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Abstract: The appropriate use of discretion is frequently identified as critical in the policing of Indigenous people -€" in particular, for reducing the over-representation of Indigenous people in the criminal justice system. The NSW Police Aboriginal Strategic Direction 2007 -€" 2010, for instance, has as its seventh objective: Reduce offending and over-representation of Aboriginal people in the criminal justice system. And one of the strategies listed for achieving this objective is "Encourage the appropriate use of discretionary Police power (2007, p. 47). This claim about the efficacy of appropriate use of police discretion is then taken to imply the normative assertion that police ought to use their discretion appropriately to reduce Indigenous representation in the criminal justice system -€" which seems reasonable, given the various issues that arise from contact with that system, together with the gate-keeping role that police play in relation to it. Just as reasonable, however, is the claim that in obliging police to use their discretion appropriately we must be assured that they can use it appropriately -€" that they know what appropriate use of discretion actually entails. My argument in this paper is that the ability of police to use discretion appropriately is compromised by the fact that the concept "appropriate use of discretion has not been rendered conceptually precise. To ground the claim that police ought to use their discretion appropriately to reduce Indigenous representation in the criminal justice system, we first need to clarify exactly what appropriate use of discretion entails and, specifically, what it entails in the context of policing Aboriginal people.

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"Appropriate" police discretion and Indigenous over-representation in the Criminal Justice System

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Introduction

In Australia, 'the appropriate use of discretion' is frequently identified as being critical in the policing of Indigenous people, with particular reference to addressing the over-representation of Indigenous people in the criminal justice system and the issues that flow from that (e.g. deaths in custody and limited employment options due to having a criminal record)¹. For instance, the NSW Police Force *Aboriginal Strategic Direction 2007 – 2010* has as its seventh objective: 'Reduce offending and over-representation of Aboriginal people in the criminal justice system' (2007, p. 46). And one of the strategies listed for achieving this objective is 'Encourage the appropriate use of discretionary Police [*sic*] power' (2007, p. 47). None of the references that I have read to 'appropriate use of police discretion', however, give any practical guidance on what such discretion involves – what is it to use discretion appropriately? In particular, what should police alter about their current use of discretion to ensure that it is being used appropriately?

These questions are not merely of theoretical interest. Answers to them will provide police with guidance as to how they can best carry out their roles in the community, and – if necessary – improve on their current practices. This paper will determine what 'appropriate use of discretion' ought to mean when considered via a teleological consideration of its role in policing; and briefly indicate how the thus-developed account can assist in the critiquing of judgements about police interactions with Indigenous people.

Background

That a link exists between the use of police discretion and the over-representation of Aboriginals in the criminal justice system appears to have been first made in Australian academic literature by Elizabeth Eggleston in her seminal work *Fear, Favour or Affection* (1976)². It has been more commonly asserted since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found that the main reason so many Aborigines died in custody was that they were over-represented in the criminal justice system.

1.3.1 The work of the Commission has established that Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody.

1.3.2 However, what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community. ...

1.3.3 The conclusions are clear. Aboriginal people die in custody at a rate relative to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community. But this occurs not because Aboriginal people in custody are more

likely to die than others in custody but because the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often (Johnston, 1991, vol. 1)³.

Therefore, reduce the rate at which Aboriginal people enter custody – and here the key role of police as the acknowledged gatekeepers of the criminal justice system comes to the fore – and the numbers of Indigenous deaths in custody will thereby reduce as well. Clearly, the key premise here is the use of discretion by police – the fact that they make decisions about how to handle a situation and, therefore, who will or will not enter the criminal justice system and, moreover, how they might enter it. If police did not have discretion, their role as gatekeepers would be no more than a rote one. It is the fact of their discretion which allows the claim to be made that they have options about exercising their gatekeeper role – options that could be brought to bear to reduce the entry of Aboriginal people into the criminal justice system.

The Commission also observed that because police have wide discretion about who to arrest and charge, as well as where to patrol and which offenders will be targeted, they play a direct role in the over-representation of Aboriginal people in the criminal justice system (The Law Reform Commission of Western Australia, 2006, p. 192).

It should be noted, though, that the relevant literature does not identify inappropriate police discretion as the single or even the most significant cause of over-representation in the criminal justice system. For example, Weatherburn, *et al.* have focussed on ‘high rates of Aboriginal involvement in serious crime’ (2003, p. 65). And the RCIADIC reports concluded that:

... the more fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system in the first place. The view propounded by this report is that the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society-socially, economically and culturally (Johnson, 1991, para. 1.7.1)

Notwithstanding these other identified causal contributions, much attention has focussed on police discretion, to the extent that at least some police are directed via policy (e.g. the NSW Police Force *Aboriginal Strategic Direction 2007 – 2010*, mentioned above) to ensure their discretionary decision making is undertaken with a view to reducing Indigenous over-representation in the criminal justice system. And it is this point which constitutes the starting point for this paper: because a link is made between police discretion and Indigenous over-representation, and because this link is accepted by a number of key agents, including police organisations, the police who are subject to the resulting sorts of instructions are entitled to know what they mean. If police ought to use their discretion in some particular way, then – a la Kant – it should be the case that they *can* use it in that way, they should understand and be able to operationalise what it is they are expected to do.

Most directions concerning police discretion and Aboriginal over-representation in the criminal justice system put significant weight on the concept of ‘*appropriate* discretion’ – it is not merely discretion *per se* that can reduce the over-representation of Aboriginal people, it is discretion *used appropriately* which can do this. And conversely, it is discretion used inappropriately that plays a significant causal role in the over-representation of Aboriginals in the criminal justice system. As recently as 2006, a Coroner in Queensland, investigating the death of an Aboriginal man in police custody, concluded – *inter alia* – that ‘The arrest of Mulrunji was not an appropriate use of police discretion’ (Clements, 2006, p.28).

In the interests of balance, it should also be noted that while we are looking at police discretionary authority in the broader context of what has become known as over-policing, it is also possible for that authority to be implicated in the *under-policing* in a community. And, in fact, both charges have been made against police in Australia. Of over-policing, Cunneen has said

The concept of over-policing has been used to describe how Indigenous individuals in particular, and Indigenous communities more generally, are policed in a way that is different from, and more intensive than the policing of non-Indigenous communities. Over-policing can partly explain the over-representation of Indigenous people in the criminal justice system ... (2001, p. 29).

Under-policing is used to describe situations in which police fail to respond to requests for assistance or intervention (e.g. because they see the victim as somehow ‘unworthy’ – Cunneen cites the policing of domestic violence offences against Aboriginal women as an example; 2001, pp. 160 - 165). Under-policing is sometimes explained in terms of the under-resourcing of specific communities – e.g. Commissioner Johnston recommended in Volume 3 of his RCIADIC Report that police services determine whether ‘The policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities’ (1991, Recommendation 88b). Cunneen, however, notes that under-policing, like over-policing, ‘needs to be seen in the nature of the police response, rather than simply in terms of resources’ (2001, p. 164) – communities may well have adequate policing resources, but be served by police who ignore or give inadequate attention to certain sorts of offences.

Clearly, then, what it is that makes discretionary decisions appropriate or not is of considerable importance in a number of ways vis-à-vis the policing of Aboriginal people.⁴ What bothers me – particularly in my role as a teacher of professional ethics to potential and serving police officers – is the lack of grounding, or explanation, given for the term ‘appropriate discretion’, its counterparts and its obverse (‘inappropriate discretion’). What is it to use discretion appropriately? Clearly, the mere term ‘appropriate use of discretion’ implies that it is something police ought to do (while ‘inappropriate discretion’ ought to be avoided). But if it is a moral duty that is binding on police, at least in their professional role, then we must be able to give it content. We must be able to explain to police what it is they are morally bound to do when they exercise their professional discretion.

Before turning directly to the issue of explicating appropriate use of discretion, we need to clarify the concept of police discretion *per se*.

What is police discretion?

One of the most commonly-cited explanations of police discretion was coined by Kenneth Culp Davis, *viz.*, that ‘a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction (1969, p. 4). The qualification ‘effective’ is important. It should not be read merely as a reference to capacity – to whether or not a police officer is able (cognitively, physically, in a particular set of circumstances, etc.) to make a decision. Understanding police discretion in this way ‘mistakenly removes ... [its] normative underpinnings ... and reduces it to behaviour that one is free to engage in’ (Kleinig, 2008, p. 72). Instead, Culp Davis’s use of ‘effective’ should be read as a reference to the limits on police officers’ authority as imposed by the law – so that police discretion is best understood as being the authority to choose from amongst the legally available options a police officer has in a given situation.

Moreover, discretion has been identified as crucial to good policing. Lord Scarman said (in his report of his inquiry into the Brixton Disorders that occurred in 1981):

... the exercise of discretion lies at the heart of the policing function. It is undeniable that there is only one law for all: and it is right that this should be so. But it is equally well recognised that successful policing depends on the exercise of discretion on how the law is enforced. ... Discretion is the art of suiting action to particular circumstances (1981, para. 4.58).

As the preceding demonstrates, many use ‘discretion’ (or ‘police discretion’) as a noun, as though it were a *thing* that police can use, much as they can use a gun, handcuffs, hands, words, laws, etc. This is not, however, strictly accurate. More precisely, ‘discretion’ should be thought of as an adverb or adjective: it describes what sorts of decisions police can make, and the ways in which they can make those decisions. The more correct terminology – and indeed, the terminology which will enable the argument in this paper to proceed more clearly – is to say that much police authority *is discretionary*. It is a feature or characteristic of the sort of authority that police have, that much of it is discretionary – that police can decide for themselves how they will exercise it, if at all, in many of the circumstances they face.

Kleinig has further highlighted the extent of police officers’ discretionary authority by way of a taxonomy of ‘discretionary contexts’ that police have to work within:

- Scope – decisions about ‘... whether a particular issue that presents itself to police is one with which their involvement is appropriate’;
- Interpretation – decisions about ‘... whether particular actions are in violation of the law’;
- Priority – decisions about ‘how to allocate ... [their] time and resources’; and
- Tactics – decisions about ‘the tactics they employ in resolving the situations that confront them’ (2008, pp. 73 – 76).

Each of these represents multiple points at which police have to make discretionary decisions – clearly indicating the range of decisions that are left up to police, and the extent of their role in determining which people enter the criminal justice system, when they enter it, and how they enter it. Equally clear is the potential for police to make a considerable difference in relation to altering aspects of that entry point.

What do we know about inappropriate use of discretion?

Is there anything to be learned from claims that police are not using their discretionary decision-making authority appropriately – if we can determine what it is that many police are apparently doing that constitutes inappropriate discretion, what will that tell us about the appropriate use of such authority? There seem to be three key claims made (in one form or another) about inappropriate police discretionary decisions (in the context of policing Aboriginal people):

1. that such decisions are tainted by racist motives – personal or institutional;
2. that such decisions occur when police choose a harsh option from amongst those legally available to them, when less harsh options are available *and* such options would be appropriate;
3. that there are some principles for the determining of appropriate use of discretionary decision-making authority which police are either not applying or are mis-applying.

Racist motives

In some ways, this is the least theoretically interesting of the three claims – which is not to say that it is a morally insignificant claim or that it should be ignored in discussions of police discretionary decision making. Rather, it is simply to say that the fact that individual police, like other members of the community, can act from personal racist motives when making discretionary decisions, or that such decisions might be informed by institutional racism within police organisations and/or the criminal justice system, does not take us very far into determining criteria for the appropriate (or inappropriate) use of discretion. Insofar as racism is itself morally bad, so too are decisions made, acts performed, beliefs held, etc. on the basis of it. So racist discretionary decision making by police will be inappropriate simply because it is racist – and not for any reasons ‘internal’ to the concept of such decision-making or the concepts that inform it (e.g. the role of police, the purpose of discretion, etc.)

Harsh vs. less harsh options

Many attempted explanations of what makes a given police discretionary decision inappropriate rely on the claim that police chose a harsh option in circumstances where a less harsh option was available and would be appropriate.⁵ For instance, in her findings from the Inquest into the death of Mulrunji, Christine Clements followed up her claim that police had used their discretion inappropriately with the following:

There were a range of alternatives to arrest available that should have been preferred. These include giving a caution, issuing a direction or commencing proceedings by way of notice to appear or summons (2006, p. 28).

And in a report concerning public nuisance offences in Queensland, the Crime and Misconduct Commission found that:

Indigenous juveniles were significantly more likely (1.9 times more) to be dealt with by way of arrest than non-Indigenous juveniles and significantly less likely (2.9 times less) than non-Indigenous juveniles to be dealt with by way of caution over the ... [relevant] period (2008, p. 92).

These sorts of claims seem to me to be either more ‘detailed’ versions of claims about police racism or claims based on a mistaken conception of discretionary decision making. The claims can be read as asserting that when making discretionary decisions about Aboriginal people, police choose harsh options when a less harsh option is available *and would be appropriate* (cf. Clements’s ‘should have been preferred’, above) – a sort of hidden premise being that it is racism that explains the choices police make. I do not propose to investigate the empirical truth or otherwise of this claim, for the reasons given in the preceding subsection.

In relation to mistaken understandings of discretionary authority, the NSW Police Force identifies one of the actions corresponding to its afore-mentioned strategy as being ‘Encourage the use of discretionary powers as an alternative to arrest’ (NSW Police Force, *ibid.*). This is conceptually muddled. It assumes a situation in which arrest is one of a number of options available to police, i.e. in which police have other options – besides arrest – from which they can legally and ethically choose. But in such a situation, the decision to arrest will itself be a discretionary decision. Despite police routinely using the expression ‘discretionary decision’ to refer to decisions to either do nothing or to choose a ‘less harsh’

option, the term properly understood refers to any decision police make when they have a range of options from which they can legally choose. If, in a given situation, police can choose from, say, do nothing, informal caution, formal caution, Field CAN⁶, and arrest, then any decision they make, irrespective of its comparative ‘harshness’, will be a discretionary decision – simply because it is a choice made from amongst options legally available to police. The action to which the NSW Police Force draws attention, then, does not help in understanding exactly what appropriate use of discretion entails.

Thus far, then, these explanations of inappropriate discretionary decisions as harsh decisions take us nowhere at all in relation to determining clear criteria for determining why some discretionary decisions are appropriate and others are not. Indeed, we seem to have simply come full circle: on what basis should police decide that a less harsh option (or even a harsh option) ‘would suffice’, would be appropriate? What factors should reasonably inform *that* decision, even leaving aside clearly irrelevant factors such as racist motives?

This brings us to the third of the key claims made about inappropriately made police discretionary decisions, *viz.*, that there are some principles for the determining of appropriate use of discretionary decision-making authority which police are either not applying or are mis-applying.

Incorrect use of discretion

This view has been expressed most directly by Chan, *et al.* in their claim that

There is near consensus that the problem with discretion is its *misuse* – not only in terms of corrupt or violent practices, ... but also in terms of departure from the principles and standards required by the law, eg consistency, equity, proportionality, due process and justice (2004, p. 73).

Given that discretionary authority involves police choosing between lawful options, I take issue with the claim here that ‘corrupt or violent practices’ are misuses of discretion. Insofar as instances of corruption may be illegal, and given that police violence equates to unlawful assault⁷, neither should count as a use of discretion, nor a misuse⁸. Police have no discretionary authority to choose to act illegally. However, the remainder of the quote expresses the view at issue very neatly. Inappropriate discretionary decisions will be decisions that are not consistent, not equitable, not proportional, not just, etc. A more detailed list is currently part of the initial ethics subject taught to NSW policing students, where inappropriate discretion is described as meeting the following criteria:

- Ignores relevant facts
- Takes account of irrelevant facts
- Is applied inconsistently (subjectivity as its basis)
- Is based on irrationality (or on emotion or how you’re feeling)
- Is applied in bad faith (PPP123 Teaching Team).

But these general terms do not strike me as being very helpful to the daily professional practice of police where discretionary decision making is part of their daily round. For example, what criteria should police use to determine what factors are relevant and which factors are not relevant? What determinants of justice should police measure their discretionary decisions against – is it just to proceed formally against the person who steals only because of hunger or the person who assaults another in a moment of extreme provocation? Presumably consistency does not mean treating all cases the same, but treating

like cases alike – but what makes two cases alike (or, more specifically, relevantly alike for policing purposes)? What factors/characteristics/ etc. can be justifiably compared to determine relevant sameness or difference? In essence, these sorts of criteria for determining inappropriate uses of discretion assume an answer to the question of what counts as an appropriate use of discretion – an answer which police do not currently have.

So – we cannot derive the criteria for appropriate use of discretion from the key factors associated with inappropriate discretion since the most cogent of these factors appear to assume the very criteria we are looking to identify.

A teleological perspective on the appropriate use of discretionary authority

In this section, I want to approach this issue from a teleological perspective, i.e. by way of the question: what is the *purpose* of allowing police to have discretionary decision making authority? Arguably, this authority will be used appropriately when it is used for the purpose for which it was given. Recall Aristotle's claim that a good knife is one that fulfils the purposes of a knife – if the key purpose of a knife is to cut, a good knife must be one that is sharp (minimally) and can therefore cut well. Similarly, then, if the key purpose of discretionary decision making authority is **x**, good (or appropriate) discretionary decision making must be decision making that allows police to achieve **x**. So – what is **x**? What is the purpose for which police have authority to make discretionary decisions?

In the literature, a number of reasons are given for police *requiring* such authority. These include the fact that laws can over-reach, that they do '... not exhaustively prescribe', that 'upholding and enforcing the law is only one of the ends of policing', and that 'the law has to be interpreted and applied in concrete circumstances' (Miller, *et al.*, 2006, pp. 93-94). So on one understanding, the purpose of discretionary decision making authority is to allow police to take account of these features of their work environment. But even with this explanation in hand, it is still possible to ask 'but what is the purpose of that authority – what *exactly* does it do: When it is allowing police to, for instance, ensure the law does not over-reach, what exactly is it doing?' (By way of analogy: we can say that the purpose of cough medicine is to stop a cough – but when it does that, what exactly is it doing? Is it suppressing a cough reflex? Is it curing an infection which is causing a cough?)

To answer these questions, I think we need to consider the key role of policing itself because the purpose of discretionary authority will surely be a function of that role. I do not propose to argue here for the proposition that the key role of police (in most liberal democracies and specifically in Australia) is to keep the peace. References to keeping the peace are included in the formal oaths or affirmations that police make to be granted the office of Constable, e.g. in NSW, officers swear '... that I will cause Her Majesty's peace to be kept and preserved, and that I will prevent to the best of my power all offences against that peace' (*Police Regulation 2008*, Reg 7). Moreover, Lord Scarman has argued that keeping the peace should be the primary duty of police, with all other functions and roles coming second in the event of a conflict between them (1982).

But what does keeping the peace mean? A number of explanatory expressions have been used in relation to the term, including 'conditions of social calm', 'conditions of public order' and the 'preservation of public tranquillity' (the second and third of these are both mentioned in Edwards 2005, p. 147, with the latter attributed to 'Mayne'⁹). This sort of explanation, however, is easy to misunderstand, appearing to refer primarily (possibly even solely) to the

absence of some sort of riotous assembly. So, for instance, policing students commonly list demonstrations, albeit usually violent demonstrations, as their examples of when police might be called on to keep the peace.¹⁰ And while this is certainly accurate, it is also too narrow. There is more to keeping the peace than preventing or dealing with disorderly *assemblies*, since social disorder also includes ‘disorder’ in the sense that *a* murder, *a* robbery, *an* assault, *an* offensive act, etc. constitute forms of societal disorder.

To escape this tendency to narrowly interpret the disorder or conditions-of-non-calm that is inherent in the concept of keeping the peace, a better definition of the concept is required. For this purpose, the following is arguably the best I have found: ‘the protection of moral rights, *viz.*, those moral rights that are enshrined in the criminal law and/or are constitutive of an orderly society’ (based on Miller, Blackler and Alexandra 2006, p. 48). It would take me too far beyond the topic of this paper to present a thorough defence of this definition. Suffice to say that I think its key strength is that it allows us to see isolated, or individual, instances of disorder, as being at least equally constitutive of a breach of the peace as are ‘collective instances’ of such disorder – thus fitting with how the expression is used in key instances (e.g. police officers’ Oath of Office). And while I think an area of vulnerability for the definition is in the specification of the ‘moral rights ... constitutive of an orderly society’ (what exactly are these, beyond that they are those specified in the criminal law), I do not think the definition is at risk of fatal attack on this front.

With this definition of keeping the peace in hand, we can return to the question of what – exactly – discretionary decision making authority allows police to do. When such authority allows police to ensure the law does not over-reach, or to decide exactly what the law intends or requires, or which of their roles they should be pursuing, what exactly is it allowing police to do? If we understand the key role of police to be keeping the peace, and keeping the peace to be the protection of relevant moral rights¹¹, what becomes clear is that their discretionary decision making authority allows police to balance the moral rights they aim to protect. Without revisiting the vast area of rights, we are familiar with the fact that rights are the sorts of things that can be in tension with each other, that can conflict, that they can be of differing moral weights depending on circumstances, that some are typically more important than others, etc. That is, they are precisely the sorts of things which would require some sort of discretionary decision making authority to make the judgements that are needed in relation to them.

So, if the purpose of discretionary decision making authority in policing is to allow police to protect moral rights – in particular, to make the sorts of judgements that such protection must entail – then what can we conclude about our original question as to what counts as appropriate (or good) discretionary decision making? We said above that if the key purpose of discretionary decision making authority is *x*, good (or appropriate) discretionary decision making must be decision making that allows police to achieve *x*. What we have come to is the conclusion that *x* should be seen as ‘allowing police to best keep the peace’ or ‘enabling police to protect the relevant sorts of moral rights’. Good or appropriate discretionary decision making on the part of police will be decision making that *is aimed at* protecting the relevant sorts of moral rights. Conversely, inappropriate discretionary decision-making will be decision-making that is *aimed at* some other purpose.

Note the italicised text in the preceding two sentences. This is an important qualification. We could have said that a good discretionary decision is one that *does* protect moral rights. And certainly this would be ideal. But it also seems likely to be unfair. On a number of

occasions, police can make perfectly good decisions on the basis of the information they have – identify the rights at issue, correctly prioritise them, etc. – and still have a situation turn out badly (i.e. turn out in such a way that rights are not protected) because their information was inaccurate or incomplete. E.g. a person may give police incomplete information about a person's medical condition, so that the police decision to take a statement rather than call for medical assistance results in a death. Or police may prioritise their role of protecting life over their role of protecting property during a bushfire, not realising that a particular remote and apparently abandoned house is being used by squatters. Arguably, a careful account of causation could perhaps remove police from the sorts of causal chains implied in these examples; though it is also true that police often fall victim to the hindsight of others, particularly in relation to determinations of what should have been foreseeable to them in a given situation¹². A more nuanced causal account will have to wait for another paper.

Of course, the foregoing raises questions about the ability of police to recognise and articulate the rights at issue in any given situation – an ability which we cannot simply presume. We could, in effect, gloss over this question by saying that insofar as one function (perhaps the primary function) of the criminal law is to protect certain key moral rights, then it must be true that so long as police can point to a lawful basis for their actions, they will be on 'safe ground' as regards those actions being 'rights-protecting' ones. But I think what is at issue in relation to appropriate use of discretion and the policing of Indigenous people is not so much whether police actions are lawful, but whether some of their lawful actions have been performed for the right reasons – *viz.*, the reasons which formed the basis of the respective law. So, for instance, a person may well be drinking alcohol in a public place and breaking the law thereby. But the discretionary decision-making authority of police in such a situation should be informed by the rights that 'the criminalisation of drinking alcohol in a public place' are designed to protect, not, by the mere fact that a law has been broken. If no such rights are being affected (e.g. the offender is in an isolated public place at 2 a.m. in the morning), then the lawfulness of their actions is not sufficient to guide police as to appropriate discretionary decision-making. It would seem that police education must, perhaps in ethics classes or in-depth law classes, inform police about the 'rights-basis' of their authority.

Appropriate use of discretion and Aboriginal over-representation in the criminal justice system

As mentioned earlier, 'the appropriate use of discretion' is regularly identified as critical in the policing of Indigenous people, specifically as a key means of reducing the over-representation of Indigenous people in the criminal justice system. If we can now explicate the appropriate use of discretion as being the use of that authority for the protection of moral rights, what can we say about how it should be used to reduce Aboriginal over-representation? If the appropriate discretionary decision for police to make is one that aims at protecting relevant moral rights, then a police officer who makes an appropriate discretionary decision must be able to point to the relevant moral rights that are being protected and perhaps demonstrate why those rights trump other rights, particularly if the rights of two or more people are in conflict. Of course, this does not mean that the rights of Aboriginal people should always trump for a discretionary decision to count as appropriate. However, it is true that one way of understanding claims that police use their discretionary authority inappropriately in relation to Aboriginal people is as asserting that the respective decisions tend to be such that the rights of others *unjustifiably* trump Aboriginal people's rights in a regular way.

A common example of a police discretionary decision that is said to contribute to Aboriginal over-representation is one in which an Aboriginal person is arrested for offensive language and/or a public intoxication offence. Both factors were present in the recent case of Cameron Doomadgee who died in police custody on Palm Island in 2004. While no charges were actually laid against Mr Doomadgee, the arresting officer did say his actions were prompted by the fact that ‘Mulrunji had appeared to be affected by liquor and ... he was offensive to [the Aboriginal Police Liaison Officer]’ (Clements, 2006, p. 15). In relation to Mr Doomadgee’s arrest (this being the action that brought him into contact with the criminal justice system), the following facts are taken from the transcript of the 2006 inquest into his death (note the coroner uses Mr Doomadgee’s tribal name, Mulrunji).

A young man, Patrick Bramwell, was outside the house [which police were attending] and clearly intoxicated. He was swearing at the police and his grandmother complained to the police about his behaviour. Senior Sergeant Hurley arrested him.

Police Liaison Officer Bengaroo told investigating police that Mulrunji had been walking past when Patrick Bramwell was being arrested. The two men knew each other. Mulrunji commented directly to Lloyd Bengaroo, challenging him as to why he should help lock up his own people. The indication was that Mulrunji was intoxicated. Lloyd advised him to walk down the road or he too would be locked up. When Senior Sergeant Hurley got back in the car he asked Bengaroo what the person had said - he clearly had not heard the conversation. When Bengaroo’s account was given, Hurley’s response was that he would lock him up. The only additional “event” was that having walked off down Dee Street, Mulrunji turned and swore at the police officers. Senior Sergeant Hurley then drove down to where Mulrunji was standing and arrested him (Clements, 2006, p. 2).¹³

Recall that the decision to arrest Mr Doomadgee was the subject of the Coroner’s comment ‘The arrest of Mulrunji was not an appropriate use of police discretion’ (Clements, 2006, p.28). An appropriate use of discretion, we have concluded, is one which aims to protect relevant moral rights. The Coroner’s comment that Senior Sergeant Hurley made an inappropriate discretionary decision in this instance therefore amounts to the claim that he was not aiming at the protection of the relevant sorts of rights. What rights might he have been intending to protect? Possibly, the rights of members of the public who heard Mr Doomadgee swearing or who were affected by his intoxication – though no such people were mentioned in accounts of the arrest. Any rights of Mr Doomadgee’s? Possibly, a right to have his life protected if his state of intoxication was such that he was at risk of harm. Again, though, the evidence presented does not suggest that such a risk existed. The rights of Mr Bengaroo? Here, the question must be – what rights could possibly be relevant? I can think of no right Mr Bengaroo has not to be queried about his reasons for taking on his particular job, unless of course the query were to be expressed in terms of offensive language. The accounts of Mr Doomadgee’s arrest do not indicate this, even though ‘swearing’ is referred to – but then we must confront the question of how much ‘offensive language’ police should ‘put up with’ as part of their job and, indeed, what should count as offensive in the context of police-work. For instance, in his RCIADIC report for Victoria, NSW and Tasmania, Commissioner Hal Wootten said

It is surely time that police learnt to ignore mere abuse, let alone simple “bad language”. In this day and age many words that were once considered obscene have become commonplace in many circumstances, and are in common use amongst police no less than amongst other people. Maintaining the pretence that they are sensitive persons offended by such language ... does nothing for respect for the police. It is particularly ridiculous when offence is taken at the rantings of drunks, as is so often the case (<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/regional/nsw-vic-tas/121.html>).

Of course, a more forensic investigation of the case could be undertaken, but the above seems to encapsulate most of what police would have time to consider during the actual incident. And on this account, it does seem that the explanation developed in this paper of what counts as appropriate use of discretionary authority, is workable both in theory and in the context of actual police-work. By the lights of that explanation, the Coroner is correct in her assertion that Senior Sergeant Hurley inappropriately used his discretionary authority in arresting Mr Doomadgee.

Conclusion

The importance of police making good discretionary decisions is beyond argument. Although we have focussed on the importance of such decision-making from the starting-point of reducing Aboriginal over-representation in the criminal justice system, it is clearly true that the scope and moral significance of police powers (many of which are discretionary) mean that those powers can cause considerable harm if used poorly. The imperative to address the gap in relation to what counts as appropriate use of discretion is not insignificant. This paper has adopted a teleological method, based on the purpose of policing and the purpose of discretionary authority therein, to arrive at some specific criteria which can inform police discretionary decision making. While these criteria may seem vague in some senses ('such decision making should aim at protecting the relevant sorts of moral rights'), this is still an advance on the previous position and gives police and others some specific way to guide and adjudicate the decisions made by police.

Moreover, the focus on protecting relevant rights also points to the need for police to be better informed about the rights they are duty-bound to protect, and for professional ethics subjects for police to perhaps focus more on dealing with situations where rights are in tension or conflict or, indeed, where the relevant rights are simply unclear. In post- or neo-colonial societies¹⁴, such as Australia, the possibility that some minority rights are routinely sacrificed for the sake of majority rights will be an issue that must also be considered, particularly given the over-representation of Aboriginal people in the criminal justice system, the issue which provided the initial impetus for this paper.

Notes

- ¹ E.g. Royal Commission into Aboriginal Deaths in Custody (1991); NSW Police Force *Aboriginal Strategic Direction 2007-2011*; Eggleston (1976).
- ² I am grateful to one of my PhD students, Mr John Williams-Mozely, for clarifying this point for me.
- ³ The complete RCIADIC reports (National, State, individual deaths) are available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>
- ⁴ There is no reason to think that the conclusions to be derived in this paper will not be applicable to other groups of people subject to police action. Nonetheless, as has been indicated so far, claims about the difference that could be made by police using their discretionary authority appropriately are most commonly made in the context of policing Aboriginal people.
- ⁵ The qualifier 'in circumstances where a less harsh option was available' is important – some researchers have argued that Aboriginals are over-represented in crimes that are so serious they cannot be dealt with by any response less than arrest (e.g. crimes such as 'serious theft or violent offences').
- ⁶ Field CAN = Field Court Attendance Notice, a document handed to an accused requiring them to attend court to answer a charge ('in the field' refers to the fact that there is no need for a return to a police station).

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- ⁷ The various qualifications in this sentence are due to the fact that police can behave lawfully but corruptly (e.g. exercising a lawful function for personal benefit), and can engage lawfully in behaviour that looks particularly violent when trying to subdue a violent suspect, witness, etc.
- ⁸ Cf. Kleinig, who understands Culp Davis's earlier definition literally: 'Pace Davis, if a police officer beats a vagrant in a back alley, he is not exercising his discretion either well or badly' (1996, p. 83).
- ⁹ Presumably Sir Richard Mayne, joint first Commissioner of Police of the Metropolis, i.e. the head of the London Metropolitan Police.
- ¹⁰ Interestingly, Edwards seems to have made the same mistake as these students. He has referred to Scarman's view as asserting 'the primacy of public order' and says that such a view of policing is 'by no means universally accepted'. This latter he justifies by reference to the 1998 wharf disputes in Australia in which some Police Commissioners apparently 'expressed a preparedness to risk violence from dockers to uphold the legal right of opposing groups to cross the picket line and collect [shipping] containers' (2005, p.147, in footnote).
- ¹¹ For ease of expression, I will use 'relevant moral rights' to refer exclusively to those rights that are 'enshrined in the criminal law and/or are constitutive of an orderly society'.
- ¹² i.e. what their duty of care entailed.
- ¹³ In a number of news reports of Doomadgee's arrest, reference was made to him singing or whistling the then-popular song 'Who let the dogs out?', an occurrence which was said to particularly upset Senior Sergeant Hurley. No mention of this is made in the Inquest transcript.
- ¹⁴ See Cunneen 2001 for a discussion on the fitness of these adjectives, in relation to the policing context.

References

- Chan, Janet, Barga, Jenny, Luke, Garth & Clancey, Garner (2004). 'Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997', *Criminal Law Journal*, vol. 28, no. 72, pp. 72-92.
- Clements, Christine (2006). *Inquest into the death of Mulrunji*. Accessed online at <http://www.courts.qld.gov.au/mulrunji270906.pdf> [accessed 31 August 2009].
- Crime and Misconduct Commission (2008). *Policing Public Order - A review of the Public Nuisance Offence*. Accessed online at <http://www.cmc.qld.gov.au/data/portal/00000005/content/3670300121161906459.pdf> [accessed 31 August 2009].
- Cunneen, C. (2001). *Conflict, politics and crime: Aboriginal communities and the police*. NSW, Australia: Allen & Unwin.
- Davis, Kenneth Culp (1969). *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge, Louisiana: Louisiana State University Press.
- Edwards, Charles (2005) *Changing Policing Theories for 21st Century Societies*. NSW, Australia: The Federation Press.
- Eggleston, Elizabeth (1976). *Fear, Favour or Affection*. Canberra, Australia: Australian National University Press.
- Johnston, Elliott (Commissioner, Royal Commission into Aboriginal Deaths in Custody) (1991). *National Report, vols. 1-5*. Accessed online at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> [accessed 31 August 2009].
- Kleinig, John (2008). *Ethics and Criminal Justice*. UK: Cambridge University Press.
- Kleinig, John (1996). *The Ethics of Policing*. New York: Cambridge University Press.

Law Reform Commission of Western Australia (2006). *Aboriginal Customary Laws - The interaction of Western Australian law with Aboriginal law and culture*. Accessed online at <http://www.lrc.justice.wa.gov.au/094-FR.html> [accessed 31 August 2009].

Miller, Seumas, Blackler, John & Alexandra, Andrew (2006). *Police Ethics*, (2nd ed.). NSW, Australia: Allen & Unwin.

NSW Police Force (2007). *Aboriginal Strategic Direction 2007 – 2010*. Accessed online at http://www.police.nsw.gov.au/data/assets/pdf_file/0004/105178/aboriginal_strategic_direction2007-2011.pdf [accessed 31 August 2008].

Police Regulation 2008 (NSW)

PPP123 Teaching Team (2009). *PPP123 Professional Ethics Study Guide*. Wagga Wagga, Australia: Charles Sturt University.

Scarman, Lord L. (1981). *The Scarman Report: The Brixton Disorders*. London: Her Majesty's Stationery Office.

Wootten, H. (Commissioner, Royal Commission into Aboriginal Deaths in Custody) (1991). *Regional Report of Inquiry In New South Wales, Victoria & Tasmania*. Accessed online at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/regional/nsw-vic-tas/121.html> [accessed 31 August 2009].