

# Legitimate Policing and Professional Norms

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**Abstract:** Police officers exercise political power. In order for political power to be permissibly exercised, or legitimate, it must meet certain legitimacy conditions. Some of the legitimacy failures in law enforcement today stem from inadequate attention to adjusting police practices in response to new evidence. Using the medical profession as a comparison, this chapter argues that law enforcement organizations have ethical obligations to evaluate themselves in light of the latest research, as well as to support ongoing research into best practices. In other words, the cultivation of epistemic and improvement norms should be central to police work. Though some agencies have taken steps in this direction, much work remains for policing to become a profession that is truly self-critical and committed to self-improvement. Policing has a fraught relationship with professionalism; the professional norms defended in this paper contribute to a model of legitimate police professionalism.

On July 26, 2017, nurse Alex Wubbels was assaulted by Detective Jeff Payne. Detective Payne was ordered to collect a blood sample from an unconscious patient who had been in an automobile accident, though he was not suspected of being under the influence of drugs or alcohol. Wubbels explained that Payne could collect a blood sample only with a warrant, with the patient's formal consent, or if the patient were under arrest. When Wubbels refused to let Payne collect a blood sample because none of these criteria were met, Payne, under an order from Lieutenant James Tracy, charged towards Wubbels and dragged her outside. He placed her under arrest, cuffed her, and put her in a police vehicle.

Prior to the arrest, Wubbels was communicating with her supervisor who also informed Payne that he did not have the authority to collect a sample. Another officer on the scene suggested to Payne that they get a search warrant. But Payne himself recognized that they lacked the probable cause for a search warrant. He later claimed that he had authority from Utah's "implied consent" law. Not only was this law changed ten years prior to the incident, the US Supreme Court had earlier ruled that blood tests require a warrant. Payne, apparently ignorant of the relevant laws and policies, and despite the protests of Wubbels, her

supervisor, and security for the hospital, *and* despite the apparent hesitance of his fellow officer, arrested Wubbels (Hawkins 2017).

In the end, Wubbels was not charged, and she reached a settlement with Salt Lake City. After a period of paid administrative leave, Detective Payne was fired. Lieutenant Tracy was demoted (Wamsley 2017).

### The Clash of Professional Norms

This case is noteworthy for a variety of reasons. Unlike many cases of police brutality, the officer's misbehavior occurred against a backdrop of his own safety and without any need for urgent action. It occurred despite the warnings of hospital staff that he was making a mistake, and despite another police officer voicing concern. Unfortunately, none of his fellow officers intervened or objected more forcefully. It is also noteworthy because Payne was fired. Most noteworthy of all, for my purposes: it throws into sharp relief the divergent informal norms of two service professions, medicine and law enforcement.

Public discourse around policing is often critical and calls for institutional change. Our formal institutions, however, are only as effective as the informal norms they operate on top of.<sup>1</sup> In light of that, this chapter examines some of the informal norms that govern policing with the aim of identifying possibilities for improvement. In particular, I'll focus on policing strategies and policies rather than individual police-citizen interactions. The professional norms in policing are partly responsible for the manner in which the law is enforced, and they need attention.

I begin with some remarks on the relationship between law enforcement and political legitimacy. This provides a useful set of tools for thinking about the ethics of law enforcement. I shall then use legitimacy requirements to evaluate the informal norms of policing. There are two kinds of norms that I shall focus on. These are epistemic and "improvement" norms. The state of these informal norms in policing

indicates a deficiency in professionalism broadly construed within law enforcement. I should emphasize that my claim is not that these norms don't exist within law enforcement; it is rather that they are not robust enough. They aren't endorsed widely enough, aren't weighed strongly enough, or they fail to take priority over other norms. Further, there are institutional impediments to norm improvement. Understanding which informal, professional norms are desirable can help to recommend institutional reforms. The norms I shall discuss are relevant to the case described above, though they apply broadly. Achieving clarity about professional norms in policing is an important part of the project of professionalizing police work, a project begun about a century ago by August Vollmer.<sup>2</sup>

### Law Enforcement Strategies and Political Legitimacy

Police ethics must concern itself with questions about individuals as well as institutions. When are individual officers permitted to engage citizens, and when are they permitted to enforce particular laws?<sup>3</sup> There are also questions about strategy and policy. How will officers in a department remove illegal guns from the streets, deter burglaries, deal with officer misconduct, or wage the day's battle in the war on drugs? What policies and strategies govern patrol officers, detectives, and others, given their tremendous amount of discretion?

Because police officers and other members of law enforcement are the ones who enforce many of the decisions of the state, law enforcement strategy is justified in large part by considerations of *normative* political legitimacy. By legitimacy I mean the property of being *morally permitted* to exercise political power.<sup>4</sup> This sense of "legitimacy" is normative, unlike the descriptive sense used in other work (Tyler 2004). Normative legitimacy is not determined solely by whether citizens believe a police officer or agency to be legitimate. Policing is a profession, but it is a political profession; the normativity here is partially political, so the justifications must be as well.

Suppose that political legitimacy is in fact a foundational component of the professional ethics of law enforcement. Does this make police ethics redundant on the grounds that it is explained entirely by whatever theory of legitimacy we have? Perhaps if the True Theory of Legitimacy says that a particular government and law are legitimate, agents of that government may enforce it, and if the True Theory of Legitimacy says that a particular government or law is illegitimate, agents of that government may not enforce it. On this view, how members of law enforcement should behave—their professional ethics—is determined entirely by whatever normative theory tells us which governments and laws are legitimate.

This line of reasoning is mistaken. It glosses over an important issue, namely that legitimate governments and laws can be made illegitimate by bad law enforcement. Theories of political legitimacy are therefore incomplete without police ethics. Most readers will think that the government of New York City and most of its laws are legitimate. Even if the New York City Police Department (NYPD) are permitted to stop cab drivers using fraudulent medallions, they are not permitted to shoot drivers using the fraudulent medallions. Nor are they permitted to enforce the law selectively while giving their friends a pass. Either of these modes of enforcement would be illegitimate; police lack the permission to exercise these kinds of power. Any law can be illegitimately enforced. With enough illegitimate enforcement, an entire agency can become illegitimate. The Acapulco police department, for example, was so compromised by criminal organizations that the Mexican military disarmed it (Agerholm 2018). At some point an organization goes from a bad law enforcement agency to a criminal gang or occupying force.

Finally, note that much of what law enforcement organizations do is not given to them directly by legislatures or the courts. This fact is often overlooked. Locke, in discussing the importance of separating executive and legislative powers for example, claimed that the legislature has (he seems to mean *sole*) authority over “how the force for the commonwealth shall be employed” (Locke 1968, chapter 12, section 143). But this is strictly speaking false; it ignores the reality of how bureaucracies function. To put the point

differently, it is insensitive to the fact that the decisions of electorates and legislative bodies will always underdetermine modes of enforcement.

Discretion in law enforcement—about whether to engage a suspect in conversation or pursuit, to write a motorist a ticket, to focus on small “broken windows” infractions or to focus on crime “hot spots,” to prosecute an accused criminal on this charge or that, or to stack those charges—is largely unavoidable. Law enforcement strategy and policy occupies an intermediate zone between laws and particular instances of political power. For this reason we can’t have a complete account of police or law enforcement ethics more generally by relying only on the True Theory of Legitimacy. In the following section I use the NYPD’s practice of stop, question, and frisk (SQF) as a way to emphasize this point.

Although police ethics requires input from a theory of legitimacy, I do not want to rely on a particular theory of legitimacy here. I shall remain agnostic on how to fully specify a theory of legitimacy and instead rely on a few legitimacy requirements that are rather widely endorsed. Enforcement is plausibly illegitimate when the enforcement strategy is *disproportionate*, *unequal*, or when it is *harsh* rather than lenient.

Let’s take the proportionality requirement first. Suppose legislatures are permitted to regulate the supply of taxis in their jurisdiction. They are nevertheless not permitted to set the death penalty or a \$10 million fine as the punishment for operating an unauthorized taxi. What makes this the case also applies to other aspects of law enforcement. Even if officers in New York City are permitted to arrest individuals operating a taxi without a medallion, they are not permitted to use lethal force to prevent a driver from picking up a passenger. They may only impound the driver’s car, issue a ticket, refer the case to a prosecutor, or something along these lines. Lethal force would be disproportionate in a case like this. This means that police commanders may not adopt a taxi law enforcement strategy in their department that permits officers to use lethal force. If the cost of this is less than full compliance with that particular law, that is simply a cost of legitimate policing.

As William Blackstone famously put it, “the law holds it better that ten guilty persons escape, than that one innocent party suffer” (Blackstone 1765, book four, chapter twenty-seven). We might disagree with Blackstone about whether such leniency is actually widely respected in law creation or enforcement, but we are unlikely to disagree that leniency in an imperfect political procedure is a necessary part of that procedure’s legitimacy. When it comes to punishment, Blackstone’s view that false positives are worse than false negatives not only seems clearly correct, it seems to apply naturally to other aspects of law enforcement. The Fourth Amendment’s prohibition on unreasonable search and seizure is a manifestation of this: we have a somewhat (some would argue insufficiently) demanding justificatory requirement for a member of law enforcement to search or seize property. Even when contact with the criminal justice system doesn’t result in legal punishment, it can still be seriously costly. Therefore, if the result of an enforcement strategy is a high false positive rate, or in other words is harsh rather than lenient, it is likely illegitimate.

Consider finally the equality requirement. Legislatures are not permitted to create a system of laws that intentionally benefits some members of society at the expense of others. Some kind of political equality is necessary for political legitimacy. Here too it is clear that this requirement applies to law enforcement more generally. A police department that enforces drug laws against one criminal organization and not another is illegitimate, and not only because drug prohibition is not a legitimate use of political power. A police department that tends to enforce laws against one race or ethnicity and not another is likely illegitimate; at that point the department stops looking like a *police* force.

Police ethics is a matter of political philosophy. It is also a matter of professional ethics. It is especially interesting for the political philosopher because, as an interface between law and citizen, occupying a space between legislated policy and particular instances of political power, modes of law enforcement can be the difference between legitimate and illegitimate political power. It is especially interesting for the professional ethicist because the relationship between officer and citizen is regularly

adversarial. In what follows, I shall draw together these two points to further develop a professional police ethics that is sensitive to the demands of political legitimacy.

## Epistemic Norms and Professionalism

Good professions obey a variety of closely related epistemic norms. Before practicing medicine, medical professionals undergo years of rigorous training. Additionally, medical professionals change their professional behavior in response to research because they aim to provide patients with the best care possible. Many healthcare professionals enroll in “continuing education” programs in order to keep up with research developments, and many also make some effort to read medical journals. Other professionals, including lawyers, educators, and engineers, also participate in continuing education programs; it is often required by licensing bodies. Of course, not all healthcare professionals do this, but there is some normative expectation that they will.<sup>5</sup>

Note also that healthcare professionals are often the ones conducting the peer-reviewed research. Clinical trials that study the efficacy, risks, and best practices for new treatments are typically conducted by physicians and other healthcare professionals. Not only do members of the healthcare profession typically recognize an obligation to stay informed, there is also an expectation, a professional norm, that new medical knowledge will be discovered by members of the field.

So there are two distinct but related epistemic norms in healthcare: one of knowledge *acquisition*, and one of knowledge *production*. The normative expectation that healthcare as an institution will aim at the best outcomes possible, understood in terms of patient beneficence and autonomy, generates both of these epistemic norms.

It is a moral and professional failing to disregard these epistemic norms. Deficiencies in epistemic norms contribute to deficiencies with respect to legitimacy. Let us consider a controversial case study: stop,

question, and frisk “Terry stops” in New York City. The US Supreme Court’s decision in *Terry v. Ohio* allows police officers to detain individuals suspected of being engaged in criminal activity for a short period of time and to “pat down” individuals who are detained without violating the Fourth Amendment’s prohibition on unreasonable searches and seizures. This decision laid the ground for New York City’s controversial stop, question, and frisk policy (SQF). The adoption and continued defense of this strategy is but one example of a failure to satisfy epistemic norms within law enforcement.

Proponents of SQF claim it deters crime, with some attributing the historic drop in New York City crime to the policy. Members of the NYPD and the Michael Bloomberg administration are among these proponents.<sup>6</sup> The enforcement strategy has become intensely controversial, and many of its vocal proponents are members of law enforcement. Are they correct? Is SQF a legitimate enforcement strategy?

The SQF enforcement strategy is controversial not only in part because it is unclear whether the practice deters crime. It is controversial because it might result in the rights violations of innocent citizens, and because it is possibly carried out in a racist manner; at the very least, minorities clearly bear the majority of the burdens associated with SQF. While blacks and Hispanics are minorities in New York City, the vast majority of New Yorkers stopped, questioned, and frisked are black or Hispanic. The police practice might license racist harassment of innocent citizens.

Bloomberg responded to this claim as mayor, claiming that the decision to engage a suspect is entirely about behavior, not race or ethnicity (Bloomberg 2013). Further, those who find the charges of racism directed at stop and frisk nothing more than political correctness run amok are keen to point out that minorities are stopped at rates that closely match the minority against minority crime rate.<sup>7</sup> This, however, is probably not true. In 2007, years before Bloomberg and others made this argument, Andrew Gelman and co-authors showed that “members of minority groups were stopped more often than whites, both in comparison to their overall population and to the estimated rates of crime that they have committed” (Gelman et al 2007, 813ff).

There is the additional problem that the NYPD, in this context, might not be very good at identifying behavior that is actually indicative of criminality: from 2003 to 2013, the NYPD performed 1241 stops per day on average, arresting only 73 people per day on average. That's a "success" rate of only six percent. Further, the practice, aimed largely at removing weapons from the streets, yielded only 2 arrests per day on average for illegal possession of a gun (Apel 2016, 62). The low number of arrests generated by these Terry stops suggests that physical appearance, rather than behavioral cues, could be the cause.

If SQF is in fact an instance of unequal policing, then its legitimacy as an enforcement strategy is partially undermined. The success rate calls into question both the proportionality and leniency of SQF.

Consider first the costs of SQF. Interactions with police, even when they don't lead to incarceration, can be harmful. It likely decreases the mental health or wellbeing of those stopped (Geller et al 2014). Interaction with law enforcement has also been found to decrease political participation, which in turn can decrease the quality of democratic decision-making (Weaver and Lerman, 2010). Simply put, we need a rather strong justification for stopping someone, demanding a justification that they are not doing anything illegal, and physically touching and searching them if we are unsatisfied with their explanation. This is widely agreed upon by serious moral theories, and it is reflected in many legal jurisdictions.

What are the benefits of SQF? The main benefit touted by proponents is crime deterrence.<sup>8</sup> Crime rates did drop when the NYPD was practicing SQF. Crime rates in New York City began falling in the early 1990s *before* the adoption of SQF, however, probably in large part because of a sharp increase in the number of police officers employed by the city (Fagan et al 2010, 309). At the very least, it is difficult to separate the deference effects of a larger police presence from the deterrent effects of controversial Terry stops.<sup>9</sup> Some empirical work has found that SQF has no effect on robbery and burglary rates (Rosenfeld and Fornango 2010). Yet, despite historically low crime rates, the rate of Terry stops in the city *increased* drastically from 2003 to 2008 under Bloomberg. And because citizens who have negative interactions with

the police are less likely to communicate with them, part of the crime drop attributed to the policy could be simply a drop in crime *reports* (Apel 2016, 63). In addition to an increase in the size of the police force and possible reductions in crime report rates, there has also been a steady increase in the number of surveillance cameras in the city that could deter crime (Apel 2016, 61). In light of this, it is difficult to confidently attribute the crime drop to SQF.

Might the low arrest rate described above actually be evidence of the policy's success? Bloomberg relied on this very argument, claiming that stops that do not result in an arrest can still be legitimate. They can stop an assault or mugging before it begins, for example. While this is in principle true, we now know that this is unlikely to be the case. Crime rates did not rise when SQF was abandoned.<sup>10</sup>

SQF needs to have a deterrent effect in order for the force required by the enforcement strategy to be proportionate. If an enforcement strategy does not succeed in protecting or serving the community, then we have some evidence that the force does not meet the proportionality requirement, because we have force without anything to justify it. Consider an analogy with the proportionality requirement for permissible self-defense: if a method of self-defense harms innocent bystanders without having any tendency to neutralize the threat, that method is not justified on self-defense grounds.

If SQF does in fact turn out to have a deterrent effect, and its particular manifestation is not unequal, it still faces the following problem. Whereas we want our criminal justice procedures to be *lenient*, SQF is far from it. Crime rates fell during SQF and Terry stops continued to rise while crime rates fell. This means that SQF has targeted more innocent citizens as time goes on, and the practice has become increasingly harsh rather than maintaining an appropriate level of leniency.<sup>11</sup>

Normative evaluations of political power, whether domestic law enforcement or otherwise, often must be comparative. How does this method of enforcement compare to other *feasible* alternatives? Perhaps the SQF strategy is simply the best option available to us. Perhaps it does indeed have a deterrent effect. Without SQF, New York City may have descended into a Hobbesian war of all against all. If SQF were the

only feasible strategy for avoiding such misery, it may well be legitimate. Our law enforcement institutions would need some justification for that claim as part of the case for why SQF was legitimate. As far as I can tell, this justification does not exist. That crime rates fell in New York City prior to SQF suggests that other enforcement strategies that were more proportionate and appropriately lenient were available. As noted above, some empirical examination suggests that increased police presence, *but not the increased stops themselves* reduces crime (Macdonald et al 2016).

A proper analysis of SQF in light of legitimacy requirements would have made it clear that the strategy should have been abandoned. The upshot is twofold: there are good reasons to think that SQF was an illegitimate enforcement strategy, and more robust epistemic norms in policing could have prevented the adoption, or shortened the duration, of the enforcement strategy experiment. The practice was abandoned in New York City, but not because the department concluded that it was ineffective or illegitimate. It was deemed unconstitutional.

The effects of insufficient epistemic norms in policing are far-reaching. Detective Payne, in the case discussed at the outset, clearly violates the epistemic norm of policing, the knowledge acquisition norm in particular. But he is not alone. In 2018, Sergeant Josh Rosenblatt, a legal instructor in the Baltimore Police department, claimed that the police academy in Baltimore is passing officers who lack adequate knowledge of the Constitution and when it is legal to arrest or search citizens (Rector and Fenton 2018). The problem isn't isolated to the rank-and-file; in a world with more robust epistemic norms in policing, the "gateway drug theory" would be abandoned in the upper ranks of law enforcement.<sup>12</sup>

The epistemic norm deficiencies can be a cause for concern even when the policing seems not to suffer as a result. The Buffalo Police Department (BPD) is unusually good at not shooting suspects: they shot no one for a five-year period between 2012 and 2017. Whatever rules of engagement or use-of-force training strategies used in the department are thus more likely to be legitimate. But, worryingly, BPD do not seem to know what it is that they are doing right. In a story on the subject, the police union president

says it may just be luck. The other five officers CNN spoke with were unable to offer an explanation for their good performance. This state of affairs is clearly better than in many mid-sized American cities, but it is a cause for concern nevertheless (Lake 2017).

Law enforcement is as difficult and complicated as medicine, and it needs epistemic norms to match. Professional epistemic norms are important for ensuring that professional activity is competent. But that is not all. Epistemic norms are related to, or possibly partly constitutive of, “improvement” norms. Professional activity needs to be competent, but it is highly desirable that professionals recognize an obligation to raise the bar of competence. Epistemic norms play a crucial role in the improvement norms that govern medicine and other professions.

### Keeping the Bad Apples from Spoiling the Bunch

Acquiring the knowledge necessary for competent professional activity makes it clear that there is much we don’t know about the subject matter. When this obtains, the knowledge acquisition norm generates the knowledge production norm. This norm is not only an epistemic norm, it can also be described as an *improvement* norm. The improvement norm, however, extends beyond epistemic norms.

In medicine the improvement norm is most clearly manifested in the research component of the profession. But it is also manifested in dexterity practice for surgeons. Soldiers and police alike demonstrate a recognition of this norm when it comes to physical fitness, marksmanship, and other “combat” skills that require practice. Likewise for other professions.<sup>13</sup> In the context of policing the norm obviously requires more than exercise and target practice. It requires, among other things, having a more general concern with officer performance. Good policing cannot happen individually. The collective nature of policing implies that law enforcement professionals ought to be particularly concerned with the performance of their fellow officers in addition to their own. Let me unpack this claim.

Members of law enforcement, whether they're officers working a beat, detectives, or officers in managerial positions, are providing for the *general* security.<sup>14</sup> The force that police officers wield is not justified by appeal to considerations about the particular citizens an officer will interact with, but rather by appeal to considerations about the citizenry in general. In this way, the *adversarial* nature of policing is constitutive of its *collective* nature.

Practically speaking, when members of a community come to distrust some police, it undermines the efficacy of the police department. One officer's unprofessional, unethical conduct will mean that other officers (including officers from other agencies) are less effective at their jobs (Tyler 2004). For example, municipalities that rely heavily on police departments for revenue (e.g. through fines) also have higher rates of unsolved property and violent crime (Goldstein et al 2018). When police brutality cases are publicized, citizens are less likely to call the police to report ongoing crime (Desmond et al 2016). Cynicism about law enforcement tends to decrease cooperation with the police and cynicism about one law enforcement agency tends to transfer to other agencies (Kirk et al 2012).

So, an unprofessional, unethical police officer in one agency can undermine the effectiveness of his or her own agency, but also of other agencies as well. Good police officers then must be concerned with eliminating the so-called "bad apples" who are either badly motivated or badly performing. Not only do they undermine the goals of law enforcement, they risk de-legitimizing the law enforcement organization itself. Thus, from the obligation to competently perform one's professional activity, and from the improvement norm, it follows that there must be a strong *accountability* norm in law enforcement.<sup>15</sup>

There are useful similarities with medicine here as well. Some of the professional obligations commonly recognized in medicine are agent- and patient-relative, meaning that *this* provider has an obligation to *that* patient. Others, we might say, are agent- and patient-neutral, meaning they apply to all providers and are had to all patients (or perhaps even more broadly). Deceiving a patient into accepting a particular treatment violates both kinds of obligation. There is an obligation the provider has to the patient

that is violated. There is, plausibly, also an obligation not to do things that damage the trust patients have in the healthcare system that is crucial to effective and permissible medical care.<sup>16</sup>

Police ethics includes both kinds of obligation. Members of law enforcement will have obligations of the agent- and patient-relative variety. They will also have neutral obligations. Indeed, this follows from the adversarial nature of policing: the foundational obligation to protect and serve is had to the community in general, and satisfying that obligation typically brings police into contact with others who must be constrained in some way.

There are at least two components of the general accountability norm: an obligation to not interfere with the removal or punishment of a fellow professional for unethical conduct, and an obligation to bring unethical conduct to light. Let us call these the *non-interference* and *whistleblowing* norms.

The law enforcement profession has not fully recognized these norms. Take the NYPD's retaliation against Adrian Schoolcraft as an example. Here, officers harassed the rare whistleblower in law enforcement as punishment for whistleblowing, and further attempted to interfere with the investigation of corruption within New York City's 81st Precinct station (Goodman 2013). The NYPD, more generally, rarely acts to punish police officers who lie under oath. Between 2010 and 2018, the Civilian Complaint Review Board received 81 complaints about officers lying; in only two of them did the NYPD's Internal Affairs Bureau uphold the Board's complaint (Goldstein 2018).

This is a familiar phenomenon. The so-called "blue wall of silence" means that officers are unlikely to report or testify about misconduct (Koepke 2000). When misconduct is brought to light, internal affairs investigations are often not objective, plausibly because they are not sufficiently institutionally independent. Police unions complain when misconduct is made public knowledge, and often advocate against police oversight.<sup>17</sup> The close relationship between prosecutors and police officers is another institutional impediment to accountability norms.

I should emphasize that my point is not that there is no accountability norm in policing. Rather, the claim is just that the norm seems to be rather weak and it is undermined by various institutional design problems. Further, as evidenced by the “blue wall of silence” mentality manifest in counterproductive police unions, there seems to be a rather strong competing anti-accountability norm.

In addition to negligent police unions and incentive problems for internal investigators and prosecutors, the size of policing agencies is another institutional impediment related to accountability. When, despite the prevailing tendencies, an officer is removed from the job because of misconduct, this is often short-lived. Incompetent officers can bounce from agency to agency until they eventually use lethal force without justification.<sup>18</sup> Officers can sometimes find employment *after* using lethal force without justification: four years after fatally shooting Tamir Rice, and one year after being fired by the Cleveland Police Department, Timothy Loehman was hired by the Bellaire, Ohio, Police Department (Matthew 2018). The decentralized nature of policing is partly responsible for these problems.

The common complaint about “Monday-morning quarterbacking” further illustrates the state of accountability norms in policing. It does no good to criticize the quarterback the morning after the game when we’ve had the benefit of hindsight and experienced none of the pressures of the job. There is something to this complaint, but this way of thinking about access to knowledge can be taken too far. It is easy to be too deferential to the perspective of individual officers. In discussing the BPD’s low rate of killing citizens, one officer had this to say: “I’ve lost—not close friends, but friends, because of the comments they’ve made about, you know, ‘This cop was wrong.’ Were you there? ... I mean, you weren’t there. That’s why I wouldn’t critique anybody—I would never critique another cop” (Lake 2017). Surely this officer is not an outlier in the profession in holding that the judgment of an officer in the line of duty is basically beyond reproach. We don’t even have to take this officer literally for this to be objectionable. It would be absurd to think one is *never* entitled to critique an officer’s performance; it is not much less absurd to think that one is *usually* not entitled to critique an officer’s performance. Though the Monday morning

quarterback complaint is right that we should take into account the way that the circumstances of the job can lead to blameless mistakes, it does not follow that any professional's conduct is beyond criticism.

Members of law enforcement are exactly the people who need to be critical of unprofessional policing.

Before moving on, let me explicitly connect the improvement norms I've discussed in this section with the legitimacy requirements set out at the beginning. Recall that legitimate policing requires equal, lenient, and proportionate enforcement. When law enforcement professionals violate the accountability norm by failing to whistle blow, by failing to cross the blue wall of silence, or by otherwise interfering an investigation, they are engaging in unequal policing. Officers are permitted to use discretion, but ignoring professional misconduct is very different from ignoring a speeder or a beer in a paper bag on the street. Unequal policing doesn't merely make particular instances of enforcement illegitimate, it risks rendering the entire agency illegitimate.

There is a final sense of accountability worth discussing in this section. Not only does the law enforcement profession need a more widespread recognition of the obligation to hold others accountable for their unethical conduct, the profession also needs more accountability for enforcement strategies more broadly. Currently, for the most part, law enforcement agencies do not commit themselves upfront to abandoning strategies that prove ineffective because they do not spell out what it would mean for an enforcement strategy to be ineffective. This means that we have no way of easily falsifying the empirical claims used to justify new or experimental enforcement strategies.

Being clear from the beginning what the failure conditions for a proposed enforcement strategy are opens law enforcement up to accountability. NYPD Chief Ray Kelly went on the record to say that if SQF were ended, violent crime would go up (Cushing 2013). We now know that it did not. Kelly responded not by admitting that he was wrong, but by criticizing the crime statistics (Boniello 2016). Perhaps Kelly is right that clean statistics would vindicate him, though that seems unlikely. A more robust ability to hold

agencies accountable for their enforcement strategies would hopefully result in the abandonment of this strategy. This requires law enforcement to make falsifiable claims in support of enforcement strategies.

In Detective Payne's case, despite determinations from an internal affairs review and a Police Civilian Review Board that Payne acted wrongfully, Payne's police union complained that the investigation was "corrupted" by "premature" release of bodycam footage. In response to an obviously illegitimate use of police force, citizens complained and the city acknowledged that wrongdoing occurred. Incredibly, these statements were considered "inflammatory" by the police union (Hunt and Ramseth 2017).

### Conceptual Improvements in Policing

After World War II, medical ethics underwent a revolution. Before the Nuremberg Code, the Declaration of Geneva, the Declaration of Helsinki, and a series of precedent-setting court cases in the 1950s, medical ethics was dominated by considerations of welfare as conceived of by physicians. Medical paternalism was the norm. A variety of conceptual changes played a role in the change to autonomy-based medical ethics, clearly spurred in part by the horrors of involuntary medical experimentation. In particular, recognizing that (i) welfare is partly determined by autonomous preferences, and that (ii) mere acquiescence isn't evidence of valid consent, made it clear that the principle of respect for autonomy was far weightier and demanding than had been recognized.

The stark contrast in medical ethics before and after WWII is another reason why this comparison is useful. It is easy for an optimist to look at the Black Lives Matter movement, law enforcement's unequivocal defeat in the war on drugs, and the changes demanded by the ongoing opioid epidemic, and see ourselves as on the cusp of a similar drastic transition in policing. We must ask, then, what went into medicine's transition? How can we instigate a similar transition in policing?

We might say that the goals of medical care were “thicker” after WWII. The goals of medical care went from mere health to a holistic integration of the values of autonomy and wellbeing. In turn, this allowed us to change the way that we think about the goals or nature of medicine: acting only with the patient’s informed consent became far more important than merely returning the patient to health. This had huge ramifications. Hospitals had to institute and refine consent forms and procedures. Advance directives and goals of care were created and made more nuanced. Hospitals instituted procedures to make patients aware of the importance of advance directives and having trustworthy, official proxy decision-makers. This transition is still underway, of course, as evidenced by the AMA’s reluctance to recognize that active euthanasia is a legitimate tool in the physician’s toolkit; there are remnants of the beneficence-before-autonomy medical ethic.

A similar distinction can be drawn in policing. The “thin” goals of policing are just the successful apprehension and prosecution of criminals. Of course, no one thinks that this exhausts the goals of policing. The International Association of Chiefs of Police description of the duties of police is a plausible description of the “thick” goals of policing: “The fundamental duties of a police officer include serving the community; safeguarding lives and property; protecting the innocent; keeping the peace; and ensuring the rights of all to liberty, equality and justice” (International Association of Chiefs of Police 1989). Satisfying the thin goals of policing does not guarantee that any of the thick goals will be satisfied. Just as good medicine requires medical professionals to recognize that health is not the final end of medicine, good policing similarly requires law enforcement professionals to recognize that successful arrests and prosecutions are not the final end of policing. A singular focus on crime deterrence and punishment in law enforcement would be like a singular focus on disease prevention and treatment in medicine. In other words, *moral clarity* about the goals of policing, and their lexical priority, is necessary for good policing.

Clarifying the goals and values of medicine allowed us to add tools to the toolkit. A medical profession aimed solely at the treatment of pathology has no room for palliative care. Palliative care, a

multidisciplinary approach to managing harmful symptoms that came into existence roughly alongside the doctrine of informed consent, can occur alongside curative care, though it is often the sole component of end-of-life care.

A “pathocentric” conception of medicine has a hard time permitting organ transplants from healthy donors to patients on the grounds that the surgeon turns a healthy *person* into a *patient*. Joseph Murray, the first to transplant a human kidney, considered the transplant an ethical “compromise” on these grounds (Davis and Crowe 2009, 589). Fortunately, organ transplants are now core rather than peripheral medical procedures. There is now widespread agreement that medicine is not purely pathocentric.

Palliative care and organ transplants, are reactions to the fact that the goals and values of medicine can conflict. Paying attention to value conflict can uncover possible professional improvements in policing as it has in medicine.

Recognizing the value conflict, in emergency situations when resources are scarce, medical professionals triage patients to treat the most serious problems first. Some police departments seemingly do not take this seriously enough. In 2015, for example, the Flint Police Department was gifted a new drug sniffing dog.<sup>19</sup> The department, under serious resource constraints, and facing high levels of violent crime, deemed drug prohibition to be important enough to spend their limited time seeking out those who illegally possessed drugs.

Perhaps the thought was that by enforcing drug laws, police would be able to indirectly target violent crime. But this itself embodies a failure to recognize that goals of law enforcement can conflict. Enforcing prohibition laws that generate a black market is often a major *cause* of violence. Eliminating crime and protecting citizens are thus in tension. If, however, law enforcement looked beyond traditional law enforcement *methods* of achieving their goals, they could reduce this tension.

I have in mind the perhaps counterintuitive harm-reduction approach to treating the ills of drug abuse. Sometimes the solution to a problem is counterintuitive. For example, it is common for kidney

transplant recipients to have *three* kidneys, because if their original kidneys are not necrotic, it is a net benefit to the patient to leave them in their body. Similarly, treating the individual and social problems of drug abuse by giving drug users a supervised injection site and a needle exchange may seem as counterintuitive as leaving pathological kidneys in a transplant patient. We have, however, compelling evidence that housing support, therapy, needle exchange centers, and so on, are better at treating the problems of drug abuse than incarceration. Harm reduction characterizes the medical response to drug use. Law enforcement, on the other hand, is by and large skeptical of harm-reduction approaches, evidenced by how long they have taken to spill over into the law enforcement arsenal. One Ohio sheriff, for example, refuses to have officers carry naloxone despite the obvious fact that this is one successful way to reduce the death toll of the opioid epidemic (Siemaszko 2017).

Finally, sometimes professionals simply need better training regarding the moral obligations that follow from uncontroversial professional goals and norms. In some cases, it is very difficult to figure out what morality requires in a complex situation. But in many cases, what morality requires is quite clear. For example, the cost of interacting with police entails that police need to be justified in engaging with citizens (where engaging means stopping citizens or otherwise using force). They may not randomly engage with citizens.

Unfortunately, in a bid to improve police-community relations, the Halifax, Virginia, police department thought it would be a good idea to have “random ice cream stops” where motorists would be pulled over and given ice cream. The officers report that the motorists genuinely enjoyed the interaction, though there are clear incentives not to communicate one’s displeasure in a situation like this (Criss 2016). If we put aside the challenge of eating ice cream while driving and simply grant that many motorists like the interaction, this is still a bad idea. It would be analogous to medical professionals performing random, benign medical procedures. Just because a random flu vaccination can be in some ways benign does not mean that it is justified. A medical professional who performed random benign medical procedures would

be guilty of, among other things, ignorance of what their professional obligations require of them. The same analysis applies to officers conducting random ice cream stops.

The recent behavior of St. Louis police officers serves as a less benign example of this problem. After breaking up protests, an unfortunately large number of police officers were heard chanting “Whose street? Our Street!” (Lartey 2017). These officers seem not to respect the constraints on the adversarial nature of policing; policing should never be “us” versus “them.” When it is, legitimacy is likely lost.

## Conclusion

I have argued that the proportionality, leniency, and equality requirements for political legitimacy apply directly to law enforcement strategies and rules of engagement. Those requirements can be fully met only when law enforcement, as a profession, recognizes more robust (and partially overlapping) epistemic and improvement norms. The epistemic norms include a knowledge acquisition and knowledge production norm. The improvement norms, in addition to requiring the profession to engage in knowledge production, also include the accountability norms of non-interference, whistleblowing, and falsifiability. Finally, I argued that increased moral clarity, itself a professional improvement, paves the way for more-likely-to-be-legitimate enforcement strategies.

This analysis explains a variety of moral problems in policing and is motivated in part by the view that simply spending more money on training and punishing unprofessional, unethical, and criminal law enforcement agents will not fix our problems. Force is rarely the best method for changing bad behavior and bad outcomes. Instead, we want professions to be self-regulating as far as possible.

There are many plausible suggestions for reform. Police decertification could be pursued more aggressively, along with other reforms, at the state level (Puro et al 1997; Goldman 2016). Explaining the blue wall of silence to jurors could increase police accountability (Koepke 2000). Perhaps requiring officers

to carry their own “malpractice” insurance would make some unprofessional officers unemployable (Ramirez et al 2018). All of these face the well-known problem that policing in the United States is radically decentralized, making widespread reform difficult to achieve. To conclude, I would like to discuss just one possibility for rectifying the professional norm and legitimacy deficiencies in policing: making law enforcement more multidisciplinary. Making law enforcement more multidisciplinary is likely to increase moral clarity and strengthen epistemic and improvement norms.

The successful transition from paternalism-dominated to autonomy-dominated medicine required further specialization. Hospitals tend now to employ clinical ethicists to take part in decisions about medical care. Having an “outsider” in the room helps to increase the salience of considerations apart from medical wellbeing. The ongoing transition to more fully respect autonomy at the end of life was facilitated by the creation of a new specialization, palliative care. Medical professionals are as susceptible to bad incentives as anyone, and adding the clinical ethicist and palliative care positions to the hospital hierarchy serves as a check against these risks. These new roles, though slightly antagonistic to the existing conceptual frameworks, have been thoroughly integrated into the medical profession. Mild antagonism can itself be responsible for rectifying the norm deficiencies identified here.

Adding more police ethics to the law enforcement curriculum is a way of making policing more interdisciplinary. One of the benefits of making medical ethics a required part of the typical medical education is that professionals have a shared language to think about the competing values in morally charged situations that inevitably arise. More fundamentally, it introduces new metrics on which to evaluate possible courses of action. The evaluation should not stop at “is it legal?” and “will it deter crime?” Work on (descriptive) police legitimacy has already had an influence on the profession, but a larger influence would be welcome.

In order to further take advantage of some of the useful, mild antagonism found in the medical profession, the administrative ranks of law enforcement agencies might also be diversified. If no one in the

administrative positions is concerned with various legitimacy requirements, no one has to convince others that an enforcement strategy is legitimate. These kinds of institutional antagonism require people to take seriously the perspective of others even if only one party gets their way. This could have the further effect of decoupling the *goals* of law enforcement from *methods* of law enforcement.

One way to begin changing the norms is to change the selection effects involved in the hiring and staffing process. At the political level, we can encourage law enforcement agencies to work with criminologists and other social scientists, possibly by increasing the grant money for that kind of research. Even better, we should encourage law enforcement agencies to have members who engage in criminology research. Pairing researchers with police administrators trying out new enforcement strategies allows for more robust epistemic norms, more accountability, and better division of labor. Bringing criminologists and other social scientists into law enforcement agencies would change an agency's culture. This happens to an extent now, of course, though the transition can be strengthened and accelerated.

Perspectives from moral philosophy, medicine, and social science would improve the informal, professional norms within policing. Corporations have specialization at the executive level; the make-up of the executive and the board of directors matters for how the firm behaves. We can induce change within policing by remaking police departments.

The Police Executive Research Forum has made a number of recommendations along these lines. They recommend equipping officers with naloxone and working with public health and social service agencies (PERF 2017, 14). Richard Biehl, police chief in Dayton, Ohio, has equipped officers with naloxone to great success (Goodnough 2018). The National Police Foundation acknowledges the empirical evidence concerning the costs of SQF and risks associated with the strategy (Police Foundation 2017). I hope to have provided a normative framework that explains why we badly need to amplify these kinds of voices within the law enforcement profession. Again, my point is not that these norms are nonexistent; rather, it is that

they need to be strengthened and extended, and competing norms and institutional impediments to improving the norms need to be eliminated.

One might object that the entire analysis I've offered is suspect on the grounds that medical malpractice claims more lives than police malpractice. Perhaps medicine is not the exemplar I've claimed that it is.<sup>20</sup> Perhaps medicine even has a thing or two to learn from policing. In response, I should clarify that the medical profession has deep moral problems of its own. The profession has, however, made a serious effort to reign in its abuses over the last several decades as patient autonomy has been pushed to the core of medical ethics and practice.

A natural worry about increased professionalization in law enforcement is that, rather than improving the quality of law enforcement, it would actually make it worse by undermining democratic oversight and the possibility of democratic authorization. If the police are experts, why would they take guidance from the voters? There is much more to be said about the relationship between democratic values and legitimate policing, and about how to make policing more legitimate. For now, I hope to have made it clear that achieving an appropriate relationship between the sense of professionalism in law enforcement and democratic authorization requires us to revise the way we think of law enforcement and to make changes to our law enforcement institutions. Law enforcement strategies aren't legitimate just because they are pursued by legitimate agents or agencies. Good policing is exceptionally difficult in no small part because legitimacy requirements are demanding.

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## Notes

- <sup>1</sup> Douglass North (1991) famously defines institutions as *including* informal constraints. All that matters for present purposes is that the manifestation of formal rules is highly dependent on informal norms.
- <sup>2</sup> August Vollmer is widely considered the "father of modern policing." Sarah Seo (2019) chronicles the relationship between Vollmer's drive to professionalize policing and the adoption of the automobile.
- <sup>3</sup> I take up these questions in earlier work (Monaghan 2017, 2019).
- <sup>4</sup> Not everyone uses "legitimacy" in this way. My usage follows Buchanan (2002).
- <sup>5</sup> The American Medical Association's (AMA) code of ethics has the following to say on the matter: "Physicians should strive to further their medical education throughout their careers, to ensure that they serve patients to the best of their abilities and live up to professional standards of excellence" (AMA 2016, Opinion 9.2.6).

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<sup>6</sup> NYPD spokesman Paul J. Brown and spokesman for then-mayor Michael Bloomberg Marc LaVorgna both make this claim (Taylor 2011). Bloomberg himself endorses this claim (Bloomberg 2013).

<sup>7</sup> See the Bloomberg op-ed cited above and Mac Donald (2010).

<sup>8</sup> The practice of stop and frisk has received some support from criminologists. Weisburd et al (2015) provide some evidence for thinking that the practice does deter crime, though they point out that it is not clear whether there are better police practices for deterring crime. They also point out that one of the costs of the policy beyond police resources could be diminished police legitimacy. It should be rather obvious, though, that the comparative information we lack is precisely what we would want to know in order to evaluate the practice.

<sup>9</sup> MacDonald et al (2016) claims that the above-cited Weisburd study does not make this separation, undermining the conclusion Weisburd et al draw.

<sup>10</sup> Of course, it is possible that the NYPD's strategy for *documenting* Terry stops has changed, while its Terry stop strategy has not.

<sup>11</sup> See again Fagan et al (2010, 311) and recall from Geller et al (2014) that there are real costs associated with Terry stops.

<sup>12</sup> Former US Attorney General Jeff Sessions, on the other hand, appears to be a proponent of the gateway drug theory (Ganeva 2016).

<sup>13</sup> The AMA's principles of medical ethics explicitly recognize this duty: "A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated." Further, it even recognizes a political manifestation of this duty: "A physician shall respect the law and also

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recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient” (AMA 2016, Principles III, V).

<sup>14</sup> The United States Supreme Court has ruled that police are not obligated to provide services to particular citizens (*United States v. Armstrong* 1996; *Town of Castle Rock v. Gonzales* 2005).

<sup>15</sup> An accountability norm also follows from a weaker “competence” norm. Here too the AMA recognizes a relevantly similar professional obligation: “A physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities” (AMA 2016, Principle II).

<sup>16</sup> This sort of concern underlies the attempt to restrict the sphere of permissible medical action to exclude things like cosmetic enhancement surgeries. See, for one example, Miller et al (2000). For a more general discussion of trust in medicine see Clark (2002). They are but two of many possible examples.

<sup>17</sup> The Nashville Fraternal Order of Police opposed the measure to establish a citizen review board and funded an ad campaign against it (Gonzalez 2018).

<sup>18</sup> See, for example, the case of Michael Rosefield who left a number of police departments before shooting a fleeing suspect two hours into his new job with the East Pittsburgh police department (Mock 2018).

<sup>19</sup> Sonitrol, a private security firm, paid for the dog and purchased naming rights for the German Shepherd named Sonitrol (Young 2015).

<sup>20</sup> Thanks to David Klinger for bringing this objection to my attention.