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Research in Brief: Officer Use of Discretion: Lessons Learned from the Misdemeanor Justice Project

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Until recently, conversations around public safety have largely focused on serious crimes and felony arrests. This is expected, given that these more serious breaches of the law often result in greater harm to individuals and

communities. However, in the last five years, with high-profile events such as the death of Eric Garner, the shooting of Michael Brown, and other incidents, there has been an increased focus on lower-level crimes and the criminal justice system's response to these crimes. Indeed, it is becoming evident that lower-level enforcement actions like misdemeanor arrests, citations or summonses, and pedestrian and vehicle stops—all of which are often initiated at the discretion of individual officers—might be crucial factors in communities' perceptions of core issues such as procedural justice, police legitimacy, and the fairness and equity of the criminal justice system.

The Misdemeanor Justice Project (MJP) at John Jay College of Criminal Justice, funded by the Laura and John Arnold Foundation, seeks to provide practitioners and policy makers with empirical evidence to inform the rapidly evolving conversations around the criminal justice system's response to lower-level offenses. In July 2018, the MJP released a special issue of *Criminal Justice Policy Review*. Three of the nine articles in the issue are related to officers' use of discretion and are particularly relevant to law enforcement. An examination of these studies suggests a complex relationship between the power of arrest, the discretion of individual officers, and departments' practices and policies.

Finding 1: Department policies might influence enforcement of minor crimes more than individual officer discretion.

Researchers Cynthia Lum and Heather Vovak examined trends in the use of misdemeanor arrests for minor crimes among law enforcement agencies with more than 500 police officers from 1990 to 2013.¹ Their analysis found four distinct groups—high increasers, middle increasers, middle stable, and low stable—based on the changes in the enforcement rates for minor crimes during that time period. Of the 105 agencies, 6 were high increasers, 18 were middle increasers, 46 were middle stable, and 35 were low stable.

This indicates that in the 1990s and 2000s, most agencies did not increase arrests for minor crimes. The authors also examined whether local crime or economic and demographic characteristics explain how agencies fall into these four groups but found no commonalities. That is, for instance, the agencies in the high increasers group did not necessarily have increasing crime rates or poverty rates over the same time span. The authors concluded that enforcement of minor crimes is likely most influenced by department policy choices rather than crime and demographic factors. These results also suggest that, relative to department policies, individual officer discretion might play a smaller role in the enforcement of minor crimes. Most importantly, these results highlight the notions that correlations between crime rates, economic and demographic indicators, and enforcement strategies are jurisdiction specific and will vary across different jurisdictions.

Action items:

- Remain cognizant of department policies' effects on officer behavior during enforcement of minor crimes and other discretionary activities.
- Ensure that, to the best of its ability, your agency submits to national data collection systems to allow for nationwide comparisons and to further inform departmental practices nationwide.
- Understand that discretion among officers is inherently subjective and is subject to a degree of variability most significantly influenced by organizational culture.

Finding 2: Officer buy-in is necessary to implement discretionary practices, and monitoring is needed to determine whether intended effects are achieved.

Researchers Robert Worden and Sarah McLean examined the use of Law Enforcement Assisted Diversion (LEAD) in Albany, New York, a discretionary pre-booking diversion program for low-level offenders who frequently interact with the criminal justice system and whose problematic behavior is

driven by substance use, mental illness, or poverty.² Over a one-year span, only 43 (7.5 percent) of 576 LEAD-eligible individuals were diverted, indicating that the majority of officers were not diverting people to this program. Half the officers the researchers surveyed held somewhat negative attitudes toward LEAD, suggesting that this might be a reason for the low level of diversion. It further indicates that officer buy-in is necessary when discretionary diversion options are offered as a law enforcement strategy. Further, those individuals who were diverted were not the high utilizers or otherwise intended recipients of the program; rather, diverted persons had limited or no criminal histories. This suggests that agencies need to clearly define program objectives, explain their rationale, and train officers accordingly.

Action items:

- Recognize that implementing a harm reduction policing philosophy can be successfully operationalized on the ground only when officers possess a solid understanding of the underlying concepts upon which the initiative is based.
- Integrate strong data collection processes in order to closely monitor programs and policies and to determine whether intended goals are being achieved.
- Assess counterproductive organizational attitudes prior to launching a harm reduction program, and reinforce the program's evidence-based societal benefits to begin shifting officer attitudes.

Finding 3: Implicit biases might be at play in highly discretionary enforcement strategies such as vehicle stops.

Researchers Joshua Chanin, Megan Welsh, and Dana Nurge analyzed data on traffic stops initiated by police officers in San Diego, California, in 2014 and 2015 with a focus on racial disparities.³ They found that black drivers were subject to both discretionary and non-discretionary searches at a greater frequency than white drivers. Further, searches were less likely to result in the discovery of contraband for black drivers relative to white

drivers. The authors argue that these findings suggest that greater surveillance of black drivers results from discretionary actions such as traffic stops and that officers' decision-making may be impacted by implicit bias.

Action items:

- Know what data are being captured (or not captured) to ensure that both quantitative and qualitative research questions can be meaningfully answered (e.g., "number of stops" is good, "reason for stop" and "outcome of stop" are better).
- Raise the level of awareness in your agency regarding implicit bias and its presence within all people, including the understanding that bias is particularly consequential in interactions between police and community members.
- Collect data in order to stay abreast of operational realities within your agency.

Conclusion

Collectively, these papers suggest that (1) department policies are critical for determining how, and to what extent, minor crimes are enforced; (2) the success of department practices that rely on high levels of officer discretion are dependent upon the degree to which officers buy into the philosophical approach; and (3) racially driven implicit bias among officers may significantly influence discretionary enforcement actions and result in disparate consequences for community members.

Among these studies, there is a crosscutting theme that highlights the need for more comprehensive administrative data. While Lum and Vovak's research used the FBI's Uniform Crime Reporting (UCR) data, their results remain incomplete because not all law enforcement agencies submit data to the FBI. As a result, the FBI data provide only a partial picture of the enforcement of minor crimes. Moreover, Worden and McLean's results highlight the need to collect data and monitor results when assessing a program's goal or outcomes and indicate that data capacities should be organized to allow for these evaluations. Lastly, lack of available administrative data prevented Chanin, Welsh, and Nurge from controlling for important factors such as make and model of car, the neighborhood of the stop, or officer demographics. Though their results align with prior

research, the availability of these additional variables could have altered the outcomes of their study.

The clear lesson here is that the development of data capacity within police departments is critical and should be expanded to facilitate conversations about local criminal justice system's response to minor crimes. The ultimate goal, of course, is to standardize data collection so as to allow for broad comparisons of enforcement practices and eventually evaluate core notions of police legitimacy and fairness and equity of the system across jurisdictions.

Notes:

¹ Cynthia Lum and Heather Vovak, "Variability in the Use of Misdemeanor Arrests by Police Agencies from 1990 to 2013: An Application of Group-Based Trajectory Modeling," *Criminal Justice Policy Review* (July 2018): 536–560.

² Robert E. Worden and Sarah J. McClean "Discretion and Diversion in Albany's LEAD Program," *Criminal Justice Policy Review* (July 2018): 584–610.

³ Joshua Chanin, Megan Welsh, and Dana Nurge, "Traffic Enforcement through the Lens of Race: A Sequential Analysis of Post-Stop Outcomes in San Diego, California," *Criminal Justice Policy Review* (July 2018): 561–583.

See the November 2018 Informer (available online November 1, 2018) for information about other studies featured in this special issue of *Criminal Justice Policy Review*.

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