. It could be that freedom and equality can be protected not only by adherence to the rule of law but also by commitment to a conception o human rights or personal sovereignty the latter pressed as political demand additional to that of the rule of law But I think that he implicitly accept the richer, more substantive view o the rule of law, for he quotes with approval Locke's contention tha "*where-ever law ends, tyranny begins*," and that the person who "exceeds th power given him by the law . . . may b opposed, as any other man, who b force invades the right of another." This strongly suggests that Reima sees the rule of law as securing us no

merely against arbitrariness but also against (other?) violations of our rights.

Because of this, Reiman believes that in a free society adherence to the rule of law will preclude the grant of discretionary authority to police. It is only if such authority has been explicitly granted, or if it is reasonable to expect it to be granted, that we may reconcile police discretion with the rule of law. He takes it that the former has not occurred, and believes the latter to be lacking in merit.

Consider now the second issue: the coherence of the rule of law with democratic or contractual processes. Reiman seems to take it for granted that there is an easy fit between the rule of law and its modern expression in liberal democratic society. Yet a little reflection indicates that this is not the case. The rule of law, at least according to Reiman's conception, seems to require that laws be applied exceptionlessly. Democratic and contractarian theories, on the other hand, emphasize the value of the majority will, and that will need not be limited to or even be compatible with the substantive requirements of law. . . .

The seriousness of this potential tension between the rule of law and democratic values is not unrelated to the way in which we construe both the rule of law and democracy. If democracy and the rule of law are both thought of formalistically—as no more than a crude majoritarianism, on the part of one, and a law of rules, on the part of the other—then the tension could be quite significant. But if democratic rule is anchored instead in the values of equality and freedom, and the rule of law is likewise anchored in a theory of human rights, the rule of law may be seen as expressing one of the conditions under which (liberal) democratic aspirations may be realized.

Have people actually withheld discretionary authority from the police? Reiman might have referred to the full enforcement statutes that have been passed in many states. If the people have not spoken, then their representatives certainly have, and they have charged police with responsibility to arrest anyone who violates a law. What more appropriate evidence could we want in a democratically ordered society? Strong as this consideration is, however, I am not entirely convinced that we should take it as our only—or even as decisive—evidence of what the people have chosen.

First of all, a great number of violations are dealt with informally by police, and for the most part their choice not to arrest or summons or cite does not meet with public disapproval. We all know that many of those who are stopped for traffic offenses—such as speeding or having defective tail lights—are let off with a warning rather than a summons, and yet, unless the case is an egregious one, we do not complain. Maybe our failure to protest can be put down to naked self-interest—the recognition of our own propensity to speed or our failure to make regular checks of our car's condition, and the desire that we should be treated leniently if caught. But I think there is rather more to it than that. For we also recognize that people exceed the speed limit or fail to ensure that their car is not in violation of laws relating to its condition for

many different reasons, and in some of these cases we would feel that an injustice had been done were a ticket to be issued or the driver arrested. For the most part, we would be more upset were someone who was speeding for a "legitimate" reason to be ticketed than we would be were someone not to be ticketed for a comparable offense for which there were no "legitimating" reasons.

Reiman alludes to the possibility of a public acceptance of discretion, but says that it does not amount to a public grant of authority. In the circumstances which he has in mind—the nonarrest of drug dealers and prostitutes on condition that they become informants—I am at least sympathetic. But this is probably a special case; at least it is a more controversial one. What we might ask is whether the circumstances in which the discretion is exercised are such that the discretion could (though not necessarily will) be sustained in a public forum. In the case of the circumstances under which the services of drug dealers and prostitutes are obtained, I can imagine that there would be a significant division of opinion. But in the cases to which I earlier alluded, in which traffic laws are violated, I think that the argument for publicly defending an exercise of discretion not to arrest or ticket is much stronger.

Second, there is some reason to view full enforcement statutes only as broad statements of purpose and not as rigid requirements. This is not to say that they would be modified if challenged. They are, however, products of a political process, a process that is sometimes best served if statements are made in categorical and unqualified terms. Lending credence to this view is the finding that despite provisions for doing so, full enforcement statutes are rarely enforced and, further, this fact per se brings with it no public outcry. It is only when the discretion is exercised in what seem to be *inappropriately* lenient ways that complaints are heard. Although we are all aware that the police exercise discretion, when it is not felt to be oppressive it is rarely opposed. Furthermore, it is not uncommon for the police to publicize in broad terms the fact that they selectively enforce the law. What generally sticks in people's craw is not less than full enforcement per se, but the discriminatory way in which that is sometimes practiced and the disregard for victims that it sometimes displays.

Third, although legislation sometimes mirrors a social consensus (or at least social majority), it does not always do so. It may be progressive or lag behind social change. There are many reasons for the hiatuses that occur between legislation and social values—some understandable, some reprehensible—and sometimes police are left with the task of making informal adjustments so that social peace may be preserved. Statutes outlawing sodomy, adultery, and fornication may remain on the books for political reasons, yet police would alienate significant sections of their community and generate considerable social turmoil were they to enforce them.

For these reasons, I do not think it unreasonable to argue that the purpose of full enforcement statutes is not so much to require that every law be enforced on every occasion on which it can be, but to place an onus on

police to enforce. The difference is important. Those who violate the law know that police have a defeasible obligation to enforce it. Enforcement is not optional; but neither is it mandatory. It is a defeasible obligation on the part of police to investigate law breaking and to take some action with regard to all violations that are called to their attention.

As I noted earlier, there is a sense in which full enforcement statutes are politically necessary. To pass laws and not require that they be enforced or to indicate explicitly that whether or not they will be enforced will be left to the discretion of the police, would be to undermine their force as law. *Even if* it is left to the discretion of police whether or not to enforce the law by means of arrest or summons, the law needs to be magisterially asserted. Otherwise those who break the law will not see their fate as a consequence of their violating the law but only as a matter of negotiation between themselves and the police. Allowing police discretion to enforce the law selectively is not intended to sanction the latter.

Let us now look in more detail at Reiman's four objections.

Vagueness and Uncertainty

Reiman's first claim is that any acceptance of discretion will render the law "vague and uncertain." Why should we think this to be the case? If the law says that the speed limit is 55 mph, and police do not generally ticket people unless they are traveling 10 mph over the speed limit, the law is not thereby rendered vague and uncertain. Nor does it suggest that the speed limit is really 65 mph and not 55 mph. A person who is traveling at 70 mph will be charged with traveling 15 mph over the speed limit, not 5 mph. And a person who happens to get picked up for traveling at 60 mph cannot complain that he wasn't traveling over 65 mph, and therefore should not have been picked up. Of course, he might wonder why he, of all the people who travel over 55 and under 65 mph, was picked up. But if at 60 mph this person was creating a risk, then there does not seem to be any problem about the police picking him up and not others.

This having been said, it might still be reasonable for us to agree that the police generally wait until people are about 10 mph over the limit before they move in. The reasons here are practical. Our speedometers may be slightly off. The instrumentation used by the police may not be completely accurate. The road may be straight and clear, and visibility good, and no risk may be involved. We may have simply allowed the car to drift above the speed limit, easy to do when one has been driving for a while. It involves a better use of police resources to target those who are more than 10 mph over. And, finally, there may be all sorts of personal reasons why we were traveling above the limit—to get someone to hospital, because we are late picking up the children, we need to get to a bathroom, and so on. Unless there is some special reason to give the law strict liability status, its rigid application in some of these cases would be obnoxious, and would do little to advance the purpose of the law. Laws are not contextless requirements but embedded in social purposes, and

although they provide clear guidelines, they are not, or at least should not be, impervious to the social purposes that have informed them. "Overreach" of the law, as Klockars calls it, the working of injustice because laws are expressed too specifically or generally, is correctable by means of discretionary judgments. The correction doesn't make the law vague or uncertain, but allows factors relevant to the law's purpose (both in general and in particular cases) to be incorporated into its enforcement.

Another way of putting this is to say that humans are rational beings, capable of understanding not only the terms of laws (their letter), but also the purposes (or spirit) that led to their promulgation. A person who is "given a break" when traveling at 63 mph, because he was responding to an anxious call from his wife, is not going to go on his way less certain about the law, because he understands not only the letter of the law but also the spirit that infuses it.

Confusion of Powers

Would selective enforcement in effect give police the power to amend the law, and thus subvert the purposes that have made the doctrine of a separation of powers so valuable to sustaining liberal democratic structures? Reiman certainly thinks so, and he is not alone in this. The virtue that informs the doctrine of separation of powers is the dispersal of power and thus a diminished likelihood of its being used tyrannically: "liberty will be best protected if police, judges, and law makers each do what they are mandated to do." Whereas it is the task of the legislature to make and amend the law, it is the task of the police to enforce it. . .

The discretionary decisions of individual police officers are often "private" and therefore veiled from public scrutiny. This clearly poses a problem, for if police are to be given the power to make discretionary judgments, they need to be accountable for exercises of that power, and that will be very difficult to achieve if their decisions are made out of public view.

But what I think we should conclude from this—and what is to some extent manifest in practice—is that police discretion needs to be much more carefully circumscribed than judicial discretion. We should note what this means and what it doesn't. Since police discretion is private in the sense that much of what police do is unsupervised, this will remain the case whether or not they have the formal power to act in a discretionary manner. So removing, circumscribing, or not granting them the power to make discretionary judgments about whether or not to arrest will have no effect on the visibility of their conduct. The question we must ask then is: Is it better that police not have that formal discretionary power (even though they may privately act as though they do), or that they be granted a formal discretionary power, although one that is circumscribed (even though we may not be able to keep a close eye on how they use it)?

How we answer this question goes to the very heart of our aspirations for policing. If we see the largely paramilitary structure of contemporary policing as necessary or desirable, then, whether or not it is possible to provide

better supervision, the denial of discretionary authority will better reflect the discipline of police work. But if we wish to encourage greater professionalism in policing, then the answer will most likely be the grant of discretionary authority, along with efforts to educate police in its wise use.

In addition, we should note that although it may be practically difficult to give the decisions of individual police officers the same kind of scrutiny as the decisions of judges, there is nothing to stop the general practice of police decision making from being publicly reviewed, and nothing to stop certain general kinds of discretionary decisions from being discussed in a public forum. Indeed, there often is such discussion when the assumed discretion is exercised in a way that is thought to be harmful to the legitimate interests of those involved—whether they be citizens who believe that they have been discriminatorily targeted, suspects who feel they have been harshly treated, or victims who consider that their legitimate expectations have not been met. I have no problem with greater publicity in this regard, and indeed would think it highly desirable. . . .

But Reiman, I suspect, would oppose the grant of discretion *even were* there to be such discussion, *even were* it to be generally agreed that some such discretion would be utilitarianly desirable, and *even were* discretionary guidelines to be publicly promulgated. His reason for this would probably be that powers that should be separate would here be conjoined, that the checks and balances so important to preserving a free society would here be compromised. But this assumes a separation of powers that has never existed; nor could it have. Judges are appointed by politicians; police chiefs are appointed by mayors; funding for the judicial and executive branches of government is usually determined by the legislative branch; and so on. The question is not so much: What separation can we achieve? but: What of importance is secured by whatever arrangement that exists? What we want and need is not a complete separation of powers but sufficient separation—sufficient, that is, for independence and strength—so that we can ensure that the values of a free society are nurtured and preserved. I do not see any virtue in the separation of powers *in abstracto*, but only insofar as it is able to safeguard citizens against tyranny. If it is possible to do well (even better) with less than complete separation, then there should be no decisive objection to that being so.

Of course it would be different if police acted as though they had the discretionary authority to add to our current stock of laws. That indeed would make the exercise of discretion tyrannical. But what we have in mind in talking of selective enforcement is a lessening of the grip of law, an easing of the burdens it imposes, and this, provided that, as a result, victims do not go unrequited, should not be seen as an instance of tyranny. Indeed, I am arguing almost the opposite, viz., that a form of tyranny (or certainly harshness) may reside in always applying the law as written in the circumstances as given.

Reiman is correct to identify the issue of police discretion as an area of concern. But the appropriate

response, I believe, is not to condemn that discretion as a transgression of proper boundaries, but to bring it into the public domain for monitoring and discussion, as necessary.

What I think should be more worrying from Reiman's perspective is some form of departmentally sanctioned discretion—where, for example, a police chief promulgates as departmental policy a qualification of the law as written. Suppose, for example, the law forbids the possession of marijuana, but the police chief informs members of the department that no action should be taken against those who have less than 1 oz. of marijuana in their possession. Here, it might be argued, the chief exercises a form of discretion that effectively "amends" the law as written. Is *this* justifiable?

Although it may not be legally provided for, I do not see why it should not be morally justifiable, though there are clearly problems if a decision of this kind is cloaked in secrecy. Although a public *announcement* might well send the wrong message, it is not too difficult to see how a police department could justify this way of husbanding its resources.

Davis gives the example of a police department that, in the face of a law prohibiting gambling, promulgates to its members the following rule:

> In the absence of special circumstances, we do not ordinarily arrest for social gambling in the absence of (a) a complaint, (b) a profit from the gambling other than gambling winnings, or (c) extraordinarily high stakes. When we receive a complaint, we ordinarily investigate, but for first offenders we may break up social gambling without making arrests.

What is going on here? I think it is reasonable to suggest that the legislature did not have as its focus the weekly game of cards played by a group of friends, where only a few dollars change hands over the course of an evening—although there is nothing in the statute to exclude such activities from its purview. With good reason we might also suggest that were the legislature to have attempted to qualify its prohibition so that activities such as these were excluded from its purview, it would have gotten into legislative quicksand. It could not have used the above wording, since it invites inquiries into the meaning of "special circumstances," "extraordinarily," and "ordinarily," and even then is expressed permissively. As Reiman recognizes, human behavior and the circumstances in which it occurs are extraordinarily diverse, and good legislative practice usually involves the drawing of relatively bright lines. My contention is that a police organization that has one ear open to the legislature and one to the community will be able to develop reasonable guidelines for the exercise of discretion.

The foregoing case also touches upon another point that often guides police discretion: the presence or absence of a complaint. Of course, the presence or absence of a complainant is not a decisive feature in deciding whether to go ahead with an arrest, for sometimes victims refuse to lay a complaint for reasons that have nothing to do with the seriousness of a situation. Yet, in the absence of a complaint that

would assist in any case for prosecution, arrest may achieve very little. So, although police may have a legally sufficient reason for making an arrest, they may choose not to arrest if the charges are minor and the case will otherwise have a very uncertain future. Scarce resources are expended that might have been more productively used elsewhere.

Discrimination

It is the possibility of using discretion in a discriminatory way that troubles me most. It troubles me, not just because of the *possibility* of discretion being exercised discriminatorily, but because *appeals to discretionary power have often been used* to cloak discrimination. Yet we may wonder whether removal of whatever assumed discretionary competence that police have with regard to arrest will resolve this problem, or even go any way toward alleviating it.

As I indicated earlier, the unsupervised nature of much police work will not change just as a result of some change in policy with respect to arrest/nonarrest. If police deviate from discretionary guidelines by claiming that they are only exercising a discretion they have, they will just as readily claim that they have or do not have legally clear grounds for arrest when they act discriminatorily under a full enforcement policy. The poor and ethnically different will still tend to attract disproportionate attention, and not just because they may be in violation of the law more frequently. For the source of discrimination is not to be found in the power to use discretion but in the disposition to act with prejudice, and there is probably no greater difficulty involved in showing that guidelines for exercising discretion were ignored than in showing whether legally sufficient grounds for arrest were present.

Once again, to the extent that it is possible, the best counter to poorly or discriminatorily exercised discretion is not to outlaw it but to reeducate its users and to require that, where decisions or patterns develop that appear discriminatory, they be justified. Given the absence of supervision, this will not guarantee anything, but it may function to deter the development of entrenched practices of discrimination. Ultimately, the issue is not one of having or not having full enforcement laws. It is a matter, rather, of police who want to make fair decisions.

Improper Leverage

Reiman is concerned that discretionary authority will be used in a tyrannical fashion. In particular, he is concerned that the additional power that discretion to arrest gives to police beyond their power to arrest enables them to coerce people into doing things that they would otherwise be unwilling to do. In other words, it allows for the tyrannical exercise of power. He instances the cooption of someone as an informant in exchange for nonarrest.

Why does this constitute a tyrannical use of power? Reiman writes that

> if we are not ready to endorse a law requiring all citizens to give the police whatever information they want, then such use of discretion as leverage to get information

amounts to allowing police to exercise a power over some citizens that we would not allow them to exercise over all.

One thing to note about this criticism is that it is leveled at a particular use of discretion, and not at selective enforcement as such. The police officer who allows a speeding motorist to go unsummonsed after a stern reprimand about the dangers of speeding is not exploiting that power to gain something to which he would not otherwise have had access. We could, therefore, forbid police from using their power as leverage without denying them the power to enforce the law selectively.

So why does Reiman use this argument? It seems to me that the importance of the argument is that it gives *some* plausibility to the idea that the power not to arrest might contribute to tyranny. It is necessary to give plausibility to that claim because, at first blush, the power not to arrest those who have done that which would justify arrest appears to be the very antithesis of a *tyrannical* use of power. I am sure that the motorist who gets off with just a warning or reprimand feels relieved rather than oppressed. Tyranny would be involved were the officer to take the view that even though the speed limit was 55 mph, he would ticket people who were traveling only at 50 mph. Or because the color of their car was displeasing to him. Those would be tyrannical police acts. So the additional leverage that a police officer may gain as a result of his discretionary authority is necessary to give some credence to the idea that it is a tyrannical power.

But as far as I know, defenders of police discretion have not argued that police should be able to impose *greater* burdens on others than the law allows. The argument for selective enforcement is always an argument that police should be permitted, in appropriate circumstances, to impose less than a full enforcement policy would dictate.

Maybe a greater burden could be imposed in cases in which informants are coopted. But I do not think it necessary that this should occur. Note that there is a considerable difference between there being a law requiring that we give police whatever information they want, and the choice offered to offenders to avoid arrest by becoming informants. In the first case, the threat of arrest attends the refusal to provide information per se. In the second case, the threat of arrest attends the violation of some other law, but may be removed if a person is willing to provide information. To the person in the latter situation, becoming an informant may represent an acceptable bargain and, if there are no significant victims involved, the arrangement may represent good social value. If the person does not wish to become an informant, then the arrest that follows will be sufficiently justified by the initial offense, and does not need additional support from the refusal to provide information.

Most of us are aware that police frequently gain informants by means such as these. Yet for the most part their use evokes from us no angered or resentful response. Reiman takes our reaction to manifest no more than the lack of respect we have for

drug dealers and prostitutes, and our acquiescence in their being treated "in a tyrannical fashion." But I think we need to distinguish two different kinds of case. One is the situation in which the police officer says something like: "If you are prepared to give me a certain piece of information, I won't take you in." The other is where the officer uses arrest as a *continuing threat* in order to have the person become an ongoing informant. In such cases, where the offender might be looking at a few years in prison, and becoming an informant has significant risks and no clear endpoint, the arrangement may well be seriously exploitative of a vulnerable person.

What Reiman establishes, I think, is that the discretion not to arrest can be easily misused, and needs to be monitored. Officers who make use of informants should be required to submit for approval the uses they make of them and the conditions under which they retain their services.

Conclusion

It is important that a free society be governed by rules, not men. But the adherence to rules need not be mechanical, for the rules, apart from curbing governmental arbitrariness, also serve important social purposes beyond themselves. If those wider purposes are not being served, then either the rules should be amended or, if that poses problems, there should be granted to those who administer them the power to make discretionary judgments concerning their application and enforcement. Provided that those who make such judgments can be held accountable for them, it should be possible to secure a greater just freedom than would be the case were no such discretion permitted. ■

Against Police Discretion: Reply to John Kleinig

Jeffrey Reiman

In "Selective Enforcement and the Rule of Law," John Kleinig has presented a powerful rejoinder to my argument that police discretion has no rightful place in a liberal democratic state. He replies to the four reasons which I give for the undesirability of police discretion. Those reasons are: (1) that police

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discretion renders the laws vague and uncertain. Rather than stating forthrightly what will and what will not be permitted, laws subject to discretionary enforcement effectively contain the additional wild-card proviso "if a police officer judges it appropriate . . . "; (2) that by adding this proviso, police discretion effectively amends the laws as passed by the people's representatives, and thus usurps the exercise of legislative authority; (3) that police discretionary power is almost certain to be used frequently in ways that discriminate (in effect, if not in intent) against the poor, powerless, and unpopular in our society—undermining the legitimacy of the law where it is most in need of legitimacy; (4) that granting police discretion to decide whether or not to enforce the law gives police officers the ability to use that discretion as leverage over other citizens, say, by threatening arrest if a citizen won't reveal some desired information.

In what follows, I shall start with some general observations about the issues. Then, I shall respond to Kleinig's specific replies to my four reasons for finding police discretion undesirable, and show why I think these replies are unsatisfactory. I shall close with some final comments on the issue, including a further argument against police discretion, namely, that it is incompatible with treating us as citizen-sovereigns of a liberal democratic polity and that it is an affront to our dignity as responsible agents.

General Observations

A large part of my objection to police discretion is that it usurps the legislative authority of the people and their elected representatives. Consequently, if there are laws that the people truly want enforced with discretion, I have no objection if the people through their representatives include express provision for discretion in the law when they enact it. Quite the contrary, that is exactly what I think they should do. It follows that, even where I might agree with Kleinig that discretionary enforcement serves some valuable social aim, my view will be that it is still wrong that that discretion is simply taken by the police as their right. If discretionary enforcement is what the citizens want, then let them say so in the law. They and their elected representatives are the only ones with both the right and the duty to do so. What's more, doing so in the visible arena of the legislature will force open discussion of the proposal. Hence it is irresponsible of the legislature to refrain from providing for discretion in the law when they want it and instead to leave it to police to build it in in the far less visible realm in which they work.

In the essay to which Kleinig is replying, I defined "police discretion" as "the freedom of police officers to decide whether or not to arrest an individual when the conditions that would legally justify that arrest are present and when the officer can make the arrest without sacrificing other equally or more pressing legal duties." Consequently, if the police must prioritize their enforcement activities because of limited resources (so long as this prioritization reflects the choice to enforce other equally or more important laws), I do not count this as

discretion for purposes of this discussion. I think in general that the legislature should keep the number of laws down to a number that the police can effectively enforce. If they don't, then the police will have no choice but to prioritize and my objection will be to the irresponsibility of the lawmakers in forcing this on the police rather than making the hard choices for which they were elected. Thus, when, as he does at numerous points, Kleinig justifies police discretion as needed to husband limited resources, my difference with him will not be over what the police do so much as over what the legislature has failed to do.

Because he is a fair-minded fellow, Kleinig has offered me additional ammunition for my argument by pointing out that many states have passed full enforcement statutes charging "police with responsibility to arrest anyone who violates a law." I was content to think that simply passing laws that state categorically that people doing such and such will be arrested, and so forth, was enough to show that the people and their representatives have not given the police discretionary authority. That they have in many cases gone further and expressly mandated full enforcement only strengthens my claim here—for which I thank Kleinig. He, however, takes the fact that there is no public outcry when the police handle violations without arrest as indicating that even explicit full enforcement statutes do not express what the people have chosen. This seems a stretch to me. If the people's representative pass *both* categorical criminal laws calling for arrest *and* laws that insist that those criminal laws be fully enforced, then it seems that the people have done enough to show their will. That there is little or no public outcry over much selective enforcement nonetheless is better explained as apathy (or perhaps frustration at having twice tried and failed to get the police to enforce the laws), than as indication of yet a different public will than that already twice expressed in the laws. Indeed, that the police and Kleinig think that it is okay to second guess the public in the face of two layers of laws is evidence, in my view, of the way in which police discretion undermines the people's role in a liberal democratic polity.

Kleinig occasionally speaks of the denial of discretionary authority as implying that the police are to apply the law mechanically. And, in the same spirit, he suggests that we will want to grant the police discretionary authority if we would like to "encourage greater professionalism in policing." I think that the use of the term "mechanical" in this context is misleading. As Kleinig himself suggests in his essay, determination of whether legally sufficient grounds for arrest exist is as complex a matter as judging whether or not to arrest when one has the discretionary authority to do so. Police work will always require intelligence and judgment, and denial of discretionary authority is not going to change that. The use of the term "professionalism" is, in my view, even more problematic. Since the opposite of professionalism appears to be amateurism, it's hard to deny that one wants to encourage professionalism in policing. However, traditionally, professionals (doctors, lawyers, and the like) have successfully asserted

the right to exercise authority at their discretion and to be accountable only to fellow members of their profession for that exercise. This model has no place in policing. The authority that doctors and lawyers possess is that of *knowledge* (they are authorities *on* health or the law). Such authority is rightly judged by others who are equally authorities in those areas. Police have this sort of authority, they are authorities *on* law and perhaps *on* order as well. However, the authority that police have that Kleinig would have them exercise with discretion is, by contrast, that of *power* (police have authority *over* other citizens, the right to arrest them and use force in the process). Allowing authority of this sort to be exercised with discretion is a dangerous thing even if Kleinig is correct that we should allow it. In any event, we should not be fooled by the positive sound of the term professionalism into thinking it appropriate to treat the authority that police exercise as including discretion in the way that the authority of doctors and lawyers does.

Specific Reasons, Replies, and Responses

I turn now to Kleinig's responses to the four reasons I offered for the undesirability of police discretion. For ease of identification, I shall number the first paragraph in which each of the four reasons is discussed.

(1) In response to my claim that discretion renders the laws vague and uncertain, Kleinig writes:

> If the law says that the speed limit is 55 mph, and police do not generally ticket people unless they are traveling 10 mph over the speed limit, the law is not thereby rendered vague and uncertain. Nor does it suggest that the speed limit is really 65 mph and not 55 mph. A person who is traveling at 70 mph will be charged with traveling 15 mph over the speed limit, not 5 mph. And a person who happens to get picked up for traveling 60 mph cannot complain that he wasn't traveling over 65 mph, and therefore should not have been picked up.

Now, before responding to Kleinig's claim that this poor fellow cannot complain, consider a different question: What is the *real* speed limit in this example? It seems to be sometimes 65 mph and sometimes 55 mph. Does a driver in this situation get clear guidance about how fast to drive from the legal system, that is, the *whole* legal system from lawmaker to law enforcer? Clearly not. If he drives at 55 mph, he will find everyone passing him in full view of the police. If he drives at 60 mph, he probably won't get a ticket except when some police officer thinks he should. That he cannot complain if this happens makes things worse rather than better. The situation that Kleinig describes is one in which a person is asked to think that he may in fact drive 60 mph *while he has no grounds to complain if he gets penalized for doing so*. This is precisely what police discretion does. It sends a mixed and confusing signal that takes it largely out of the citizen's hands whether he gets penalized or not.

That the citizen can avoid being ticketed by driving 55 mph is no better

answer here than that he could avoid being ticketed by not driving at all. Why should he drive at 55 mph, allowing all cars to pass him, when he sees others driving above 55 mph in full view of the police? The law is not just words on a lawbook page or numbers on a speed limit sign. It is a whole system which includes these words and numbers in a real human practice that the citizen confronts as a whole. The speed limit signs tell him one thing and the police practice tells him another. Consequently, his ability to control his fate is weakened by the contradictory and confusing message that he receives from the legal system as a whole.

Can this driver rightly complain? Perhaps not in our discretion-ridden legal system. But, morally speaking, I think he can complain because the legal system failed to do what it was supposed to do. It failed to give him clear guidance about how to avoid getting penalized—just the flaw for which laws are sometimes found unconstitutional because of vagueness. Did this driver have reason to think he was courting a ticket by driving 60 in a 55 mph zone? The answer seems to me to be: yes and no. *Yes*, because he knew that the posted speed limit was 55 mph. *No*, because he didn't know that going five miles over that limit was in fact treated as breaking the law. *Yes and no:* how much more uncertain can the law be than that?

(2) Regarding my claim that police discretion effectively amends the laws that the people's representatives have passed, Kleinig describes a situation in which, though the law prohibits all gambling for money, a police department promulgates a rule among its officers that excludes arresting people for social gambling for moderate stakes. Of this, Kleinig writes:

> What is going on here? I think it is reasonable to suggest that the legislature did not have as its focus the weekly game of cards played by a group of friends, where only a few dollars change hands over the course of an evening—although there is nothing in the statute to exclude such activities from its purview. With good reason we might also suggest that were the legislature to have attempted to qualify its prohibition so that activities such as these were excluded from its purview, it would have got into legislative quicksand.

I don't deny that the police in this example are modifying the legislature's work in a good way, and maybe even in a way that the legislature would have wanted its work modified. But, good or bad, the police are modifying the law. The people's representatives passed a law against gambling, and the police have transformed it into a law against certain kinds of gambling and not against others. The police have taken over a job that is not theirs to take. That a blanket law against gambling is a bad law, I am the first to admit. But it is the people's law, and they will never make better laws if they can leave it to the police to clean up their poor lawmaking. For this reason, we should not so quickly accept that the legislature couldn't have made a law closer to their real intention without getting into "legislative quicksand." Quite the reverse. Trying to spell out just what it is about gambling that

makes it the appropriate target of a criminal law would have been a good exercise for the legislature and for the people whose representatives they are. Because police discretion will patch up their incomplete lawmaking, the people and their representatives are deprived of a valuable exercise in democratic governance and allowed to shirk the responsibility to make good and adequately specific laws. If, instead of covering up for their poor lawmaking, the police enforced the law as the lawmakers wrote it and, say, started arresting well-to-do suburbanites at their weekly gin rummy games, the lawmakers would soon be back at the drawing board trying to make a law that clearly targeted the kind of gambling the people want penalized. The short-term costs to those suburbanites would, in my view, be far outweighed by the benefits of making the lawmakers make the law express the people's real will. And, knowing that the police will not clean up their sloppy work will make the lawmakers more careful in future lawmaking as well.

If the legislature finds that it cannot specify what kind of gambling is illegal, then that is grounds for wondering whether it should be illegal after all—wondering that doesn't occur because the police have patched the law. Moreover, if the legislature cannot specify what kind of gambling is illegal but make a law against it wholesale expecting the police to do the specifying, then they fail to make a law that can guide the citizens in their behavior and thus they fail at what they were elected to do. All of this is covered up—and kept insulated from change—by police discretion. Some gambling will lead to arrest and other gambling will not, and the distinction between them will be made by the police, not by the people's representatives.

(3) In response to my claim that discretion will be used discriminatorily against the poor, powerless, and unpopular in our society, Kleinig proposes that discretion be limited by guidelines promulgated by police departments. As to whether this will be effective in preventing discrimination, Kleinig contends that it will be no less effective than a full enforcement policy:

> If police deviate from discretionary guidelines by claiming that they are only exercising a discretion they have, they will just as readily claim that they have or do not have legally clear grounds for arrest when they act discriminatorily under a full enforcement policy. . . . For the source of discrimination is not to be found in the power to use discretion but in the disposition to act with prejudice, and there is probably no greater difficulty involved in showing that guidelines for exercising discretion were ignored than in showing whether legally sufficient grounds for arrest were present.

Kleinig's response seems to me to be unsatisfactory on several grounds. First of all, as his account shows, guidelines for discretion place an additional layer of desiderata on top of the determination of whether legally sufficient grounds for arrest are present. Even if it is true that "there is probably no greater difficulty involved in showing that guidelines for exercising discretion were ignored than in

showing whether legally sufficient grounds for arrest were present," there is surely greater difficulty in showing that *both* sets of rules were misapplied than in showing that the law alone has been misapplied. At very least, Kleinig's proposal gives the police two levels at which they can deny that they were acting discriminatorily, instead of one. Second, if there were a full enforcement policy, then citizens would come to expect it and they would be able to protest where it was violated, particularly if it were violated in a discriminatory fashion. Under a policy that allows discretion, the citizens have additional grounds for uncertainty about what the police are actually doing, and thus it will be more difficult for them to complain about what appears to be discrimination. And finally, if guidelines for discretion can be formulated that are satisfactory, then they will express the implicit will of the lawmakers and the people who elected them. But, then, the lawmakers should have bitten the bullet and formulated those guidelines themselves as part of the laws they were making, rather than make incomplete laws and let the unelected police fill in the blanks.

(4) I argued that discretion gives police officers a kind of leverage over citizens that can be used tyrannically. What I have in mind here are cases—seen commonly in film and television portrayals of police work—in which the police hold the threat of arrest over some small-time crook as a way of compelling that individual to become an informant. This is clearly a power that police have only when they can refrain from arresting someone who is legitimately subject to arrest. And it is a power which we would not grant to police over all citizens, since if we wanted that we would pass a law requiring all citizens to give police whatever information the police want. Consequently, police discretion here gives police a special power over some citizens which the lawmakers have not given the police over those citizens and which the lawmakers would not give the police over all citizens.

Against this, Kleinig's reply has three parts. First, he takes it that we could simply forbid the police to use their discretion this way, while leaving the rest of their discretionary authority intact. He does not, however, explain how this would work, and it seems that his earlier observation on the difficulty of controlling police decisions of this sort would work against it. As I said earlier, it seems that outright prohibition of discretion would give citizens the best and clearest weapons against such leverage. For example, imagine a small-time crook who had been "leveraged" into becoming an informant by the threat of arrest not carried out. Suppose that this fellow decides he no longer wants to be an police informant, and the police officer involved decides to arrest him. If there were no discretion allowed, the would-be noninformant could point to earlier cases when the police officer could have but didn't arrest him. This would give him a weapon against continued exploitation. However, as long as discretion is allowed, the police officer will always be able to explain the earlier nonarrests as appropriate discretion. Even if, as Kleinig has suggested, the police officer would always be able to claim that legally sufficient grounds for

arrest didn't exist in the earlier case, the fact remains that allowing discretion gives the police two levels of protection of their actions, whereas forbidding discretion leaves them only with one.

Second, Kleinig maintains that the occasional trade of nonarrest for information (as opposed to the continuing threat of arrest to make someone an ongoing informant, which Kleinig admits "may well be seriously exploitative of a vulnerable person") is an acceptable practice. To the individual who has violated a law for which he could be rightly arrested and who is offered nonarrest in return for information, writes Kleinig,

> becoming an informant may represent an acceptable bargain and, if there are no significant victims involved, the arrangement may represent good social value. If the person does not wish to become an informant, then the arrest that follows will be sufficiently justified by the initial offense . . .

But, if the initial offense justified arrest, how was it justified not to arrest him? Did the law say that people who commit this offense will be arrested unless they can provide some "good social value"? Either the legislature which passed the relevant law wanted people to be arrested who violated it, or the legislature wanted the police to be able to use this law sometimes not to arrest but to get information. If the former, then, in not arresting, the police officer violates the wishes of the legislature and the people they represent. If the latter, then the legislature has misled the citizenry by passing a law saying one thing while wishing and expecting something different. Either way, the citizens are swindled out of real democratic control of the agents of their government.

Third, Kleinig makes here a point he makes generally, namely, that discretion is not tyrannical because it amounts to allowing the police, not "to impose *greater* burdens on others than the law allows," but, rather "to impose less than a full enforcement policy would dictate." Naturally, allowing the latter is not as bad as allowing the former, but that doesn't mean that allowing the latter is good. It still modifies undemocratically the laws as made by the people's representatives; it still renders unclear what really is going to be treated as illegal; and it still leaves room for continued leverage against small-time crooks to make them into ongoing informants—which both Kleinig and I regard as exploitation of the vulnerable, but which he thinks and I doubt can be eliminated surgically while leaving police discretion intact.

Concluding Comments

I conclude, now, with a more general observation about the significance of police discretion and its incompatibility with law as an instrument of self-governance by the citizens of a liberal democratic state. In his discussion of the discretionary administration of speed laws, Kleinig refers to the driver let off without a summons as one who has been "given a break." And later, Kleinig adds: "I am sure that the motorist who gets off with just a warning or reprimand feels relieved rather than oppressed." Now, I think that there is something inappropriate

in our thinking of the police as "giving us a break"—however natural it is for us to want to get one. What it suggests is that the power to arrest is the police officer's own power and we, his subjects, are relieved that he has shown the mercy not to impose the full force of his power. What's wrong here is that, in a liberal state, the police officer's power belongs to the citizens. It is ***our*** power, not the police officer's own. Thus, Locke said of the extent of the political authority in a legitimate state, that it is "the joint power of every member of society." And John Rawls has written that, in liberal democratic polities, "political power, which is always coercive power, is the power of the public, that is, of free and equal citizens as a collective body."

We are not to be thankful to the police officer for giving us a break, as if his mercy were a gift to us from him. Rather, his "mercy" is his disobedience of our will as expressed in our laws; he has twisted into his own shape (for however good a reason) a power which we gave him in a shape that we designed. Such mercy (however natural it is to desire it) is an insult to us as citizens of a democracy. If we want speeding laws to be administered mercifully, then it is our business to build mercy into our laws. If we want speeding laws to be administered with discretion, then it is our business to build discretionary authority into our laws. If we make laws, we should expect them to be carried out as we make them. Anything less fails to take us seriously as the sovereign citizen-rulers of a democratic polity.

But discretion is not only an insult to us as citizen-sovereigns of a liberal democratic state, it is an insult to us as responsible agents. The distinguished philosopher of law, Lon Fuller, catalogued eight features of what he called the "internal morality of law." Among these are that the law be clear enough to guide citizens in choosing how to conduct themselves, and that there be congruence between official action and declared rule. I think that I have shown that discretion undermines both of these features. Interestingly, Fuller thought of these features of law as a morality because he thought of law as a purposive enterprise, one that implicitly treats the people subject to it as responsible agents. He wrote:

> To embark upon the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.
>
> Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent.

To the extent that police discretion makes the law unclear and opens a gap between the stated rule and the official actions done in its name, it does not address the citizens as individuals capable of governing themselves in light of public rules. Rather it subjects citizens to an ill-defined and unpredictable police authority in the face of which citizen self-governance is reduced to guessing what the laws will actually mean in the hands of this or that police officer.

In closing, I want to acknowledge the very important fact that instituting a policy of full enforcement will require significant changes in our legal system if this policy is not to bring worse evils than the discretion it is meant to replace. For instance, police often refrain from arresting individuals because they may have to spend a night in jail until they can see a judge and because, even if they are acquitted, they will end up with a damaging arrest record. Consequently, for full enforcement to work, we will have to staff our courts with enough judges so that arrestees can see them in short order, and we will have to eliminate the practice of holding acquitted persons' arrest records against them. Since jailing arrestees because there's no judge around and holding arrest records against acquitted people amount to punishing people who are either presumed or legally innocent, these changes seem long overdue.

The most important change that full enforcement requires, however, is that we reduce dramatically the number and complexity of our criminal laws. And this too seems long overdue. . . . The simple fact is that a free society should have few and clear criminal laws that the police should be expected to enforce wherever they apply.

In short, full enforcement is part of a "package deal." If, as I expect, we can't have the whole package—if we are not about to limit criminal law to a small number of clear statutes or to provide resources for speedy, nonpunitive treatment of arrestees, and so on—then Kleinig is right: We should keep police discretion and try to curb its abuses. But, then, we should admit that we have failed to stand up to the full measure of our roles as citizen-sovereigns of a liberal democratic polity. Instead of controlling the exercise of our public power by means of rules we have democratically enacted, we have handed this job over to the police and can only hope that they perform it fairly to the disadvantaged, and mercifully to us all. ■

The Continuing Debate

What Is New

Some of the most interesting recent studies of police discretion have focused on how neighborhood/environmental factors influence police discretionary behavior. Studies indicate that in communities of lower economic status, police are more likely to make arrests (rather than give warnings or pursue other alternatives). In addition, police are likely to use greater force in economically disadvantaged neighborhoods. Notice that such studies are not merely finding that more arrests occur in poorer neighborhoods; rather, when confronted with similar offenses, police discretionary behavior results in a greater likelihood of arrest when the offense took place in a poor neighborhood than in a more affluent environment.

Where to Find More

Perhaps the classic paper on police discretion—which brought the issue of police discretion into the open and into debate—is Joseph Goldstein, "Police Discretion