Police Accountability and the Central Problem in American Criminal Justice

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Research and policy development on controlling police use of deadly force began with the work of James J. Fyfe. His pioneering research, based on his 1978 dissertation, found that administrative controls effectively reduced discharges of officer firearms (Fyfe 1978, 1979). This point is well known to all students of American police, and his research has had a profound impact on police firearms policy. Today, virtually all police departments have put in place the administrative controls over the use of firearms use that Fyfe studied (Geller and Scott 1992).

Less well known is that the research and policy development inspired by Fyfe’s work were but one part of a much broader evolution in policy and research that addresses what some see as the central problem in American criminal justice. At the time of his dissertation research, there was ferment throughout the criminal justice field over the use and misuse of official discretion (Walker 1993). The central thrust of policy change over the past 30 years has, in very broad terms, paralleled the developments related to police use of deadly force. Fyfe’s findings on the effectiveness of administrative controls over police shooting discretion provided important support for the development of similar controls over discretion in other parts of the criminal justice system, including bail setting, plea bargaining, sentencing, and parole release.

The impact of Jim Fyfe’s original work on the control of police use of firearms (see chapter 2) has another important dimension. Many cynics
dismiss academic research as a largely self-referential enterprise, without practical utility, in which academics talk only to themselves. To the contrary, Fyfe’s work demonstrates that academic research—research that meets the highest scientific standards—does make a difference in the real world of criminal justice and as a consequence in the lives of all Americans (Walker 2004).

**Original Research on Police Use of Deadly Force**

Fyfe’s original research on police use of deadly force was a landmark event in several respects. The issue of police shootings had been a bitter controversy for many years, particularly with respect to police-community relations. Many of the riots of the 1960s had been sparked by the fatal shooting of an African American by a white police officer (National Advisory Commission 1968). These events initiated a political and scholarly debate over police shooting practices. On the one side, many community activists, some scholars, and a number of elected officials saw a pattern of racial bias among persons shot and killed by the police. Some analysts found disparities of 6:1 or even 8:1 in the ratio of African Americans to whites fatally shot. On the other, the police and their allies argued that whatever racial disparities existed were the result of differential involvement in criminal activity by African Americans, not bias on the part of the police (Geller and Scott 1992:147–157).

It should be noted that similar debates have occurred—and for that matter continue—with respect to racial disparities in traffic enforcement (Harris 2002), imprisonment (Blumstein 1982), the use of the death penalty (Paternoster 1991), and the entire criminal justice system (Walker, Spohn, and DeLone 2007). Thus, as it emerged into a political controversy in the 1960s, the debate over the racial aspects of police shootings was directly related to larger questions of race and criminal justice that continue to animate public debate.

The debate over police shootings in the 1960s, in what we can call the pre-Fyfe era, was inconclusive because it was based on completely inadequate data. Critics of the police did not have access to official police files on shooting incidents and based their analyses on other available data, such as published aggregate police data or media accounts, both of which we now recognize are often unreliable and certainly not adequate for the task of a meaningful analysis of police shooting patterns (Kobler 1975;
Robin 1963). For their part, the police and their supporters were not about to conduct detailed analyses of internal police files either—a task for which few police officials were equipped and which in any event would have opened up the data to independent inquiry.

One of the important collateral contributions of Fyfe’s research on police use of firearms, with enormous long-term consequences for police research in general, was in helping open police departments to research by independent investigators. Younger scholars today probably do not fully appreciate the closed nature of American police departments through the mid-1960s. The first systematic observation of police patrol work involved Albert Reiss and Donald Black’s study for the President’s Crime Commission in 1966 (Black 1980; President’s Commission on Law Enforcement and Administration of Justice 1967a; Reiss 1971). Even this project encountered problems both in gaining access for the field research and in reporting any observations of questionable police conduct. Suffice it to say that within just a very few years, an increasing number of police departments accepted the principle of openness to research, discovering that solid research is an important component of professional development and improved policing. The net result over the past few decades has been an impressive body of research (National Research Council 2004).

Openness with regard to patrol work was one thing (even when it included observations of officer use of force), but the highly sensitive issue of police use of deadly force was another matter altogether (Geller and Scott 1992, 29–32). The great breakthrough occurred almost simultaneously in two locations in the mid-1970s. At nearly the same time that Fyfe gained access to the New York City data, William A. Geller obtained access to the shooting files of the Chicago Police Department. His report appeared about the same time as Fyfe’s first scholarly article (Geller and Karales 1981).

The findings of Jim Fyfe’s research are well known and need only a brief summary here (see chapter 2). He investigated the impact of Temporary Order of Policy 237 (TOP 237) on firearms discharges by New York City police officers between 1971 and 1972. Police Commissioner Patrick V. Murphy issued TOP 237 in August 1972. (Interestingly, Murphy does not mention this historic step in his memoirs; see Murphy and Plate 1977.) The new policy restricted the use of deadly force to situations involving the defense of life, replacing the traditional “fleeing felon” rule. The policy also prohibited discharging firearms as warning
shots, as calls for assistance, or at or from moving vehicles, as well as in other situations. In addition to the substantive policy, TOP 237 added an accountability process. Officers were required to complete a report after each firearms discharge, and those reports were subject to an automatic review by a Firearms Discharge Review Board (FDRB) comprising high-ranking supervisors (Fyfe 1979).

Examining firearms discharges in the NYPD between 1971 and 1975, Fyfe found that TOP 237 has had a significant and positive impact. The weekly mean of officers’ discharging their weapons declined by 29.9 percent. In addition, the policy had no unintended or adverse consequences: no increase in officer injuries or deaths followed implementation of the policy, nor did serious crime increase. As best as could be measured, compliance with the policy was high. While there was some increase in the number of accidental shootings reported, the overall percentage of discharges remained relatively low (9 percent of all discharges in the post-237 period) (Fyfe 1979).

The data also indicated that the principal factor associated with shootings in New York City was the environment of the precinct in which the officer worked. Not surprisingly, shootings were highest in high-crime areas and lowest in low-crime areas (Fyfe 1981). The most important corollary of this finding was that the officer’s race was not a significant factor in police shootings.

Policy Impact and Theoretical Implications

Fyfe’s research had a dramatic impact on police policy (chapter 2). When Commissioner Murphy introduced the defense-of-life policy in 1972, it was a radical innovation. To be fair, there were undoubtedly other law enforcement agencies that already had restrictive policies. The FBI, for example, adopted a restrictive defense-of-life policy in the 1940s (Geller and Scott 1992, 251). The important point, however, is that none had the lasting national impact on policy that New York City’s had. Within a matter of a few years, the defense-of-life policy was the standard policy in major cities across the country (Geller and Scott 1992, 255–57; Sherman 1978). Today, deadly force policy varies somewhat from department to department, with some a bit more permissive in situations when an armed felon is believed to pose a risk of committing another crime. Departments also vary with regard to the specific prohibited
actions. With regard to the principle of a required report and an automatic review, however, there is basically no variation, despite considerable differences in how those reviews are conducted. The standard policy on police use of deadly force that exists today stands in sharp contrast to the great variations in policy that existed in the era before TOP 235, including the virtual absence of any meaningful policy in some agencies (Uelmen 1973).

Although in his original research on police use of firearms Fyfe did not explore the theoretical implications of his findings, they make a significant contribution toward explaining police behavior and support the organizational-managerial interpretation. This view holds that officer behavior is in part (an important qualification) influenced by organizational factors, in this case formal policies and the administration of those policies. Support for the organizational-managerial perspective has important policy implications, because it suggests that certain important aspects of police behavior can be controlled through the development and enforcement of meaningful administrative policies. Walker (1993) argues that this principle has been extended to other components of the criminal justice system.

This perspective stands in contrast to individual explanations for police behavior, which focus on the characteristics of individual officers, particularly race and ethnicity, gender, and education. As noted earlier, Fyfe did not find that an officer’s race explained shooting rates (Fyfe 1981), nor has other research supported such explanations of behavior (National Academy of Sciences 2004, 115–54). Although many reformers have assumed that police behavior can be improved through increased employment of racial and ethnic minorities, women, and officers with higher levels of education, the evidence does not indicate that such changes are likely to be an effective reform strategy (Fyfe 1981; National Research Council 2004, 115–54).

The organizational-managerial perspective also differs from sociological perspectives that attempt to explain police behavior in terms of the external environment and situational factors of particular police-citizen encounters (National Research Council 2004, 111–15). Unlike the organizational-managerial viewpoint, the sociological perspective is inherently pessimistic with regard to policy for the simple reason that the police do not control either their community environment (e.g., levels of poverty or social disorganization) or situational factors (e.g., victim-offender relationships or substance abuse by the citizens they encounter).
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Discretion: The Central Problem in Criminal Justice

The research on police use of deadly force arrived at a critical moment in the history of American criminal justice. Administrators, elected officials, judges, and scholars alike were wrestling with the problem of controlling the discretion of criminal justice officials (Gottfredson and Gottfredson 1988; Walker 1993). The various stakeholders had different policy objectives. Some wanted to reduce racial disparities; others wanted to close alleged loopholes and eliminate leniency toward serious offenders; others simply wanted a more rational and transparent justice system. Fyfe’s research made an extremely important contribution to this active policy debate to the extent that he provided empirical evidence of the effectiveness of a particular method of controlling discretion. While it would be overreaching to suggest that he launched or inspired this development, the point is that his contribution goes beyond the relatively specialized area of police use of firearms and is part of a larger public and scholarly concern about the functioning of the entire justice system.

The Discovery of Discretion

The exercise of discretion was a neglected issue in American criminal justice until the late 1950s and early 1960s. The pivotal event was the American Bar Foundation Survey of 1956–57, which conducted the first observational studies of criminal justice officials at work: police, prosecutors, judges, correctional officials, and so on (Walker 1992). The project began with a research agenda of gathering data, most of which involved purely administrative factors (e.g., the number of patrol cars) (American Bar Foundation 1955). The field research quickly shattered the assumptions underlying the original research agenda as the research team made observations with staggering implications. In the case of policing, criminal events involved a relatively small portion of their activities. Most was
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devoted to what we now call order maintenance and problem solving: public drunkenness, mentally ill people, domestic disturbances, and so on. Moreover, officers exercised broad discretion in handling these situations and, even worse, frequently ignored legal considerations altogether. Officers often ignored clear violations of the law and at other times used the law for purposes unrelated to punishment (e.g., locking up the chronic drunk). The survey generated similar revelations on plea negotiations, sentencing, and other observed parts of the system. Pleas of guilty, for example, were the product of a variety of organizational and sociological factors that generally had little to do with the rule of law, strictly speaking (Goldstein 2005; Newman 1966).

The findings of the bar foundation demolished the traditional view of the administration of criminal justice in which officials operated in a “ministerial” fashion, executing the law as written. In its place, the foundation developed a “law-in-action” perspective focusing on the various sociological, organizational, and personal factors that influence decision-making. The eventual result was a new paradigm for the criminal justice system, one that has served as a guide to teaching, research, and policy-making over the past half century (Walker 1992).

The Legitimacy Crisis of the 1960s

A political and legal crisis over the legitimacy of the justice system spurred recognition of the central problem in criminal justice. The crisis was a product of two separate but overlapping developments. First, the Supreme Court—with an activist, civil libertarian orientation—probed the previously hidden realms of the justice system (Walker 1992; 1998, 180–201). Second—and most famously and controversially—were Supreme Court decisions related to police search-and-seizure and interrogation practices (Mapp v. Ohio, 367 U.S. 643 [1961]; Miranda v. Arizona, 1966). The Court also issued a landmark decision on the right to counsel for all accused felons (Gideon v. Wainwright, 372 U.S. 335 [1963]), and the NAACP launched its constitutional attack on the death penalty, which culminated in Furman v. Georgia in 1972.

The revolution in constitutional law over criminal justice coincided with the escalating national race crisis. A serious of urban riots swept the nation’s cities from the summer of 1964 through 1968 (National Advisory Commission 1968). At the same time, growing concern about the justice system prompted President Lyndon Johnson to create the President’s
Crime Commission in 1965, the first national study of the criminal justice system since the Wickersham Commission of 1929–1931 (National Commission on Law Observance and Enforcement 1931; President’s Commission on Law Enforcement and Administration of Justice 1967a). Following the fourth summer of urban riots in 1967, Johnson created the Kerner Commission to study the riots and make recommendations for reform (National Advisory Commission on Civil Disorders 1968).

The racial crisis and the Supreme Court decisions inspired other criticisms of the criminal justice system. Constitutional challenges to the death penalty were a direct outgrowth of the civil rights movement (Meltsner 1974), as was the prisoners’ rights movement (Walker 1998). A variety of factors, meanwhile, fueled a profound discontent with the indeterminate sentence (see below).

Searching for the Effective Control of Discretion

The various criticisms of the justice system increasingly focused the attention of policymakers and scholars on the problem of discretion and prompted a search for effective means of controlling it. The result was, in effect, a debate over alternative means of control. Although police experts rarely talked with sentencing or prison experts, they were all wrestling with essentially the same set of issues—what can be seen as the central problem in criminal justice.

The traditional approach to controlling discretion—that is, the professional model—relied on the education and training of officials. It sought to emulate established practices in professions of medicine, law, and education. Applied to criminal justice, however, the professional model was clearly inadequate. With respect to the police, recruitment standards, educational levels, and training programs did not begin to meet even the minimal levels expected of a profession (President’s Commission on Law Enforcement and Administration of Justice 1967b). With respect to court officials—judges, prosecutors, defense attorneys—the emerging research on the criminal process, derived from the American Bar Foundation Survey, indicated that, despite their professional training as lawyers, their decisions as justice officials were heavily influenced by sociological factors—often with undesirable effects (Newman 1966).

In the 1960s, many liberals and civil libertarians placed their hopes for the control of discretion in the U.S. Supreme Court. The net effect of such decisions as *Mapp, Miranda,* and other decisions was that the
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Court wrote a set of administrative rules for the police. In subsequent years, the Court’s decisions represented a set of rules for applying the death penalty. Perceptive critics, including some who fully supported the intent and effect of the Court’s various rulings, argued that the Supreme Court was an inadequate instrument for governing day-to-day decisions in the justice system (Amsterdam 1973–74, H. Goldstein 1967). The Supreme Court has no mechanism for enforcing its own decisions, there are ample opportunities for evading the intent of decisions (Leo and Thomas 1998; Oaks 1970), and too many decision points are left untouched by Court rulings. In the area of policing, Herman Goldstein (1967) made the strongest argument about the limits of all forms of external control, concluding that internal administrative controls were likely to be the most effective.

Some scholars responded by arguing that police discretion should be abolished, as in Joseph Goldstein’s 1960 pathbreaking article. As later parts of this chapter explain, there were similar proposals for abolishing plea bargaining (National Advisory Commission on Criminal Justice Standards and Goals 1973, 46) and for “flat time” sentencing that would eliminate judicial discretion on criminal sentencing (Task Force on Criminal Sentencing 1976). As is explained below, the idea of abolishing discretion never won any serious support, and policy development moved in the direction of administrative controls—the model investigated by Fyfe in his research on deadly force.

**Administrative Control of Other Police Actions**

Administrative controls over police use of deadly force represented an application of the general principle of administrative rule making. As elaborated by administrative law expert Kenneth Davis (1971, 1975), rule making seeks to control discretion by structuring, confining, and checking its exercise (Walker 1993). The next section explains its application to other critical police actions.

**High-Speed Pursuits**

The most elaborate application of rule making involves high-speed vehicle pursuits. The process of policy development on this aspect of policing parallels that of deadly force very closely. For decades, vehicle pursuits by
Police officers were completely ungoverned by any formal policy. Basically, officers pursued fleeing vehicles at their own choosing. Concern about the risks and consequences of pursuits began to arise in the 1970s, primarily because of the costs of litigation over pursuit-related deaths and injuries. The initial studies found that high-speed pursuits were extremely dangerous police actions, resulting in high rates of accidents and injuries and of deaths to police officers, pursued drivers, and innocent bystanders. Subsequent research provided a refined picture of these consequences, and if some of the earliest findings appear to be exaggerated, the risks are nonetheless now recognized as significant and worthy of control (Alpert and Dunham 1990).

Policies for controlling vehicle pursuits have followed the administrative rule-making model already applied to deadly force:

- First, controls take the form of written policies that specify when pursuits are permitted or forbidden; this effort represents structuring discretion in Davis’s 1971 model.
- Second, policies allow for the exercise of discretion but guide it by specifying factors that an officer should take into account: the seriousness of the suspected offense and the risks posed by road conditions, time of day, the social environment (e.g., residential neighborhood, school zone, and the like), and so on. The policies ask officers to weigh the benefits of apprehension against the risk of injury or death. This step represents confining discretion in the Davis model.
- Third, officers are required to complete an incident report after each pursuit.
- Fourth, these reports are then reviewed by either a supervisor or a committee to determine whether the officer’s actions complied with official policy (Alpert and Dunham 1990).

These latter two steps represent checking discretion in the Davis model. Evaluations of police vehicle pursuits have found restrictive policies effective in reducing the incidence of accidents, injuries, and deaths. As with Fyfe’s research on deadly force policies, moreover, administrative controls limiting pursuits have not been found to have adverse unintended consequences (Alpert and Dunham 1990).
Nonlethal Force

The principle of administrative control over the use of deadly force has been extended to police use of nonlethal force and essentially to all forms of police use of force (Alpert and Dunham 2004). Policies closely parallel the deadly force model: a written policy that specifies when force can and cannot be used; the requirement of a written report of each incident; and an automatic review of each report by either a supervisor or a review committee. In response to considerable community protests, for example, the model is currently being applied to the use of electroconductive devices, popularly known by the trademarked name Tasers (Police Executive Research Forum 2005).

Research on the impact of administrative controls over nonlethal force is far less developed than in the area of deadly force (National Institute of Justice 1997). There are no studies paralleling Fyfe’s original study that would investigate the impact of administrative controls over the use of force. As a result, while a strong consensus of opinion in the law enforcement profession holds that restrictive controls are necessary, no empirical evidence supports the belief that they are in fact effective in limiting the use of force.

Domestic Violence

The women’s rights movement in the 1970s identified domestic violence as a serious national problem and directed particular attention to the failure of police to arrest men who assaulted their wives or partners. Research, including data from the ABF survey, found that police officers were less likely to make arrests when the parties involved were married (Black 1980; Sherman 1992).

Lawsuits against the police in Oakland and New York City alleging discrimination against women resulted in settlements that included written departmental policies designed to guide the discretion of officers in handling domestic disputes (Loving 1980). As other departments adopted similar policies and a number of states enacted laws related to police handling of domestic violence, a rough consensus on policy emerged. That consensus included a presumption of arrests when a felonious assault had occurred and standards to guide the arrest discretion in the absence of that presumption. These policies are generally characterized as
mandatory arrest or arrest preferred. In many departments, the new domestic violence policies also included the requirement that officers complete a special domestic violence incident report separate from the standard incident or arrest reports.

In short, the 1970s witnessed a revolution in police policy related to domestic violence that closely paralleled the revolution in policy on deadly force. The traditional practice of leaving arrest discretion completely unregulated was rejected and replaced by controls representing the administrative rule-making model that followed policy developments on deadly force and high-speed pursuits. It is worth noting that domestic violence is virtually the only arrest situation where officer discretion is regulated.

Unlike the areas of deadly force and high-speed pursuits but like the area of less lethal force, no empirical studies have investigated the impact of arrest preferred or mandatory arrest policies with respect to domestic violence.

The Control of Discretion in the Courts

The effort to control of discretion in the courts took place mainly through the movement to reform bail and the attempt to control plea bargaining.

Two Bail Reform Movements

Bail practices also came under heavy attack during the 1960s. The traditional money bail system in America meant that innumerable poor defendants remained in jail awaiting trial (Goldfarb 1965; Wice 1974). Caleb Foote’s pioneering research in the 1950s found that detaining people before trial not only was a punishment in and of itself but also hindered the defendant’s ability to prepare his or her case, thereby increasing the probability of both conviction and a sentence of incarceration. Civil libertarians were concerned about violations of the Eighth Amendment right to bail, while social justice liberals focused on the impact of detention on the poor. Unnecessary pretrial detention of many people, meanwhile, imposed significant financial costs on county or city budgets (President’s Commission on Law Enforcement 1967a, 326). In addition to the unfairness of the money bail system, reformers also began to question the arbitrariness of bail decisions. Most courts had no standards
for guiding judges’ decisions about whether to require money bail at all
and, if ordered, how much bail to require.

Credit for initiating reform of the American bail system at both the
federal and the local level in the 1960s belongs to the Kennedy administra-
tion and to Attorney General Robert Kennedy in particular. The attorney
general developed an interest in the issue as part of his larger concern
about poverty and the plight of poor African-American criminal defen-
dants in particular. In New York City, meanwhile, the Vera Foundation
developed a pioneering bail release program. An evaluation found that
released defendants were no more likely to commit crimes on bail or to fail
to appear at trial than were defendants who remained in jail (Botein 1964).
Kennedy convened a national conference on bail in Washington, D.C.,
which involved virtually all the leading experts on the subject and featured
an opening address by Chief Justice Earl Warren, who spoke passionately
about the need to ensure justice for the poor (National Conference on Bail
and Criminal Justice 1965).

Attorney General Kennedy’s initiatives led to a wave of bail law
reform. The 1966 federal bail reform act rejected the money bail par-
adigm and replaced it with a presumption of pretrial release, generally
through release on recognizance. Meanwhile, states revised their bail
laws along the same lines, with most adopting a presumption of release,
typically including release on recognizance or 10 percent bail plans
(Thomas 1976).

For the purpose of this chapter, the important aspect of the new bail
procedures was the development of bail release “schedules” specifying the
criteria to be used in determining eligibility for release on recognizance.
These criteria were based on the likelihood of a defendant’s appearing at
trial, as well as employment, family ties, and the like. A defendant would
be assigned points for each criterion he or she met, and the resulting point
total would be used to determine eligibility for release. Here, as with other
emerging controls in the justice system, the goal was to limit and guide
the discretion of judges to provide greater consistency in decisions and
to reduce, if not eliminate, discrimination based on class, race, or gender
(Goldkamp and Gottfredson 1985).

A second bail reform movement occurred in the 1970s, however, with
the opposite purpose. The conservative political mood of the nation
included increased public fear of crime by repeat offenders. Conservatives
argued that too many dangerous offenders were released on bail and that
crime could be reduced by detaining them before trial. The result was
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anew wave of bail laws that sought to detain defendants who posed a risk to public safety. The Supreme Court upheld preventive detention in 1987 (Salerno v. United States). Although the policy goals of preventive detention are completely different from those of the first bail reform movement, it is significant that both movements relied on the same technique for controlling bail decisions.

Goldkamp and Gottfredson’s 1985 research on bail guidelines in Philadelphia reveals the extent to which those guidelines resemble the administrative rule-making model for controlling discretion. They structure and confine discretion through a decisionmaking grid that embodies two factors: the severity of the immediate offense and factors that indicate dangerousness (e.g., demeanor in the courtroom or threat to victims or witnesses). The guidelines seek to control discretion, moreover, to achieve broad public policy goals: protection of public safety and rationality and equity in bail setting (Goldkamp and Gottfredson 1985, 163–86).

Goldkamp and Gottfredson found that the bail guidelines in Philadelphia were generally effective in achieving their intended goals. Judges conformed to the guidelines in 76 percent of all cases. The amount of bail set by judges subject to the guidelines was lower than that set by judges in a control group. Particularly important, bail decisions were “markedly more consistent” (Goldkamp and Gottfredson, 1985, 198) than those by judges in the control group, indicating an increase in equity in bail decisions.

The Goldkamp and Gottfredson findings support both the theoretical and the policy implications of Fyfe’s research on deadly force. They suggest that judicial discretion in bail setting can be controlled by formal written guidelines. This supports the organizational-managerial theory of judicial behavior. It does not support the view that judicial decisionmaking is shaped by individual characteristics, particularly the race or gender of judges. It also casts doubt on the professional model of controlling discretion, which relies on professional training of judges.

Attempts to Control Plea Bargaining

Plea bargaining was another key decision point in the criminal justice system that involved completely unfettered discretion. Even worse, unlike sentencing or parole release, the process of plea negotiations was hidden behind closed doors, with pleas announced in court only after the deal had been done. As with sentencing reform, critics of plea bargaining had
different policy perspectives. Liberals saw arbitrariness and possible patterns of discrimination, while conservatives saw excessive leniency. Many critics believed that prosecutors deliberately overcharged defendants so that the ensuing plea negotiations would result in an actually appropriate charge. Civil libertarians were particularly concerned that the process appeared to coerce defendants into waiving their Fifth Amendment protection against self-incrimination (McDonald 1985, 2–5). All the various criticisms of plea bargaining highlighted the larger point that prosecutorial discretion, like police discretion, had traditionally been almost completely unchecked (McDonald 1985).

These criticisms finally coalesced in the early 1970s in a movement to abolish plea bargaining altogether (McDonald 1985, 102–5). The National Advisory Commission on Criminal Justice Standards and Goals called for the abolition of the practice within five years (1973, 46). Needless to say, this proposal was almost completely ignored. The state of Alaska was the only major jurisdiction to attempt to abolish plea bargaining. Because of the centralized structure of the state’s criminal justice system, abolition could be accomplished by administrative order from the attorney general directing prosecutors to “refrain from engaging in plea negotiations with defendants” or to achieve a guilty plea “in return for a particular sentence.” In addition, prosecutors should not reduce charges in return for a guilty plea (Rubinstein, Clarke, and White 1980).

The Alaska ban was subject to a formal evaluation funded by the U.S. Justice Department. The evaluation found that, contrary to both proponents and opponents, the ban had little impact on the processing of cases through the system. Most important, the dire predictions of opponents did not come true: the criminal courts did not “collapse,” and there was no huge backlog of cases. Most surprising and contrary to the expectations of just about everyone, there was only a small increase in the number of trials (Rubinstein, Clarke, and White 1980). The surprising findings only confirmed the durability of the process leading to guilty pleas, whether overt or covert. A similar ban in the district court in El Paso, Texas, however, found mixed results of a prosecutor-initiated ban on plea bargaining (Callan 1979; Holmes, Daudistel, and Taggart 1992).

The failure to abolish plea bargaining has led to reforms based on the administrative rule-making model, including written policies to guide the practice. Such guidelines have been developed through a variety of means. Some have been developed at the initiative of prosecutors themselves. In New Jersey, however, the state supreme court, holding
that differential plea bargaining practices across counties were unconstitutional, ordered the state attorney general to develop uniform statewide guidelines (New Jersey Attorney General 2004). In Minnesota, state law requires each county attorney to adopt “written guidelines governing . . . plea negotiation policies and practices” And are to include “the circumstances under which plea negotiation agreements are permissible . . . [and] the factors that are considered in making charging decisions and formulating plea agreements” (Minnesota Statutes Sec 388.051, 2006).

Plea negotiation guidelines consist of several different elements. Many local rules prohibit bargaining over charges in the case of certain high-profile crimes, usually sex offenses or those involving use of weapons. This practice represents an attempt to limit the discretion of prosecutors for the purpose of ensuring the appropriate punishment of serious offenders. Some guidelines also involve closer supervision of staff prosecutors, usually in the form of administrative review by the head prosecutor or a deputy head. This practice represents a check on plea bargaining, similar to the review of officer reports on firearms discharges, although in the case of plea bargaining there is the obvious advantage of being able to review negotiated agreements before they are executed rather than after the fact.

Empirical research on the impact of plea bargaining guidelines has not produced any definitive findings. The traditional view has been that any attempt to limit the discretion of either prosecutors or judges in the processing of criminal cases will simply displace discretion “upstream” or “downstream,” in what some experts have characterized as a “hydraulic” or “zero sum” effect. Miethe regards this view as “firmly entrenched” in a skeptical attitude toward reform efforts (1987, 155). In that study of the impact of the Minnesota Sentencing Guidelines, however, Miethe did not find any significant “hydraulic displacement of discretion” onto prosecutors as a result of placing significant limits on the discretion of judges.

The Attack on the Indeterminate Sentence

In their discussion of bail guidelines, Goldkamp and Gottfredson noted the very “clear parallels” between bail reform and concurrent efforts to reform both criminal sentencing and parole decisionmaking (1985, 36–37). Another part of the growing discontent with the American criminal justice system in the 1960s was a profound disillusionment with the indeterminate sentence. Adopted in the great reform period before
World War I, the indeterminate sentence was essentially universal by the 1960s, and as one scholar has pointed out, it was possible to talk about the American system of sentencing (Tonry 1988). By the 1990s, though, that was no longer the case, and the indeterminate sentence has been replaced in a number of jurisdictions by some form of determinate sentencing (Bureau of Justice Assistance 1996). Determinate sentencing, whatever its specific form, embodies the principles of administrative rule making (Davis 1971).

The general public, scholars, and civil rights activists alike shared a discontent with indeterminate sentencing, although they had very different perspectives on the exact nature of the problem. Some argued that sentencing decisions were simply arbitrary, with no rhyme, reason, or pattern. One convicted robber went to prison while another was sentenced to parole; one convicted robber was sentenced to 15 years in prison while another was sentenced to only 5 years. Some liberal critics, however, saw not arbitrariness but a pattern of discrimination, particularly with regard to race. Some liberal critics also argued that the original humanitarian goals of the indeterminate sentence—namely, individualizing punishment and providing correctional treatment—had become perverted in practice and actually resulted in longer sentences than were reasonable (American Friends Service Committee 1971; Morris 1974).

Conservative critics, in contrast, believed the unfettered discretion of the indeterminate sentence resulted in a pervasively weak system that failed to punish serious criminal behavior properly. Judges, they argued, improperly placed some serious offenders on probation and gave others inappropriately light sentences, while parole boards released offenders too early (Wilson 1975). This view was the same one that fueled the movement for preventive detention in setting bail.

Despite their very different social policy agendas, both liberal and conservative critics of the indeterminate sentence agreed on one basic point: the system was dishonest. Criminal codes advertised certain punishments for crime (say, up to 50 years for certain offenses), and judges might sentence offenders to, for example, 3 to 10 years in prison; the reality of actual time served, however, was much less. Unfettered discretion, in the words of one critic, had led to a system of “law without order” (Frankel 1972). The emphasis of Federal Sentencing Guidelines on “truth in sentencing” was one response to this view (U.S. Sentencing Commission 1987). Observers generally agreed that the heart of the problem was the nearly unfettered discretion exercised by judges in
sentencing and by parole officials in making decisions on parole release. A general consensus emerged that the appropriate solution was to limit judicial discretion to a greater or lesser degree.

The criticisms directed at sentencing decisions were directed at parole decisions with equal force. Liberal critics argued that parole release decisions were either wholly arbitrary or systematically discriminatory. Conservative critics, meanwhile, argued that early release on parole put dangerous criminals back on the street where they would again victimize law-abiding citizens. Studies of parole found that release decisions were shaped in part by institutional needs, particularly the threat of denying early release as a means of controlling the inmate population. Studies also suggested that release criteria corrupted the treatment programs offered within prisons. Inmates participated in group therapy or other activities simply because doing so would help to earn release. As a result, some critics argued, instead of instilling habits of good behavior, treatment programs only cultivated cynicism and manipulative skills (Allen 1959; Morris 1974).

It is important to recognize that, at the time the indeterminate sentence was created, the grant of broad discretion was seen as a great scientific advance, one that would not only reduce crime but also treat criminal offenders in a more humane fashion than in the past—primarily by individualizing sentences. The rise of the indeterminate sentence was fueled in large part by the emergence of the social and behavioral sciences (Walker 1998, 123–24), precisely the point that aroused many critics. Decisions that were essentially therapeutic in nature were being made without any scientific basis.

By the early 1970s, the various criticisms of the indeterminate sentence converged to create a powerful movement for sentencing reform. Initially, however, this convergence brought together those with very different objectives, and consensus quickly came apart. The initial reform idea was something called “flat-time” sentencing. The idea was that sentencing statutes would provide a fixed sentence for each crime, say, three years for burglary (Task Force on Criminal Sentencing 1976). In effect, this approach involved abolishing judicial discretion altogether. After a brief flurry of interest among scholars, the idea of flat time quickly died, as was the case with respect to plea bargaining. Abolishing sentencing discretion was recognized as impractical, given the variety of factors (seriousness, prior record, and other mitigating or aggravating factors) that enter (or should enter) into a sentencing decision. In addition, the political
coalition supporting flat time came apart as the conflicting goals of liberals and conservatives became apparent (Law Enforcement Assistance Administration 1978).

The debate over flat-time sentencing, however short, was a very fruitful exercise because it illuminated the practical aspects of sentencing, including the problem of controlling judicial discretion. Out of this debate emerged the idea of structured sentencing or sentencing guidelines (Tonry 1988). For the purpose of this chapter, the relevant point is that structured sentencing embodies the essential features of the administrative controls over police use of deadly force. These elements include a recognition that discretion cannot be abolished, both as a practical and as a philosophical matter; that discretion can be effectively limited by establishing broad parameters of permissible outcomes; and that formal criteria can guide decisionmaking within those parameters.

The sentencing guidelines operating in the federal courts, Minnesota, and an estimated 15 other states embody the same basic models, although they differ with respect to goals and some important details (Bureau of Justice Assistance 1996). (The status of the Federal Sentencing Guidelines is uncertain owing to recent Supreme Court decisions.) A sentencing matrix is employed based on the seriousness of the current offense and the offender’s criminal history. Based on these two factors, the matrix indicates the presumptive sentence. The Minnesota Sentencing Guidelines specify certain offenses as presumptively probation and some as presumptively incarceration. Where incarceration is the presumptive sentence, the guidelines specify a range of months within which the judge can set the actual sentence. In addition, judges may depart from the presumptive sentence, either upward or downward in terms of severity, but must justify the decision in a written sentencing memorandum. These elements of the guidelines follow the basic elements of the administrative rule-making model by structuring, confining, and checking judicial discretion.

The impact of sentencing guidelines is mixed, primarily because of significant variations in the purpose and specific requirements of the guidelines in different jurisdictions. On the one hand, the Federal Sentencing Guidelines have the stated purpose of ensuring punishment, and the increase in the population in federal prisons indicates that they have achieved that result. The Minnesota Guidelines, on the other hand, have the stated purpose of limiting imprisonment, and they appear to have achieved that result (Bureau of Justice Assistance 1996, 100–107;
Miethe and Moore 1989). The fact that two very different sentencing guidelines systems, with opposite purposes, can both achieve their intended objectives lends powerful support to the idea that judicial sentencing decisions are malleable and subject to control by formal rules.

The evidence on the impact of sentencing guidelines, while mixed, lends further support to the organizational-managerial view of official behavior in criminal justice. Discretionary decisions can be shaped by formal rules and regulations. The evidence does not support individual theories of official behavior, focusing on the race, ethnicity, or gender of decisionmakers.

**Conclusion**

Jim Fyfe’s major contribution to American policing involved his research finding that administrative controls effectively reduced firearms discharges by police officers. Evidence from his work and others indicates that such controls have extremely positive social policy benefits. They greatly reduce the number of unnecessary shootings of unarmed people. They also reduce the racial disparity in persons shot and killed by the police. Moreover, he found that these gains are achieved without adverse unintended consequences. The collateral social benefits of these results include a reduction in incidents that inflame racial tensions and a consequent improvement in police-community relations.

The purpose of this chapter has been to argue that Fyfe’s contributions were not confined to policing or even to the limited subject of police use of firearms. His work was directly connected to a broad stream of research and policymaking throughout the American criminal justice system and addressed what I call the central problem in criminal justice: the exercise of discretion by criminal justice officials, the adverse consequences of unfettered discretion, and the movement to institute controls over that discretion. I have argued that this movement embraces other critical incidents involving the police, bail setting, plea negotiations, sentencing (including the death penalty), and parole release decisions.

The trend toward the control of discretion in all these areas of criminal justice involves the model of administrative rule making found in the NYPD shooting policy investigated by Fyfe in his dissertation. That model attempts to limit but not abolish discretion through written guidelines that specify permissible and impermissible actions, factors to be considered
in making decisions within those limits, and a process of accountability, including written incident reports and supervisory review of those reports. Jim Fyfe did not initiate or necessarily influence the parallel efforts in the other parts of the justice system. But his work was a very important part of this larger reform movement, and it provided one of the relatively few examples of empirical evidence indicating the effectiveness of the controls in question.

As already suggested in this chapter, Fyfe’s original research on police use of deadly force made contributions to criminal justice policy and research that reach far beyond the immediate subject of police use of firearms. With respect to theoretical explanations of police behavior, his work lends support to the organizational-managerial argument that officer behavior is malleable in some important (but not necessarily all) respects. Formal rules can shape officer decisionmaking, and those rules can have positive social policy benefits. This view stands in contrast to theories of police behavior based on the characteristics of individual officers and sociological theories of police-citizen encounters. As suggested in this chapter, the organizational-managerial theory of official behavior can also be applied to other components of the criminal justice system.

In its time, the new work on police use of firearms was also extremely important in helping open police departments to serious research by independent investigators. It demonstrated to police that independent research would not destroy their organizations and that research can actually be an important element of professional development and better policing.

Finally, the research on police use of firearms challenged the widespread cynicism about academic research. Many people, both within and outside the academic world, believe that research has no relevance to the real world of people’s lives. Fyfe’s work proved that the best research can make a real difference in social policy and can help support change efforts that have a direct impact on the well-being—indeed the lives—of countless people. Thirty years after he defended his dissertation and published his first seminal article, probably thousands of people—most of them African-American males—are alive today because of policies that are based on this work. That fact is probably the greatest tribute to the importance of policy-related social science research. It also points the way for future research and policy review aimed at controlling discretion, which itself is the fundamental goal of any effort to achieve accountability.
NOTE

1. Interview with F. Remington, 1988, and Herman Goldstein, July 13, 1988. The files of the American Bar Foundation Survey are housed in the library of the University of Wisconsin Law School. They are a fascinating and incredibly rich source of information on criminal justice agencies in three communities in the 1950s.

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MASTERS


Holding Police Accountable


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