

Fall 1989

# Police Discretion: A Comparative Perspective

Gregory H. Williams  
*University of Iowa*

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Courts Commons](#), and the [Criminal Law Commons](#)

## Recommended Citation

Williams, Gregory H. (1989) "Police Discretion: A Comparative Perspective," *Indiana Law Journal*: Vol. 64 : Iss. 4 , Article 3.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol64/iss4/3>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).

# Police Discretion: A Comparative Perspective

GREGORY HOWARD WILLIAMS\*

## INTRODUCTION

In the heat of the moment, we are often critical of decisions without fully comprehending the factors which influence them. This is especially true when United States citizens analyze the operation of foreign criminal justice systems. For example, there was an angry U.S. reaction to "Mexico's inability—or unwillingness—to attack drugs and corruption head on"<sup>1</sup> after the 1985 murder of a U.S. drug enforcement agent. While corruption may be a serious obstacle to Mexico's efforts to aid the United States in combating the flow of drugs into this country, many critics overlook the point that other factors, specifically constitutional and statutory provisions, may affect how the Mexican government responds to criminal law violations. A very cursory review of the Mexican system warrants the conclusion that the nonexistence of plea bargaining, restrictive conspiracy statutes, and provisions against self-incrimination may partially explain why results acceptable to the United States citizens have not been achieved in Mexico.<sup>2</sup>

---

\* Professor of Law, University of Iowa. I would like to thank my colleague, Professor Lakshman Guruswamy for his comments on an earlier draft of this article. I would also like to thank Steve Rhodes, Gregory Gukenberger, Kim Karn and Michael Rabbit for their assistance. This article was initially conceived while the author was a Visiting Professor at Durham University, and develops and expands on work that originally appeared in Williams, *Police in the Dock: Law or Fact*, 1986 *CRIM. L. REV.* 719.

1. Larmer, *Mexican Drug Case Frustrates U.S.*, *Christian Sci. Monitor*, Jan. 12, 1988, at 7, col. 1. The concern about extensive drug usage in the United States is at the forefront of public consciousness and has resulted in the compromise of our democratic principles. It has affected all of our institutions, even the Supreme Court. A number of U.S. Supreme Court decisions reflect the strong interest of the Court in fighting drugs and a willingness to limit individuals' rights in order to achieve that goal. See *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (stating that "it is a veritable national crisis in law enforcement caused by smuggling of illicit narcotics"). We have seen the fourth amendment become qualitatively different at the international borders than in the interior of the United States because of the heightened governmental interest in preventing smuggling of narcotics and contraband into the country. See *United States v. Montoya de Hernandez*, 475 U.S. 531, 544 (1985) (detention of 16 hours at the international border was not unreasonably long where it was suspected that defendant smuggled drugs via her alimentary canal).

2. See Larmer, *supra* note 1, at 10, col. 1. Surprisingly, in spite of the view of some that the Mexican system of criminal justice is totally alien to ours, there are many similarities. While the Mexican legal system is based on European civil law, Mexico is far from a pure civil law country. There is a trend toward acceptance of notions of precedent and *stare decisis* in Mexico. Currently, when a court has ruled the same way on five successive occasions by a certain majority, that decision becomes binding precedent on it and all lower courts until that court reverses itself with the same majority of votes with which the first case was decided. J.

We honor, if not always respect, rules which control how we deal with criminal defendants in the United States, yet surprisingly we ignore such requirements when we look to our southern neighbors.<sup>3</sup> This disregard for the integrity of foreign criminal justice systems has permeated the highest levels of our government.<sup>4</sup>

Cultural myopia not only results in wholesale ignorance of foreign legal systems but obscures recognition of the fact that problems of law enforcement transcend political boundaries. Consequently, we have little understanding of how the problems we face in our criminal justice system arise and are resolved elsewhere. While we know little about worldwide approaches to criminal justice problems, we know even less about the scope,

HERGET & J. CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 77 (1978).

The Mexican Constitution also includes many provisions analogous to those in the U.S. Constitution. Examples of similarities between the constitutions with respect to criminal procedure include Mexico's Article 16 of Title One, Chapter One, which provides in part that: "No order of arrest or detention shall be issued against any person other than by the competent judicial authority, and unless same is preceded by a charge, accusation, or complaint for a credible party or by other evidence indicating the probable guilt of the accused." CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.] art. 16, tit. 1, ch. 1, reprinted in G. FITZGERALD, THE CONSTITUTIONS OF LATIN AMERICA 147 (1968). Article 20 provides another example:

2) He [the accused] may not be forced to be a witness against himself, . . . 4) He shall be confronted with the witnesses against him, who shall testify in his presence if they are to be found in the place where the trial is held, so that he may cross-examine them in his defense, . . . 6) He shall be entitled to a public trial by a judge or jury of citizens who can read and write and are also residents of the place and district where the offense was committed, provided the penalty for such offense exceeds one year's imprisonment, . . . 8) He shall be tried within four months if charged with an offense whose maximum penalty does not exceed two years imprisonment, and within one year if the maximum penalty is greater.

*Id.* at art. 20, reprinted in G. FITZGERALD, *supra*, at 147-50.

However, a similar constitution does not ensure similar results. Many ideas central to civilian criminal procedure are still present in Mexico. Three such differences stand out. In Mexico, a criminal case is built by a judge or panel of judges in a series of hearings which could extend over a longer period of time rather than one trial. Additionally, instead of having exclusionary rules of evidence, different kinds of evidence receive different weights in a formal scheme. Finally, the role of the court is quite different in that the judge takes a much more active part in the proceedings. J. HERGET & J. CAMIL, *supra*, at 81.

3. Yet some of those rules are much more extensive than rules found in the United States. For example, the Mexican system of Amparo, which is not only similar to the American writ of habeas corpus, it is broader in scope. Any citizen may seek a writ of Amparo for infringement of his civil rights. The writ may be sought against any official, tribunal, police officer, legislature or bureaucrat. See T. WEIL, AREA HANDBOOK FOR MEXICO 335-36 (2d ed. 1975).

4. A recent example of cultural chauvinism was the clandestine and secret spiriting of suspected drug trafficker Juan Ramon Matta Ballesteros out of Honduras to a third country where he was turned over to U.S. authorities. According to press reports, the Honduran public was outraged by the lack of recognition of Honduran sovereignty and there were numerous public demonstrations against the action. One Honduran citizen was quoted as saying, "We have laws, judges, and a supreme court in this country too, just like any other. I understand that the Americans are interested in this case, but Matta is a Honduran and should be tried in Honduras under Honduran law." N.Y. Times, Apr. 11, 1988, at 9, col. 2.

extent and control of discretion exercised around the globe.<sup>5</sup> Since the exercise of discretion is central to our criminal justice system, the broader our base of knowledge about it, the more successful we might be when attempting to deal with it. While there has been some recent recognition in the U.S. of the importance of controlling judicial discretion in the sentencing decision,<sup>6</sup> little attention has been paid to problems presented by other aspects of discretion. A reflective view from abroad makes it clear that a German citizen might well criticize American prosecutors for their free-wheeling decisionmaking with as much vehemence as we direct toward Mexican officials. The German reference point is that of a prosecutor required to prosecute all cases involving serious crimes. Our wide-open plea bargaining system stands in direct opposition to the official German approach.<sup>7</sup> The Germans have also recognized and attempted to limit one of the most neglected areas of discretion: police discretion.<sup>8</sup> In fact, several countries have surpassed the United States in both recognizing and guiding the exercise of police discretion. In Sweden a five-member committee of Parliament has as its primary function the responsibility of overseeing police activity.<sup>9</sup>

During the past decade, the issue of police discretion has become an important public concern in England. For example, Lord Scarman's report on the 1981 riots in Brixton<sup>10</sup> emphasized that "the exercise of discretion

---

5. Kenneth Culp Davis, one of the scholars who revived interest in police discretion in the late 1960's has also been at the forefront in suggesting that a comparative perspective might assist our efforts to address the growing problems of discretion in criminal law enforcement. Professor Davis' review of discretion in several European nations shows that vital information can be gleaned from such a process. See K. DAVIS, *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA* 195 (1976).

6. The federal sentencing act seeks to control disparate sentences. See 18 U.S.C. § 994 (1987). However, the U.S. is not the only country which has recently undertaken revision of sentencing provisions. Canada has also taken steps to review its sentencing law and policy by creating a study commission. The commission recommended legislation creating a permanent sentencing commission with the power to issue sentencing guidelines which would take effect like those of the U.S. commission. The legislation would include a new scale of maximum penalties, repeal of mandatory minimum sentences, elimination of discretionary parole release, and statement of general principles to govern sentence choice. Hirsch, *Federal Sentencing Guidelines: The U.S. and Canada Compared*, 4 OCCASIONAL PAPERS FROM THE CENTER FOR RES. IN CRIME AND JUST. 12-13 (1988).

7. See J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 87 (1977).

8. See generally, Linnan, *Police Discretion in a Continental European Administrative State: The Police of Baden-Wurtemberg in the Federal Republic of Germany*, 47 *LAW & CONTEMP. PROBS.* 185, 186-87 (1984) (describing the West German attempt to limit police discretion through extensive training, articulation of standards, and accountability after the fact).

9. G. BERKLEY, *THE DEMOCRATIC POLICEMAN* 152 (1969).

10. See LORD SCARMAN, *THE SCARMAN REPORT: THE BRIXTON DISORDERS* (1981). Scarman criticized the police not only for precipitating the riots, but for the total failure of relations between the police and the residents of Brixton. Further, he found that misconduct and "unimaginative and inflexible" tactics of the police inflamed the community. *Id.* at ¶¶ 4.61-4.68.

lies at the heart of the policing function."<sup>11</sup> The Scarman report led to a number of changes in policing throughout England.<sup>12</sup> The issue of police discretion continued to be a critical issue during the Miners' Strike of 1984, as there were frequent challenges to the manner of police response to miners' protest activities.<sup>13</sup> Enduring focus on the nature of police discretion in the English criminal justice system seems assured by the recent enactment of the Police and Criminal Evidence Act.<sup>14</sup> The Act not only introduced new laws and procedures to deal with criminal activities, but it established a system of greater police accountability to achieve the proper balance between the investigative needs of the police and the rights of citizens.<sup>15</sup>

The difficulty of this balancing effort is evident from several angry exchanges between English police officials and political leaders.<sup>16</sup> These

---

11. *Id.*, quoted in Ryan & Williams, *Police Discretion*, 1986 PUB. L. 285, 305. Police decisions and tactics were criticized as provoking, increasing or contributing to the disorder. Levenson, *Democracy and the Police*, 6 POL'Y L. REV. 42 (1981).

12. See *The Times* (London), Dec. 13, 1985, at 20, col. 1. In light of the recommendations by Lord Scarman, and in order to limit police show of force, the Chief Constable of the Toxteth section of Liverpool, an area of high unemployment and street crime, ordered a new policing policy emphasizing foot patrol by officers and strict controls on police vehicles in the area. It precluded police vehicles from patrolling under normal circumstances. See *The Times* (London), Dec. 6, 1985, at 1, col. 2. In a case challenging the policy, Mr. Levey, a jeweler, claimed that police allowed armed robbers, who stole £40,000 worth of his jewels, to get away when they entered the area of Toxteth. Mr. Levey unsuccessfully sought a declaration that it was unlawful for the Chief Constable to declare Toxteth a "no-go" zone, an order that the area be policed, and damages for breach of duty and negligence.

13. See A. SMITH, *OFFENSES AGAINST PUBLIC ORDER 20-22* (1987). During the miners' strikes, over 100 charges of riot were brought, but there were no convictions. The social background of the recently enacted Public Order Act of 1986 shows long and continual interest in the issue of police discretion. Public Order Act, 1986, ch. 64. According to Professor Smith, the Act was molded by the race riots in the 1950's, anti-Vietnam demonstrations and student unrest in the 1960's, inner-city riots in 1980, 1981 and 1985, and the miners' strikes of 1984-1985. *Id.*

14. The Police and Criminal Evidence Act of 1984 is the first legislative attempt in England to define comprehensively the investigative powers of the police. Police and Criminal Evidence Act, 1984, ch. 60. Prior to its enactment, the law on criminal procedure was dated and had developed in an incoherent fashion. Substantial public criticism in the face of police conduct in the urban riots and miners' strikes led to the adoption of a new code of criminal procedure. See generally V. BEVAN & K. LIDSTONE, *A GUIDE TO THE POLICE AND CRIMINAL EVIDENCE ACT OF 1984* (1985).

15. The determination of the proper degree of discretion and control seems to have been a critical part of legislative concern motivating passage of the Act. The Commission recognized the problems of police discretion and used as an evaluative framework the three principal criteria of fairness, openness, and workability to decide the proper distribution of power and authority. Smythe, *The Report of the Royal Commission on Criminal Procedure: I. The Investigation of Offences*, 1981 PUB. L. 184, 186. Smythe characterized the work done in the passage of the Police and Criminal Evidence Act as dealing with an issue of immediate concern to all citizens. *Id.* at 184.

16. Opposition political leaders, apparently frustrated by their inability to engage the police in fruitful discussion concerning criminal law enforcement, publicly ridiculed the police when they were unable to control London riots. A local Labour party leader and member of Haringey Council was quoted as saying, in reaction to the police inability to control the riots

examples make it clear that not only are questions of police discretion important in the United Kingdom, they have been at the forefront of public debate<sup>17</sup> in recent years in a way not experienced in the United States since the late 1960's.<sup>18</sup> What can we learn from the English experience? Have theories or principles to answer the basic questions surrounding the exercise of police discretion evolved from such attention? Have judicial opinions provided insights which might be useful in our attempts to understand and address problems of police discretion? It is to these questions that we now turn.

## I. THE DEVELOPMENT OF ENGLISH LAW

One of the earliest English efforts to control discretion in the arrest decision is found in a code which levied fines on law enforcement officials who failed to enforce specific criminal laws. Constables were subject to fines when they failed to make arrests to preserve morality, safety, or the public peace. Penalties ranged from a minimum of two shillings to a maximum of twenty pounds.<sup>19</sup> These early attempts to structure arrest

---

in Brixton, that the "police got a bloody good hiding." *The Times* (London), Oct. 9, 1985, at 1, col. 5. In response, the Police Commissioner, Sir Kenneth Newman, attacked what he viewed as "anti-police prejudice," *The Guardian*, Oct. 17, 1985, at 1, col. 2, and accused opposition party leaders of "openly inflaming the criminal minority and inciting riots." *Id.* at 20, col. 3.

17. According to R. REINER, *THE POLITICS OF THE POLICE* 60-82 (1985), policing in Great Britain has become increasingly political in the last two decades, beginning with the increasing unrest of the 1970's and carrying through the 1981 urban riots and 1984 Miners' Strike.

18. See PRESIDENT'S COMM'N ON ENFORCEMENT AND ADMIN. OF JUST., TASK FORCE REPORT: *THE POLICE* 13-38 (1967); REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 157-68 (1968).

19. Twenty pounds for non-enforcement of the laws relating to hawkers and peddlers, bawdy houses, gaming-houses or disorderly houses not licensed for music and dancing, Two pounds for failure to attend the prosecution of persons bound on recognisances to appear, failure to apprehend persons throwing fireworks, to execute the summons of a justice, to report persons keeping alehouses without licenses, or to enforce certain laws relating to the armed forces. One pound for failure to assist the officers of Customs and Excise, for failure to carry out the orders of a justice regarding vagrants or for neglecting to prosecute fraudulent bakers . . . . Ten shillings for neglect of duty relating to drunkenness, idle or disorderly persons, rogues and vagabonds; and to road offenses, including the depositing of rubbish in the streets. Five shillings for various instances of neglect in connection with the laws concerning the armed forces. Two shillings in a great variety of cases: for the non-enforcement of laws against profanity; for not apprehending lunatics when required to do so by a justice; for refusal to search for gun-powder; for failure to apprehend drivers of vehicles who misbehaved themselves; for failure to return a list of persons required to repair highways, or to apprehend persons committing nuisances, or to execute a warrant for a justice.

2 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE CLASH BETWEEN PRIVATE INITIATIVE AND PUBLIC INTEREST IN THE ENFORCEMENT OF THE LAW* 162-63 (1957),

decisions apparently had little practical effect due to the lack of any central supervisory authority to carry out the threat of financial punishment.<sup>20</sup> Even if a central authority had existed, the minimal compensation of constables would likely have doomed any successful monetary sanctions. In any event, such approaches to controlling police discretion soon disappeared, and there is no record of such attempts after the formation of the forerunner of modern police departments in 1829.<sup>21</sup> It was not until the end of the century that English courts began to focus on the appropriate range of discretion exercised by administrators.<sup>22</sup> Later cases made it clear that similar broad powers and constraints likewise applied to police administrators. It is those later cases that provide the jurisprudential framework which guides English courts as they analyze police arrest powers.<sup>23</sup>

### A. Blackburn I

*Ex Parte Blackburn*<sup>24</sup> stands as the seminal English case on police discretion. Blackburn, a member of Parliament suing in his capacity as a private citizen, challenged a gambling enforcement policy established by the London Police Commissioner. The Commissioner, possibly because of limited personnel or doubts about the scope and validity of the law,<sup>25</sup> had issued a rule limiting application of a commercial gambling statute to casinos where there was some indication of cheating or where such casinos which had

20. See *id.* at 162. Generally these statutes were designed to alert constables and encourage enforcement of the law.

21. The origin of modern policing, both in the United States and the United Kingdom, is normally considered to be the order of Sir Robert Peel, Home Secretary in the Duke of Wellington's administration in 1829, to create the "New System of Police." D. BAYLEY, *POLICE AND SOCIETY* 73 (1977).

22. In those decisions, the House of Lords made it clear that while an administrative body had extensive power to decide issues requiring discretionary judgment, administrators must be guided by "rules of reason and justice," *Sharp v. Wakefield*, 1891 App. Cas. 173, and action must not be "arbitrary, [or] vague[,] . . . but legal and regular," *id.* at 179.

23. Unfortunately we have not seen similar development of general principles in the United States. While cases like *Bargain City U.S.A., Inc. v. Dilworth*, 407 Pa. 129, 179 A.2d 439 (1962), and *Gowan v. Smith*, 157 Mich. 443, 122 N.W. 286 (1909), are rare examples of cases dealing with questions of discretion in the arrest decision, there is a distinct failure to develop policing theory and principles in those cases.

24. [1968] 1 All E.R. 763 (C.A.) [hereinafter *Blackburn I*]. To avoid confusion with three other cases filed by Mr. Blackburn, the cases will be referred to as *Blackburn I-IV*, respectively. Mr. Blackburn's first suit was followed by *Ex parte Blackburn* (No. 2), [1968] 2 All E.R. 319 (C.A.) [hereinafter *Blackburn II*]; *Ex parte Blackburn and Another* (No. 3), [1973] 1 All E.R. 324 (C.A.) [hereinafter *Blackburn III*]; and *Ex parte Blackburn*, *The Times* (London), Mar. 6, 1980, at 10, col. 5 (also decided by the Court of Appeal) [hereinafter *Blackburn IV*].

25. See *Blackburn I*, [1968] 1 All E.R. at 768. Despite the court's apparent ease in interpreting the purpose of the gambling statute, other English commentators have had more difficulty. See A. WILCOX, *THE DECISION TO PROSECUTE* 68 (1972) ("Attempts to control gambling have run into difficulties, partly because the legislature has never been altogether clear about what it wants to suppress.").

become gathering places for criminals.<sup>26</sup> Blackburn's application for a writ of mandamus<sup>27</sup> to order full enforcement<sup>28</sup> of the gambling law gave the courts an opportunity to review the Police Commissioner's non-arrest policy. Although the Court of Appeal, England's second highest, denied the request for a writ of mandamus because the Commissioner's policy was in the process of being rescinded at the time of the suit, the court elaborately articulated its philosophy regarding the enforcement powers of the police.<sup>29</sup>

Central to the court's theory was acceptance of the idea of independence of the police from local or even central government control.<sup>30</sup> This independence developed from the mixed legal status of the English Police Commissioner as both a justice of the peace (exercising some judicial powers) and a constable (exercising executive powers).<sup>31</sup> Flowing directly from the idea of independence was the conclusion that broad-ranging powers were assigned to the office. The Court of Appeal in *Blackburn I*, while confirming

26. See *Blackburn I*, [1968] 1 All E.R. at 763.

27. Lord Denning, M.R., indicated mandamus was a proper way to enforce the performance of an officer's duty. *Id.* at 769. Lord Denning even went so far in one of Mr. Blackburn's later cases to indicate that the application for a writ of mandamus by Mr. Blackburn was both "timely and useful." A.G. *ex rel.* McWhirter v. Independent Broadcasting Auth., [1973] 1 Q.B. 629. The mutual admiration apparently continued, as Mr. Blackburn was later to have "referred to Lord Denning, M.R., as 'the greatest living Englishman' and received the retort 't'hat that to the House of Lords.'" H. WADE, *ADMINISTRATIVE LAW* 360 (1982).

28. See Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543 (1960), for the following definition of full enforcement:

Minimally, then, *full enforcement*, so far as the police are concerned, means (1) the investigation of a disturbing event which is reported to or observed by them and which they have reason to suspect may be a violation of the criminal law; (2) following a determination that some crime has been committed, an effort to discover its perpetrators; and (3) the presentation of all information collected by them to the prosecutor for his determination of the appropriateness of further invoking the criminal process.

*Id.* at 559-60. Although Goldstein argues that full enforcement "is not a realistic expectation," *id.* at 560, there have been situations where the government has attempted to fully enforce a particular statute. A recent example of a full-enforcement policy being implemented involves the United States Coast Guard and customs officials' seizures of boats, cars, and other vehicles in suspected smuggling areas for possession of small amounts of marijuana. See generally *N.Y. Times*, May 22, 1988, at 1, col. 2.

29. One might argue that the views expressed by the various members of the court are nothing more than dicta, see, e.g., Williams, *Prosecution, Discretion and the Accountability of the Police*, in *CRIME, CRIMINOLOGY AND PUBLIC POLICY* 161 (R. Hood ed. 1974), but later decisions have often turned to *Blackburn I* as the cornerstone for discussion of police powers.

30. See H. WADE, *supra* note 27, at 129.

31. See *Blackburn I*, [1968] 1 All E.R. at 764. The mixed legal status of the police may well be a carry-over from an earlier period in history when the English sheriff exercised both judicial and executive powers in England. This mixed status allowed such officers to be considered independent since they were neither truly executive nor judicial officers. See H. WADE, *supra* note 27, at 129. In the United States, in spite of some early examples of combining the office of justice of the peace and sheriff, they have traditionally been separated. See B. SMITH, *RURAL CRIME CONTROL* 39, 41, 47 (1933).



such broad powers as a historical fact,<sup>32</sup> was unwilling to be quite so sweeping in its view.

While conceding broad power to the police, the Court of Appeal found that the police must still be "answerable" to the law,<sup>33</sup> which allows the courts some residual power to intervene to overrule police decisions.<sup>34</sup> Apparently the court saw the Commissioner's action in *Blackburn I*, had it not been rescinded, as the equivalent of declaring a duly enacted statute null and void, or more specifically, violative of the general philosophy that the police can determine the circumstances under which statutes will be enforced, but not whether they will be enforced.<sup>35</sup>

The primary objective of *Blackburn I* appears to have been to clarify the point that broad policies of non-enforcement are improper, but general guidance regarding criminal law enforcement guidance for officers is permitted.<sup>36</sup> The concern about outright non-enforcement of criminal statutes is underlined by the court's statement of its willingness to strike down a hypothetical enforcement policy which might provide that "no person should be prosecuted for stealing any goods less than £100 in value."<sup>37</sup> Yet the

32. In 1958, "the view of the government was no police authority (a local governing body with general oversight power over the police) or anyone else has any authority to interfere in . . . the enforcement of the law by the police." *Blackburn I*, [1968] 1 All E.R. at 764.

33. *Id.* at 769 (citing *Fisher v. Oldham Corp.*, 1930 K.B. 364; *A.G. for New South Wales v. Perpetual Trustee Co.*, [1955] 1 All E.R. 846 (C.A.)).

34. A. SMITH, *supra* note 13, at 18.

35. Enforcing some criminal statutes requires an interpretation by the police of legislative intent because the legislature does not have the time to fully articulate all possible situations in which criminal statutes should be enforced. See J. WILSON, *VARIETIES OF POLICE BEHAVIOR* 16-18 (1968). In *Blackburn I* the Court of Appeal recognized that the police were not solely responsible for problems arising from interpretation of the gambling statute.

The lawyers themselves are at least partly responsible. The niceties of drafting and the refinements of interpretation have led to uncertainties in the law itself.

This has discouraged the police from keeping observation and taking action; but it does not, I think, exempt them also from their share of the responsibility.

*Blackburn I*, [1968] 1 All E.R. at 770. Furthermore, the court added that the "law [on gambling] was thought to be still uncertain because the *Kursaal* (No. 1) case was believed to be going to the House of Lords and therefore no step should be taken meanwhile." *Id.* at 773 (referring to *Kursaal Casino Ltd. v. Crickett* (No. 2), [1967] 3 All E.R. 360 (Q.B.), *rev'd*, [1968] 1 All E.R. 139 (H.L.)).

36. The barrier erected by *Blackburn I* regarding non-enforcement of a particular statute may be more ephemeral than real, as neither that case nor any other case has ever upheld challenges to police non-arrest policies. See Sanders, *The Prosecution Process*, in *MANAGING CRIMINAL JUSTICE: A COLLECTION OF PAPERS* 65, 66 (D. Moxon ed. 1985). *Blackburn I* "conceives law enforcement as a matter of individual cases, just as every constable may find it on the streets." T. JEFFERSON & R. GRIMSHAW, *CONTROLLING THE CONSTABLE* 56 (1984). Subsequent cases have reinforced the argument that it is appropriate for the police to establish departmental policy when enforcing the laws. See *Rigby v. Chief Constable of Northhamptonshire*, [1985] 2 All E.R. 985 (Q.B.); *Ex parte Levey*, *The Times* (London), Dec. 18, 1985, at 20, col. 1 (Q.B.).

37. *Blackburn I*, [1968] 1 All E.R. at 769. Would Lord Denning have had the same reaction if the amount was £10 instead of £100? The example in the opinion may have sprung

position of the court is confusing, as after the general admonition against a blanket policy of non-enforcement, one member of the court stated that it would be permissible to promulgate a policy "not to prosecute . . . young teenage boys who have had sexual intercourse with girls just under the age of sixteen."<sup>38</sup> To support that position the Criminal Law Amendment Act of 1885 was analyzed. Its objective was found to be to protect young girls from seduction, and that prosecutions of young boys were "not the sort of cases which the legislature had in mind when the Criminal Law Amendment Act . . . was passed."<sup>39</sup> According to this view, the statute was intended to provide protection for young girls from adult males<sup>40</sup> and, had it considered application of the statute to young boys, Parliament would have made it clear that young males were not to be prosecuted.<sup>41</sup> This interpretation of the statute was followed by the view that "experience has shown that if young boys are prosecuted in such circumstances, the courts usually take the humane and sensible course of imposing no penalty."<sup>42</sup>

Further confusion is generated about the scope of law enforcement discretion by another example of a statute expected to be fully enforced—the housebreaking law. In considering that statute, the judgment is offered

to mind because the Chief Constable of South End had, prior to the opinion in *Blackburn I*, indicated that shoplifters would not be prosecuted. See Freeman, *Controlling Police Discretion*, 6 POL'Y L. REV. 51 (1981). But a need for such discretion was recognized in *Arrowsmith v. Jenkins*, [1963] 2 Q.B. 561 ("police cannot prosecute every [one] . . . and must exercise a wide discretion when to prosecute").

38. *Blackburn I*, [1968] 1 All E.R. at 771.

39. *Id.*

40. Although *Queen v. Tyrell*, 1894 Q.B. 710, 712, is not discussed in the *Blackburn I* opinion, it supports the suggested approach of looking at whom the statute is designed to protect and whom to punish. In *Tyrell* the court reversed the conviction of a minor girl for aiding and abetting her own rape by an adult. The court argued that her conviction contradicted the purpose of the statute, which was to protect young girls:

I do not see how it would be possible to obtain convictions under the statute if the contention for the Crown were adopted, because nearly every section which deals with offences in respect of women and girls would create an offence in the woman or girl. Such a result cannot have been intended by the legislature. There is no trace in the statute of any intention to treat the woman or girl as criminal.

*Id.* at 712 (opinion of Matthew, J.).

41. This approach is similar to that taken by a number of sexual abuse statutes, which distinguish prosecutions based on the age of the victim and the seducer, with lesser or no penalties for those who are in the same age range. See MODEL PENAL CODE §§ 213.3(1)(a), 213.4(6) (1980). See also ME. REV. STAT. ANN. tit. 17-A, § 254 (1964). To be guilty under the Maine statute, the actor must be at least 19 if the other person is between 14 and 16, or at least five years older than the victim. Lord Salmon's position in *Blackburn I* finds historical support in *R. v. Prince*, [1875] 2 L.R.-Cr. Cas. Res. 154, which expanded the protection afforded young girls and upheld the prosecution of a young male who took an unmarried girl of nearly 14 from the "possession" of her father, even though the jury found that the defendant made a reasonable mistake as to the age of the young girl. Although factually distinct, *Prince* supports the proposition asserted in *Blackburn I* that the purpose of similar statutes was to protect young girls. However, since Lord Salmon's position in *Blackburn I* is not developed, this analysis may add more to the discussion than he intended.

42. *Blackburn I*, [1968] 1 All E.R. at 771.

that "[t]he object of the statute which made housebreaking a crime was quite simply to prevent housebreaking in the interests of society."<sup>43</sup>

Unfortunately, neither example is helpful in determining the scope and extent of discretion expected to be exercised under criminal statutes. It is unclear what principles call for concluding that commercial gambling, theft, and housebreaking statutes are to be fully enforced, yet sexual abuse statutes are subject to discretionary enforcement.<sup>44</sup> One can, in fact, with relative ease conceive of circumstances under which gambling or petty theft statutes are not expected to be enforced. In many small-stakes gambling and petty theft cases, police have often refused to make arrests and courts have upheld those decisions.<sup>45</sup> At the very least, the policy rationale offered for passage and full enforcement of the English gambling laws—that they “distracted the young men from practising archery which was needed for the defence of the country”<sup>46</sup>—certainly could not be controlling in 1968. Thus, while offering important views on the general power of the police, *Blackburn I* fails to develop how police are to decide the appropriate enforcement rules of criminal statutes.<sup>47</sup> This lack of focus on structuring and controlling

43. *Id.*

44. It seems that almost every statute has some circumstances under which it is not expected to be enforced, even murder statutes. See J. KAPLAN & R. WEISBERG, *CRIMINAL LAW: CASES AND MATERIALS* 364-65 (1986) (citing San Francisco Chronicle, June 20, 1984, at 4).

45. See A. WILCOX, *supra* note 25, at 68, for a discussion of an English view on this point. Gambling laws in the United States are primarily aimed at prohibiting large-scale gambling operations that are often associated with organized crime rather than being an attempt to prohibit small-stakes gambling. Statutes, however, rarely distinguish the two situations. LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEX. L. REV. 434, 436-37 (1967). In Iowa, the lack of this distinction between the two types of gambling led the Attorney General to fully enforce the gambling statutes in an effort to force the legislature to define more specifically the scope of the gambling statute. The effort of the Attorney General to change the law was successful, and the legislature undertook to delineate the circumstances under which certain gambling activity was legal. See Des Moines Register, June 12, 1972, at 1A, col. 1; June 13, 1972, at 1A, col. 8; June 19, 1972, at 1A, col. 2; June 21, 1972, at 1A, col. 2.

46. *Blackburn I*, [1968] 1 All E.R. at 766.

47. English commentators have split on the meaning of *Blackburn I*. One suggests that *Blackburn I* left open the question of whether the Home Secretary or police authorities could direct police in their duties simply because the issue was not raised directly in the case. See G. MARSHALL, *POLICE AND GOVERNMENT* 15-32 (1965). Others, however, argue that *Blackburn I* effectively precludes the Home Secretary or police authorities from directing the police. See T. JEFFERSON & R. GRIMSHAW, *supra* note 36, at 47-58. Jefferson and Grimshaw also argue that there is a basic incompatibility between the idea of obligation to the law and obligation to lawful orders. *Id.* This dichotomy thereby implies a need for some control over police actions. Since *Blackburn I* precludes control from high-level officials, they argue that some form of community-based oversight is necessary, given the traditional weakness of county councils in exercising control over police actions. See *id.* at 174-76. This is because the police authority cannot give detailed instructions to police officers regarding the manner of investigation of offenses or decisions concerning prosecutions. *Id.* at 174. Jefferson and Grimshaw are, therefore, arguing for a form of community control which would have the power to

discretion may have been due to the overriding concern in *Blackburn I* to chastise the police and address a perceived public image problem<sup>48</sup>—to make it clear that the “police owe the public a clear legal duty to enforce the law.”<sup>49</sup> Unfortunately, with such a limited objective, the court leaves many unanswered questions.

The fact that questions about the scope and extent of police discretion were unanswered and continued to be so cannot be characterized as the fault of Mr. Blackburn. On several occasions over the years, the indefatigable Londoner attempted to persuade the courts to order the police to fully enforce the laws, and it is in those later cases that we gain additional insight into the true meaning of the initial *Blackburn* decision.<sup>50</sup> Aside from concerns about gambling, Mr. Blackburn sought strict enforcement of an anti-pornography statute as well. On two occasions, cases he filed were dismissed on the ground that judicial intervention in the enforcement practices of the police would be overreaching. The judicial panels concluded that, in the absence of complete non-enforcement of the law, judicial review of the Police Commissioner's official duties would be inappropriate. The Police Commissioner was deemed to have full power to decide the allocation of personnel and resources in combatting pornography. The panels indicated that, if enforcement problems did exist under the pornography statute, it was due to the statute itself and not the actions of the police, and that rather than to order full enforcement of those statutes, the more desirable

---

oversee investigations and police behavior.

Jefferson and Grimshaw have specific recommendations to ensure proper community controls. They suggest that public commissions of police should be set up in each police area. *See id.* at 179. The commissions would appoint the chief police officer, subject to the approval of the Home Secretary and of the police committee of the county council. *Id.* The public commissions would have the power to issue instructions to chief officers about the general task of upholding the law in their area. *Id.* The general task of upholding the law would concern those matters in which the law provided no instructions to the police. *Id.* The proper scope of decisions made by the commissions would be open to review by the courts. *Id.* Individual citizens would have the right to petition commissions to request attention to specific police matters. *Id.* at 174-76. The commissions would report regularly to Parliament for guidance, although the commissions would retain responsibility for administering any needed discipline. *Id.*

For a model of increased control over police action in America, see Williams, *Police Discretion: The Institutional Dilemma—Who Is In Charge?*, 68 IOWA L. REV. 431, 471-72 (1983), which argues that local governments are best suited to control police. The involvement of mayors and city councils arguably would result in broadened political support and legitimacy of formulated rules. However, the traditional reluctance of local officials to become involved in police decisions due to ignorance of police methods may retard acceptance of this model. *See generally* Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515, 521 (1971).

48. “People might well think that the law was not being enforced, especially when the gaming clubs were openly and flagrantly being conducted as they were in this great city.” *Blackburn I*, [1968] 1 All E.R. at 770.

49. *Id.* at 771.

50. *Blackburn IV*, *The Times* (London), Mar. 6, 1980, at 10, col. 5.

approach would be to amend the statute. Thus, the subsequent *Blackburn* cases indicate that the courts are to intervene to control arrest decisions only in "extreme cases"<sup>51</sup> and that the Police Commissioner has complete discretion to decide deployment of officers, their activities and how they should perform their duties.<sup>52</sup>

### B. *Holgate-Mohammed v. Duke*

The issue of police discretion arose more recently in *Holgate-Mohammed v. Duke*.<sup>53</sup> There the House of Lords, the highest English tribunal, considered whether a police detective had abused his discretion in making an arrest. The detective, while investigating a burglary, concluded that Ms. Holgate-Mohammed, a suspect in the case, would be more cooperative with the police if questioned while in custody. Consequently the woman was arrested, removed to police headquarters, and interrogated.<sup>54</sup> The station house interrogation failed to produce a confession and, since no additional evidence linking her with the crime was discovered, she was released. Subsequent to her release she sued the police for false imprisonment, prevailed at the trial court level, and the police appealed.

Lord Diplock, writing for the House of Lords, began his analysis of whether discretion had been abused by reviewing the Criminal Law Act of 1967 which provides: "Where a constable with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence."<sup>55</sup> Diplock found the "may arrest" language in the statute to provide broad discretion to officers making arrests, as long as reasonable

51. *Blackburn III*, [1973] 1 All E.R. at 331. Unfortunately, no definition of "extreme cases" is provided, and it appears such cases will have to be discovered on a case-by-case basis.

52. *Id.* at 338. See also *Blackburn IV*, *The Times* (London), Mar. 6, 1980, at 10, col. 8. One could argue that a greater reluctance to mandate enforcement of the obscenity laws than gambling laws is expected as there is a closer connection to freedom of speech questions when attempting to control obscenity. In fact, the opinions recognize that the law "fails to provide a satisfactory test of obscenity," *Blackburn III*, [1973] 1 All E.R. at 332, and it is "difficult to apply," *Blackburn IV*, *The Times* (London), Mar. 6, 1980, at 10, col. 7. Yet it seems counter-intuitive to give the police greater power to enforce ambiguous statutes unless there is a clear understanding that such responsibility is expected to be exercised in the criminal justice system.

53. [1984] 1 All E.R. 1054 (H.L.).

54. See *id.* at 1054.

55. *Id.* at 1056 (quoting Criminal Law Act, 1967, ch. 58). Reasonable cause in England appears to be a lesser standard than probable cause in the United States, as it is met when a constable reasonably suspects that the person has committed the offense. See G. WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 488-89 (2d ed. 1983). The English standard is much closer to the reasonable suspicion standard of *Terry v. Ohio*, 392 U.S. 1 (1968).

cause to make such an arrest existed.<sup>56</sup> He characterized this police decisionmaking as "executive discretion expressly conferred by statute on a public officer."<sup>57</sup> According to English law, executive discretion is reviewed under the principles laid down in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*<sup>58</sup> In *Wednesbury*, proprietors of a movie theater questioned a restriction on their license which excluded children under the age of fifteen years from Sunday theater performances, whether such children were "accompanied by an adult or not."<sup>59</sup> The owners of the theater sought a declaration that it was *ultra vires* for the licensing authority to impose such a restriction.<sup>60</sup> After ruling that the licensing authority had not acted improperly, the opinion undertook to describe the factors appropriate for consideration in determining whether an officer has properly exercised discretion: "Bad faith, dishonesty—those, of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration."<sup>61</sup>

Despite the lack of explicit reference to *Wednesbury* in the *Blackburn* opinions, they reinforce *Wednesbury*'s admonition against intervention in executive agency decisionmaking by stressing that as long as there is an attempt to "give effect to the intentions of Parliament,"<sup>62</sup> the actions of the police are largely unassailable. Thus, both the *Blackburn* line of cases and *Wednesbury* support the principle that the first goal of an enforcing body is to attempt to interpret honestly and fairly the meaning of criminal statutes and, as far as possible, to give them effect.<sup>63</sup>

56. This position presents an interesting contrast to some arguments made in the United States that have narrowly interpreted the language, "may arrest without warrant," as referring solely to circumstances when an arrest can be made without a warrant. Some scholars have indicated such language conveys only the expectation that an arrest will in fact be made when reasonable cause to make an arrest exists. See Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 72 n.56 (1976).

57. *Holgate-Mohammed*, [1984] 1 All E.R. at 1057.

58. [1947] 2 All E.R. 680, 681 (C.A.).

59. *Id.* at 681-82.

60. See *id.* at 680.

61. *Id.* at 682. The opinion gives an example of what type of rule would be an unreasonable exercise of discretion: A teacher cannot be dismissed because she is red-headed. *Id.* at 683.

62. *Blackburn III*, [1973] 1 All E.R. at 770.

63. *Wednesbury*, [1947] 2 All E.R. at 682. Once the principles that control the exercise of discretion are respected, the "discretion is an absolute one." *Id.* After it is resolved that an action is appropriately within the statute, it cannot be attacked unless it can be said that "no reasonable authority could ever have come to it," and only then can the courts interfere. *Id.* at 683. Still, the interpretive powers of executive agencies cover a broad range, and when review of those powers is sought, courts are circumscribed by certain guiding principles. *Wednesbury* states:

The courts must always remember, first, that the Act [the licensing statute] deals, not with a judicial act . . . ; secondly, that the conditions which, under the exercise of that executive act, may be imposed are in terms put within the

While embracing the independence theory of executive agencies, the primary focus in *Holgate-Mohammed* was directed to the application of the *Wednesbury* factors to the case at hand.<sup>64</sup> The court began its analysis by attempting to determine whether the arrest of Ms. Holgate-Mohammed was an improper and "extraneous factor" within the meaning of *Wednesbury*.<sup>65</sup> The central question was whether the detective should have "excluded from his consideration, as irrelevant to the exercise of his statutory power of arrest, that there was a greater likelihood (as he believed) that the appellant would respond truthfully to questions about her connection with . . . the burglary, if she were questioned under arrest at the police station?"<sup>66</sup>

The question was answered in the negative and the House of Lords concluded that the lower court's determination that the detective had acted unreasonably was in error. According to the House of Lords, the lawfulness of the arrest did not depend on the lower court's view of whether the arrest was reasonable, but on whether it was an exercise of discretion that was "ultra vires under [the] *Wednesbury* principles."<sup>67</sup> Thus, the House of Lords made it clear that it was appropriate to ask only whether the officer had a "good faith" belief that there was a greater likelihood that a suspect would respond truthfully at the station. The officer was entitled to take his "good faith" belief that the woman might confess into consideration when deciding whether to arrest, and such a "good faith" belief was not considered "an

discretion of the local authority without limitation; and thirdly, that the statute provides no appeal from the decision of the local authority.

*Id.* at 682. After stating those principles, the court then asked what power the courts did in fact have and concluded that courts were barred from interfering with executive agency acts unless it was shown that the authority had contravened the law. "The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law."  
*Id.*

64. An example in the United States of inappropriate factors used in law enforcement discretion is the use of an arbitrary classification which has no rational relation to the state's interest in the particular law being enforced. In *People v. Kail*, 150 Ill. App. 3d 75, 501 N.E.2d 979 (1986), *appeal denied*, 114 Ill. 2d 553, 508 N.E.2d 732, *cert. denied*, 108 S. Ct. 95 (1987), the police had a policy of strictly enforcing all laws against suspected prostitutes. The court found that the enforcement of a bells-on-bicycles ordinance primarily against suspected prostitutes violated constitutional provisions on equal protection. *See id.*

65. *Holgate-Mohammed*, [1984] 1 All E.R. at 1057. As to the exercise of the power of arrest, the *Holgate-Mohammed* panel accepted the county court judge's conclusion that the detective, in making the initial arrest, acted in good faith.

He thought that he was making . . . proper use of his power of arrest. So his exercise of that power by arresting the appellant was lawful unless it can be shown to have been "unreasonable" under *Wednesbury* principles, of which the principle that is germane to the instant case is [whether] "he [the exerciser of the discretion] must exclude from his consideration matters which are irrelevant to what he has to consider."

*Id.*

66. *Id.* at 1058-59.

67. *Id.* at 1060.

extraneous consideration.”<sup>68</sup> The result had the officer’s decision been motivated by bad faith, i.e., had he wanted to punish her by a temporary arrest irrespective of the effect of confinement on her desire to respond to interrogation, is left to conjecture. Under those circumstances, perhaps the court would decide that the arrest was inappropriate. In any event, *Holgate-Mohammed* stands for the general proposition that once there is reasonable cause<sup>69</sup> to make an arrest, a decision to arrest cannot be successfully challenged.

The analysis, however, is unsatisfactory. On close inspection there appears to be a conflict with the *Wednesbury* principle that an arrest must be made in “good faith.” It is hard to conceive that an arrest for the purpose of coercing a confession can ever be in “good faith.” “Good faith” connotes the idea that unfair tactics should not be used to coerce statements of potential criminal defendants. The court does not directly address this question but turns to the general proposition that cases, statutes and normal police practices support the use of arrest for the purpose of “using the period of detention to dispel or confirm . . . reasonable suspicion.”<sup>70</sup>

In spite of their shortcomings, *Holgate-Mohammed*, the *Blackburn* cases, and the *Wednesbury* opinion provide a substantial body of jurisprudence to guide thinking about the proper exercise of police discretion in England. The emerging theory is one of the police as an independent executive agency exercising broad powers which can be challenged only in rare and special situations. What are those rare and special situations? *R. v. Dytham*<sup>71</sup> is one case which has helped define the outer parameters of discretion. Dytham, while on duty as police constable, failed to intercede while a man was beaten to death by an angry mob. Dytham was charged with neglect of duty for willfully failing to take any steps to protect the victim. The Court of Appeal held that a constable who willfully and without reasonable excuse or justification neglected to perform a common law or statutory duty was indictable for the common law offense of misconduct in public office. While the court did not rule that the officer had a duty to arrest, he was found to have an obligation to “preserve the Queen’s Peace or to protect the person.”<sup>72</sup> Thus, while there might not be an obligation to arrest, there is an obligation to do something.<sup>73</sup> However, the *Dytham* view has been challenged in a recent case.<sup>74</sup>

---

68. *Id.* at 1055.

69. Lord Diplock stated that “[t]he county court judge by whom the appellant’s action for false imprisonment was heard at first instance and who had the advantage of hearing and seeing the witnesses held that [the detective] . . . did have reasonable cause for suspecting her to be guilty of . . . burglary.” *Id.* at 1057.

70. *Id.* at 1059.

71. [1979] 3 All E.R. 641 (C.A.).

72. *Id.* at 642.

73. This approach is consistent with an American case of nearly identical facts. In *Larue*



## C. R. v. Coxhead

In *R. v. Coxhead*,<sup>75</sup> a constable stopped a motorist observed driving on a sidewalk, cutting corners, and travelling at an excessive speed. Immediately the driver was given a breath test, which proved positive, he was placed under arrest and taken to a police station where a more precise alcohol test, required in English drunk driving cases, was to be administered.<sup>76</sup>

Upon arrival at the station, it was discovered that the driver was the son of a local police inspector. Aware that the inspector suffered from a serious heart condition and believing the son's arrest might adversely affect the inspector's poor state of health, the sergeant in charge refused to administer the test. This refusal resulted in dismissal of the case. Subsequently the sergeant was charged and convicted of conduct "tending . . . to pervert the course of public justice."<sup>77</sup>

The key issue at trial was whether the sergeant had the power to decide not to give the station house test. The prosecution presented witnesses, notably a superintendent of police who, while conceding discretion existed in "trivial" cases, asserted there was no discretion to terminate a case where there had been a positive roadside breathalyzer test. A retired police officer was presented as a rebuttal witness, and he contended that enforcement norms authorized constables to terminate drunk driving investigations. Sergeant Coxhead himself testified that he believed he had the discretion to refuse to administer the test.

An initial question for the court was who should determine whether the constable could exercise arrest discretion.<sup>78</sup> Defense counsel submitted that

---

v. Davies, 8 Cal. App. 750, 97 P. 903 (1908), the California Supreme Court affirmed a court of appeals decision which held that, since it was known that people were breaking the law and an officer was present, he had a duty to prevent the disturbance. The officer's inaction under the circumstances was held to be a willful neglect of office and made him liable for removal. Another example of this approach was seen in a case which upheld removal of a sheriff from office because he failed to investigate a minor female's complaint that she had been molested by her father, despite corroborating evidence presented by the girl's aunt and two others. See *People v. Mullin*, 197 Cal. App. 2d 479, 17 Cal. Rptr. 516 (1961).

74. *R. v. Coxhead*, 1986 R.T.R. 411 (C.A.). See *Case and Comment*, 1986 CRIM. L. REV. 251. Some parts of Section C are a further development and continued expansion of research that originally appeared in Williams, *Police in the Dock: Law or Fact*, 1986 CRIM. L. REV. 719.

75. 1986 R.T.R. 411. See *Case and Comment*, *supra* note 74.

76. 40 H. HALSBURY, HALSBURY'S LAWS OF ENGLAND ¶ 489 (4th ed. 1983).

77. *Coxhead*, 1986 R.T.R. at 416. See also *Case and Comment*, *supra* note 74, at 251.

78. Recent events in England reinforce a concern about who properly decides the scope and extent of arrest discretion. Defeat of the proposed Sunday Trading Bill brought questions of non-prosecution to the forefront. Despite calls from the press for prosecution, some enforcement agencies apparently made decisions not to prosecute those violators who sold products on Sunday. See *The Northern Echo*, Apr. 23, 1986, at 8, col. 1. Those who implement such policies of non-prosecution may not be able to avoid a *Coxhead*-type charge of intending to pervert the course of public justice. There have been similar problems with selective

it was for the court to decide as a matter of law whether the defendant had discretion to act as he did. The judge rejected that argument and ruled that although discretion could be exercised in some cases and not others, the existence and scope of discretion were questions of fact for the jury to decide. The Court of Appeal confirmed the approach of the trial court and upheld the conviction of the constable.

It is easy to agree that the sergeant was properly convicted for releasing the son of the police inspector, yet the principle by which that conviction was upheld reflects a fundamental error in deciding a law-fact question. It seems inescapable that the issue of discretion contemplated in the enforcement of criminal statutes is a question of law for the court to resolve. Factual considerations appropriate for a jury arise only after an initial determination regarding the scope and extent of discretion is resolved. What a statute means, the particular wrongdoing to which it is directed, and how it is to be enforced are peculiarly questions for the court.<sup>79</sup> Juries simply are not expert at deciding questions of statutory interpretation,<sup>80</sup> and the range of discretion contemplated within a statute. In fact, it is almost impossible to reconcile the court's decision with the language of the English Road Traffic Act, which provides: "A constable *may* arrest a person without warrant . . . if as a result of a breath test he has reasonable cause to suspect that the proportion of alcohol in that person's breath or blood exceeds the prescribed limit."<sup>81</sup> The statutory language is permissive, not mandatory, and does not require a police constable to make an arrest. To permit a jury to decide that the statute does not contemplate discretion flies in the face of the explicit language of the statute.<sup>82</sup>

Adherence to the Court of Appeal's decision in *Coxhead* will likely present substantial problems for English courts in the future, especially if a jury decides that arrest discretion exists under a statute. Conceivably, according to *Coxhead*, in such a situation an officer may act without

---

enforcement of Sunday blue laws in the United States. See *Taylor v. City of Pine Bluff*, 226 Ark. 309, 289 S.W.2d 679 (enforcement agencies can selectively enforce blue laws among similar businesses, provided that such classifications could have been made by the legislature), *cert. denied*, 352 U.S. 894 (1956). See also *Highland Sales Corp. v. Vance*, 244 Ind. 20, 186 N.E.2d 682 (1962); *City of Minneapolis v. Buschette*, 307 Minn. 60, 240 N.W.2d 500, 506 (1976) (selective enforcement of prostitution ordinance).

79. See *Brutus v. Cozens*, [1972] 2 All E.R. 1297 (H.L.). The case has been criticized for holding that "[t]he meaning of an ordinary word of the English language [in a statute] is not a question of law." *Id.* at 1299. See A. SMITH, *supra* note 13, at 8.

80. See G. WILLIAMS, *supra* note 55, at 476. The court decides controversies between parties and, where there is a relevant statute, the statute may resolve the issue. If the statute is obscure or incomplete, "the court must perfect the rule that the statute announces or fashion or adjust one in the light of how the court relates its role to the role of the legislature." See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 14 (1975).

81. Road Traffic Act, 1972, § 5; 40 H. HALSBURY, *supra* note 76, at ¶ 491 (emphasis added).

82. P. HALNAN & J. SPENCER, *ROAD TRAFFIC OFFENSES* §§ 4.53-60 (1985).

restriction. Yet while both *Holgate-Mohammed*<sup>83</sup> and *Wednesbury*<sup>84</sup> recognize that discretion is necessary in police work, they delineate boundaries within which the police are expected to operate. Even if one assumes arguendo that the *Coxhead* decision is proper, the court has left out a step. Once a jury decides discretion exists under a statute, it would seem to be necessary to make a second-level inquiry to determine whether discretion was abused in a particular situation. For example, if a constable decided to arrest only blacks or youths for a crime for which it was determined he had discretion under the applicable statute, then the jury would seem obligated to make the second-level inquiry and decide whether that discretion had been abused.<sup>85</sup>

*Coxhead* also fails to conform with previous English cases which suggest that non-prosecution is appropriate in some drunk driving cases when the amount of alcohol discovered is truly minimal. In such situations, law enforcement authorities had been encouraged to exercise discretion not to prosecute.<sup>86</sup> Another problem created by the *Coxhead* decision concerns the uniformity of jury opinion on questions of discretion.<sup>87</sup> It is difficult to conceive of a rational and consistent non-prosecution policy emerging from unrelated jury decisions. *Coxhead* presents the distinct possibility that individual constables may be subject to fluctuating views on arrest discretion.

While one can plausibly argue that the police should be accountable to the public and controlled in their exercise of discretion, the *Coxhead* approach does not appear to be the most desirable way to proceed.<sup>88</sup> The

---

83. [1984] 1 All E.R. at 1054.

84. [1947] 2 All E.R. at 682.

85. Arguably the example which the court provides of cases where no discretion exists is subject to qualification. In many cases in which murder seems to be the appropriate charge, English law enforcement officials have chosen to prosecute for manslaughter or lesser charges in spite of encouragement to bring the more serious charge whenever possible. See 40 H. HALSBURY, *supra* note 76, at ¶ 531. See also *infra* note 89.

86. *Delaroy-Hall v. Tadman*, [1969] 2 Q.B. 208, 215-16 (The court stated that when a driver's alcohol level was only minimally in excess of the statutory limit, it would be a good reason for not prosecuting the offender.). See also *Nattrass v. Gibson*, 1968 C.L.Y. 3464 (there is an expectation of discretion in law enforcement), cited in G. WILLIAMS, *supra* note 55, at 619.

87. Another conceivable result of the *Coxhead* decision may be its signaling the end of the use of police cautions, which are similar to warnings given by the police in lieu of custodial arrest. For a discussion on the use of police caution, see D. STEER, *POLICE CAUTIONS: A STUDY IN THE EXERCISE OF POLICE DISCRETION* (1970). Cautioning has never been widely used by the police, but it has been a significant law enforcement option and has been strongly encouraged for important public policy reasons. One scholar recently made a compelling argument that there should be a greater use of cautions because of differential arrest practices based largely on socioeconomic considerations. See Sanders, *supra* note 36, at 83-84. If police may have to answer for a decision to caution as opposed to a decision to prosecute, they are quite likely to decide to arrest rather than caution. Thus, under *Coxhead*, police "propensity to prosecute" is likely to become greater, not lesser.

88. For one model to enhance police accountability in the arrest decision, see G. WILLIAMS, *THE LAW AND POLITICS OF POLICE DISCRETION* 113-41 (1984).

Court of Appeal's lack of understanding of the importance of questions about discretion is evident in its discussion of examples used to support its decision. The court cites examples of "trivial" cases where discretion not to arrest exists in cases such as "riding of a bicycle without lights, failing to switch on car sidelights when leaving a car park at night, failure to sign a driving licence, or to have the road fund licence on the windscreen . . . . [On the other hand,] no discretion would exist at the other end of the scale, for example, in murder."<sup>89</sup>

In contrast, *Blackburn I*, while finding that discretion was abused in the enforcement of the gambling laws, did recognize that discretion existed in the charging of sex offenses and pornography. In addition to narrowing the range of discretion discussed in the *Blackburn* cases, arguably the Court of Appeal decision also conflicts with another Court of Appeal case decided five years earlier which stated that "police are not bound in all circumstances to act every time there is a breach of the law."<sup>90</sup>

To avoid the problems outlined, perhaps the Court of Appeal should have required that questions of arrest discretion be subjected to a two-level analysis. First, the court, not the jury, must decide whether discretion exists

89. *Coxhead*, 1986 R.T.R. at 411. See also *Case and Comment, supra* note 74, at 251. For a counterpoint on the Court of Appeals conclusion regarding murder, see *R. v. Seymour*, [1983] 2 App. Cas. 493 (H.L.). In *Seymour* the facts clearly warranted a charge of murder and would seem to allow no discretion, yet the defendant was charged with manslaughter. *Seymour* had been living with a Mrs. Burrows and, following a quarrel, had a collision with her car. As Mrs. Burrows got out of the car and walked toward defendant's truck, he drove his truck against her car so violently that it moved 10 to 20 feet. Mrs. Burrows was crushed between the two vehicles and died one week later. *Id.* at 501-02.

One might argue that vehicular homicide presents issues which are different than the "normal" murder case. That may be correct, but the non-prosecution decision is a practical judgment clearly outside English murder statutes. It is arguable that this approach has been confirmed by the House of Lords in *R. v. Moloney*, [1985] 1 All E.R. 1025 (H.L.). In *Moloney*, the House of Lords overturned Moloney's murder conviction and substituted a conviction of manslaughter. *Id.* at 1026 (L. Hailsham). Moloney had fired a shotgun at his stepfather's head at a range of six feet, killing him instantly. The two men had had a very good relationship but had been drinking heavily when the victim challenged Moloney to see who could load and draw a shotgun faster. *Id.* at 1027-29 (L. Bridge). However, it is clear in *Moloney* that the House of Lords went to particular pains to distinguish a situation in which a motorist who, while "overtaking in a narrow country lane in the face of an oncoming cyclist, recognises and takes not only 'some risk' but a serious risk of hitting the cyclist" does not have the requisite intention for murder if the cyclist is killed. *Id.* at 1038 (L. Bridge). In *Moloney*, the House of Lords ruled that there are two requirements to prove the requisite intent for a murder conviction: one, that death was the natural consequence of Moloney's voluntary act and, two, that Moloney foresaw death as a natural consequence of his act. Deciding that Moloney never considered death as a consequence, his conviction of murder was overturned. *Id.* at 1039 (L. Bridge). It seems this position is not tenable if the question is whether the conduct was intentional. *Moloney* reflects a policy decision in which the House of Lords made it clear that there are some circumstances where they expect discretion to be exercised not to prosecute for murder. In essence, it is another example of "statutory" interpretation by the House of Lords.

90. *Ex parte Central Electricity Generating Board*, [1981] 3 All E.R. 826, 840 (C.A.). In this case, Lord Denning makes it clear that arrest decisions are policy decisions in which the court should not interfere. *Id.* at 833.

under the common law or statute. This requires the trial judge to review the statute or common law and analyze its scope and purpose as well as the enforcement mode expected. If the judge finds discretion is not to be exercised under the common law or statute (which must be a rare decision in light of the English principle of "constabulary independence"<sup>91</sup>), only then is the jury called upon to perform its role as fact-finder and to determine whether or not there was an intention to violate the statute.

If the judge concludes that the exercise of discretion is appropriate under the statute, then the judge does not necessarily dismiss the case or "turn a blind eye."<sup>92</sup> Instead, the judge analyzes how law enforcement agencies have interpreted the statute and attempts to discover what kind of policy direction has been given to the individual officers who are called upon to make law enforcement decisions. In the *Coxhead* situation it would seem appropriate for the court to conclude that discretion did exist under the statute, but that the local department had a policy of fully enforcing the law or providing clear guidance on the decisionmaking process. The presentation of tangible evidence such as manuals, training bulletins, and other information which contain policy directives could be presented. The jury issue under the *Coxhead* facts would be relatively simple: whether the facts show that the sergeant intentionally violated departmental policy in not enforcing the law. If the jury finds that he did, then he is properly convicted.

If the chief superintendent is unable to present manuals, training materials, or other information which show a full-enforcement policy with regard to drunk driving offenses, a case against the sergeant might still be made. The chief superintendent would be in a position to speak of the general practices of the department on drunk driving cases which had been conveyed to constables, and the jury could then determine whether the sergeant had intentionally abused his discretion. The judge should properly direct the jury to convict only if it finds the activity of the police sergeant is sufficient to amount to a clear abuse of discretion. The prosecution would have to prove the intentional abuse of discretion beyond a reasonable doubt. This approach does not seem an unduly onerous burden. The courts have indicated time and again that they know how to instruct a jury to resolve allegations that a constable is acting beyond the scope of his authority.<sup>93</sup>

---

91. "Constabulary independence" is a term which characterizes the obligation of the constabulary office to uphold the law and the legal powers which the office bestows. See T. JEFFERSON & R. GRIMSHAW, *supra* note 36, at 14-15.

92. Williams, *Turning a Blind Eye*, 1954 CRIM. L. REV. 271.

93. See, e.g., *Donnelly v. Jackman*, [1970] 1 All E.R. 987, 989 (Q.B.) (police officer's conduct of tapping appellant on shoulder in order to question him was within the course of the officer's duties); *Lindley v. Rutter*, [1981] 1 Q.B. 128, 135-36 (forcible removal of defendant's brassiere was beyond scope of duties of police constable unless search was thought necessary for any lawful purpose or was necessary for the defendant's protection); *Beard v. Wood*, *The Times* (London), Feb. 6, 1980, at 23, col. 1 (Q.B.) (spot checks by police are within scope of officer's duties if not done capriciously).

Juries likewise have shown that they are able to recognize clear abuses of discretion by individual constables. The approach does, however, require police agencies to be open and honest regarding their enforcement policies.

In all likelihood, the law-fact error of *Coxhead* will be corrected when the court next has an opportunity to do so; however, there is cause for concern about *Coxhead's* development of the circumstances when discretion is expected to be exercised. If the *Coxhead* view that discretion is not expected to be exercised in drunk driving cases prevails despite the permissive language of the drunk driving statute, the issue likely will continue to be litigated. The major difficulty with *Coxhead*, however, is determining whether the examples of discretion discussed in the opinion are to be viewed as narrowing the broad range of discretion supported in *Holgate-Mohammed* and the *Blackburn* cases. In all likelihood, the House of Lords' broad approach to discretion in *Holgate-Mohammed* ultimately will prevail, but *Coxhead* may be an obstacle.

If *Coxhead* moves away from center stage, then we can conclude a number of things about police discretion in England. First, the cases support the argument that police officials have the power and responsibility to develop general guidelines for constables to follow while exercising the broad discretion they do and must have in enforcing the law. Second, there are specific principles by which to review the exercise of arrest discretion. When determining questions of police discretion, the courts generally look to applicable statutes to determine if discretion is permissible. Certain factors may be considered when deciding whether there has been a contravention of the law in discretionary matters.<sup>94</sup> These factors include unreasonableness, disregard of public policy, and various other extraneous circumstances.<sup>95</sup> Once the court determines discretion exists, the jury decides whether that discretion was abused. Even though the jury ultimately decides the issue of abuse of discretion, the courts have voiced concerns about appropriate factors for consideration by the jury. Third, a blanket policy of non-enforcement of a law is clearly impermissible.<sup>96</sup> Fourth, abuse of discretion can occur when the police decide not to act in particular situations. Constables abuse their discretion when they neglect to perform a duty without just cause.<sup>97</sup> There is a duty to act when confronted with certain situations, and police officers' motives are generally considered irrelevant in these circumstances.<sup>98</sup> While English judicial theory on the exercise of police discretion is limited and includes some gaps in logic, it clearly is more advanced than that developed by courts in the United States. Thus, United

---

94. See *Holgate-Mohammed*, [1984] 1 All E.R. 1054; *Wednesbury*, [1947] 2 All E.R. 680.

95. See *Wednesbury*, [1947] 2 All E.R. at 682.

96. See *Blackburn I*, [1968] 1 All E.R. at 771.

97. *Dytham*, [1979] 3 All E.R. 641 (C.A.). See *supra* text accompanying notes 71-74.

98. *Dytham*, [1979] 3 All E.R. at 641. See *supra* text accompanying notes 71-74.

States courts, when faced with police discretion issues, may find it fruitful to turn to English cases for general guidance. *Coxhead*, for example, in spite of the confusing nature of the opinion, raises issues that seem especially fruitful for comparison. Deficiencies were discovered in the Court of Appeal's approach in *Coxhead*. One might ask, "Would American courts do any better"?

## II. ABUSE OF POLICE DISCRETION IN THE UNITED STATES

American statutes which provide some guidance on police discretion generally fall into two basic categories. First, there are statutes which delineate the general structure and operation of police agencies, much like enabling provisions, and second, there are substantive criminal statutes which sometimes include language concerning enforcement. The general structure statutes often include language which requires police officers to "keep the peace" or "arrest all offenders."<sup>99</sup> While such statutes appear to permit no enforcement discretion, a close analysis of them and the context in which they were written reveals that they do not mandate full enforcement. There is strong support for the proposition that such statutes can at best be considered general guidelines, not specific commands, and that officers are to exercise their judgment in enforcing the criminal laws.<sup>100</sup> Operational statutes with mandatory enforcement language are presently in decline and are being replaced by provisions much like those found in the following Colorado statute:

A peace officer *may* arrest a person when:

- a) He has a warrant commanding that such person be arrested; or
- b) Any crime has been or is being committed by such person in his presence; or
- c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.<sup>101</sup>

Other statutes which detail substantive criminal violations sometimes include language regarding enforcement. For example, in recent years there has been enactment of statutes limiting police discretion in the area of spouse

---

99. Williams, *Police Rulemaking Revisited: Some New Thoughts on An Old Problem*, 47 LAW & CONTEMP. PROBS. 123, 139-43 (1984).

100. *Id.* Also see *Everton v. Willard*, 426 So. 2d 996 (Fla. Dist. Ct. App. 1983) (full-enforcement statute does not create a mandatory duty to arrest), *aff'd*, 468 So. 2d 936 (Fla. 1985). See also *Hildenbrand v. Cox*, 369 N.W.2d 411 (Iowa 1985) (no absolute duty upon policeman to detect intoxicated motorist and take him into custody).

101. COLO. REV. STAT. § 16-3-102 (1986) (emphasis added).

abuse.<sup>102</sup> However, substantive criminal statutes which speak directly to enforcement issues are a rarity.

If we consider drunk driving offenses like that in the *Coxhead* case, we find that despite great interest concerning drunk driving, such statutes in the United States rarely mandate arrest.<sup>103</sup> Even though many of those statutes provide for mandatory jail sentences upon conviction,<sup>104</sup> and require specific procedures for the police to follow *after an arrest for drunk driving*,<sup>105</sup> legislatures have not seen fit to mandate arrest when probable cause exists for an arrest. Thus, under the wide-ranging arrest discretion available to American police officers,<sup>106</sup> a claim that there has been an abuse of criminal law enforcement discretion like that in *Coxhead* might easily arise in the United States.

Even though drunk driving statutes do not mandate arrest, no one would argue that officers possess total and absolute discretion to decide when to enforce such statutes. There are parameters within which officers must operate. However, police agencies which seek to penalize criminally officers for perceived abuse of discretion might find considerable difficulty in deciding when those parameters have been breached and a failure to arrest constitutes criminal misconduct.<sup>107</sup>

---

102. See, e.g., IOWA CODE § 236.12(2) (1989) (“b. A peace officer shall, with or without a warrant, arrest a person . . . if, upon investigation, including a reasonable inquiry of the alleged victim and other witnesses, if any, the officer has probable cause to believe that a domestic abuse assault has been committed which resulted in the alleged victim’s suffering a bodily injury.”).

103. Section 28.35.030 of the Alaskan Code (operating a vehicle while intoxicated) simply defines the crime as a misdemeanor and does not impose a mandatory duty to arrest upon an officer who stops a motorist suspected of committing the offense. See ALASKA STAT. § 28.35.030 (1984).

104. Iowa does not mandate arrest upon observing violation, but does in fact provide for a mandatory two-day jail sentence for conviction of a first offense. See IOWA CODE ANN. § 321J.2(2)(a) (West Supp. 1988).

105. See, e.g., WIS. STAT. ANN. § 345.24 (West Supp. 1988):

345.24. Officer’s action after arrest for driving under influence of intoxicant.

A person arrested under s. 346.63(1) or an ordinance in conformity therewith or s. 346.63 . . . (2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, may not be released until 12 hours have elapsed from the time of his or her arrest or unless a chemical test administered under s. 343.305 . . . shows that there is 0.05% or less by weight of alcohol in the person’s blood or 0.05 grams or less of alcohol in 210 liters of the person’s breath, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest.

106. See, e.g., Pepinsky, *Better Living Through Police Discretion*, 47 LAW & CONTEMP. PROBS. 249 (1984).

107. Traditionally criminal misconduct has been defined as a misuse of authority motivated by a desire for personal gain. Such personal gain need not be limited to monetary gain and may be in the form of status, influence, and prestige. The definition of misconduct has been confounded by including activities where there is an abuse of authority even though there is no evidence of personal gain. H. GOLDSTEIN, *POLICING A FREE SOCIETY* 188-89 (1977).



Historically, official failure to act has come within the ambit of nonfeasance<sup>108</sup> and was indictable at common law.<sup>109</sup> Most states have codified this common law concept. In some jurisdictions, misconduct in office simply requires an element of willfull misbehavior.<sup>110</sup> Other jurisdictions require an intent "to obtain a benefit . . . or to injure or to deprive another of a benefit."<sup>111</sup> Still others appear to be hybrids, with both the "intent to obtain a benefit" language and a knowing failure to exercise a duty imposed by law.<sup>112</sup>

108. R. PERKINS & R. BOYCE, *CRIMINAL LAW* 546 (3d ed. 1982).

109. *See, e.g.*, *State v. Winne*, 12 N.J. 152, 96 A.2d 63 (1953); *Commonwealth v. Bellis*, 508 Pa. 122, 494 A.2d 1072 (1985).

110. *E.g.*, the North Carolina statute reads as follows: "shall willfully omit, neglect or refuse to discharge any of the duties of his office." N.C. GEN. STAT. § 14-230 (1986).

111. *E.g.*, ALASKA STAT. § 11.56.850 (1983):

Official misconduct.

(a) A public servant commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person of a benefit, the public servant

(1) performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that that act is unauthorized; or

(2) knowingly refrains from performing a duty which is imposed upon the public servant by law or is clearly inherent in the nature of the public servant's office.

(b) Second degree official misconduct is a class A misdemeanor.

*See also, e.g.*, N.J. REV. STAT. § 2C:30-2 (1979):

A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:

a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or

b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a crime of the second degree. If the benefit obtained or sought to be obtained, or of which another is deprived or sought to be deprived, is of a value of \$200.00 or less, the offense of official misconduct is a crime of the third degree.

112. *See, e.g.*, COLO. REV. STAT. § 18-8-405 (1986):

(1) A public servant commits second degree official misconduct if he knowingly, arbitrarily, and capriciously:

(a) Refrains from performing a duty imposed upon him by law; or

(b) Violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Second degree official misconduct is a class 1 petty offense.

*See also, e.g.*, WIS. STAT. ANN. § 946.12 (West 1982):

Any public officer or public employe who does any of the following is guilty of a Class E felony:

(1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of his office or employment within the time or in the manner required by law; or

(2) In his capacity as such officer or employe, does an act which he knows is in excess of his lawful authority or which he knows he is forbidden by law to do

Special problems arise when attempting to apply misconduct statutes to situations where the claim is made that an officer has failed to make an arrest in an appropriate situation. First, it is necessary to determine whether the failure to arrest is the violation of a mandatory or discretionary duty, as "when the duty is mandatory the omission itself is criminal, whereas when discretion is lodged in the officer it is necessary to show that the failure to act was corrupt."<sup>113</sup> As suggested above, drunk driving statutes rarely mandate arrest. Consequently, to convict for failure to arrest it is necessary to show "something more than the intentional and deliberate forbearance to do a discretionary act."<sup>114</sup> Unfortunately, while many states have recognized the need to find corruption, they have focused almost exclusively on that element, largely eliminating discussion of the appropriate range of discretion under a statute, thus providing no guidance for future cases.

An example of this approach is evident in *State v. Lombardi*,<sup>115</sup> where the Wisconsin Supreme Court upheld the criminal conviction of a sheriff for failure to perform the duties of his office. The State alleged that the sheriff had permitted a nightclub to operate in violation of gambling, prostitution, and liquor laws, and that on approximately five occasions the sheriff caused the dismissal of drunk driving arrests without referring them to the local district attorney for prosecution. The Wisconsin court, much like the Court of Appeal in *Coxhead*, held without comment or specific interpretation of the drunk driving statute that once an arrest was made, the sheriff had a duty to refer such cases to the prosecutor, and that failure to do so constituted an abuse of discretion. Again like *Coxhead*, while the result was intuitively correct, the implications of the principle established were not fully considered. For example, under the rule of the case, once a deputy sheriff makes a decision to charge a motorist with drunk driving, that decision is not reviewable by the sheriff. In other words, a deputy would have more power and authority than a popularly elected and politically accountable sheriff. Surely, it could not have been the intent of the

---

in his official capacity; or

(3) Whether by the act of commission or omission, in his capacity as such officer or employe exercises a discretionary power in a manner inconsistent with the duties of his office or employment or the rights of others and with intent to obtain a dishonest advantage for himself or another; or

(4) In his capacity as such officer or employe, makes an entry in an account or record book or return, certificate, report or statement which in a material respect he intentionally falsifies; or

(5) Under color of his office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law.

113. R. PERKINS & R. BOYCE, *supra* note 108, at 546.

114. *Id.* at 547.

115. 8 Wis. 2d 421, 99 N.W.2d 829 (Wis. 1959).

court to bar a law enforcement executive from developing and enforcing departmental rules on law enforcement. In addition to requiring that all arrests be referred for prosecution, the court found the sheriff had abused his discretion by creation of an informal rule forbidding deputies from consulting with the prosecutor on any law enforcement matters without the sheriff's prior approval. Thus, not only does it appear that the individual with overall responsibility for the operation of a law enforcement agency has less authority than his minions, the Wisconsin Supreme Court limited the power of the sheriff to deal as an equal with the district attorney. Such a holding certainly violates the historical and political independence of the sheriff from the prosecutor.<sup>116</sup>

The squalid facts of *Lombardi* support the court's attempt to punish a corrupt public official, but the opinion creates considerable uneasiness. The court's failure to discuss the scope of discretion provided in criminal statutes and the expected level of enforcement makes it difficult to find principles and standards for guidance in later cases. It seems that only when the issue of corruption is removed is it possible for courts to focus clearly on the range of discretion to be exercised by the police. In *State v. Dekker*<sup>117</sup> another Wisconsin court, without being blinded by the issue of corruption, was able to discuss a departmental enforcement rule and determine that it required the exercise of some individual judgment. Furthermore, the *Dekker* court indicated that if there were a desire to successfully prosecute misconduct under departmental rules, such rules must define with sufficient certainty the time, mode, or occasion for the duty "so as to eliminate any judgment or discretion from being exercised by police officers."<sup>118</sup>

It is clear that the deference given to the judgment of Officer Dekker was not accorded to Sheriff Lombardi. One ultimately comes to the same troubling conclusion that emerged from *Coxhead*. Is the determination as to whether discretion exists in a particular situation motivated solely by a desire to punish what most would believe were improper acts, or are there underlying principles that indicate what appropriately might be considered within the ambit of discretion? Unfortunately, no clear principles are found when cases from other jurisdictions are reviewed.<sup>119</sup>

---

116. The district attorney's office rarely seems concerned with supervising the exercise of discretion within a police department. One reason may be the tradition against the involvement of prosecutors in police arrest policies. Possibly a more important reason, however, is that the prosecutor has the power to overrule arrest decisions, should it be considered necessary to do so. This in itself serves as a check on the police. Another factor to consider is that by drawing attention to police discretion, the prosecutor may find attention also given to the discretion of his office. See Williams, *supra* note 47, at 457-59.

117. 112 Wis. 2d 304, 332 N.W.2d 816 (Wis. Ct. App. 1983).

118. *Id.* at 312, 332 N.W.2d at 820.

119. It seems apparent that if allegations of police corruption are present, then courts are willing to intervene and impose standards of conduct. In matters involving actions more

In addition to the lack of principles by which to determine if failure to arrest is punishable misconduct in a *Coxhead*-type claim, there is a related problem of attempting to prosecute misconduct when there is no tangible

---

appropriately defined as misconduct short of corruption, there is a distinctly different treatment. The courts are more inclined to allow the administrative findings to be upheld without further intervention. In *State v. Duble*, 172 N.J. Super. 72, 410 A.2d 1173 (1979), a police officer was criminally charged with neglect of duty. The court decided that the duty was imposed by administrative and not criminal law. Therefore, because the infraction concerned only internal operations, the appropriate remedy would be departmental discipline, not judicial sanction. The duty must be judicially or statutorily imposed before its violation can result in the use of administrative enactments to procure criminal convictions against officials.

Although under some statutes personal gain is not required to find misconduct or corruption in office, courts in general have been reluctant to punish unless that element is present. The personal gain need not be limited to the accused official. New York, for example, has held that violations occur when the accused acts to benefit third parties. See *People v. Thompson*, 58 Misc. 2d 511, 296 N.Y.S.2d 166 (N.Y. Sup. Ct. 1969). *People v. Heckt*, 62 Misc. 2d 287, 306 N.Y.S.2d 320 (N.Y. Sup. Ct. 1969), found that the required intent to benefit was met where the defendants failed to arrest the operators and participants of an illegal card game. The court determined that the intent to benefit was made by the defendants' participation in the games and, consequently, their hopes of winning.

In *People v. Mackell*, 47 A.D.2d 209, 366 N.Y.S.2d 173 (1975), *aff'd*, 40 N.Y.2d 59, 351 N.E.2d 684, 386 N.Y.S.2d 37 (1976), the court held that neglect or omission of official duty could be a crime under limited circumstances where the legislature specifically declared them so. The court was concerned with interfering in the discretionary powers of law enforcement agencies. The court therefore required that the responsibilities of duty be precisely defined before a criminal conviction would be warranted. Illinois, on the other hand, is an example of a state that has taken the position that a violation of discretion need not involve an element of gain. At least one Illinois court has stated that a police officer has no discretion to release anyone against whom there are grounds for a criminal complaint. See *People v. Thoms*, 50 Ill. App. 3d 398, 403, 365 N.E.2d 717, 720 (1977) ("it is clear that a police officer has no discretion to release anyone against whom there are grounds for a criminal complaint, as here"). This latter approach has not been followed by other Illinois courts. See *People v. Steinman*, 57 Ill. App. 3d 887, 897, 373 N.E.2d 757, 764 (1978). This case suggests that to be criminally liable, a police officer must be acting in an official capacity regardless of whether or not the officer was actually on duty. See *id.* (citing *People v. Jordan*, 15 Ill. App. 3d 672, 304 N.E.2d 713 (1973)). The court in *Steinman* defined official capacity to be the use of the office to extract unwarranted consideration or benefits. *Id.* at 897-98, 373 N.E.2d at 764-65 (citing *People v. Bouse*, 46 Ill. App. 3d 465, 360 N.E.2d 1340 (1977)). Other Illinois courts generally have held that corruption occurs when a public employee exploits his position to the detriment of the public good in accordance with the relevant Illinois statute, *e.g.*, ILL. ANN. STAT. ch. 38, para. 33-3 (Smith-Hurd 1988), which reads as follows:

**Official Misconduct.**

A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

- (a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or
- (b) Knowingly performs an act which he knows he is forbidden by law to perform; or
- (c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
- (d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition, he commits a class 3 felony.

personal gain by the errant officer. *Coxhead*, it will be noted, involved no such allegation. In many American jurisdictions, *Coxhead's* conduct would be culpable only if the goodwill gained could be translated into a professional advantage, such as promotion. If, for example, it could be shown that the sergeant was given preferential treatment in promotion opportunities as a result of not arresting the drunk driver, then it would be possible to prosecute under an American public misconduct statute. The main difficulty with successfully prosecuting a case like *Coxhead* would be developing sufficient admissible evidence. Because promotions are the result of administrative processes composed of many factors, it would be difficult to prove one individual's actions were determinative in a promotion. Therefore, in America it is far more likely that successful prosecution would occur only when there is direct and tangible evidence of some gain or benefit.

While important, the questions about "gain" detract from what must be the fundamental issues in *Coxhead*-type cases. Does discretion exist under the statute? Who decides whether it exists? What is the nature of such discretion? *People v. Garska*<sup>120</sup> is a good illustration of a case which attempts to address the first two issues. The evidence established that Garska, the village president, the local sheriff, and the attorney general had conspired to allow illegal gambling by some citizens in return for monetary gain. At the conclusion of the trial, the jury was instructed that it was the president's duty, under the village charter, to oversee the enforcement of the gambling ordinance. On appeal, the village president claimed that, since the charter was vague and ambiguous, the jury should have been allowed to determine the meaning of the charter. The Michigan Court of Appeals held, *inter alia*, that "interpretation of [the village charter] was a question of law for the court and not a question to be determined by the jury [merely] on opinion testimony."<sup>121</sup> Other American courts called upon to deal with allegations that an official has abused discretionary powers appear to have followed the approach in *Garska*.<sup>122</sup> In *State v. Hanly*,<sup>123</sup> a conviction for official misconduct was appealed based on a claim that a trial judge's instructions preempted what should have been the jury's decision.<sup>124</sup> The

---

120. 303 Mich. 313, 6 N.W.2d 527 (1942).

121. *Id.* at 322, 6 N.W.2d at 530-31.

122. *See, e.g., State v. Anderson*, 370 N.W.2d 653 (Minn. App. 1985) (addressing the "question of law" issue); *State v. Begyn*, 34 N.J. 35, 167 A.2d 161 (1961).

123. 127 N.J. Super. 436, 317 A.2d 746 (App. Div.), *cert. denied*, 65 N.J. 578, 325 A.2d 711 (1974).

124. The trial judge had explained to the jury that the unauthorized use of county funds by a public official for the employment of household help at his private home was unlawful, and that if the jury found that the official did these things as a matter of fact, they must find him guilty. Although this case does not involve a police officer, an assumption can be made that the same method would be followed in the prosecution of an officer for misconduct in office. *See, e.g., State v. Gleitsmann*, 62 N.J. Super. 15, 161 A.2d 747 (App. Div.) (upholding the conviction of a police officer for the unauthorized use of a municipal telephone and a police car), *cert. denied*, 33 N.J. 386, 164 A.2d 849 (1960).

appellate court held that the trial judge had appropriately defined, as a matter of law, the duties of the public official and what conduct was considered beyond the parameters of the statute.

While courts have generally recognized that the question whether discretion exists under a statute is an issue of law, properly tried by the court, the matter does not end there. There is still the problem of deciding the appropriate range of discretion. This problem was evident in the recent case of *State v. Hess*,<sup>125</sup> where South Carolina turned to New Jersey decisions for guidance.<sup>126</sup> Using New Jersey case law, the South Carolina Supreme Court determined that police had a duty of accountability imposed by the common law, even in confidential investigations.<sup>127</sup> The purpose of this duty was to provide the public an opportunity to evaluate police work.<sup>128</sup> In upholding the officer's conviction, the South Carolina Supreme Court held that "even officials operating in secrecy must be at the same time and in some manner accountable."<sup>129</sup> More importantly, for our purposes, the court indicated that it was imperative for the chief to establish ways by which the "public could openly, frankly or fairly judge him or his work."<sup>130</sup> Whether or not the intent of this language was to require the police to develop internal guidelines which could be used when determining whether particular investigative practices are improper is unclear. But such an approach would be very helpful in eliminating the *Coxhead*-type problems where jurors decide the appropriate range of discretion in criminal statutes.

If there is a desire to punish officers who abuse their discretion, then the best approach might be either to draft criminal statutes which permit no discretion or to develop guidelines for the exercise of law enforcement discretion and punish such violations under clearly drafted obstruction of justice statutes. Unfortunately, such clearly drafted statutes do not presently exist.<sup>131</sup> Furthermore, according to the drafters of the Model Penal Code, those that do exist "seem to impose criminal sanctions for . . . innumerable violations of regulations that can be enforced adequately through dismissal,

---

125. 279 S.C. 14, 19, 301 S.E.2d 547, 550, *cert. denied*, 464 U.S. 995 (1983).

126. *Id.* Hess was the former Chief of the Columbia Police Department and initiated a series of meetings with Hendrix, a reputed organized crime figure. In exchange for money, Hess revealed confidential information obtained through his position. Hess was charged with "corruptly" informing Hendrix, and Hess insisted that what appeared to be misconduct was in fact an exercise of his discretionary power to investigate criminal activity.

127. *Id.* at 20, 301 S.E.2d at 550 (quoting *Begyn*, 34 N.J. at 43, 48, 167 A.2d at 165, 168; *State v. Furey*, 128 N.J. Super. 12, 318 A.2d 783 (1974)).

128. *Id.* at 20, 301 S.E.2d at 551 (quoting *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 475, 86 A.2d 201, 222, *cert. denied*, 344 U.S. 838 (1952)).

129. *Id.*

130. *Id.* at 21, 301 S.E.2d at 551.

131. For one example of an ambiguous statute cited by the Model Penal Code drafters, see MODEL PENAL CODE § 242.1 comment 4 (1980). See also LA. REV. STAT. ANN. § 14:134 (West 1986).

forfeiture of pay, denial of advancement, or other non-penal sanctions."<sup>132</sup> It is not surprising that, when discussing obstructing government penalties, the Model Penal Code drafters opted not to offer suggestions for statutory provisions to deal with the type of factual situation under discussion here as "broad definitions of the kinds of official misconduct warranting criminal sanctions will tend to become enmeshed with highly detailed legislative regulation of governmental affairs."<sup>133</sup> In a prescient view, the Code drafters warn against "casual imposition of serious penalties for relatively minor violations of official duty evidencing neither evil design nor intentional disregard of the interests of government."<sup>134</sup> In spite of that admonition, unusual applications of statutory provisions have been attempted in efforts to deal with police corruption. One unique example has been the use of the RICO statute.<sup>135</sup> RICO has traditionally been used to combat organized crime, although the courts have been willing to extend RICO to government agencies,<sup>136</sup> and several courts have found police departments to be "enterprises" within the meaning of RICO.<sup>137</sup> To be subject to prosecution for an abuse of arrest discretion under a RICO statute, the accused policeman, in addition to meeting the enterprise requirement, would have to commit at least two specified acts chargeable under state law and punishable by imprisonment for more than a year.<sup>138</sup>

*United States v. Burnsed*<sup>139</sup> is an example of the usage of RICO in a police misconduct case. In *Burnsed* an essential element of the RICO prosecution was that Burnsed violated a state law involving bribery punishable by imprisonment for more than one year. The allegations were that Burnsed and other police officers accepted money and the services of

132. MODEL PENAL CODE § 242.1 comment 4 (1980).

133. *Id.*

134. *Id.*

135. The Racketeer Influenced and Corrupt Organizations Statute (RICO) was passed by Congress as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (1983)).

136. See *United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977) (recognizing the Pennsylvania Bureau of Cigarette and Beverage Taxes as an enterprise under RICO), *cert. denied*, 434 U.S. 1072 (1978); *United States v. Barber*, 476 F. Supp. 182, 188, 190 (S.D. W. Va. 1979) (the West Virginia Alcohol Beverage Control Commission is a legal entity and comes within the meaning of "enterprise" under the RICO statute).

137. See *United States v. Girzywacz*, 603 F.2d 682, 685-86 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977) (the statutory language of RICO is broad and makes no distinction between the public and private sectors, and therefore the Macon, Georgia Police Department can constitute an enterprise under RICO), *cert. denied*, 435 U.S. 904 (1978).

138. See 18 U.S.C.A. § 1961 (West 1986). Relevant portions of section 1961 read as follows: "(1) 'Racketeering activity' means (A) any act or threat involving . . . bribery, extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year . . . (5) 'pattern of racketeering activity' requires at least two acts of racketeering activity . . ." *Id.*

139. 566 F.2d 882 (4th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978).

prostitutes as payment for permitting illegal gambling clubs to operate. The state law allegedly violated was Section 16-212 of the Code of Laws of South Carolina,<sup>140</sup> which punished by not more than ten years imprisonment any executive, judicial, or legislative officer who corruptly accepted a gratuity for influencing his official duties. Burnsed denied being an executive officer under Section 16-212, and argued that his only violation was of Section 16-214,<sup>141</sup> which imposed a fine of not more than \$300 on sheriffs and other officers for accepting bribes. Properly placing Burnsed under the latter charge would have precluded a RICO conviction since the possible penalty was less than a year in prison. The district court rejected Burnsed's argument and concluded that police officers were executive officers within the meaning of Section 16-212. The court reasoned that because Section 16-212 included all three branches of government, by logical necessity police officers were included,<sup>142</sup> thus facilitating the use of RICO to prosecute local police misconduct.

While *Burnsed* is an example of how RICO can be applied to prosecution of a local police officer, such prosecutions are unusual. Under RICO Guidelines, a prosecution is not to be undertaken if an essential portion of the criminal charge of racketeering can be proved through other methods.

---

140. S.C. CODE ANN. § 16-212 (Law. Co-op. 1962) (current version at S.C. CODE ANN. § 16-9-220 (Law. Co-op. 1985)):

Every executive, legislative, or judicial officer who corruptly accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to such an officer under an agreement or with an understanding that his vote, opinion, or judgment shall be given in any particular manner or on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that, in such capacity, he shall make any particular nomination or appointment shall forfeit his office, be forever disqualified to hold any public office, trust or appointment under the laws of this State and be punished by imprisonment in the State Penitentiary at hard labor not exceeding ten years or by fine not exceeding five thousand dollars and imprisonment in jail not exceeding two years.

141. S.C. CODE ANN. § 16-214 (Law. Co-op. 1962) (current version at S.C. CODE ANN. § 16-9-240 (Law. Co-op. 1985)):

If a sheriff, deputy sheriff, constable or other officer authorized to serve legal process receives from the defendant or any other person any money or other valuable thing as a consideration, reward or inducement for omitting or delaying to arrest a defendant or to carry him before a magistrate, for delaying to take a person to prison, for postponing the sale of property under an execution or for omitting or delaying to perform any duty pertaining to his office shall be punished by a fine not exceeding three hundred dollars.

142. The court of appeals found a requirement of acting "corruptly" under § 16-212. The court cited *State v. Meehan*, 160 S.C. 111, 115, 158 S.E. 151, 152-53 (1930), for a definition of corruption which was defined as giving something of value in exchange for influencing the officer in the discharge of official duties. The court had no difficulty in determining that Burnsed's actions were indeed corrupt and that he was properly prosecuted under § 16-212. The requirement of corruption was to be found in § 16-212, not in § 16-214. The court reasoned that this difference demonstrated a legislative awareness of different levels of culpability. *Burnsed*, 566 F.2d at 884.



Furthermore, a RICO prosecution would have to meet additional requirement set by the Principles of Federal Prosecution.<sup>143</sup> Purely state law violations would not be prosecuted unless the offending officer were involved in organized crime, were able to suppress the local investigation, or presented special problems for prosecution due to personal influence. Thus, while a RICO indictment of police officers who abuse their law enforcement discretion is possible, it is certainly not probable.<sup>144</sup>

### CONCLUSION

Questions about how to control arrest decisions have troubled United States scholars, policymakers, and citizens for years. The difficulty has been to develop an approach that recognizes and supports the need for independent judgment, yet limits and controls the range of judgment to be exercised. This article has undertaken to demonstrate that developing an understanding of the efforts of other countries to address these questions is of some value. While no approach can be transposed from one legal culture to another without modification, important lessons and ideas can be drawn from different experiences. Review of the judicial approach to arrest discretion in England and the attempt to apply some of the jurisprudence of those cases to similar situations in the United States have shown the value of cross-cultural efforts. It is clear that in England, as in the United States, there is a problem of overly vague criminal statutes and consequent difficulty in attempting to determine when enforcement is expected. The English, however, have had to confront a unique situation regarding non-enforcement: When is it appropriate to charge for failure to

---

143. The principles allow for a RICO indictment in the following cases:

- A. Cases where local law enforcement officials are unlikely to investigate and prosecute and where the federal government has a significant interest;
- B. Cases with significant organized crime involvement; or
- C. Cases in which the prosecution of significant political or governmental individuals may pose special problems for local prosecution.

UNITED STATES ATT'YS' MANUAL, PRINCIPLES OF FEDERAL PROSECUTION §§ 9-27.000 to 9-27.760 (1984).

144. See UNITED STATES ATT'YS' MANUAL, RICO Guidelines Preface §§ 9-110.200 to -110.211 (1984). See also UNITED STATES ATT'YS' MANUAL, PRINCIPLES OF FEDERAL PROSECUTION §§ 9-27.000 to -27.760 (1984). Although there is no evidence of its use in this context, another possibility for federal intervention is 18 U.S.C. § 3333 (1970). It authorizes special grand juries to issue reports commenting on noncriminal activity. It is primarily a grant of power to grand juries to make reports to the district court concerning public officials and their involvement in organized crime. In the context of abuse of police discretion, § 3333 may be helpful in giving a grand jury the power to make reports concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by appointed public officers and to make recommendations for either removal or disciplinary action. The difficulty with § 3333 is the possibility of libel suits if the grand jury criticizes a public official without handing down an indictment. Another limiting factor in the use of § 3333 is that it is limited to federal offenses.

enforce the criminal law when such failure is motivated by factors not traditionally considered within the ambit of corruption? The English example has pointedly shown another reason for departmental manuals and norms to establish the proper standard of police conduct in America. If no clearly established departmental norms or rules exist, censure for abuse of discretion will be increasingly difficult. Recently we have seen that it is possible to control and structure the sentencing discretion of judges; surely we can give the same attention to discretion exercised in the arrest decision.

