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Policing the Demos: Liberalism and the Birth of Police Discretion

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POLICING THE DEMOS:
LIBERALISM AND THE BIRTH OF POLICE DISCRETION

by

Colin Christensen

A dissertation submitted in partial satisfaction of the
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Committee in charge:
Professor Jonathan Simon, Co-Chair
Professor Franklin Zimring, Co-Chair
Professor Wendy Brown

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ABSTRACT

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This dissertation examines the changing relationship between democracy and the police in the last half-century of police form. Specifically, it offers a genealogy of the concept of police discretion in several foundational texts in police science and explores the ways in which the shifting meaning and dangers of police discretion have mediated that relationship. Beginning with President Johnson's Crime Commission, the dissertation charts how police discretion transformed from the central dilemma of policing in a democratic society to near total disappearance as an object of police reform. In so charting, it shows how the Crime Commission's preference for controlling discretion through administrative legalism was replaced by a concern for squaring discretion with the norms and standards of legitimacy that underwrite law. That concern is evidence not only in academic studies of police behavior like those developed in the works of Jerome Hall, Jerome Skolnick, James Q. Wilson, and Egon Bittner, but appears as well in the Supreme Court's Due Process Revolution cases. The dissertation submits that police discretion is best understood in terms of political decisionism, and it argues that these transformations are the result of liberalism's failure to coherently account for decisionistic power. Consequently, the dissertation contends, police reform has expanded rather than curtailed police discretion and its attendant violence. Moreover, it demonstrates how discretion is reprogrammed in the era of community policing, and it argues that not only is the impasse between police abolition and police reform best understood as a result of liberalism's faults, but that community policing's moral-political rationality complicates the prospects for both.

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High thanks I owe to so many excellent teachers, mentors, comrades, and friends for making this dissertation possible. Many a dissertation hedge the difficult task of acknowledging all those deserving of recognition and gratitude in the claim that it would be near impossible to name everyone who played a part along their way. That is their right, and they are probably wise for doing so. Alas, however, this dissertation will not be one of them. I thus ask readers both to forgive and to indulge me as I endeavor to honor the small army that has supported me throughout the many years leading to this writing. Should I overlook one of you, I offer not a pre-emptive apology but a voucher for one beer on me and cheers to you for bothering to crack this thing open.

I am lucky to have been brought up in two intellectual homes, one in the Appalachian foothills of southwest Virginia and another in the hills of San Francisco's East Bay. These hills gave me space to roam and think, to grow and make mistakes. Not just this dissertation but the person I am today is a product of these hills and the people that call them home.

At Emory & Henry College, I was spoiled with dedicated teachers and great friends that continue to inform my thought today. The debt I owe to Joe Lane, my first teacher of the political, is immeasurable. As my undergraduate advisor, mentor, and friend, Joe taught me how to think critically about the world and orient my place within it. For believing in me, teaching me to savor a well-crafted sentence, loaning me countless books that I never gave back, and saving me from law school, he deserves foremost thanks. For setting me down the path that has culminated with this dissertation, he also deserves all blame. Special thanks goes as well to Shelley Koch for opening my eyes to the social and to Melissa Taverner, whose leadership in the classroom inspired me to teach. For their continued friendship and willingness to entertain my musings about police, my sincere thanks extends to my old friends and classmates Kaitlyn Parks, Carter Aylor, Sydney England, Charles Smith, Jarrett Dunning, Carlie Fogleman, Rayce Lamb, Billy Parsons, and Paul Stotlz. I hope that this dissertation makes you all proud.

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for all my life pursuits. Kinch helped me navigate more than few critical junctures in graduate school, and he certainly saved me from countless blunders. It was from Kinch that I first learned about the Jurisprudence and Social Policy Program, and my gratitude for his kind and generous response to an email from eager undergraduate student who couldn't even point to Berkeley on a map is beyond measure.

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Brendon each time I sat down to write, and it is his memory that reminded me of the urgency of the predicaments this dissertation explores. I dedicate this dissertation to him. Life's a garden, dig it.

DECISION AND DISCRETION

I. INTRODUCTION TO THE PROBLEM

THIS dissertation contributes to the study of police governance by interrogating how attempts to align policing with democracy have been thwarted by the decisionism afforded to law enforcement under the banner of 'police discretion.' In so interrogating, the ambition of this dissertation is to offer a genealogy of police discretion that critically engages dominant discourses in the last half-century of police reform. To that end, the dissertation pursues a series of interrelated sub-questions: Why has police discretion evaded serious political scrutiny? How have the reciprocal discourses of liberal legality and liberal democracy conditioned the meaning of police discretion, its value, dangers, and limits? How has the failure to incorporate decisionism into the liberal democratic discourse foiled the project of police reform? How has this discourse concealed the fundamental illegitimacy of a power that operates not by law but by decision? How does it prefigure and refigure this power? And what are the costs of these conceits and configurations?

The discretionary power designated to police officers represents the delicate limn between legitimate state action cabined by law and situational exigencies about which the law is silent and during which police authority operates unfettered to secure order. Abstractly, police discretion obtains "whenever the effective limits on [an officer's] power leave him free to make a choice among possible courses of action or in action."[1] Crucially, that discretion operates within the officer's *effective* limits means, in Kenneth Davis' words, "[it] is not limited to what is authorized or what is legal but includes all that is within…the officer's power."[2] As recent years have borne witness to the haunting of American political life by police killings, the political salience of the persistent and disturbing presence of police violence has been magnified by the often legally trivial precipitating circumstances that set in motion many fatal encounters between private citizens and public law enforcement. A dispatch for 'stealing in progress' in Ferguson, Missouri culminated with the responding officer fatally shooting the unarmed teenaged suspect, an arrest in progress for selling loose cigarettes on Staten Island resulted with the suspect dying from the arresting officer's use of a chokehold, a woman arrested during a routine traffic stop in Prairie View, Texas later died in police custody: in each of these cases the justification for the use of force is found not in the legal infraction that warranted police intervention but in the individual discretion of the police officer. As the point of departure between the legal cause for intrusion and the ensuing civilian fatalities, police discretion poses a question of sovereign decisionism, of when state agents may act unbound by law in service of securing peace and order. Yet, contemporary police reform efforts, most of which motivated by concerns over police violence, have failed to see the ways in which police discretion operates unbound by and without submission to the legal mechanisms that seek to curtail excessive, arbitrary, and often deadly uses of force.

Consider the variety of decisions that police officers make in three prosaic—and ubiquitous—law enforcement practices: investigatory street stops, routine traffic stops, and the use of coercive

[1] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), 4.
[2] Davis, *Discretionary Justice*, 4.

physical force to effectuate an arrest. Each of these episodes might typically be evaluated in terms of their legal legitimacy. Was there reasonable suspicion, based on 'articulable facts,' of apparent or potential criminal activity to justify a street stop? Was there evidence of a traffic violation warranting a stop, and was the officer's conduct pursuant to that stop reasonable in scope and duration? Was an officer's use of force befitting of the severity of the crime and the level of threat presented? These are the sort of questions asked and answered in the light of Fourth Amendment doctrine. Often, however, police conduct either does not "trigger" the Fourth Amendment or, alternatively, the Fourth Amendment "facilitates the space" from stopping people to killing people.[3]

Begin with the investigatory street stop. Take the case of Keilon Hill, an African-American political canvasser arrested by a white officer in West Des Moines, Iowa after reports of a 'suspicious person' allegedly 'soliciting' in a suburban neighborhood.[4] During the first five minutes of the approximately 12-minute video of the encounter released by the WDPD, the officer patrols the neighborhood in search of the person of suspicion (at times wandering almost aimlessly). Upon observing a black male paused on the sidewalk, the officer approaches him, informing the suspect that "someone called in about you," and that "people were concerned… for their neighborhoods." How, exactly, the officer knew Mr. Hill was the "you" about which concerned neighbors had called is never explained. The suspect, Hill, immediately asks "what am I doing wrong?" And after a brisk exchange distinguishing solicitation (the legal infraction the officer proffered in response to 'what am I doing wrong?') from political canvassing (which is not a crime), Hill asks the officer to "leave me alone sir, I have not broken any laws." The officer diffidently responds "well, I'm still investigating … [a] suspicious person…they called in about you." For the remaining seven and a half minutes of the video, Hill relentlessly attempts to assert his right to be free from warrantless intrusion while the officer asks for his identification, his name, his reasons for being in the neighborhood, demanding that he "stop!" that he's "not free to go," complaining almost petulantly to dispatch, "he won't identify himself as the suspicious person I'm investigating." Hill was ultimately arrested on misdemeanor charges of harassing a public official.

The police-citizen encounter in West Des Moines is remarkable in no significant way.[5] But it is instructive for understanding (a) the number and types of decisions made by the officer to carry out the encounter and (b) the limits of assessing the interaction in terms of Fourth Amendment legalities. Indeed, the officer's decision to follow, to approach, to question Hill's whereabouts and identity, to request his legal identification—none of this "triggers" the Fourth Amendment because none of these

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[3] Devon Carbado, "From Stopping Black People to Killing Black People: Fourth Amendment Pathways to Police Violence," *California Law Review* 105 (2016): 125-164, 131. Hereafter cited as Carbado, "Fourth Amendment Pathways to Police Violence."

[4] Tyler J. Davis, "'Treated like a Criminal for Absolutely No Reason': Black Campaign Worker Acquitted of Harassing Police Officer," *The Des Moines Register*, April 30, 2019, https://www.desmoinesregister.com/story/news/crime-and-courts/2019/04/30/keilon-hill-black-campaign-worker-iowa-david-young-acquitted-harassment-public-official-wdm-police/3621793002/. In the process of preparing this dissertation for filing, a second case of blatant racial profiling and police abuse involving Mr. Hill made headlines in Denver, Colorado. See Elise Schmelzer, "'He Looks like a Turd': Denver Police Racially Profiled Black Driver, Lawsuit Alleges," *The Denver Post*, February 4, 2022, https://www.denverpost.com/2022/02/04/denver-police-racial-profile-lawsuit-keilon-hill/.

[5] Indeed, I suspect it would have hardly been surprising if, rather than being arrested on misdemeanor charges of harassing a public official—upon which we'd do well to reflect on the perversity of such a charger by asking who was harassing whom? —Mr. Hill had been beaten, tased, or even killed by the arresting officer. In fact, I suspect most first-time viewers of the video might very well anticipate such grave outcomes as the encounter unfolds.

decisions are considered seizures.[6] Even the officer commanding Hill to "stop!" as he attempts to walk away would not necessarily constitute a seizure.[7] As Devon Carbado illustrates, common decisions that are considered the stuff of policing—to follow, to approach, to question one's whereabouts and identity, to question one on public transportation, to question one's immigration status, to seek permission to search, to use undercover informants, to conduct voluntary interviews, to conduct computer surveillance, to investigate welfare eligibility, to surveil a homeless dwelling, to chase—do not "trigger" the Fourth Amendment and thus, to put the point in reverse, afford officers broad discretion to initiate (and, in cases like Hill's, force) interactions with citizens.[8] Crucially, without triggering a formal seizure, there is no need to ask whether the officer's conduct in these instances is reasonable.

Unlike investigatory street stops, traffic stops are considered de facto seizures under the Fourth Amendment.[9] Yet to question whether any given traffic stop is itself reasonable is a bit of a false dilemma. After all, traffic violations are both easily discernable and committed regularly by everyone operating a vehicle.[10] Stops are legitimate based on any objective violation of traffic laws—driving too fast, driving too slow, failing to signal, driving too close to the center line, following too closely[11]—and thus it is not difficult for police to demonstrate probable cause for effectuating a traffic stop. As a result, police often use "minor violations as pretexts to seek evidence of more serious criminal wrongdoing."[12] Significantly, this 'ferreting out' of more serious crime can have fatal consequences. In Carbado's words, "an ordinary traffic stop can be a gateway to extraordinary police violence."[13] Walter Scott was pulled over for a broken taillight, Sandra Bland for failing to use her turn signal, Philando Castille for faulty brake lights—each ultimately dying at the hands of police officers or in their custody.

Put aside for a moment the officer's decision to use deadly force in each of those cases. If the very act of driving a car inevitably violates some sort of traffic code, then, not unlike the investigatory street stop, traffic stops are matters of decision: to enforce the violation, upon whom?, to use the infraction as pretext for broader criminal investigation, to question about previous criminal history, to ask if there are drugs in the car, to conduct a records check, to contact immigration and customs enforcement, to ask the driver and other passengers to exit the car, to search the car and frisk the driver, to seek permission to search the car without informing the driver of their right to refuse, to

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[6] Carbado, "Fourth Amendment Pathways to Police Violence," 138.

[7] California v. Hodari 499 US 621 (1991). The moment at which the officer says to Hill, "you are not free to go" may be the point at which Hill is formally seized, but this only circles back to the question of whether the seizure at that point was legitimate.

[8] Carbado, "Fourth Amendment Pathways to Police Violence," 130-148. That Hill was arrested despite the fact that the officer could supply no reasons of articulable suspicion that would justify his seizure under *Terry*, and in spite of the fact that any possible evidence of criminal wrongdoing (i.e., solicitation) was dispelled by Hill being a political canvasser, highlight, in Carbado's words, "an African American's vulnerability to being subject to a *legal* arrest that began as an *illegal* seizure," in "Fourth Amendment Pathways to Police Violence," 135.

[9] Delaware v. Prouse, 440 U.S. 648, 653 (1979).

[10] Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 708 (2000) (arguing "everyone commits [traffic violations] the minute you get into your car"); Carbado, "Fourth Amendment Pathways to Police Violence," 153-154 (surveying vehicle code violations).

[11] For a useful catalogue of the range of these objective violations see Carbado *supra* note 3, at 154.

[12] Charles Epp, Steven Maynard-Moody, and Donald Haider-Market, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago: University of Chicago Press, 2014), 35.

[13] Carbado, "Fourth Amendment Pathways to Police Violence," 150.

arrest the driver for the traffic violation and proceed to search the car.[14] None of these decisions stretch reasonableness far enough to run afoul of the Fourth Amendment. As one group of scholars has put it, "the line between illegal and legal is reduced to little more than whether or not the officer 'articulates' a set of plausibly suspicious driver behaviors as the justification for a stop and search… In other words, the difference between a legal and illegal stop is not what the officer saw and did but how he or she describes it."[15] Thus have many scholars argued that Fourth Amendment doctrine regarding traffic stops does not so much offer protections for drivers as precipitate police-citizen encounters that often result in violence.[16]

Whether on the sidewalk or on the roadside, it is all but expected that police officers will use some degree of physical force to effectuate an arrest. This is both a fact of social life and a legal reality embraced by the Supreme Court: "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[17] Maybe it's simple "pain compliance techniques,"[18] wrist control or arm-bars, for instance. Maybe it's a neck restraint, pepper spray, or a taser. Maybe it's 'hard impact strikes.' Or maybe it's deadly force. Though the prescription for the degree of force appropriate to a given situation is usually outlined by a department's "use of force continuum,"[19] during a police-citizen encounter it is ultimately up to the officer to decide. Indeed, the legal doctrine governing police uses of force asks not whether an officer's decision to, say, taser a pregnant woman during a traffic stop,[20] was *objectively* reasonable from the perspective of a common citizen (whoever that may be) but "from the perspective of a *reasonable officer* on the scene."[21] In combination with a regime of qualified immunity, which shields officers acting in their official capacity unless they've violated a "clearly established right" at the time of the incident, the decision to use force is virtually unlimited. Significantly, the 'clearly established rights' at stake are those enshrined by the Fourth Amendment, the same doctrine that at once is not 'triggered' by many common policing activities that initiate police-citizen encounters while also expressly licensing others.[22] Thus have we borne witness to the growth of a heartbreaking catalogue of police killings that appear patently abhorrent—Mario Woods shot 20 times by five officers for carrying a kitchen knife, Tamir Rice shot for brandishing a toy gun, Freddie Gray beaten to death, Stephon Clark, John Crawford III, Alton Sterling, Keith Lamont Scott, Thurman Blevins all shot to death—but are nonetheless considered justified.[23]

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[14] Carbado, "Fourth Amendment Pathways to Police Violence," 149-163.

[15] Epp *et. al.*, *Pulled Over*, 35. Emphasis in original. They reiterate the point: "The point is that this technical requirement to have a lawful justification for a stop offers no meaningful limitation on officers' authority to make stops," at 159.

[16] See Devon Carbado, "Blue-on-Black Violence: A Provisional Model of Some of the Causes," *Georgetown Law Journal* 104 (2016): 1479-1530.

[17] *Graham v. O'Connor* 490 U.S. 386 (1989), 396. See also, *Terry v. Ohio* 392 U.S. 1 (1968), 22-27.

[18] These are definitions supplied by the use of force continuum guidelines for San Diego and Phoenix. *See*, SAN DIEGO POLICE DEPARTMENT PROCEDURE 1.04, *Use of Force*, at 4-5. https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569bec23be7b96bf77342043/1453059111335/San+Diego+Use+of+Force+Policy.pdf; *see also*, PHOENIX POLICE DEPARTMENT, *Operations Orders* 1.5, at 5-9, https://www.phoenix.gov/policesite/Documents/operations_orders.pdf

[19] See, e.g., San Diego, *Use of Force*. For instance, San Diego's use of force guidelines consists of five levels, beginning with verbal communication and escalating to deadly force. The Phoenix Police Department's consists of eight levels.

[20] *Brooks v. City Seattle*, 599 F.3d 1018 (9th Cir. 2010) (holding that the officer's use of force was reasonable).

[21] *Graham v. O'Connor* 490 U.S. 386 (1989), 396. Emphasis added.

[22] See e.g., Carbado "Fourth Amendment Pathways to Police Violence."

[23] Type any of these names into a Google search bar and a scrolling list of civilians killed by police appears.

Despite the variation in the types of activities each of these policing practices entails, all three episodes feature the officer's discretion as standing before, in-between,[24] and beyond law. "Justified under the circumstances," conclude county prosecutors and district attorneys as citizens take to the streets in protest and outrage, calling into question precisely what has justified yet another officer in taking life. "What sort of legal justification is this?" many inquire as repeated failed indictments captivate our newsfeeds. What do these justifications say about the contemporary formation of state power when its agents, its police, may force interactions without legal cause, manipulate technical pretext as cover for intrusive investigations, and wield physical force – deadly force – pursuant to and in pursuit of both, all while their actions are to be adjudicated by the self-referential standard of the 'reasonable police officer'? And how are they enabled and made possible by the discretionary authority reserved for police? If the decisions that police make each day carry with them the license to violence without necessarily triggering the mandates of legality, in what ways might police discretion determine the limit and scope of legal jurisdiction itself?[25]

This dissertation does not so much seek to answer these questions as it does to raise them by way of understanding police discretion as an instantiation of political decisionism rather than as an amorphous zone of administrative latitude. Decisionism, a term of art amongst political theorists, is a detrimentally absent concept in legal and criminological discussions of police discretion. It denotes the concrete, situationally specific ability to determine action independent of and unrestrained by external authority. This dissertation will rely on Carl Schmitt's infamous formulation of decisionism, which for him is the hallmark of sovereign power. In *Political Theology*, Schmitt sets out decisionism as a two-tiered capacity that begins with a first decision that an exceptional situation exceeding legal approximation exists, followed by a second decision regarding what actions are to be taken in response to it.[26] Its most acute instantiation manifests in the 'state of exception,' which Bonnie Honig aptly describes as a "paradoxical situation of alegality" in which "law is legally suspended and sovereign power operates unfettered by way of decision."[27] Schmitt analogizes the exception in jurisprudence to the miracle in theology, defining the exercise of decision as an act of will and the exception as a liminal, "borderline concept" that casts in sharp relief the contrast between two opposing spheres: theologically, the finite versus the infinite, juridically, law versus chaos.

While decisionism materializes in moments of extreme exigency and is unbound by any external authority, this does not mean it is an arbitrary or aimless means without ends. Rather, Schmitt's decisionism is intimately linked with his concept of the political, which he defines as the distinction between friend and enemy.[28] "The distinction of friend and enemy," Schmitt writes,

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[24] This is the name Wayne LaFave gives to the traffic stop, whose technical legality gives rise to ancillary investigatory practices that are not strictly illegal. LaFave, "The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment," *Michigan Law Review* 102 (2004): 1862-1894.

[25] Here, I am borrowing from Judith Butler's opening provocation in her work on the innovation of indefinite detention at Guantanamo Bay during the G.W. Bush Administration. Butler seizes on the "resurgent sovereignty" that indefinite detention inaugurates and that reserves prerogative power "for the executive branch of government or to managerial officials with no clear claim to legitimacy" in ways (that I will develop below) that I find both instructive and applicable for understanding the power of police discretion. *See* Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), 51, 54.

[26] See generally, Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, [1922] 2006); see also, David Bates, *States of War: Enlightenment Origins of the Political* (New York: Columbia University Press, 2012), 17.

[27] Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009), 66-67.

[28] Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press [1932] 2007).

"denotes that utmost degree of intensity of a union or separation, of an association or dissociation." Schmitt understands the concepts of 'friend' and 'enemy' in their "concrete and existential sense," and by implication they only "receive their real meaning precisely because they refer to the real possibility of physical killing." This antithetical formulation derives its content from "the radicalization of difference to the point of a conflict in which life may be sacrificed," which means that the antagonistic logic constitutive of the political operates apart from any other moral, economic, or aesthetic referents.[29] Both friendship and enmity, in other words, are always and only concrete, existential conditions whose antithesis is defined only in relation to the other.

Schmitt's thought is clear that the political distinction between friend and enemy precedes law altogether: "the concept of state presupposes the concept of the political." In other words, because the political operates on an existential register, friend-enemy groupings must first be established prior to any technical-legal instruments that seek to regulate them. Decisionism thus corresponds to the political by way of the moment of crisis that threatens the very existence of the friend grouping, and whose demands therefore supersede legal measure. For purposes of this dissertation, the central insight deployed from this coupling is not to suggest that police discretion involves the determination between friends and enemies *per se*, but that it operates on an existential register that borrows from and mirrors both logics, foregoing legal measure.

Interpreting police discretion through the lens of decisionism thus offers two unique analytical advantages. First, because decisionism is concrete, existential, prior to and beyond law, it allows for a critical reappraisal of proposed police reforms that rely on legal, rule-bound restraints to solve the problem of police violence by way of cabining police discretion. In other words, by placing decisionism at the center of an analysis of police discretion we are able to more fully comprehend the multifarious ways in which the armatures of liberal legality have strained, morphed, and concealed the value, limits, and dangers of the power police have to make decisions unbound by law.

Second, because decisionism is related to the exception as a "borderline concept," it supplies a useful tool for distinguishing the unique character of police discretion. Doctors, teachers, bankers—they, too, exercise discretion in their daily pursuits. But granting an informal paper extension or approving a mortgage or prescribing experimental treatments are not decisions that touch upon the "outermost sphere" of either enterprise; this sort of discretion does not stand outside the rules of the profession. Because, for Schmitt, the "border" of the interrelated concepts of decision and exception is animated by conditions of "extreme peril," the limn is always between order and chaos, security and ruin. As one reader of Schmitt has put it nicely, "the exception absorbed by law is discretion; the exception absorbed by chaos is mere violence."[30] That the enterprise of law enforcement, too, is often conceived of as a 'borderline concept,' as the 'thin blue line' standing between a society ordered by law and one plagued by anomie and fear, invites us to ask whether the extra-legality of police discretion is an exception 'absorbed by law' or whether it is an instantiation of sovereignty antecedent to and outside of law. Put a different way, the unique advantage of foregrounding decisionism is that by virtue of its own blurring of the law-politics binary it invites us to grapple not only with the ways police discretion relies on a decisionistic logic but also how through this reliance acts of administrative law enforcement blur with acts of political sovereignty.

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[29] Banu Bargu, "Predicaments of Left-Schmittianism," *South Atlantic Quarterly* 113, no.4 (2014): 716.

[30] Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011), 43.

In theory, policing is simply an administrative function of the state. The police are charged with the broad and ambiguous task of 'enforcing the criminal law'; there is nothing political about what they do. Yet, as we saw above, many commonplace policing practices operate independent of law and go beyond this task of strict law enforcement. To compound matters, the philosophy of order maintenance policing that is nearly uniform across American police departments does not even purport to have law enforcement as its core mandate but the mitigation of 'disorder.'[31] At the same time, our political present has witnessed the state retrench social welfare programs of all forms, thus burdening police with domestic welfare functions. Police are tasked with all varieties of services wholly apart from enforcing the law, from helping resolve domestic disputes to recovering lost property to escorting citizens to sectioning off streets for downed power lines. Increasingly, it is not the government proper – its "first face" as some political scientists would have it – but the police (the "second face") that are not only the most likely non-civilian agents with whom citizens interact but to whom they are likely to turn for assistance. As Joe Soss and Vesla Weaver put the point: "Police are our government."[32]

Thus, the present insistence of police reformers that policing ought to be subject to popular control levies a claim about sovereignty. Reserving discretionary authority for the police, however, levies a similar claim. Where the former asserts that it is the people who are sovereign and thus rule over the police, the latter maintains that police must have a zone of authority that cannot be subject to external rule because it responds to the higher call of securing 'public order.' The police, unlike officials in other administrative agencies, use their discretion and their judgment to decide matters of life and death. And they do so one behalf of the 'public.' To be sure, this is not their only function, but no other state agency holds this license to violence. Thus does Giorgio Agamben argue that "the police are always operating within a similar state of exception" as the one envisaged by Schmitt's sovereign.[33] For the purposes of this dissertation, the point is not to argue that police are in fact some sort of "street sovereign."[34] Rather, the point is to employ a feature of sovereignty – a feature that Schmitt saw as constitutive of the concept and that political liberals reject – to grapple with the political stakes of police discretion. Indeed, if the "indispensable features of [classical] sovereignty" are sixfold—including (1) supremacy, (2) perpetuity, (3) decisionism, (4) absoluteness and completeness, (5) non-transferability, and (6) specified jurisdiction[35]—then calling the police sovereign raises the

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[31] See Bernard Harcourt, *The Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge: Harvard University Press, 2001).

[32] Joe Soss and Vesla Weaver, "Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities," *Annual Review of Political Science* 20:30 (2017): 1-27.

[33] "The point is that the police – contrary to public opinion – are not merely an administrative function of law enforcement; rather the police are perhaps the place where the proximity and the almost constitutive exchange between violence and right that characterizes the figure of the sovereign is shown more nakedly and clearly than anywhere else… The rationales of 'public order' and 'security' on which the police have to decide on a case-by-case basis define an area of indistinction between violence and right that is exactly symmetrical to that of sovereignty." Giorgio Agamben, *Means Without Ends: Notes on Politics*, trans. Cesare Casarino and Vincenzo Binetti (Minneapolis: University of Minnesota Press, 1991), 103. To be sure, in this section Agamben appears to be building more directly off the insight of Walter Benjamin's *Critique of Violence*, but as his later work in *State of Exception* demonstrates, Agamben reads Benjamin and Schmitt to have been in 'secret conversation' with each other on this topic. See Giorgio Agamben, State of Exception, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 52-64.

[34] This is Nirej Sekhon's term for police in his essay "Police and the Limit of Law," *Columbia Law Review* 119 (2019): 1711-1772.

[35] Wendy Brown, *Walled States, Waning Sovereignty* (Princeton: Princeton University Press, 2010), 22.

obvious problem that the police are an administrative agency (which renders their power transferred from some higher executive) and that their actions are reviewable by the courts (which implies a lack of supremacy).

However, if for so many Americans 'police are our government,' then to think critically about police power, to think *politically* about police authority, is to consider the ways in which sovereignty emerges within and reverberates through the field of policing. It is to critically engage the ways in which police discretion gives rise to disparate experiences of state power, of legal protection, of freedom, of belonging within the same collectivity in which each individual is purportedly equal to the other. Though police discretion may not be the supra-legal power that Schmitt saw as constitutive of genuine sovereignty, it also cannot be reduced to simple administrative latitude. The order that police endeavor to secure is always the public order. And they do so in ways that cannot be fully explained as merely following executive directives (as we might with the military) nor as choosing amongst a range of public resources to serve those in need (as we might with the social worker) because (a) their discretion increases as one moves down the structural hierarchy and (b) the range of resources at their disposal includes "whatever is in the officer's power," which includes coercive force not necessarily limited by principles of legality. These differences call into question the "public" of public order; they attune us to policing's power to determine which peoples are 'protected and served' and which are merely surveilled and dominated, which communities are taken care of and which are dealt with.

The value added by employing a theory of political sovereignty to think about policing is that it allows us to better discern both the ways in which the decisions police make every day cannot be explained away by appeals to legality or illegality and the implications these decisions have for the experience of membership and belonging, inclusion and exclusion, security and servility, life and death in the American *polis*. As one scholar has described the pursuit of political theory: "Theory depicts a world that does not quite exist, that is not quite the world we inhabit."[36] This does not mean that we are excused from misappropriating theoretical conventions in service of a critique that doesn't quite work. It does not absolve us from the error of making the theory do the work we want it to, no matter how desperately we wish it would. Yet, if theory is "more or less of an incitement to thought, imagination, desire, possibilities for renewal" by way of recoding and rearranging the meanings of the world we occupy "in order to reveal something about the meanings and incoherencies we live with," then the ambition of using a theory of sovereignty to think critically about the predicaments of police discretion is to produce a political representation of what is too often reduced to a legal aberration. It is to orient the project of police reform away from the liberal penchant for rules and procedures, to remove the blinders of universalism and individualism, and towards the problem of how policing orders the collectivities that experience such rules and procedures differently, and how the ordering made possible by police discretion cannot be fully comprehended, captured, nor cabined by legal procedure.

So, a series of provocations: if decisionism really is an ineradicable feature of sovereign power; if the police may use their discretion in ways that do not implicate law but nonetheless may precipitate violence; if the law may be used as a tactic to initiate police-citizen encounters; and if the courts defer back to the self-referential standards of policing to evaluate police conduct, then the current calls for aligning policing with democracy prompt us, if not demand us, to reconsider how the police are situated in a larger constellation of sovereignty. Though it may be some combination of an executive branch that authorizes the police to enforce the law and a legislature that determines what the law on

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[36] Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton: Princeton University Press, 2005), 80.

the books is, that so much of policing in the field appears unbound by law, and which judges have demonstrated a reticence to check *in toto*, invites us to consider the ways in which policing is functionally decisionist and interrogate the political implications such decisionism has for organizing the American political community around democratic commitments to equality and self-rule.

The political stakes of these provocations are at least fourfold. While they are both concrete and theoretical, they are certainly not exhaustive of the problem.

(1) *People are dying*. During a police-citizen encounter the officer has near unlimited authority. He may violate your personal autonomy, he may yell at you, he may twist your arm, he may beat you, he may present legal charges against you for the inconvenience. You, the civilian, cannot walk away. Unlike an encounter with another civilian, the officer may use force to effectuate the encounter, and this force is considered legitimate so long as the officer can rehearse a hackneyed set of 'articulable facts' that signify danger or criminality, whether real or manufactured. With legal armatures in place that exhibit pro-defendant bias when civilians object to police conduct and courts that rely on the self-referential standard of the 'reasonable police officer' to evaluate the propriety of police conduct, the unlimited authority present in the encounter remains unlimited by the institution designed to impose limitations.

(2) *Police reform's focus on liberal legality and liberal democracy cannot account for decisionism, and therefore cannot cabin police discretion*. Police reform today participates, as it has for over a half-century, in a liberal democratic discourse that rejects political decisionism. Accordingly, it cannot question seriously the value of police discretion. The premiums on universality, inclusivity, and procedural regularity tendered by political liberalism are at odds with particular, exclusive, existential, and necessarily irregular function of police discretion. By failing to attend to decisionism, police reform that is limited by the political imagination of liberal democracy cheapens the very prospects of reformation. Whether under the appellations of democratic policing, community policing, problem-oriented policing, or constitutional policing, none of these modes of police reform can respond adequately to the existential register in which police discretion is all too often situated. Thus do they risk perpetuating under only slightly different auspices the very problems that they seek to remedy.

(3) *The violence made possible by police discretion is not experienced equally—it falls disproportionately upon the poor and upon people of color*. It is an empirical reality that poor communities and people of color are more heavily policed than their affluent white counterparts, thus subjecting them to increased police exposure and possible violence. On the one hand, this calls into question the promise of democratic police reform, and the fifty-year quest to align American policing with democratic constraints, both of which require at bottom commitments to substantive political equality and self-rule. From a federal district court's finding that 83% of New York City's police stops were of African American and Latino men to the killings of Black men like Michael Brown, Walter Scott, Eric Garner, and Laquan McDonald, all the way down to the now widespread actuarial methods of determining which street corners to police by using thinly-veiled racialized input variables; given socio-economic inequality and stratification, what is the promise of democratic police reform for agencies tasked with patrolling variegated jurisdictions, wherein certain streets demarcate the 'good side of town' from the 'bad,' officers gravitate to "hot spots" while contributing to their generation, and walled communities

expressive of petty-bourgeois insecurity dot the same spatial-territorial boundaries that police are charged with treating equally?

On the other hand – or perhaps, to extend the same hand a bit further – by calling into question the promise of 'democratic' police reform in light of discriminatory policing practices, what is at stake is the familiar critical concern that people of color are given formal political and legal equality while experiencing substantive inequality on both fronts. The oft quoted adage "equality before the law" is impeached by a law enforcement apparatus that so evidently does not police people of color on the same terms as whites. The political (and legal) implication is that people of color are subjugated and oppressed by police authority, which is cast in sharp relief by police discretion.

(4) *Police discretion works to define citizenship*. While this may be an abstraction of the previous political predicament, it is nonetheless pressing and timely for a political present that seems manically obsessed with questions of citizenship. For if police are engaged in political decisionism by using extra-legal violence to subjugate populations based on race, if they are policing the boundary of who enjoys full access to the rights of life, liberty, and property, then the very notion of citizenship is at stake. If the concrete experience of being policed gives the lie to the fiction of formal political equality under the law, then so, too, it calls into question the meaning, requirements, and entitlements of and to membership in the American political community. If under liberal democracy membership within the political community is vitalized juridically, if it is defined in part by the legal, constitutional right to go about one's pursuits freely, unencumbered by arbitrary or unwarranted intrusion, then discriminatory policing bears upon not only concrete lives but also abstract notions of which lives, whose lives, enjoy legal protection in the first place.

Thus does this dissertation take on the urgent task of interpreting the ways in which the last half-century of police reform has identified similar dangers policing presents for democratic life without demonstrating a willingness or ability to arrest the discretionary power that creates the conditions of possibility for these very dangers.

II. HISTORICAL BACKGROUND OF POLICE REFORM AND POLICE DISCRETION

Police reform over the last half-century is bookended by two presidential commissions tasked with identifying problems facing modern law enforcement and offering recommendations for their solution. Most recently, President Obama's Task Force on 21st Century Policing opened its final report with a premium on securing "trust between law enforcement agencies and the people they protect and serve." Standing as the first of six "pillars" for '21st Century Policing,' trust between the police and the communities they serve is the "key" and "foundational principle" without which "the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services" cannot be ensured, improved, or reformed. Tellingly, this diagnosis bears the traces of its predecessor from nearly fifty years earlier, when President Johnson's Commission on Law Enforcement and the Administration of Justice published *The Challenge of Crime in a Free Society* in 1967. That report had similarly observed that "there is much distrust of the police," and that this constituted "as serious as any problem the police have today."

Though separated by nearly fifty years, both commissions explored the tense relationship between the police and the public, between democracy and policing, identifying in common issues such as police distrust, racial antagonism, and police violence as central problems facing modern law enforcement. Their prescriptive orientations, however, were markedly different. Whereas Johnson's Crime Commission treated policing as an insular problem of police administration, Obama's Task Force found promise in popular input and control over policing. Significantly, both commissions considered police discretion to be necessary and inescapable to the enterprise of law enforcement. So, out of a common set of problems each commission derived categorically different solutions, while neither questioned the legitimacy of police discretion.

A central thesis of this dissertation wagers that meaningful police reform, aimed at either reducing police violence and/or maximizing democratic rule, cannot be achieved without attending to the logic of sovereign decisionism underpinning the discretionary power that makes such violence possible. Previous scholarship regarding the nature, function, dangers and abuses of police discretion has generally followed two modes of inquiry, both of which take as their common evaluative standard and normative ambition the furtherance of democratic values. On the one hand, at least since the 1960s, police discretion has been treated as a problem of legality: *how ought police to proceed in legally legitimate ways during situations in which the law offers no positive instruction*?[37] On the other hand, more recently, police discretion has been treated as a problem of democratic theory: *what are the constraints that our democratic commitments place on policing, and how do law enforcement practices implicate, shape, or run afoul of these democratic sensibilities*?[38]

Yet, regardless the mode of inquiry, the discretionary power of law enforcement is never itself questioned. Whether legally uncertain or democratically suspect, a generous penumbra of discretion is taken to be necessary for and accepted as fundamental to policing—indeed, as a constitutive function of policing.[39] *Why has the reservation of discretionary power for policing evaded serious political scrutiny?* One possible reason, the dissertation will argue, is due to the inability of the liberal democratic discourse that animates both the legal and democratic questions of police discretion to coherently account for decisionism. Another part of the answer is that contemporary police reform treats two separate modes of policing – democratic policing and community policing – as distinct but concomitant without seeing their contradictory aims—a contradiction that hinges on their disparate assumptions about sovereign power, and sovereign decisionism in particular.

Rethinking the 'Discovery' of Police Discretion

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[37] Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*, 4th ed. (Quid Pro, 2011 [1967]); James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (Cambridge: Harvard University Press, 1968); Egon Bittner, *The Functions of Police in Modern Society: A Reivew of Background Factors, Current Practices, and Possible Role Models* (Chevy Chase: National Institute of Mental Health, 1970); Herman Goldstein, *Policing in a Free Society* (Washington, D.C.: U.S. Department of Justice, 1977).

[38] David A. Sklansky, *Democracy and the Police* (Palo Alto: Stanford University Press, 2006); Barry Friedman, *Unwarranted: Policing Without Permission* (New York: Farrar, Strauss, and Giroux, 2017); Ian Loader and Neil Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2003).

[39] Indeed, Egon Bittner argued that "much heralded discovery" of police discretion in the 1960s ought to be "considered the understatement of the decade." Bittner, *Functions of Police in Modern Society*, 29-30.

While the history of the modern police force often begins with Sir Robert Peel's creation of the London Metropolitan Police in 1829, the history of the concept of police discretion does not begin until 1956, when the American Bar Foundation conducted its Survey of the Administration of Criminal Justice.[40] Through that survey, the ABF found that the old paradigm that held police were merely 'ministerial officers' was complicated by "the fact that the routine business of criminal justice involved the making of critical decisions without either formal controls or reference to legal norms."[41] Common wisdom amongst students of policing suggests that the ABF's study marks the 'discovery of discretion,' and the scholarship that has pursued the problems of police discretion since then has followed one of two trajectories: calls for either its abolition or for its regulation.[42] Curiously, however, the first of these trajectories – calls for the abolition of police discretion – hinge not upon police using their authority in punitive excess, as it is often decried today, but upon police *not* using their authority to enforce the criminal law.[43] Police discretion was problematized as an affront to the principles of legality and due process not because it effaced them in the process of criminal punishment but because by declining to invoke the criminal process they were debased. This was a problem that began with the police administrator's general license to 'enforce the criminal law' and understood discretionary non-enforcement as overstepping that license by arbitrarily dispensing with the criminal law; in effect, by failing to carry out the very task law enforcement was licensed for in the first place.

Wayne LaFave summarizes the competing attitudes toward police discretion at this time as a disagreement over whether "the substantive criminal law [is] something less than a mandate for enforcement in all cases."[44] Many opponents of police discretion took up A.V. Dicey's equation of the rule of law with the freedom from arbitrary power, echoing his belief that "discretion to withhold a punishment may result in just as much arbitrary power as discretion to use extralegal punishment."[45] Within this framework of legality Joseph Goldstein, for instance, saw police non-enforcement as "fundamentally lawless,"[46] while Sanford Kadish perceived police discretion as "a threat to the basic values implicit in notions of due process of law."[47] Calls for the abolition of police discretion were short-lived, however. While the possible dangers of police discretion remained within sight, by the mid 1960s discretion was accepted as an "inescapable reality" of the administration of modern criminal justice.[48] In some cases, this "chastened acceptance"[49] resulted from the view that police ought only to employ the criminal law against "certain dangerous individuals who are bothering society."[50] In

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[40] Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice 1950-1990* (Oxford: Oxford University Press, 1993), 6-10.

[41] Walker, *Taming the System*, 10.

[42] Walker, *Taming the System*, 16.

[43] Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice," *Yale Law Journal* 69, no.4 (1960): 543-594.

[44] Wayne LaFave, *Arrest: The Decision to Take a Suspect Into Custody* (Boston: Little, Brown & Co., 1965), 65.

[45] See, e.g., Sanford Kadish, "Legal Norm and Discretion in the Police and Sentencing Processes," *Harvard Law Review* 75, no.5 (1962): 909, n.15.

[46] Goldstein, "Police Discretion Not to Invoke the Criminal Process," 584.

[47] Kadish, "Legal Norm and Discretion," 904. Importantly, Kadish seemed more concerned with the capacity for police discretion to be used in punitive excess rather than for under enforcement.

[48] Walker, *Taming the System*, 16.

[49] Walker, *Taming the System*, 16.

[50] Thurman Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935), 153 (arguing "the ideal that all laws should be enforced without a discretionary selection is impossible to carry out. It is like directing a general to attack the enemy on all fronts at once").

others, discretion was accepted to allow police officers to better serve the 'public interest,'[51] to focus more exclusively on crime prevention, or to distribute the limited resources of policing to meet the vast demands of society.[52]

Since the mid 1960s, the discourse of police discretion has abandoned the abolition framework in favor of a regulative ideal. Rather than questioning the legitimacy of discretionary power under the democratic rule of law, this discourse has embraced the delicacies and dangers of that relationship to ask only how it might be best regulated as to minimize its threat and abuse. The concept of police discretion thus stands as a placeholder for the uncomfortable relationship between the police and the people in a democratic society, and we might say that police discretion was not so much 'discovered' during this period as it was born. In other words, in the short-lived abolition discourse, the problem was a more or less simple binary: do police have a substantive mandate to fully enforce the criminal law? Is it legitimate for police not to enforce the criminal law when presented with criminal wrongdoing? Once that framework shifts to a regulative ideal, the discursive register changes such that police discretion is no longer some static characteristic that can be accommodated within a binary of legitimacy and illegitimacy. Instead, presented as a problem to be regulated, the very meaning of police discretion – its value, purposes, aims, limits, and dangers – becomes plastic. The protean instantiations of police discretion therefore change the stakes of the problem of its misuse as one that must not be solved but negotiated, and thus inaugurates a process through which the meaning and value of police discretion is conditioned by shifts within the reining legal and political discourses over time.[53]

Put a different way, that discretion was 'discovered' in 1956 only implies that the fact that police use their authority independent of formal processes of law or legal norms was documented. It is a descriptive claim revealing a state of affairs previously unrecognized. Yet, once that recognition has taken place, it becomes an open question as to what police discretion means, how it is to be valued, how it is to be used or abused, how it is to be regulated. These are each questions for which the evaluative standards change, evolve, and shift over time, and thus alter the concept of police discretion in the process.

Defining Discretion

Consider the various ways in which police discretion has been problematized over the last half-century. Roscoe Pound and Kenneth Culp Davis both offered abstract definitions of discretionary power. Pound, for instance, understood discretion as "an idea of morals, belonging to

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[51] This assumes, by logical necessity, that 'the public' is interested in punishing certain criminal behaviors more than others and thus calls into question 'who' constitutes 'the public' whose interests the police represent.

[52] See LaFave, *Arrest*, 65 (surveying attitudes toward police discretion).

[53] I say the problem of police discretion must be "negotiated" to signify that the post-abolition discourse is neither interested nor capable of eliminating the dangers this power presents to a democratic society. At best, it can maneuver and navigate the tensions between the demands of liberal legality and demands for crime prevention, security, and order, but never relieve them. The impossibility of resolution is illustrated by the often paradoxical formulations of the problem of police discretion: that democracy is endangered by policing at the same time that it is dependent upon it. I owe this insight to Bonnie Honig's reading of William Connolly: "paradoxes are salient clues into political life's secrets; they are challenges to be negotiated, not puzzles to be solved or overcome," in Honig, *Emergency Politics*, 13.

the twilight zone between law and morals."[54] For him, discretion is "an authority conferred by law to act in certain conditions or situations in accordance with an official's … own considered judgement and conscience."[55] Davis, on the other hand, defined discretion independent of morals, stating simply 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."[56] What Pound referred to as "the twilight zone between law and morals," Davis saw as "'the effective limits' on the officer's power," noting that "discretion is not limited to what is authorized or what is legal…because a good deal of discretion is illegal or of questionable legality."[57] For them, and Davis particularly, the challenge lay in "confining, structuring, and checking" the effective limits of police discretion—in a word, regulation.

Legality and Police Discretion

Alternatively, sociologists Jerome Skolnick and James Q. Wilson problematized discretion by reference to legality. Skolnick, for example, partitioned police discretion into two categories: delegated and unauthorized. Whereas 'delegated discretion' is "clearly accorded to the police" by way of the articulated parameters of their duties, 'unauthorized discretion' obtains during instances in which "an official invents, claims, or usurps discretionary authority without it having been specifically delegated."[58] James Q. Wilson framed police discretion by reference to what he saw as two separate policing functions: law enforcement and order maintenance. Whereas enforcing the criminal law is what police do in theory, in practice Wilson argued police were far more concerned with maintaining order, a function that while not necessarily in conflict with legality operates on its boundaries. For both sociologists, the problem of police discretion was a legal difficulty of how to limit unauthorized discretion and define the police officer's role according to their law enforcement function as much as possible.

Egon Bittner saw discretionary power as utterly unremarkable, instead focusing our attention to the "non-negotiable use of violence" as the special characteristic that united all police functions.[59] For him, the question was not one of law and order, nor how police discretion squares with the rule of law, but "on what terms can a society dedicated to peace institutionalize the exercise of force?"[60] This framework implicitly acknowledges, however, that the decision *whether* to use force and *how* to use force remains the province of the officer. Thus, Bittner's problematic remains open to a line of questioning familiar to Skolnick and Wilson that defines the terms of institutionalized force by reference to the legality of discretion.

These legal frameworks of police discretion were accompanied by political problematics that focused on the role of the individual officer. George Berkley argued that discretionary police power increases when democratic consensus wanes, thus inviting the possibility for one to infringe upon the

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[54] Roscoe Pound, "Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case," *New York University Law Review* 35 (1960): 926.
[55] Pound, "Discretion, Dispensation and Mitigation," 926.
[56] Davis, *Discretionary Justice*, 4.
[57] Davis, *Discretionary Justice*, 4.
[58] Skolnick, *Justice Without Trial,* 66.
[59] Bittner, *Functions of Police in Modern Society*.
[60] Bittner, *Functions of Police in Modern Society*, 47.

other.[61] Acknowledging that the policeman poses a threat to democracy by standing in a position of superiority to the private citizen that could jeopardize the latter's freedom, he suggested the police be a bit more like Plato's guardians, employing their discretion to be models "not just of orderliness, but also of intelligence, tolerance, and understanding."[62] In similar fashion, William Ker Muir suggested that the coercive power of police discretion be tacticalized in service of equality. Drawing on Max Weber, Muir advocated that policemen, as "street corner politicians," develop an ethic of conviction and an ethic of responsibility such that they demonstrate "a passion for freedom, made articulate in constant social discussion, interpreted within a tragic perspective which presupposes free will, reflected on by a government of political mentors, and institutionalized by the law."[63] Yet, views of the sort offered by Berkley and Muir have little theoretical or political purchase. They speak more to the agentic persuasion of the police officer than to the license of authority that they enjoy. If only all policemen were angels.

Democracy and Police Discretion

Police discretion has also been treated as a political problem to be dealt with by way of popular input and control. Rather than focusing on the individual officer – the 'democratic policeman,' as Berkley would have it – the goal here is democratic polic*ing*. Barry Friedman, whose book on this subject has been called 'the holy grail of democratic policing'[64] and "the definitive guide to contemporary policing and its necessary reforms," reframes the problems of police discretion as a failure of democratic governance rather than as an abuse of power. Here's Friedman:

> We have categorically failed to offer clear guidance to policing agencies as to what they are to do (or refrain from doing). If anything, we've sent mixed messages. We insist that above all we want safety and low crime. But then, when the police do their best to deliver, we start casting blame about the way they went about it. It is we who are at fault, for failing to specify how we wish to be policed, for largely ducking the question altogether.[65]

'Policing' is thus diagnosed as an output problem for which the input is the public's tendency to let it proceed 'without permission.' By implication, Friedman's turn to inputs over outputs parlays a problem of "unbridled executive power" into an indictment of failed democratic governance. What has been traditionally understood as a legal balancing act between respect for individual liberty and the demands of crime control is for Friedman also a political question that animates "the entire history of democratic governance and constitutionalism;" it is a politics that consists in the "struggle to devise systems to keep [executive] power in check." What has been lost with respect to policing, what has

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[61] George Berkley, *The Democratic Policeman* (Boston: Beacon Press, 1969), 2.
[62] Berkley, *The Democratic Policeman*, 213.
[63] William Kerr Muir, *Police: Streetcorner Politicians* (Chicago: University of Chicago Press, 1977), 282.
[64] Robert E. Worden and Caitlin J. Dole, "The Holy Grail of Democratic Policing, Review Essay of Unwarranted," *Criminal Justice Ethics* 38, no.1 (2019): 41-54.
[65] Barry Friedman, *Unwarranted: Policing Without Permission* (New York: Farrar, Strauss, and Giroux, 2017), 16, 318.

been "cast aside," is "our much-admired system of democratic accountability and transparency." In so turning to the inputs of police governance rather than the oft-elevated outputs of crime control, Friedman forcefully disavows the "free pass on democratic governance given to policing agencies," by denying that "policing is special" or "different in some way that justifies [a] shortcut on democracy."[66]

The long way to democratic policing, in Friedman's view, follows two possible routes. On the first, the challenge is simple: apply the democratic principles of transparency, accountability, and the rule of law to the police just the same as any other branch or agency of government. Here, the fundament of democratic policing is popular input in police governance. The second route, alternatively, obliges the police to create rules to govern their practices, and to submit these rules for popular review, comment, and subsequently, revision. Though its administrative framework differs, this second route shares with the first the baseline premise that "the people decide what's in and what's out" (2017, 59). All roads lead, ultimately, to Friedman's conclusion that for policing to be democratic "what we need are rules and policies to govern policing, written in advance, with public input."[67] As a problem of democratic governance, then, Friedman foregrounds police discretion as a problem of political sovereignty with the goal of restoring the police to the control of the demos.

David Sklansky offers what is perhaps the most comprehensive account of the relationship between democracy and the police. Not unlike Friedman, Sklansky's inquiry begins by asking, "what constraints does a commitment to democracy place on the police?"[68] The point of departure separating them, however, manifests in the way Sklansky also asks this question the other way around: "What implications, conversely, does modern law enforcement have for how we think about democracy?" Put a different way, while Friedman developed a theory of democratic policing that hinged on what he saw as the first principles of democracy, a hinge that opened only one way with democracy controlling policing, Sklansky understands the interaction between the two to be reciprocal. What is expected of democracy influences what is expected of policing, and vice versa. Importantly, neither set of expectations is static. For Sklansky, to understand what might be meant by 'democratic policing' we must confront two stories – one about the shifting 'orthodoxies' of police practice and reform, the other about the shifting discourse of democratic theory – and probe the ways in which they are 'intertwined.' That these two stories are closely bound to each other is Sklansky's central thesis, and thus rather than presuming policing is a problematic outlier in democratic governance, pace Freidman, he orients us towards problematizing the two together to understand more fully the ways in which they push and pull on one another.

Sklansky's normative argument is that the relationship between democracy and the police can be enriched by shifting the valence of democracy from "a stable system of collective self-government" to a spirited "opposition to entrenched patterns of unjustified inequality."[69] Neither pluralist nor participatory nor deliberative theories of democracy can offer a principled explanation for why law

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[66] Friedman, *Unwarranted*, 16-17. There is a sense of confusion percolating throughout Friedman's book, a fuller of analysis of which I supply in chapter four. On the one hand, it seems policing is decried as un-special, as undeserving of "a shortcut on democracy." On the other hand, it is "we who are at fault, for failing to specify how we wish to be policed." So, while police are the ones abusing power, it is only because the people has disabused itself of the power to control them. It seems hunger is proof of our sins!

[67] Friedman, *Unwarranted*, 92.

[68] Sklansky, *Democracy and the Police* (Palo Alto: Stanford University Press, 2008), 1.

[69] Sklansky, *Democracy and the Police*, 109.

enforcement matters more for democracy than other administrative agencies and functions. Once democracy is attuned to an opposition of unjustifiable hierarchy, "the special salience of the police immediately becomes clear: the police are both a uniquely powerful weapon against private systems of domination and a uniquely frightening tool of official domination."[70] Thus, the normative thrust of is to offer an account of how the 'democratic' of democratic policing might be "deepened." From the perspective of democratic oppositionalism:

> Making policing more democratic entails making it as effective as possible in combating unjustified patterns of private domination and unthreatening as possible as a tool of official domination.[71]

Sklansky, building off the work of political theorist Ian Shapiro, suggests that this tradition of democratic oppositionalism is predicated on disagreement, conflict, and dissensus as a both 'signs' and 'preconditions' of a 'well-functioning democracy."[72] To this point, not unlike Friedman, he argues that the procedural posture required to foster such democratic dissensus entails making "mechanisms of collective decision as inclusive as possible" and preparing the institutional space "for opposition and dissent."[73] Paring the principle anti-egalitarianism with the virtues of pluralism, participation, and 'eighteenth century political economy' engenders a "rounded," "purposely eclectic" theory of democracy, one that Sklansky wagers may "develop a richer set of meanings for 'democratic policing" in contemporary American political life.

Curiously, while both Friedman and Sklansky acknowledge the dangers that police discretion presents to democratic society, neither questions the legitimacy of police discretion as such. For Friedman, what is needed are rules governing discretion. His one caveat, however: "unanticipated emergencies."[74] Perhaps Friedman has in mind an extremely thick rule-book; after all, as Skolnick, Wilson, and Bittner teach us, policing trades in the unanticipated. Sklansky is considerably more thoughtful on this matter. "Just as there is no way to eliminate enforcement discretion in policing," Sklansky argues, "there is no way to bring all of that enforcement under the control of rules."[75] "Police discretion, and a massive amount of it, is simply unavoidable."[76] The key normative task, recall, is to make the discretion police wield "as *unthreatening* as possible as a tool of official domination."[77] The goal is not to neutralize the threat. Indeed, says Sklansky, it can't be; with discretion, the threat persists nonetheless.

Democratic Policing: Theory and Praxis

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[70] Sklansky, *Democracy and the Police*, 109.
[71] Sklansky, *Democracy and the Police*, 109, 106-114.
[72] Sklansky, *Democracy and the Police*, 110.
[73] Sklansky, *Democracy and the Police*, 110.
[74] Friedman, *Unwarranted*, 59.
[75] Sklansky, *Democracy and the Police*, 178.
[76] Sklansky, *Democracy and the Police*, 177.
[77] Sklansky, *Democracy and the Police*, 109. Emphasis added.

While the tense relationship between the people and the police has long been used to frame the stakes of the regulative discourse of police discretion, in both its legalistic and democratic instantiations, problematizations like Friedman's and Sklansky illustrate how democracy been transposed from the *ambition* of police reform to the *form* of police reform. From the police professionalization movement in the era of August Volmer to the scientific and evidenced-based policing revolution and the resurgence of community and constitutional policing, each of these programs of police reform attempts to square American policing practices with our democratic commitments and sensibilities. Some of these policing innovations focused on effectiveness and policing outputs (e.g., problem-oriented policing, hotspots policing, compstat), others focused on inputs and the means of policing (e.g., community policing, constitutional policing), but all took democracy to be the aspiration and normative goal that ought to guide policing and that policing ought to be in furtherance of. Now, with the ascendance of 'democratic policing,' democracy is no longer simply the aspiration of police reform but is instead the prescription and solution for problematic policing practices. Thus, it is not just that police discretion presents a problem for democracy but that democracy must tame police discretion.

Though precisely what 'democratic policing' entails is less than certain, there is no shortage of evidence demonstrating its dominance in the police reform discourse. In 2015, under the leadership of Barry Friedman, NYU School of Law founded The Policing Project, a non-profit organization with the mission of "strengthening policing through democratic governance" that partners with police agencies nationwide to foster "robust engagement between police departments and the communities they serve."[78] Since its founding, the organization has partnered with many police agencies, notably in Nashville, Chicago, Camden, and New York City, promulgated a list of "principles of democratic policing," and developed a model of rules and policies in line with these principles for America's nearly 18,000 policing agencies.

Beyond first principles, democratic policing has been instantiated by proposals for notice and comment rule-making,[79] justifications for 'copwatching' practices,[80] calls for increased community engagement in policing,[81] redefinitions of the legitimate role of police,[82] and re-imaginations of the plurality of public interests police represent.[83] More broadly, democracy has become the fulcrum for reforming criminal justice writ large. For instance, Northwestern University School of Law's flagship law journal dedicated a 2017 symposium issue to "democratizing criminal justice," which included fifteen articles foregrounding democracy in criminal justice reform and a "Manifesto of Democratic

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[78] THE POLICING PROJECT 2015, available at https://www.policingproject.org/resources/democratic-policing

[79] Barry Friedman and Maria Ponomarenko, "Democratic Policing," *New York University Law Review* 90, no.6 (2015): 1827-1907.

[80] Jocelyn Simonson, "Copwatching," *California Law Review* 104, no.2 (2016): 394-445.

[81] Monica C. Bell, "Police Reform and the Dismantling of Legal Estrangement," *Yale Law Journal* 104 (2017): 2054-2150; Sunita Patel, "Toward Democratic Police Reform: A Vision for 'Community Engagement' Provisions in DOJ Consent Decrees," *Wake Forest Law Review* 51, no.4 (2016): 793-880; Kami Chavis Simmons, "New Governance and the 'New Paradigm' of Police Accountability: A Democratic Approach to Police Reform," *Catholic University Law Review* 59, no.2 (2010): 373-426; Samuel Walker, "The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context," *Saint Louis University Public Law Review* 22, no.1 (2003): 3-52.

[82] Eric J. Miller, "Role-Based Policing: Restraining Police Conduct 'Outside the Legitimate Investigative Sphere,'" California Law Review 94, no.3 (2006): 617-686; Joe Soss and Velsa Weaver, "Police Are Our Government."

[83] Ian Loader, "Plural Policing and Democratic Governance," *Social & Legal Studies* 9, no.3 (2000): 323-345; Ian Loader, "In Search of Civic Policing: Recasting the 'Peelian' Principles," Criminal Law and Philosophy 10, no.3 (2016): 427-440; Sklansky, *Democracy and the Police*.

Criminal Justice."[84] Relying on insights from Weber, Habermas, Tocqueville, and Pettit, the manifesto summarized its position as standing "for the 'We the People' principle in criminal justice."[85] In sum, whether by way of agonistic "contestation and resistance,"[86] ensuring "front-end transparency and accountability,"[87] or re-enlivening value rationality over instrumental rationality and bureaucratization,[88] contemporary police reform is committed – both in the academic literature and political practice – to emboldening the power of the people by making the police responsive to them.

III. METHODS AND OVERVIEW OF THE APPROACH TO THE PROBLEM

Overview of the Approach

The arc of police reform over the last fifty years has reconfigured the governance of police discretion from prizing administrative legal restraints to prioritizing democratic political processes. Whereas Johnson's Crime Commission treated policing as an insular problem of police administration, by the time Obama's Task Force on 21st Century Policing reconsidered the state of American policing practices the register was adjusted to focus on popular input and control. One of the overarching ambitions of this dissertation is to offer an account of *how the challenge of policing in a democratic society transformed from a legal to a political question*. In so aspiring, this dissertation grapples with the concept of police discretion as it relates to the democratic commitments against which it has been problematized over the last half-century. While at mid-century these commitments were configured legalistically, today they straightforwardly implicate theories of democracy, and consequently of sovereign power more broadly.

What has remained constant over this period, however, is the pride of place that police discretion enjoys in these discussions. One way of framing the question motivating this dissertation might be to ask *how police reform efforts of the last fifty years have been foiled by the decisionistic power endowed to police under the banner of police discretion*. After all, many of the problems to which Johnson's Crime Commission responded continue to haunt contemporary American life, which is evidenced no less by Obama's Task Force. Another way might be to ask *why police discretion has evaded serious political scrutiny*. Indeed, even if such political scrutiny was belied by the administrative legal gaze of the 60s and 70s, a wide discretionary birth remains reserved to policing in a contemporary moment in which democratic political constraints are the analytic fulcrum of choice.

Yet another way of formulating this inquiry is to look to the forms of reason – the shared assumptions, normative valuations, and conceptual boundaries – that govern the discourse of police discretion, whether legal or political. Here, the task requires attention not simply to the different frameworks in which police discretion is bound but also to the distinctly liberal commitments that are

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[84] Joshua Kleinfeld, "Manifesto of Democratic Criminal Justice," *Northwestern University Law Review* 111 (2017): 1367-1412.
[85] Kleinfeld, "Manifesto of Democratic Criminal Justice," 1378; *see also* Jocelyn Simonson, "The Place of 'the People' in Criminal Procedure," *Columbia Law Review* 119, no.1 (2019): 249-307.
[86] Jocelyn Simonson, "Democratizing Criminal Justice Through Contestation and Resistance," Northwestern University Law Review 111, no.6 (2017): 1609-1624; Patel, "Toward Democratic Police Reform."
[87] Friedman, *Unwarranted*; Friedman & Ponomarenko, "Democratic Policing."
[88] Kleinfeld, "Manifesto of Democratic Criminal Justice."

common to both. Doing so integrates the two previous interrogative pathways to allow questions such as: How has the failure to incorporate decisionism into the liberal democratic discourse foiled the project of police reform? How has it concealed the fundamental illegitimacy of a power that operates not by law but by decision? How does it prefigure and refigure this power? And what are the costs of these conceits and configurations? The stakes of this problem are not found in the faults of the liberal discourse, in the self-contradictory or even hypocritical grounds for reserving to police a wide birth of discretion (though both are present), but in the foreclosure that takes place when the discourse postulates this reservation without allowing the people affected by it – the policed, the demos – to stand in an interrogatory relation to it. Put a different way, that the zone of indeterminacy that constitutes police discretion is itself unquestioned orders the entire field of political knowledge on police governance according to a liberal form of reason that must disavow that this zone exists beyond its own limits or else risk impeachment as providing for individual, rights-oriented liberal safeguards with decidedly illiberal techniques of governance.

On Method

To answer these questions, the dissertation will employ a methodological approach that combines Foucauldian archaeology and genealogy with Schmittian historical and systematic political analysis. While each of these theoretical frameworks offer distinct advantages on their own terms, they are especially apt for interrogating the ways in which the discourse of police discretion has shifted from law in favor of politics *while simultaneously* never questioning the propriety of police discretion as such. Put a different way, that the ways in which the relationship between democracy and policing, and police discretion in particular, has been discussed over time have transformed while the priority of police discretion itself has remained constant invites us to ask how this discourse evolved and why it did so in this way. While Foucault and Schmitt are the methodological and theoretical touchstones of the dissertation, perhaps a prudent initial point of departure to understand genealogy may be to clarify what Nietzsche – the thinker the both Foucault and Schmitt share as a common intellectual touchstone – actually meant to do with his infamous genealogy of morality, and importantly, what standard of evaluation he thinks this task entails.

On one hand, Nietzsche claims to provide "an actual history of morality" (*GM* Pref: 7). On another, he demands more than mere history.[89] "We need a *critique* of moral values," he argues, "*the value of these values themselves must first be called into question*—and for that is needed a knowledge of the conditions and circumstances in which they grew, under which they evolved and changed" (*GM* Pref: 6). For Nietzsche, critique and history are, and perhaps must be, intertwined to determine the "symptoms" of a particular moral framework. Throughout the *Genealogy* he sets as his critical criterion whether our moral value judgments "have hitherto hindered or furthered human prosperity" (*GM* Pref: 3). Thus, he asks whether such valuations are "sign[s] of distress, of impoverishment, of degeneration of life? Or is there revealed in them, on the contrary, the plentitude, force, and will of life, its courage, certainty, future?" (*GM* Pref: 3). Likewise, this dissertation is more than a mere history of police discretion. It is a critique of it: calling into question the value of police discretion in the first place with attention to 'the conditions and circumstances in which it grew, under which it evolved and changed.' And just as Nietzsche interrogated the origin of morals in relation to the maximization of

[89] All quotations from Fredrich Nietzsche, *On the Genealogy of Morals*, trans. Walter Kaufmann (New York: Vintage, 1989).

human excellence, so too, this dissertation endeavors to interrogate the concept of police discretion in relation to the fulfillment of democracy, broadly defined by its fundaments of equality and self-rule.

So, with Nietzsche we have a premium on historical and on critical enquiry. In his Second Essay, we get a clear sense of how Nietzsche wants us to go about merging the two to develop a genealogy of morals. Contra "previous genealogists," who Nietzsche accuses of "seekin[ing] out some purpose" for a thing, concept, or value only to "guilelessly place this purpose at the beginning" of their enquiry, Nietzsche argues that the purpose of a thing "is absolutely the last thing to employ in the history of the origin" of it (*GM* II: 12, at 77). Put differently, a fundament of Nietzsche's genealogical approach consists in his view that origin and purpose are "two problems that are separate, or ought to be separate" (*GM* II: 12, at 76). To illustrate this point, he offers a genealogy of punishment and is clear to distinguish two aspects: first, the "enduring" aspect of punishment, "the custom, the act, the 'drama,' a certain strict sequence of procedures;" second, the "fluid" aspect of punishment, "the meaning, the purpose, the expectation associated with the performance of such procedures" (*GM* II: 13, at 79). Nietzsche's objection here is that those before him "all thought of the procedure as invented for the purpose of punishing," when, in his view, "the same procedure can be employed, interpreted, adapted to ends that differ fundamentally" (*GM* II: 13, at 79-80). (Foucault, of course, famously capitalized on this insight in *Discipline & Punish*). Indeed, he offers an extensive catalogue of the multiplicity of meanings attached to punishment, ranging from "rendering harmless" to "recompense" to "expulsion" and purification to "making of a memory" (*GM* II: 13, at 80).

Extrapolated back out to the broader register of the genealogical method, of what it is to do genealogy, this means, in Brian Leiter's words, "that there must be a *stable* or *essential* element in morality [the object of inquiry], even as the genealogy of morality reveals its multifarious meanings and purposes."[90] The vital presupposition here is that the object of genealogical enquiry has some sort of "stable or essential character" but that the stable element is *not* "to be located in the object's purpose or value or meaning."[91] For present purposes, police discretion offers this stable element for a genealogy of the relationship between democracy and policing. Thus, we might proceed with Kenneth C. Davis's definition of police discretion as "whenever the effective limits on [an officer's] power leave him free to make a choice among possible course of action or inaction" as the stable element of a genealogy that asks how this capacity for unstrained choice has been understood, framed, invoked, and conditioned over time.[92]

While genealogy intertwines history and critique, archaeology allows us to analyze how knowledge is arranged and ordered in similar ways across quite disparate fields during the same historical moment. David Sklansky's *Democracy and the Police* is an apt example of this technique, though he does not designate it with the same appellation. It is archaeological by way of demonstrating how two disparate fields (i.e., democracy and policing) arrange and order knowledge in similar fashion during distinct historical periods. "The transformation in democratic theory and the transformation in policing, are rarely set side by side, but in fact they are strongly linked."[93] Thus, by tracing the rise of democratic pluralism with the professionalization of policing in one period, followed by the

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[90] Brian Leiter, *Nietzsche On Morality* (Milton Park: Routledge, 2015), 137.

[91] Leiter, *Nietzsche On Morality,* 136.

[92] To be sure, although Foucault and Nietzsche bear significant differences in the explanatory variables they choose, they share the theoretical commitment that weds history and critique. Yet, I say this is a Foucauldian analysis rather than Nietzschean because of the premium on discourse that is more characteristic of Foucault.

[93] Sklansky, *Democracy and the Police*, 106.

ascendance of participatory democracy and the advent of policing programs aimed at community empowerment in the next, Sklansky capitalizes on the central archaeological insight that there is more continuity between disparate fields during one historical moment than there is within any particular field over time.

At the same time, Sklansky's work remains genealogical by way of illustrating how the meaning of *democratic* policing has changed over time. In contrast to archaeological inquiry, which supplies a detailed cross-section of a particular historical moment, genealogical inquiry separates its object's origin from its present purpose; it presupposes the object has some stable element, but it locates that element outside the object's purpose, value, or meaning (Nietzsche 1989/1887; Leiter 2015). Reconciling policing with democracy meant different things at different times, not because policing changed but because the democratic values that conditioned and attached to policing changed. So, policing tactics and techniques might endure more or less over time, but the purposes or expectations associated with the performance of policing are fluid. Yet, part of what Sklansky fails to see is the degree to which the various theories of democracy central to his analysis are merely different variants of the same categorical vision of democracy: liberalism. As a consequence, he fails to see the ways in which the discourse of liberal democracy limits the very horizon of meanings he unpacks.

By attending to both methods, Foucault writes: "Archaeology is the method specific to the analysis of local discursivities, and genealogy is the tactic which, once it has described these local discursivities, bring into play the desubjugated knowledges that have been released from them."[94] The role of archaeology in this dissertation is to unpack the ways in which the discourse of police discretion has been ordered by fields of knowledge beyond the close study of police governance. For instance, Chapters Two and Three endeavor to show how the legalistic frameworks of police discretion advanced by Skolnick, Wilson, and Bittner mirror the limits of the legal theoretical discourse on 'hard cases' advanced by H.L.A. Hart, Ronald Dworkin, and by implication, John Austin. The claim is not that the sociologists of policing were reading, citing, or unwittingly ventriloquizing these legal theorists, but that both discourses were governed by the same constraints of liberal democracy, and thus the weaknesses of the first-order questions of legal theory highlight what's at stake in grappling with the legality and legitimacy of police discretion. By excavating the connection between the empirical studies of police discretion and the legal theoretical frameworks of legal indeterminacy, the place of decisionism concealed within this discourse may be 'desubjugated,' to use Foucault's language. Thus does it lend itself as well to genealogy by asking how the order of things in one period evolved to order these same things differently in the next—how police discretion transition from a question of legal legitimacy to one of political sovereignty.

While Foucault provides the tools for analyzing discourse, Schmitt turns our attention to the historical and systematic development of particular concepts, what he calls a "sociology of concepts." This method, unlike sociology proper, rejects a principle of causality as the form of explanation. For instance, Marx's view that a material base structure produces an ideological superstructure, although it has a built-in reciprocation, nonetheless takes on a causal thrust. Schmitt isn't concerned with the direction in which causal arrows point, and he critiques standard sociological accounts for constructing "a contrast between two spheres" only to "dissolve this contrast into nothing by reducing one to the other."[95] In Paul Kahn's words, Schmitt's theoretical commitments maintain that "conceptual order

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[94] Michel Foucault, *Society Must Be Defended: Lectures at the College de France* 1975-1976 (New York: Picador, 2003), 10-11.
[95] Schmitt, *Political Theology*, 43.

and function are reciprocal," and therefore cannot possibly take on a single direction of causality.[96] The 'sociology' of Schmitt's "sociology of concepts" is animated by the premise that imaginative structures and social roles cannot be comprehended independently of each other. "Without an imaginative structure in which the function is embedded in forms of knowing and norms of being with others," Kahn points out, "the person called a judge or law officer will be serving purposes other than those we associate with the role."[97]

The 'imaginative structure' to which Schmitt appeals is that of Judeo-Christian (though decidedly Catholic) theology, as evidenced by his famous conviction that "all significant concepts of the modern theory of the state are secularized theological concepts."[98] Like the miracle in theology, Schmitt sees the exception in jurisprudence as the fulcrum of its imaginative structure, its importance revealed precisely by its tendency to implode causal accounts of social and political life. The liberal assumption that "demonstrating fundamental principles of liberalism will lead to progressive reform of the liberal state," is continually foiled by the zone of indeterminacy that separates norms from their application, which is for Schmitt a zone occupied by decision.[99] Liberalism, with its notions of legality and of democracy, can never succeed at cabining the decision, only displacing it. The effect is to allow the discourse of police discretion to transform from one of legality to one of democracy without ever itself being impeached. For liberal legality cannot account for an authority that exists beyond its limits nor may liberal democracy for an application of power that defies its own norms.

While Schmitt's historical method shares certain commonalities with Foucault's, Schmitt directs our attention to the "systematic structure" of concepts in ways that Foucault more or less avoids. As Kahn points out, 'systematic structure' for Schmitt has an "architectural and analogical" valence: "to draw an analogy is to draw attention to a structure of meaning."[100] The exception is understood, Schmitt claims, by reference to the miracle in theology, and thus its plentitude and force in law is intelligible because of the structure of meaning that it pulls from, a structure that proceeded the liberal state form. The analogies we use to make sense of concepts and endow political events with meaning, Schmitt suggests, reveal the boundaries of our social and political imaginary. That preventing crime is analogized to war and police officers to warriors demonstrates the existential, extra-legal structures to which we appeal to justify policing practices, practices that run against and over the strict confines of legality.[101] The point is not whether these analogies are appropriate but whether they are either compelling or absurd. By integrating Foucault's attention to the particularities of discourse, of the limits of what is said and can intelligibly be said, with Schmitt's eye toward the structure of the

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[96] Kahn, *Political Theology*, 94.

[97] Kahn, *Political Theology*, 94.

[98] Schmitt, *Political Theology*, 36. Schmitt continues, "…not only because of their historical development – in which they were transferred from theology to the theory of state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts."

[99] Kahn, *Political Theology*, 99: "They [liberal political theorists] are constantly dismayed by the failure of practice to follow theory. But it is only a presumption of the theorist to believe that practice is application of theory. This is, in Schmitt's term, 'caricature.'"

[100] Kahn, *Political Theology*, 109.

[101] In some sense, these analogies are outmoded. Today, the ascendance of market rationality has ushered forth a peculiar neo-Schmittian fusion of political decisionism with market idioms, and thus the tired analogies to war run up against appeals to responsibilizing police and civilians in ways that veil the existential dangers of war.

analogies percolating throughout these discourses, we are allowed a better sense of the power and importance of decision in police discretion and, consequently, police reform.

To be sure, there is a tension between these two methodological commitments. On the one hand, Foucault (and Nietzsche) calls into question the very stability of political concepts like sovereignty that Schmitt takes quite seriously. On the other hand, Schmitt's case for decisionism as a vital aspect of sovereign power opens up the space for discerning the limits of the liberal democratic discourse that animates police reform. The goal of the dissertation is not to contort some sort of union between Foucault and Schmitt methodologically. Rather, the point is to take seriously Schmitt's premium on decisionism (and subsequent critique of liberalism), which for him proceeds from a conceptual analysis, and to think with Foucault about the ways in which contemporary political discourse orders the field of political knowledge such that decisionism is both rejected and disavowed. The goal is not to follow Schmitt towards an analytical conclusion about the conceptual necessity of decisionism, but to disrupt a discourse that does not attend to decisionism by showing how the concrete problem of police discretion appears to instantiate these conceptual fundaments. It is not, to follow Foucault, "to discover the roots" of police discretion in sovereign decisionism but to engage sovereign decisionism in order to contribute to police discretion's dissipation.

A primary benefit of this methodological approach is that it focuses on the *limits* of the liberal democratic discourse that has shaped the legal and political treatments of police discretion by *critically* engaging its historical development. "The critic has the double task," Judith Butler writes, interpolating Foucault, "to show how knowledge and power work to constitute a more or less systematic way of ordering the world with its own 'conditions of acceptability of a system,' but also 'to follow the breaking points which indicate its emergence.'"[102] Unlike normative approximations of the sort supplied by those participating in the regulative ideal discourse of police discretion, the "primary task of critique… bring[s] into relief the very framework of evaluation itself."[103] Thus, when Skolnick frames police discretion as an "extremely important jurisprudential fact," he simultaneously denies the possibility that democratic society could function without it while also depositing the certainty of an indeterminate power at the core of jurisprudence; consequently, he (and all others within the regulatory discourse) foreclose the possibility of calling into question the certainty of police discretion. By way of genealogy, then, this dissertation endeavors to 'follow the breaking points' of the liberal democratic discourse in which the concept of police discretion has been born, cultivated, conditioned.[104] Specifically, the 'breaking points' on which the dissertation will focus are the multifarious ways in which the discourses of liberal legality and liberal democracy have attempted to erase the place of the decision, and consequently, how these erasures manifest in attempts to tame police discretion.

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[102] Judith Butler, "What Is Critique? An Essay on Foucault's Virtue," in *The Political: Blackwell Readings in Continental Philosophy* ed. David Ingram (Hoboken: Wiley-Blackwell, 2002), 223.

[103] Butler, "What is Critique?," 215.

[104] Butler reads from Foucault the notion that "to be critical of an authority that poses as absolute requires a critical practice that has self-transformation at its core," in "What is Critique?," 219. To be sure, my claim is not that the regulative ideal discourse present police power as absolute, but by placing police discretion beyond interrogation endows it with a certain absoluteness. While Chapter Three will take up precisely the extent to which the concept and effect of police discretion poses as an absolute power, I am uncertain whether this is a critique that does indeed have 'self-transformation at its core.' Perhaps I am "inhabiting that place of wavering" which exposes me to derisions of inutility or unawareness to 'how policing actually works.' Then again, perhaps that is precisely the point.

On Materials

The materials used in this dissertation are supplied in equal measure from literatures on policing and literatures on legal and political theory. The ambition of the dissertation is to integrate these materials by attending to the questions raised first by the policing literature, and then demonstrating how these questions echo inquires in the respective theoretical fields. Because the policing literature articulates the problem of police discretion in the registers of legality and of democracy, it is wise to pair these formulations with a literature grappling with similar problems of the first-order. To be sure, the methodological commitments of the dissertation avoid merely submitting one literature to the other. Instead, by beginning with the sort of problematizations contained within the policing literature and only then proceeding to the theoretical literature, the dissertation endeavors to use theory as a toolkit for unpacking the stakes of problem of police discretion as well as the limits of its frameworks and problematizations.

Aside from the policing and theoretical literature, the dissertation frames the arc of the inquiry by reading the reports of two presidential police commissions for the ways in which they each envisage the problems of American policing, the solutions to them, and the place of police discretion within them. Beginning with these reports offers two distinct advantages. First, they serve as bookends not only to the last fifty years of American police reform but also to the transition from law to politics. Second, as a technique of government,[105] the priorities set by a presidential commission, and the recommendations at which it arrives, illuminate not only the pressing national concerns of the moment but also the normative vision for the very task of governing. And this is especially the case for those commissions concerning crime and law enforcement. To the extent that the police are the arm of government with which citizens are most likely to have the most direct, and often most consequential, encounters, the vision articulated by crime and law enforcement commissions is one that both instantiates the relationship between governor and governed *and* proscribes how that relationship ought to be maintained in prosaic interactions between the two.

Whether diagnosed as a case of 'lawlessness in law enforcement' as did the Wickersham Commission almost a century ago, or as a relationship plagued by distrust as did both the Johnson and Obama Commissions, these assertions observe more than mere 'rifts' in the fabric of the American political community; moreover, they bear directly on the democratic underpinnings that bind this very fabric. Put differently, from Johnson to Obama, what is at stake is not simply an unfortunate 'community-relations problem' but is instead the relationship between democracy and policing, its aims and limits, prerogatives and possibilities. And together they tell a story of the first-order, of the shifting and inescapable tensions between democracy and the police. The disparate ways in which these commissions problematize these tensions and prescribe responses to them thus supply an empirically grounded starting point for a genealogy of police discretion.

In the period between each commission, texts have been selected according to their influence within the field of policing and criminology. Johnson's Crime Commission inaugurated a wave of empirical police studies throughout the 1960s and 1970s that complicated the commission's assumptions about policing. Of these, Jerome Skolnick's *Justice Without Trial*, James Q. Wilson's *Varieties of Police Behavior*, and Egon Bittner's *Functions of Police in Modern Society* stand out as the

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[105] Daniel Bell, "Comment: Government by Commission," *The Public Interest* (Spring 1966): 3, 6-9.

touchstones for sociological understandings of police discretion.[106] Each of these texts frames the problem of police discretion legalistically, and thus can be said to generally ask the same question in different ways: how ought police to proceed in legally legitimate ways during situations for which the law offers no guidance? During this same period, a debate over the propriety of judicial discretion was unfolding in the field of analytic jurisprudence. Not unlike the sociologists of policing, the jurisprudes – namely, H.L.A Hart, Ronald Dworkin, and by implication, John Austin – questioned how judges ought to arrive at the correct legal outcome when the law offered no positive instruction. The disagreement within this jurisprudential debate highlights what is at stake in framing the legality of police discretion, for one cannot determine how to act within the confines of legality without knowing what law is. Throughout this period, the Supreme Court was in the midst of its so-called 'due process revolution,' which supplies a string of cases regarding police discretion that illustrate the modes of analysis elaborated in the Hart-Dworkin debate. These cases help demonstrate that the stakes of the legalistic framework for police discretion extended beyond academe and bear on the politics of policing.

While Obama's Task Force found promise in democratizing policing, by all indications it was not attuned to the ways in which neoliberal political rationality – the dominant form of political reason today – undoes the basic elements of democracy.[107] Thus, while the Task Force saw community policing – an approach standing for the proposition that police agencies should partner with the communities they police to co-produce public safety – as a mode of democratic empowerment, others have noted its opposite effect. For some, such co-partnerships signal fissures in the myth of the sovereign state capable of controlling crime on its own.[108] Instead, they represent a strategy of responsibilization, devolving "responsibility for crime" to non-state actors.[109] For others, under the paradigm and practice of community policing "the legitimation of state power becomes more anonymous, but the exercise of this power by the state becomes more visible."[110] In either case, the dual instantiation of democratic and community policing reveal their competing and contradictory aims, with community policing inverting the sensibility of democratic policing by reassigning responsibility such that it is no longer the police that answer to the people but the people that must supply answers for the police.

Whereas liberalism can coherently account for neither decisionism nor police discretion – legally or politically – neoliberalism rationality reprograms discretion. Put a different way, while decisionism stretches the limits and highlights the boundaries of liberal reason, it is retooled by neoliberal rationality through dispersing and decentralizing the decision. Ticketing quotas, civil forfeiture, racial profiling, problem-oriented policing, COMPSTAT—all of these are examples of policing tactics wherein officers are calculating, yet not responsive; they are responsiblized, yet not responsible for lives. These are logics external to the officer's own discretion that guide who he sees

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[106] Herman Goldstein's *Policing a Free Society* is an honorable mention, but it is analytically somewhere between Skolnick and Wilson and thus does not offer as much additional purchase on the frameworks of police discretion during this period.
[107] Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Princeton: Princeton University Press, 2015), 17.
[108] David Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society," *The British Journal of Criminology* 36, no. 4 (Autumn 1996): 445-471.
[109] Garland, "The Limits of the Sovereign State"; Pat O'Malley, "Risk, Power, and Crime Prevention," *Economy and Society* 21, no.3 (1992): 252-275; Pat O'Malley, "Volatile and Contradictory Punishment," *Theoretical Criminology* 3, no.2 (1999): 175-196
[110] William Lyons, *The Politics of Community Policing: Rearranging the Power to Punish* (Ann Arbor: University Of Michigan Press, 1999), 11.

as suspect, which geographic areas to surveil, when to surveil them, and how to address them. Coupled with an assemblage of modern surveillance technology, they are both managed by neoliberal rationality and manage their jurisdictions according to the same.

Yet this reprogramming entails another shift as well. Whereas for the Crime Commission, the sociologists of police behavior, the jurisprudes, and the Supreme Court police power was configured according to a legal-political rationality, the dawn of community policing reconfigures this power according to a moral-political rationality. Rather than circumscribing police within law, this rationality detaches police discretion from legal points of anchorage. Not just the predicaments but the purpose of police discretion transforms from one occasioned by and directed toward the need to deter crime to one tailored to buttressing private social institutions and enforcing civic morality. This dissertation thus also takes up critiques of community policing in correspondence with the burgeoning literature on the implications of neoliberalism as a form of political rationality to query the ways in which community policing unravels the preceding frameworks of police discretion while simultaneously preserving its practice. In doing so, it engages an archive that that dissertation will refer to as the Community Policing Thought Collective, a series of essays published by the original purveyors of community policing that were responsible for popularizing and implementing community policing during the 1980s and 1990s.

IV. CONTRIBUTIONS TO THE FIELD: CRITICAL LEGACIES

While this dissertation attends to a concrete political problem—the violence and affronts to personhood that ensue from the uncabined authority of police discretion—it does so by critically engaging the forms of reason, assumptions, limitations, and implications of a series of legal and procedural abstractions – 'legality,' 'procedural justice,' 'democratic policing, 'community policing' – that are intended by reformers to remedy this problem. In so engaging, the dissertation contributes to two scholarly traditions. First, it advances the subfield of critical criminology (and in many ways radical criminology) by questioning the constitutive power effects produced by the liberal, state-centered discourse of police discretion. This field of inquiry finds its origins in Marxist ideology critique, aimed at revealing the contradictions and power relations hidden within categories like law, crime, deviance, and the state, and moving away from the positivist agenda and causal questions of traditional criminology that leave the contemplation of the state to other disciplines.

With the publication of *Discipline and Punish* in 1975, Michael Foucault at once extended and departed from these Marxist origins by calling into question the entire discourse of criminology, focusing our attention to the ways in which knowledge and power work in combination to constitute subjectivities, objects of power, and forms of reason, the very categories that Marxist criminology—indeed nearly all criminology—takes for granted. As Johann Koehler has recently put it, this long arc of penal history, but perhaps of criminology as a field, is pocked with "two intellectual-historical schisms" that enmesh these styles of criminological critique: the first, a historical accident through which the tired, totalizing theories of Marxist criminology gave way to the fresh air brought about by Foucault; the second, an evolution of the criminological episteme that witnessed 'strictly orthodox Marxisms' absorbed by Foucauldian poststructuralism, and thus the examination of power relations

and their attendant mechanics displaced from the locus of state agency to decentralized techniques of discipline.[111]

Whatever the various appellations given to this sort of criminological inquiry – critical, radical, theoretical, abolitionist – it is "above all an examination of liberalism."[112] In Stanley Cohen's words, "all serious thinking about crime" – regardless of whether it's from the valence of orthodox Marxisms or Foucauldian capillary power – "touches on the nature of liberalism."[113] Indeed, Marx relentlessly pursues the conceits of the liberal state form (e.g., individual rights, contract, law generally, the partition of the state from society by way of doubling fiction of man and citizen), and Foucault as well implores us to sever the state from the power equation as best we can to reveal the mechanisms and logics of power that find their traction in the everyday trappings made possible by liberal rationality. Thus, this dissertation contributes to critical criminological inquiry by joining this confrontation of the relationship between criminology – the study of crime and its control – and liberalism – its state form, consensual rule, the juridically constituted individual subject, its premium on reformism as well as pragmatism – without necessarily advocating for either the Marxist or Foucauldian variants or persuasions.[114]

In doing so, this dissertation barrows from and contributes to a second scholarly tradition, critical political theory. Unlike normative political theory, which concerns itself with value-based claims about how collective life in concert ought to be coordinated or the first-principles according to which societies ought to be governed, critical political theory suspends such normative judgements in service of interrogating the constellations of power that are instantiated by them. Rather than stipulating some value (e.g., liberty, equality, anti-inegalitarianism) and then assessing the palatability, acceptability or legitimacy of socio-political arrangements according to it, critical political theory calls into question the limits of the evaluative framework itself, its horizons of possibility and impossibility, its borders and frontiers, modes of exclusion and axes of oppression.[115]

That criminological and political critique share a common preoccupation with the promises and pitfalls of the reigning legal-political discourse of our time (i.e., liberalism) thus compliments the study of *police* governance. For in addition to critical criminology's familiar qualms with liberalism, critical political theory offers the distinct advantage of foregrounding "the ensemble of practices, discourses and institutions that seek to establish a certain order and to organize human coexistence."[116] Put a slightly different way, that both criminology and political theory enjoy rich literatures that unpack

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[111] Johann Koehler, "Don't Talk to me About Marx Any More!," *Punishment & Society* 22, no.5 (2020): 731-735.

[112] Stanley Cohen, *Against Criminology* (New Brunswick: Transaction Books, 1988), 14; Tony Platt, "Prospects for a Radical Criminology in the USA," in *Critical Criminology* eds. Ian Taylor, Paul Walton, and Jock Young)New York: Routledge, 1975).

[113] Cohen, *Against Criminology*, 14

[114] I say "without necessarily advocating for either the Marxist or Foucauldian variants or persuasions," for two reasons: first, because the ambition of this dissertation is to advance *critique* within the field of criminology categorically, without making a claim as to whether one approach is superior to the other; the second intention is because, as the next paragraphs will demonstrate, my concerns with the limits of the liberal democratic discourse of police reform is decidedly Foucauldian in its mode and object of inquiry. Other recent critical assessments of policing have taken a forthrightly Marixst tack (*see e.g,* Alex Vitale's, *The End of Policing* (London: Verso, 2017)), which highlight crucial implications for diagnosing the problems of modern policing. In short, though Marxist criminologies are perhaps tired, they are not without value, and I do not suppose this dissertation to deny them of it by choosing to examine a different set of concerns.

[115] Butler, "What is Critique?," 3.

[116] Chantal Mouffe, *Agonistics: Thinking the World Politically* (London: Verso, 2013), 2.

and deconstruct the effects of liberalism on their respective fields further enriches the study of police governance by widening our interrogative aperture such that the limits within one field (criminology) are exposed, while the implications of these limits for political life are brought into focus. To be sure, uniting these modes of inquiry is not merely some sort of *multi*-disciplinary submission of one field to another. The ambition is not to place one literature under a lens foreign to it. Instead, precisely because the legacy of critical criminological inquiry is bound up in tensions with liberalism, this dissertation endeavors to be genuinely *inter*-disciplinary by intersecting critical criminology's quarrels with critical political theory's lessons about and tools for unpacking the nexus of knowledge and power.

In a certain sense, then, this dissertation is an exercise in what Stuart Scheingold referred to as 'the new political criminology.' The distinctiveness of this mode of inquiry is threefold. First, it remains criminological in that is rooted in conceptions of crime and crime control. Second, it is political, according to Scheingold, "in that its focus is on the way crime control strategies both reflect and influence the distribution of power within the polity."[117] And finally, it is assigned the qualifier 'new' because "it is influenced by postmodern understandings of, and disillusionment with, the liberal state."[118] Where the traditional terrain of criminological inquiry deals in conceptions of deviance and social control – and therefore "starts with sites and practices 'given' to it by the criminal law and its administration"[119]– political criminology is concerned at its core with "the linkage between political authority and crime control policy."[120] In other words, it interrogates the "forces that determine how, why, and with what consequences societies choose to deal with crime and criminals," which calls into question the very 'givenness' of criminological knowledge.[121] This is an enterprise that moves beyond the constitution of social demeanor vis-à-vis crime and enters the fray of contestation over the aims, bounds, and imperatives of modern governance, the multiple publics that are represented (or not) in this process, and the claims to power made in the name of both effective law enforcement and democratic empowerment. In short, political criminology *a la* Scheingold is concerned with "the social and political *meanings* that attach to crime" and the ways in which these meanings are institutionally tacticalized to conduct political life in concert.

'Political criminology' thus implies a critical orientation towards its object of study. Yet, while Scheingold's 'disillusionment with the liberal state' was animated by what he and many others saw as 'a crisis of political authority' characterized by an enfeebled state "unable to build an inclusive society that minimizes crime and maximizes the well-being of the society as a whole,"[122] at a higher level of generality it was centrally preoccupied with the 'pathologies of advanced capitalist societies.' As a result, the 'political' of political criminology rests at the intersection of the Marx-Foucault schism

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117 Stuart Scheingold, "Constructing the New Political Criminology: Power, Authority, and the Post-Liberal State," *Law & Social Inquiry* 23, no.4 (1998): 857.

118 "It is criminological in that crime is seen in all of this as a symptom of, symbol for, and window into the innermost workings of contemporary society. It is political in that more attention is given to the state and to political power than is compatible, strictly speaking, with the tradition terrain of social control." Scheingold, "Constructing the New Political Criminology," 860.

119 Maureen Cain, "Towards Transgression: New Directions in Feminist Criminology," *International Journal of the Sociology of Law* 18, no.1 (1990): 10.

120 Scheingold, "Constructing the New Political Criminology," 875.

121 Scheingold, "Constructing the New Political Criminology," 859.

122 Scheingold, "Constructing the New Political Criminology," 868; Jonathan Simon, "Governing Through Crime," in *The Crime Conundrum: Essays on Criminal Justice* eds. Lawrence Friedman and George Fisher (Boulder: Westview Press, 1997); Garland, "Limits of the Sovereign State," 81.

within criminology, at once attending to the microphysics of disciplinary power (e.g., preventative social control, the new penology, actuarialism) while remaining wedded to concepts like 'inequality,' 'insecurity,' and 'alienation' to frame the political crisis.[123] Put a different way, Scheingold understood political criminology to make sense of new techniques for managing old patterns of oppression; consequently, the *political* point of departure rests in the failed project of *inclusivity*. Thus, however 'disillusioned with the liberal state' this view of political criminology may be, it remains enthralled to it. Indeed, examining the 'distribution of power within the polity' through the lens of 'crime control strategies' is only invested with political significance precisely because of the state's inability 'to build an inclusive society.' Defining the political of 'political criminology' in relation to inclusivity only serves to reinscribe the very thing it seeks to critique, simultaneously harping on the pitfalls of the modern liberal state while appealing to the promises of liberalism.

Foregrounding, with Schmitt, the fundamental antagonism of the political endows 'political criminology' with renewed purchase. Here, the inquiry seeks not only to probe the 'distribution of power within the polity' vis-à-vis crime control policies but also to question the ways in which decisionism operates within such policies. At issue is not merely the illiberal sites of domination that ensue from 'governing through crime control' but the very logic of liberal democracy that guides the politics of crime control itself. Rather than a logic of inclusivity, under this formulation the political attends to *exclusivity*, to the "ineradicable character of antagonism" that inspires constant contestation and that is elided by the liberal state form.[124] The import is not only to examine the ways in which crime control instantiates or conceals this antagonism but how the 'link between political authority and crime control policy' is broken by the decisionism that emerges from such antagonism. Indeed, a power that recognizes no outside authority is by logical necessity exclusive. As one site of crime control policy, then, contemporary police reform invites a more nuanced version of 'political criminology' by virtue of the ways in which it attempts to tame discretionary power, to assert authority over the police.

V. OUTLINE OF CHAPTERS

Chapter One: The Disappearance of Police Discretion: A Tale of Two Presidential Police Commissions

This chapter offers a comparative reading of President Johnson's 1967 Crime Commission and President Obama's Task Force on 21st Century Policing. By examining the ways in which both commissions instantiate the relationship between the police and the public, the similar diagnoses at which they arrive, and the discontinuities that separate them, this chapter argues (a) that they tell a tale of the shifting but inescapable tension between policing and democracy, (b) that the Crime Commission's understanding of police discretion as an insular problem of police administration laid the foundation for treating discretion as a problem of legality, and (c) that Obama's Task force shifts the register of police governance from internal administrative mechanisms to public political processes. In that shift, the Obama Task Force erases the problem of police discretion even as it describes the very harms that it occasions. Juxtaposed to each other, what is telling is not so much

[123] Scheingold, "Constructing the New Political Criminology," 875.
[124] Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), 30-31.

that they share a similar set of concerns about policing but is instead the ways in which these concerns are problemat*ized* much differently.

Equally, if not more so, telling are the recommended remedies proposed by each commission. Johnson's Crime Commission, for instance, saw the challenges facing urban policing as suspended in "a complex of social conditions" that spanned poverty and racial antagonism to the breakdown of the traditional family structure and juvenile delinquency.[125] And as a result of their focus on civil society's wayward social structures, the Commission chose to forego civilian involvement in policing and opted instead for a program that prioritized effective police administration, training, education, and professionalization. Reform was to be found within existing legal institutions. A half-century later, however, Obama's Task Force located the promise for meaningful police reform largely outside of existing legal institutions. While the Task Force expressed a shared concern for racial antagonisms, trust, and legitimacy, unlike their predecessor they embraced civilian oversite and involvement in policing. The remedies were at least six-fold, but the primary operating assumptions underpinning the Task Force's final report sought to redefine the mentality of police officers while at the same time increasing community engagement in the enterprise of policing.

In short, where Johnson's Crime Commission prioritized administrative and legal processes Obama's Task Force favored public input, and thus policing in a democratic society transformed from a delicate legal problem to a tense political one. Both, however, maintain that discretionary power is "necessary and inescapable" to the enterprise of policing, albeit in much different ways. Thus, this chapter will also unpack the distinctly modern understanding of deterrence that Johnson's Crime Commission linked to the notion of discretion, which departs from the classical understanding of the certainty of punishment to the officer's physical presence and exertion of personal authority independent of the formal criminal process.

Chapter Two: Decentering Discretion: The Challenge of Police Behavior in a Free Society

In the half-decade following the publication of *The Challenge of Crime in a Free Society*, at least three sociological studies of police behavior complicated the main operating assumptions that animated the Crime Commission's recommendations. These studies assessed modern policing at both the individual and organization level, and they offer a much richer picture of the enterprise of law enforcement than Johnson's commission provided. For instance, Jerome Skolnick's classic *Justice Without Trial* introduced the notion of the police officer's "working personality," which helps flesh out the sociological stakes of the police working environment for police discretion. Whereas the Commission advocated for formalizing rules to ensure a more or less uniform administration of justice, Skolnick observed that "the combination of danger and authority found in the task of policing unavoidably combine to frustrate procedural regularity."[126] Combined with social isolation, solidarity within policing, and the perception of constant threat, Skolnick's study observed novel ways in which the police officer's "working personality" manifested to create certain informal policing patterns even

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[125] President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society: A Report from the President's Commission on Law Enforcement and the Administration of Justice* with an Introduction and Afterword by Isidore Silver (New York: E.P. Dutton & Co., 1969), 239. Hereafter cited as Crime Commission Report.
[126] Skolnick, *Justice Without Trial*, 61.

in matters about which there existed formal, written rules. Likewise, James Q. Wilson developed a three-fold typology for styles of policing that expanded upon many of the observations regarding the tasks of modern policing contained in the Commission's final report. Unlike the Crime Commission, however, Wilson paid careful attention to the ways in which each style of policing was either aided or hindered by local and municipal politics. As a result, the Commission's preference for insular police administration was shown by Wilson to belie the effects of political culture on the enterprise they sought to improve. Formalizing departmental policies, it seems, could not occur in the vacuum of the precinct. Finally, Egon Bittner bristled at the perceived novelty of police discretion and instead directed our attention to the "non-negotiable use of coercive force" as the unifying characteristic of all police functions. In doing so, Bittner situated police as institutionally independent of the courts, and thus demonstrated the hollowness of the Crime Commission's belief that courts could curtail or check misuses of discretion.

This is, of course, an extremely telescoped account of Skolnick, Wilson, and Bittner. But they constitute their greatest sociological insights that complicate the Crime Commission's assumptions. Significantly, they also help connect the arc to Obama's Task Force in a conceptually unified way. Indeed, the Task Force prioritizes (a) rewiring the mentality of police officers and their orientation toward the enterprise of policing, (b) the politics of police management and public input, and (c) the overriding problem of police violence. These, in their turn, seem primed by the insights from Skolnick, Wilson, and Bittner, and thus respond, if indirectly, to those aspects of policing overlooked by Johnson's Crime Commission.

Chapter Three: From Legalism to Legality

The sociological significance that Skolnick and Wilson reveal in their studies of police and organizational management is coupled with a normative inquiry into what legitimates police discretion if the Crime Commission's legalistic framework proved untenable. By examining the police in their working environment, the studies that sought to answer the Crime Commission's call for further research on police practice inadvertently exposed a much deeper problem attending discretionary authority. Rather than shedding light on the optimal arrangement of rules, procedures, and protocols for exercising discretion in such a way that maximized crime control while remaining consistent with the principles of a free society governed by the rule of law, studies like Skolnick's, Wilson's, and Bittner's revealed the fundamental incompatibility between rule-bound authority and the pressures of (and on) police work. Law-like rules must bind, delimit, and restrain police power. Yet a tangle of danger and authority, local politics, and institutional insularity ensnared the promise of procedural consistency and policing that simply 'followed the rules.' If legitimacy depends on rules and procedures, then how are we to square an authority at odds with both to the normative commitments legalism commands—liberty, equality, fairness?

This chapter shows how the sociological studies of police discretion abandoned the Crime Commission's preference for legalism and turned instead to understanding police discretion as a problem of legality, of the norms and standards of legitimacy and fairness that underwrite law. For Skolnick, this entailed rearranging the binary between law and order to one of "order under law." Wilson, by contrast, pursued a "single standard of justice" that sought to reorient policing toward an order-maintenance function and the protection of middle-class values. Together, Wilson and Skolnick

represent opposite poles of a larger debate between law's inherent legitimacy and its social contingency. They also represent alternative emanations of an earlier attempt to cabin police discretion with "the legal process," which itself alternates between those poles without noticing the tension between them. This chapter thus also situates Skolnick and Wilson in Jerome Hall's lectures on "Police and Law in a Democratic Society" to show how they represent different faces of the schism between legal rules and legal principles that befuddles Hall's, and legal process theory's, account of police discretion.

Chapter Four: Penumbras of Police Discretion: The Due Process Revolution and the Limits of Legal Theory

This chapter further pursues the transformation from legalism to legality further and argues that this trend was not limited to the academic study of police discretion. Rather, the shuffle between legalism and legality is evidenced in the Supreme Court's due process cases. What is at stake in the transition from legalism to legality is the determinacy of law. Hall, Skolnick, and Wilson display this in different ways, but each of their accounts are caught up in the same concern over the sovereignty of law. Thus does this chapter explore that concern in the context of the Supreme Court revered "Due Process Revolution" and the jurisprudential debate over legal indeterminacy and judicial discretion, both of which also unfolded during roughly the same period. By reading these materials in relation to each other, the chapter argues that both the sociologists of policing and the legal theorists were asking a similar question: how is legal legitimacy determined in moments or about situations for which there is no positive legal instruction? Consequently, the limits within the legal-philosophical framework for this question highlight what is at stake for its reiteration in the context of police discretion. Moreover, by engaging the Supreme Court's rulings on police discretion during this period, the chapter aims to underscore that the stakes of this question are not limited to the queries of intellectually curious academics but were instead very active in the governing of American political life. The chapter begins with the Warren Court's rulings in *Miranda v. Arizona*, *Mapp v. Ohio*, and *Terry v. Ohio*, and then transitions to how both sets of materials are informed by the debate between H.L.A Hart and Ronald Dworkin over 'hard-cases.'

To ask how police might proceed in legally legitimate ways in situations that are beyond legal measure (e.g., Skolnick and Wilson) or to ask what the law requires of police conduct when it has seemingly nothing to say about it (e.g., *Terry*) is in both cases a much deeper question of legal theory. Indeed, to ask what is legally legitimate when there is no law ultimately reduces to a question that asks what law is in the first place. For present purposes, policing is the particular context in which this question is to be raised, but it is a context that is conditioned by the limits of the legal theoretical discourse on the determinacy of law that was occurring in same generation of American intellectual development as our sociologists and jurists. The issue of how we are to determine legality in moments or about situations for which law is indeterminate is epitomized by the debate between Ronald Dworkin and H.L.A Hart over this very same question. For them, the question manifests in those "hard cases" – cases like *Terry*, for instance – that judges must decide without reference to clearly established law. How are judges to reason through the correct outcome in these cases? What are the limits on their reasoning?

Hart offers a positivist model of law that seeks to remedy the difficulties of such 'hard cases.' In his view, law is divided into two zones, a "core" and a "penumbra." The "core" consists of settle

law, statutes and clearly defined rules for instance, whereas the "penumbra" consists in an area of legal uncertainty that surrounds settled law. Within the "core" questions of law are mere matters of fact, Hart argued, because they are questions that can be answered without resorting to anything beyond law. The rationale for answering 'penumbral questions,' on the other hand, "lie[s] in something other than a logical relation to premises" of simple legal deduction.[127] "If a penumbra of uncertainty must surround all legal rules," Hart claimed, "then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning…cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules."[128] By implication, questions in the penumbra are settled "in the light of aims, purposes, and policies"[129] of a particular legal problem, the propriety of which being "ultimately determined not by law but by the values which judges happen to hold."[130]

Dworkin advances two distinct critiques of Hart's model of the core and penumbra. Rather than looking outside law to the 'aims, purposes, and policies' that condition any given legal problem, Dworkin argues that 'hard cases' are already fully determined by law. In his view, there are moral principles immanent in the law, and judges are obligated to discover them.[131] Legal reasoning, he claimed, involves a process of interpretation that relies only on law to discover such principles. If legal principles already inhere law, then judges cannot exercise any discretion of the sort advocated by Hart because they are under a duty to interpret law, not apply external concerns that may be idiosyncratic to particular judges. Yet, choosing between competing legal principles, Hart rejoined, requires judicial discretion. In other words, if multiple principles underpin law then law cannot itself determine which principle best applies, only some form of reason beyond law can. In David Dyzenhaus's words, "the more Dworkin showed that the adjudication of hard cases involves a decision based on legal principles, the better the evidence for the positivist thesis about judicial discretion."[132]

Dworkin's second critique, however, introduces a richer problem. Hart's model of core and penumbra operates upon the implicit assumption that the core is ultimately larger and more significant than the penumbra. In that way, even if we acknowledge a zone of legal indeterminacy legal order itself is not jeopardized because the zone of legal determinacy – the core – has greater force and thus anchors the legal-social world. Because Dworkin understood law to be the result of an ongoing process of interpretation in which judges are "authors engaged in a chain novel, each one of whom is required to write a new chapter which is added to what the next co-novelist receives," he saw Hart's core-penumbra distinction as little more than a disagreement over the meaning of the word "law."[133] Such semantic disagreement, Dworkin argued, reveals that *all law* is a matter of interpretation, and thus what Hart understood as the settled, determinate 'core of law' is "merely an area of provisional agreement as to interpretation."[134]

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[127] H.L.A Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593-629, reproduced in *Philosophy of Law 7th edition*, eds. Joel Feinberg and Jules Coleman (Belmont: Wadsworth, 2004), 50-67.

[128] Hart, "Positivism and the Separation of Law and Morals," 56.

[129] Hart, "Positivism and the Separation of Law and Morals," 59.

[130] David Dyzenhaus, "Introduction: Why Carl Schmitt?," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (Durham: Duke University Press, 1998), 4.

[131] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978).

[132] Dyzenhaus, "Why Carl Schmitt?," 4.

[133] Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (Oxford: Oxford University Press, 2014), 49; Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986), 45-46.

[134] Dyzenhaus, "Why Carl Schmitt?," 4.

The power and effect of this second critique is twofold. First, it "implodes legal positivism," or at least Hart's influential brand of it, by eliminating the grounds of the distinction between the core and the penumbra by effectively denying the determinacy of the core.[135] As a result, it unleashes the problem of discretion from a position of marginality to a central problem of law. If Hart is correct that interpreting law, as Dworkin would have it, always involves judges exercising discretion to choose between possible interpretative alternatives, which is a decision unconstrained by law in a strict sense, then Dworkin's wager that all questions of law are interpretative means that legality is a mere matter of decision. Put a different way, what this suggests is that "when the law is indeterminate, legal meaning is always determined by power."[136]

Obviously, neither Hart nor Dworkin wish to endorse the thesis that law reduces to a tool of convenient cover for the unconstrained exercise of power, but the stakes of their debate illustrate the limits of liberal legalism, and ultimately, of Skolnick and Wilson's frameworks for police discretion. For if both sought to answer the question of how police ought to proceed in legally legitimate ways in moments of legal indeterminacy, and if the dominant legal theoretical discourse teeters on the precipice of supplanting legal legitimacy with decisionistic power, then the answer to their questions ultimately reduce to the "effective limits"[137] of the police officer. Put differently, if police have the capacity to exercise their power, not unlike if judges have the capacity to exercise theirs, then so long as it is consistent with the desires and interests of the community whose interests they represent it is *de facto* legitimate. The conceptual aporias within liberal legal theory of the sort epitomized by Hart and Dworkin thus help to explain a wide variety of policing phenomena, from racial profiling to police violence to governing through crime and 'the new Jim Crow,' because they help to demonstrate that questions of police discretion are not so much problems of legal legitimacy as they are the exercise of unconstrained power that cannot be fully comprehended in legal terms. Thus, for instance, when *Terry* invents a new category of legal police behavior called 'reasonable suspicion' it presents an open question as to whether police power is being cabined by law or whether law is simply a cover for the exercise of police power.

By attending to the limits of the first-order liberal legal discourse, this chapter illuminates what is at stake in its particular manifestation in conversations of police discretion. At bottom, what is taken as a problem of legal legitimacy is ultimately a concern of unrestrained power. And the limits of legal theory introduce us to the question of whether law "can ever operate as a constraint on power itself."[138] Because Skolnick and Wilson share the assumption that law *can* operate to constrain police discretion, reading them in the context of Hart and Dworkin advances the central inquiry of the dissertation in two distinct ways. First, it allows us to reconsider the central limitations of their frameworks, limitations that no policy or set of policies could remedy, on a register and with materials that have heretofore been left disintegrated. Second, it advances the narrative arc of the dissertation by demonstrating that part of the transformation of American policing that reconditioned policing from a legal problem to a political question inheres the legalistic discourse itself. In other words, to the extent that liberal legality ultimately runs into a question of political power, so too, the legalistic discourse of police discretion was bound to transform into a question of political power as the composition of the American political community transformed. Put yet another way, the

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[135] Dyzenhaus, "Why Carl Schmitt?," 4.
[136] Dyzenhaus, "Why Carl Schmitt?," 5.
[137] Davis, *Discretionary Justice*, 4.
[138] Davis, *Discretionary Justice*, 5.

reconfiguration of the problem of policing in a democratic society that took place from Johnson to Obama is not simply a random outgrowth American political life, it is an evolution for which the very seeds were already sown in the legal discourse that informed the problem during the 1960s and 1970s.

Chapter Five: Reprogramming Discretion: Community Policing's "Quiet Revolution"

The fourth 'pillar' of Obama's Task Force on 21st Century Policing called for adopting community policing as the philosophy and organizational strategy for America's police forces. Doing so, the Task Force reported, would enliven policing to the desires of the people, and thus further the overarching project of squaring law enforcement with our democratic commitments. While advocates of community policing, including the Task Force, often understand it to be an appendage of democratic policing by way of emboldening the role of community members in policing, more ambivalent observers, such as David Garland, Pat O'Malley, and William Lyons see it as signaling the limits of state sovereignty or the emergence of new set of governing rationalities that challenge the juridical view police power. In other words, the latter view argues that community policing tells us less about the role of 'the people' in police reform than it does about the state.

This chapter revisits a collection of early texts that laid the intellectual and programmatic foundation for community policing, which this dissertation refers to as the Community Policing Thought Collective, to argue that community policing reprograms discretion. One peculiarity of community policing is that, despite its ubiquity and popularity, it lacks a foundational text. There is no community policing bible, so to speak. Nor does it carry a settled definition. Yet it enjoys a robust social scientific literature that is generally constellated by a concern for "testing the promise" of community policing programs. Against this trend, this chapter stages an encounter with the Community Police Thought Collective to stitch together the political rationality that reprograms discretion. At bottom, this reprogramming entails a shift from treating policing and police discretion from a legal-political predicament to a moral-political process that displaces the enforcement of the criminal law from policing's *raison d'etre* and replaces it with a mandate to buttress the interests of private social institutions and enforce standards of civic morality that evolve within and emanate from them. That supplantation is also deeply imbricated with the market-political rationality constitutive of neoliberalism, which reformats the police organization on the model of the firm.

In this process, discretion, as this chapter will argue, is reprogrammed. No longer does it threaten principles of democracy, the rule of law, or social equality. It neither affronts the citizenry's right to due process nor offends standards of reasonableness. Nor does it smack of totalitarianism, unbridled power, or any of the other hangovers that haunted early post-War students of police behavior. Instead, discretion is enveloped by the paradigm of community policing such that it is celebrated, responsiblized, detached from any meaningful points of legal constraint, and wed to the authority of private social institutions. At the same time, discretion is relieved of its service to crime deterrence and animated instead by the goal of reasserting civic morality and enforcing propriety. So enveloped, one result of this arrangement is what chapter one referred to as the disappearance of police discretion, a discursive erasure of discretion from the field of police reform, as was evidenced by the Obama Task Force's simultaneous premium on community policing and total absence of discretion as a predicament of modern law enforcement. This chapter attempts to lay out how community policing's normative form of reason makes that disappearing act possible, even as it, if

paradoxically, trumpets the value of discretion. It does so by engaging with a collection of essays assembled by community policing's early purveyors, the academic researchers, consultants, and police executives responsible for popularizing and implementation community policing programs nationwide—what this dissertation will refer to as the Community Policing Thought Collective.

Reprogramming discretion thus requires a reconsideration of previous critical reflection on community policing. This chapter does not endeavor to reject these reflections as much as it does complicate them. In so doing, the analysis aims to illustrate that although community policing is often seen as an amorphous program, at base it relies on a transforming the management style of the police organization to responsiblize discretionary authority. The common assumption read into community policing, that the police can better supply their services if community members partner with them to identify and solve communal problems, is an injunction placed on the police officer more so than it is on the community. Departing from Garland's view that programs like community policing concede that the state cannot effectively control crime on its own, this injunction relies on a moral-political rather than legal-political definition of the purpose of policing. Rather than an absolute power reserved for the state—a power that democratic policing can't quite grasp—community policing, in Garland's view, articulates an inability of the state. At the same time, it implicates the people as part and parcel of crime, as necessary to control it by way of partnering with the police *and* as complicit in it by not assisting the police in the first place. As a result, community policing inverts the democratic sensibility of democratic policing by reassigning responsibility such that it is no longer the police that answer to the people but the people that must supply answers for the police. What this misses, however, is the form of normative reason that legitimates these answers. Put a different way, interpreting community policing by reference to a juridical view of power occludes the extra-juridical sources of authority, one found in morals and the other in markets, that community policing's original purveyors had in mind.

How is police discretion reconfigured in the era of community policing? How to explain its apparent political ambivalence? What are the legal and political coordinates of discretionary authority in the arrangement that community policing envisages? What is its relation to principles of legality, due process, and the rule of law? If not criminal wrongdoing, whether observed, reported, or suspected, then what precipitates police intervention? If not law, then what legitimates such intervention? Without law, does discretion cease to have a principle of limitation? Or does it take on a new limiting principle? What type of delimitation of police power follows from that principle? And what are the effects that flow from it?

By way of conclusion, this dissertation will pursue the effects that fusing the organizational management of police departments to a market rationality while wedding the legitimacy of officer conduct to standards of normalcy, propriety, and traditional morality set by private social institutions has for democratic police reform, generally, and the way these forces help explain the current divide between police abolitionists and police apologists.

CHAPTER ONE

THE DISAPPEARANCE OF POLICE DISCRETION: A TALE OF TWO PRESIDENTIAL POLICE COMMISSIONS

I. INTRODUCTION

IN 2015, President Obama's commissioned *Task Force on 21st Century Policing* opened its final report with a premium on securing "trust between law enforcement agencies and the people they protect and serve."[139] Standing as the first of six "pillars" for 21st Century Policing, trust between the police and the communities they serve is the "key" and "foundational principle" without which "the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services" cannot be ensured, improved, or reformed.[140] Tellingly, this diagnosis bears the traces of its predecessor from nearly fifty years earlier, when President Johnson's Commission on Law Enforcement and the Administration of Justice published *The Challenge of Crime in a Free Society* in 1967. That report had similarly observed that "there is much distrust of the police," and that this constituted "as serious as any problem the police have today."[141]

Precisely why each commission's observance of the trust issues between the police and the public is so telling is less a story of affective continuities and more a story—or, better, two stories—of the political ecologies that cultivated these conclusions. Perhaps a certain wariness of law enforcement is to be expected. After all, the history of American political thought – and American politics in general – is built on a long tradition of government skepticism.[142] In this abstract sense, each Commission's shared diagnosis is not very telling at all. Yet, attention to their particularities and discontinuities, to their underlying rationales, motivations, and precipitating circumstances, brings to light two disparate formulations of what both consider to be a serious 'community-relations problem.' In this sense, what is telling is not the shared problem but instead the ways in which the public's distrust of the police is problemat*ized*. Put another way, while the two Commissions may identify a shared concern the pathways they take to get there are much different, and where they depart reveals much about where they arrive.

Governing by Commission

Of course, no two commissions are exactly alike. U.S. Presidents have ordered commissions to conduct inquiries on a vast array of subject areas, ranging from water resources to the railroad system to pension policy to the HIV epidemic. Historically, George Washington organized what is

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139 President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (Washington, D.C.: Office of Community Oriented Policing Services, 2015), 1. Hereafter cited as Task Force Report.

140 Task Force Report, 1.

141 President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society: A Report from the President's Commission on Law Enforcement and the Administration of Justice* with an Introduction and Afterword by Isidore Silver (New York: E.P. Dutton & Co., 1969), 255. Hereafter cited as Crime Commission Report.

142 *See* for example, Madison's 51st Federalist.

considered the first Presidential Commission in response to the Whiskey Rebellion of 1794.[143] But the limited role of the federal government in the late 18th and 19th centuries meant that inquiries organized by the national executive were neither desirable nor useful. The modern importance of such commissions first begins with Theodore Roosevelt, who historian Hugh Graham awards the superlative "Father of the Presidential Advisory Commission" for his many public stewardship initiatives.[144] While many of the 26th President's advisory commissions concerned national conservation, the creation of the Federal Reserve System in 1913 is often credited as the direct product of the recommendations made by Roosevelt's commission on national monetary policy.[145] It is from then onward that presidential commissions are seen as an effective and useful political instrument. And in the century that has passed since Roosevelt's administration successfully used commissionships to generate public policy, repeat subject areas have been ordered for reconsideration in light of America's changing political landscape. For instance, President Kennedy's 1961 Commission on the Status of Women was later followed by President Carter's National Advisory Committee for Women in 1979. Both sought to better understand the structural inequalities curbing women's rights and make legislative recommendations for their remedy. President Truman's 1946 Commission on Higher Education for American Democracy marked the first time in U.S. history a President had licensed a commission for the express purpose of assessing the nation's education system. In the intervening period since then, Presidents Eisenhower, Kennedy, Reagan, Bush, and Obama have each organized their own commissions to investigate and formulate policy recommendations for improving education in America.

Crime has been a particularly popular subject area for presidential commissions. To date, at least six separate commissions have explored the subject, beginning with the Wickersham Commission in 1929. For some commentators, the topical ubiquity of presidential commissions, and the popularity of crime and law enforcement commissions in particular, is merely a function of political expediency. They are, as one newspaper editorial from 1971 claimed, "the new political technique for sweeping problems under the rug while pretending to do something about them."[146] In Graham's words, such commissions "disguise inactivity with the sham appearance of investigative action."[147] Not all hold this cynical view of presidential commissions, however. Daniel Bell, for example, maintained that "national commissions often are one of the few places where a central debate over specific policy issues can be conducted."[148] By removing the partial, bifurcated and often incoherent play of congressional policymaking, "the distinctive virtue of Government Commissions," Bell argued, "is that there is a specific effort to involve the full range of elite or organized opinion in order to see if a real consensus can be achieved."[149] Somewhere between these views, Warren Lehman cautioned ambivalently of the commissarial chicken-and-egg problem, which forces us to ponder whether a

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143 Hugh Davis Graham, "The Ambiguous Legacy of American Presidential Commissions," *The Public Historian* 7, no.2 (1985): 7.

144 Graham, "The Ambiguous Legacy of American Presidential Commissions," 10.

145 Graham, "The Ambiguous Legacy of American Presidential Commissions," 10.

146 *Parade Magazine, Boston Globe*, July 4, 1971, quoted in Thomas R. Wolanin, *Presidential Advisory Commissions: Truman to Nixon* (Madison: University of Wisconsin Press, 1975).

147 Graham, "The Ambiguous Legacy of American Presidential Commissions," 7.

148 Daniel Bell, "Comment: Government by Commission," *The Public Interest* (Spring 1966): 7.

149 Bell, "Government by Commission," 7.

commission's final report reflects the true minds of the relevant community stakeholders or simply that of the administration directing the inquiry.[150]

Whether hollow hand-waiving exercises or self-fulfilling prophecies, the mechanism of presidential commissions represents a two-fold opportunity. On the one hand, with little opportunity cost they allow the President to directly influence public policy on issues of chief national concern. Costs are low because their recommendations are not the product of political debate. As Walter Lehman, writing in derision of President Johnson's crime commission, put it in 1968, "it is not an entry in the intellectual market place, where presumably error will be discovered by failure to sell."[151] In his estimation, errors are presumptively fettered out by the commission, thus removing any need to openly debate their policy recommendations. By handpicking their own panel of experts, commissions enable the President to circumvent the vicissitudes of congressional policymaking by supplying him with a comprehensive policy program that is endowed with de facto legitimacy by virtue of his patronage and the commissioners' expertise.[152] This process of what Daniel Bell referred to as "government by commission" thus creases the second fold, which is to magnify the power and reach of the national executive by giving the people, by way of a commission's public inquiries, an opportunity to be heard in a modern democratic system in which public policy is increasingly initiated by executive rather legislative priorities.[153]

As a technique of governance, the priorities expressed and recommendations offered by such commissions together illuminate the pressing national concerns of the moment and portend a normative vision for the task of governing. And this is especially the case for those commissions concerning crime and law enforcement. To be sure, subject areas such as women's rights or water conservation or public education are all concerned with how those we entrust to govern go about governing. These are not unimportant, less pressing or otherwise trivial political issues. But to the extent that the police are the arm of government with which average citizens are most likely to have the most direct, and often most consequential, encounters, the vision articulated by crime and law enforcement commissions is one that both instantiates the relationship between governor and governed *and* proscribes how that relationship ought to be maintained through the prosaic interactions between the two. Whether diagnosed as a case of 'lawlessness in law enforcement' as did the Wickersham Commission almost a century ago, or as a relationship plagued by distrust as did both the Johnson and Obama Commissions, these assertions observe more than mere 'rifts' in the fabric of the American political community; they bear directly on the democratic underpinnings that bind that fabric together in the first place. Put a different way, from Johnson to Obama, what is at stake is not simply an unfortunate 'community-relations problem' but is instead the relationship between democracy and policing, its aims and limits, prerogatives and possibilities. And by attending to the

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[150] Warren Lehman, "Crime, The Public, and The Crime Commission: A Critical Review of The Challenge of Crime in a Free Society," Michigan Law Review 66, no.7 (1968): 1489. To be sure, while this sentiment may be ambivalent in the abstract, Lehman raised this contention as an explicit critique of Johnson's crime commission.

[151] Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1487-1488.

[152] Indeed, President Johnson advanced his Crime Commission's recommendations as legislative proposals in a message to Congress prior to the final report even being made public. See *Crime in America: The President's Message to Congress Recommending Crime Control and Law Enforcement Legislation for the Control of Narcotics, Firearms, and Wiretapping* (delivered Feb. 6, 1967), 3 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 182 (Feb 13, 1967), 113 CONG. REC. 985 (daily ed. Feb. 6, 1967).

[153] Bell, "Government by Commission," 3, 6-9; Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1488-89.

democratic mandates percolating just beneath the surface of each commissions' respective estimation of the police-community relations problem, together they tell a story of the first-order, of the shifting and inescapable tensions between democracy and the police.

The goal of this chapter is thus to begin to tell that story, a story that asks how each commission arrived at their recommendations and, critically, why each returns to the same set of problems despite nearly a half-century of separation. In telling that story, this chapter shows how discretion went from the central dilemma for police reform to being not even mentioned at all.

II. THE CHALLENGE OF CRIME IN A FREE SOCIETY

It is a bit of a misnomer to call President Johnson's a "police commission." Though formally ordered as a commission on "law enforcement and the administration of justice," its primary object of inquiry was not so much policing as it was crime. Indeed, Johnson's instructions to the commission widened the inquisitive aperture with the goal of "[deepening] our understanding of the causes of crime and of how society should respond to the challenge of the present levels of crime."[154] In pursuit of this task, the commission could not avoid grappling with the problems of urban policing in order to offer adequate recommendations for 'how society should respond to the challenge of crime.' But it is important to bear in mind that their discussions of policing, and their task force report on the police in particular, are situated in this larger context of understanding the causes and effects of crime in America.

Curiously, Johnson's motivation for ordering his Crime Commission is less than clear. According to Isidore Silver, it was triggered by "no particular event" at all.[155] While the 1960s were plagued by social unrest spurred in part by race rioting and mass protests over the Vietnam War, the political ecology of the time was sown with a general feeling of fear about crime, especially violent crime,[156] and about a failing criminal justice system.[157] These atmospheric conditions combined with the absence of any particular flashpoint is thus one way of understanding why Johnson's Crime Commission surveyed "a complex of social conditions" that spanned poverty and racial antagonism to the breakdown of the traditional family structure and juvenile delinquency.[158] But it remains to be explained how – and why – the champion of the Great Society elevated these disjointed 'social conditions' to the level of national concern under the banner of crime prevention. For this there are at least two possible explanations. The first begins in July 1964, not with Johnson's political program, but with his Republican presidential opponent's, Barry Goldwater. The second follows thirteen months later in August 1965, *after* Johnson announced his plan to organize a Crime Commission but *before* the Commission completed its work, with the Watts Riots in Los Angeles, California.

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154 Crime Commission Report, 57.

155 Isidore Silver, "Introduction" to Crime Commission Report, 18.

156 Crime Commission Report, 165.

157 David Weisburd & Anthony Braga, eds., *Police Innovation: Contrasting Perspectives* (Cambridge: Cambridge University Press, 2006), 4-5; see also Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2006).

158 Crime Commission Report, 239.

Under the first account, the broad strokes of the Commission's final report represent "the transmutation of Goldwaterism," a political platform embodying the themes of moral turpitude and public apathy toward crime, and animated by the murder of Kitty Genovese.[159] Until the 1964 Republican National Convention, neither crime, policing, nor criminal justice were major political issues, especially not for presidential politics. They couldn't be—if there was a fear of crime at the time, even violent crime, it was too general, too abstract to offer electoral purchase in a nation-wide election. Moreover, crime control was seen as an almost exclusively local and state-level concern. That is until news headlines across the country were captivated by the story of thirty-eight individuals who bore silent witness to the murder of Ms. Genovese in a New York City street.[160] That over three dozen individuals heard Ms. Genovese's brutal stabbing unfold over the course of nearly thirty minutes gave a face to the public's otherwise amorphous fear of crime and, significantly, endowed America's crime problem with at least two distinct meanings.[161] On the one hand, it inspired a moment of collective self-examination.[162] The thirty-eight onlookers were "respectable, law-abiding citizens," interchangeable with any other American.[163] Consequently, their inaction forced Americans to ask what kind of people they were if those typical among them could sit idle while another was harmed.[164] As Lehman observed, "we were concerned because those thirty-eight people were ourselves, able to look passively on while a woman was murdered."[165] America's crime problem, under this view, was fomented by our own moral decay.[166] Thus the solution was to restore, reassert, and take responsibility for our own *individual* virtue, to be the ones who go to Ms. Genovese's aid.[167]

Goldwater's political innovation, on the other hand, was to place the responsibility for America's crime problem on the federal government.[168] If America was in a state of moral decay, and if crime was at once the wellspring and evidence of that decay, then it was the government's fault for not being tough on law and order, for failing to enforce the law and punish wrongdoers. In part, Goldwater was able to shift the register of responsibility from the individual to the government on account of the fortuitously timed case of Arlene Del Fava, another New York City woman who, unlike Genovese, was able to fend off her attacker with a switchblade knife.[169] Del Fava's juxtaposition to Genovese was a key cultural signifier that helped to raise crime to the level of presidential politics. For Goldwater, the fact that Del Fava faced charges for carrying her switchblade knife – a misdemeanor

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159 Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1492, 1495.
160 Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1492-93.
161 Martin Gansberg, "37 Who Saw Murder Didn't Call Police; Apathy at Stabbing of Queens Woman Shocks Inspector," *The New York Times*, March 27, 1964.
162 Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1492-93.
163 Gansberg, "37 Who Saw Murder Didn't Call Police."
164 See "What Kind of People Are We?," *The New York Times*, March 28, 1964, page 18. Available at https://nyti.ms/3y8IYYo.
165 Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1492-93.
166 Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1492-93.
167 Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1493.
168 Richard H. Rovere, "Letter From San Francisco," *The New Yorker*, July 25, 1964, at 77.
169 Neil Sheehan, "Woman Who Used Switchblade on Assailant Is Heard by Jury; Queens Panel Expected to Refuse to Indict—O'Connor Praises Her Actio*n*," *The New York Times*, July 15, 1964, page 28; Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1493.

crime under New York's Sullivan Law for possession of an illegal weapon – stood for everything that was wrong with the government's approach to crime.[170] Here was a woman, Goldwater implored, trying only to avoid, in her own words, becoming "another Kitty Genovese,"[171] and yet for defending herself she faced criminal liability; her attacker, meanwhile would, in Goldwater's characteristic hyperbole, "receive a medal."[172]

In Lehman's account, "it was not now the good who had grown weak"—as the view that Kitty Genovese's murder was the result of our atrophied moral fortitude would suggest—"so much as it was the bad who had grown strong."[173] And this strength was owed to the government both for failing to control crime and enforce the criminal law, and when it did, doing so in the wrong way. Precisely how this occasioned federal intervention – and with precisely what powers the federal government could do anything about it – remained ambiguous. But what Goldwater had done, and done successfully, was tap into that part of the public psyche that identified not only with Genovese and Del Fava but also with the thirty-eight witness who did nothing to help Genovese. The public's fear of crime, as embodied by these two cases, thus allowed Goldwater to redefine America's crime problem in their image, shrewdly presenting the solution in himself as High-Sheriff-in-Chief.[174]

Despite his dismally unsuccessful bid for the presidency, that Goldwater had successfully elevated the political salience of America's crime problem was evidenced only months later when President Johnson "adopted the Goldwater theme to his own ends."[175] In his March 1965 message to Congress establishing his Commission on Law Enforcement and the Administration of Justice, Johnson framed crime as "a malignant enemy in America's midst."[176] Suddenly, what presidential candidate Johnson had dismissed as a responsibility "vested in the states,"[177] President Johnson declared "no longer merely a local problem."[178] In the same breath that he began by reminding Congress that "our system rejects the concept of a national police force," he concluded by claiming that "the extent and seriousness of the [crime] problem have made it of great national concern."[179] With this he thus simultaneously assuaged America's collective anxiety of foreign totalitarian regimes and the ideological threat they presented to Western democratic values—of which a national police force was the hallmark—while also carving out a place for federal government intervention in what was traditionally a local enterprise.[180]

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170 Sheehan, "Woman Who Used Switchblade on Assailant Is Heard by Jury."

171 Sheehan, "Woman Who Used Switchblade on Assailant Is Heard by Jury."

172 "Goldwater's Remarks to the Press," *The New York Times*, July 17, 1964, page 11; Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1494.

173 Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1496.

174 As Richard Rovere wrote for The New Yorker in 1964, "not even the most assiduous and imaginative of Goldwaterologists was prepared for the Senator's emergence in San Francisco as a candidate for High Sheriff as well as for President," in "A Reporter at Large," *The New Yorker*, October 3, 1964, page 201-02.

175 Lehman, "A Critical Review of The Challenge of Crime in a Free Society," 1497.

176 Lyndon B. Johnson, "President Johnson's Special Message to Congress on Law Enforcement and the Administration of Justice," March 8, 1965. Access provided by The American Presidency Project https://www.presidency.ucsb.edu/node/242223.

177 "Transcript of President's News Conference on Foreign and Domestic Affairs," *The New York Times*, July 19, 1964, page 56.

178 Johnson, "President Johnson's Special Message to Congress on Law Enforcement and the Administration of Justice."

179 Johnson, "President Johnson's Special Message to Congress on Law Enforcement and the Administration of Justice."

180 See Sklansky, *Democracy and the Police*, 16-18 (citing Brian Chapman, *Police State* (New York: Praeger, 1970) to observe that "the hallmarks of totalitarian bureaucracies ... were also 'integral part[s] of the nature of any police system.'"); *Cf.*,

He also repackaged the competing interpretations of the Genovese case such that crime remained a national crisis that necessitated federal action, as Goldwater would have it, but that required citizens to recognize their own complicity in and contributions to the generation of the crime problem. Respect for law and for law enforcement officers, reporting crimes, summoning assistance, cooperating with police—these were all duties "citizens too often shunned" in Johnson's estimation.[181] It is no stretch to say that the allusion was to the murder of Ms. Genovese when he implored the proposed Commission to "suggest means of improving public attitudes towards the individual's sense of responsibility to his community," and therefore to aiding public authorities, "in the light of recent examples of what happens when private citizens remain bystanders at tragedy." Ours was a "free land," Johnson reminded Congress, and as such "order can never be achieved by police action alone." While not exactly the appeal to restore individual virtue, it was also not the view that responsibility started and ended with the government. Indeed, to the extent that individuals bore responsibility for America's crime problem, it was in their capacity as citizens rather than as moral agents. By implication, Johnson had in a peculiar way democratized the crisis as a sort of two-way street, with every American at once at fault for yet victimized by the crime problem.

Johnson's serpentine distribution of the responsibility for America's crime problem illustrates the uncertain frontier that distinguishes the public from the private in matters of law enforcement. The challenge of crime consisted not only in striking a balance of law enforcement which is "both fair and effective" but also in inspiring citizens to aid and participate in a process that was not fully their domain. The observations and recommendations produced by Johnson's Crime Commission reflect this liminal balancing act, and as a result they just as much grapple with the relationship between the police and the public—between the obligations of democratic citizens and the proper province of coercive legal authority—as they do with particularities of and possibilities for public policies that service crime control.

Indeed, the preliminary throat-clearing of the Commission's executive summary surveys the suspected causes of crime beginning with "adolescents or Negroes or drug addicts or college students or demonstrators" and then moving on to "policemen who fail to solve crimes; judges who pass lenient sentences or write decisions restricting the activities of the police; parole boards that release prisoners who resume their criminal activities."[182] Private citizens, not necessarily *criminals*, are the initial suspects, followed by the criminal justice apparatus. In precisely what capacity this set of private citizens is responsible, their active criminality or their mere complicity, is unclear. But from the outset the Crime Commission demonstrated a wariness toward reducing the crime problem to defective law enforcement and not-so-tough-on-crime judges.

That both Johnson and his Crime Commission framed the challenge of crime in America as a delicate balancing act between the duties and burdens of private citizens and public servants alike is also explained in part by the linkage of crime control – *a la* Goldwater – and the antipoverty policies that characterized Johnson's vision for the Great Society.[183] Whereas the imperative for federal intervention in crime control was galvanized by figures like Genovese and Del Fava, its fusion with

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Sarah A. Seo, "Democratic Policing Before the Due Process Revolution," *Yale Law Journal* 128 (2019): 1257 (arguing that there was a "Cold War imperative to distinguish American police from totalitarian police."

[181] Johnson, "President Johnson's Special Message to Congress on Law Enforcement and the Administration of Justice."

[182] Crime Commission Report, 55.

[183] Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016), 100.

anti-poverty programs was driven by the L.A. Watts riots of August 1965. Watts stood as the perfect confluence of social forces animating both Johnson's already existing War on Poverty and his newly declared War on Crime. On one hand, the rioting was precipitated by an otherwise unremarkable traffic-stop-turned-violent between a black family and white police officers that sparked six days of violence in South Central Los Angeles.[184] The optics of collective violence and appearance of lawlessness were ready fodder for tough-on-crime politics. On the other hand, the rioting unfolded in the shadow of a special hearing held by the House Committee on Education and Labor, which took place in the Will Rogers Park Auditorium of the Watt's neighborhood, to determine why the city of Los Angeles had "failed to implement War on Poverty measures."[185] Intended as a forum for members of an unemployed, racially segregated, and impoverished community to air their grievances before those capable of instituting social welfare reforms of the sort envisioned by the Great Society and the War on Poverty, Watts instead produced, in Elizabeth Hinton's words, "growing doubts about ambitious antipoverty programs while generating enthusiasm for anti-crime policies and aggressive law enforcement.[186]

Unlike the race rioting that ensued from the battles over segregation in the early 1960s, what set Watts apart was its characterization by national media and federal policymakers as an all-out warzone. Indeed, Watts was seen less a riot than it was an 'uprising,' a rebellion of the poor black community members of South Central Los Angeles against the predominantly white state and local law enforcement.[187] In the end, over 250 white-owned business had been damaged or destroyed, incurring $200 million in property damages.[188] And public figures ranging from California Governor Pat Brown to L.A. police chief William Parker described the residents participating in the riots as an "attacking force," as "very much like fighting the Viet Cong."[189] If Johnson had been over-indulgent with his appeals to enmity in his message to Congress regarding America's crime problem, Watts demonstrated that it was justified.

According to Hinton, "the dominant perception of the Watts violence was that young black residents seized control of the city for nearly a week, seeking revenge for historical racism and inequality, terrorizing innocent people with guns, and threatening national security."[190] The Watts violence was also interpreted by members of the Johnson administration, Crime Commission, and national media as a consequence of the instability and breakdown of the nuclear black family. Informed in large part by the work of Daniel Patrick Moynihan – whose research argued that issues of unemployment, poverty, and delinquency within the black community were the product of a "tangle of pathology" that prevented black people from bettering themselves – this view located blame for the collective unrest in defects of individual behavior, allowing the government to conveniently "remove itself from accountability for the de facto restrictions, joblessness, and racism that perpetuated poverty and inequality."[191] By turning to the pathologies of the black community, Johnson was able to create a space for federal intervention to combat both crime and poverty that was rooted in the reassertion of individual agency. Unlike Goldwater, who used the image to Genovese to claim

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[184] Hinton, *From the War on Poverty to the War on Crime*, 64.
[185] Hinton, *From the War on Poverty to the War on Crime*, 63.
[186] Hinton, *From the War on Poverty to the War on Crime*, 97.
[187] Hinton, *From the War on Poverty to the War on Crime*, 97.
[188] Hinton, *From the War on Poverty to the War on Crime*, 68.
[189] Hinton, *From the War on Poverty to the War on Crime*, 69.
[190] Hinton, *From the War on Poverty to the War on Crime*, 71.
[191] Hinton, *From the War on Poverty to the War on Crime*, 60.

that violent crime was enabled by weak government and meek law enforcement, Johnson used the depictions of the Watts violence to advance a more attenuated version of government intervention, claiming not only that *citizens* must right their complicity in America's crime problem by doing more to assist law enforcement but also that the *government* must do more to help citizens help themselves.[192]

While Watts, according to Hinton's central argument, marks a crucial turning point for the origins of mass incarceration by initiating the fusion of the War on Poverty with the War on Crime and thus subjecting all elements of public life to the carceral gaze, it also marks a significant departure at a crossroad of police governance and American democracy. Whereas the political posture of the Great Society's signature initiatives was oriented according to a liberal principle of "maximum feasible participation" that sought to empower the people most affected by racial discrimination, poverty, and crime through community action agencies and programs, episodes of collective violence not unlike Watts "rationalized a further retreat from the more transformative notions of liberal social reform."[193]

Part of what is at stake in this turn is, as Hinton points out, a "broader phenomenon that involved the shift from a social welfare to a punitive intervention" that emerged operationally with intensified law enforcement penetration, especially within urban black communities.[194] Part of what is at stake is also an ostensibly more limited phenomenon that involved the change of course from public participation in police governance toward a professionalized, legally insular model of police management that effectively detached police officers and administrators from community oversite. To the extent that shifting the valence of police governance may not fully explain the fusion of policing with social welfare programs, it may indeed be more limited from a structural perspective.[195] However, the significance of the Crime Commission's turn away from community oversite and toward an insular model of police governance is that it set the stage for the next half-century of American policing practices, their imperatives, rationales, and legal justifications, and ultimately helps to explain contemporary problems associated with each, from civil rights abuses to racial profiling, killings of civilians to present demands to 'defund the police'. Put a different way, the Crime Commission's vision of policing as a self-sufficient, self-governing, perhaps we might even say self-policing, site of organizational management rather than democratic governance recasts police power beyond the reach of popular control, reconfiguring not just a series of policy programs along the way but the very contours of legal and political authority in America.

Thus, while the history of Johnson's adoption and transposition of Goldwaterism and of the influence the Watt's riots had upon the Crime Commission's recommendations is nothing new, extended reflection upon this history helps to prime and explain two fundamental problems that plague the contemporary relationship between American democracy and its police. First, this history helps to explain how (and why) the first meaningful national discourse on urban policing took as its

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[192] Hinton, *From the War on Poverty to the War on Crime*, 77 (arguing that "'self-help' became the War on Poverty's guiding principle").

[193] Hinton, *From the War on Poverty to the War on Crime*, 65.

[194] Hinton, *From the War on Poverty to the War on Crime*, 65.

[195] The structural changes pursued by the Johnson administration is, notably, Hinton's chief focus: "The Johnson administration quickly combined the existing education, health, housing, and welfare programs aimed at eliminating crime's root causes with the police training, research programs, and criminal justice and penal reforms intended to suppress criminal activity" in *From the War on Poverty to the War on Crime*, 13. While empirically persuasive and politically pressing, these structural implications cannot speak to the political logic and rationality motivating them in the first place, nor can they fully explain the legal and political justifications for police practices that are moored to no apparent structural program, imperative, or strategy.

starting point an insular view of law enforcement that both distanced public input from police governance and prepared the conditions for a series of legal doctrines that would go on to uphold, justify, and further insulate from public constraint the discretionary power of police officers and administrators. Second, the proximity of Johnson's turn toward crime control and the racial antagonisms fueling the Watt's riots helps to explain how that insular orientation of police governance was itself conditioned by racial anxieties. Indeed, discriminatory policing is made possible by discretionary authority, and the Crime Commission's insular legal framework for police governance effectively unleashed police agencies to determine for themselves the propriety of their own discretion. To better understand the mechanisms that enable the sorts of racism pervading contemporary American policing thus requires that we return to the ways that the Crime Commission's recommendations for police reform set in motion the armatures of law and policy that have secured and galvanized the discretionary authority afforded to police today.

Presumptions of the Crime Commission

While the Crime Commission's final report surveyed a "complex of social conditions," its move to distance policing from public oversite was united by three central assumptions. First, the purpose of policing is crime deterrence. Questions pertaining to precisely which techniques of policing and patrol structures were most effective or whether policing ought to be proactive or reactive were left open, but the deterrent mission of policing was understood as a bedrock first principle. Second, the police should not be "subject to special scrutiny from the outside."[196] Though a certain deference to law enforcement inheres this assumption, the Commission, as we will see, seemed both more concerned with effective organizational management, which was stymied by public oversite "from the outside," and skeptical of where community involvement might lead, especially in light of the "convulsive social changes that are taking place in America," of which Watts served as a prime example.[197] And, third, policing ought to be professionalized. Here, the Commission invoked the frequent theme of "improving the quality of policing" and offered formal recommendations that included minimum education standards for recruits; "standards on age, height, weight, visual acuity, and prior residence"[198]; training programs that "prepare recruits to exercise discretion properly, and to understand the community, the role of the police, and what the criminal justice system can and cannot do"[199]; employing within each department "a skilled lawyer full time as its legal advisor"[200]; dividing police functions between "three kinds of officers... the 'community service officer,' the 'police officer,' and the 'police agent'"[201]; and implementing "the guiding organizational principle of central control" in which "key ranking staff and line personnel" are organized "into an administrative board similar in function to a corporation's board of directors."[202]

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196 Crime Commission Report, 265.
197 Crime Commission Report, 242.
198 Crime Commission Report, 282.
199 Crime Commission Report, 285.
200 Crime Commission Report, 290.
201 Crime Commission Report, 275.
202 Crime Commission Report, 290-291. This fusion of police governance with market idioms also signals the introduction of neoliberal political rationality into law enforcement, to be taken up in closer detail in chapter five.

Each of these assumptions are deeply imbricated, both conceptually and programmatically; they are both mutually conducive and reciprocal. Together they would go on to form the foundation for a legalistic way of thinking about governing and policing, of the relationship between the police and the public, that deferred political questions directed at the scope of police authority to questions of administrative law that presumed police were best left to govern themselves.

Five important premises about police authority and the discretion animating it emerge by way of these assumptions. First, crime deterrence is equivocal neither with eliminating crime nor law enforcement. "The mission of the police is not to remove the causes of crime, but to deter crime, and to deal with specific criminals whoever they are, and with specific crimes whenever, wherever and however they occur."[203] So, too, because police "make policy informally everyday" deterring crime is neither always nor necessarily a matter of enforcing the criminal law but of doling out a series of administrative decisions to secure community safety.[204] Thus in order to deter crime police must have license to such in-moment judgements like "stoppin[g] persons for brief questioning." Independent of this role, there is no reason in principle that police should enjoy such license. Second, police discretion is both a necessary and "inescapable" aspect of policing. The challenge is to "distinguish carefully between legitimate field interrogations and indiscriminate detention."[205] Third, police are informal policy-makers.[206] By virtue of the discretion police exercise in their day-to-day encounters with citizens—'whether or not to break up a sidewalk gathering, whether or not to intervene in a domestic dispute, whether or not to stop and frisk, whether or not to arrest,' for example—police officers make administrative decisions that do not necessarily implicate the formal criminal process but nonetheless establish patterns of behaviors and expectations for the communities they police. In turn, this raises the Commission's fourth main premise, that specific guidance for the legitimate exercise of police discretion (i.e., police policy) is best left to police administrators. And imbricated with this is a final premise, which is perhaps a sub-premise of the previous, that while community input is important, it extends only so far as expressing concern, not exercising control.

Together these premises form what this dissertation refers to as a *legalistic* model of police governance. As opposed to a political model of police governance that might prioritize public input and oversite in policing—a model that the Obama administration's Task Force on 21st Century Policing would come to champion nearly fifty years later—this framework is legalistic by virtue of its premium on internalized, bureaucratic management and its belief that formal rules, made by police administrators, could remedy the tensions between the police and the public. That this model is called legalistic should not be conflated with the law enforcement function of the police. Its distinctively legal signature is owed instead to the normative presuppositions that authority vests in and emanates from a set of rules and crystalizes in rule-bound institutions (what Max Weber referred to as "legal-rational authority"), and to the recurring operational directive that all areas of uncertainty – from hiring practices to when to arrest to handling citizen grievances – ought to be clarified with specific instructions, policies, and procedures.

Indeed, the legalistic framework guiding the Commission's inquiry is evidenced by the first formal recommendation they offer for police reform: "State legislatures should enact statutory provisions with respect to the authority of law enforcement officers to stop persons for briefing

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[203] Crime Commission Report, 243.
[204] Crime Commission Report, 266.
[205] Crime Commission Report, 247.
[206] Crime Commission Report, 266.

questioning, including specifications of the circumstances and limitations under which stops are permissible."[207] Though arguably oriented toward the legislative political process, the Commission also noted that such statutes could only be "properly struck" in combination with police administrators and that, where both fell short, "court review then proceeds under more enlightening circumstances."[208] Motivated by the questions raised and left unanswered by the Supreme Court's decision in *Miranda v. Arizona*, the Commission sought to make more explicit those "hard choices that policemen must make every day" but that police manuals "almost never discuss."[209] So, too, this legal-institutional framework was extended to oblige police departments to "develop and enunciate policies that give police personnel specific guidance for the common situations requiring exercise of police discretion."[210] In recognition of the vast scope of discretionary police power, the Commission formally recommended that "policies should cover such matters, among others, as the issuance of orders to citizens regarding their movements or activities, the handling of minor disputes, the safeguarding of the rights of free speech and free assembly, the selection and use of investigative methods, and the decision whether or not to arrest in specific situations involving specific crimes."[211]

Novelties of Deterrence and Discretion

While the use of discretion was seen by the Commission as "an inescapable part of [the] job,"[212] as "not only appropriate, but necessary," the burden for spotting its limits was not exclusive to the individual officer. Instead it was "incumbent on police departments to define as precisely as possible when arrest," which they saw as the apex of discretionary power, "is a proper action and when it is not."[213] Here, there are at least two sub-premises at work. First, not only does the remedy for problematic policing practices rest with police administrators, it materializes in the form of clearly written rules that are transparent to the public. "Not only should policemen be guided by departmental policy," the Commission wrote, "but the people who will be affected by these decisions—the public—have a right to be apprised in advance, rather than ex post facto, what police policy is."[214] However, as we will see in more detail shortly, this premium on antecedent transparency cloaked the Commission's wary attitude toward community involvement in police policy. Second, the ability of the police to deter crime hinges on the use of discretion. But for its totalitarian tinge and limited local funds to pursue it "in any case," "presumably," the Commission opined, "deterrence would be best served by placing a policeman on every corner."[215] Short of this ambition, for police to deal with crimes "whenever, wherever and however they occur" requires precisely those "hard choices" that are the stuff of discretionary judgements, that "are the heart of police work" and that police manuals "never discuss."[216] If, to put the Commission's point more simply, the very point of deterring crime is

[207] Crime Commission Report, 247.
[208] Crime Commission Report, 247.
[209] Crime Commission Report, 266.
[210] Crime Commission Report, 267.
[211] Crime Commission Report, 267.
[212] Crime Commission Report, 242.
[213] Crime Commission Report, 270.
[214] Crime Commission Report, 266-267.
[215] Crime Commission Report, 248.
[216] Crime Commission Report, 266.

to make American communities feel safe, then police discretion "determine[s] to a large degree the safety of the community."[217]

This is a novel understanding of the relationship between deterrence and discretion which, as we will see in chapter two, would later be best articulated by Egon Bitter. It is worth pausing for a moment to consider the substance of this novelty in order to better appreciate its impact for the trajectory of police reform that it set in motion. Unlike the classical notion of deterrence introduced by such thinkers as Cesare Beccaria or Jeremy Bentham, which in their own ways relied on the certainty of punishment to produce a deterrent effect, the Commission's view of discretion belies legal certainty. Although both Beccaria and Bentham formulated their views on deterrence with an eye toward punishment, their principled foundations extend to policing just the same. "All punishment is mischief," Bentham said famously, so it must serve some useful purpose if it is to be justified. Similarly, Beccaria saw the purpose of punishment as "nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise."[218] Both thinkers shared the belief that "pleasure and plain are the motive forces of all sentient beings," and each understood deterrence to be predicated on the dual principles of necessity and proportionality. "There must be a proportion between crimes and punishments," Beccaria claimed. "If an equal punishment is laid down for two crimes which damage society unequally," he cautioned, "men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so."[219]

Two observations from this view of deterrence are worth noting. First, it adopts the perspective of the criminal wrongdoer. It aims to develop a criminal code that is used by judges only on a factual basis, "enquiring into citizen's actions and judging whether they conform or not to the written law,"[220] and is used by individual citizens to determine whether a crime, relative to the punishment to which it is in proportion, is "advantageous" or worth committing. While deterrence may be the principled grounds for what is an otherwise "tyrannous" infringement of one's personal freedom, it is not advanced as a framework only for justifying a set of practices or institutional arrangements of the state but as a reason for "defending the repository of the public well-being from the usurpation of individuals."[221] Put another way, never is deterrence proffered from the perspective of the state's interest alone but from "the despotic spirit of everyman"[222] that risks submerging citizens to "the petty tyrannies of many individuals,"[223] be them private citizens or public magistrates.

Deterrence is then, second, built upon conditions of certainty. These conditions range from the very reason for which men enter into political society, that is, to ensure personal security, to the clarity of the laws governing them, to the surety that punishment will follow from criminal wrongdoing. Throughout *On Crimes and Punishments*, Beccaria uses the language of "mathematics," "sums," and "proportions" to convey that deterrence is something that must be calculable. Individuals must be able to weigh for themselves the legal ramifications of their conduct, and they must be able to do so with the surety that they will not be subject to arbitrary interpretations of the law. For this

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[217] Crime Commission Report, 266.

[218] Cesare Beccaria, *On Crimes and Punishment and Other Writings*, trans. Richard Davies, ed. Richard Bellamy (Cambridge: Cambridge University Press, 1995 [1764]), 31.

[219] Beccaria, *On Crimes and Punishment*, 21.

[220] Beccaria, *On Crimes and Punishment*, 15.

[221] Beccaria, *On Crimes and Punishment*, 10.

[222] Beccaria, *On Crimes and Punishment*, 9.

[223] Beccaria, *On Crimes and Punishment*, 15.

reason, Beccaria's theory of deterrence denied "criminal judges" the capacity for legal interpretation due to precisely the risk that it introduced too much uncertainty into the relationship between the citizen and the magistrate. Instead, he took as proper only those criminal adjudications that resulted from a "perfect syllogism": "the major premise should be the general law; the minor, conformity or otherwise of the action with the law, and the conclusion freedom or punishment. Whenever the judge is forced, or takes it upon himself, to construct even as few as two syllogisms, then the door is opened to uncertainty."[224] Here, Beccaria's premium on legal certainty is underscored by his disdain for the capacity of a state agent's individual proclivities to render deterrence null.

> Every person has his own point of view, and at different times, every person has a different one. The spirit of the law, therefore, would be the upshot of good or bad logic on the part of the judge and of the state of his digestion, and would depend on the turbulence of his emotions, on the weakness of the aggrieved party, on the judge's relations with the plaintiff and on all those tiny pressures which, to the wavering mind of man, change the appearance of every object. Hence, we see the fate of a citizen changing many times as he progresses through the courts, and the lives of wretches falling victim to fallacious reasoning or the momentary turmoil of the mood of the judge, who takes legitimate interpretation of the law the haphazard upshot of this series of confused impulses which affect his mind. It is for this reason that we see the same court punish the same crime differently at different times, because it consults not the constant and fixed voice of the law, but the erring instability of interpretations.[225]

Unlike Beccaria, for the Crime Commission the demands of modern policing prevented such dispassionate, syllogistic reasoning. Whereas the classical understanding of deterrence, especially Beccaria's, was inimical to discretionary judgements, the Crime Commission's successfully fused discretion and deterrence, framing police discretion as a sort of informal, prosaic policymaking that necessarily hinged on an officer's physical presence and exertion of personal authority rather than the formal criminal process. The contrast between these two views could not be sharper. Part of this contrast strikes at the very core of Beccaria's view that only a "perfect syllogism" could yield just punishment: the criminal justice system's "philosophic core is that a person may be punished by the Government if, and only if, it has been proved by an impartial and deliberate process that he has violated a specific law. Around that core layer upon layer of institutions and procedures, some carefully constructed and some improvised, some inspired by principle and some by expediency, have accumulated."[226]

Another part of this contrast strikes at the division and separation of governmental powers that Beccaria thought vital to ensure impartiality in criminal proceedings. "Law enforcement policy is made by the policeman," the Commission wrote in their executive summary.[227] Moreover, "every policeman... is an interpreter of the law" as well as "an arbiter of social values."[228] And because of this,

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[224] Beccaria, *On Crimes and Punishment*, 15.
[225] Beccaria, *On Crimes and Punishment*, 15.
[226] Crime Commission Report, 70.
[227] Crime Commission Report, 75.
[228] Crime Commission Report, 75.

the Commission rightfully recognized, "much is at stake in how the policeman exercises this discretion."[229] To be clear, here the Commission was speaking descriptively rather than normatively, though they were certainly also speaking uncritically. Hence their move to clarify in a set of rules the aims and limits of police discretion made from *within* police departments by their own administrators. In other words, that police were informal policymakers that interpreted the law for themselves on the basis of their professional discretion and in the pursuit of crime deterrence was taken as a fact of modern life. Thus was the challenge of crime in a free society deterred not by legal certainty – that is, the confident prediction of the punishment one would face for a given criminal offense – but by police presence – that is, the likelihood of criminal apprehension. This meant that deterrence was untethered from the proportion of crimes to punishments and moored instead to the proximity of law enforcement officers. By implication, it also meant that the principle of strict necessity was compromised in the process, decentering the criminal offense and foregrounding instead the policeman's ability to perceive and respond to those suspected of committing them.

What is novel about this view of crime deterrence is this: whereas Beccaria and Bentham saw deterrence as something that was predictable, regulated, and calculable, the policeman's role is depicted by the Crime Commission as fluid, varied, and indeterminate. Deterrence is not achieved, under this latter view, by the certainty of legal sanction pursuant to criminal wrongdoing but by the individual officer's ability to intervene based on his assessment of possible wrongdoing. This is a view of deterrence that inverts the classical understanding and formally inaugurates a modern one. Whereas the classical view achieved deterrence by making criminal behavior something that can be calculated as desirable or undesirable by the *citizen*, this modern view weds deterrence to the *officer's* ability to ferret out crime and thus to *his* calculation of deviance and, perhaps, wrongdoing.

> A criminal code, in practice, is not a set of specific instructions to policemen but a more or less rough map of the territory in which policemen work. How an individual policeman moves around that territory depends largely on his personal discretion... the manner in which a policeman works is influenced by practical matters: the legal strength of the available evidence, the willingness of victims to press charges and of witnesses to testify, the temper of the community, the time and information at the policeman's disposal. Much is at stake in how the policeman exercises this discretion.[230]

The Commission's spatial imagination of the policeman's discretionary authority does, however, cushion their view of deterrence from the claim that it is merely unfettered authority. It is still grounded in law, it just embraces the possibility of constructing multiple "syllogisms"—to use Beccaria's language—in the pursuit of demonstrating and deterring criminal activity. In this sense, while the Commission's understanding of deterrence is novel, its view of legality is not. Indeed, that the criminal code is a "rough roadmap of the territory in which policemen must work" and move about with discretion signals not so much an infatuation with police power but an embrace of a sort of legal realism. Not only do classical theories of deterrence fail to capture the uncertainty of crime prevention during a historical moment in which criminal codes don't seem to adequately dissuade individuals from committing crimes, they also do not appreciate the interdependence between the

[229] Crime Commission Report, 75.
[230] Crime Commission Report, 75.

police and the public. Put simply, discretionary authority remains informed by and bounded within law, it just does not reason syllogistically. As we'll see in the coming chapters, this relationship between discretion and deterrence is situated within a larger discourse of legal theory taking place at roughly the same time that began to question the limits of legal realism and legal formalism, on one side of the ledger, and legal positivism, on the other.

The Curious Role of Community Involvement in Crime Control

Law enforcement alone was incapable meeting the demands of crime control, the Commission argued, because "widespread crime implies a widespread failure by society as a whole."[231] Yet the Commission's wary attitude toward community involvement in police governance conveyed a curious relationship between the police and the public that cast "society as a whole," and individual communities in particular, as bearing an equal share of blame as did police agencies for America's crime problem, on the one hand, while denying that communities ought to have any sort of formal oversite in matters of policing, on the other. Indeed, this schism between community-police interdependence and insular police management is evidenced throughout the Commission's final report, appearing on an abstract level of political generality, in some moments, while circumscribing specific and quotidian boundaries for this relationship, in others. For instance, at what is perhaps their most abstract level of generality, the Commission wrote: "The government of a free society can act only in response to the desires of the governed. This is true in general and in detail. The Nation's overall effort against crime will be only as intense as the public demands that it be. The lines along which the Nation takes specific action against crime will be those that the public believes to be the necessary ones."[232] Yet formulating the policies governing the police was not the province of public oversite but instead required recognition "by the community that policymaking is a legitimate and essential part of the police function."[233] What are we to make of this curious schism between the police and the public? What is the historical significance, theoretical foundation, and practical effect of the dissonance between police-community interdependence and internalized, administrative police policymaking?

The Commission thought the public was understandably "of two minds about the police," welcoming official protection while resenting official interference.[234] This dichotomy was informed by the "intimacy of the contact between the police and the community," contact which had the potential to "affect in some way someone's dignity, or self-respect, or sense of privacy, or constitutional rights."[235] Since, as they saw it, much of police work is seeing to it that mundane disorderly conduct that may be neither all that serious nor illegal does not lead to a "serious breach of public order"—i.e., crime deterrence—police officers needed to be "involved in the most intimate, personal way with the lives and problems of citizens of all kinds."[236] Thus, "what is distinctive about the responsibility of the police," the Commission wrote, "is that they are charged with performing [their] functions

[231] Crime Commission Report, 86.
[232] Crime Commission Report, 159.
[233] Crime Commission Report, 271.
[234] Crime Commission Report, 241.
[235] Crime Commission Report, 240-241.
[236] Crime Commission Report, 240.

['enforcing the law and maintaining order'] where all eyes are upon them and where the going is roughest, on the street."[237] The combination of these factors meant, as a result, that "the way the police perform their duties depends to a large extent which state of mind predominates, whether the police are thought of as protectors or oppressors, as friends or enemies."[238]

With the relationship between the police and the public so entangled and so delicate, then, one way of reading the Commission's oscillation between them is to notice how, not unlike the public's two minds towards policing, the Commission was of two minds towards the public, welcoming their input but resenting their interference. Indeed, while the Commission privileged internal police management over external community control, they didn't shun community involvement altogether. Rather, the Commission welcomed the public in an advisory capacity. A more dubious reading might suggest that such welcoming served the limited and hollow function of providing useful public relations cover, portraying the police as responsive to community concerns in theory when in practice they could not care less. However, attention to the Commission's focus on organizational management yields a different portrait, one in which the wayward relationship between the police and the public is further strained by shifting social structures and racial antagonisms and, therefore, casts the police as both a source of social stability while also requiring their own.

Put another way, prompted by violent episodes that pitted the police and the public against each other, Watts in particular, the Commission dedicated more attention to 'professionalizing' America's police departments than maximizing their popular control because the popular movements of the time were seen to introduce precisely that which policing was meant to quell: social disorder, public unrest, and violent crime. At the same time, however, they could not entirely insulate the police from the concerns of the public, lest they appear to foment the seeds of totalitarianism.[239] Thus did the Commission maneuver the relationship between the police and the public by channeling community concerns through a series of bureaucratic armatures that served the dual purpose of allowing community input while limiting community oversite and of professionalizing police departments.

To be clear, the Commission in no uncertain terms thought the police should not be controlled from the outside. The police, in their view, were subject to more public visibility than other state agencies, which made them open to public grievances more frequently than their other state-administrative counterparts. Such grievances, however, often did not warrant legal action. As the Commission understood things:

> many of the grievances that constitute acts of misconduct will not qualify as a basis for criminal action. In going beyond the established legal procedures, the Commission finds it unreasonable to single out the police as the only agency that should be subject to special scrutiny from the outside. The Commission, therefore, does not recommend the establishment of civilian review boards in jurisdictions where they do not exist, solely to review police conduct. The police are only one of a number of official agencies with whom the public has contact, and in some cases, because they are the

[237] Crime Commission Report, 239.
[238] Crime Commission Report, 241.
[239] See Sklansky, *Democracy and the Police*, chapter one.

> most visible and conspicuous representatives of local government, they may be the focus of more attention than they deserve.[240]

Importantly, the Commission was not placing the police beyond public scrutiny altogether. By seeking to qualify community oversite powers on the basis of criminal action the Commission established America's criminal courts as the public's forum in which to review police misconduct. For reasons that will be explored further in the next chapter, it is especially important to notice that the Commission's threshold for "special scrutiny" requires a "basis for criminal action," as that basis is obfuscated by a series of legal doctrines that privilege police officers: 'probable cause,' 'reasonable suspicion,' 'qualified immunity.' However, while the Commission's attempt to portray the police as the solemn victims of the public eye served as a reason to keep community members at arms-reach, it also produced an opposite effect. Rather than simply denying to community members any powers of oversite and any role in police policymaking, the Commission's wary attitude toward the public became a *basis* for police professionalism. If policing was to be situated against the grain of democratic commitments to popular control and participation, then police departments needed to establish a robust series of protocols, standards, and mechanisms of transparency in order to avoid the appearance of wielding their powers arbitrarily as they saw fit. The public need not have control over policing, but they ought to be consulted. Thus, as the Commission sought to up the ante for police administrators to improve "the quality of police personnel from top to bottom"[241] they turned their attention to bureaucratic and institutional innovations that, among other things, created channels for community input.

That community involvement was refashioned as a vehicle for police professionalism is evidenced by both the Commission's strategy for professionalizing the police and the sheer number of recommendations pertaining to community input contained within that strategy. Consider the strategy. For the Commission, police professionalism hinged on two necessary commitments: first, it required establishing clear guidelines for police conduct and procedures in the form of a body of rules, and second, it required organizational management constellated according to a principle of central control and operationalized through a regimented bureaucratic process. Above all, the Commission sought to privilege the unique acumen of police officers and administrators. By formalizing that acumen through rulebooks and within institutional structures, the Commission was able to at once buttress police authority while ostensibly squaring that authority with democratic commitments to transparency, accountability, and the rule of law. As they saw it:

> Policymaking would result in the codification of police expertise that could be used in training programs and that would be available to all policemen everywhere. It would involve the police in the programs of social betterment to which the community as a whole is dedicated. It would, in short, do much to professionalize police work in the most meaningful sense of the word.[242]

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[240] Crime Commission Report, 265.
[241] Crime Commission Report, 273.
[242] Crime Commission Report, 271.

Indeed, the Commission was arguably at its most creative with respect to folding community involvement into police professionalism. Not only did it outline a process for responding to citizen grievances against police conduct, it went as far as recommending "the creation of a new kind of officer, a 'community service officer'" to "enhance the community's respect for and sense of identity with the police"[243] as well as offering a principled five-point plan for a "community relation's program."[244] That program, the Commission cautioned, was "not a *public*-relations program to 'sell the police image' to the people… it is a long-range, full-scale effort to acquaint the police and the community with each other's problems and to stimulate action aimed at solving those problems."[245] While they saw this effort as "essential to effective law enforcement," the Commission also stipulated that "immediate law enforcement considerations may take precedence," taking care to remind the public that the mission of policing took priority over the community's place within that mission.[246]

Cultivating a shared identity between the police and the communities they serve was vital to easing the tension between them, and to adjusting their relationship towards "person-to-person encounters rather than the black-versus-white, oppressed-versus-oppressor confrontations they too often are."[247] "The relationship between the police and the community is so personal," the Commission explained, "that every section of the community has a right to expect that its aspirations and problems, its hopes and fears, are fully reflected in its police."[248] Though the tone here is both abstract and aspirational, the practical import served to further the move toward police professionalism by formally recommending that departments hire "a sufficient number of minority-group officers at all levels of activity and authority" and that police be better educated so that they are "thoroughly aware of, and trained in, community-relations problems."[249] Indeed, the Commission offered no less than fifteen formal recommendations that pertained to the makeup of police personnel, ranging from the representativeness of minority officers relative to minority neighborhoods to recruit education and intelligence standards, from police salaries and promotion schedules to in-service training and evaluation.

Minority representation in policing is perhaps one of the most apt illustrations of the Commission's move to fuse community concerns with police professionalism. While the Commission sought to channel public grievances against the police, including racial discrimination, through a "formal machinery" within each department that would process, investigate, and respond to each claim accordingly, they also sought to address such concerns on the front-end by stipulating minority representation within the department's professional hiring practices.

> A department can show convincingly that it does not practice racial discrimination by recruiting minority-group officers, by assigning them fairly to duties of all sorts in all kinds of neighborhoods, and by pursuing promotion policies that are scrupulously fair to such officers. If there is not a *substantial percentage* of Negro officers among the policemen in a Negro neighborhood, many residents will reach the conclusion that the

[243] Crime Commission Report, 254.
[244] Crime Commission Report, 258.
[245] Crime Commission Report, 258.
[246] Crime Commission Report, 259.
[247] Crime Commission Report, 259.
[248] Crime Commission Report, 274.
[249] Crime Commission Report, 261.

> neighborhood is being policed, not for the purpose of maintaining law and order, but for the purpose of maintaining the ghetto's status quo. They may draw the same conclusion if most or all of a department's Negro officers are assigned to patrol Negro neighborhoods, and are rarely seen in white neighborhoods or performing such duties as criminal investigation or staff work, or teamed in two-man patrol with white officers. [250]

Curiously, the stakes of the Commission's admonishment that community-relations were not matters of public-relations, that they were dedicated to understanding substantive concerns rather than managing the public image of law enforcement, is cast here as a matter of presentation. What is introduced as a concern for fostering solidarity by way of cultivating a shared identity is put into effect by way of mere appearances—of 'seeing' minority officers in white neighborhoods, of ensuring the right number of those minority officers are in minority neighborhoods (but also in white neighborhoods and in positions of elevated status), of shielding against claims of racially discriminatory policing practices by employing non-white officers. This is not a case of the Commission saying one thing while doing another. Increasing the number minority officers was meant to remedy the organizational deficit incurred with unrepresentative police forces, notwithstanding the impression that the Commission's recommendations speak only to the imagery rather than the effect of minority representation in policing. In short, the best response to a serious community concern—racial discrimination in law enforcement—was, in the Commission's view, to approach the problem administratively through hiring practices and duty assignments.

Clear policies, diverse departments, and institutional channels for community concerns each operated within the shadow of the Commission's greater emphasis on the organizational management required to put these recommendations into practice. Across the several studies pursued and many experts consulted by the Commission, the "same two failures were cited universally as the crucial ones: The failure to develop career administrators, and the failure to use the techniques and acquire the resources that experts on the subject prescribe."[251] At "the heart of the matter," the Commission claimed, was a lack "central control." This principle of organizational management is the fulcrum for the Commission's move to insulate policing from community control. It leverages policymaking, bureaucratic and institutional armatures, and police expertise to concentrate police governance within a limited set of administrative officials. "Overall it implies the maintenance of departmental integrity by providing that governmental control over the department is exercised only by top-level executives through top-level enforcement officials, and not by neighborhood politicians through precinct officials," the Commission wrote.[252] In a series of three formal recommendations, the Commission laid out what this style of organizational management ought to include.

> (1) Police departments must take every possible step to implement the guiding organizational principle of central control. Specialist staff units for such matters as planning, research, legal advice, and police personnel should include

[250] Crime Commission Report, 261.
[251] Crime Commission Report, 287.
[252] Crime Commission Report, 288.

persons trained in a variety of disciplines and should be utilized to develop and improve the policies, operations, and administration of each police function.[253]

(2) Every department in a big or medium-sized city should organize key ranking staff and line personnel into an administrative board similar in function to a corporation's board of directors, whose duty would be to assist the chief and his staff units in developing, enunciating and enforcing departmental policies and guidelines for the day-to-day activities of the line personnel.[254]

(3) Every department, regardless of size, should have a comprehensive program for maintaining police integrity and every medium- and large-sized department should have a well-manned internal investigation unit responsible only to the chief administrator. The unit should have both an investigative and preventative role in controlling dishonest, unethical, and offensive actions by police officers.[255]

Specialization, hierarchical management structures, and internal accountability mechanisms formed the core of the Commission's view of "central control." These features correspond to a distanced public eye in at least two ways. First, and perhaps most obviously, specialization muted the benefits of public, community input for policymaking by replacing those perspectives with in-house staff. From policy formulation to operations and administration, police departments that were managed according to the Commission's principle of centralized control would be those that conducted their own planning, research, and legal advice. Indeed, the Commission offered a separate formal recommendation that "every medium- and large-sized department should employ a skilled lawyer full time as its legal advisor,"[256] further containing matters of law, policy, and administration within police agencies and apart from community oversite. Second, by orienting internal investigation units toward police conduct that was "dishonest, unethical, and offensive," the Commission configured police accountability – not merely the unit itself – as responsive to the chief administrator, rather than to the public. As a result, the importance and priority of community grievances against police misconduct that did not "qualify as a basis for criminal action" was left to be determined solely by each department's chief administrator. In other words, while the Commission may have provided for a "formal machinery" to process community complaints, it also left it to departmental officials to set the standard for which of those complaints would be taken seriously. The Commission's pursuit of centralized control thus distanced the police from the public on both the front-end of policymaking as well as the back-end of accountability for misconduct.

So, community input submitted to a professionalized bureaucracy, administered by executives according to a principle of centralized control, and guided by a rulebook of their own design—this is how the Crime Commission featured a legalistic model of policing. Consequently, the Commission

[253] Crime Commission Report, 290.
[254] Crime Commission Report, 290-91.
[255] Crime Commission Report, 294.
[256] Crime Commission Report, 290.

galvanized an insular view of police governance that championed internal administrative rulemaking, rejected civilian oversight, understood discretion as fundamental to and necessary for effective policing, and expressed the belief that formal rulemaking could remedy problems associated with police discretion. The key assumptions that informed this model of policing would go on, as we will see, to be challenged and complicated by empirical studies of police management, and ultimately, replaced a half-century later with a different model of policing envisioned by Obama's Task Force on 21st Century Policing.

III. THE CHALLENGE OF POLICING IN THE 21ST CENTURY

Nearly fifty years after the publication of *The Challenge of Crime in a Free Society*, President Barack Obama established a Task Force on 21st Century Policing with the goal of "identifying best practices and offering recommendations on how policing practices can promote effective crime reduction while building public trust."[257] The motivations behind Obama's Task Force are not nearly as difficult to discern or disentangle as those for Johnson's Crime Commission. Indeed, the report's appeal to those "recent events that have exposed rifts in the relationships between local police and the communities they serve" was no opaque allusion. On the contrary, it was quite clear that the Task Force was precipitated by a series of fatal police-citizen encounters occurring in 2014, chief among them the killing of Michael Brown at the hands of a Ferguson, Missouri police officer. Though not mentioned by name, in the wake of a grand jury's decision to not indict the officer involved in that killing, and in response to which nationwide protests ensued, it took the Obama administration less than one month to order the establishment of the Task Force. Even so, there are important similarities in the social and political pressures that inspired both presidential commissions.

The Lessons of Michael Brown

It is too reductive, and generally uninteresting, to place the two presidential investigations of policing next to each other to discern their overt causes. Doing so would reveal a simple conclusion: Johnson's Crime Commission was inspired by no particular event, while Obama's Task Force was catalyzed by an episode (and, indeed, multiple episodes) of police violence that captivated American's political attention. One had a key flashpoint, the other did not.

To be sure, the lack of a singular point-source for Johnson's Crime Commission does, as we saw earlier, have important explanatory power. It helped to explain, for instance, precisely why the Commission surveyed a "complex of social conditions" and why it took on the entire system of criminal justice in America – of which the police were an important part – rather than focusing on one specific issue or institutional arrangement. It also encouraged careful consideration of the broader political ecology of the 1960s, a terrain that included Barry Goldwater's treatment of crime as a centerpiece for presidential politics, the visceral murder of Kitty Genovese as a fulcrum for leveraging

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[257] President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (Washington, D.C.: Office of Community Oriented Policing Services, 2015), 1. Hereafter cited as Task Force Report.

public anxieties about violent crime in order to advance claims about the strength and scope of state authority, and the significant racial symbolism and political influence of the Watts riots.

Just as it was an important question to ask why Johnson ordered the Crime Commission in light of no apparent cause, it is equally important to ask what made the apparent cause of Obama's Task Force so consequential in the first place. In so asking, we are able to see how the "transposition of Goldwaterism" that primed Johnson's Crime Commission corresponds to a similarly nuanced phenomenon fifty years later, what Franklin Zimring calls the "double transformation of police killings" in America.[258] According to Zimring's account, the otherwise unremarkable fact pattern leading to the officer-involved killing of Michael Brown was endowed with deep political significance for two reasons. First, Michael Brown's death was elevated to a position of national concern because its very typicality cast it as a "representative example for most Americans of a recurrent and general problem."[259] Because police agencies are governed at the state and local level—what Zimring calls "the political disaggregation of power over police"—police killings are often understood as state or local, rather than national, problems. While this is a limitation of police governance, on one hand, it is also a limitation of the public discourse on police violence, on another. Police killings, prior to the summer of 2014, were treated as "singular dramas rather than recurrent events dominated by government policy choices."[260] What set the killing of Michael Brown apart was not that it was altogether unique but that it shared all too much in common with a catalogue of police killings across the United States.

For Zimring, the events in Ferguson, coupled with the killing of civilians at the hands of public law enforcement in Baltimore, Cleveland, New York City, and beyond, transformed the story of these policing killings from individual cases of police misconduct to institutional faults plaguing the enterprise of policing itself. "What sets the post-Ferguson era of concern apart from the earlier history of non-concern about police violence," Zimring argues, is the transformation "from a series of singular events to recurring episodes of the use of lethal force that seemed to be worrisome because they were representative."[261] So, the first shift in the "double transformation of police killings" appears in the discursive aggregation of police killings that elevates the use of lethal force by police officers from a strictly local problem to a national concern.[262]

The second shift involves the particular content of that concern. The killing of Michael Brown, and of so many others that made national headlines in 2014 and 2015, was not seen as a crime control problem. The dominant discourse of and trend in police reform in the pre-Ferguson era, beginning with the Crime Commission and continuing as far to include the political response to controversies in policing as high profile as the brutal beating of Rodney King, was to regard police violence "as an issue of crime policy or the regulation of police conduct."[263] Certainly, we saw no shortage of examples of this preference for regulation, in the form of organizational management, from Johnson's Crime Commission. Instead, Michael Brown's death was taken up as a "question of civil rights." What was foregrounded was not a fault in police policy and procedure but "the taking of life as the central act

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[258] Franklin Zimring, *When Police Kill* (Cambridge: Harvard University Press, 2017), chapter 1.
[259] Zimring, *When Police Kill*, 13.
[260] Zimring, *When Police Kill*, 11.
[261] Zimring, *When Police Kill*, 14.
[262] Zimring, *When Police Kill*, 15.
[263] Zimring, *When Police Kill*, 15.

and the victim's loss as the focus of concern."[264] As a result, the content of the national concern over police violence emphasized, according to Zimring's account, the extent to which such police violence represented an intrusion of one's individual civil rights.

Both of these transformations prepared the ground for Obama's Task Force on 21st Century Policing. Importantly, the role and function of Michael Brown's death is not dissimilar to that of Kitty Genovese. Factually, the two episodes could not be more distinct. Symbolically, however, the two are united by their capacity to inspire a moment of re-imagination in American criminal justice. That Miss Genovese was so brutally murdered while so many bystanders looked on was used by Goldwater, and later by President Johnson, to elevate crime control to the level of presidential politics and federal intervention. Significantly, her murder also provided the framework for defining the problem of violent crime in America. For Goldwater, this was framed as a problem of weak government and emboldened criminals. Not far removed, for President Johnson, her murder was illustrative of the ordinary citizen's complicity in America's crime problem, the bystanders evidence of the fact that Americans were not doing enough to assist with law enforcement and thus silently abetting violent crime. The public just as much as the police were responsible for her death, and the program with which to respond to America's crime problem was one that distributed blame and used the wayward impulses of the public to constellate power in the police.

By contrast, the double transformation inspired by the image of Michael Brown's killing refocused blame on state agents and, rather than prioritizing what was at stake for American society writ large, emphasized the individual costs and denials of civil liberties that were incurred by those who suffered at the hands of police violence. As we will see, it functioned within Obama's Task Force to re-center the public in the constellation of police power. The point is not that the stories of Kitty Genovese and Michael Brown are the same. The point is that they both facilitate a substantive change in the understanding of what is at stake in the problems of American criminal justice. And the importance of recognizing these broader phenomenological shifts is that doing so prepares the ground for asking the properly critical question of whether such shifts correspond to a re-imagined concrete order of things or whether the continued existence of the same concrete problems signals the limits of and mutual participation in a mode of political discourse that sets the terms in which such problems can be reimagined and redefined. Crucially, as well, is the question of whether the frameworks that emerged out of these two moments in the history of American criminal justice, generally, and American policing, specifically, create the conditions of possibility for those very problems in the first place.

A thick history is thus at work even before we begin to unpack the diagnoses and prescriptions offered by Obama's Task Force. Taken in historical isolation, Michael Brown's death reveals precisely the transformation in the political discourse of police misconduct that Zimring lays outs. To be sure, an important part of Zimring's claim is that the transformative power of Brown's death is only revealed once we place it in the greater history of the public discourse on police violence. His case in point, the disparate reactions to Rodney King as compared to Michael Brown.[265] However, this valence is at once too limited – by focusing only on the discourse of police killings – and too general – by claiming that the shift is from police policy to civil rights. If, instead, we see how Michael Brown and Kitty Genovese are similarly situated as tragic counterparts in the history of *police reform*, in the historical evolution of the entire project of grappling with the problems between and attempting to square

[264] Zimring, *When Police Kill*, 15.
[265] Zimring, *When Police Kill*, 12-15.

solutions to the tense relationship between democracy and the police, the stakes of the analysis change in two distinct ways. First, doing so encourages us to ask precisely how much the problems facing American policing have changed in the period of time between the two commissions. Do the two tragedies shift the ways we think about those problems without ever inspiring equally transformative solutions to solve them? Pursuing this question raises a second concern: to what extent do either of these transformative moments, double or otherwise, leave intact, perhaps even further and reinscribe, the broader discourse of police reformism that makes the problems each commission takes up possible in the first place? It is with these considerations in mind that we turn to Obama's Task Force.

Obama's Task Force on 21st Century Policing

Published nearly a half-century after the *Challenge of Crime in a Free Society*, the final report of Obama's Task Force on 21st Century Policing located the promise for meaningful police reform largely outside of existing legal institutions. This was marked departure from Johnson's Commission, which sought reform from within those institutions, foregoing civilian involvement in policing and opting instead for a program that prioritized effective police administration, training, education, and professionalization. While the Task Force expressed a shared concern for racial antagonisms, community trust, and public legitimacy, unlike their predecessor they embraced civilian oversite and involvement in policing. Their remedies were six-fold, spanning community policing and crime reduction to the use of technology and social media, from public trust and legitimacy to police and oversight, training and education to officer wellness and safety. Yet each of the six "pillars" that organized the final report were united by twin ambitions that sought simultaneously to redefine and reorient the purpose of policing while at the same time increasing community engagement in the enterprise of law enforcement. In short, where Johnson's Crime Commission prioritized administrative and legal processes Obama's Task Force favored public input, and thus policing in a democratic society transformed from a delicate legal problem to a tense political one.

That Obama's Task Force inaugurated what this dissertation refers to as a *political model* of police governance is evidenced not only by those twin ambitions but also by the final report's unifying framework, which took up questions of "legitimate authority" as its "philosophical foundation."[266] It is political both because it prioritizes public input and community oversite in matters of policing, therefore opening law enforcement to the sort of popular deliberation and public accountability that are two of the hallmarks of political liberalism, and also because at the core of these priorities is a concern for fostering public trust between citizens and police such that police authority is conferred, rather than observed, by the public.[267]

The transformation from the Johnson administration's legalistic model to Obama's political model can be charted as well by reference to the double transformation in police killings that Zimring lays out. On one hand, the shift in the public discourse away from treating policing killings as singular, discrete events and instead as issues of national concern corresponds to the Task Force's view that

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[266] Task Force Report, 5.

[267] Task Force Report, 10 (noting that "the public confers legitimacy only on those they believe are acting in procedurally just ways.")

resolving the tensions between the police and the public is "essential" to "democracy."[268] No longer is the problem merely one of responding fairly and effectively to citizen concerns and complaints. Precisely because police violence is an issue of national concern it is also an issue that strikes at the core of the organization and distribution of state power in America, at once exposing and calling into question the institutional machinations and legal armatures that prime and legitimate killings by police. On the other hand, the change from regulative police policies to civil rights claims emerges throughout the Task Force's final report. The legal safeguards that civil rights and liberties are intended to provide are understood as input variables to be considered in the formulation of nearly every policy proposal the Task Force offered. Such substantive consideration departs, materially and in tone, from the Crime Commission's belief that "every restriction that is placed on police procedures by the courts—or anyone else—makes deterring and solving crimes more difficult."[269]

Policing in the new millennium, as told by the Task Force, thus required fundamental changes in the political attitude of police and toward policing. Indeed, in the Task Force's words, trust and legitimacy need be built and nurtured "on both sides of the police/citizen divide."[270] Reforming America's police departments and practices was cast as a collective, collaborative project. Centralized control was not enough to remedy the fractured trust between the police and the public, nor was it capable of redeeming the apparent illegitimacy of police power. If it were, there might have been no need for Obama's Task Force in the first place.

"Building trust and nurturing legitimacy" functions as a sort of catchphrase in the Task Force report. It is, in their words, "the foundational principle underlying [their] inquiry."[271] Pursuing these entwined goals was both a political ambition and an empirical problem. For the Task Force, "decades of research and practice" demonstrated that "the public confers legitimacy only on those they believe are acting in procedurally just ways."[272] Procedural justice required that officers be "honest, unbiased, benevolent, and lawful."[273] Though presented as a principled framework, the Task Force's understanding of procedural justice was informed by research in social psychology that supported the idea that the public "feels obligated to follow the law and the dictates of legal authorities and is more willing to cooperate with and engage those authorities because it believes that it shares a common set of interests and values with the police."[274] Legitimate authority is wed to the impartial and unbiased exercise of power. Trust and legitimacy are not lacking because the public does not show enough respect for the police, as President Johnson saw it, but because the police are not seen by the public as treating them with dignity and respect, being neutral and transparent in their decision-making, or conveying trustworthy motives.[275]

Procedural justice could not, however, be reduced to justice through procedure. It was not enough that police follow clearly defined procedures when interacting with the public, no matter how neutral or transparent they might be. As the Task Force put it, "behavior is more likely to conform to culture than rules."[276] If the organizational culture of a police department fomented explicit or implicit

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[268] Task Force Report, 1.
[269] Crime Commission Report, 244.
[270] Task Force Report, at 1.
[271] Task Force Report, 9.
[272] Task Force Report, 9-10.
[273] Task Force Report, 9-10.
[274] Task Force Report, 9-10.
[275] Task Force Report, 10.
[276] Task Force Report, 12.

biases, disrespectful language, or harmful prejudices then the justice of procedural justice is bankrupt. Rules alone were not enough to achieve procedural justice.

On the contrary, to build trust and legitimacy required, the Task Force submitted, police agencies to adopt "a guardian mindset."[277] The Task Force cautioned that "law enforcement cannot build community trust if it is seen as an occupying force coming in from outside to rule and control the community."[278] Quoting Plato's *Republic*—which said that "In a republic that honors the core of democracy—the greatest amount of power is given to those called Guardians. Only those with the most impeccable character are chosen to bear the responsibility of protecting democracy"—the Task Force argued that the way in which "officers define their role will set the tone for the community."[279] Conduct that might be "perfectly permitted by policy," the Task Force observed, may nonetheless undermine community confidence in the police if they feel like they are being dealt with rather than tended to.[280] Importantly, at stake in the guardian mindset is not only the prosaic relationship between police officers and community members but also the integrity of American democracy. Biased, suspect, or otherwise arbitrary policing activities undermined public trust and debased the democratic values police purport to protect. This required a change in the very mindset of policing, one that sought to move police away from the para-military model that had been in place since the Second World War and that reoriented how police understood their role and the power that came with it.

Trust and legitimacy were not new issues in American policing. Indeed, many of the Crime Commission's recommendations were advanced with an eye toward easing the tensions between the police and the public and therefore fostering mutual trust. Yet for the Crime Commission legitimacy was achieved through centralized administration, bureaucratic expansion, and police professionalism. For the Task Force, on the other hand, legitimacy was always and in every case built upon community involvement. Their final report features no less than nine formal recommendations with nineteen accompanying action items aimed at building trust and legitimacy. Some of these are statements of normative and symbolic ambition, such as their suggestion that police adopt a guardian mindset or that "law enforcement agencies acknowledge the role of policing in past and present injustice and discrimination and how it is a hurdle to the promotion of community trust."[281] Because procedural justice hinged on the perception of neutrality, honesty, and reciprocity, even these more symbolic recommendations would, in the Task Force's view, pay concrete dividends in the relationship between the police and the public. Others of these are more quotidian, such as realizing a culture of transparency through public review of all departmental policies and "regularly post[ing] on the department's website information about stops, summonses, arrests, reported crime, and other law enforcement data aggregated by demographics."[282] In short, the public's trust in policing could only be achieved through including and respecting their voice in matters of law enforcement, and it was only by doing so with sincerity, neutrality, and transparency that measures to cultivate trust would be endowed with the air of legitimacy.

If building trust and legitimacy between the police and the public was predicated on a change in the political attitude of law enforcement it underlies as well "all questions of law enforcement policy

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[277] Task Force Report, 11.
[278] Task Force Report, 11.
[279] Task Force Report, 11.
[280] Task Force Report, 12.
[281] Task Force Report, 12.
[282] Task Force Report, 13.

and community oversite."[283] Not unlike the Crime Commission, however, the precise role of the community in police governance remains unclear. The normative framework is certain: "Some form of civilian oversite of law enforcement is important in order to strengthen trust with the community."[284] Yet the Task Force does not go on to lay out precisely what community oversite entails, what powers it ought to maintain, or with what authority over local police departments it is to be endowed. To be sure, this is a marked departure from the Crime Commission, which explicitly denied the importance of civilian oversite boards and recommended that they not be established in jurisdictions that did not already have one. Indeed, even in the face of sparse empirical evidence supporting the efficacy of civilian oversite and review boards—which the Commission relied on in part to reject them—the Task Force argued that they were a necessary, though insufficient, condition for building trust and legitimacy. As Brian Buchner, a witness to the Task Force's policy and oversight listening session, put the point: "Civilian oversight alone is not sufficient to gain legitimacy; without it, however, it is difficult, if not impossible, for the police to maintain the public's trust."[285]

At their highest level of generality, civilian oversight is realized in whatever way each community finds appropriate "to meet the needs of that community."[286] Elsewhere the Task Force recommended "external and independent prosecutors investigate police use of force resulting in death,"[287] and encouraged law enforcement agencies to "implement nonpunitive peer review of critical incidents separate from criminal and administrative investigations."[288] Thus even if the precise role of the community in civilian oversite is not entirely clear, two takeaways on this point are immediately obvious. First, communities ought to have some form of oversight power over those charged with policing and protecting them. Second, there ought to be outside scrutiny of police policies and police conduct. Both function to pierce the strictly internalized investigative and disciplinary framework of centralized control championed by the Crime Commission.

Throughout the Task Force report the distance that the Crime Commission sought to establish between the police and the public is reeled. Abandoning a warrior mindset if favor of guardianship and calling for community oversite are their most ambitious attempts. But the programmatic orientation throughout the document is one of transparency and accountability. From promulgating departmental policies and policing statistics to carrying business cards with which to identify themselves to citizens, obtaining written consent for searches to devising new standards with which to search LGBTQ individuals, implementing body-worn cameras to engaging the community through social media—each of these are policy recommendations advanced with an eye toward building trust and legitimacy by way of transparency and accountability.

If external scrutiny is welcomed by the Task Force, the total absence of clearly articulated enforcement mechanisms for police accountability renders the relationship between the police and the public unremoved from the Crime Commission's order of things. While the Task Force does not reinscribe the Commission's schism of community-police interdependence coupled with insular police management by granting the community standing in police affairs, their shapeless vision for how that standing is effectuated programmatically calls into question both the value of that standing as well as

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[283] Task Force Report, 19.
[284] Task Force Report, 26.
[285] Task Force Report, 26.
[286] Task Force Report, 26.
[287] Task Force Report, 21.
[288] Task Force Report, 22.

the distinction of civilian oversite. Put a different way, the amorphous role of community authority in the Task Force report makes civilian oversite a normative distinction without much substantive or concrete difference. Indeed, without a clear place for community authority and public accountability mechanisms that have any teeth, each of the policies advanced in furtherance of 'transparency and accountability' serve only to "professionalize" the police in the name public trust much the same way as did the Crime Commission.

To be sure, the Task Force never quite uses the language of police professionalism. Theirs was not a call to improve the quality of police officers "from top to bottom." Throughout their report, however, the Task Force refers to police as "law enforcement professionals." The use of this appellation signals the success of the Crime Commission's premium on police professionalism at the same time that it marks the continued hegemony of that project. "Though today's law enforcement professionals are highly trained and highly skilled operationally," the Task Force wrote, "they must develop specialized knowledge and understanding that enable fair and procedurally just policing."[289] "The goal is not only effective, efficient policing," the Task Force claimed in a move that articulates at once an embrace of and departure from the central tenets of the Crime Commission, "but also procedural justice and fairness."[290] Thus does the Task Force bear the traces of its predecessor with respect to professionalizing the police through specialization, training, and education while also moving the normative needle away from insular police management and centralized control.

The important point here rests not so much in the particulars of police professionalism. Indeed, specialization and bureaucratization are as much features of modernity, categorically, as they are of police professionalism in particular. Instead the important point appears in the systematic structure of community engagement and police policies designed to enhance public trust. That is, even if the normative valence that the Task Force adopts represents a radical departure from the Crime Commission's, without a clear statement of the concrete authority that accompanies that normative vision it stands to reason that community inclusion services police professionalism more than it empowers civilian oversite. This is not to say that the two brands of police professionalism are exactly the same. In part this is because the Crime Commission's prescriptions had become the baseline by the time Obama's Task Force was formed. In part this is because centralized control is no longer the guiding principle for police professionalism in the twenty-first century. But in either case, it calls into question precisely how the balance is struck between the imperatives and prerogatives of policing and commitments to community oversite and empowerment. How, then, is the Obama administration's framework for policing sustainable as a political model of police governance if the very features that figure it as a political—popular input, public transparency and accountability—remain, as one observe described them, "platitudinous and abstract"?[291] What is at stake in the Obama era that was not considered in Johnson's? In what ways does the Task Force foreground those stakes in its proposals?

Tentative answers to these questions are found, according to the Task Force, in the philosophy and practice of community policing. Unlike the policing strategies embraced by the Crime Commission, which prioritized crime deterrence by way of the physical presence of law enforcement, community policing pursues "organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to

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[289] Task Force Report, 52.

[290] Task Force Report, 52.

[291] Radley Balko, *The Rise of the Warrior Cop: The Militarization of America's Police Forces* (New York: PublicAffairs, 2014), 65.

public safety issues such as crime, social disorder, and fear of crime."[292] This spirit of collaboration meant that "officers enforce the law *with* the people not just *on* the people."[293] Under a paradigm of community policing, imperatives for crime reduction are wed to the equal protection of civil rights. "Any prevention strategy that unintentionally violates civil rights, compromises police legitimacy, or undermines trust is," the Task Force warned, "counterproductive from both ethical and cost-benefit perspectives."[294] By implication, this meant that crime reduction alone could not be the unifying goal of law enforcement. The Task Force put this point squarely: "the absence of crime is not the final goal of law enforcement. Rather it is the promotion and protection of public safety while respecting the dignity and rights of all."[295]

By fusing legal, ethical, and communal concerns with the usual imperatives of effectiveness and efficiency, the Task Force reimagined the balance between the police and the public. Community engagement could not serve as a fulcrum only for police professionalism, as it did for the Crime Commission, because the standards for policing were set outside the profession. In other words, by decentering crime reduction as the "final goal of law enforcement" the Task Force denied the hegemony of police expertise.

Under this view police could not set their own standards with reference to only their own acumen because respect for dignity and civil rights is an openly political rather than strictly administrative practice. Here law enforcement is presented as but part of what Chantal Mouffe refers to as the stuff of politics, "the ensemble of practices, discourses and institutions that seeks to establish a certain order and to organize human coexistence in conditions which are always potentially conflicting."[296] Though civil rights and respect for dignity are aspects of collective life over which police officials and administrators do not enjoy exclusive province, this does not mean they have no voice on these matters. Indeed, that is what makes the Task Force's vision openly political, that the police and the public have conflicting viewpoints but equal standing. As a result, even if the precise authority the public wields over the police is opaque, the purposive goal of policing—to say nothing of, but certainly in combination with, its renewed orientation—is recast by the Task Force such that policing is a democratic project rather than an administrative function.

That part of the 'double transformation in policing killings' transformed issues of police regulation to questions of civil rights[297] is in plain view here as well. Significantly, for the Task Force the orientation toward civil rights and individual dignity was not limited to the specific issue area of police violence. To be sure, episodes of police violence may well have been the catalyst for the Task Force. Yet the popular energy that animated the shift from crime control policy and police regulation to civil rights worked in both directions. It was not only questions of civil rights that were centered in the discourse of police reform. Questions about precisely what was being reformed were centered as well. Put a different way, that the Task Force folded respect for civil rights into the purpose of policing itself meant that the usual bag of policies aimed at crime reduction was now outmoded. If crime reduction was no longer the unique purpose of policing then the assumptions underlying the preceding half-century of police reform were ill-suited for twenty-first century policing.

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[292] Task Force Report, 41.
[293] Task Force Report, 41. Emphasis in original.
[294] Task Force Report, 42.
[295] Task Force Report, 42.
[296] Mouffe, *Agonistics*, 2-3.
[297] Zimring, *When Police Kill*, 15.

Administratively, publicly distanced, insular police management could not cultivate the sort of trust and legitimacy the Task Force prioritized. Nor could the understanding of deterrence introduced by the Crime Commission. That understanding hinged on the physical presence of police officers to deter crime, and only in so deterring was crime reduction possible. The Task Force's move to decenter crime reduction challenged that view of deterrence. Should police enforce the law *with* rather than *over* the community required that public safety be "co-produced,"[298] and the assertion of police authority was anathema to guardian mindset the Task Force sought to inspire. If deterrence remains an operating assumption for the Task Force at all, it is arguably more pastoral in sentiment. With community members and police officers working in concert to "identify problems and collaborate on implementing solutions that produce meaningful results for the community,"[299] deterrence is funded in the mutual shepherding that allows police to better predict community problems and residents to better predict police practices.

Thus did Obama's Task Force transform the normative assessment of policing from effectiveness and efficiency to procedural justice and fairness. The political model of police governance that ensued was not unremoved from the legalism that animated the Crime Commission. That legalism, which favored internal rulemaking to regulate police conduct, was replaced with a framework that prioritized civil rights and liberties, therefore calling into question the law-politics binary that partitioned law enforcement from the demands of the public. It remains to be seen, however, whether the Task Force's appreciable departure from the normative valence of its predecessor would result in concrete changes in the ordering and outcomes of police power.

V. Continuity and Change in U.S. Policing, or The Disappearance of Discretion

There are at least two ways of mapping the Task Force's recommendations that help to explain both their departures from the Crime Commission's as well as the renewed framework for police governance that followed. The first, which will be developed in more detail in the next chapter, is to observe how the limits to the Crime Commission's operating assumptions are folded into the Obama administration's understanding of and response to the challenges of policing in modern society. As, we'll see, a series of social scientific studies of police behavior published in the decade following the Crime Commission demonstrated the limits and shortcomings of an insular legal framework for police governance. They thus help to orient the framework the Task Force developed, a framework that took up questions of "legitimate authority" as its "philosophical foundation."[300] The second is to note the continuities across these divergent frameworks. For all their differences, the common assumptions that they share help to evaluate the significance of their departures and, as a result, reconsider the trajectory of police reform from then to now.

Whether by taking on a guardian mindset or training in de-escalation techniques, that police may lawfully use violence against citizens is never itself questioned. To be sure, these recommendations do modify that assumption, suggesting at the very least that the police ought to avoid violence at all costs.

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[298] Task Force Report, 45.
[299] Task Force Report, 45.
[300] Task Force Report, 5.

Indeed, the Task Force is quite explicit about this, arguing that "a clearly stated 'sanctity of life' philosophy must also be in the forefront of every officer's mind."[301] Yet the lack of enforcement mechanisms coupled with the fact that the core assumption is left intact render the Task Force's final report, in Radley Balko's words, "platitudinous and abstract."[302]

Put a different way, though the ambitions of the two presidential police commissions are radically different, they remain wed to the same order of things, whether that be the tools each recommends to reform American policing or the ultimate powers that police enjoy. Training, education, community engagement—these are all noble pursuits, but they neither call into question things like the discretionary authority that police wield nor the license to force that accompanies it. And the Task Force's attempt to reel police authority within civilian oversite is left wanting without any clear suggestion for how that ought to be realized. Supplying answers to "why" rather than "how" is the signature of those recommendations that depart meaningfully from the Crime Commission. Ironically, while Obama's Task Force was preoccupied with a more specific problem than Johnson's, and though they supply a more specific understanding of the problems of urban policing, the central aspiration of their recommendations is ultimately just as limited as those of its predecessor.

Rethinking the deeper philosophical reorientation of policing like the one that community policing envisages is of course all for the good. But exactly how we develop, implement, and carryout policies in service of this ideal remains to be seen. At best, this could mean that there will persist an asymmetry between theory and practice – that policing will never quite live up to our democratic aspirations. At worst, this could mean that a coveted halcyon image of American policing obscures a much more problematic, violent reality.

Despite their radical departures, the general framework for the problem of policing in modern society is consistent across both reports. Policing is problematized not merely with reference to its concrete faults – racial discrimination, violence, infringements upon individual rights, or abuses and misuses of authority in general – but with reference to the democratic ideals and commitments of which policing runs afoul. This is why Johnson's Crime Commission configured their report as the challenge of crime in a "free" society. It is also why Obama's Task Force placed a premium on building trust and legitimacy—because these were "essential in a democracy."[303] The differences in their recommendations are owed to many things – the political ecologies of the day, the changed scientific and sociological understandings of policing, the constitutional evolution of the legal doctrines that govern law enforcement – but they are united by the frictions that democratic ideals and police imperatives generate for each other.

So, too, they are united by a series of common assumptions about police power: that it includes a license to violence, that it is vitalized by a wide birth of discretionary authority, that it is capable of being squared with those very democratic commitments of which it runs afoul and against which it is problematized in the first place. Whether aspiring to centralized control or community policing, administrative regulation or the protection of civil rights, both presidential commissions ultimately grapple with the same problem. Yet, it is critical to see one thing in particular: in grappling with these problems, the Obama Task Force never once engages with the problem of police discretion. This is especially curious considering that the dangers policing presents for a democratic society are common

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[301] Task Force Report, 19.
[302] Balko, *The Rise of the Warrior Cop*, 65.
[303] Task Force Report, 1, 9.

across both reports. Those dangers were problematized, for the Crime Commission, by reference to police discretion. Indeed, the 'challenge of crime in a free society' was not an abstract dilemma. On the contrary, it was a concrete problem of police discretion, of how to balance the "necessary and inescapable" reality that police must exercise authority independent of law with the normative commitments that the rule of law demands. Discretion has no purchase in the Task Force report, however. Though the harms discerned in that report are similar to its predecessor, what causes those harms shifts. Curiously, in describing discretionary police conduct, police discretion disappears.

How to account for this disappearance of police discretion? How to make sense of the continued tension between democracy and the police? Why has police discretion evaded serious scrutiny by both commissions? What accounts for the transformation of and radical departure from policing as an administrative problem to a democratic practice? How has the prerogative power of police discretion been configured as a problem of legality? And what explains the giving way of those administrative legal frameworks fashioned to cabin policing to the demands of transparency, accountability, and external oversite? How does policing transform from a problem of administrative, legal regulation to one of popular, political energy? Critically, how do the predicaments of police discretion disappearance in the process?

These are the questions that the remainder of this dissertation endeavors to answer.

CHAPTER TWO

DECENTERING POLICE DISCRETION: THE CHALLENGE OF POLICE BEHAVIOR IN A FREE SOCIETY

An examination of how the criminal justice system works and a consideration of the changes needed to make it more effective and fair must focus on the extent to which invisible, administrative procedures depart from visible, traditional ones, and on the desirability of that departure.

–*The Challenge of Crime in a Free Society*

I. INTRODUCTION

THE absence of any serious consideration regarding the aims and limits of police discretion in the Task Force on 21st Century Policing's final report is the result of a long series of modifications, interruptions, and fractures in the discourse of police reform. From Johnson to Obama, the discontinuities that took the shape of two distinct models of police governance removed discretion from the field of problems that strain the relationship between the police and the public. But this does not mean that the disappearance happened all at once. Nor that discretion has vanished from the zone of police power altogether, if at all. Yet how to explain for the disappearance? How was the authority of police discretion specified? What rules of formation did those specifications follow? How was such authority dispersed within the legalistic model of police governance? And what sort of legal justifications galvanized that model?

Understanding how we arrived at a moment in which the dangers of police discretion are neither apparent nor problematized requires that we first understand how it was defined, assessed, and delimited as an object in plain view. What regularities can be discerned in these planes of emergence? What are their shared assumptions? In what ways do they depart from each other? And how do those departures contribute to the disappearance of discretion?

The disappearance of police discretion as a central problem of police reform from Johnson to Obama did not happen all at once. The stark contrast between the two presidential police commissions is not a historical rupture. Rather, the shift from Johnson's legalistic framework for police governance to Obama's political framework – and the erasure of police discretion from the picture along the way – was put in motion by a series of academic, empirical, and legal innovations that tested, challenged, and complicated the Crime Commission's portfolio of reforms. This chapter focuses on the scholarship on policing and organizational management that emerged in the decade following the publication of *The Challenge of Crime in a Free Society*. Where the Crime Commission focused on the management of police departments, that scholarship prioritized the individual police officer to consider the limits of centralized control. The organizational realities that these studies revealed illuminate the gap between the Commission's vision for optimized, centrally administered law enforcement and the police practices that emerged over the next half century. Yet the essential political character of police policy embodied by Obama's Task Force recommendations is not a natural extension of that academic discourse. What then, this chapter asks, did that scholarship add to the discourse of police reform? And what did it ignore?

The disappearance of police discretion is, the chapter argues, predicated upon *decentering* police discretion. The Crime Commission's animating principle of centralized control was a vision for police departments, not policemen. It was preoccupied with formal controls. The scholarship, on the other hand, changed the focus to informal rules governing police conduct. As a result, police behavior – and the problem of police discretion in particular – was shown to be guided by an assemblage of forces that were largely, if not entirely, outside the chief administrator's control. Understanding the problems of policing in a democratic society required attending to police work as it was dispersed in the field and not simply constellated in the precinct.

Johnson's Crime Commission, to be sure, was not blind to the presence of informal procedures in police services. And they took caution to remind the public that their work was yet to be finished. However comprehensive their research and analysis might have been, they wagered with both modesty and ambition, understanding more fully the challenges facing the "American system of criminal justice" required "above all [t]he willingness to reexamine old ways of doing things, to reform, to experiment, to run risks, to dare."[304] What policing and criminal justice needed beyond what the Commission could fully supply was, in a word: "vision."

Accordingly, the Commission offered two distinct pathways for continued research and development in the field of policing. These pathways encompassed both the Commission's assumption that the primary role of policing was crime deterrence as well as their premium on organizational management. Indeed, the Commission's singular "overall recommendation in the field of police operations" encouraged that "research, in the form of operational experiments that are scientifically observed and evaluated, be conducted by departments in conjunction with universities, research centers, and other private organizations."[305] Empirical studies were to be aimed at determining which methods of patrol, techniques for crime detection, and distributions of policing resources would be most effective for deterring criminal activity. Ensuring that policing operations were true to their commitments to fairness and effectiveness required, on the other hand, examining "the extent to which invisible, administrative procedures depart from visible, traditional ones, and on the desirability of that departure."[306]

It did not take long for police administrators, legal scholars, and social scientists to take up the Commission's research agenda. In the half-decade following the publication of *The Challenge of Crime in a Free Society*, at least three sociological studies of police behavior – Jerome Skolnick's *Justice Without Trial*, James Q. Wilson's *Varieties of Police Behavior*, and Egon Bittner's *The Functions of the Police in Modern Society* – complicated the main assumptions that animated the Crime Commission's recommendations. These studies assessed modern policing at both the individual and organizational level, and offered a much richer, and more intimately detailed, picture of the enterprise of law enforcement than Johnson's commission provided. So, too, in the decades between Johnson's presidency and Obama's Task Force, the conclusion of several longitudinal studies of the effect of specific patrol configurations and policing practices on crime deterrence dispelled what many experts at the time, including those featured on the Commission, enthusiastically embraced as the common wisdom of crime control.

While the sociological studies of organizational management within America's police agencies are most revealing for understanding the limits of the Commission's principle of central control, the

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[304] Task Force Report, 81-81.
[305] Task Force Report, 295.
[306] Task Force Report, 74.

quantitative studies that pursued the Commission's questions regarding police effectiveness are important for understanding the evolution of contemporary policing practices. The former illuminate considerations for the competing principles of legality in the next chapter. The latter will help set the stage for probing the relationship between technocratic innovation and political accountability in chapter five. For now, however, consider both sets of studies in reverse order.

II. THE SCIENCE OF PREVENTATIVE POLICING AND CRIME DETERRENCE

Although crime deterrence served as the normative lodestar for police operations, the particular problems with which the Commission was preoccupied arose from three distinct types of uncertainty regarding the deterrent effect of law enforcement. First, the commission questioned "the extent to which crimes of various kinds can be deterred."[307] Whether some types of crimes—homicide as opposed to burglary, for example—are more or less likely to be deterred by specific policing practices remained a wholly unasked and answered question at the time of their reporting. Likewise, second, the Commission raised concerns over "the extent to which various kinds of people can be deterred from crime." Alongside the thinly-veiled, racialized threat of "strangers" that fueled the "widespread public anxiety about crime," and that served as "a chief reason [the] Commission was organized," appeared the folklore of the "hardened" criminal who thwarted the criminal justice system's best efforts.[308] Juveniles, especially black youth raised in the fatherless homes that permeated poor, urban communities of color fell squarely within this mythos. Whether such criminal proclivities were malleable, precisely how to identify the shady figures possessing them, and what to do about it—these were the criminogenic questions flagged for future study. Third, the Commission introduced a set of quotidian questions with respect to "where and when what kinds of crimes are most likely to occur." A separate but related question concerning the deterrent value of "different patrol techniques" lead the Commission to ask whether certain patrol configurations—foot patrol, motor patrol, one-man or two-man patrol, for example—resulted in either more arrests or fear of arrest. These were the concerns motivating the Commission's "overall recommendation" for further research "in the form of operational experiments that are scientifically observed and evaluated."[309]

Since at least the Second World War, the Commission observed, the standard model of policing had remained unchanged. This model has been characterized as a generic, "one size fits all" strategy that was mostly reactive.[310] The common wisdom was that preventive patrol, mostly random and in police cars, was "the best method of controlling crime [a]vailable to the police."[311] Its deterrent value lay in visible police presence. Here, again, the randomness and therefore unpredictability that underpinned this view of preventative patrol signals the modern turn of the Commission's understanding of deterrence. However, less than a decade later, a study completed in 1974 that assessed the measurable effect of preventive patrol on crime rates in Kansas City found that

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307 Task Force Report, 249.
308 Task Force Report, 165-67, 159.
309 Task Force Report, 295.
310 David Weisburd and John Eck, "What Can Police Do to Reduce Crime, Disorder, and Fear?," *The Annals of the American Academy of Political and Social Science* 593, no.1 (2004): 44.
311 Task Force Report, 295

preventative patrol "had no measurable effect on crime or citizen feelings of security."[312] In that study, fifteen police beats were divided into three treatment groups – five with no preventive patrol, five with a preventive policing presence typical of the department, and five with preventive patrol doubled or tripled. Ultimately, the study found no difference in the crime rates between treatment groups, ostensibly impeaching the notion that visible police presence was conducive to crime deterrence. Yet the Commission's distinctly modern valence for crime deterrence was not so easily dismissed. Indeed, the Commission's embrace of deterrence has proved nothing short of canonizing a first-principle of police reform. In part, this is owed to a more general trend in the field of criminology to prioritize evidence-based claims and analyses, a trend in which deterrence is well at home.[313] So, too, this is owed to the influence and lasting power of the reformism first introduced by the Commission's report. Rather than abandoning the standard model of policing that informed the Commission's views, the outcome of the Kansas City experiment raised a new series of questions about the distribution of police resources.

That the mission of policing was crime deterrence and that deterrence was realized through visible police presence were key assumptions that were left more or less unscathed. There is no clearer indication of this than in a second (and now canonically, *the* second) study of preventative policing undertaken nearly 30 years after the Commission concluded its work. While preventive patrol as a general application was debunked by the Kansas City study, the later study in Minneapolis concluded that preventive patrol could be effective if it were strategically focused. In that study, the researchers found that fifty percent of crime in the city occurred in only three percent of the street addresses.[314] By identifying these 'hot spots' and focusing police attention to them, their studies found that police presence, and thus the same logic underpinning preventive patrol, could produce a "general deterrent effect" if combined with a place-predictive model. Now widely known as 'hot spots policing' this model supplies part of the answer to the Crime Commission's question regarding whether we can determine where and when particular kinds of crime are most likely to occur.

The general commentary following the results of the Minneapolis experiment has pointed toward the "rise of big data-policing," a paradigm of policing characterized by increasingly sophisticated datasets and powerful computer algorithms that are able to identify criminal patterns in focused geographic locations and thus allow police to strategically deploy their resources to specific locations and in pursuit of predicted types of criminal activity.[315] Critically commentary, however, has noted how specific applications of hot-spots policing raise dubious questions regarding what counts as the crime data that is used to predict risk, how this data is counted in the first place, and whether predictive policing techniques merely build upon themselves to create their own self-fulling prophecies.[316] At a higher level of theoretical generality, critics of place-based predictive policing have argued that focusing patrol in one location will only displace criminal activity to some other location outside of the 'hot spot.' To be sure, there is empirical evidence to the contrary. Studies in Jersey City,

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[312] David Weisburd and Anthony Braga, "Introduction," in *Policing Problem Places: Crime Hot Spots and Effective Prevention*, eds. David Weisburd and Anthony Braga (Oxford: Oxford University Press, 2010), 8.

[313] For an account of the ascendence of evidence-based criminal justice policy, see Johann Koehler, "Making Crime a Science: The Rise of Evidence-Based Criminal Justice Policy" (PhD. diss., University of California, Berkeley, 2019).

[314] Weisburd and Braga, "Introduction," 11.

[315] Andrew Guthrie Ferguson, *The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement* (New York: Ney York University Press, 2017), chapter 4.

[316] Ferguson, *The Rise of Big Data Policing*, 72-73.

Seattle, and New York City have found that hot spots do not displace criminal activity elsewhere, and that the notion of individuals with "fixed criminal proclivities" is simply unsupported.[317]

The reason for noting this trend in the empirical research of policing practices is twofold. First, the common presentation of pro-active policing and crime deterrence in anthologies, edited volumes, and well-cited books and articles begins with Kansas City and telescopes ahead to Minneapolis. The two are situated in the literature as something of companion or counter-part studies, even though they are separated by over twenty years. While contemporary scholarship on policing's role in crime deterrence is largely an extension of the insights from the Minneapolis study, that study itself is often presented as a reprisal of its predecessor. Thus, second, this trend raises an important question regarding why the marriage of crime deterrence and preventative policing remained intact after the outcome of Kansas City. Put a different way, the historical gulf that separates the two studies belies the basic insight that the primary operating assumption informing the Commission's view of policing was shown to be doubtful less than a decade after the publication of their report. Why did the union of deterrence and policing persist for thirty years nonetheless? What explains the lasting power of the Commission's framework for deterrence? How was this framework conditioned, enabled, and effectuated by the armatures of police governance, from police administrators to the federal judiciary? These are the questions raised by the trajectory of the Commission quantitative research agenda that will be taken up in the next chapter.

III. ORGANIZATIONAL MANAGEMENT AND POLICE BEHAVIOR

The scientific considerations raised by the Commission's research agenda were connected to a second set of questions regarding the prosaic, daily management of police departments. Just as the Commission stipulated that the purposive first principle of policing was crime deterrence, they also stipulated that police departments be managed as administrative hierarchies constellated according to a principle of central control. Yet a series of three studies that examined, in the Commission's formulation of the question, "the extent to which invisible, administrative procedures depart from visible, traditional ones," revealed the perils and pitfalls of centralizing control in America's police departments.

The first of these studies, Jerome Skolnick's *Justice Without Trial*, published only months before the Commission's report, introduced the notion of the police officer's "working personality" and helped flesh out the occupational pressures that influence police discretion. Whereas the Commission advocated for formalizing rules to ensure a more or less uniform administration of justice, Skolnick observed that "the combination of danger and authority found in the task of policing unavoidably combine to frustrate procedural regularity."[318] Combined with social isolation, solidarity within policing, and the perception of constant threat, Skolnick's study observed novel ways in which the police officer's "working personality" manifested to create informal policing patterns even in matters about which there existed formal, written rules.

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[317] Weisburd and Braga, "Introduction," 17-19, 23-24; Franklin Zimring, *The City That Became Safe: New York's Lessons for Urban Crime and its Control* (Oxford: Oxford University Press, 2011), 188-190.

[318] Skolnick, *Justice Without Trial*, 61.

The second, James Q. Wilson's *Varieties of Police Behavior*, developed a three-fold typology for styles of policing that expanded upon many of the observations regarding the tasks of modern policing contained in the Commission's final report. Unlike the Crime Commission, however, Wilson paid careful attention to the ways in which each style of policing was either aided or hindered by local and municipal politics. As a result, the Commission's preference for insular police administration was shown by Wilson to ignore the effects of political culture on the enterprise they sought to improve. Formalizing departmental policies, Wilson cautioned, could not occur in the vacuum of the precinct.

Third and finally, Egon Bittner's *The Functions of the Police in Modern Society* bristled at the perceived novelty of police discretion and pointed instead to the institutional independence of police departments. Contrary to the Commission's suggestion that America's judiciary system would supply those "more enlightening circumstances" under which to resolve legislative disputes regarding police policy,[319] Bittner argued that the authority courts have over police in practice was conditional at best. Consequently, the authority of police discretion was justified by the police officer's license to what he termed "non-negotiable coercive force," which revealed the Commission's hope for judicial restraint over law enforcement to be hollow at best.

Skolnick and the Police Officer's "Working Personality"

Writing almost concurrently with the Commission, Skolnick noted that "whenever a system of justice takes on an *insular* character, a question is raised as to the degree of *justice* such a system is capable of generating."[320] Yet this did not mean that the insular, legalistic model of policing embraced by the Commission was doomed to be unjust. Instead, that model, which Skolnick considered a "system of justice without trial," operated "against a background of known rules, but that also... develop[ed] a set of informal rules or 'hidden principles' in response to the formal rules."[321] It was these 'hidden principles' that constrained the enterprise of policing and that, consequently, redeemed secluded and insular police administration from obloquy as "a system of 'unpredictable and patternless interventions.'" Importantly, if the Commission assumed that clearly defined rules could guide and constrain police conduct, Skolnick assumed—quite explicitly—that "the police violate rules and regulations."[322] At issue was not whether the police departed from formal rules but the "conditions under which rules may be violated with greater or lesser intensity."[323] Skolnick's study thus emphasized an "action perspective" of policing, questioning "how the working environment of police influences *law* enforcement, that is, the capacity of police to respond and contribute to the rule of law as a master ideal of governance."[324] The precise content of what Skolnick meant by "the rule of law as a master ideal of governance" will be subjected to scrutiny in the next chapter. For now, however, consider what Skolnick meant as the officer's "working environment."

While the Commission's report on policing attempted to mediate the disparate viewpoints of police officials, on one hand, and community members and public interests, on the other, Skolnick's

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319 Crime Commission Report, 247.
320 Skolnick, *Justice Without Trial*: *Law Enforcement in Democratic Society*, 4th ed. (Quid Pro, 2011 [1967]), 13.
321 Skolnick, *Justice Without Trial*, 13.
322 Skolnick, *Justice Without Trial*, 19.
323 Skolnick, *Justice Without Trial*, 19.
324 Skolnick, *Justice Without Trial*, 19-20.

sociological approach to policing sought to study policing as a "participant-observer." The task, as he saw it, was to "see the world through the eyes of the subjects."[325] "A study of law in action," Skolnick wrote, "is a study of people interpreting and thereby transforming principles and associated rules within legal institutions."[326] By studying policing in this way, Skolnick discovered two key features of police work that complicate the Commission's recommendations. First, he observed how police work generated "distinctive cognitive tendencies in police as an occupational grouping."[327] Such tendencies, to which Skolnick also referred as "cognitive propensities" and "behavioral responses," formed what he would term the police officer's "working personality." That personality was unique to police officers due to the special "features of their social situation," and it contributed to the development of "ways of looking at the world that are distinctive to themselves, cognitive lenses through which to see situations and events."[328] Second, and pursuant to the first, Skolnick observed that police behavior and patterns of law enforcement changed with the officer's working conditions and duty assignments. Or, in his words, that "the strength of the lenses may be weaker or stronger depending on certain conditions."[329] Thus, procedural regularity in law enforcement was frustrated both by the ways in which the situational environment of policing affected police behavior, generally, as well as how the variation across types of environments affected specific patterns of law enforcement.

For Skolnick, the police officer's "working personality" was the product of three key elements present in police work: danger, authority, and efficiency. While danger and authority were the principal variables that were unique to police work, they were compounded by a societal and institutional demand for workplace efficiency. Skolnick summarized the development of the officer's working personality like this:

> The police officer's role contains two principal variables, danger and authority, that should be interpreted in light of a "constant" pressure to appear efficient. The element of danger seems to make the police officer especially attentive to signs indicating a potential for violence and lawbreaking. As a result, the officer is generally a "suspicious" person. Furthermore, the character of police work makes an officer less desirable than others as a friend, because norms of friendship implicate others in the officer's work. Accordingly, the element of danger isolates the police socially from that segment of the citizenry that they regard as symbolically dangerous and also from the conventional citizenry with whom they identify.[330]

Significantly, the interaction between authority, danger, and efficiency both creates as well as ratchets the officer's working personality. "The element of authority reinforces the element of danger in isolating the police," Skolnick wrote.[331] Likewise, the perception of danger "undermines the judicious use of authority."[332] Consequently, in Skolnick's view, more pressing than the problems of

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[325] Skolnick, *Justice Without Trial*, 23.
[326] Skolnick, *Justice Without Trial*, 25.
[327] Skolnick, *Justice Without Trial*, 39.
[328] Skolnick, *Justice Without Trial*, 39.
[329] Skolnick, *Justice Without Trial*, 39.
[330] Skolnick, *Justice Without Trial*, 40-41.
[331] Skolnick, *Justice Without Trial*, 41.
[332] Skolnick, *Justice Without Trial*, 41.

fairness and effectiveness in law enforcement were "the conditions under which the police, as authorities, may [feel] threatened."[333] Indeed, attention to the police officer's working personality revealed, among other things, that "deny[ing] recognition of the officer's authority ... stresses their obligation to respond to danger." The complimentary and reciprocal relationship between danger and authority thus presented not only the greatest challenge for reforming American policing practices but also, in Skolnick's estimation, for squaring policing with the democratic rule of law.[334]

The perception of danger could not be more central to Skolnick's understanding of the dilemmas of law enforcement in a democratic society. In his words, "the *raison d'etre* of the police officer" arose from "the threat of violence and the possibility of danger to the community."[335] "Police officers, because their work requires them to be occupied continually with potential violence," Skolnick observed, "develop a perceptual shorthand to identify certain kinds of people as symbolic assailants, that is, as persons who use gesture, language, and attire that the police have come to recognize as a prelude to violence."[336] The practical effect of this disposition was to see the world in terms of regularities and irregularities, order and disorder, of persons who 'belong' and those who don't, things that 'look right' and things that do not look right. In short, danger fomented within the police officer's working personality a tendency toward constant suspicion of perceived outliers, deviants, and others; it "require[d]" the police officer "to live in a world straining toward duality, and suggesting danger when 'they' are perceived."[337]

While the association of otherness with danger risked reifying social stereotypes as causes for legal intrusion, the centrality of danger to the officer's working personality posed two complications for organizational management as well. The dangers of police work, in Skolnick's words, "not only draws police together as a group but separates them from the rest of the population,"[338] on the one hand, while "frustrate[ing] procedural regularity,"[339] on the other. Put a different way, that the officer's working personality was animated by a sense of constant existential threat caused him to feel removed from the rest of society, an experience of social isolation that alienated them "in two directions" by distancing the officer both from the symbolic assailant by whom he was constantly besieged as well as the "conventionally respectable (white) citizenry" who were unaware of and unable to identify and apprehend that assailant.[340]

Organizationally, the difficulty that follows is twofold. First, because of their social isolation police establish a sense of social solidarity that is unique amongst themselves. That solidarity encapsulates police as a profession, but its intensity is conditioned by the particular dangers present in their different duty assignments. By implication, second, the authority that police officers enjoy – and that is necessarily conditioned by those duty assignments – "becomes a resource to reduce perceived threats rather than a series of reflective judgements arrived at calmly."[341] "As a result," Skolnick concluded of the police officer's working personality, "procedural requirements take on a

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333 Skolnick, *Justice Without Trial*, 41.
334 Skolnick, *Justice Without Trial*, 62.
335 Skolnick, *Justice Without Trial*, 42.
336 Skolnick, *Justice Without Trial*, 42.
337 Skolnick, *Justice Without Trial*, 42.
338 Skolnick, *Justice Without Trial*, 49.
339 Skolnick, *Justice Without Trial*, 61.
340 Skolnick, *Justice Without Trial*, 50.
341 Skolnick, *Justice Without Trial*, 62.

'frilly' character, or at least tend to be reduced to a secondary position in the face of circumstances seen as threatening."[342]

Skolnick's sociological perspective of policing bears on the Commission's recommendations in at least two distinct ways. First, the Commission's desire to foster mutual identification between police and the communities they serve is hindered, if not altogether jettisoned, by the officer's working personality. To be sure, the Commission proffered that desire as a normative ambition. Communities should feel that the public officials entrusted to protect them are fully and adequately representative of the kind and character of their own. While the Commission maintained that this shared identity ought to be substantive, and not merely a matter of keeping up good appearances, their preference for police professionalism both reduced that substantive ambition to precisely a function of nominal appearance and failed to capture the unique demands upon police that stymied the co-identification they sought after. Put a different way, in addition to the internal inconsistencies of their own recommendations, the cognitive propensities of police officers themselves complicated the promise of the police and the public forming a shared substantive identity. Ordinary citizens did not see the world the same way as the police, said Skolnick, and police experienced the world differently than ordinary citizens. The social isolation and internal solidary that ensued thus at the very least complicated one of the Commission's more ambitious goals.

Second, that the constitutive elements of the officer's working personality – danger, authority, efficiency – work to "frustrate procedural regularity" strikes at the very core of the Commission's orientation toward procedural reform. Skolnick's study helps to explain how "the social environment of police affects their capacity to respond to the rule of law."[343] Beyond merely complicating the possibility of solidarity between the police and public, the combination of danger and authority lead police officers to prioritize threats, not policies. The Commission's goal of centralized control and clearly articulated rules for guiding police conduct would, in light of the sociological reality of police work, be "reduced to a secondary position." That reduction calls into question the promise and efficacy of procedural reform in the first place. Moreover, Skolnick's observation that "operational law enforcement could not be understood outside [s]pecial work assignments" further complicates the Commission's penchant for a specialized division of labor in American police departments. In the Commission's view, police departments ought to be divided into a complex of specialized units that were each responsible to a singular, central administrator. Yet the working conditions that are unique to each 'special work assignment' affected the officer's working personality differently. As a result, the disparate types of threat and experiences of danger across these duty assignments could not be captured by the uniform set of policies and procedures that the Commission hoped would regulate police conduct.

Wilson and the Effects of Political Culture on Police Style

If Skolnick's study of the police working environment revealed the extent to which the cognitive and behavioral tendencies unique to law enforcement officers challenged the Commission's assumptions about community cohesion and procedural reform, a later study by James Q. Wilson

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[342] Skolnick, *Justice Without Trial*, 62.
[343] Skolnick, *Justice Without Trial*, 40.

would go on to complicate the Commission's legalistic model of police governance. Although the Commission sought to insulate law enforcement from local politics by distancing public oversite and depositing control within each department's chief administrator, Wilson's *Varieties of Police Behavior* paid careful attention to the ways in which styles of police administration were either augmented or hindered by local and municipal politics. In short, Wilson showed that the Commission's preference for insular police administration belied the effects of political culture on the enterprise they sought to improve. Contra the Commission, Wilson argued, formalizing departmental policies could not occur in the vacuum of the precinct.

Varieties of Police Behavior developed an important typology for understanding different styles of policing and their attendant forms of organizational management. Unlike the Crime Commission, which took the two primary functions of the police to be law enforcement and community service, Wilson drew a sharper distinction between law enforcement, on the one hand, and order maintenance, on the other. For him, the law enforcement function was of little intrigue. It was what the police did "when there is no dispute."[344] Enforcing the law was a matter of fact, it involved questions of guilt or innocence, which in Wilson's view was an empirical problem that required hardly any discretionary judgement. Order maintenance, on the other hand, was a question of blameworthiness, "over what is 'right' or 'seemly' conduct." Such conduct did not rise to the occasion of legal wrongdoing as much as it "disturbs or threatens to disturb the public peace."[345] Wilson thought the police were better understood by paying attention to their order maintenance function than their law enforcement function because it exemplified those qualities that set the occupation of policing apart from any other: "sub-professionals, working alone, exercis[ing] wide discretion in matters of utmost importance (life and death, honor and dishonor) in an environment that is apprehensive and perhaps hostile."[346] In the absence of apparent legal wrongdoing, which Wilson argued compromised much of police work, the police officer "approaches incidents that threaten order not in terms of enforcing the law but in terms of 'handling the situation.'"[347]

Like the Commission, Wilson was attuned to the importance of police discretion. Yet by defining the functions of police in terms of law enforcement and order maintenance – and by observing how order maintenance tended to predominate the enterprise of policing – *Varieties of Police Behavior* was able to show not only how the discretionary authority of police officers was controlled and managed differently according to the stylistic preferences of each department's chief administrator but also how those preferences were shaped and conditioned by each locality's political culture. To that end, Wilson discerned three distinct patterns with which police departments put those functions into effect: the watchman style, legalistic style, and service style.

Briefly, whereas under the watchman style police emphasize order maintenance as their principal function and "judg[e] the seriousness of infractions less by what the law says about them than by their immediate and personal consequences,"[348] the legalistic style is the opposite, treating "commonplace situations as if they were matters of law enforcement" and acting as if "there were a

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[344] James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (Cambridge: Harvard University Press, 1968), 17.
[345] Wilson, *Varieties of Police Behavior*, 16.
[346] Wilson, *Varieties of Police Behavior*, 30.
[347] Wilson, *Varieties of Police Behavior*, 31.
[348] Wilson, *Varieties of Police Behavior*, 141.

single standard of community conduct—that which the law prescribes."[349] Somewhere in between these two approaches, the service style "take[s] seriously all requests for either law enforcement or order maintenance (unlike police with a watchman style) but [is] less likely to respond by making an arrest or otherwise imposing formal sanctions (unlike police with a legalistic style)."[350] In short, it is a style of policing that intervenes "frequently but not formally."[351]

More will be said about the consequences and implications of these different styles in the following chapter. For now, however, what is important to note is not so much the effects of each style but the forces that bring such styles about. In Wilson's words:

> the police are in all cases keenly sensitive to their political environment without in all cases being governed by it. By sensitive is meant that they are alert to, and concerned about, what is said about them publicly, who is in authority over them, how their material and career interests are satisfied, and how complaints about them are handled. ... To be governed means that the policies, operating procedures, and objectives of the organization are determined deliberately and systematically by someone with authority to make these decisions.[352]

Police policies were in most cases, Wilson observed, "determined by the police themselves and without any deliberate or systematic intervention by political authorities."[353] There were some exceptions to this rule, but on the whole the style embodied by a particular police department did not hinge, as some might expect, on direct political or public pressure. Instead, the emergence of different styles of policing was explained by more general community interests, attitudes, and expectations. Wilson referred to this influence as a community's political culture, which he defined as "those widely shared expectations as to how issues will be raised, governmental objectives determined, and power for their attainment assembled."[354] To put the point more forcefully political culture consisted in, said Wilson, "an understanding of what makes a government legitimate."[355]

While *Varieties of Police Behavior* presented the influence of political culture in somewhat vague, amorphous, and at moments grand terms, its effect on policing hinged on the partisan character and intensity of local politics. "The more partisan the political system," Wilson explained, "the more politicians represent geographic constituencies, and the more nonprofessional the executive head of government, the more likely the city will have a political culture favorable to the watchman police style."[356] Conversely, those cities with "nonpartisan officials" and that centralized authority in a "highly professional city manager" were more likely to enjoy a political culture that favored the legalistic police style.[357] City managers were "buffer[s] between political pressure and police administration," which

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[349] Wilson, *Varieties of Police Behavior*, 172.
[350] Wilson, *Varieties of Police Behavior*, 200.
[351] Wilson, *Varieties of Police Behavior*, 200.
[352] Wilson, *Varieties of Police Behavior*, 230.
[353] Wilson, *Varieties of Police Behavior*, 230-31.
[354] Wilson, *Varieties of Police Behavior*, 233.
[355] Wilson, *Varieties of Police Behavior*, 233.
[356] Wilson, *Varieties of Police Behavior*, 272.
[357] Wilson, *Varieties of Police Behavior*, 272.

freed police of special-interests and catered to the sort of distanced, insulated law enforcement championed by the Commission.[358] Partisan local officials, on the other hand, engender inconsistent police administration that either reduced the police to "an instrument of party control" or encouraged sporadic patterns of law enforcement that were the "product of police inclination."[359] Though admittedly crude, Wilson found support for the contingent impact of political culture on policing style in the arrest rates for law enforcement versus order maintenance situations in each of the cities he studied. This is why Wilson claimed it exerted an indirect rather than deliberate pressure on policing.

Johnson's Crime Commission was not blind to the empirical reality that different localities approach matters of criminal justice differently. Indeed, they say in the introduction to their report that American criminal justice is "not a monolithic, or even a consistent system" and that no two jurisdictions "operate precisely alike."[360] *Varieties of Police Behavior* certainly confirms that observation. However, it also challenges the normative vision the Commission sets out for police governance. Centralized control and police professionalism were both at the mercy of local political officials. While more developed urban municipalities might have been more amenable to employing a city manager, and therefore to achieving the dual goals of distancing police from the wayward proclivities of local politics and enhancing police professionalism, those localities that elected officials based on partisan preferences were not. The implications of this departure are twofold. First, it meant that the Commission's vision for police governance was unlikely to be achieved in a vast majority of American police departments and agencies that served small, local communities—those areas that embodied a political culture of partisanship. As a result, it meant that uniform law enforcement – policing that was fairly, effectively, and equally administered by each department – was a false hope precisely because of the ways in which local political culture effected the style of police administration, and the ways in which that style effected rates of arrest and police intrusion.

Bittner and the Institutional Independence of Law Enforcement

Egon Bittner's *The Functions of the Police in Modern Society* is a sociological study of a different sort than Skolnick's and Wilson's. Unlike *Justice Without Trial* and *Varieties of Police Behavior*, Bittner did not study the police as a participant-observer, nor did he study any particular police department. Yet, like those studies, *The Functions of the Police in Modern Society* takes up concrete dilemmas of policing in practice, what he referred to as "reality conditions and practical circumstances,"[361] in order to discern the extent to which the "programmatic idealizations" of police reform aligned with the actual role the police had taken on in modern society.[362] In Bittner's words, the goal of his project was to "elucidate the role of the police" in two ways: first, "by reviewing the exigencies located in practical reality which give rise to police responses," *and* second, he added with emphasis, "by attempting to relate the actual

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[358] Wilson, *Varieties of Police Behavior*, 258.
[359] Wilson, *Varieties of Police Behavior*, 246-47.
[360] Crime Commission Report, 70.
[361] Egon Bittner, *The Functions of the Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models* (Chevy Chase: National Institute of Mental Health, 1970), 5.
[362] Bittner, *The Functions of the Police in Modern Society*, 4.

routines of response to the moral aspirations of a democratic polity."[363] Thus did he situate the tension between democracy and policing front and center.

Bittner produced his monograph under the sponsorship of the National Institute of Mental Health as part of their Center for Studies of Crime and Delinquency. It was not intended as an official government document that reflected the positions or views of the NIMH.[364] However, this does mean that it was intended for a different audience than Skolnick and Wilson. In tone, structure, and method, Bittner's study is far more matter of fact, awarding little time to the academic's proclivity for subtlety and nuance, and making short shrift of those academic abstractions and popular polemics that he saw as both patently obvious and analytically uninstructive. Throughout the monograph, Bittner is contemptuous of those 'theoreticians' and 'jurists' who offer up diagnoses of and prescriptions for police reform without ever questioning "the pretense of understanding and agreement" regarding the role of the police.[365] In his view, the common wisdom that understood the role of the police to "center around law enforcement, crime control, and peacekeeping" lent itself as a basis for both "polemic purposes" as well as "praise of the police."[366] That the baseline understanding of the role of the police in modern society could produce such radically opposite interpretations meant that it was both an analytically bankrupt and programmatically uninstructive framework.

Hence why most readers remember Bittner for his claim that "the capacity to use force [is] the core of the police role."[367] What united all aspects of police work, Bittner argued, was their license to what he called "non-negotiable coercive force."[368] The traditional framework that understood the police role as that of law enforcement, crime control, and peacekeeping was inadequate in part because it was disunified. Not all peacekeeping activities involved crime control, and not all crime control activities involved law enforcement. This much was taken for granted by Skolnick and Wilson as well. Yet precisely because this understanding was schematic, Bittner argued, it could not identify the common core to all policing activities, regardless of whether those activities fell into the categories of peacekeeping, law enforcement, or crime control.

"It makes much more sense to say," Bittner claimed, "that the police are nothing else than a mechanism for the distribution of situationally justified force in society."[369] Any and every time the police are called upon, the result may be legitimate violence. Bittner explained this by probing, among other things, what civilians sought to accomplish through the idiom of 'calling the cops.' "The role of the police," he said in summary, "is to address all sorts of human problems when and insofar as their solutions do or may possibly require the use of force at the point of their occurrence."[370] This is a definition of police that calls into question norms of legitimacy and legality, both of which will be pursued further in chapter three and four.

For now, however, it is important to see that Bittner's understanding of the police role is powerful not only due to its analytical clarity and topical importance but also because of its detachment from judicial oversite. While his chapter dedicated to the use of force raises the provocation that "the

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363 Bittner, *The Functions of the Police in Modern Society*, 5. Emphasis in original.
364 Bittner, *The Functions of the Police in Modern Society*, front matter.
365 Bittner, *The Functions of the Police in Modern Society*, 2.
366 Bittner, *The Functions of the Police in Modern Society*, 2.
367 Bittner, *The Functions of the Police in Modern Society*, 36.
368 Bittner, *The Functions of the Police in Modern Society*, 46.
369 Bittner, *The Functions of the Police in Modern Society*, 39.
370 Bittner, *The Functions of the Police in Modern Society*, 44.

frequently heard talk about the lawful use of force by the police is practically meaningless,"[371] this argument is predicated on his view from an earlier chapter that emphasized the "institutionalized segregation of the police from the courts."[372] Contrary to the appearance that "judges have become the custodians of the legality of police procedure," Bittner argued, "nothing could be farther from the truth."[373] Not only do courts have "no control over police work," according to Bittner, they have "never claimed to have such control."[374] This is because the judge is not the policeman's immediate superior, and because the judge has little to do if the policeman doesn't go about apprehending criminals. Thus, Bittner observed, "there is nothing that prevents [the policeman] from doing what he pleases while forwarding cases on a take it or leave it basis."[375]

What Bittner was describing is both a friction endemic to the institutional relationship between the courts and the police as well as a logical predicament of police in a democratic society. Put differently, the police were functionally immune from judicial constraint because judges have no concrete enforcement power over police departments, and this was highlighted by the fact that the discretionary authority that was central to the police function blurred the boundaries of legality. Bittner concluded this point:

> Thus, the institutional independence of the police from the judiciary is ultimately based on the realization that policemen are inevitably involved in activities that cannot be fully brought under the rule of law. Only a limited set of legal restrictions can be conditionally imposed on the police which, however, still do not make it impossible for the police to proceed as they see fit. Judges do not review the cases in which these restrictions have been violated. They have resorted to simple dismissals even though this might possibly injure the effectiveness of crime control. Nothing can explain this ... except the fact that the courts are in fact powerless vis-à-vis the police establishment.[376]

Bittner's analysis demonstrates one of the Crime Commission's most significant follies. If the courts had no functional power over America's police departments, then the Commission's preference for insular police management was without any external constraint. Yet the courts figured into the Commission's legalistic framework in at least two important ways. First, the courts were to be relied upon to settle disputes over police policies made in consultation with state legislatures. Despite their belief that "every restriction that is placed on police procedures by the courts ... makes deterring or solving crime more difficult," the Commission conceded, begrudgingly, that "police procedures must be controlled somehow."[377] That 'somehow' rest not in the courts, necessarily, but in statutory guidance offered by state legislatures as well. Legislating police policy could only be "properly struck," however, in combination with police administrators and, where both fell short, "court review then

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[371] Bittner, *The Functions of the Police in Modern Society*, 38.
[372] Bittner, *The Functions of the Police in Modern Society*, 31.
[373] Bittner, *The Functions of the Police in Modern Society*, 25.
[374] Bittner, *The Functions of the Police in Modern Society*, 25.
[375] Bittner, *The Functions of the Police in Modern Society*, 27.
[376] Bittner, *The Functions of the Police in Modern Society*, 34-35.
[377] Crime Commission Report, 244.

proceeds under more enlightening circumstances."[378] Thus were courts intended to help guide the construction of police policy and offer an external check on police procedures when police administrators and state legislatures disagreed.

The courts were also presented by the Commission as the public's forum in which to contest the propriety of police conduct. Because civilian oversite authority was denied on the grounds that most civilian complaints against police conduct did not rise to the level of criminal wrongdoing, the Commission reasoned, courts provided ample opportunity for oversite in those cases that trigger criminal action. "Going beyond the established legal procedures" would be unreasonable, the Commission argued, for it would "single out the police as the only agency that should be subject to special scrutiny from the outside."[379] Police were not spared of all scrutiny, according to this view, by virtue of the "established legal procedures" that allowed civilians to contest police wrongdoing that qualified as criminal in a court of law. The courts were thus configured in the Commission's model of police governance as constraining police procedure on the front end and checking police criminal misconduct on the back end. Even if taken on their own terms, such judicial constraints were likely inadequate. After Bittner, however, they were revealed to be wholly vacant.

IV. BEYOND THE BOOKS: TWO TAKES ON THE SCHOLARSHIP

So, what instruction does this scholarship offer for the history of police reform – and police discretion – in the United States? There are at least two ways of beginning to answer that question. The first is to consider the ways in which the insights from that academic literature re-emerged in Obama's Task Force report. That the central theses from the sociological literature of the 1960s and 1970s appear to inform Obama's policy proposals may signal the special importance and lasting power of decentering the problem of police discretion. Indeed, that Obama's Task Force advanced a political model of police governance that prioritized public input in police policy is itself a form of decentering the Crime Commission's vision for centralized control.

Alternatively, a second way is to consider the lack of fit between the scholarship's observations and Obama's normative framework for policing in a democratic society. Even if the problems of urban policing in the twenty-first century appear informed by the scholarship that pursued the Crime Commission's research agenda, the ultimate conclusion at which Obama's Task Force arrived – that policing presents a fundamental question of political legitimacy and therefore requires public input and oversite – is not a natural extension of that literature. For all the empirical and organizational richness those studies offered, policing was never cast as a political problem.

In short, making sense of that scholarship's impact on the trajectory of police reform requires that we observe both what it added and what it ignored. Significantly, as well, it requires attending to the implications of those exclusions.

Take One: A Primer for Obama's Task Force

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[378] Crime Commission Report, 247.

[379] Crime Commission Report, 265.

From the ambitions of procedural regularity and community trust, to centralized control and judicial oversite, crime deterrence and preventative patrol, the literature that emerged in the decade following the publication of the Commission's final report challenged nearly every one of the central assumptions of and policy proposals for policing in modern society. Despite these challenges, however, the Crime Commission's influence on the trajectory of police reform, as we saw in the previous chapter, persisted well into the new millennium.

The sociological literature on policing that emerged in the decade following the Crime Commission revealed the limits of the Commission's legalistic model of police governance in at least three ways. First, per Skolnick, we learned that the police officer's "working personality" both frustrated procedural regularity and socially isolated the police officer from the civilian world. As a result, the Commission's goals for centrally constellated, rule-bound police management and co-identification between the police and the public were thwarted by the occupational pressures unique to the police officer's working environment. Second, per Wilson, we learned that local political culture influenced the types of crimes that would be enforced and the style of police management that would animate the organization. By implication, the Commission's goal for uniform law enforcement and centralized control were shown to be inattentive to the effects of local politics on police behavior. Finally, per Bittner, we learned that the legal purview of the judicial system is at best conditional over policing in practice, rendering the police institutionally independent of the judiciary. Thus, the Commission's concern that the courts stymie law enforcement's ability to ferret out crime was at best misplaced and at worst hollow hand-waving.

One way of understanding the arc from the Crime Commission to the Task Force is to note the ways in which the insights from this literature are baked into the assumptions and recommendations of the latter. For instance, Skolnick's insistence that police work molded the officer's "cognitive propensities" is instantiated in at least two distinct ways. On the one hand, the guardian mindset that the Task Force sought to inspire was juxtaposed against the "warrior cop." Where the warrior mindset was predicated on an image of police as crime fighters, the guardian envisaged a caretaker's mindset, capable of force if needed but oriented toward de-escalation rather than combat. The former is a figure captivated by constant danger and suspicion, the latter by his trust and confidence in the community. On the other hand, those same cognitive propensities generated a matrix of shorthand queues on which officers relied to perceive dangerous situations. For the Task Force, the same shorthand queues took on the language of "implicit bias" that fomented racial discrimination and thus problematic policing practices. By recommending implicit bias training and adopting a guardian mindset, the Task Force can thus be understood as attending to the pressures and realities of the police officer's "working personality."

The influence of Wilson's *Varieties of Police Behavior* is less direct but equally pressing. Although Wilson did not have much to say about the normative role of local politics in law enforcement—even if he does seem partial to centralized control by way of city managers—his observations on the effects of local politics on police priorities seems to be both taken for granted and emboldened by the Task Force. Wilson demonstrated, among other things, that police management did not take place in the vacuum of the precinct. Likewise, the Task Force encouraged broad community engagement and oversite in police business. This is, of course, central to the political model of police governance that the Task Force advised. In part, however, we might also say that Wilson's study showed the impurity of insular police management, which therefore underpins the idea of popular police governance.

The Task Force seldom, if ever, appeals to the role of the judiciary in twenty-first century policing. Aside from a single action item regarding "youth courts," an armature of restorative justice that aims to remedy juvenile behavior without punitive legal intervention, the very idea of the judiciary is absent from their final report. This paucity is evidence of the Task Force's break with twentieth century legalism. It is also evidence of Bittner's influence on our contemporary understanding of 'the function of police in modern society.' In other words, Bittner's observation of the institutional independence of the police not only flags the Commission's remarks on the courts, it also casts in sharp relief the gulf separating the two presidential inquiries of American policing. Indeed, democratizing law enforcement is an appreciable departure relative only to the insular, legalistic model championed by the Johnson administration. And undergirding the very idea of insular legalism is the notion that the Courts will adjudicate the errors of the police administrator. Thus, the practical inefficacy of a model of police governance that relied on an external control without enforcement power was abandoned in favor an approach that situated the police and the public as stakeholders in the same project.

Bittner's study is also a useful analytical fulcrum for understanding how little the Task Force departed from the Crime Commission. While the broad strokes of each inquiry's normative framework envisage the relationship between the police and the public in much different ways, neither calls into question the distinctive power of police. For Bittner, what made police unique was their use of non-negotiable coercive force. Any situation in which police are involved can and likely will, Bittner suggested, end in some use of physical force. That the police enjoy the greatest (domestic) share of the state's monopoly over legitimate violence was the hallmark of police in modern society, and this is an assumption that remains unchallenged by Obama's Task Force.

Take Two: Reifying Judicial Supremacy

The scholarship that pursued the Crime Commission's research agenda for studying the organizational effectiveness of America's police departments only answered half the question. While the focus on police officers in place of police departments highlighted important limitations of the Crime Commission's vision for centrally administered law enforcement, neither Skolnick, Wilson, nor Bittner pursued the second half of the Commission's question, which asked whether informal departures from formal policy and procedures were 'desirable.'[380] In part, this is because each of these studies remain wed to a legalistic model of police governance even as they complicate its practical efficacy. In part, this is because none of these studies poses a question of political legitimacy in quite the way we saw from Obama's Task Force. Put differently, to ask whether informal departures from formal structures is desirable is a normative question, and the scholarship on the organizational management of police departments largely shied away from making normative political claims.

As a result, the essential political character of police policy embodied by the Obama Task Force is not well at home in any of these studies. Of the three, *Varieties of Police Behavior* comes the closest, but Wilson was more concerned with developing a descriptive typology for understanding the causes and effects of police service style than staking out a normative position on the fundamental political question of who is best fit to decide questions of police policy. Indeed, if anything, Wilson

[380] Crime Commission Report, 74.

appears sympathetic to the Commission's view that centralized administrators are best fit to determine police policy, as is evidenced by his preference for city managers to function as "buffers" between law enforcement and local partisan pressures. Wilson – the political scientist – seems most concerned with removing partisanship from the field of law enforcement, animated by a principle of efficiency and a goal of police professionalism. Hence why his study considered the ways in which local politics maximized or stymied that pursuit; this is a key liberal idea (in the Millian sense of the term) but it veers carefully away from the problem of political agency. Precisely because local partisanship effects police priorities, Wilson argued, policing ought to be cabined as an administrative legal problem.[381]

So, if the question of political legitimacy is neither asked nor answered by the literature on police management, then precisely how does it contribute to the trajectory of police discretion in America? In what ways does this literature enable the disappearance of police discretion we see in Obama's Task Force even as it simultaneously pursued the Crime Commission's agenda, which was preoccupied with the problem of discretion, and avoided normative political arguments, which is the hallmark of Obama's vision of police governance? The simple answer is that by studying police officers rather than police departments, and by focusing on informal mechanisms of law enforcement rather than formal machineries, the literature set in motion a general intellectual trend that sought to decenter the question of both police discretion and police governance. Thus can, as we saw above, Obama's Task Force be read as a general extension of that literature. But that level of generality does not supply much explanatory power. It does not explain, for instance, why Obama's Task Force took the further step of politicizing police governance. Moreover, decentering police discretion does not lead by logical necessity either to the disappearance of discretion nor away from administrative, bureaucratic constraints.

The more complicated answer is that in a roundabout way the scholarship underscores the importance of two of the Commission's key operating assumptions, setting in motion a much more intricate trajectory for police discretion that would unfold largely in the Supreme Court. First, by decentering discretion the literature magnified its significance. The problem of policing in a democratic society was vitalized, in the Commission's view, by police discretion. While the Commission saw discretion as a 'necessary and inescapable' part of effective law enforcement, the scholarship showed it to be deeply at odds with the Commission's framework for centralized departmental control. This is the first roundabout: the very framework that the Commission developed in response to the problem of and tension between police discretion and democracy was shown to be operationally defunct even as the significance of police discretion was magnified.

The second roundabout appears in the way in which the scholarship re-inscribes the supremacy of the courts in marshalling police practices. The Commission quite explicitly invoked the courts as the safeguard against police misconduct, even if it is not entirely clear that they opened this channel to question the legality of departmental practices. This is a curious logical snafu in the Commission's reasoning wherein, on the one hand, they focused on police departments rather than on police officers yet, on the other hand, carved out a place for judicial oversite of police officers rather than police departments. Even if the sociological studies of police behavior, and Bittner's in

[381] To be sure, this is the orthodox understanding of Wilson's argument in *Varieties of Police Behavior*. In the next chapter, that orthodox view is challenged by attending to the normative implications of the "problem of justice" facing police officers, and Wilson's conclusion that a "single standard of justice" ought to orient and constrain police behavior.

particular, showed the judiciary's functional impotence over the police, these studies also underscore the importance of judicial restraint by virtue of ignoring the political character of police policymaking.

Put a different way, even if they showed the Commission's reliance on the judiciary to be all but hollow, by not pointing toward another viable alternative – theoretically or practically – they occasion close scrutiny of those judicial decisions regarding police behavior. Hence the scholarship's roundabout re-inscription of the importance of judicial oversite.

To be sure, neither Skolnick, Wilson, nor Bittner asserted explicitly that the courts are an effective restraint on police conduct. On the contrary, they were each in their own ways quite explicit that the courts were ineffective at this task. But they each remain committed, to varying degrees, to a legalistic model of police governance: Skolnick in his belief in the rule of law; Wilson in his persuasion for centralized administration and management; Bittner in his advocacy for police professionalism. While they may not point to the courts for surety, they also do not point fully to the public for guidance, oversite, or control either. In part, again, this is because they also avoid making normative claims about government. But it is important to note that in the absence of any viable alternative form of external constraint over policing, the implication is either an implied belief that courts have something yet on offer or risk embracing a certain view of authoritarianism. Put differently, even if the courts were not to be counted on in the way that the Commission might have imagined, they were also not to be counted out.

In order to trace the arc of police discretion from Johnson to Obama, we must therefore look to the courts, to what their decisions on police behavior accomplished, how they evaluated the legal propriety of police conduct, how they understood the purpose of policing and defined their authority by reference to the limits of constitutional legality. To better grasp how the discourse of police reform transformed from a question of legality – proffered just as much by the scholars of organizational management as by the Commission – to a question of political responsibility, we must turn now to the legal discourse that delimited police discretion in the same moment that it was being decentered. That discourse, as we'll see, precipitates an important transition from legalism, which presented the propriety of police conduct as a matter of rule-following, to legality, which sought to square police discretion with the more abstract and capacious norms and standards of legitimacy that undergird law.

CHAPTER THREE

FROM LEGALISM TO LEGALITY

But when the legalist understanding of the rule of law had to give way to the realities of twentieth-century policing, the meaning of the rule of law changed from an anti-discretion principle to a due process ideal. Due process conveyed the meaning that even if individuals in the United States were not free from the tremendous power of the police, Americans were free.

—Sarah Seo[382]

WHAT legitimates police discretion if legalism is an ineffective mode of governance? By examining the police in their working environment, the studies that sought to answer the Crime Commission's call for further research on police practice inadvertently exposed a much deeper problem attending discretionary authority. Rather than shedding light on the optimal arrangement of rules, procedures, and protocols for exercising discretion in such a way that maximized crime control while remaining consistent with the principles of a free society governed by the rule of law, studies like Skolnick's, Wilson's, and Bittner's revealed the fundamental incompatibility between rule-bound authority and the pressures of (and on) police work. Law-like rules must bind, delimit, and restrain police power. Yet a tangle of danger and authority, local politics, and institutional insularity ensnared the promise of procedural consistency and policing that simply 'followed the rules.' Do the limits of legalism that these studies put on display disclose only the inefficacy of a particular arrangement of rules and procedures? Or does that disclosure penetrate deeper than concerns over efficacy? Do those practical shortcomings, in other words, bankrupt the very legitimacy of police discretion?

The Crime Commission's legalistic model of police governance presumed that the legitimacy of police discretion depended on formal rules that could at once guide and constrain police conduct. In part, this presumption was reactive. The "discovery of discretion" that took place just prior to the Crime Commission presented the exercise of discretionary authority as the work of informal rules generated in the absence of either comprehensive departmental policies or administrative oversite.[383] In part, this presumption is fitting with the general thinking in liberal democracies that equates the propriety of everything from moral duty to political legitimacy with strict adherence to rule-following.[384] From that vantage, the Crime Commission's mixture of governance legalism[385] –

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382 Sarah Seo, "Democratic Policing Before the Due Process Revolution," *Yale Law Journal* 128 (2019): 1290.

383 Samuel Walker, *Taming the system : the control of discretion in criminal justice*, 1950-1990 (Oxford: Oxford University Press, 1993); *Cf.*, Joseph Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice," *Yale Law Journal* 69, no.4 (1960): 543-594; Herman Goldstein, *Policing in a Free Society* (Washington, D.C.: U.S. Department of Justice, 1977).

384 Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1986); Bernard Harcourt, *Critique and Praxis: A Radical Critical Philosophy of Illusions, Values, and Action* (New York: Columbia University Press, 2020); Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992).

385 Wendy Brown and Janet Halley, "Introduction," in *Left Legalism/Left Critique*, eds. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 10.

subordinating administrative state power to the reign of law-like rules – and adversarial legalism[386] – relying, if in a roundabout way, on courts to impose criminal and civil penalties against individual officers in cases of extreme misconduct – is part of a deeper ideological commitment to rule abidance and the legal process.[387] To the extent that the Crime Commission's legalistic model of police governance represents an ideological commitment to legalism, the scholarship that decentered the unit of analysis from the police department to the police officer exposed not only the practical limitations of that model but also its conceptual shortcomings. If legitimacy depends on rules and procedures, then how are we to square an authority at odds with both to the normative commitments legalism commands—liberty, equality, fairness?

To be sure, a key feature of the Crime Commission's multi-faceted brand of legalism is its decidedly liberal qualities: its axiomatic insistence on equality before the law, its balancing act between individual liberty and the demands of crime control, its attempt to dull the racially discriminatory edge of police discretion by encouraging impartiality and by wielding police power to protect and uplift political minorities. To the extent that the conceptual distinction between legalism and liberalism is essentially folded in on itself in contemporary political discourse, perhaps this reminder does not make much difference.[388] What's important is that legalism and liberalism, while close kin, do not share an identical substance.[389] That the Crime Commission collapses them into each other – a move that countless others before and after have made as well – sets the stage for treating the dilemma of legalism as one of liberalism as well—"liberal legalism," as some have described it.[390]

In principle there is no reason that legalism must require normative commitments to liberty, equality, or even fairness. Indeed, a rich literature on "autocratic legalism" shows how a shallow commitment to strict legalism foments anti-democratic abuses of power that are perfectly "legal."[391] However, precisely because these are the norms to which the Crime Commission affixes its legalistic model of police governance, that these values are jeopardized by police discretion not only raises the stakes of the problem but also calls into question the meaning of legal legitimacy itself. Put another way, once legalism is equated with liberalism—and vice versa—the shortcomings of one scuttles the other. This is what Philip Selznick meant by the "means swallowing the end" in liberal democracies and why he, perhaps rightly, bemoaned the "decay of legality to legalism."[392] By conflating the norms of legitimacy with the process of legitimation, the Crime Commission's brand of legalism—indeed, liberal legalism categorically—ramifies the incompatibilities between discretionary state authority and

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386 Robert Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2003); Jeb Barnes and Thomas F. Burke, *How Policy Shapes Politics: Rights, Courts, Litigation, and the Struggle Over Injury Compensation* (Oxford: Oxford University Press, 2015).

387 Robin West, "Reconsidering Legalism," *Minnesota Law Review* 88 (2003): 119-122; Shklar, *Legalism*.

388 See *infra* chapter one.

389 Halley and Brown, "Introduction," 6-10.

390 Harcourt, *Critique and Praxis*, 244-45; Halley and Brown, "Introduction," 4-10.

391 Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85 (2018): 545-584; Javier Corrales, "The Authoritarian Resurgence: Autocratic Legalism in Venezuela," *Journal of Democracy* 26, no.2 (2015): 37-51; Javier Corrales, "Trump is Using the Legal System like an Autocrat," *The New York Times*, March 5, 2020, https://www.nytimes.com/2020/03/05/opinion/autocratic-legalism-trump.html (last visited Feb 2, 2021); Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham: Duke University Press, 2004).

392 Selznick, *Moral Commonwealth*, 330-31.

rule-bound proceduralism such that the existence of the former displays a bald commitment to the latter as either naïve,[393] inconsistent,[394] besides the point,[395] or illusory.[396]

Both modes of attacking legalism's shortcomings, one that points to the practical failures that thwart the efficacy of rigid regulative frameworks and another that seizes upon the conceptual fault lines that splinter liberal legalism's coherence, have sustained a robust literature on the indeterminacy of rules. Legalism is an inadequate ideological framework, that literature holds, because there is no way for rules to determine in advance the correct action for officials to take in every possible situation, nor the proper way to resolve conflicts amongst the rules themselves. These dynamics of legal indeterminacy are the subject of both tedious doctrinal and elevated philosophical analysis, so much so, in fact, that one commentor has remarked that "there are now so many demonstration of this indeterminacy critique in action that it is increasingly meaningless to string cite them."[397] However tired that critique might be, it does have much to offer for understanding what is at stake in a discourse that insists at once on discretionary authority and on law-like rules to cabin it. Indeed, its philosophical investigation is the subject of the next chapter, and careful attention to a cleavage that emerged in the discourse of police discretion after the publication of the *Challenge of Crime in a Free Society*, the subject of this chapter, demonstrates why that philosophical investigation matters.

While the limits of liberal legalism inspire debate over the sustainability of a mode of governance that relies on systematizing rules for both its administration and its legitimacy, the practical shortcomings of the Crime Commission's legalistic model of *police governance* introduced a different sort of debate. Rather than legalism, police discretion motivated a debate over legality. Philip Selznick put the distinction between these concepts nicely. Whereas legality, he wrote, "refers to appropriate norms of legitimacy, regularity, and fairness," legalism by contrast, is the "mechanical or mindless following of rules and procedures."[398] The key feature that separates the two, and what gets lost once legality 'decays' into legalism, is the "regard for purposes and effects, so that the substantive aims of justice and public policy are lost to view."[399] Strikingly, the same cadre of scholars whose close studies of police practice demonstrated the weaknesses of legalism did not gravitate, as so many others did, toward the indeterminacy critique. Instead, they turned their attention to the purposes and effects of police discretion. As a result, they brought into sharp focus the substantive aims of justice that orient, or perhaps ought to orient, police policy. While a dogged commitment to legalism limits the conversation to one about the efficacy of a particular arrangement of rules, shifting the register to legality transforms that conversation into one about the very norms of legitimacy that legalism takes for granted.

The goal of this chapter and the next is to reveal the discursive regularities across three disparate collections of texts that grapple with discretionary power. In this chapter, we will focus on one of

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393 This is the essential thrust of much of the Critical Legal Studies movement. Synoptically, in their view law has no inherent value or legitimacy and instead reflects the interests of the powerful, and to think otherwise is to misapprehend legal practice.

394 This is how Robin West describes some of the faults splintering Judith Shklar's account of legalism. See West, "Reconsidering Legalism," 126-128.

395 This is how Robin West describes the impact of the "indeterminacy critique" on the legalistic commitment to the morality of rule-following. See West, "Reconsidering Legalism," 127, n.38.

396 Harcourt, *Critique and Praxis*, 245

397 West, "Reconsidering Legalism," 128, n.39.

398 Selznick, *Moral Commonwealth*, 330-31.

399 Selznick, *Moral Commonwealth*, 331.

those collections by returning to Skolnick's and Wilson's account of police discretion and asking how each attempted to plum and negotiate the meaning of legitimacy as it related to police discretion. In the next, we will examine how the Supreme Court took up a similar pursuit in the cases that made up its revered Due Process Revolution. If the Crime Commission vitalized police discretion as both "necessary and inescapable," the challenge presented to social scientists studying the police and members of the federal judiciary responsible for police oversight set about squaring those absolute values with the democratic commitments, the 'free society,' to which law enforcement was ostensibly subordinate. Despite the diversity in their perspectives, methods, and purposes, both the social scientific and jurisprudential frameworks for police discretion shift the register from legalism to legality. In doing so, both frameworks run into and up against a deep legal theoretical dilemma without resorting to high theoretical language. Hence why engaging the legal philosophy debate over the determinacy of rules will prove so important; ultimately, it will allow us to more fully understand the stakes of the problem of police discretion for a society organized under the banner of democracy and governed according to the rule of law.

II. LEGAL PROCESS AND POLICE DISCRETION: A PRELUDE TO SKOLNICK AND WILSON

Jerome Skolnick's *Justice Without Trial* and James Q. Wilson's *Varieties of Police Behavior* offer two of the most instructive accounts for mapping the transformation of the discourse of police discretion from one of legalism to one of legality. Unlike others writing in the decade following the publication of the *Challenge of Crime in a Free Society*, what sets apart Skolnick and Wilson is their attempts to make sense of police discretion as a problem of legal *authority*: to classify what kind of authority it was, to question how the demands of policing as a practice compromised its strict legal regulation, to specify the conditions upon which it was occasioned and justified, to negotiate the legitimacy of that authority within a discursive regime that remained wed to the supremacy of rules. They were not alone, of course. Police discretion was a hot topic, especially within legal academia.[400] Much of that discussion, however, focused on police discretion as a dethatched problem of administrative law and bothered little with the special regulatory challenges generated by the police working, organizational, and political environments – let alone what those special problems revealed about legitimacy and legality.[401] The tone had been set by the Crime Commission, and rehashing the familiar themes of centralized administration, internalized rulemaking, and judicial oversite dominated the literature of the day.[402]

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400 David Sklansky, "Police and Democracy," *Michigan Law Review* 103 (2004): 1736-37 (observing that "when legal scholarship on the police began to proliferate in the 1960s, much of it focused on the problem of police discretion").

401 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: University of Louisiana Press, 1969), 219 (arguing that "the constant objective, when discretionary power is excessive, should be for earlier and more elaborate administrative rules").

402 Anthony G. Amsterdam, "Perspectives on the Fourth Amendment," *Minnesota Law Review* 58 (1974); Gerald M. Caplan, "The Case for Rulemaking by Law Enforcement Agencies," *Law and Contemporary Problems* 36, no.4 (1971): 500-514; Robert M. Ingleburger & Frank A Schubert, "Policy Making for the Police," *American Bar Association Journal* 58, no. 3(1972): 307-310; Davis, *Discretionary Justice* (turning to administrative "constraints" for police discretion); Sklansky, "Police and Democracy," 1737 (arguing that "there was general agreement, too, that the principal solution [to the problem of police discretion] lay in greater judicial oversite of the police.")

Skolnick and Wilson departed from that trend in two important ways. As we saw in the last chapter, the Crime Commission's focus on police departments sparked a trend in police science that shifted the focus to individual police officers. That move revealed the weaknesses, limitations, and oversites in the Crime Commission's preference for centralized control over police conduct. But by decentering the problem of discretion from the police administrator to the police officer, many studies of police behavior narrowed the focus on police discretion such that it was understood as a problem endogenous to the street patrolman. Skolnick's *Justice Without Trial*, by contrast, demonstrated how discretion went beyond street encounters and saturated the process of criminal investigations as well. Wilson's *Varieties of Police Behavior*, on the other hand, stuck closer to the Crime Commission's departmental focus. Unlike the Crime Commission, however, Wilson's study sought to explain how discretion was exercised differently, even at the street patrol level, depending on the organizational style of the department. According to the National Research Council's survey of the literature in its 2004 report on 'fairness and effectiveness in policing,' "research on police behavior and its determinants declined after the 1970s," and the studies produced in the decade following the Crime Commission have "remained a staple of police research ever since."[403] The authors of the National Research Council report lament that the unique insights of Skolnick's and Wilson's works have been largely neglected in the literature that followed. "Most analysis continues to focus on the behavior of individual police officers," they wrote.[404]

This should give us special reason to renew our focus on what Skolnick and Wilson had to say about police discretion. The exercise of discretionary power – and its attendant problems for liberal democracy – changes depending on where one looks. A narrow focus on the conduct of individual officers will highlight, among other things, discriminatory patterns, selective enforcement, and affronts to personhood and legal protections that ensue from both. And that, it seems, is the place most have looked.[405] By shifting the gaze to criminal investigations and organizational management new stakes were revealed, each in their own ways highlighting more significant problems for the rule of law, on the one hand, and the standards of justice that inform the functions of law enforcement, on the other.[406] This makes their studies especially valuable historical and conceptual artifacts for understanding how police discretion was problematized in the 1960s and 1970s.

Yet, while Skolnick and Wilson may be the most instructive for understanding the genealogy of police discretion as an object of power, this does not mean they were necessarily the most influential figures of their time. Indeed, names like Anthony Amsterdam, Herman Goldstein, and Kenneth Culp Davis tend to predominate contemporary accounts of the history of police reform during the period

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403 National Research Council, *Fairness and Effectiveness in Policing: The Evidence* (Washington, D.C.: The National Academies Press, 2004), 23.

404 National Research Council, *Fairness and Effectiveness in Policing*, 23.

405 See, e.g., National Research Council, *Fairness and Effectiveness in Policing*, 23 (claiming that "studies of the exercise of discretion have focused almost exclusively on patrol" and that "most analysis continues to focus on the behavior of individual police officers").

406 To be sure, this is a neither clear nor exhaustive dichotomy. A robust literature that has enjoyed an especially kinetic period of recent development explores the ways in which legal doctrine enables police discretion and how police discretion is often used in ways that do not trigger legal cause at all. *See*, e.g., Devon Carbado, "From Stopping Black People to Killing Black People: Fourth Amendment Pathways to Police Violence," *California Law Review* 105 (2017). The next chapter will take up this specific aspect of the problem of police discretion in more detail.

between the Johnson and Nixon administrations.[407] What each of these figures share in common, not unlike the cadre that came before them—Jerome Hall, Joseph Goldstein, Sanford Kadish, Wayne LaFave—is the belief that robust administrative rules coupled with prompt judicial oversite was the best solution to the problems associated with police discretion.[408] They represented an extension and rearticulation of a view already widely held. They neither disrupted the legal discourse of police discretion nor advanced proposals that were all that innovative. Hence why Davis's sustained analysis of the doctrinal armatures of administrative law as they apply to policing and Amsterdam's argument in favor of police rulemaking 'stimulated' and 'overseen' by "courts enforcing constitutional law" receive so much attention—they confirm a common liberal intuition about law's ability to solve problems regarding the exercise of state power.[409]

This does not mean Skolnick and Wilson were obscure figures, either at the time or today. Both *Justice Without Trial* and *Varieties of Police Behavior* were well-received and remain widely cited to this day.[410] Both had much to say about discretionary police authority, and both privileged, to varying degrees, the rule of law in their frameworks. Yet they occupy a sort of second-string position in contemporary histories of police reform and police discretion because their accounts operate, perhaps paradoxically, at once on a slightly higher level of abstraction while also pursuing more particular questions of law enforcement than their historical counterparts' concern with street patrol could accomplish. This is especially peculiar given the fact that, unlike Amsterdam and Davis, they studied the particularities of policing from a sociological perspective, observing the police where they worked rather than opining about the development, administration, and maintenance of rules from the lectern. Where the literature is narrowly tailored to police discretion, however, Skolnick and Wilson are largely absent.[411] Conversely, where the literature is more broadly construed to the predicaments of policing in a democratic society both are usually cited, but often not for what they have to say about police discretion.[412]

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[407] These figures are centered in the accounts offered in, for example, Walker, *Taming the System*; Sklansky, *Democracy and the Police*; and Barry Friedman and Maria Ponomarenko, "Democratic Policing," *New York University Law Review* 90 (2018): 1827-1907.

[408] Sklansky, *Democracy and the Police*.

[409] Amsterdam, "Perspective on the Fourth Amendment," 380. For a contemporary extension of his same paradigm, see Samuel Walker, "Governing the American Police: Wrestling with the Problems of Democracy," University of Chicago Law Review Forum 15 (2016): 659 (arguing that "democratic governance has failed to achieve the goal of constitutional policing, in which the police are committed to the rule of law, particularly with respect to due process of law and equal protection of the laws.")

[410] See, for instance, their prominence in the National Research Council report.

[411] See especially Walker, *Taming the System* (whose account purports to trace the "discovery of discretion" yet does not include Skolnick and Wilson).

[412] Recent scholarship, for instance, has deployed concepts like 'symbolic assailant' and the police officer's 'working personality' from Skolnick's *Justice Without Trial* to analyze contemporary trends in policing. See, e.g., Jeannine Bell, "Dead Canaries in the Coal Mines: The Symbolic Assailant Revisited," *Georgia State University Law Review* 34 (2017): 513-580; Milton Heumann and Lance Cassak, "Profiles in Justice: Police Discretion, Symbolic Assailants, and Stereotyping," *Rutgers Law Review* 53 (2000): 911-978; Kimora, "The Work of Jerome H. Skolnick: A Pioneer in Policing," *Police Practice and Research* 14, no. 3 (2013): 255-267; Meghan Stroshine, Geoffrey Alpert, and Roger Dunham, "The Influence of 'Working Rules' on Police Suspicion and Discretionary Decision Making," *Police Quarterly* 11, no. 3 (2008): 315-337. Skolnick himself appears to have favored those concepts in his later work more so than his ideal of 'order under law' that will be pursued here. See, for instance, Jerome H. Skolnick, "The Color Line of Punishment," Michigan Law Review 96 (1998): 1474-1485. Likewise, a contemporary resurgence of attention to Wilson's *Varieties of Police Behavior* examines his typology of police styles and, occasionally, the determinates of discretion, but not his normative remarks. See, e.g., John Liederbach

But their analyses of the concrete dynamics of police discretion were not merely diagnostic. They also called into question the idea of legal legitimacy and the limits of legal authority. Put a different way, they asked how police could go about their dual missions of law enforcement and order maintenance in congruence with the spirit of legality rather than simply within the confines of positive law. If the dilemma of how to proceed with legitimacy in moments for which there was no positive legal instruction was solved by simply creating more legal rules, as was the case for folks like Amsterdam, Davis, and everyone else committed to bald legalism, then what to do in the meantime? What tools were available to police administrators to control their patrolmen's discretion while rules were drafted and cases litigated? How to proceed when the ambiguities of both emerged in the ever-shifting landscape of police work? Should we accept rule-following as the moral standard best suited to evaluative the propriety of police work at all?

That Skolnick and Wilson advanced frameworks for the organizational management of police discretion as a problem of legality—a more abstract and encompassing problem that reaches beyond legalism's priority on rule-following to negotiate the norms and standards of legitimacy that underpin law—also places them in peculiar relation to the preceding cadre of scholars that studied the tense relationship between America's policing practices and its espoused democratic commitments. Jerome Hall in particular stands out, and it is important to see how Skolnick and Wilson bear the traces of his thought while also departing from his core beliefs. Indeed, the academic and intellectual gulf separating scholars of administrative and constitutional law from social scientists of police practice is cast in sharp relief by Hall's influential series of lectures delivered in 1952 and published the following year under the title *Police and Law in Democratic Society*.[413] For in those lectures Hall is at once captivated by the problem of discretion in policing, negotiating his way through the detritus of legal indeterminacy that early twentieth century legal realists had left behind, without ever giving the concrete practices and legal tensions he grapples with that name.[414]

That there is a certain intellectual kinship between Hall, Skolnick, and Wilson is not a novel observation. David Sklansky, for instance, has argued that Skolnick's emphasis on procedural regularity and the rule of law "echoes aspects of earlier arguments," including the ones advanced by Hall's lectures.[415] Indeed, according to Sklansky, Hall's lectures, in combination with William Westley's dissertation *Violence and the Police*, mark "a turning point in the scholarship about police."[416] Generally, that departure established the "tradition of independent, academic examination of American police."[417] But it also put in place a particular pattern by which to examine them. Hall and Westley

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and Lawrence F. Travis III, "Wilson Redux: Another Look at Varieties of Police Behavior," *Police Quarterly* 11, 4 (2008): 447-467; Jihong Zhao, Ni He, and Nicholas Lovich, "The Effect of Local Political Culture on Policing Behaviors in the 1990s: A Retest of Wilson's Theory in More Contemporary Times," *Journal of Criminal Justice: An International Journal* 34, no.6 (2006): 569-578. Bernard Harcourt has dedicated significant attention to the normative implications of Wilson's scholarship. Unlike the argument pursued here, however, Harcourt locates those implications in Wilson's work on broken windows policing rather than in *Varieties of Police Behavior*. See Bernard Harcourt, *The Illusion of Order: The False Promise of Broken Windows* (Cambridge: Harvard University Press, 2001).

413 Jerome Hall, "Police and Law in a Democratic Society," Indiana Law Journal 28 (1953); Sklansky, *Democracy and the Police*, 39-40 (claiming that Hall's lectures were one of "two pioneering and highly influential articles" published in 1953 that "marked a turning point in scholarship about police." The second was William Westley's *Violence and the Police*.).

414 Sarah A. Seo, "Democratic Policing Before the Due Process Revolution," *Yale Law Journal* 128 (2019): 1278 (describing Hall's lectures as attempt to "account for the discretion that he could not name.").

415 Sklansky, *Democracy and the Police*, 3.

416 Sklansky, *Democracy and the Police*, 39.

417 Sklansky, *Democracy and the Police*, 39.

highlighted, among other aspects of policing, the cleavage that separated concrete police practices from abstract democratic ideals and, in doing so, oriented the academic study of policing toward the "basic causes of those conflicts."[418] Sociologically, the insight that the police are a distinct social and occupational group with its own psychological disposition that results from pressures of police work, Sklansky suggests, is a lineage that Skolnick and Wilson share with Westley.[419] Their connection to Hall, however, follows from a different valence.

According to Sklansky, what Skolnick and Wilson share with Hall is a set of core assumptions rooted in a belief in democratic pluralism. From the perspective of democratic pluralism, interests groups are the most accurate unit of political analysis. And politics consists of the competition between them. The central themes at work in that framework, Sklansky notes, are "a distrust of mass politics, a pre-occupation with social stability and the avoidance of authoritarianism, and a focus on group competition rather than reasoned discourse as the engine of democracy."[420] Importantly, what sustains the political scheme animated by those themes is the rule of law. In Sklansky's words, "the whole system of interest-group competition made sense only if government involved something more than officials acting on their arbitrary whims."[421] Skolnick's goal of establishing "order under law" is thus explained, argues Sklansky, by pluralism's wariness of mass politics and priority on the rule of law, which are also key aspects of Hall's lectures.[422] Likewise, Wilson's outright rejection both of community control over policing and of reforms that sought to redesign policing's institutional armatures are the culmination of his "thoroughgoing pluralist" commitments.[423] Hall's lecture express a similar commitment to a type of institutional settlement.

The traces of democratic pluralism certainly appear throughout Skolnick's and Wilson's works. But that is not an adequate explanation of the ways both of them go about legitimating police discretion. Pluralism's heavy reliance on the rule of law raises a fundamental question regarding precisely what the rule of law entails. Focusing, as Sklansky does, only on the political features of pluralism—its aversion to participatory politics, its premium on group competition, its desire for social stability, its confidence in institutional arrangements—elides the shifting terrain of legality that destabilizes the glue that holds all of those beliefs together: the rule of law. Put another way, pluralism is a theory of politics but not a theory of law. At the time Skolnick and Wilson worked through the predicaments of police discretion, legal discourse was in flux. Thus, even if the political desiderata of democratic pluralism are more or less constant across their accounts, the concept of legality is not. Indeed, by departing from the legalist commitment to strict rule-following, Skolnick and Wilson, each in their own ways, adjusts the valance of legal discourse in their pursuit of a political scheme capable of sustaining pluralist ideals. Significantly, those adjustments also follow another pattern instantiated in Hall's lectures. Rather than pluralist politics, that pattern entails a commitment to a legal process that relies, on the one hand, upon institutional settlement and clear rules to determine the legitimacy of official conduct and, on the other hand, legal principles to close the gaps that might emerge between rules. Thus another reason to reconsider Hall's influence upon Skolnick and Wilson.

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418 Sklansky, *Democracy and the Police*, 40.
419 Sklansky, *Democracy and the Police*, 40.
420 Sklansky, *Democracy and the Police*, 6.
421 Sklansky, *Democracy and the Police*, 44.
422 Sklansky, *Democracy and the Police*, 44-45.
423 Sklansky, *Democracy and the Police*, 53, 54-55.

Hall's lectures have undergone something of a revival in recent scholarship on democracy and policing thanks to Professor Sarah Seo's careful and illuminating analysis.[424] According to Seo, Hall's lectures are a special case study in mid-century thought on democracy, police, and the rule of law. Specifically, she argues, Hall's lectures "offer a starting point for a cultural history of fundamental principles of American law."[425] That point of departure is an endeavor to "explor[e] the *symbolic* meaning" of the legal norms animating Hall's lectures rather than the "*legal* meanings" pursued by traditional doctrinal analysis.[426] Unpacking Hall's lectures from the perspective of cultural history allows Seo to advance two interrelated claims. The first contends that Hall's lectures are motivated by a concern "to differentiate the United States from a police state when American police exercised authority in ways that were necessary for social order and yet seemed reminiscent of totalitarian police behavior."[427] At a time when the violence wrought by the Nazi gestapo haunted the Western political psyche and the United States was ensnared in the paranoid beginnings of a Cold War against the Soviets, any exercise of authority not strictly limited by and submitted to legal restraint, judicial oversite, and some sort democratic accountability smacked of totalitarianism.[428] Hence the titular "democratic society" of Hall's lectures occasioned an analysis of how policing serviced democracy and democracy reined policing, even if the mechanisms that pushed and pulled on that arrangement were deeply at odds.

The second argues that Hall's reliance on the idea of due process to sustain that cultural distinction is "representative of his generation's views on policing."[429] In fact, Hall's understanding of due process in the context of policing is so representative, Seo suggests, it provides for a more "fully coherent view of the Supreme Court's criminal procedure decisions" during the so-called Due Process Revolution.[430] Rather than a rupture, interruption, or discontinuity in American legal thought, the Due Process Revolution cases are consistent with Hall's belief that due process hinged on the sanctity of the fair trial.[431] Significantly, because Hall's lectures are, in Seo's view, "an artifact reflecting American legal culture in the mid-twentieth century," that consistency is not limited to one scholar's idiosyncrasies but is in keeping with the larger discursive regime at the time. American policing could be at once highly discretionary while also living up to its purported democratic commitments because, for the Warren Court as much as for Hall, democracy requires the "separation of magisterial and law enforcement roles," and due process is what preserved that separation.[432]

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[424] Seo, "Democratic Policing Before the Due Process Revolution."

[425] Seo, "Democratic Policing Before the Due Process Revolution,"1252.

[426] Seo, "Democratic Policing Before the Due Process Revolution,"1252. Emphasis in original.

[427] Seo, "Democratic Policing Before the Due Process Revolution," 1256.

[428] Seo, "Democratic Policing Before the Due Process Revolution,"1256; Sklansky, *Democracy and the Police*, chapter one.

[429] Seo, "Democratic Policing Before the Due Process Revolution," 1254.

[430] Seo, "Democratic Policing Before the Due Process Revolution," 1249-1250, 1296-1302.

[431] Seo, "Democratic Policing Before the Due Process Revolution," 1295-1297 (claiming that "placing *Terry* within a longer period stretching back to Hall suggests more continuity on the part of the Warren Court"). The next chapter will take up the promise of this claim in further detail.

[432] Seo, "Democratic Policing Before the Due Process Revolution," 1291-1292 (observing that the references to totalitarian states in the Warren Court's criminal procedure cases "suggest that the Due Process Revolution was not just a legal movement to reform policing" but was also, by way of Hall's lectures, part of a "cultural project" to distinguish America's democratic character by relying on "a democratic theory that accommodated discretionary policing").

Seo argues that Hall's lectures are especially valuable because they "offer a rare source for gleaning how a legal theorist thought about policing in a democratic society."[433] Hall's evolution as a legal theorist, she observes, is marked by an "apostasy"[434] from an early commitment to legal realism in favor of a "legalist tradition" that sought to carve out "a theory that might legitimize administrative governance under the rule of law" and thus provide "a middle road between the free fall of discretion and the bulwark of legalism."[435] While the Legal Process School embodied the dominant mode of thinking about this dilemma of administrative legitimacy at the time, according to Seo, Hall's lectures "hinted at a gap in legal-process theory."[436] Whereas the typical legal process theorist grappled with the compatibility of judicial and bureaucratic discretion with the rule of law, for Hall, "the police aspect of the rule of law" is "the most important level of all."[437] Yet it is unclear what sort of "gap" Hall is supposed to be hinting at. Does "the police aspect of the rule of law" reveal a conceptual shortcoming of legal process theory? Or does legal process theory fall short by not addressing the police? Do we stand to learn something new about the legal process view of legal legitimacy or might we learn something about the predicaments of policing through a legal process lens?

Unfortunately, Seo does not supply a clear answer to either of these questions. Instead, no sooner than she suggests that Hall is staging an intervention with process theorists does she move on to assess the affinity between Hall's understanding of the rule of law and the one offered by Fredrich Hayek (*not* a process theorist) in *The Road to Serfdom*.[438] Curiously, while Seo charts Hall's intellectual development as a thinker disenchanted with the promise of legal formalism to one warry of legal realism's lack of principled constraint on legal choice, Hall's significance as a legal theorist is far from clear. Indeed, Seo's analysis identifies "obvious contradictions between [Hall's] view of the rule of law in theory and rule of law in practice"[439]—an error that Seo smooths over by unraveling the symbolic meanings that supply cultural, though not legal, consistency—not exactly high praise for a legal theorist. Seo's cultural history, however, ultimately culminates with a legal-theoretical point: that legal legitimacy requires due process, realized by the separation of judicial and law enforcement functions. Is this a novel theoretical intervention? Is it merely an extension of process theory to a new subject? What sort of legal theory is this? And what are its stakes?

Seo offers a cursory overview of the legal process school that captures the conventional wisdom of its ambitions, which sought to "provide guidelines for administrative decision makers that would make their exercise of discretion 'lawlike and legitimate.'"[440] Closer inspection of the core tenets

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433 Seo, "Democratic Policing Before the Due Process Revolution," 1254-1255.

434 Seo, "Democratic Policing Before the Due Process Revolution," 1267.

435 Seo, "Democratic Policing Before the Due Process Revolution," 1269.

436 Seo, "Democratic Policing Before the Due Process Revolution," 1270.

437 Hall, "Police and Law in a Democratic Society," 144 (cited in Seo, "Democratic Policing Before the Due Process Revolution," 1270). Framing the discourse in this way calls into question what distinguishes the police from the "bureaucrats" employed by other executive agencies. For a discussion that denies that there is much of a meaningful distinction see Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage, 1980); William Kerr Muir, *Police: Streetcorner Politicians* (Chicago: University of Chicago Press, 1977). For a discussion that affirms a substantive distinction between the police and other administrative bureaucrats *see* Micol Siegal, *Violence Work: State Power and the Limits of Police* (Durham: Duke University Press, 2018).

438 Seo, "Democratic Policing Before the Due Process Revolution," 1271.

439 In Seo's words, "Hall's illustration of the rule of law in action contradicted the basic premise of the rule of law in theory," at 1273.

440 Seo, "Democratic Policing Before the Due Process Revolution," 1269 (quoting William Eskridge & Philip Frickey, "The Making of The Legal Process," *Harvard Law Review* 107 (1994): 2048).

of legal process theory, however, reveals that the contradictions and slippages in Hall's analysis are not only the result of the working out of a cultural anxiety in legal language. In addition, they are contradictions and slippages endogenous to legal process theory itself. While this calls into question the "gap" in legal process theory that Hall's lectures 'hint at'—and whether such a gap exists at all—it also attunes the analysis to the ways in which Hall's understanding of policing conflates two distinct types of legal legitimation. Once police discretion is identified as an object in plain view rather than an authority to be disavowed, however, those views of legal legitimacy are disaggregated both as a legal theoretical matter as well as a matter of justifying police discretion. That disaggregation changes what is at stake in the problem of discretion. Thus we have special reason to peak under the hood and examine the theory of law driving Hall's analysis of democracy and the police.

Whence legal process theory? What concerns motivated its formation? What is at stake in making discretion "lawlike and legitimate"?[441] According to Geoffrey Shaw, legal process theory is an attempt to respond to the challenge of legal realism, which invites jurisprudents to "explain how legal *in*determinacy can be reconciled with the rule of law."[442] By the time of Hall's lectures, the American legal realist movement had all but fully dispelled the notion that legal officials, in particular judges, mechanically apply the law to the facts before them.[443] According to the realists, legal legitimacy is not determined by a set of abstract principles but by prevailing social interests. In Scott Shapiro's words, "the realists argued that any principle could be made to fit any string of past cases" and, as a result, "formalist principles [were] mere ciphers whose primary function [was] to permit courts to reach, under the guise of deductive logic, any outcome they think best."[444] One judge might well interpret a legal standard based on its textual import, another based on its purposive intent, and neither would in principle be more or less correct that the other.[445]

While the legal realists had sufficiently tattered the façade of legal determinacy that vitalized legal formalism, the prospect of unrestrained choice (i.e., discretion) caused many, including Hall, to worry that rule of law was a mere form of words. In response, a group consisting of mostly Harvard Law faculty and visitors developed a set of materials known today as the Legal Process School. Geoffrey Shaw summarizes the import of legal process theory like this: "discretion is acceptable in the legal system if it is sufficiently constrained and responsibly exercised."[446] Predicated partly on the realist's belief that law is "sometimes indeterminate," process theory relies on "responsible judges decid[ing] cases rationally" and "explain[ing] their reasoning in writing."[447] Whereas the former requires judges to "observ[e] their institutional position with respect to the other branches of government," the latter "reflect[s] the judiciary's professional craft, rationality, and wisdom—things in which the public could place its trust."[448]

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441 Eskridge and Frickey, "The Making of the Legal Process," 2048.

442 Geoffrey C. Shaw, "H.L.A Hart's Lost Essay: Discretion and the Legal Process School," *Harvard Law Review* 127 (2013): 668. Emphasis in original.

443 Michael C. Dorf, "Legal Indeterminacy and Institutional Design," *New York University Law Review* 78 (2003): 878-89 (arguing that "legal realism rendered untenable the formalist notion that judges mechanically apply a disembodied called 'The Law'").

444 Scott J. Shapiro, *Legality* (Cambridge: Belknap Press, 2011), 259.

445 Karl N. Llewllyn, *The Bramble Bush: On Our Law and Its Study* (2d ed. 1960) (quoted in Shapiro, *Legality,* 260).

446 Shaw, "H.L.A Hart's Lost Essay," 668.

447 Shaw, "H.L.A Hart's Lost Essay," 668.

448 Shaw, "H.L.A Hart's Lost Essay," 668.

As a theory of law, the legal process consists of three basic premises. First, the legal process entails a commitment to reasoned elaboration.[449] Because "general directives" are often ambiguous and difficult to apply to specific situations, legal officials must "'elaborate the arrangement [of law] in a way which is consistent with other established applications of it' and 'must do so in the way which best serves the principles and policies it expresses.'"[450] Second, law is an institutional system that consists of rules as well as standards, policies as well as principles.[451] Whereas rules intend specific outcomes, standards "essentially delegate rulemaking responsibilities to courts, agencies, or private institutions."[452] The discretion required to carry out that responsibility is, however, limited "by an underlying 'principle'" that ensures "harmon[y] with more basic principles and policies of law."[453] Finally, the "process" of legal process theory consists of a sort of "procedure-based positivism."[454] Pursuant to this last premise, this means that "the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment."[455]

The core premises that constitute legal process theory are an attempt to extend three pre-war legal traditions to a post-war legal discourse that sought to square administrative governance, and the discretion it required, with the rule of law.[456] According to William Eskridge and Philip Frickey, the editors of *The Legal Process: Basic Problems in the Making and Application of Law*—the most influential materials associated with legal process theory originally assembled in 1958 by Henry M. Hart, Jr. and Albert M. Sacks—the main themes of the entire legal process project are "an ambitious synthesis and elaboration of the three pre-war [legal] traditions."[457] Together, the main tenets of those traditions upheld "law as policy, the importance of institutional relationships, and legitimacy based on principle and democratic openness."[458] By combining these tenets, legal process theory departs from "traditional liberal (social contract) theory," which relied on isolated, individualized man as its unit of political and legal analysis.[459] Instead, a recognition of people's fundamental "interdependence" led Hart and Sacks to view the state as responsible for "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man."[460] Hence the conventional wisdom that the legal process school is a defense of the legitimacy of the administrative welfare state.[461]

One might wonder what marks the transition from pre-war to post-war legal discourse. In large part, the simultaneous success and waning of legal realism provides an answer. The success of legal realism rests in its critique of legal formalism. By mid-century, the vision of a fully determinate,

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449 Eskridge and Frickey, "The Making of The Legal Process," 2042-2045.
450 Eskridge and Frickey, "The Making of The Legal Process," 2043 (quoting Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 165 (tent. ed. 1958)).
451 Eskridge and Frickey, "The Making of The Legal Process," 2043.
452 Eskridge and Frickey, "The Making of The Legal Process," 2043.
453 Eskridge and Frickey, "The Making of The Legal Process," 2043 (quoting Hart and Sacks, *The Legal Process*, 165).
454 Eskridge and Frickey, "The Making of The Legal Process," 2045.
455 Eskridge and Frickey, "The Making of The Legal Process," 2045 (quoting Hart and Sacks, *The Legal Process*, 715).
456 Eskridge and Frickey, "The Making of The Legal Process," 2042.
457 Eskridge and Frickey, "The Making of The Legal Process," 2042.
458 Eskridge and Frickey, "The Making of The Legal Process," 2042.
459 Eskridge and Frickey, "The Making of The Legal Process," 2042.
460 Eskridge and Frickey, "The Making of The Legal Process," 2042; Hart and Sacks, *The Legal Process,* 2, 110.
461 Seo, "Democratic Policing Before the Due Process Revolution," 1244-46.

autonomous entity called "the Law" was in tatters thanks to that critique.[462] As an attempt to move beyond the realist's implication that discretion is essentially unrestrained, it is important to see that indeterminacy is at the heart of the legal process project. Yet in precisely what relation process theory stands to legal indeterminacy is difficult to disentangle. On one hand, in keeping with the New Deal tradition, and in defense of the administrative state, process theory requires at least *some* legal indeterminacy. Otherwise discretion can't exist. On the other hand, legal indeterminacy is what prepares the ground for the totalitarian excess that captivated the American cultural psyche at mid-century.[463] If law is incomplete, it leaves open a space for unrestrained authority to rule by discretion rather than by law. The legal process was imagined to impose restraint and prevent that from happening. Process theory's relation to indeterminacy thus points in both directions.

This is a theoretical schism that is easy to miss if we focus only, as have many, on the process part of the legal process materials.[464] Indeed, even Eskridge and Frickey suggest that, as a legal philosophy, legal process is "epitomized" by the claim that "the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment."[465] To be sure, the "process" of legal process theory accomplishes several things. For instance, it "defines the roles and duties of different institutions," and, in so defining, "provides mechanisms for controlling discretion."[466] Consequently, it renders a "principle of institutional settlement" fundamental to law's legitimacy.[467] In Hart's and Sacks's words, that principle is "the central idea of law."[468] It also generates a theory of legal obligation. "Decisions which are the duly arrived at result of duly established procedures of this kind," wrote Hart and Sacks, "ought to be accepted as binding upon the whole society unless and until they are changed."[469]

Despite the centrality of process to legal process theory, this "flattened" theory of law belies the two other essential features of this mode of legal analysis, both of which appear throughout Hall's lectures.[470] As a consequence of their view of the state, Hart and Sacks understood law as "a purposive activity, a continuous striving to solve the basic problems of social living."[471] That view is also what ultimately generates the theory of "reasoned elaboration,"[472] which resolves the problem of legal ambiguity by reference to "the arrangement...consistent with the other applications of [the law]" and "the way which best serves the principles and policies it expresses."[473] So, whereas the 'process' of legal process theory resembles a sort of legal positivism, the primacy of principles resembles something closer natural law theory, or a sort of renewed formalism. Thus have many pointed to the intellectual

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462 Seo, "Democratic Policing Before the Due Process Revolution," 1267 (claiming that legal process reformers hoped judges would "surrender[] the illusion of an autonomous law"); *Cf.*, Dorf, "Legal Indeterminacy and Institutional Design," 889.

463 Sklansky also observes that a general anxiety of totalitarianism saturated the American political consciousness during this period, but he credits that as a distinctly political anxiety and not one engendered or fomented by legal indeterminacy. See Sklansky, *Democracy and the Police* 16, 47.

464 This seems to be the primary focus of Seo's reading of the legal process school. *See id.*

465 Eskridge and Frickey, "The Making of The Legal Process," 2044-45 (quoting Hart and Sacks, *The Legal Process,* 715).

466 Eskridge and Frickey, "The Making of The Legal Process," 2044-45.

467 Eskridge and Frickey, "The Making of The Legal Process," 2044-45.

468 Hart and Sacks, *The Legal Process,* 4.

469 Hart and Sacks, *The Legal Process,* 4.

470 Eskridge & Frickey, "The Making of The Legal Process," 2045.

471 Hart and Sacks, *The Legal Process,* 166; Eskridge and Frickey, "The Making of The Legal Process," 2043.

472 Eskridge and Frickey, "The Making of The Legal Process," 2043.

473 Eskridge and Frickey, "The Making of The Legal Process," 2043(quoting Hart and Sacks, *The Legal Process,* 165).

kinship between legal process theory and H.L.A Hart, on one hand, and Ronald Dworkin, on the other.[474]

The protean quality of legal process thought that allows it be associated with otherwise incompatible thinkers like H.L.A Hart and Dworkin is perhaps owed to the fact that, in positing law as an institutional system, process theory relies on "rules and standards, policies and principles."[475] This is a curious conceptual slippage. Legal legitimacy is predicated on legal processes, which is a positivistic perspective that cabins discretion within procedure; yet, within that procedure principles are what legitimate the outcome. Indeed, basic principles are a central analytic fulcrum in legal process theory. As Eskridge and Frickey note, "basic principles and polices form the basis for extending a rule or statute to a novel context...for reformulating old rules or provisions... and even for replacing prior rules or practices with new ones."[476] If principles ground the legal system, then there is really not any room for discretion because law is fully determined by those principles.[477] For a theory that purportedly hinges on the centrality of procedure to construct a theory of legal legitimation, it certainly relies heavily on principles to determine the content of law.

The schism between rules and principles is another way to read the contradictions that pock Hall's lectures. It is also an especially productive way to read his lectures because of that schism's roots in the problem of legal indeterminacy. Indeed, throughout *Police and Law in a Democratic Society* Hall makes reference to the "sovereignty of law," a concept that suggests law is something absolute, complete, autonomous. While that combination of words is often an elevated rhetorical flourish common amongst legal theorists, it is not just fancy dicta in Hall's argument. Rather, it is the very problem that orients his entire analysis. "The paramount problem of our times," in Hall's estimation, "concerns the maintenance of world order by methods which are compatible with democratic values."[478] Though the functions of the police were a "narrow" aspect of that problem, Hall thought they were of "general significance."[479] Indeed, Hall thought that "the illegal use of physical force by officers of the law is the most dramatic exhibition of what is involved in this vital issue."[480] Maintaining order through methods consonant with democratic values is thus "epitomized," in Hall's words, "as the universal sovereignty of law."[481]

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474 For the connection between H.L.A Hart's legal theory and the legal process school, see Dorf, "Legal Indeterminacy and Institutional Design.," For the connection between Dworkin and the legal process school, see Vincent A. Wellman, "Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks," Arizona Law Review 29(1987); *Cf.*, Dorf, "Legal Indeterminacy and Institutional Design," 920-21, n171, n172 (claiming "that Dworkin's work falls within the Hart and Sacks tradition has been widely noted").

475 Eskridge and Frickey, "The Making of The Legal Process," 2043-44.

476 Eskridge and Frickey, "The Making of The Legal Process," n.81.

477 In some sense, this raises and important question as to precisely what is meant by 'discretion.' Indeed, though the strongest case for this version of the determinacy thesis is made by Ronald Dworkin, he is also careful to distinguish between three 'senses' of discretion, two 'weak' and one 'strong,' in order to support it. *See*, Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), chapters two and three. Both the determinacy of legal principles and the 'senses' of discretion will be pursued further in the next chapter.

478 Hall, "Police and Law in a Democratic Society," 177.

479 Hall, "Police and Law in a Democratic Society," 177.

480 Hall, "Police and Law in a Democratic Society," 176.

481 Hall, "Police and Law in a Democratic Society," 177.

Hall's grappling with the functions of the police in a democratic society is situated within that larger discourse about legal indeterminacy.[482] And the arguments that drive his lectures track legal process theory's confusing relationship to that problem, not only through the premium he places on due process, but also by way of the slippages between rules and principles that lead him there. In some sense, this is a subtle point to discern. Indeed, Professor Seo has good reason to read the cultural overtones of Hall's lectures as the engine driving his argument. Hall frequently distinguishes between "the police of dictatorial states" and democratic culture, values, and ethics.[483] Not once does Hall use terms like "indeterminacy." Crucially, however, he also never uses the term "discretion" even as he describes police practices that exhibit its concrete features and pose its conceptual hurdles for the rule of law. In Seo's words, "Hall grappled with the conundrum of police in a democratic society, unable to see or acknowledge that discretion, the source of that conundrum, was pervasive and unavoidable."[484] This is why Hall's lectures are valuable for understanding a discourse about police discretion that transitioned from legalism to legality: they preempt that transition. By presenting the predicaments of policing in a democratic society in relation not only to totalitarian regimes but also to the sovereignty of law, Hall's lectures invite consideration of the norms that legitimate police power rather than simply the mechanisms that can control police conduct.

A stunning paragraph at the end of Hall's first lecture demonstrates how the schism between rules and principles in the legal process framework allows Hall to disavow discretion. Here's Hall describing "the police aspect of rule of law":

> Rules of law are certain standards and commands, expressed in thousands of statutes, decisions, regulations, and in constitutions. It is important to note the interconnectedness of the entire body of legal rules. They are arrangeable in harmonious order extending from the very general propositions of constitutional law through the middle range of statutes and decisions, down to the very specific concrete applications of them by police officers. The rule concretely exhibited in the arrest of John Doe by a police officer is: If I reasonably think X's home was entered by someone intending to commit a crime there, and I reasonably think John Doe did that, it is my legal duty to arrest him. That is the specific meaning of the rule which in statutes and case law is stated in the following general terms: If a police officer reasonably thinks a felony has been committed, it is his legal duty to arrest anyone whom he reasonably believes committed the felony. And a relevant constitutional provision might be the very broad generalization, "due process." In sum, the policeman who conforms to law is the living embodiment of the law, he is its microcosm on the level of its most specific incidence. He is literally law in action, for in action law must be specific. He is the concrete distillation of the entire mighty, historic corpus juris, representing all of it, including the constitution itself. Thus, the law-enforcing activity of the policeman takes on its greatest significance not only because it is law in the concrete form in

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[482] According to Seo, Hall's lectures are situated "within this larger discourse about the legitimacy of the administrative state." Seo, "Democratic Policing Before the Due Process Revolution," 1270. The point here is not so much to raise an objection to that interpretation. Rather, it is so push it to a higher level of abstraction to see how dilemmas in the philosophy of law shaped that discourse on the administrative state.

[483] Hall, "Police and Law in a Democratic Society," 143.

[484] Seo, "Democratic Policing Before the Due Process Revolution," 1256.

> which it is experienced by individual persons, but also because the meaning and value of the entire legal order are expressed in the policeman's specific acts or omissions—so long as he conforms to law.[485]

The rule, in other words, is substantiated by a principle. On the one hand, an officer owes a "legal duty," a construction which suggests the officer has no choice. Yet, on the other hand, that duty is based on the officer's reasonable belief, a construction which entails discretion. According to Seo, "[Hall] understood warrantless arrests to conform to the rule of law because reasonableness provided a limiting principle."[486] But rules of law, Hall thought, consist of "standards" and as well as "commands." Discretion is invited by one, foreclosed by the other. Hall "failed to appreciate any difference between rules and standards when it came to policing," Seo writes, "instead emphasizing how the standard of reasonableness was crucial to the rule of law.[487] For Seo, Hall's conflation of rules and standards is a "blind spot" that allows him to "invoke a less-than-traditional view of rules and standards to justify the discretionary powers of the most authoritarian figures in American society."[488] Placed in context with legal process theory, however, that conflation is not so much idiosyncratic to Hall as it is part and parcel of process theory's attempt to ward legal indeterminacy. Indeed, if the gaps between rules are mortared with legal principles, then what looks like discretion is actually a decision already determined by law.[489]

Another example of Hall's simultaneous description and disavowal of discretion comes at the beginning of his second lecture. This time, Hall asserted that "intelligent law-enforcement," especially when "police must be selective in making arrests," "demands realistic decisions guided by democratic goals and knowledge of the facts."[490] The situation that Hall had in mind was the event of a public riot, which he thought presented the police with the unique opportunity to "demonstrate the effectiveness of democratic police methods" precisely because it was "the maximum challenge to the efficiency of his force."[491] Here, again, rules and principles collide. Whereas arrests are governed by rules that stipulate the causes for legal intrusion when public assembly turns riotous, making them "selectively" requires discretion. That those selections be "guided by democratic goals" orients the analysis back toward those 'basic principles and policies of law' that, per legal process theory, ground the legitimacy of the decision.[492]

It is productive to interpret remarks like these in Hall's lectures as part of the larger discourse about legal indeterminacy, and as part of the legal process school's attempt to justify the administrative state in particular, for at least two reasons. The first, which will be explored in more detail in the next

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485 Hall, "Police and Law in a Democratic Society," 144.

486 Seo, "Democratic Policing Before the Due Process Revolution," 1272 (quoting Hall, "Police and Law in a Democratic Society," 144).

487 Seo, "Democratic Policing Before the Due Process Revolution," 1273.

488 Seo, "Democratic Policing Before the Due Process Revolution," 1273.

489 See Ronald Dworkin, "A Model of Rules I," in *Taking Rights Seriously*.

490 Hall, "Police and Law in a Democratic Society," 149-150.

491 Hall, "Police and Law in a Democratic Society," 149.

492 To be sure, Hall's remarks call into question precisely what he means by "democratic." Seo wonderfully illustrates how Hall's use of the term evolves from and understanding instantiated by self-rule, to one crystalized in the rule of law, and ultimately to one associated with due process. See Seo, "Democratic Policing Before the Due Process Revolution," 1255-56, 1262. Because each of those meanings fits into the broader constellation of "basic principles and policies of law" that animate legal process theory, I will not explore them here.

chapter, is that it produces a genuine legal-theoretical dilemma. By oscillating between rules, principles, and procedures, legal process theory enables discretion in practice while erasing it in theory. Thus could Hall describe police practices that are textbook cases of discretionary conduct without considering it discretion. If 'basic principles' already underly rules of law, then negotiating the ambiguity of rules is a process of determining what the law—not one's individual judgement—requires. It is a properly critical question whether that argument is theoretically sustainable. But it is an argument that offers a bit more analytical purchase on the legal treatment of police discretion, especially within a due process framework.

Treating Hall's slippages between rules and principles only as a logically inconsistent, and therefore conceptually sloppy, attempt to distinguish American police from dictatorial stormtroopers produces a legal theory that is far from satisfying. According to Seo, Hall's understanding of due process hinges on the separation of the judicial and law enforcement functions. Without that separation, she argues, the integrity of America's prized fair and public trials disappears. Thus does the rule of law, for Hall and for the Warren court, transform from an "anti-discretion norm" to due process: "Due process conveyed the meaning that even if individuals in the United States were not free from the tremendous power of the police, Americans were free."[493] Maybe so. Yet, in a funny way, this cultural interpretation of a theory of law elides the fact that it is legal indeterminacy which produces the cultural anxiety in the first place. There is an incomplete push-me-pull-you dynamic at work here between concrete and theoretical concerns.

For Seo, Hall's lectures are motivated by a concrete concern—police becoming the "handmaidens of dictatorial power"[494]—and that concern tenders a legal theory that prides the partitioning of decisionmaking power in service of securing fair trials. But Hall's lectures are also motivated by a theoretical concern—the sovereignty of law—which is a concern that, for many at mid-century, licensed the sort of concrete problems so offensive to America's democratic sensibilities. Indeed, Hall himself claimed that the concrete problem of policing is part of that larger problem of securing the universal sovereignty of law. On one hand, this calls into question the complementarity and reciprocity between law and culture. Do legal ideas shape cultural values or do cultural values shape legal ideas? Surely, the dynamic is more circuitous than linear.[495] On another hand, to the extent that Seo argues a cultural anxiety of totalitarianism is inflected into a legal theory of due process, which therefore renders coherent the relationship between discretion and the rule of law, law is void of substance. As a theory of law, it's coherence is in form only. It is *literally* better living through advertising. Is due process simply a grift that defrauds civil liberties so long as Americans get their day in court? We will return to these questions in the next chapter.

The second reason for interpreting Hall's lectures in both the context of legal indeterminacy and the legal process school's response to that problem is that traces of both reappear in Skolnick's and Wilson's accounts of police discretion. The three share a core analytical feature. The problem of legal

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493 Seo, "Democratic Policing Before the Due Process Revolution," 1290.

494 Seo, "Democratic Policing Before the Due Process Revolution," 1271.

495 To be sure, Seo acknowledges, following Clifford Geertz, that cultural values are complex "webs of significance." Seo, "Democratic Policing Before the Due Process Revolution," 1252 (citing Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures* (1973), 3, 5. However, the argument that unfolds pursuant to that insight tacks linearly—e.g., that Hall's legal thought, like most Americans at mid-century, is driven by a cultural anxiety of totalitarianism. Thus the question as to whether this dynamic is a web in which Hall is enmeshed or a conceptual one-way street. The point is not that there is no conceptual room for a more circuitous dynamic; rather, the point is that Seo's analysis does not present much possibility for that room.

indeterminacy colored the backdrop of their analyses of police functions—Hall by way of the challenge of legal realism, Skolnick and Wilson by way of the limits of administrative legalism—yet none of them indulge that critique. Instead, each in their own way turns to legality, to the norms and values that law legitimates.

In so turning, the three thinkers are also separated by a core analytical feature. Whereas Hall does not name police discretion, preferring instead to "shadowbox" with it, as Seo has eloquently described his approach, by the time Skolnick and Wilson enter the conversation police discretion had been identified in plain view, both descriptively and normatively. It was, according to the Crime Commission, both 'necessary and inescapable.' While legal process theory's schism between rules and principles carves out room for discretion even as it shrouds it to the point of erasure, the 'discovery of discretion' that took place between Hall's writing in the early 1950s and the renewed interest in American policing during the mid 1960s and 1970s eased the tension. Rather than denying discretion, the challenge was to figure out how to live with it and still be true to core liberal democratic commitments.

As a result, the place of rules and principles in the legal discourse of police discretion changes. Skolnick, as we'll see, embraces a sort of soft, procedure-based positivism that bears many of the signatures of Hall's analysis. Due process, in his view, did not entail a narrow commitment to fair trials, however. Nor did it push discretion to the backburner. Rather, for Skolnick, due process highlights the predicaments of police discretion, and it is the fulcrum for transitioning away from the oppositional arrangement of law, on one hand, and order, on the other. By contrast, Wilson turns to a sort of metaphysical abstraction, not unlike Hall's policeman as law incarnate, to justify discretion. Contra Skolnick, for Wilson procedure-based positivism compromised democratic commitments to equality and fairness. In place of that scheme, Wilson advocates a renewed, single standard of justice that transforms police discretion into an expression of right rather than, as the legalist framework feared, an expression of power. Consequently, he advances a view of police discretion consonant with Hall's notion of policing guided by the "goals of democracy" rather than merely constrained by law. Thus, the schism that is at the core of Hall's argument, as we will now see, is separated out into its component parts in Skolnick's *Justice Without Trial* and Wilson's *Varieties of Police Behavior*, respectively—a separation that reveals new stakes in relationship between discretion and legality.

III. SKOLNICK AND ORDER UNDER LAW

The dilemma of balancing the "conflicting principles of order and legality," as Skolnick put it, was "epitomized in the question of police discretion." That question reduced to "whether there ought to be a loosening or tightening of restraints on the decisional latitude of police."[496] In pursuing an answer to that question in *Justice Without Trial*, Skolnick invites us to consider discretion in terms of whether it is used pursuant to authority that is supported by law. This is a different sort of question than the one that ask only whether the rules have been followed.

Crucially, for Skolnick, the police must always have some degree of decisional latitude. His analysis relies on the central assumption—what he referred to as an "extremely important jurisprudential fact"—that "it is impossible to eliminate discretion entirely from the administration of

[496] Skolnick, *Justice Without Trial*, 65.

criminal law."[497] Compared to those who came before him, Hall chief among them, this is a controversial starting point. Yet by the time of his writing the ubiquity of discretionary decision making, not just in policing but throughout the administrative state in general, had been recognized and secured as the new conventional wisdom of criminal justice.[498] Unlike the legal of scholarship of the 1950s that questioned the propriety of discretionary power as such or, like Hall, disavowed its existence, by the 1960s the sociological realities of police work had given way to a new paradigm that embraced its empirical certainty and inevitability, questioning instead the best ways discretion could be cabined, directed, and controlled.

What happened in the intervening period to occasion that embrace of discretion as an unavoidable reality of policing is an open question. The general shift in the American political landscape away from the New Deal era welfare state toward a regulative ideal and the rise of the administrative, and ultimately carceral, state is the tell for some.[499] That explanation also forms the backdrop for the reception of the American Bar Association's study that "discovered" police discretion. From that vantage, it is little wonder why the conversation spent little time dwelling over the elimination of discretion and focused instead on the ways to regulate it use.[500] If the *raison d'etre* of the state was rooted in administration, which itself requires discretion, then there is little controversy after all.

But what about the deep cultural anxiety over unbound state power? Were those fearful of the gross abuses that discretion enabled, folks like Hall for example, just paranoid? Perhaps. But one implication of the ABA's study is that it more or less normalized discretion. Jerome Hall and Sandford Kadish could warn of discretion's assaults upon the rule of law and upon liberalism because they either disavowed that it existed in practice or they outright denied that it ought to. Discretion was already widespread, the ABA study 'discovered,' yet we didn't live in a totalitarian police state! Those simultaneous realities combined with the ascendance of an administrative ideal, on one hand, and a commitment both to legalism and legal pacifism, on the other, do much to ward the anxieties about a police state. The prospect of malignant discretionary policing turned out to be benign.

Policing's malignance depends on where one looks, however. Hence the displacement of cultural anxieties of a police state with racial anxieties about who governs the police and how police control crime. The ideological legalism that informed and animated the Crime Commission's vision for police governance transcribed those anxieties into the language of rules. As a result, the quest for a more democratic policing of America – a policing that was less racially discriminatory, more deserving of the public's trust, increasingly effective at deterring crime, accountable for its missteps – was no longer a matter of substance but of efficacy. Did the rules facilitate those ends? Did the police adhere to them? Were they held accountable when they did not? When the rules didn't work as imagined, as we've seen, much of the conversation simply continued the endeavor for better rules, which often meant more rules, rather than questioning whether the framework fit the problem.

Skolnick's primary contribution to that conversation consists not so much as a novel framework for police discretion but in what he observed within the dynamics of police work. For him, evaluating the propriety of police conduct began with the question of whether the discretion police exercise was

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[497] Skolnick, *Justice Without Trial*, 67.

[498] Walker, *Taming the System,* 11-12; see also, Keith Hawkins, *The Uses of Discretion* (Oxford: Oxford University Press, 1995)

[499] Michael Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* (New York: Columbia University Press, 2007); Hinton, *From the War on Poverty to the War on Crime.*

[500] Walker, *Taming the System*; Seo, *Policing the Open Road*; Goldstein, *Policing a Free Society.*

delegated or unauthorized. Indeed, precisely because discretionary decision making had been accepted as 'necessary and inescapable' the problem, as Samuel Walker observes, "is not discretion itself, but its misuse."[501] Unauthorized discretion, as Skolnick defined it, obtained during instances in which "an official invents, claims, or usurps discretionary authority without it having been specifically delegated."[502] Unauthorized discretion was not authority that had been inherently misused *per se*. It was not a problem of using one's discretion in ways that were discriminatory, excessive, or otherwise arbitrary, even if it was certainly a pathway to such outcomes. Rather, it was a problem of administrative unclarity regarding the limits of a police officer's power and, by implication, the assaults upon the rule of law that might ensue. Whether benevolent or violent, the problem of unauthorized discretion was the same in every case: it was discretion that lacked legitimate legal and organizational backing.

By contrast, 'delegated discretion' is "clearly accorded to the police" by way of the articulated parameters of their duties. Skolnick saw that "mere delegation of authority does not appear to determine arbitrary police conduct."[503] By observing the occupational environment of policing, Skolnick found that when an officer knew the boundaries of his power under a set of defined circumstances, his conduct was "tempered."[504] However, in the face of potential danger—in those exigent circumstances for which there can be little definition—he found that police were "more inclined to resort to the use of their authority," which, not unlike the Crime Commission's view of deterrence, meant the authority of their physical presence.[505] In the eyes of the police officer "the uniform constitutes authority," Skolnick wrote, "and they are usually willing to back up a challenge with all the force they can command."[506] Thus, Skolnick concluded, the threat of arbitrary police discretion materializes in situations that can't always be captured by defined rules: "whether or not the officers have actually been delegated such authority [to use force to neutralize perceived danger] may be open to question, but it is not an important consideration for street police officers."[507]

At first glance, Skolnick's framework of delegated and unauthorized discretion accomplishes little more than underscoring the importance of administrative rules. Discretionary latitude that is clearly accorded to police officers through a series of administrative rules and guidelines constitutes legitimate authority because it is cabined by a matrix of accountability mechanisms within the department, which is ultimately accountable to the public. That it was the perception of danger which exposed the limits of this legalistic, rule-oriented view of police discretion was not necessarily a new idea. And, as we saw in the previous chapter, Skolnick certainly did not advance this observation as a critique of legalistic models of police governance. Upon closer inspection, however, Skolnick reoriented the analysis of police discretion away from the simple binarism of those legalistic models—all of which in their various ways presupposed that discretion exercised within the limits of clear administrative rules would on the whole be proper and actions taken beyond those rules on the whole improper—focusing instead on "the problems associated with delegated discretion."[508] Shedding light

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501 Walker, *Taming the System*, 4.
502 Skolnick, *Justice Without Trial*, 66.
503 Skolnick, *Justice Without Trial*, 82.
504 Skolnick, *Justice Without Trial*, 82.
505 Skolnick, *Justice Without Trial*, 82.
506 Skolnick, *Justice Without Trial*, 82.
507 Skolnick, *Justice Without Trial*, 82.
508 Skolnick, *Justice Without Trial*, 65.

on the tensions of delegated discretion, Skolnick argued, allowed for a better understanding of the dynamics and dangers of its unauthorized instantiations.

Importantly, what concerned Skolnick was not so much whether rules were effective at controlling police discretion but "the sociological significance of discretion."[509] Rather than endeavoring to "suggest[] and rationaliz[e] specific reform measures" in a fashion not unlike Amsterdam or Davis, Skolnick sought to understand the logics informing and social forces operating upon an officer's discretionary judgements made under authority that was expressly delegated to him. The clearest of administrative guidelines, in his view, did not supply a sufficient explanation for the choices police officers made within the parameters of the authority delegated to them. Rendering a choice "amongst possible courses of action or inaction," as Davis understood discretion, was not a simple matter of being "confined, structured, and checked" by administrative rule-making.[510] Actions taken pursuant to such rules, Skolnick observed, were filtered through a series of standards, criteria, and principles that were neither articulated in the form of positive rules nor amenable to the uniform delivery imagined by them. On the contrary, the use of delegated discretion was guided by each officer's conception of justice, a conception that was informed in large part by the officer's occupational environment.

Focusing on the sociological significance of police discretion entailed a different set of methodological commitments than those to which traditional legal scholars subscribed.[511] Whereas the prototypical legal scholar at mid-century – scholars like Hall, for instance – assessed the propriety of police conduct in terms of whether it remained within or breached the legal constraints governing law enforcement practices, Skolnick abandoned this mode of thought altogether. Instead, Skolnick's study of police discretion was predicated upon the assumption that "police violate rules and regulations."[512] The challenge of police discretion from the sociological perspective was to understand "the conditions under which rules may be violated with greater or lesser intensity."[513] And that challenge could only be met by studying police in their "occupational environment," without the distance and strict jurisprudential priors that buttressed the law professor's lectern.

This meant that police officers could not be fully understood as mere government agents. They were also "workers," "employees," and members of an "organization" that maintained its own "internal measures of competence."[514] Attention to the realities of police work – both in the field, as we saw in the previous chapter, as well as within the employment organization – revealed how much more complicated the "dilemma of democratic society requiring the police to maintain order and at the same time to be accountable to the rule of law" was than the binary of lawful and lawless policing contended.[515] On one hand, Skolnick observed that the police officer's "occupational environment" facilitated a "conception of the police officer as *craftsman* rather than as *legal actor*, as a skilled worker

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[509] Skolnick, *Justice Without Trial*, 65.

[510] Davis, *Discretionary Justice*, 4, 216.

[511] In fact, this is putting things diplomatically. The first edition of *Justice Without Trial* was reviewed in the pages of no less than ten American law reviews, and the reviewers – most of whom were traditional legal scholars – shared a common preoccupation with Skolnick's sociological method. Their receptions can safely be described as varying degrees of lukewarm, some taken by what they saw as a methodological novelty, others taken aback by what they saw as method with no generalizable significance.

[512] Skolnick, *Justice without Trial*, 19.

[513] Skolnick, *Justice Without Trial*, 19.

[514] Skolnick, *Justice Without Trial*, 211.

[515] Skolnick, *Justice Without Trial*, 211.

rather than as a civil servant obliged to subscribe to the rule of law."[516] On another hand, this individual conception was encouraged by the police organization's internal control structure, which "reinforce[d] the importance of administrative and craft values over civil libertarian values."[517] Those controls, Skolnick observed, were "more likely to emphasize efficiency as a goal rather than legality, or, more precisely, legality as a means to the end of efficiency."[518]

Understanding the police officer as a worker and the police department as an organization that employs and measures the competency of the officer as a worker and an employee recast the specter of totalitarianism in the image of the police as well. Whereas for Hall the fine line between democratic policing and totalitarian policing was demarcated by the separation of functions in the legal process from arrest to adjudication, for Skolnick totalitarianism reverberated as an "ideology of work."[519] Here, again, Skolnick saw the problem of police discretion as a problem not limited to state power but as a problem colored by the sociological realities of civil society. Relying heavily on the work of fellow Berkeley sociologist, Reinhard Bendix, Skolnick understood the main difference between totalitarian and non-totalitarian forms of subordination not so much in terms of arbitrary authority without legal limitation but in terms of how each approached the "managerial handling of problems."[520] "In brief," he surmised their central analytical distinction, "the managerial ideology of nontotalitarian society maximizes the exercise of discretion by subordinates, whereas totalitarian society minimizes innovation by working officials."[521] Thus, where the existence of discretion in the enterprise of law enforcement was the hallmark of totalitarianism for Hall, foreclosing the individual initiative that discretionary authority enabled and encouraged ran in face of a "democratic ideology of work" for Skolnick.[522]

Skolnick captures this tense matrix of competing ideals in a subsection of the final chapter of *Justice Without Trial*, aptly titled "occupational environment and the rule of law":

> In the same society, the ideal of legality rejects discretionary innovation by police, although the ideal of worker freedom and autonomy encourages such initiative... [T]he conflict between the democratic ideology of work and the legal philosophy of a democracy brings into focus the essential problem of the role of the police... They are legal officials whose tendencies to be arbitrary have roots in a conception of the freedom of the worker inhering in the nontotalitarian ideology of the relation between work and authority, a conception carried out in the context of police work.[523]

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516 Skolnick, *Justice Without Trial*, 208. Italics in original.

517 Skolnick, *Justice Without Trial*, 210. 'Civil libertarian values' is another way of referring to the values of legalism, or the strict circumscription of state power to law-like rules and legitimacy based on following them. The premium in this instantiation of legalism, however, is placed on freedom. Police conduct is subordinated to law-like rules, under this view, in order to establish a clear boundary beyond which the state cannot interfere with nor intrude upon an individual's exercise of liberty. For a clear distinction of the subtle variants of legalism's premiums—"liberals" from "moral conservatives" from "civil libertarians"—*see* Halley and Brown, *Left Legalism/Left Critique*, 6.

518 Skolnick, *Justice Without Trial*, 210.

519 Skolnick, *Justice Without Trial*, 208.

520 Skolnick, *Justice Without Trial*, 208 (citing Reinhard Bendix, *Work and Authority in Industry* (1963)).

521 Skolnick, *Justice Without Trial*, 209.

522 Skolnick, *Justice Without Trial*, 211.

523 Skolnick, *Justice Without Trial*, 211.

So, not only was the practical efficacy of the police officer's ability to deter crime and maintain order at odds with administrative and law-like rules, but the conflicting principled commitments between which the police officer found himself uniquely suspended meant that he could be either a competent craftsman *or* a legal actor, but rarely, if ever, both.

This methodological departure from legal strictures to social structures did not, however, mean that the normative concerns that captivated folks like Hall were erased from the picture. Indeed, as we'll see, Skolnick was deeply concerned with protecting the integrity of the rule of law. Yet, by abandoning the strict binary view of legal authority that interpreted official conduct as either lawful or lawless, legitimate or arbitrary, Skolnick was able to anatomize the systemic forces, patterns, and informal rules that governed unauthorized discretion but nonetheless threatened a democratic society governed by the rule of law. At the same time, he was also able to demonstrate how even the discretionary license accorded to police officers by administrative guidelines was not as constrained as it might appear.

The Hidden Forces of Delegated Discretion

Officers acting on the authority delegated to them, Skolnick observed, depended upon "a perception of the principles controlling the work at hand and the interplay of a number of criteria."[524] The enterprise of delegated authority in policing, Skolnick argued, was analogous to the college admission's officer:

> Such an official is delegated the authority to make alternative official decisions, such as to select some students for admission and to reject others. That this individual represents delegated authority, however, also implies that he or she must carry out discretionary decisions in line with the *standards* of the institution and the *criteria* for justifying decisions made on the basis of the principle... Given the *principle* of scholarly potential, the official must decide on the basis of relevant criteria including grades, admissions examination scores, and personal recommendations.[525]

Though a bit parochial, Skolnick argued that the analogy of the college admission's officer was instructive for understanding the often overlooked problem of delegated authority for two reasons. First, it illustrated how discretionary power is contingent upon and complicated by the standards, criteria, and principles of the institution. How are admission's criteria to be weighed and prioritized? By what standards are criteria determined and selected? What principled commitments animate the institution? And how to resolve the competitions between them? These were each questions that were left to be decided at the admissions officer's discretion. Second, it highlighted how the outcome of such decisions was not a matter of optimization but of justice. "Depending on the principles and criteria utilized," Skolnick suggested, "the official will achieve more or less justice, based on the

[524] Skolnick, *Justice Without Trial*, 67.
[525] Skolnick, *Justice Without Trial*, 66. Emphasis in original.

precept that like cases shall be treated alike."[526] That the selection and priority of criteria was a slippery business and that institutions were typically committed to more than one principle opened the door to inequities, thus creating a dilemma for the administration of justice. Justice depended, therefore, "on the commitment that the official is attempting to fulfill and the fairness with which the criteria are used."[527]

By way of the college admissions officer Skolnick was making the point that the exercise of delegated discretion presented a complex series of problems that were simultaneously pressing dilemmas of justice and underappreciated matters in the legalistic discourse of police reform. The legalism that sought to cabin, structure, and check police discretion with administrative rules and judicial oversite did not interrogate the ways in which discretion was used within those legal boundaries. Instead, the authority that was delegated to police officers by such rules was understood as presumptively legitimate. Yet, as Skolnick encouraged readers to observe, legitimate authority did not exercise itself, and the logics according to which it was exercised brought into relief first-order questions regarding equal treatment under the law and, indeed, the Law's sovereignty.

By contrast, what Skolnick defined as unauthorized discretion was not so much a range of conduct but an unlicensed use of official authority. The problem was not that unlicensed actions were problematic *per se* but that without specific authorization such actions took on an arbitrary character. This did not mean that exercises of unauthorized discretion were without pattern or pursued at the officer's whim. Rather, the arbitrary character of unauthorized discretion was owed to the lack of higher-order values—which for Skolnick were a mix of democratic values and institutional goals that were sought after independent of their technical efficacy—guiding the activity.

For Skolnick, the contrast between unauthorized and delegated discretion was best demonstrated by the relatively simple policing activities of meting out parking violations and enforcing traffic warrants. Parking violations were, in Skolnick's view, "the best illustration of automation in the administration of criminal law" because "the officer's opportunities for the exercise of choice are narrowly circumscribed."[528] Put simply, enforcing parking violations required next to nothing of the officer's individual judgement—either the parking meter was expired or it was not. One situation prompted criminal intervention in the form of a ticket, the other nothing at all. Yet even within this simple binary moments of discretion might still emerge. Skolnick's case in point: the officer who chooses not to invoke the criminal law and who abstains from writing a ticket for a motorist returning to their car after the meter has expired but before the officer has written the citation. Early scholars of police discretion, as we saw in the introduction, thought such conduct problematic. Choosing not to write the ticket meant that law was subordinated to the arbitrary whims of those tasked with enforcing it rather than the other way around. Skolnick, however, saw things differently.

> The officer's actions here is based on (1) a private moral conception compatible with institutional goals—a person is entitled to a "break" even after committing a crime—and (2) an "institutional principle"—the general goals of the police department are

[526] Skolnick, *Justice Without Trial*, 66.
[527] Skolnick, *Justice Without Trial*, 66.
[528] Skolnick, *Justice Without Trial*, 67.

> best served if the law is not enforced so strictly as to generate resentment in the ordinary law abiding citizen.[529]

This combination of individual morality coupled with institutional principles and conditioned by the officer's occupational environment formed the core of what Skolnick considered sociologically significant about police discretion. If the parking violation had "been ignored on the basis of the officer's personal feelings toward the motorist," then the officer would have, in Skolnick's view, acted arbitrarily.[530] In that case, guided by neither departmental standards nor sound individual morality, discretionary power teetered toward illegitimacy.

Skolnick discerned a similar interaction between principles and institutional goals in the case of the warrant officer enforcing unpaid traffic citations. Here, a principle of efficiency met the combined ideas "rough justice" and "good public relations."[531]

> When a warrant officer tracks down an offender, that individual may not have the funds to post bail. The warrant officer has the authority to arrest the person, and an arrest is the most *efficient* means of clearing warrants. But warrant police are not *required* to arrest in such a situation. Depending on their 'judgement,' they are administratively authorized to postpone arrest and give the offender time to make bail. The department regards automatic arrest as unduly harsh; such an inflexible policy would be both unjust and result in poor public relations. The able warrant officer, therefore, is one who clears warrants, but judiciously.[532]

Skolnick thought the warrant officer offered "an uncommonly good opportunity to observe the process by which police exercise *delegated* authority."[533] Despite the relatively inconsequential nature of the offense – Skolnick himself noted that in pursuing a citation for overtime parking "the warrant officer deals what may appear trivial" – danger and authority, the key ingredients to the police officer's "working personality" that combine to "frustrate procedural regularity" and catalyze the show of authority, are still present.[534] Though the parking citation is not a violent or otherwise dangerous offense, by the time the warrant officer is involved the offender has "violated at least two notices to post bail," which in Skolnick's observations lead the officers to "interpret the person's disregard for the legal process as *potentially* dangerous."[535] Significantly, however, Skolnick found that the warrant officer's delegated discretionary authority occasioned "fairly evenhanded standards for the administration of criminal justice," and not, as one might expect, the lawless exercise of authority.[536]

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529 Skolnick, *Justice Without Trial*, 67.
530 Skolnick, *Justice Without Trial*, 67.
531 Skolnick, *Justice Without Trial*, 71.
532 Skolnick, *Justice Without Trial*, 71.
533 Skolnick, *Justice Without Trial*, 71.
534 Skolnick, *Justice Without Trial*, 71
535 Skolnick, *Justice Without Trial*, 71. Italics in original.
536 Skolnick, *Justice Without Trial*, 81.

Compared to the street patrol officer, who in Skolnick's view "is especially prone to asserting authority when facing outright hostility without the formal capacity to impose legal sanctions," the warrant officer "is delegated almost absolute administrative discretion to arrest when the offender cannot produce bail."[537] Where the latter had full legal authority to decide, the former had only the authority attached to their uniform. The key issue for Skolnick was not discretion, categorically, but discretion without a claim of *legal authority* behind it. Warrant officers, he concluded, did not "find it necessary to exceed their delegated discretion nor to be especially punitive within its terms"[538] precisely because their occupational task and administrative function – "bill collector and law enforcement officer"[539] – were clearly delineated. The warrant officer could just as legitimately decide *not* to arrest the offender unable to produce bail. Their delegated discretion supplied them the latitude to determine the criteria for determining the trustworthiness of each offender to post the bail in the future. And the officer could show he was doing his job effectively so long as he could account, formally or informally, for the bail. In either case, the warrant officer was able to exercise their discretion such that he served the dual commandments of the substantive criminal law and procedural due process.

The Harms of Unauthorized Discretion

Those same commandments form the crux of the problem of unauthorized discretion. In contrast to the warrant officer, the street patrol officer, under constant pressure to appear as both an efficient worker as well as a competent craftsman of law and order, had to negotiate the substance of the criminal law against the limitations upon state authority that due process required. From the policing of prostitutes to the use of confidential informants to the premium departmental leadership placed on clearance rates, Skolnick's study demonstrated that the dynamics of police discretion augured inventive and unauthorized practices that threatened to undermine not only the rule of law in principle, but the legal process – and especially the separation of policing, prosecutorial, and judicial functions that the legal process theorists so revered – in practice.

At times the threat presented was "the officer creat[ing] a set of punitive sanctions that by law [did] not exist,"[540] as was the case for the police officer foregoing the mandatory quarantine of prostitutes in exchange for their cooperation as an informant. At others, enforcing the substance of the criminal law for crimes without citizen complaints, as was the case for narcotics enforcement, resulted in "a structure demanding independent action on the police officer's part" that ignored the "constraints embodied in the principles of due process."[541] In still other cases, police discretion's threat of unauthorized authority appeared as a usurpation of prosecutorial prerogative, as was the case for the criminal investigator who forfeited a portion of a suspect's criminal liability in exchange for their admissions to additional offenses in order to increase the detective's "clearance rate."[542] That maneuver was especially troubling, in Skolnick's view, because it presented the double threat of

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537 Skolnick, *Justice Without Trial*, 81.
538 Skolnick, *Justice Without Trial*, 81.
539 Skolnick, *Justice Without Trial*, 72.
540 Skolnick, *Justice Without Trial*, 100.
541 Skolnick, *Justice Without Trial*, 124.
542 Skolnick, *Justice Without Trial*, 157.

'reversing' and 'undermining' "the hierarchy of penalties associated with the substantive criminal law"[543] and "established by the legislature."[544]

What is particularly striking about Skolnick's account of the perils of police discretion is not, as those before him feared,[545] the sheer variety of unauthorized, legally baseless behaviors it enabled. Instead, what is striking is the attitudinal disposition and motivational forces unite that array of unauthorized actions. In Skolnick's account, the exercise of unauthorized discretion was buoyed by an "administrative bias," on the one hand, while vitalized by a perceived moral duty to uphold the "stated aims of the community as expressed in substantive criminal law,"[546] on the other. In a funny way, this is a case of legalism working against itself. Because, according to Skolnick, police officers view the world in "probabilistic terms," individuals suspected of criminal wrongdoing were not seen as "constitutionally protected citizens, but predictable actors whose misbehavior they [the police] usually judge correctly."[547] As a result, from the police officer's perspective, one's factual guilt took precedence over one's legal culpability; contrarily, outside of that perspective, this meant that police were "cold and hostile" toward the due process of law. "One cannot presume a defendant to be innocent," Skolnick wrote of the police attitude toward due process, "when the character and actions of the defendant so strongly suggest guilt."[548] Significantly, this meant that discretion was not a problem limited to street policing. It was occasioned by criminal investigations as well and, for Skolnick, this presented an even greater danger to the rule of law than the discriminatory beat cop. Legalism, which casts moral duty as a matter of rule-following, catalyzed discretionary authority that went beyond and acted against the rules over suspicions of rule-breaking.

The antagonism between "zealous law enforcement" and due process meant, Skolnick concluded, that "the working philosophy of the police has the end justifying the means; according to this philosophy, the demands of apprehension require violation of procedural rules in the name of the higher justification of reducing criminality."[549] Police owed a foremost duty to ferreting out crime. Doing so while remaining within the confines that the rule of law imposed was a "contingent" and "secondary obligation."[550] That these duties were arranged in priority order was not just a product of the police organization's administrative bias. It was also produced by the feeling amongst police that procedural due process lacked moral weight. The harms inflicted by the criminal wrongdoer were greater than those of the police officer's incursion on the rule of law. For the police officer, this view was fueled both by the occupational commitment to the substantive criminal law and by his feeling of indignation toward "harsh working conditions" that the principles of due process created for him.[551] The key point is not so much that the substantive criminal law stood as the expression of a

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543 Skolnick, *Justice Without Trial*, 155, 157.

544 Skolnick, *Justice Without Trial*, 161. "Although the prosecutor is legally accorded a wider area of discretion than the police officer," Skolnick argued, "the setting for the police officer's work offers great opportunity to behave inconsistently with the rule of law. Police discretion is 'hidden' insofar as the officer often makes decisions in direct interaction with the suspect." Skolnick, *Justice Without Trial*, 210.

545 Consider, for instance, Sanford Kadish's fear that arbitrary power begets arbitrary power in *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904 (1962).

546 Skolnick, *Justice Without Trial*, 181.

547 Skolnick, *Justice Without Trial*, 181.

548 Skolnick, *Justice Without Trial*, 181.

549 Skolnick, *Justice Without Trial*, 204.

550 Skolnick, *Justice Without Trial*, 203.

551 Skolnick, *Justice Without Trial*, 204.

conventional morality proper to the community.[552] Rather, the point is that, as a matter of principle, due process—one of legalism's hallmarks—was "not a morally persuasive condition" for police conduct. Police did not, Skolnick observed, "feel shame" nor "feel morally blameworthy" when courts struck down their actions as violations of the rule of law. "On the contrary," Skolnick wrote, "police typically view the court with hostility for having interfered with their capacities to practice their craft."[553]

From Unauthorized Discretion to Order Under Law

So, what does all of this mean for understanding police discretion as a problem of legal legitimacy? Skolnick's focus on the police as a social, occupational organization illustrates that the goal of administrative efficiency and the principle of legality are at odds. To navigate this tension, Skolnick argued that "what must occur is a significant alteration in the ideology of police, so that police professionalization rests on the values of a democratic legal order rather than on technological proficiency."[554] Politically, this means that to keep police discretion from undermining legality there need be "widespread support for the rule of law."[555] "If the police are ever to develop a conception of legal as opposed to managerial professionalism," Skolnick cautioned, "they will do so only if the surrounding community demands compliance with the rule of law."[556] Precisely because the perils of police discretion were the product of an administrative bias, their resolution could not be found in administrative guidelines. Contra the Crime Commission, the police needed to be exposed to, rather than insulated from, the public.

Why, however, after studying the interior social life of the police organization would Skolnick turn to the exterior influence of the community to constrain police discretion? It is important to note that what Skolnick is advocating is *not* a crude form "democratic policing." His premium is not placed upon popular control. It's not even placed upon popular input in police matters. It resides, rather, in a "widespread support for the rule of law," in the rule of law "as a master ideal of governance."[557] Throughout *Justice Without Trial* Skolnick presents the dual demands of law and order as an irrevocably conflictual dichotomy in which police gravitate toward securing order even if that meant circumventing the law. Due process, from the police's perspective, is morally bankrupt because it undercuts the police officer's duty and capacity to secure the vision of order imagined by the substantive criminal law. Put a different way, due process is motivated by the same moral imperative as legalism. In fact, we might even say that due process is legalism by another name. Both are united by the idea that moral duty is a matter of rule-following. Yet unreflective rule-following was inadequate instructional guidance for police behavior not only because it was at odds with the dynamics of police work but also because it was not conducive to meeting the substantive demands of the criminal law.

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[552] In fact, for Skolnick, it is precisely because the substantive criminal law is understood by police as the reflection of "conventional morality" that values like due process as seen as ancillary, at best, and fetters to police work and morale, at worst. Skolnick, *Justice Without Trial*, 183-89.
[553] Skolnick, *Justice Without Trial*, 204.
[554] Skolnick, *Justice Without Trial*, 214-15.
[555] Skolnick, *Justice Without Trial*, 220.
[556] Skolnick, *Justice Without Trial*, 215.
[557] Skolnick, *Justice Without Trial*, 20.

What was needed instead, Skolnick wagered, is a retooling of the "master ideal of governance" such that the rule of law was not treated as simply a law of rules.

Skolnick relied intermittently on two legal theorists throughout the pages of *Justice Without Trial* that grapple with elevated concepts like the rule of law and the principle legality, terms which Skolnick took to be synonymous.[558] The first is Lon Fuller, a Harvard Law professor whose influential text *The Morality of Law* set out eight "principles of legality." The second is, if oddly enough, H.L.A. Hart, an Oxford professor of jurisprudence whose revival of legal positivism in his equally, if not more, influential *The Concept of Law* ignited an intense intellectual feud with Fuller over the separation of law a morals.[559] Skolnick picks and pulls from both thinkers. Fuller's notion of "law as an enterprise" is, for example, the backdrop for Skolnick's claim that his study is properly a sociology of law rather than a sociology of work.[560] Indeed, Skolnick directly quoted, with added emphasis, Fuller's claim that "it would be hard to call [lawless unlimited power] unjust in any more specific sense until one discovered what hidden principle, if any, guided its intervention."[561] Hence his departure from the view of police discretion that saw conduct unbound by rules as arbitrary, and his quest instead for the "informal norms and 'hidden principles'" that determine "how the formal rules actually operate."[562]

Fuller's legal philosophy attunes Skolnick's analysis to two special features about police discretion. The first is the "affinity between legality and justice" that the "insular character" of police work calls into question. Already, this opens the analysis onto a plane at odds with legalism. Analyzing police behavior in light of the known rules is the first step in determining the "justice of law," not in simply determining the efficacy a system of rules. On this point regarding the "justice of law," Skolnick quoted Fuller, and his point, contra the legalists, is that "understanding the conditions under which rules may be violated with greater or lesser intensity" enables us to better appraise the morality of rule-violative conduct.[563] That there is room for meaningful appraisal at all, which is altogether a zone of valuation that legalism forecloses, means that constraining police discretion in practice, and squaring police discretion with democratic values in theory, requires rethinking the ways in which the norms of legitimacy in a democratic society governed by the rule of law are impressed upon the police.

Thus the second influence of Fuller's legal philosophy: the public scrutiny that law and justice, against the backdrop of known rules, mutually require. "It is the virtue of a legal order conscientiously constructed and administered," Fuller wrote, "that is exposes to public scrutiny the rules by which it acts."[564] Skolnick's call for the widespread public support for the rule of law, and for the community

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[558] Skolnick, *Justice Without Trial*, 7.

[559] See H.L.A Hart, "Positivism and the Separation of Laws and Morals," *Harvard Law Review* 71(1958) (insisting on a distinction between law as it is and law as it ought to be); Lon. L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958) (rejecting Hart's distinction in favor of the 'internal morality of law' that renders law a normative enterprise; *Cf.*, Benjamin C. Zipursky, "Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty," *New York University Law Review* 83 (2008) (recasting the Hart-Fuller debate as one between the legal practicality and legal perfectionism).

[560] Skolnick, *Justice Without Trial*, 15. "Although the subjects of this research are primarily police officers, and police mirror the conflict between legality and order," Skolnick wrote in a footnote, "the theoretical concern is with the phenomenon of law and its enforcement, rather than with the police as an occupational category. It is, therefore, to be interpreted as a study in the sociology of law, rather than as one concerned with issues found in the sociology of work."

[561] Lon L. Fuller, T*he Morality of Law: Revised Edition* (New Haven: Yale University Press, 1969).

[562] Skolnick, *Justice without Trial*, 13.

[563] Skolnick, *Justice without Trial*, 19-20.

[564] **F**uller, T*he Morality of Law*, 157-158.

to demand compliance with it, was certainly levied in this spirit. But, in a funny way, this is also what prompts Hart's entrance into Skolnick's analysis. To the extent that Skolnick invoked Fuller to point out what was special about legal analysis in the context of police work – and therefore what made an analysis of police work legal rather than strictly sociological – it is not clear that he relies on him to substantiate the rule of law. What is the precise content of the rule of law, indeed of all law, if legal rules are not ethically or morally exhaustive? What is 'law' in the world of 'order under law'? As it turns out, that is an open question. Following Hart's lead, Skolnick thought law had an "open texture," which is Hart's terminology for the notion that all legal rules exist within a penumbra of uncertainty that requires legal officials to interpret their meaning.[565] In short, laws do not enforce themselves. Indeed, the twofold dilemmas between law and order, on one hand, and competing interpretations over what either consists of, on the other, is the central conundrum that animates *Justice Without Trial*.

Amongst the ambiguities that pock the application of the rule of law and the divergent demands that mediate police performance, Skolnick thought that "the meaning of law in a society is ultimately dependent on its political and social philosophy."[566] For most readers, this might seem like an otherwise innocuous statement. Perhaps it is. But it also signals to us that the 'law' of "order under law" is something that is socially constructed, rather than something that is natural or *a priori*. In this respect, Hart's brand of legal positivism is especially instructive for clarifying Skolnick's "order under law." To be sure, we might do well to proceed with caution in reading Skolnick's disjointed references to legal theory too closely. Skolnick was not a legal philosopher. And his footnotes are generous employers of legal theoreticians.[567] But there is value in seeing how legal theory, and aspects of Hart's argument in *The Concept of Law* in particular, adds analytical clarity not only to what Skolnick meant by "order under law" but also to what we mean to take away by charting a transition from legalism to legality. Here is why.

In addition to arguing that law has an "open texture," Hart maintained that law also has an "internal perspective" through which, and only through which, a legal system is fully intelligible. Hart described that perspective like this:

> This internal aspect of rules may be simply illustrated from the rules of any game. Chess players do not merely have similar habits of moving the Queen in the same way which an external observer, who knew nothing about their attitude to the moves which they make, could record. In addition, they have a reflective critical attitude to this pattern of behavior: they regard it as a standard for all who play the game... These views are manifested in the criticism of others and demands for conformity made upon

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565 Hart, *The Concept of Law*, 3rd edition (Oxford: Clarendon Press, 2012), 125–27.

566 Skolnick, *Justice without Trial*, 17.

567 Indeed, Skolnick cites an article by Philip Selznick on natural law approvingly. See *id.* at note 24. He also relies on definition of the rule of law offered by Sandford Kadish in the same essay in which Kadish argues against the consistency—and propriety—of police discretion in a society governed by the rule of law. See *Id.* at note 26. In a late chapter on "conventional morality, judicial control, and police conduct," Skolnick exhibits a certain agnosticism amongst an entire bench of theorists on the issue of the legal enforcement of morals. See *Justice Without Trial,* 183-185. The point is that even as we endeavor to unravel some of what Skolnick meant by "order under law" we'd do well to remember that Skolnick was neither a legal theorists nor, it seems, a purist.

> others when deviation is actual or threatened, and in the acknowledgement of the legitimacy of such criticism and demands when received from other.[568]

Hart appealed to the internal aspect of a legal system in order to distinguish the special character of social and legal rules from mere group habits. The key ingredient of that internal aspect is the "critical reflective attitude to certain patterns of behavior as a common standard," which is expressed through normative language.[569] By contrast, an external perspective of a legal system may be able to figure out the rules through mere observation—that Queens move in a specific way—but that cognizance does not occasion normative criticism when the rules are broken. From an external point of view, moving a chess piece incorrectly prompts only the claim, "that's not how the game works," and nothing more. The primacy of normative criticism is how Hart understood what made law special and what established the foundation for legal obligation, which obtains "when general demand for conformity and insistent and the social pressure brought to bear upon those who deviate threaten to deviate is great."[570] The ability for legal rules to impose obligations depends, he wrote, on the "*seriousness* of social pressure behind the rules."[571]

Hart's understanding of law's "internal aspect" offers a thicker explanation of legal duty than legalism. The legalist's view that endows rule-following with moral significance is incapable of offering a normative justification for discretion. What Skolnick's analysis reveals is that the dangers of discretion are not limited to the indeterminacy of rules that hollows out legalism's practical import. Law's "open texture" invites discretion, and Skolnick's point is not to rule discretion out of existence. Rather, it is that the dilemmas of discretion result from a milieu of social forces that mediate police work in such a way that encourages police to disregard due process and, ultimately, undermine the rule of law. Whereas the legalistic perspective of police discretion is concerned with discretionary over-enforcement, Skolnick discerns equal danger in discretionary non-enforcement—as is the case with forgoing mandatory quarantine holds for cooperative prostitutes—and under-enforcement—as is the case with reversing the hierarchy of punishments to secure clearance rates. Neither warrants normative criticism because they violate rules; instead, normative criticism is occasioned because they depart from the underlying principle of legality. Without the principle of legality, the enterprise of law enforcement loses its democratic character. The impropriety rests in the usurpation that occurs when police redraw the penalty structures established by the people through legislation.[572]

This is why Skolnick sought to place "ultimate responsibility for the quality of law and order in American society on the citizenry" rather than on police administrators.[573] While the features of the

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568 Hart, *The Concept of Law*, 56–57.
569 Hart, *The Concept of Law*, 56–57.
570 Hart, *The Concept of Law*, 86.
571 Hart, *The Concept of Law*, 87. Emphasis in original.
572 Skolnick, *Justice without Trial*, 18. "A democratic society envisions constrain on those who re granted the right to invoke the processes of punishment in the name of the law. Such people must draw their rules clearly, state them prospectively. The rules themselves must be rational, not whimsically constructed, and carried out with procedural regularity and fairness. Most important of all, rule is from below, not from above. Authorities are servants of the people, not a 'vanguard' of elites instructing the masses. The over-riding value is consent of the governed. From it derives the principle of the accountability of authority, accountability primarily to courts of law and ultimately to a democratically constituted legislature based on universal suffrage."
573 Skolnick, *Justice without Trial*, 220.

police officer's occupational environment relegate the rule of law to an obligation secondary to managerial efficiency, feverish public demands for crime control set that managerial pathology in motion. The community and its public officials typically reward order maintenance, so much so that "even the so-called liberal politician is inclined to urge police to disregard the rule of law when he or she perceives circumstances as exceedingly threatening," wrote Skolnick.[574] The forces that contribute to constructing and galvanizing a normative orientation for police work that praises managerial efficiency and opposes the due process of law is thus not only the product of an insular professional ethic amongst police. Making matters worse, it is encouraged by the community.[575]

Yet for Skolnick legality is both a "variable and an achievement." Law's "open texture" meant that legality is "a working normative system that develops in response to official conduct."[576] And it's "internal aspect" meant that only 'serious social pressure' could impose upon police an sense of obligation to the principle of legality. Without that pressure, the rule of law is subordinated to demands for administrative efficiency. As a consequence, the ability for the rule of law to "develop" in such a way that furthers protections of individual liberty and ensures equal treatment under law is, Skolnick warned, "hampered."[577]

Thus, in describing the lack of shame and blameworthiness that police feel in violating the due process that the rule of law in a democratic society requires, Skolnick's appeal to "altering the ideology of police" is a claim about the normative force of the internal aspect of law. To be sure, this doesn't mean he thought police should necessarily *be shamed* for running afoul of the rule of law. Indeed, his conception of 'widespread community support' entailed "demand[ing] compliance with the rule of law by *rewarding* police for such compliance."[578] But the substance of the rule of law derives from that internal aspect, not from statute or sanction. Legality could not be achieved by merely stipulating rules. It also required a higher-order commitment that imposed upon police and civilians alike a sense of obligation to its strictures, substantive *and* procedural.

Skolnick parlays this vision in the phrase "order under law." This combination of words is his attempt to rearrange the dilemma of law and order that simultaneously inspired inventive, if unauthorized, discretion and undermined the rule of law. In his words:

> Order under law is concerned not merely with the achievement of regularized social activity but with the means used to come by peaceable behavior, certainly with procedure, but also with positive law... In short, "law" and "order" are frequently found to be in opposition, because law implies rational restraint on the rules and procedures utilized to achieve order. Order under law, therefore, subordinates the ideal of conformity to the ideal of legality.[579]

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[574] Skolnick, *Justice without Trial*, 218. A striking feature of this part of Skolnick's concluding remarks is how he relies on James Q. Wilson's argument from "The Police and Their Problems" to arrive at a claim about restraining police discretion. By contrast, as we'll see in the following section, Wilson pursues that argument to arrive at a claim about enabling police discretion.

[575] Skolnick, *Justice without Trial*, 218.

[576] Skolnick, *Justice without Trial*, 214.

[577] Skolnick, *Justice without Trial*, 214.

[578] Skolnick, *Justice without Trial*, 215. Emphasis added.

[579] Skolnick, *Justice without Trial*, 8.

Precisely because order under law could not achieve social control "through threat of coercion and summary judgment" it required a commitment that went beyond legalism.[580] Part of exercising that commitment required a recognition of the fact that policing in a democratic society has a "built-in dialectic."[581] Courts might strike down certain police conduct in the name of due process or individual rights, but the disposition of the community is the greater influence on prosaic police behavior. In fact, relying on the courts to define due process could blowback in the opposite direction. "Especially when the police are burdened with the responsibility of enforcing unenforceable laws, thereby raising the specter of a crime-ridden community," Skolnick cautioned, "decisions that specifically protect individual liberty may increase pressure from an anxious community to soften the laws and thus may contain the seeds of a more 'order-oriented' redefinition of procedural requirements."[582] Thus, while due process is a key analytical fulcrum in Skolnick's normative argument, its value resides in a respect for legislatively determined penalties rather than, as was the case for Hall, the partitioning of judicial and law enforcement functions.

At this point, the similarities between Skolnick's understanding of the problem of police discretion and Hall's treatment of policing in a democratic society are striking. Both arrive at the concept of due process to lay out what is at stake in the problem. Both exhibit a preference for a sort of procedure-based positivism that prides the smooth functioning of legal processes over administrative rulemaking. Both think of discretionary non-enforcement and under-enforcement of the law as a greater danger than discretionary over-enforcement. In each case, policing is a problem of legality, not efficiency. What matters is securing the supremacy of law rather than merely combating crime by whatever means are least offensive. In many ways, Skolnick's ideal of "order under law" is akin to Hall's concern with the "sovereignty of law," both united by the idea that due process is a distinctive value for a democratic society governed by the rule of law.

Yet the differences that separate them are quite stark as well. For starters, due process means different things and serves different purposes in each of their analyses. Whereas due process required, for Hall, a separation of law enforcement and judicial functions, for Skolnick due process meant following the penalty structures established by the legislature. Ironically, this is an arguably more democratic version of due process. Rather than relying on the idea that democratic society requires the separation of decision-making institutions, Skolnick advanced a view of due process that is rooted in the idea that the people decide, through the creation of a penalty structure in the substantive criminal law, what is due for one's criminal acts. Police run afoul of that arrangement, not because they decide one's guilt or innocence—though that is also an implication of the practices, especially in the case of clearance rates, that Skolnick discovered—but because they usurp the people's decision by 'inverting the hierarchy of penalties.' Put a different way, Hall employs his understanding of due process to define democracy,[583] while Skolnick relies on a fundament of democracy—popular lawmaking—to instantiate the value and purpose of due process.

There is yet another important point to take away here. Although both thinkers push the problem of police discretion to a higher level of abstraction and generality, grappling with the

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[580] Skolnick, *Justice without Trial*, 8.

[581] Skolnick, *Justice without Trial*, 220.

[582] Skolnick, *Justice without Trial*, 220.

[583] Seo, "Democratic Policing Before the Due Process Revolution," 1256, 1262 (arguing that Hall "revised his definition of democratic policing—from self-rule, to the rule of law, and finally to due process—to accommodate police action, rather than the other way around, which would have required significant reforms to policing as it was then practiced").

underlying norms and standards of legitimacy that determine the content of legality rather than proffering a system of administrative rules, they arrive, ultimately, at different ends of the spectrum. Skolnick thought of the rule of law, the ideal of legality, and governance committed to 'order under law' as constraints on police authority. The dangers of police discretion were not limited to compromising the fairness of criminal trials, as is the case in Hall's lectures. What made police discretion dangerous is, instead, its potential to usurp powers properly belonging to the legislature.

Because that usurpation was not limited to the powers of the courts, which was Hall's chief concern, Skolnick's 'order under law' touches on the daily practices of policing—not just the ones that precipitate a trial. Indeed, he is most concerned with those practices that don't implicate courts at all. On one hand, the difference here rests only in where one chooses to place the accent mark. For Skolnick, that mark is placed on legislative powers. For Hall, on judicial powers. Arguably, police discretion poses a danger to both. On the other hand, however, Hall's approach to due process doesn't offer any substantive constraint on police practices at all. So long as they were not deciding one's guilt or innocence, they were acting legitimately within their zone of authority.[584] By contrast, Skolnick's view of law's "open texture" produces a claim about how to assert control over police practices within that zone authority. It is not a matter of simply constructing a trip wire. Rather, it is a matter of "demanding compliance" before that wire is tripped.

In some sense, we might imagine Hall to argue that this is a distinction without much difference. Perhaps the problematic policing practices that Skolnick identifies, that argument might go, prove Hall's point. Whether bargaining with quarantine holds or dickering with clearance rates, in either case the police, not judges, are determining one's guilt or innocence. But whereas Skolnick's ideal 'order under law' explicitly proposes a constraint on police behavior, Hall's process-based argument ultimately offers them more license. The mechanism that allows Hall to do so is built into the legal process thinking that underpins informs his analysis. Rules, as well as legal procedures, in that framework, are ultimately substantiated by principles. By contrast, Skolnick's version of due process does not turn to law's inner principles (despite his affection for Fuller's legal theory), but to the social pressure the public commands. Thus, even as the traces of Hall's premium on due process emerge throughout Skolnick's account, that concept neither means the same thing nor serves the same function Hall imagined. In fact, to see how Hall's due process argument enhances rather than constrains police discretion, we must turn to James Q. Wilson.

IV. WILSON AND THE DETERMINANTS OF DISCRETION

Unlike the others we've considered so far, Wilson's *Varieties of Police Behavior* takes up the problem of police discretion as one of behavioral science and organizational management. Where legal scholars turned to the doctrines of administrative and constitutional law—or, as we saw with Hall, the legal process more broadly—and where Skolnick's sociological persuasion led him to invest special attention to the police officer's working environment, Wilson's book exhibits the political scientist's concentration on the effects of political culture, public opinion, and legal limitations on the police administrator's ability to control his officers' discretion. Not unlike Skolnick, Wilson's study is an up-close and personal look at the lives of police officers and administrators in eight American

[584] Seo, "Democratic Policing Before the Due Process Revolution," 1256, 1262.

communities. His was not an abstract exercise in legal theory. Crucially, however, Wilson departs from Skolnick by shifting the interrogative aperture away from the sociological realities of work performance that shape and influence discretionary authority to focus instead on the what he termed the organizational "determinants of police discretion."[585] In doing so, his interest was not so much in the sociological forces that influence a patrolman's discretion but on the organizational tools that police administrators use to control their patrolmen's conduct.

Whereas Skolnick's framework for police discretion began with a distinction between delegated and unauthorized authority, a move that allowed him to proceed from the 'autonomous' administration of justice by the meter maid to the policing of vice, the exploits of the police informer system, and the clearance of criminal investigations, Wilson sticks with petty offenses in order to pursue a different, though similarly binary, framework for police discretion. Rather than delegated and unauthorized, Wilson frames the problem of police discretion as a conflict between *whether* and *how* an officer should intervene in a given situation. Wilson's study is primarily concerned with "common offenses"—'drunkenness, disorderly conduct, assault, driving while intoxicated, gambling, vandalism, and the like'—because, in his view, they "raise in particularly clear form the question of administrative discretion."[586] In part, that clarity is owed, if paradoxically, to the ambiguity of such offenses. Indeed, as Wilson quipped, "to some delicate souls, a rough shove may be an assault."[587] Determining what constitutes "assault," and thus prepares the ground for legal intervention, is, ultimately, a "question of administrative discretion." In part, however, that clarity is occasioned by the capacity for such offenses to cast in sharp relief the tiered questions of whether and how an officer should intervene in such situations. Here's Wilson:

> A murder, in the eyes of the police, is unambiguously wrong and beyond question serious; murderers are accordingly arrested. But with respect to a street-corner scuffle or a speeding motorist, the police exercise discretion whether to intervene (should the scuffle be stopped? should the motorist be pulled over?) and, if they do, just how to intervene (by an arrest? a warning? an interrogation?).[588]

The police organization is unique, in Wilson's view, in that "within it discretion increases as one moves down the hierarchy."[589] This, too, was a key reason for studying petty offenses. The police patrolman, as the lowest-ranking official within the police organization, enjoys the greatest amount of discretion because he is "almost solely in charge of enforcing those laws that are the least precise, most ambiguous, or whose application is most sensitive to the availability of scare resources and the policies of the administrator."[590] "In short," Wilson justified his focus on both petty offenses and on the street-patrol officer, "the patrolman often intervenes when people have not asked for him (and

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[585] James Q. Wilson, *Varieties of Police Behavior: The Management of Law & Order in Eight Communities*, 2nd edition (Cambridge: Harvard University Press, 1978), 83-85.
[586] Wilson, *Varieties of Police Behavior*, 6-7.
[587] Wilson, *Varieties of Police Behavior*, 6.
[588] Wilson, *Varieties of Police Behavior*, 7.
[589] Wilson, *Varieties of Police Behavior*, 7.
[590] Wilson, *Varieties of Police Behavior*, 8.

would prefer he stayed away) and under circumstances where what constitutes a successful intervention is unclear or in dispute."[591]

Police Discretion and the Problem of Justice

There is yet another reason for Wilson's focus on the street patrol officer.[592] In addition to their concrete function and organizational place, patrolmen, in Wilson's words, "face in a special way the problem of justice."[593] While such an abstract proposition may seem like a curious outlier in Wilson's otherwise empirically grounded and doggedly typological claims about police behavior, it could not be more important for understanding the implications of his view of discretionary power. Two reasons in particular stand out. First, in his remarks about "justice as a constraint" on police behavior we see the first-order, normative stakes of the problem of police discretion that tend to get subsumed by the positivistic force driving the rest of the book. Thus, while his approach is markedly apart from Hall and Skolnick, he shares their concerns regarding the magnitude of the problem. This also situates Wilson's study as part of the transition from legalism to legality in the discourse of police discretion. The problem of police discretion is not a problem of rule-following. Rather, it is a problem that reveals, distends, and challenges the bounds of normative legitimacy.

Second, and perhaps more importantly, Wilson's brief focus on the problem of justice in street-level policing in the early pages of *Varieties of Police Behavior* attunes us to the competing conclusions at which he later arrives. As we'll see, Wilson's argument unfolds along two vectors. The first follows from empirical observation, describing how police administrators manage and constrain their patrolmen's discretion in practice. This is both the central thrust of the book and the common take-away from it.[594] The second follows from what Wilson thinks wrong, misguided, and ineffective about those techniques. This is an often overlooked aspect of *Varieties of Police Behavior*, but it highlights in singularly instructive ways not only the stakes of the problem of police discretion but also the peculiar intellectual kinship Wilson shares with Hall, and later, with Dworkin. That kinship is the other side of the analytical coin that unites Hall to Skolnick; consequently, not unlike Hall's, Wilson's analysis does more to enable rather than to constrain discretion.

Exactly what does Wilson mean by "justice"? What does justice require of policing? What is its bearing on democracy? How does it purport to constrain police behavior? Lofty as these questions are, Wilson's answers to them are rather capacious. For Wilson, justice meant, simply, "fairness, or treating equals equally."[595] Justice as fairness entailed "treat[ing] clients on the basis of clear rules, known in advance, and uniformly applied to all persons without 'favoritism,' that is, without making 'unreasonable' or 'irrelevant' distinctions."[596] Yet because the patrol officer's function often did not

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591 Wilson, *Varieties of Police Behavior*, 9.

592 To be sure, Wilson's focus on the street patrol officer was not so much inspired by an interest in discretion at the individual level *per se*; instead, studying the determinates of discretion at the individual level was in service of his greater interest in relationship between organizational management and policing style. The point is not to confuse Wilson's study with those that only consider discretion as a problem at the level of the individual police office.

593 Wilson, *Varieties of Police Behavior*, 34.

594 National Research Council, *Fairness and Effectiveness in Policing,* 23-24.

595 Wilson, *Varieties of Police Behavior*, 34.

596 Wilson, *Varieties of Police Behavior*, 35.

implicate the formal legal process, it faced in more pressing ways a substantive, rather than procedural, question of justice. "If justice consists of equals being treated equally," Wilson wrote, "then what a patrolman *does* is the 'treatment' and how *he* asses the interests and claims of the parties is an implicit judgment of who is 'equal' to whom and in what sense."[597] This meant that the patrolman dealt in distributive justice, in the Aristotelian sense of the term, treating individuals differently based on his perception of their merit.[598]

The dilemma of justice here is, in fact, not so much animated by treating equals unequally but the opposite, treating unequals equally. Whereas in the abstract persons are 'equal,' in the streets they are, as Wilson observed, "dirty, angry, rowdy, obscene, dazed, savage, or bloodied. To him [the patrolman], they are not in these circumstances 'equal,' they are *different*."[599] And in precisely what sense individuals were different determined the just distribution of police treatment. As Wilson put it, "what they deserve depends on what they *are*." Bum or boy scout, 'stud' or 'working stiff,' 'wise guy' or 'good guy,' white or Black, poor or middle class—from the patrolman's perspective "to be just to these people means to give each what he deserves and to judge what he deserves by how he acts and talks."[600]

The procedural conception of justice that animates liberal legalism – and that is evidenced in Hall's preference for the legal process – did not apply to the street patrol officer because his work was not procedural. Instead, his distributive, and by consequence substantive, conception of justice guided his conduct. "The patrolman's substantive and distributive conception of justice influences both his decision *whether* to intervene in a potentially disorderly or law-violative situation and his decision *how* to intervene."[601] Where procedural justice might seek to constrain the decision regarding whether to intervene based on what the statutory law says—meaning police intervention is just only "if the police act against only those persons, and all such persons, whose known or probable behavior is proscribed by law and act against them only in the way provided by the law"—this conception of justice was "unworkable" and "self-defeating" in practice.[602] Not unlike Skolnick's diagnosis of the police officer's working personality, Wilson observed that police must make rapid judgements using shorthand cues, chief among them danger and impropriety.[603] Significantly, this meant that in order to effectively prevent crime police officers were "called upon to 'prejudge' persons" and, as Wilson observed, the line between prejudgements based on professional obligation and personal opinion was "often very thin."[604]

What is striking about the way Wilson lays things out is how he presents policing at odds with the very definition of justice he uses to set up the problem. Precisely what does justice require of policing? That is less than clear. Indeed, Wilson is clearer about how justice is *not* a constraint on policing than he is about how it imposes special limits or obligations on police behavior. His only positive instantiation of the problem wagers that justice requires treating equals equally, an insight he

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[597] Wilson, *Varieties of Police Behavior*, 36. Italics in original.

[598] Aristotle, *Politics*, trans. C.D.C Reeve (Indianapolis: Hackett, 1998), Bk. III, chapters 9 & 12: "justice seems to be EQUALITY, and it is, but not for everyone, only *for equals*. Justice also seems to be inequality, since indeed it is, but not for everyone, only *for unequals*... what is just is just *for certain people*...").

[599] Wilson, *Varieties of Police Behavior*, 36. Italics in original.

[600] Wilson, *Varieties of Police Behavior*, 36.

[601] Wilson, *Varieties of Police Behavior*, 38. Italics in original.

[602] Wilson, *Varieties of Police Behavior*, 38.

[603] Wilson, *Varieties of Police Behavior*, 39.

[604] Wilson, *Varieties of Police Behavior*, 38.

borrows from John Rawls's theory of "justice as fairness."[605] Yet, whereas Rawls's theory of justice is predicated on eliminating the influence of morally arbitrary differences between persons on the political arrangements of civic life,[606] Wilson's understanding of the problem of justice in policing foregrounds precisely those differences to explain the delicate dynamic between discretionary authority and procedural justice. Rather than positing fairness as the core idea of justice, a move that allows Rawls to pursue a scheme of egalitarian liberalism that erases differences amongst persons, Wilson introduces justice as fairness as a foil for a different sort of problem. For Wilson, much unlike Rawls, the goal of justice is not to eliminate conflict, but to embrace it.

To be sure, though Wilson uses the language of "justice as fairness," he never engages Rawls's work in any substantive way. Arguably, given the rise of Rawls's popularity at the time, Wilson's passing footnote to Rawls's theory of justice as fairness is merely an act of academic genuflection. Yet even if Rawls's political philosophy does not play a substantive analytical role in *Varieties of Police Behavior*, it is worth noting how Wilson's turn to the problem of justice in policing—both in the early pages of the book and at its conclusion—departs from what Rawls sought to achieve by way of justice as fairness. Or, to put the point the other way around, noticing what is at stake in Rawls's theory of justice, and its subsequent emanations,[607] highlights the implications of Wilson's understanding of the legality of discretion.

In *A Theory of Justice*, Rawls pursues a politics of reconciliation.[608] On one hand, justice as fairness seeks to reconcile the tensions between equality and liberty. Where liberals of a libertarian stripe prioritize individual liberty at the expense of substantive equality,[609] justice as fairness imagines a scheme of egalitarian liberalism that promotes a version of substantive political equality that is consistent with individual rights. On the other hand, that theory relies on a *politics* of reconciliation by reducing conflicts between competing conceptions of the good to a process of rational deliberation. By theorizing the "correct" grounds of justice, Rawls hoped to produce a voluntary "overlapping consensus" that engenders a "union of social unions."[610] Hence the reconciliatory ambition of the scheme: the goal is not to only to formulate a "correct conception of justice" but to do so in such a way that leaves no room for dispute that the conception so formulated *is* correct. Famously, Rawls

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605 Wilson, *Varieties of Police Behavior*, 34 (citing John Rawls, "Justice as Fairness," *The Philosophical Review* 67, no.2 (1958): 164-194).

606 Rawls, "Justice as Fairness," 165-168.

607 A caveat is in order here: Wilson cites to Rawls's 1958 essay in *The Philosophical Review* entitled "Justice as Fairness." At the time Wilson was writing *Varieties of Police Behavior*, Rawls's more famous works like *A Theory of Justice* and *Political Liberalism* had not yet been published. However, the framework of justice as fairness that Rawls's lays out in his 1958 essay is a touchstone for his later works. This is not to say that Rawls did not revise some features of his argument over time. However, the basic tenets of that framework remain more or less intact across his works, and the principles they instantiate are constant in the shifting dilemmas of civic life that Rawls discerns in his later work. Here, I will make reference to some of Rawls works that were published after *Varieties of Police Behavior* on the assumption that the theoretical features of those later works are constant enough to his 1958 essay to interpret their stakes in relation to Wilson's. Put another way, even though the concerns of justice as fairness that Rawls articulates in his books come after Wilson's *Varieties*, the dilemmas to which they respond are both abstract and trans-historical enough to add analytical clarity to Wilson's claims about justice.

608 Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), 129 (arguing that "reconciliation, not politicization, is Rawls's goal in *A Theory of Justice*.").

609 See, e.g., Robert Nozick, *Anarchy, State, Utopia* (New York: Basic Books, 1974).

610 John Rawls, *A Theory of Justice*, revised ed. (Cambridge: Belknap Press, 1999), 462; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 320-22.

accomplishes this task from the starting point of the "original position," a hypothetical situation in which individuals are "rational" but "mutually disinterested" regarding the principles of justice because they are cloaked by a "veil of ignorance" that leaves them unaware of their place in society, natural assets and abilities, personal values, or psychological propensities.[611] Divorced from their social circumstances and united only by their rational faculties and common intuitions about justice, the point of the original position, Rawls wagers, is to arrive at principles of justice "that free and rational persons concerned for their own interests would accept in an initial position of equality."[612]

The principles of justice at which actors in the original position, situated in ignorance of their own social reality, ultimately arrive prioritize the right over the good, committing society to an ideology of "reasonable pluralism" that refuses to allow one social group's conception of the good to dominate others'. That consensus, Rawls argued, would "settle" the dispute over how to strike the right balance between liberty and equality because the principles of justice it is built upon engender mutual respect and recognition of every individual's moral worth. Rawls justifies the constraints imposed by the original position in various ways. The one that is the most important for mapping the relationship of Wilson to Rawls is, however, the latter's desire to remove the imposition of antecedent moral worth. In the abstract, this meant that "no one should be advantaged or disadvantaged by natural fortune or social circumstance in the choice of principles [of justice]."[613] Concretely, this meant individuals ought not be able to "tailor principles to the circumstances of [their] own case."[614] In so constraining, Rawls claimed that the correct grounds of justice, justice as fairness, supplied a welcome alternative to consequentialist moral philosophies, which he critiqued both for prioritizing the good over the right and for fomenting political inequality, while also providing an explanation for how a society deeply divided by religious, moral, and philosophical doctrines could exist peaceably overtime.[615]

For all that it promises, some of Rawls's readers have critiqued the politics of reconciliation that justice as fairness requires as a triumph of pragmatism over truth,[616] a "dangerous utopia" that "subordinates" and "jeopardize[es] democracy,"[617] an assemblage of "denuded" subjects divorced of communal attachments,[618] or a "strategy of depoliticization."[619] Much criticism of Rawls's *A Theory of Justice* is directed at the constraints imposed by original position. After all, without that device the contractualism that Rawls imagines as the basis for just political arrangements disintegrates. Without those constraints, deliberation is no longer free from the tilt of antecedent moral worth, ceases to be rational, and runs afoul of reasonableness. Critiques of the original position are powerful and important. But most participate in a sort of analytical jujitsu that attempts to unsettle the premises of Rawls's argument and interrupt the syllogistic force that vitalizes the 'correctness' of the conception of justice he champions. Wilson's reliance on Rawls does not, however, bear on those analytics;

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611 Rawls, *A Theory of Justice*, 12-14.
612 Rawls, *A Theory of Justice*, 11.
613 Rawls, *A Theory of Justice*, 18.
614 Rawls, *A Theory of Justice*, 18.
615 Rawls, *Political Liberalism*.
616 Jurgen Habermas, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," Journal of Philosophy 92, no.3 (1995); Jurgen Habermas, "'Reasonable' Versus 'True,' or the Morality of Worldviews," in *Habermas and Rawls: Disputing the Political*, ed. James Gordon Finlayson (London: Routledge, 2011). For an instructive summary of the Habermas-Rawls debate see Harcourt, *Critique and Praxis*, 179-181, 131-135.
617 Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2005), 31, 41.
618 Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).
619 Honig, *Political Theory and the Displacement of Politics*, 128.

instead, it bears on the image of a just society that those principles produce. In this respect, Bonnie Honig's penetrating analysis of Rawls's theory of justice is especially instructive for discerning the peculiarity of Rawls's appearance in *Varieties of Police Behavior*.

In *Political Theory and the Displacement of Politics*, Honig critiques Rawls for closing the space of politics.[620] Whereas an open politics invites continual contestation over the institutions, subjectivities, rights, obligations, assemblages of state power and the ensemble of practices that coordinate life in concert, Rawls's politics of reconciliation, in Honig's words, "displace[s] political action with introspection."[621] The original position, whatever its analytic faults, functions "not to open up alternative possibilities or to investigate any unexpected effects of [the actors'] initial agreement but to consolidate existing practices."[622] Rawls errs, according to Honig, not because his principles of justice are inadequate but because his procedure for resolving political conflicts enthrones "a single, sovereign perspective" that "displaces politics with administration."[623] Significantly, the aspect of Rawls's theoretical program that demonstrates its problematic character—the "remainders of politics" to which a depoliticized strategy of reconciliation cannot attend—resides in his remarks about criminal punishment.[624] Here's Rawls:

> in a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men's conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done. Thus a *propensity to commit such acts is a mark of bad character,* and in a just society legal punishments will only fall upon those who display these faults.[625]

Honig notes that in this passage from *A Theory of Justice* Rawls returns to a "discourse of antecedent moral worth."[626] Criminal behavior is, for Rawls, "a mark of bad character." It is a character "so bewilderingly deviant," in Honig's words, that it can only be explained as an outlier exogenous to Rawls's system of justice as fairness. It is the result of a character flaw that cannot be accounted for by the constraints imposed by the original position. There, individuals consent to Rawls's principles of justice because they constitute the only scheme rational persons would agree to in advance. Separated from the contingencies of their own lives, individuals are united by a shared "sense of justice." Criminals, because they are "bad characters," are prone to commit injustices before they

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620 Honig, *Political Theory and the Displacement of Politics*, 133.
621 Honig, *Political Theory and the Displacement of Politics*, 135.
622 Honig, *Political Theory and the Displacement of Politics*, 135.
623 Honig, *Political Theory and the Displacement of Politics*, 136.
624 Honig, *Political Theory and the Displacement of Politics*, 136; *Cf*., Bonnie Honig, "Rawls on Politics and Punishment," Political Research Quarterly 46, no.1 (1993): 99-125.
625 Rawls, *A Theory of Justice,* 276-277.
626 Honig, *Political Theory and the Displacement of Politics*, 138.

enter, while they occupy, and after they've left the original position.[627] They are not, however, irrational. By defining punishment deontologically, Rawls presents criminal behavior as an assault on the ideals of justice; by implication, the problem is not that those prone to criminality are irrational or are somehow incapable of rational calculation but that they do not share the same 'sense of justice' as others. The logical slippage, as Honig instructively lays out, resides in the fact that criminality, because it is characterological, is non-rational; consequently, in exactly that space in which abstract rationality reigns and individual affect wanes, actors have no idea if they possess that "mark of bad character" which exceeds rational approximation.[628]

Criminal law is not meant to remedy those individuals whose natural inclinations do not align with the scheme of justice as fairness. They have, in Honig's words, "committed [themselves] to a conception of the good that is incongruent with the principles of right."[629] Those characters are 'marked' from the start, and their rehabilitation is literally impossible. Instead, the purpose of the criminal law is, Rawls says, "to uphold basic natural duties." Punishment is justified deontologically.[630] Punishment does not function as "an incentive scheme."[631] It is not a matter of deterrence. Nor is it entirely a matter of retribution or vengeance. Because criminal behavior is the result of some characterological defect, punishment is a matter of enforcing "compliance" with the well-ordered scheme of justice as fairness.[632] Compliance in what way, however? Injustice is endogenous to and emanates from "a mark of bad character," the acts flowing from it criminalized. Thus, Honig suggests, "it is actually the brand of character from which these actions emanate that [justice as fairness] outlaws."[633] Compliance, then, isn't a matter of acting a certain way—it is a matter of *being* a certain way.[634]

According to Honig's reading, Rawls "treat[s] punishment as an expression of right, not power."[635] And this is where the relationship of Rawls to Wilson begins to come into sharper focus. "They key to Rawls's account of punishment," Honig writes, "is that that system is simply not responsible for the production of criminality."[636] On the contrary, "criminality is extrasystematic."[637] The troublesome implication is, for Honig, that this justification for punishment "relies solely on rationality."[638] It is rational to punish criminals, according to a scheme of justice as fairness, not

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[627] "On Rawls's account," Honig writes, "talents and attributes are randomly and inequitably distributed among persons, whereas the sense of justice is assumed to be equally available to everyone. The problem [with criminality] is that some cannot affirm their sense of justice." *Political Theory and the Displacement of Politics*, 141.

[628] Honig, *Political Theory and the Displacement of Politics*, 140-44. Honig delivers a crippling blow to Rawls when she points out that, ultimately, for criminals and misfits in his scheme of justice as fairness, "here one can only say: *their nature is their misfortune*" (quoting Rawls, *A Theory of Justice,* 576).

[629] Honig, *Political Theory and the Displacement of Politics*, 139-140.

[630] Honig, *Political Theory and the Displacement of Politics*, 138.

[631] Honig, *Political Theory and the Displacement of Politics*, 138.

[632] Rawls, *A Theory of Justice*, 277.

[633] Honig, *Political Theory and the Displacement of Politics*, 139.

[634] This is the central thrust of Honig's critique of Rawls. For her, it is the creation of a limited subjectivity that is the most harmful implication of Rawls's scheme of justice as fairness. Though we will not explore that aspect of Honig's critique here, it certainly has important implications for Wilson's later work on broken-windows policing. See, e.g., Harcourt, *Illusion of Order*, chapter six.

[635] Honig, *Political Theory and the Displacement of Politics*, 146.

[636] Honig, *Political Theory and the Displacement of Politics*, 142

[637] Honig, *Political Theory and the Displacement of Politics*, 142.

[638] Honig, *Political Theory and the Displacement of Politics*, 141.

because they have committed a wrong, but because they possess the *wrong disposition* to live amongst a society ordered by its principles. Incapable of being rehabilitated, the presence of criminals means that justice requires "punishment [to] play a heavy-handed role in order to maintain stability."[639] Crucially, that stability is not social, it is systematic. Put a different way, the mark of bad character that defines criminality unsettles a conception of justice that relies on rational actors for its foundation and its sustainability. By treating the criminal as an irredeemable deviant whose "nature is their misfortune," Rawls displaces all responsibility for the act of punishment, rendering it an act that follows not from the way society protects and upholds certain values but from what the system for determining those values requires. Here, punishment does not reflect a matrix of social values, it is simply the right thing to do because rationality demands it. As a result, crime and punishment are depoliticized and, per Honig, the solution to crime is simply "more punishment."[640]

Mercifully, we need not dwell much longer on Rawls in order to discern the oddity of Wilson's turn justice as fairness. In the early pages of *Varieties of Police Behavior*, justice is a concept at once pressing upon but poorly aligned with the realities of police work. By its closing pages, however, "a single standard of justice" is presented as the solution to the dilemma of how to wield discretionary authority in a way that is consistent with the norms of a democratic society. What drives that transition in the intervening pages? What does that renewed standard entail? Does that concept of justice mean the same thing it did at the open—namely, justice as fairness? Not unlike the role of criminal punishment in Rawls's theory of justice, answers to these questions reveal that justice shifts from a constraint upon to a license for police discretion in Wilson's account. In fact, the structure of Wilson's argument mirrors the central features of the relationship between criminality and justice as fairness. A standard that eliminates conflicts over conceptions of the good, a scheme for which the presence of outliers does not invite amendment or reconsideration but only coercion, a system of official intervention framed as a matter of right, not of power—each of these exhibit the imposition of value in a system that denies it does so.

Wilson's "single standard of justice" represents a similar, if less elegant, imposition. Rather than following from rational and disinterested deliberation, however, Wilson's return to justice is the result of two shifts. The first shift emerges out of a pattern of practice he observes in way police administrators attempt to control their patrolmen's discretion: converting order maintenance into law enforcement. The second follows from what he thinks is wrong with that approach. Wilson's take on justice as a constraint on police behavior, and the analytical one-two step that shuffles from abstract ideals to concrete practices and back again, is easy to lose track of. In no small part this is because he shifts from the initial (in)egalitarian dilemma of distributive justice to a concern for the under-enforcement of criminal law that results from the competing conceptions of justice held by police officers and trial court judges, respectively. The locus of the problem is displaced. Introduced as a problem facing the police patrolman, the predicaments of justice in law enforcement are displaced to the judiciary. But it is important to sit with Wilson's remarks on how police officers face the problem of justice, irrespective of the way that problem is further complicated by matrix of actors that constitute the criminal justice apparatus, because it helps us to separate the descriptive Wilson from the normative Wilson, which is a schism that is often overlooked.

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[639] Honig, *Political Theory and the Displacement of Politics*, 144

[640] Honig, *Political Theory and the Displacement of Politics*, 146.

Wilson observed that competing demands on police services led police administrators to hedge discretion in the law enforcement function. Wilson not only thought this ill-suited to effective police work but also normatively misguided. Attending to what grounds the first of those claims compounds what is at stake in the second. Put differently, what underwrites effectiveness in police work? Crime control? Clearance rates? Arrest rates? Ticketing Quotas? Something else? In short, what sort of value does effectiveness represent? On the other side of the ledger, the problem of justice as a constraint on police conduct is not so much that it exhibits a distributive bent that invites prejudice, discrimination, and inequality in law enforcement. Instead, the problem is that the standard of justice, irrespective of its distributive or procedural instantiations, is not uniform across police agencies. And this lack of a unified conception of justice to unite, guide, and constrain America's police officers meant not only that police administrators would be either more or less effective at controlling police discretion. It meant, in addition, that discretionary power could not be fully appreciated as a power for the public good. Thus do we run into questions not far afield from those raised by Rawls's scheme: What constitutes the public good? Who is the public? What is the good?

Roughly 250 pages separate Wilson's remarks on justice as a constraint and his normative conclusion that policing needs a unified conception of justice. Here's how we get from one point to the other. Because a significant degree of legal and directional ambiguity inhered the broad category of "common offenses," Wilson focused on the ways in which police administrators maneuvered and negotiated those ambiguities to control police discretion while at the same time satisfying local political demands for crime control. Though it ultimately arrives at a claim about justice, *Varieties of Police Behavior* is avowedly *not* a study of the administration of justice, with or without trial.[641] Instead, it takes up a different, more specific problem—"enforcing laws that involve conflicts among citizens, that are necessarily ambiguous in their definition, or that require the police to intervene on their own initiative without a citizen to serve as either a victim or a complainant"—in order to discern, describe, and explain variations in police behaviors, the limits of organizational and legal constraints on them, and the ways in which local political culture contributes to both.[642]

What is striking about this move is not only the empirical reality of managing police discretion that it reveals but also the two distinct conclusions it allows Wilson to generate. Because he did not share Hall's and Skolnick's concern over the sovereignty of law, Wilson's normative conclusion is much less straight forward than his empirical assessment. He did not call upon democratic values, the legal process, or the social weight of the rule of law to guide police behavior. Unlike both Hall and Skolnick, Wilson's account is not one of the dangers of police discretion but of the techniques for managing the exercise of discretion in light of the political demands placed upon police services. This is why unraveling his normative conclusion is a bit tricky—it is developed not in response to a set of first-order principled commitments (e.g., the rule of law or due process), but to a more utilitarian pre-occupation with maximizing the police administrator's, and his patrolmen's, ability to do what they're good at, namely, maintaining order. And this is the first clue that connects Wilson to Rawls: where

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641 In Wilson's words, "it is far from clear that what the police administer *is* justice..." *Varieties of Police Behavior,* 10. Perhaps a convenient way of stating the difference between Hall and Skolnick is that for Hall, because he disavowed discretion, there can only be justice *with* trial, whereas for Skolnick, because he did not disavow discretion, there *could* be justice *without* trial.

642 Wilson, *Varieties of Police Behavior*, 10.

justice as fairness engenders political stability, policing oriented by a single standard of justice secures order. Of what does order consist? What is it's relation to law? To legal sanction? In what ways is it different from both? And what is lost when the enterprise of maintaining order is converted to one of enforcing the criminal law?

Descriptively, Wilson concluded that the "general drift" in the management of police discretion was to "convert, wherever possible, matters of order maintenance into matters of law enforcement."[643] This meant, as a function of police practice, substituting the legalistic style of policing in place of the watchman style.[644] By implication, this also meant "multiply[ing] the rules under which the patrolman operates."[645] Wilson credited this trend to three primary factors. In part, he explained, it was a general "consequence of police reform" that aimed to reduce the amount of discretion police wield. But the premium on law enforcement over order maintenance was also the product of an imbricated set of demands for 'efficiency and vigor' in all law enforcement activities. On the one hand, this meant that individual police officers were evaluated based on their arrest records, while police departments – and their chief administrators – were rated on their ability to deter criminal activity more generally, on the other.[646]

Converting order maintenance to law enforcement was not the accidental result of one goal serving the other, even if the two were at times complimentary and reciprocal. Wilson was careful to note that some arrests may indirectly serve order maintenance goals. "Arresting a drunk is one way of breaking up a fight or ending disorder," he wrote, "but this is at the discretion of the patrolman; to the extent his superiors order him to arrest drunks, he must go out and find drunks above and beyond what he might arrest as a way of managing disorder."[647] Here, again, we should remember that Wilson was interested in how police administrators attempted to control their patrolmen's discretion. On certain matters, Wilson observed, police administrators could obtain exact compliance depending on how easily their directives could be verified. Whether the orders were to close down brothels, issue traffic tickets in large numbers, or arrest drunks for public intoxication, what rules of this sort had in common is that, on the one hand, they avoided the traps of proceduralism or operational ambiguity—which only served to invite more discretion—while also, on the other hand, defining the officer's task in terms of enforcing the criminal law.[648]

But not all police activities were so easily amenable to controlling the discretion they invited. For Wilson, it depended not only on whether the situation was one of law enforcement or order maintenance but also whether the interaction was prompted by the police or by the citizen. That matrix of functions and invocations forms the content of Wilson's empirical typology of discretion, what he referred to as "the four determinants of discretion." Police functions – law enforcement or order maintenance – remained the "major determinants" because they explained "enough of the variation" in police behavior in the eight communities he studied. On the law enforcement side of the ledger, the amount of discretion an officer enjoyed depended on who prompted the interaction. Even when the police act on their own volition, if it was a matter of law enforcement it could be "strongly

643 Wilson, *Varieties of Police Behavior*, 281.
644 Wilson, *Varieties of Police Behavior*, 281.
645 Wilson, *Varieties of Police Behavior*, 281.
646 Wilson, *Varieties of Police Behavior*, 282.
647 Wilson, *Varieties of Police Behavior*, 282.
648 Wilson, *Varieties of Police Behavior*, 76.

influenced by the policy of the administrator."[649] Law enforcement policies, Wilson observed, are goal-oriented, and thus the police administrator had "substantial control over his officers" in situations of police-invoked law enforcement because an officer's performance could be measured based on "whether the substantive law enforcement goal has been attained."[650] Should a citizen call upon the police to enforce the criminal law, officers were left with little discretion whether to intervene, though they still enjoyed a significant degree of discretion regarding how to intervene, a decision that also lent itself to the influence of departmental policy.

The order maintenance column of this matrix is not so straightforward. Citizen-invoked order maintenance occasioned significant discretion due to the absence of a clear legal violation but the citizen's expectation that the officer 'do something' about their complaint. Such situations could not be brought easily under departmental control because they lacked the steady performance metric offered by law enforcement, and thus "the handling of these situations will vary considerably ... depend[ing] more on the personal characteristics of the officer and the citizen participants than on departmental policies."[651] "Young college-educated patrolmen in a pleasant suburb may handle these matters in one way," Wilson illustrated the point, "older, working-class officers in a racially mixed central city may handle them in another."[652]

Police-invoked order maintenance, on the other hand, is what occasioned the trend toward converting order maintenance to law enforcement. Although "intermediate in both the degree of discretion and the possibility of departmental control,"[653] police-invoked order maintenance is the most instructive case for understanding how *Varieties of Police Behavior* revealed a popular way of thinking about legitimating police conduct that was not strictly guided by law. Police-invoked order maintenance consisted of a situation in which "the police on their own authority and initiative intervene in situations of actual or potential disorder."[654] For that reason, "discretion in these cases," Wilson surmised, "is more under the control of the patrolman and can be modified only by general incentives to be 'more vigorous' or to 'take it easy.'"[655] Otherwise, the police administrator could control his officers' discretion by instructing them to arrest specific disorderly conduct, "a man intoxicated in a public place even if he is bothering no one" for instance, by treating it as a *law enforcement function*.

As Wilson saw it, the police administrator had two options available to him to control discretionary order maintenance, which was both a power and a function not necessarily bounded to or triggered by claims of legality. Either the administrator can "indicate, though rarely by an explicit policy statement, what level of disorder is tolerable" or, alternatively, he can "instruct, almost always by explicit directive, the patrolman to treat problems of disorder as if they were problems of law enforcement."[656] Following Wilson's preferred example, this meant that drunks were not a problem

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649 Wilson, *Varieties of Police Behavior*, 86.

650 Wilson, *Varieties of Police Behavior*, 86. This seems in line with Skolnick's observations regarding the 'delegate discretion' of warrant officers, who served an exclusively law enforcement function and thus, while they exercise discretion, do not undermine the rule of law because they know the limits of their power – what the law allows – and the metrics with which their performance is evaluated relative to the goals set by the institution.

651 Wilson, *Varieties of Police Behavior*, 89.

652 Wilson, *Varieties of Police Behavior*, 89.

653 Wilson, *Varieties of Police Behavior*, 89.

654 Wilson, *Varieties of Police Behavior*, 88.

655 Wilson, *Varieties of Police Behavior*, 88.

656 Wilson, *Varieties of Police Behavior*, 121-122.

because they were acting disorderly but because they were in violation of a legal prohibition against public intoxication. "The law," Wilson noted, "makes it easy to implement any departmental policy that seeks to have drunks handled on a law enforcement basis."[657] With the distance of modern eyes Wilson's view appears a bit parochial, for we now well know how short a stretch it is to tie conduct thought "disorderly" to some sort of criminal legal statue, whether it regard public drunkenness, indecency, vagrancy, loitering, or a more capacious breach of the "public peace." Writing from the pathos of the late 1960s and early 1970s, however, Wilson's discovery that police administrators tended to treat problems of disorder as matters of law enforcement was not intended as a technique of *social control* as much it was *administrative control*.[658] That conversion functioned as a way to control police discretion, and to render it legally legitimate.

From Law Enforcement to Public Justice

That Wilson's response to this practice shuffles the analysis back to the register of justice, however, signals the second clue that connects the problem of justice in policing to Rawls. What might a 'single standard of justice' accomplish that converting order maintenance to law enforcement could not? Does justice function as better constraint on police conduct? What might make such an abstraction more effective than the concrete practice that relies on positive law? How might their ambitions be different? Might that standard of justice, with its renewed supremacy and univocality, align policing with democracy in ways that legal sanctions cannot?

Varieties of Police Behavior does not share the same vocabulary as the one used by Hall or Skolnick to grapple with these problems. In its pages one will not encounter terms like the "sovereignty of law," as Hall would have it, nor as Skolnick preferred, "order under law." Indeed, the concept of the "rule of law" is hardly mentioned at all. But there is a certain anxiety percolating throughout its pages, animated, as we saw in the previous chapter, partly by the influence of political culture on the quality of police services. Significantly, however, that anxiety is entwined with a palpable frustration with the primacy of the 'legalistic style' of policing that influence had brought about, which Wilson credited to a near collective obsession, in his estimation set in motion by the Wickersham Commission, with defining good policing in terms of preventing 'major crimes.'[659] To be sure, the continued value of *Varieties of Police Behavior* is often credited to its ability to show not only how the discretionary authority of police officers was controlled and managed differently according to the stylistic preferences of each department's chief administrator but also how those preferences were shaped and conditioned by each locality's political culture.[660] Yet there is a more a fundamental tension between law and politics implicated by the forces that inform those stylistic preferences. Put a different way, contained within Wilson's typology of police styles is a revealing point about how to determine

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[657] Wilson, *Varieties of Police Behavior*, 125.

[658] For analyses of policing as a technique of social control *see* David Garland, *Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Jonathan Simon, *Governing Through Crime*; Fear; Harcourt, *Illusion of Order*.

[659] Wilson, *Varieties of Police Behavior*, 296: "It was the Wickersham Commission that, in its 1931 report, concluded that the police should be judged by their ability to prevent major crimes such as bank robberies and burglaries, that they had failed in this task, and that accordingly they should be 'taken out of politics' in order to perform to this task better."

[660] See, e.g., Liederbach and Travis, "Wilson Redux"; Zhao, He, and Lovrich, "A Retest of Wilson's Theory"; National Research Council, *Fairness and Effectiveness in Policing*.

the legitimacy of police conduct in situations for which there is no clear law. And this is where the empirical Wilson transforms to the normative Wilson.

Wilson thought that the trend toward converting order maintenance to law enforcement was "misled" for a variety of reasons. But it is important to signpost his descriptive conclusion separately from his normative aim because of its value for understanding the ways in which police discretion was problematized in the decade following the Crime Commission's final report. Put differently, precisely because the preference for treating problems of order maintenance, which required maximal discretion, as matters of law enforcement—and a preference for a legalistic style of policing more generally—emerged as a 'general trend' in police management across a study of eight diverse American communities, it is representative of a way of thinking about the problem of police discretion, and how that problem was negotiated in practice, in the late 1960s. The crucial point is that, somewhat unlike the Crime Commission's view, police discretion was not simply an abstract problem solved by administrative rulemaking. From the perspective of the police administrator it was a concrete problem of legality best resolved by turning his officers' authority back to the posited law in moments for which the legitimacy of the officer's conduct was legally uncertainty. That difference is one of form, not of kind. For whatever its shortcomings, legalism was certainly popular.

The ascendance of this legalistic way of thinking about and practicing good policing, according to Wilson, was the result of both a wrongheaded way of defining the task as well as a series of false alternatives in police reform. On this point, Wilson appears to take aim at both the Crime Commission's vision for policing *and* the alternatives it rejected, siding neatly with neither. Defining policing as the narrowly tailored endeavor to reduce and deter crime and coupling that definition with an insular, bureaucratic form of management failed to see the "trade-off between leniency and equity" that policing required.[661] Though the legalistic department may promise more equity in the sense that "it treats persons more evenly [and] tends to reward officers for following the rules," it was also less lenient by virtue of the fact that it imposed a duty to convert order maintenance into law enforcement, a duty that could be realized only through an officer "mak[ing] an arrest wherever he can."[662] A watchman-style department, by contrast, was more lenient in that it tended to overlook minor offenses, but it also tended to "treat harshly and sometimes extralegally serious matters," which occasioned the appearance, if not the reality, of unequal treatment by law enforcement.[663]

The problem, for Wilson, is that the imagined alternatives to these arrangements for 'maintaining order' hinged on either "redistributing authority in the police department," decentralizing the functions of police, or both.[664] Here, Wilson shared the Crime Commission's aversion to community involvement in and control over policing. It made no sense to him for police to be "commanded by those whose disorder they must regulate and whose misdeeds they must correct."[665] Whether the risk was "fourth-rate politicians in the wards and neighborhoods" making the police administrator's job harder (it was "hard enough," he noted, "to run a good police department when it is subject to second-rate politicians in city hall"),[666] the neighborhood police department being

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661 Wilson, *Varieties of Police Behavior*, 283.
662 Wilson, *Varieties of Police Behavior*, 284.
663 Wilson, *Varieties of Police Behavior*, 284.
664 Wilson, *Varieties of Police Behavior*, 285.
665 Wilson, *Varieties of Police Behavior*, 285.
666 Wilson, *Varieties of Police Behavior*, 286.

bastardized into "an instrument for inter-neighborhood conflict,"[667] or "deep racial divisions... putting police at the mercy of the rawest emotions,"[668] the "proper government policy is not," he said, to "arm the disputants" by dispersing to the community the authority to govern the police.[669] To be sure, however, he also thought that "the localistic police forces of small towns and homogenous suburbs" were something of an exception to this rule because "they need not handle profound social conflicts."[670] Legalistic policies and practices sought to neutralize the conflictual nature of policing a free society by casting the police as impartial arbiters of the substantive criminal law, a stance which Wilson saw as untenable in jurisdictions characterized by economic and demographic diversity, to say nothing of its departure from the goals of order maintenance.

Proposals to decentralize America's police departments were less offensive, even if they compromised administrative regularity and, consequently, risked weakening "regard for the rule of law" itself,[671] because "decentralization, properly understood, *strengthens* local units."[672] Good order maintenance policing, which for Wilson was good policing categorically, was a necessarily subjective endeavor. It required of the patrol officer the "capacity to make reliable judgements about the character, motives, intentions, and likely future actions of those whom they must police."[673] It required of the police supervisor the license to "judge his patrolmen on the basis of their ability to keep the peace on their beat." In both cases, such judgements were "necessarily subjective and dependent on close observation and personal familiarity." Objective, legalistic standards like arrest rates belied these subjective judgements and were ill-suited and often undesirable for managing real or potential disorder.

Setting the goalposts, at one end, in the law enforcement function and, at the other, in dispersed authority over the police, merely prevented the police from accomplishing what they were good at: maintaining order. In a telling paragraph that appears in the final pages of *Varieties of Police Behavior* that reads like an impossible wish list of police powers, Wilson lays out his normative vision in no uncertain terms.

> A decentralized, neighborhood-oriented, order maintenance patrol force requires central command to insure a reasonably common definition of appropriate order, a reduction in the opportunities for corruption and favoritism, and the protection of civil liberties of suspects and witnesses. Equity should be an important constraint on order maintenance as well as on law enforcement, and equity requires bureaucratic regularity. That bureaucratic regularity, which insists that people be treated as if they were legally equal, and order maintenance, which assumes that people must be handled in full awareness of their moral differences, are competing values is obvious; that having an organization alert to such competing values will produce strains is entirely

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667 Wilson, *Varieties of Police Behavior*, 289.
668 Wilson, *Varieties of Police Behavior*, 289.
669 Wilson, *Varieties of Police Behavior*, 290.
670 This exception clearly conditions the authority over police on the basis of race, coloring his remarks that follow such that his preference for order maintenance is inexorably bound to an anxiety about policing black and brown communities.
671 Wilson, *Varieties of Police Behavior*, 286.
672 Wilson, *Varieties of Police Behavior*, 290. Emphasis in original.
673 Wilson, *Varieties of Police Behavior*, 291.

> clear; but all human values are to some degree in competition and most organizations exist to manage that strain by striking reasonable balances.[674]

Decentralization coupled with bureaucratic regularity, order maintenance that appreciates difference but treats all as equal under the law, policing that was particular in its pathos and orientation but determined by generalities—this is the peculiar alchemy that Wilson set about. How to make sense of these seemingly contradictory aims?

The tensions that emerge here are yet another instantiation of the dilemma of policing a free society, and especially of allocating to police a vast degree of discretionary authority not strictly delimited by law in a society purportedly constituted by and governed under its sovereignty. Understanding Wilson's vision for sound, effective policing capable of enabling police administrators to at once license and control his patrolmen's discretion requires appreciating the way that it operates on the contour of legality. Controlling discretion by way of policy guidance served little more than to generate a laundry list of factors for police to consider on job, an unrealistic expectation that left open how police were supposed to consider those factors in the moment. In any case, the clearer the policy, Wilson thought, the more likely courts would find a reason to strike it down as discriminatory. The 'decentralized, neighborhood-oriented, order maintenance patrol force' was predicated instead on the support of public officials who relieve the police administrator from the burden of being "evaluated solely or even primarily on the basis of the trend in the rate of serious crime."[675]

Yet, according to Wilson, even that much wasn't enough. Good policing was order maintenance policing, and "order maintenance," he said, "means managing conflict, and conflict implies disagreement over what should be done, how, and to whom."[676] Another clue that signals the peculiar kinship shared by Wilson and Rawls. There would always be a certain degree of resentment towards policing, a resentment that Wilson thought was "often justified." If police interventions weren't decried as racially discriminatory it would only be a matter of time before they'd be condemned for something else. Because police were tasked with addressing a crime problem, Wilson argued, they were ultimately trying to "manage the unmanageable." Order maintenance was thus a more realistic aim for police services because police could essentially determine for themselves, through central command, a "reasonably common definition of appropriate order." Note here the contrast to the Crime Commission. In their view, central command oriented police energies toward crime deterrence and cabined discretion within a system of rules. By comparison, central command, still insulated from the public, determined what constitutes "appropriate order," which meant embracing the fact that the very concept of order maintenance was at odds with legality, in the positivist sense, and that people would disagree about what that endeavor required, where its legitimate boundaries emerged, and whose interests it served. Order, in other words, was not the product of public input or democratic contestation but of dominant interests.[677]

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[674] Wilson, *Varieties of Police Behavior*, 293.

[675] Wilson, *Varieties of Police Behavior*, 295.

[676] Wilson, *Varieties of Police Behavior*, 296.

[677] Indeed, Wilson set up the discussion about justice and order in his concluding chapter in opposition to "the recently required opinions of certain liberals and radicals that decentralization and 'participatory democracy' are among the chief remedies for social problems." Wilson, *Varieties of Police Behavior*, 288.

Like justice as fairness, which seeks closure, Wilson fuses order to justice to lay claim to the good. The goal of justice is not reconciliation, however. It is compliance with the ideal of order. Precisely because "all human values are in competition" anyway, Wilson thought, the police organization had to do its best to strike a 'reasonable balance' between those competing demands. What policing needed was a "single standard of justice," and thus a universal standard of "public order." Wilson is not subtle about what that vision of public order looks like. It is a class-based order that prioritizes middle class values. The conflict and disagreement over police conduct—"what should be done, how, and to whom"—is explained entirely in these terms. Indeed, Wilson goes as far as to claim that "it would be a mistake [to] assume that race is the decisive factor" in police-citizen encounters.[678] "Throughout history," Wilson writes,

> the urban poor have disliked and distrusted the police, and the feeling has been reciprocated; the situation will not change until the poor become middle class, or at least working class, or until society decides to abandon the effort to maintain a common legal code and a *level of public order acceptable to middle-class persons*.[679]

Wilson is more than clear about the values that public order represents. He is also straightforwardly unapologetic about defending those values, and entirely unphased that they might express an ideal of the good that others do not accept. "If by 'middle-class bias' is meant a concern for the security of person and property and a desire to avoid intrusions into one's privacy and disturbances of one's peace," Wilson retorts, "it is not clear why such a 'bias' is a bad thing or, indeed, why it should be called a 'bias' at all."[680] The language of political liberalism—personhood, property, individual security---allows Wilson to shuffle seamlessly between a concrete reference point (e.g., the poor and middle-class *persons*) and an abstract ideal. That ideal, the single standard of justice, is not the result of rational deliberation, as Rawls's justice as fairness would have it. Its propriety, its correctness, is merely stipulated. And Wilson has no reason to believe that this is a "bad thing."

What accounts for the singularity of this conception of justice, then? What gives voice to its univocality? Wilson draws a contrast to a "double standard of justice."[681] Against a common definition of appropriate order, that standard allowed "different neighborhoods ... to have radically different levels of public order."[682] Wilson was referring here to the institutional features of Jim-crow policing, which judged crime and disorder in black communities as a less serious concern than in white communities. Significantly, though, the problem with this double standard is not that it fails to extend full legal protection to communities of color. Rather, the problem is that there was a "relative lack of territorial differentiation among Negroes of different classes."[683] Because communities of color were both segregated and consolidated, the middle and lower classes were intermixed. What this meant, for Wilson, is that

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[678] Wilson, *Varieties of Police Behavior*, 297. "If all negroes were turned white tomorrow this hostility, only slightly abated, would continue."
[679] Wilson, *Varieties of Police Behavior*, 297. Italics added.
[680] Wilson, *Varieties of Police Behavior*, 297.
[681] Wilson, *Varieties of Police Behavior*, 298.
[682] Wilson, *Varieties of Police Behavior*, 297.
[683] Wilson, *Varieties of Police Behavior*, 298.

> even if one might justify a level of law enforcement appropriate to lower-class culture and different from that provided to the community as a whole, middle-class persons unable to separate themselves physically from the lower class would be victimized in two ways: they would get less police protection than they want and, because black skins tends in the eyes of whites to conceal class differences, they are likely to be treated by the police (mistakenly) in ways not appropriate to their status.[684]

A "double standard" of justice errs not because it treats equals unequally, but because it treats unequals equally. What is especially striking about this formulation of the problem—stunning, really—is that it turns on a discourse of desert. Middle-class minorities might receive less police protection than they *want*, yet it is the police that are *mistaken* for treating them in ways *not appropriate to their status*. The claim about individual desire—the want for police protection—veils the justification for that desire. Members of the urban poor might just as well desire police protection, but they do not have a legitimate claim to it because it is not befitting their status. Middle class persons don't simply *want* police protection. They *deserve* it. It is their *status* that grounds the demand. And police conduct trips the limit of justice when it mistakenly denies them what is their right.

This is why Wilson's turn to Rawls is at once so peculiar, so odd – and yet – so fitting: While justice as fairness is introduced, at first, as a framework outmoded by the realities of police work, the single standard of justice we encounter in the closing pages of *Varieties of Police Behavior* relies on that framework's rationale to justify and legitimate police discretion. Justice as fairness, too, is intended as a singular standard. Whereas, for Rawls, arriving at that standard begins with a situation of initial equality, Wilson's point of departure is precisely the opposite. Material inequalities shape and justify his standard of justice. Yet, as we've seen, when it came to crime and punishment, justice as fairness, like Wilson's standard, turned to a discourse of desert to justify the scheme's outliers, to demarcate its boundaries, ensure its own stability. The point is not that Rawls's justice as fairness and Wilson's single standard of justice are the same thing. Indeed, the aspirations that animate Rawls's scheme—prioritizing the right over the good in such a way that cultivates substantive political equality and produces an institutional arrangement the protects society's least advantaged—are fundamentally betrayed by Wilson's prioritization of the middle class. Rather, the point is that in both cases justice functions to legitimate an order of things that licenses state coercion and subordinates a class of persons under the aegis of reasonableness. Justice, in other words, enables and expands the role of punishment and policing in each analysis, respectively.

Three connections between Rawls's account of criminality in justice as fairness and Wilson's defense of order maintenance policing through his single standard of justice demonstrate their shared political mechanics. First, both Rawls and Wilson rely on justice to displace conflict. Justice as fairness accomplishes this task by pursuing a politics of reconciliation. In the face of competing and irreconcilable moral, religious, and philosophical doctrines, Rawls sought to construct a scheme of egalitarian liberalism that guaranteed social stability. The principles of justice that structure that scheme, in Honig's words, "displace politics with administration."[685] Once established, the principles of justice are no longer open to discussion, amenable to revision, or reflexive to the scheme's

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[684] Wilson, *Varieties of Police Behavior*, 298.

[685] Honig, *Political Theory and the Displacement of Politics,* 136-137.

shortcomings. Wilson's standard of justice does not rely on reconciliation. But it serves the same purpose. The difference is only that he thought consensus over appropriate order and the propriety of police behavior relative to it was impossible; so, rather than arrive at justice through rational deliberation, he made an arbitrary stipulation. The effect is exactly the same: to displace politics with administration.

Put another way, where Rawls relied on the original position as a default for the experience of dissonance—a move that allows him to depoliticize and thus erase from the field of contestation ideals of the good incompatible with his principles of justice—Wilson relies on the police to literally enforce that ideal. The point is not to mollify difference and facilitate unanimous consent, or a singular perspective, or equal grounds of cognition. Rather, the point is enthrone a 'single standard of justice' that licenses police to secure a quality of life consistent across communities, not by way of law (e.g., using departures from legally proscribed behaviors as the invitation for official intervention) but by way of discretion (e.g., using the officer's subjective judgement to determine whether and how to intervene). Critically, this is a difference of form, not of kind. Rawls sought to buttress a view of the good. So, too, did Wilson. Where Rawls turns to analytics and philosophical jargon to protect that view of the good, Wilson turns to police; consequently, Rawls's remarks on criminality and punishment demonstrate that his politics of reconciliation is a matter of establishing and maintaining hegemony. Wilson is merely saying that quiet part out loud.

The second connection that unites the two appears in the justification for punishment and policing. In both cases, punishment and policing are expressions of right, not of power. For Rawls, this is because criminals and misfits are so fundamentally, characterologically different than the rational actors borne of the original position that they cannot be rehabilitated. Punishment is neither an incentive scheme nor a will to power. It simply ensures compliance with justice as fairness which, because it is the "correct conception of justice," is thus simply the right thing to do with those unruly figures whose values do not align with its vision of the good.

Wilson's justification for order maintenance, and by implication police discretion, hews to this logic. For him, punishment – which we might think of as formal legal intervention that results in arrest – is also not an incentive scheme. Too much of that is actually deleterious, he argued. It tilts the balance of leniency and equity too far. Yet in light of this, the answer was not to rein *policing*. On the contrary, the answer was to expand it. Crucially, that move is facilitated by defining effective policing in terms of order maintenance rather than law enforcement. Where the orientation of the latter points toward punishment, the former cultivates public peace. Discretionary policing is thus justified neither in terms of law nor in terms of power, but by reference to what a single standard of justice requires. One paradoxical implication of expressing the right of police authority in this way is that criminal law no longer functions as an incentive for good behavior, in principle or in practice. Instead, the ever watchful eye of the policeman serves this purpose. Thus does Wilson depart, as did the Crime Commission, from the classical view of deterrence, securing sociability not by way of the certainty of punishments that attach to criminal behaviors but to the presence of the police officer, and the near unlimited possibilities of his authority.

Policing, like Rawlsian punishment, is an expression of power disguised as an expression of right. Police discretion is an expression of right inasmuch as it is guided by a 'single standard of justice.' Yet because Wilson must stipulate what justice stands for—not justice as fairness, as he began, but middle-class sensibilities—discretion employed in its service is also fundamentally an expression power. The standard of justice that guides it is not singular because everyone agrees to it. Precisely the

opposite. Its univocality is not a harmony, it is one voice recognized above others. Singularity is what was "needed," not what existed. Thus does "justice" repackage discretion as an expression of right, aided and abetted by Wilson's more genteel concern for leniency and equity.

Like Rawls, who justified punishment not to those who are punished but to those who "mete it out,"[686] Wilson justifies discretion not to those whose liberties might be undermined by its unfettered reach but to those who are tasked with maintaining order, on the one hand, and to those who benefit from that maintenance, on the other. Indeed, the negative test case, the "double standard of justice," is not problematic because it allows unequal treatment, it is problematic because it treats the wrong people unequally. For Rawls, the rationale for this is owed to criminality's extra-systematicity. For Wilson, it is occasioned by the fact that police are asked to do the impossible, to respond to problems they didn't create and can't hope to solve, to "manage the unmanageable." In both cases, the reasoning is the same: coercion is justified by right, not by power. Rawls succeeds at veiling this logic better than Wilson. In part, this is because, for Rawls, a society correctly ordered according to his two principles of justice is absent systemic injustice, leaving "nothing that can account for criminal behavior."[687] The analytics and abstraction required to sustain that view disembody, figuratively and literally, the reason for punishment. On the other side of the ledger, this is owed in part to the line that Wilson unapologetically draws: middle class values are simply the right ones to enforce. By instantiating that claim by way of a "single standard of justice," however, Wilson inelegantly excuses himself from a dispute over power. Police authority, and the standard of justice that guides it, is not a matter of a powerful ruling class enforcing its ideal of the good life onto others. Rather, it is simply what justice requires. The decision here is just as arbitrary as Rawls's justification for punishment—it's just significantly more unabashed about the concrete society it imagines.

Thus a final connection: the purpose of punishment and policing is to enforce compliance with the scheme of justice. Coercing behavior such that it is compliant with justice as fairness is, for Rawls, really all that is left to ground the practice of punishment. That those unruly, deviant characters were too defective to be remedied meant that punishment could not serve a deterrent function. And because justice as fairness is the product of rational deliberation, retribution can only explain so much. Disembodied rational actors lack the social signifiers that invest criminal acts, and the punishments that attach to them, with any substantive meaning. Hence Honig's claim that "Rawls imagines a practice in which there is no moral anguish, no unruly excess, no joy in another's suffering, no troublesome doubts, only a sense of justice."[688] With that "sense" serving as the denominator that both explains criminality and justifies its punishment, all that vitalizes punitive practices is a desire for maintaining the stability of that scheme.[689]

So, too, in Wilson's account all that remains is a desire to maintain order. That desire is couched in a different sort of claim, however. Middle class values might express an ideal conception of order, but that does not fully explain why a discretionary order maintenance approach is better suited to the purpose of policing. For whatever concern he feigns for leniency and equity, it is not clear why middle class persons would mind heavy-handed law enforcement. Presumably, their enlightened respect for

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686 Honig, *Political Theory and the Displacement of Politics*, 141.

687 Honig, *Political Theory and the Displacement of Politics*, 142. "It [justice as fairness] has eliminated thereby all the environmental factors, all the injustices both arbitrary and systemic, that in other regimes motivate persons to criminal behavior."

688 Honig, *Political Theory and the Displacement of Politics*, 146.

689 Honig, *Political Theory and the Displacement of Politics*, 144.

personhood, property, and security would, like Rawls's properly rational subjects, prevent them from law violative behavior in the first place. What makes order maintenance, as a technique for policing, so ideal?

To answer this question, Wilson reasons from the negative. "'The 'problems of the police,'" by which he meant the tensions, hostilities, and claims to discrimination they face in the course of their duties, "are long-standing and inherent in the nature of their function."[690] The issue is that these prosaic difficulties masked a more pressing problem. The "definition of those problems" is what had "changed" and therefore "misled or unsettled" policing in America. Prioritizing law enforcement, in particular law enforcement aimed at 'serious crime' rather than minor disorder, had shifted the order of things such that police were presented with an impossible task, perceived as ineffective, and destined to unsustainably tilt the balance between leniency and equity one way or the other. To put the point simply, Wilson didn't think that the police were very good crime fighters. Or, at the very least, they were much better at maintaining order than they were solving the crime problem. "If they were expected to do less," Wilson claimed, "they might not be so frustrated by their inability to do much of anything."[691]

Thus did Wilson adjust those expectations by reorienting the purpose of policing toward order maintenance. In so adjusting, Wilson expanded the role and legitimacy of discretion in policing. Each of the follies that ensue from the expectation that police fight serious crime are united by a view that seeks to manage discretion by eliminating discretion, by relegating it to objective measures rather than embracing its provisional character. Maintaining order, like discretion itself, is always an evolving enterprise sensitive to the particularities of each jurisdiction, and legitimate to the extent that it services a conception of public order consistent with a single standard of justice. The particularities of police conduct might change from place to place, but the objective would not. Put a different way, though there may be varieties of police behavior, order is univocal.

In combination, the mechanics of justice in Rawls's account of criminality and Wilson's defense of order maintenance policing share an almost identical structure. Justice facilitates an analytical sequence that displaces conflict, disguises power, and disciplines offenders. As a result, Wilson's departure from legalism as a framework for constraining discretion presents police authority as an expression of right rather than of power. Consequently, as we'll now see, like Hall's turn to the democratic policeman, Wilson's analysis enhances the legitimate scope of police power.

Missed Connections: Revisiting Hall's Democratic Policeman

How does Wilson's pursuit of a single standard of justice fit into the discursive transition from legalism to legality? After all, that is the inquiry with which this chapter began. As it turns out, to answer that question we need to revisit Hall.

Throughout *Police and Law in a Democratic Society*, Hall considered the norms that legitimate police power rather than simply the legal mechanisms that are capable of controlling police conduct. In keeping with the program set out by the legal process school, Hall advanced an understanding of

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690 Wilson, *Varieties of Police Behavior*, 299.

691 Wilson, *Varieties of Police Behavior*, 299.

legality that at once enables discretion in practice while erasing it in theory. Where positive rules of law run out, that theory relies on both principles and procedures to determine the propriety of official conduct. As a result, with the gaps between rules mortared with legal principles, what appears as unbound discretion is actually a decision already determined by law. Thus did Hall ease policing's tense relationship to the universal sovereignty of law by way of an abstraction. So long as police were acting pursuant to their "legal duty" to enforce the law, even if positive rules of law did not fully determine their actions, the policeman was nonetheless "the living embodiment of the law."[692]

Two key analytical devices facilitate that incarnation. The first grounds discretion in "democratic goals and knowledge of the facts."[693] The second turns to a principle of reasonableness to endow the justification for police discretion with univocality. Hence the police officer's "legal duty to arrest anyone whom he reasonably believes committed the felony." As a duty, the officer has no choice. Justifying that duty by way of reasonableness, however, gathers its force from an appeal to propriety, to terms that reasonable persons would agree to. Hall's turn to a principle of reasonableness and subsequent enthronement of the policeman as law incarnate, not unlike Wilson's single standard of justice or Rawls's justice as fairness, thus transforms policing from an expression of power to an expression of right.

What unites Hall and Wilson is the way that discretion is folded into their scheme for policing a democratic society. Whereas the legalistic discourse positions discretion as an outlier in the system and attempts to utilize its best features while constraining its worst abuses, reframing discretion in terms of legality—of the standards and norms of legitimacy that animate a liberal democratic society—allows both Wilson and Hall to present a scheme of policing that is *more democratic* precisely because it is *more discretionary*. Indeed, for Hall it was those "maximum challenges to the efficiency" of police authority, challenges which invited the most discretion, that offered "the greatest opportunity to demonstrate the effectiveness of democratic police methods."[694] One way of thinking about this dynamic is to use the familiar distinction between excuses and justifications in criminal defense. While criminal behavior might be excused on the grounds that, though it is normatively undesirable, it belies blameworthiness, in other cases behaviors that might otherwise violate the criminal law are considered justified because they hew to an underlying norm that furthers a greater social good. Where the former is limited to its particular case, the latter has universal import. Likewise, legitimating discretion through a regime of administrative legalism serves as an excuse for police conduct that departs from positive law. In part, this follows from logical necessity: if it is because legal rules are indeterminate that discretion arises, then the particular circumstances that expose that indeterminacy are not easily generalizable (or else law would not be so indeterminate!). In part, however, this is also owed to the fact that legalism cannot fully justify conduct that does not follow law-like rules.

In contrast to excusing discretion, Wilson and Hall fully justify discretion by framing it as an expression of right. Significantly, this is a move that fundamentally reshuffles the terms of the debate. Legalism treats discretion as an outlier in need of excuse because its normative commitments cast anything other than rule-following as an arbitrary exercise of power. Wilson avoids this trap by replacing legalism with justice. Similarly, Hall dodges that problem by substituting 'democratic goals' for legal mandates. In both accounts, police discretion is relieved of the bimodal arrangement that divided the discourse between legalism, on the one hand, and authoritarianism, on the other. One

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692 Hall, "Police and Law in a Democratic Society," 144.
693 Hall, "Police and Law in a Democratic Society," 149.
694 Hall, "Police and Law in a Democratic Society," 149.

effect of this shift is that it complicates the standard liberal-democratic understanding of the relationship between law and power. Not only does the legitimacy of state power rely on its legal justification, according to that understanding, but its liberal foundation prioritizes the right over the good. Wilson accounts for this complication by merely stipulating the basis of justice. His confidence that middle class values are simply the ones that ought to order society is what allows him to present order maintenance policing as an expression of right rather than an imposition of the good. Hall, however, is more opaque on this point. But there is at least one indication that discretion isn't as righteous as it seems:

> When a riot occurs, the house is already on fire, and the principal objective is to extinguish the flames by sound methods. One need not be a social scientist to appreciate the fact that riots are the end-results of chronic maladjustment.... we must attend to those external manifestations of the underlying causes which are relevant to the use of legal controls by the police. The important factors are those indications of maladjustment and friction which occur every day. Among these, specific symptoms of future serious troubles are insults, threats, batteries and malicious destruction of property. Intelligent law-enforcement in such seemingly petty cases is of the utmost importance in *the creation of wholesome law-abiding attitudes*.[695]

As it turns out, the need for "realistic decisions guided by democratic goals and knowledge of the facts"—which is how that paragraph concludes—begins with the presence of 'chronically maladjusted' individuals. In fact, it is the "external manifestations" of maladjustment to which police power, like Rawlsian punishment, responds. And, not unlike Wilson's understanding of disorder, the signatures of maladjustment are indicia of incivility. Thus does Hall's policeman as law incarnate, freed from the bulwark of legalism to meet the goals of democracy, wield his authority in service of a particular notion of the good. The point is not that Hall and Wilson, and by implication Hall and Rawls, are saying the same thing. Unlike those two, Hall's order of things is thoroughly more juridical; ultimately, we should recall, he hedged the legitimacy of the scheme in the legal process. He was a law professor, after all. Rather, the point is that, like them, Hall disguises discretion as an expression of right and, in doing so, conceals its disciplinary power.

Significantly, that move is also what helps place Wilson in the transition from legalism to legality. For Hall, police discretion was not only consonant with democracy so long as it wore the guise of "democratic goals." Moreover, it was legally legitimate. That legitimacy, however, was not secured by legalism's premium on rule-following. Instead, the legitimacy of his democratic policeman's discretion was occasioned by the policeman's 'legal duty,' which entailed not only executing legal mandates but also doing so 'reasonably.' With capacious limiting principles such as reasonableness anchoring the legal process, police conduct in Hall's analysis operates on the register of legality from the start. Those principles are what determine the norms and standards of legitimacy, which once articulated in legal language take on the form of legality.

Likewise, Wilson's turn a single standard of justice bears on those same norms of legitimacy. Unlike Hall, he does not attempt to put the license to power that ensues into legal language. "Legality"

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[695] Hall, "Police and Law in a Democratic Society," 149.

is thus a bit of an awkward term to describe Wilson's position. But his move away from strict legalism and towards justice to discuss state coercion means that he is operating on that register nonetheless. In some sense, whereas Hall preempts the transition from legalism to legality, Wilson picks up where he left off, opening with the problem of justice in policing rather than the problem of formulating effective legal constraints for police behavior.

IV. CONCLUSION

The empirical studies of police behavior that exposed the pitfalls of the Crime Commission's framework for police governance did more than challenge the Commission's assumptions about centralized administration and crime deterrence. They also advanced an altogether different way of thinking about the relationship between police discretion, democracy, and the rule of law. As a result, the discourse of police discretion transformed from one animated by legalism's premium on rule-following to one that grappled with the norms and standards of legitimacy that underpin law. Legality, the master principle that constellates those norms and standards in liberal democracies, thus became the central analytical fulcrum in thinking about how to square discretionary police authority with the normative commitments a free society entails. For Skolnick, legality hinged on due process and relied on collective social pressure in order to ensure police respect the rule of law as a democratic value. Wilson, by contrast, worked under the hood of legality to proffer a theory of justice against which to evaluate the legitimacy of police conduct. Both of them bore the traces of Jerome Hall, whose earlier analysis at once licensed and disguised vast discretionary police authority. This trend was not limited to the academic study of police discretion, however. Indeed, as we'll see in the next chapter, the shuffle between legalism and legality is evidenced in the Supreme Court's due process cases as well. For not unlike Hall, Skolnick or Wilson, the Court in those cases faces down the indeterminacy of rules in search of the norms and standards that underwrite and legitimate law. To them we now turn.

CHAPTER FOUR

PENUMBRAS OF POLICE DISCRETION: THE DUE PROCESS REVOLUTION AND THE LIMITS OF LEGAL THEORY

If we start by acknowledging even a large fraction of the forces at work in street policing—and, equally important, a large fraction of the limits on judging—the enterprise must quickly change. It turns out that in *Terry*'s sphere, there is much greater potential for the law, for courts, to make things worse than to make things better. Perhaps that should be the focus of legal theory.

—William Stuntz[696]

It would be obviously grotesque if one announced court decisions in the "name of a measure," instead of that of the king, of the people, or of the law, or if one would swear an oath to measures or affirm "loyalty to administrative directives."

—Carl Schmitt[697]

I. INTRODUCTION

WHAT are the legal grounds of police discretion? So far, we have considered two approaches to the predicaments of discretionary authority for a democratic society governed by the rule of law. The first, which is emblematized by the Crime Commission, is legalistic. It looked to administrative directives and law-like rules for constraining police conduct from within the police agency. The second, which emerges in various ways across the works of Hall, Skolnick, and Wilson, transitions away from legalism and toward legality. Pursuant to that transition, determining the propriety of police discretion requires attending to the norms and standards of legitimacy that underpin legal or law-like rules. Significantly, what both of those approaches share in common is the belief that discretion is an inescapable part of police work. That law-like rules or legal norms might constrain or, as we saw with Hall and Wilson, license, discretionary authority is a separate question from what grounds the legality of police discretion. Put a different way, what each of those approaches assume is not only that there is some legitimate basis for police to exercise authority independently of law but also that this basis does not undermine, contradict, or otherwise threaten the rule of law. This chapter inquires into how the Supreme Court grappled with the predicaments of police discretion.

One of the assumptions underlying the puzzling binary that casts discretion as eminent yet law as sovereign holds that decisions made by way of discretionary authority are neither objective nor rational in the same way that legal reasoning is traditionally understood to be. Whereas law is presupposed as a neutral endeavor that regulates the affairs of private citizens and public officers alike, setting out only, as the liberal understanding would have it, the rules of the game and disinterested as to the particular players within it, discretion is a necessarily subjective enterprise. Part of what is especially striking about the early analyses of police discretion—running the gamut from the Crime

[696] William Stuntz, "Terry's Impossibility," *St. John's Law Review* 72, no.3 (1998): 1229.

[697] Carl Schmitt, *Legality and Legitimacy*, trans. & ed. Jeffrey Seitzer (Durham: Duke University Press, 2004), 11.

Commission through to Skolnick, Wilson, Bittner and, preceding them all, Jerome Hall—is how they each share this basic assumption. Indeed, the early scholarship that rejected the idea that law enforcement officials should be afforded discretionary latitude did so in largely these terms; for them, once departed from the objective and value-neutral province of Law, the road to totalitarianism all but paved itself. As a matter of police policy, those working through the predicaments of police discretion in the decades tailing the Crime Commission were primarily concerned with the problem of guaranteeing liberalism's promise of disinterested governance. The Crime Commission, for instance, took care not to impose federal interests from afar by leaving police governance to the autonomy of state and local authorities, even as they proposed remedial measures to ease the tensions between the police and political minorities. Skolnick and Wilson each expressed a concern for reducing the aggravations of poverty and race on police services. Even Hall, despite his refusal to acknowledge that the policing practices he described entailed a great deal of discretion, was concerned about the appearance of impropriety when circumstances forced police to make selective arrests. In each case, the greatest challenge discretionary policing presented in practice was not actually the specter of totalitarianism—which, for however horrifying its concrete instantiations might have been at mid-century, remained an abstract threat—but the possibility of biased policing. Whether the solution lay in legalism or in legality, each of those analyses generates the appearance of value-neutrality by redefining the object of discretion. For the Crime Commission, that object was crime deterrence. For Hall, it was democratic law enforcement. For Wilson, it was a single standard of justice, and for Skolnick it was alleviating the law and order binary. Hedging those objectives in a bulwark of legalism or the norms and standards of legitimacy that underly law is what underwrites each of those frameworks. But none of these speak to how such underlying values may be articulated in legal terms. What sort of legal reasoning grounds discretionary authority?

What we don't receive from the works discussed so far is, in other words, a clear indication of the sort of reasoning that discretion entails. The Crime Commission left it to police administrators to develop general guidelines for police conduct. Skolnick laid out the sociological factors that inform a police officer's discretionary judgements, but he turned to a social constructivist understanding of law to appeal to due process as a constraint on police behavior. Wilson, by contrast, short-circuits that dilemma altogether by grounding discretion in a renewed standard of justice that obviates the police officer's need to reason altogether. Another way of putting this is that what gets lost in the transition from legalism to legality, if paradoxically, is the form of legal reason that determines the way police officers use their discretion. What does the law require of police conduct when it has seemingly nothing to say about it? And what is the theoretical basis for such requirements? How does police discretion establish a claim to legal authority? What theory of law can accommodate police discretion? According to what theory of law is discretion legitimate? Is the concept of law amenable to discretionary authority at all? If the discourse regarding police discretion transitioned from legalism's law-discretion binary to legality's purchase on the underlying norms that legitimate law, then on what register is the propriety of police discretion open to dispute? Whether constrained by due process, contained within institutional boundaries, or refracted through a prism of justice, police discretion presents an unsettled question of law.

How did the Supreme Court tend to the problem of police discretion? What is the constitutional basis of discretionary authority? And what sort jurisprudential rationale anchors the Court's reasoning—rules, processes, or principles? To pursue answers to these questions, the place to look is the string of cases that form the holy trinity of the Court's now revered Due Process Revolution. As a matter of historical chronology, these cases are important data points in the transformation of the

discourse of police discretion that evolved from a framework of bald legalism to a concern for the principle of legality. Each of the trinitarian cases—*Mapp*, *Miranda*, and *Terry*—were decided between 1960 and 1970, the same period in which the Crime Commission undertook its analysis of American policing and Skolnick and Wilson developed their close empirical studies of the concrete organizational predicaments of police discretion. They thus share a common discursive reference point. And they exhibit a similar evolution from legalism to legality.

At the same time, however, the Due Process Revolution cases open up the interrogative aperture in ways that the academic study of American policing could not. Though Hall, Skolnick, and Wilson each trade in jurisprudential concepts—rules, due process, legality, justice—they operate with more or less stable understandings of those concepts. Discretion, in their accounts, could be squared with legality by reference to those ideas. But what to make of discretion when those concepts are called into question? That is one of the effects of the Due Process Revolution.

Another way of questioning how police discretion is legally legitimate if legalism is an ineffective constraint is to ask how police might proceed in legitimate ways in situations that are beyond strict legal measure. This is how Skolnick and Wilson approached the problem. Still another way is to ask what the law requires of police conduct when it has seemingly nothing to say about the conduct in question. This is how the Supreme Court approached the problem in *Terry v. Ohio*. In both formulations, these are deep questions of legal theory. Indeed, to ask what is legally legitimate when there is no law ultimately reduces to a question that asks *what law is* in the first place. Here, policing is the particular context in which this question is to be raised, but it is a context that is conditioned by the limits of the legal theoretical discourse on the determinacy of law that unfolded in same generation of American intellectual development as our sociologists and jurists. The issue of how we are to determine legality in moments or about situations for which law is indeterminate is epitomized by the debate between Ronald Dworkin and H.L.A Hart over this very same question. For them, the question manifests in those "hard cases" – cases like *Terry*, for instance – that judges must decide without reference to clearly established legal rules. How are judges to reason through the correct outcome in these cases? What are the limits imposed upon their reasoning? What requirements must their reasoning satisfy?

Throughout the same decade in which Johnson's Crime Commission conducted its examination of the problems of policing in a free society, the Supreme Court was laying the foundation for the so-called 'due process revolution.' The folk wisdom surrounding this period of American constitutional jurisprudence suggests that "the 1960s were unquestionably the pinnacle of constitutional reform in procedural law, setting higher standards for lawful police conduct than cops had ever faced."[698] In part, this common wisdom is correct. The rulings in *Miranda v. Arizona*[699] and *Mapp v. Ohio*,[700] for instance, established rules governing police behavior that are today often taken for granted: that those subject to criminal arrest be informed of their rights to remain silent and to legal representation and that evidence produced by illegal searches and seizures be excluded from criminal trials, respectively. In part, however, this common wisdom overlooks the deference showed to law enforcement in landmark cases such as *Terry v. Ohio*.[701] In that case, the Court departed from the standard that officers demonstrate probable cause of criminal wrongdoing in order to secure a lawful arrest, instead lowering

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[698] Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*, 4th ed. (Quid Pro, 2011 [1967]), 247.
[699] 384 U.S. 436 (1966).
[700] 367 U.S. 643 (1961).
[701] 392 U.S. 1 (1968).

the threshold for investigatory stops to what the Court dubbed "reasonable suspicion." Whether in furtherance of legal protections for private citizens or deferential to the craft of policing, the legal challenges directed at commonplace policing practices during this period interrogated more than the strict constitutional propriety of law enforcement. Rather, faced with street-level policing problems, these cases hinge on an abstract question of how police ought to proceed in legally legitimate ways during situations in which the law offers no positive instruction. As a result, they raise a sort of chicken-egg question for police power: do these cases illuminate the legal boundaries of police discretion or does police discretion require its own legal approximation?[702]

While it could be argued that the cases forming the holy trinity of the due process revolution – *Miranda*, *Mapp*, and *Terry* – are examples of the Court in effect making police policy, this would ignore the limited effects of judicial restraints upon policing in practice that Skolnick, Wilson, and Bittner's studies revealed. Indeed, though *Miranda* may require an officer to read a suspect her rights, and though the ambition of *Mapp* may be to compel police officers to conduct lawful investigations lest they jeopardize the legal integrity of their enterprise, it is less than clear that these limitations have any meaningful effect. "As a tactical matter," Skolnick discovered, "[the police officer] recognizes an obligation to appear to be obeying the letter of procedural law, although often disregarding its spirit."[703] By only extending the basic principles of liberal legality to practices accepted as part of the police function – arrest and evidence collection – the procedural reform offered by each case creates a roadmap for how to "infuse the character of legality"[704] into police conduct without scrutinizing the power of police to conduct these practices in the first place. Thus, while the capacity to interrogate a suspect or to search and seize her effects relies at bottom on the expression of the officer's authority, *Miranda* and *Mapp* run short of questioning the foundations of that authority. Put differently, they proscribe how police authority ought to be used without questioning the assumption that police enjoy the authority to arrest, question, and gather criminal evidence.[705] It is only in *Terry*, however, that we get closer to that more fundamental question.

II. THE LEGALITY OF POLICE DISCRETION

Legal questions regarding the legitimacy of law enforcement practices are channeled through the Fourth Amendment, which guards citizens from unwarranted and unreasonable searches and seizures. Each of the Amendment's clauses sustains its owns scholastic cottage industry. Indeed, there

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[702] This, too, is a formulation borrowed from legal theory. As Scott Shapiro has put the point, "the possibility of law has the same structure... norms that confer legal power are the 'eggs,' and those with the power to create legal norms are the 'chickens.'" Scott Shapiro, *Legality* (Cambridge: Belknap Press, 2011), 40.

[703] Skolnick, *Justice Without Trial*, 204.

[704] Skolnick, *Justice Without Trial*, 203-04.

[705] In Seo's estimation, the point of these cases is not so much to question the assumed authority of the police but to remind police that judges are the ultimately legal authority in the outcome of criminal cases. In her account, what unites these cases is a move for the judiciary to carve out the unique role of judges in moment when the scope of policing and law enforcement was expanding to all aspects of daily life. Without such procedural safeguards, police were in effect empowered to (over)determine the outcome of criminal cases, therefore rendering the role of the judge more or less pro forma, if not entirely moot. For Seo, who lays this out by way the legal process school that was a popular mode of legal thinking at the time of these cases, the concern was not just the risk of an authoritarian police force in America. On top of that, that concern was that such an arrangement would remove the judge's place in the legal process. Seo, "Democratic Policing Before the Due Process Revolution," *Yale Law Journal* 128 (2019): 1295-1297.

are few zones of academic terrain more crowded than the legal commentary of the Fourth Amendment's doctrinal plentitude, inconsistency, and contradiction.[706] This chapter makes no attempt at unraveling these tensions, let alone at endeavoring to resolve them. One wonders if there is anything new left to be said. Instead, the ambition of this chapter is to trace the Court's reasoning in the three pivotal cases forming the core of its "due process revolution," *Mapp v. Ohio*, *Miranda v. Arizona*, and *Terry v. Ohio*, to understand precisely how they enveloped the problem of police discretion within the limits of constitutional law. In doing so, this section will pursue the argument that, not unlike the academic studies of police discretion discussed in the preceding chapter, the Supreme Court's revolutionary decisions of the 1960s and 1970s move away from legalism and toward legality such that they call into question the very concept of law. Does legality determine the boundaries of police discretion? Or might discretion bend the boundaries of legality? Might the dynamic between discretionary authority and law enforcement reveal a deeper tension between legality, on the one hand, and legitimacy, on the other? How does the Supreme Court maneuver that tension? And what sort of revolutionary potential does it tender?

Two distinct storylines have emerged out of this period of constitutional interpretation. The first heralds the Warren Court as curbing the reign of lawlessness in law enforcement, as the protector of the poor and the marginalized. It is a tale of victories for the rights of individuals to be free from unwarranted—and unfair—state intrusion. As Fred P. Graham put it, "the Warren Court changed the due process requirement to demand absolute compliance by state and local police with the key provisions of the Bill of Rights."[707] Justice Felix Frankfurter captured this revolutionary potential nearly two decades prior when he warned that requiring state and local governments to comply with the Bill of Rights would "tear up by the roots much of the fabric of law in the several states."[708] Sarah Seo echoes that sentiment when she says, summarizing this version of the story, the Warren Court "overthrew the traditional arrangement" that treated policing, and its governance, as a strictly state and local affair. "What was so revolutionary," she says, "was the judicial creation of a national standard of criminal procedure."[709] The narrative that has ensued from, and often prevails as the story we tell ourselves about, this period is that the due process revolution was a full-throated commitment to 'policing the police.'

The second version of this story isn't nearly as optimistic. In fact, it contends almost the opposite. It is a tale of how the due process revolution actually did more to facilitate than it did to ward state intrusion into the daily lives of private citizens. No one has made this case more clearly, or convincingly, than Sarah Seo in her recent book *Policing the Open Road*. Against the prevailing wisdom, Seo argues that "American courts did more to encourage and sustain, rather than to check, the police's growing authority."[710] As the title of her book suggests, she grounds that argument in a long history of cases that considered the legal status of the automobile. In her account, those "car cases" set in motion new challenges for Fourth Amendment jurisprudence well before it became the cornerstone of the Warren Court's criminal procedure doctrine. Crucially, in adjudicating the legal status of vehicular stops and searches, state and federal courts, she argues, redrew "the boundaries of legitimate

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[706] For an excellent illustration of this, see, Akhil Reed Amar, "Fourth Amendment First Principles," *Harvard Law Review* 107, no.4 (1994): 757-819.

[707] Fred P. Graham, *The Self-Inflicted Wound* (New York: Macmillan, 1970), 6.

[708] *Adamson v California*, 332 U.S. 46 (1947) (concurring).

[709] Sarah Seo, *Policing the Open Road: How Cars Transformed American Freedom* (Cambridge: Harvard University Press, 2019), 17.

[710] Seo, *Policing the Open Road*, 18.

policing" such that "Fourth Amendment jurisprudence evolved not just to limit police discretion... but also to accommodate it."[711] Only by placing the Warren Court's landmark decisions alongside those car cases, which she considers "the underbelly of criminal procedure," can we fully appreciate how an era of constitutional jurisprudence known for "act[ing] boldly in the name of upholding democratic ideals" could accelerate, encourage, and legally legitimate discretionary police authority.[712]

Seo's book is brilliant. Many of the arguments in this chapter are built upon her ideas and owe her a great debt. However, in what follows, this chapter will attempt to push her argument to a higher level of abstraction so that we might see more clearly just how high the stakes are in the due process cases. The argument is that, in keeping with the anxieties exhibited by Hall, on the one hand, and in rejection of bald administrative legalism evidenced by Skolnick and Wilson, on the other, the Court, orbiting the issue of legal indeterminacy, folds discretion into the system of legality rather than presenting discretion in opposition to or odds with law. Discretion is, in short, recognized in practice and erased in theory. As a result, their reasoning highlights the limits, and the breaking points, of liberal legality.

Where this argument departs from Seo's is material in the sense that here we will not unpack—even as we embrace—the 'car cases' that form the core of Seo's analysis. That departure is also substantive in that it challenges the very categories of legal reasoning that Seo identifies in those cases. For Seo, the jurisprudential binary between public and private rights – a binary that is fundamental to liberalism in any of its instantiations – is displaced and flattened into a standard of reasonableness that enables courts "to simultaneously empower discretionary policing for Everyman's safety and shield Everyman's privacy from discretionary policing."[713] In her estimation, departing from this classical liberal binary to determine the bounds of legitimate state conduct was facilitated by the turn to "procedural rights to protect individuals from the police" rather than "a substantive right to privacy."[714] Thus does her account offer a compelling history of "why those rights," the ones we hold up as the darlings of the Due Process Revolution, "took the form they did."[715]

The classical legal categories that marked off, on the one hand, a sphere of privacy upon which the state may not intrude without legal cause while leaving, on the other hand, everything outside that sphere subject to regulation by public authorities was jettisoned by a string of 'car cases' and, ultimately, the Due Process Revolution cases in two ways. First, according to Seo, the analysis guiding Fourth Amendment jurisprudence transformed "to an individual determination of reasonableness...to determine the warrant question."[716] Tracing this to a car case, Seo argues that this "new inquiry centered on the officer's point of view, on his reasonable belief."[717] One effect of this shift away from the categorical analysis that marked the public/private distinction and toward this individuated reasoning is that it "authorized individual officers to use their judgement in every car case" and, Seo says, "would make space for the police's power to grow."[718]

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711 Seo, *Policing the Open Road*, 16-17.
712 Seo, *Policing the Open Road*, 18.
713 Seo, *Policing the Open Road*, 18.
714 Seo, *Policing the Open Road*, 19.
715 Seo, *Policing the Open Road*, 20.
716 Seo, *Policing the Open Road*, 141.
717 Seo, *Policing the Open Road,* 141.
718 Seo, *Policing the Open Road*, 142.

Police power grew by way of this shift in legal reasoning in another way as well. Not only did the legal question as to whether a space was public or private morph into a question of whether an officer's intrusion of such space was reasonable, Seo illustrates how "the bounds of reasonable of policing" were drawn along proceduralist lines.[719] Fourth Amendment jurisprudence's "proceduralization"[720] is the result of two pressures. On the one hand, it provided a legal basis for discretionary authority by allowing procedural rights to stand as safeguards that differentiated 'reasonable' policing from "unfettered" power.[721] On the other hand, it preserved the public/private distinction in legal reasoning that justified discretionary police power in terms of the regulatable public sphere.[722]

Rather than the displacement of the public/private framework in favor of individualized reason and procedural safeguards, this chapter argues that the legal theory underpinning the Due Process Revolution relies on a distinction between legal rules and legal principles in order to legitimate police discretion. That distinction is the same one that appears as the schism pocking Hall's lectures. It is also the same distinction that is later disaggregated by Skolnick's and Wilson's respective analyses. And, ultimately, it runs us into a similar series of dilemmas. Is law always indeterminate? Must discretion be a necessary supplement to law's inherent indeterminacies? Or can law be fully determinate, complete, absolute, sovereign? Is what appears on the streets as self-referential authority (at best) or arbitrary power (at worst) actually fully determined by the force of legal principles that inhere law's greater empire? Is discretion an expression of right? Or is it an expression of power?

These are questions that are similar to the ones Seo pursues but their answers rely on a theory of jurisprudence that her analysis ignores. To be sure, according to Seo, the turn to proceduralism was occasioned by the fact that "the main theories of jurisprudence in the twentieth century failed to provide a principled method to both justify and limit the police's powers."[723] Those theories are featured in her account to include classical legal thought, legal realism, and process theory. This chapter will rely on two different theories of analytical jurisprudence, one supplied by Hart and the other Dworkin, to inform a reading of constitutional jurisprudence, generally, and Fourth Amendment jurisprudence, specifically. That these are not included in Seo's account is likely due to her focus on constitutional jurisprudence, and thus the argument pursued in this chapter is not meant as a rebuke of Seo's so much as it is a compliment, or a concurrence that reaches a similar conclusion but for different reasons. Those different reasons illuminate, this chapter will argue, a different set of political stakes for the predicament of police discretion in a democratic society.

Terry v. Ohio presents the relief between Seo's argument and the one pursued here in its sharpest form. To appreciate the ways in which *Terry* highlights the breaking point of liberal legality, however, we first have to understand how it is contoured by the cases which came before it, namely, *Mapp* and *Miranda*, and how those cases reflect a concern for the sovereignty of law. Moreover, precisely because the logic animating the Court's reasoning in *Mapp*, the exclusionary rule, is considered by the Court to have been outmoded by the facts at issue in *Terry*, it is all the more important that we understand what that rule required and from where it gathered its force. Indeed, as one student of the Court has noted,

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719 Seo, *Policing the Open Road*, 226.
720 Seo, *Policing the Open Road*, 230
721 Seo, *Policing the Open Road*, 224.
722 Seo, *Policing the Open Road*, 230.
723 Seo, *Policing the Open Road*, 226.

"the 'exclusionary rule' became the heart of the Warren Court's efforts to reform law enforcement,"[724] so we must understand what made that heart beat in order to grasp why it flat-lined in *Terry*.

Principles, Processes, and the Exclusionary Rule

But let's follow Seo's lead to get there. She offers two ways of interpreting the forces driving the Court's decision in *Mapp*, one in her book, *Policing the Open Road*, another in an essay published by the Yale Law Journal—the same essay in which she carefully unpacks Hall's lectures—entitled "Democratic Policing Before the Due Process Revolution." In her essay, *Mapp* is interpreted as a legal process case. In fact, the due process revolution itself appears there as "a project to preserve the judicially supervised 'fair trial.'"[725] Consider *Mapp*. That case involved the police searching a home without a warrant, discovering a collection of magazines that violated Ohio's law against lewd and obscene materials—evidence that was wholly unrelated to the reasons for which the police were searching the home in the first place—and subsequently pressing charges against the appellant for their possession. In a strict legal sense, the case began as a challenge to the Ohio law on First Amendment grounds. But the real issue, according to the Court, was that the search that produced the evidence was undertaken without a warrant, placing it in the sphere of the Fourth Amendment's jurisdiction. In framing the legal issue this way, Seo argues, the Court "linked police investigations to trial and accordingly viewed illegally seized evidence as a form of compelled testimony that tainted the integrity of a judicially determined conviction."[726]

Why is this argument justified in terms of the legal process? At bottom, Seo's argument is an extension of Hall's insistence that a democratic society subordinated to the rule of law required a separation of "the functions of the judge and that of policeman."[727] Under this view, allowing illegally seized evidence to be used against a private citizen in a court of law risked undermining the legal process by in effect licensing the police to "usurp a judicial function."[728] Here, that function is the judge's role in determining whether probable cause exists to approve a warrant to search, in this case, Mapp's home. Proceeding without a warrant as they did, in other words, amounted to the police deciding for themselves that there was probable cause to do so, which ran in the face of the American legal tradition that "require[d] that those instances be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[729] Thus, by turning to the warrant requirement, Seo argues, "the Warren Court was not simply protecting individual rights; more basically, it was protecting the judge's role."[730]

Miranda v. Arizona falls into this category as well. It, too, relied on the exclusionary rule, this time to bar statements made by individuals under police interrogation as evidence against them if they were made without being first informed of their rights to silence and to counsel. According to Seo,

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[724] Graham, *The Self-Inflicted Wound*, 19.
[725] Seo, "Democratic Policing Before the Due Process Revolution," 1299.
[726] Seo, "Democratic Policing Before the Due Process Revolution," 1295.
[727] Seo, "Democratic Policing Before the Due Process Revolution," 1294 (quoting Hall, "Police and Law," 155).
[728] Seo, "Democratic Policing Before the Due Process Revolution," 1295.
[729] Johnson v United States, 333 US 10, 14 (1948) (J. Jackson) (quoted in Seo, Seo, "Democratic Policing Before the Due Process Revolution," 1295).
[730] Seo, "Democratic Policing Before the Due Process Revolution," 1296.

not unlike the reverence to the legal process illustrated in *Mapp*, here "*Miranda* extended the right to counsel outside the courtroom and into the station house because, without such assistance, an officer's heavy-handed tactics to extract a confession might effectively seal a defendant's fate and render a trial moot."[731] The partition between the police and judicial functions, between law's enforcement and its adjudication, in other words, would be dissolved.

That *Terry* departs from both *Mapp* and *Miranda* in pointing to a limit of the exclusionary rule and expanding, rather than reining, the zone of legal legitimacy filled by police discretion is also explained by this focus on the legal process. As Seo puts it, stop-and-frisks, the legal issue in *Terry*, did not pose a threat to legality because they didn't "undermine the separation of judicial and law enforcement functions."[732] "*Terry* was not so much a break from the Court's earlier decisions. It simply fell on the legitimate side of police discretion because street encounters that demanded spur-of-the-moment action did not involve a traditionally magisterially role," she writes.[733]

That something is curious about *Terry* with respect to the trajectory of its preceding due process revolutionaries is apparent. Whether the continuity Seo establishes between them by way of the legal process is sustainable will be taken up shortly. For now, let's dedicate some time to the exclusionary rule. Recall that the legal process theory that guided Hall's analysis of police power in a democratic society combined, without much noticing, the role of legal standards and legal commands. One way of interpreting this slippage is as a tension between principles and rules that is built into legal process theory itself. Hall as well, we noted earlier, was motivated by an anxiety about legal indeterminacy, which is put on full display in his remarks about the "sovereignty of law." The so-called "legal process" was one way of securing such sovereignty, even if that theory doesn't tell us much about legal substance—about *what law is* in those cases for which *no positive law exists*. But precisely because it relied on a fusion of rules and principles it cannot provide a full explanation of the dynamics of discretion that are explained in those exclusionary rule cases. Put a different way, if the legal force of those cases was derived from self-interested judges wanting to preserve the role of the judiciary, and thus by implication the sanctity of Law, there would be no reason for the exclusionary rule. Indeed, if that were the case, we could imagine judges more straightforwardly saying that police have usurped a power that as a rule of law does not belong to them, therefore voiding the charges. Whether we solemnize this move under the appellation of the "exclusionary rule" wouldn't much matter—exclusion may be the result, but the force driving that outcome would be the process and nothing more. Under this view, the term "exclusionary rule" is a pleonasm.

But that's not what they do. Instead, the existence of the exclusionary rule is brought about by an appeal to principles that don't seem to rely on the proceduralism that grounds legal process theory. On this point two dominant themes emerge. The first, which is both the common wisdom regarding the exclusionary rule and a rationale explicitly guiding the Court's reasoning in *Mapp*, contends that the rule exists to deter police misconduct. "The purpose of the exclusionary rule," Justice Clark reminded us at the time, ""is to deter—to compel respect for the constitutional guaranty [against unlawful search and seizure] in the only effectively available way—by removing the incentive to disregard it."[734] "The history of criminal law," he continued, "proves that tolerance of shortcut

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[731] Seo, "Democratic Policing Before the Due Process Revolution," 1294.
[732] Seo, "Democratic Policing Before the Due Process Revolution," 1296.
[733] Seo, "Democratic Policing Before the Due Process Revolution,"1297.
[734] *Mapp*, 656 (citing *Elkins v U.S.*, 364 U.S. 206 (1960), 217).

methods in law enforcement impairs its enduring effectiveness."[735] A second theme, which appeals to a much different form of reason, stands for the proposition that legitimate government cannot govern by illegitimate means. Rather than effectiveness in law enforcement, here the point is that "the state must obey the law in enforcing the law."[736] These are two very different ways of constructing the basis for excluding evidence obtained in contravention of the Fourth Amendment.

Deterrence enjoys a certain intellectual and logical inertia. As we saw in chapter one, deterrence arguments in the context of law enforcement date back to the Enlightenment. Its appeal has been used to justify the entire existence of criminal punishment and, as it was refashioned by the Crime Commission, to supply the *raison d'etre* for modern policing. Rolling the tape backwards to check the powers of law enforcement is thus congruent with the claims about individual behavior and the administration of justice that inhere the concept. Empirically, however, this rationale stands on weak footing. And that weakness extends in both directions, encompassing both arguments in favor and arguments against the exclusionary rule. Opponents of the exclusionary rule, for instance, argue that its hamstrings the efforts of law enforcement. Sometimes this sentiment is captured as "coddling criminals,"[737] other times, famously, as requiring that "the criminal is to go free because the constable has blundered."[738] Advocates of the rule, on the other hand, are met with the reality that it does very little to change concrete police practices.[739] The narratives used to explain and justify how evidence has been obtained may change, even if the practices that exclusionary rule sought to deter have not.

It is not all that clear, in fact, that the deterrence view of the exclusionary rule is built on sound theoretical footing either. For one thing, as legal *rule*, which by definition assumes some sort of normative position that establishes how those governed by it *ought* to behave and is invoked to *achieve* that end – and which in legalese is referred to by the distinction, often coupled, between rights and remedies – the exclusionary rule is dizzying. John Henry Wigmore illustrated the contradictory logic that emerged out of the first exclusionary rule case, *Weeks v US*, like this:

> Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.[740]

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[735] *Mapp*, 658 (citing *Miller v U.S.*, 357 US 301 (1958), 313).

[736] James Boyd White, *Justice As Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1994), 209.

[737] Graham, *The Self-Inflicted Wound*, chapter seven.

[738] This is how Justice Cardozo derided the exclusionary rule in *People v. New York*, 242 N.Y. 12 (N.Y. 1926), 21.

[739] Fred Graham documents this at length in his chapter on "Policing the Police," and this is also a familiar point Skolnick pursues in the closing chapter of *Justice Without Trial.*

[740] John Henry Wigmore, *Evidence in Trials at Common Law*, 4th ed. (Boston: Little, Brown, 1961), § 2184; *Cf*, Barry Friedman, *Unwarranted*, at 81, arguing that "the very fact that otherwise good evidence is being tossed out only goes to show that the defendant is guilty—and yet without that evidence likely will walk."

We might forgive Wigmore for assuming that the central purpose of law is to punish rather than deter by chalking it up to the persuasions of the moment. But the parable of Titus and Flavius reveals not just the limited efficacy of the exclusionary rule but also one of the fatal assumptions of that rule as a deterrent to police misconduct. "The most serious flaw in the exclusionary rule," to borrow Frank Graham's words, "is the assumption that police are motivated primarily by the desire to convict wrongdoers."[741] Robert Traynor, Chief Justice of the California Supreme Court, put the point explicitly: "Police officers and prosecuting officials are primarily interested in convicting criminals."[742] A rule that is "calculated to prevent, not to repair," as Justice Potter Stewart described it, achieves deterrence by "compel[ing] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[743] That incentive, presumably, is realizing the fruits of their labors by securing criminal convictions for those they've arrested for wrongdoing. Thus must Flavius learn his lesson by watching Titus walk free.

From a sociological perspective, that assumption has been demonstrated to be almost entirely false. Police are interested in maintaining order, as we saw with Wilson, and in "clearing" crimes, as we saw with Skolnick. Neither are endeavors that require a conviction for each instance of wrongdoing. From the perspective of legal process theory, more critically, the deterrence-based argument would also seem untenable. Indeed, if the thrust of that theory is predicated on clear—and sharp—partitions between the law's enforcement and its adjudication, then those enforcing the law can't also be motivated by the same reasons as those adjudicating legal guilt. To put the point another way, if legal legitimacy relies on the separation of judicial and police functions, then police risk overstepping that boundary if their concern was motivated by determining (and securing) the legal guilt of those individuals they arrest.[744]

Alongside, though sometimes against, the view that the exclusionary rule is intended to serve a deterrent function is the view that the government ought not to benefit from its own wrongdoing. Unlike deterrence, which is a matter of pragmatism, this view is a matter of principle. As Barry Friedman has put this point, "it is the cost of having a Fourth Amendment in the first place."[745] Justice Oliver Wendell Holmes, writing in dissent in *Olmstead v U.S.*, which held that wiretapping a private citizen's phone lines without a warrant did not violate that Fourth Amendment, took up this point in the position opposite Cardozo's famous quip, arguing that it is "a less evil that some criminals should escape than the Government should play an ignoble part."[746] Similarly, Justice Louis Brandeis warned, dissenting in the same case, that "to declare that in the administration of the criminal law the ends justify the means—to declare that the government may commit crimes in order to secure the

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[741] Graham, *The Self-Inflicted Wound*, 134-35.

[742] *People v. Cahan*, 44 Cal. 2d 434 (1955), 444.

[743] *Elkins v. U.S.*, 364 U.S. 206 (1960), 217.

[744] To be sure, as Skolnick's study illustrated, for the police the arrestee is already guilty. Wilson, similarly, argued that because law enforcement was a matter of fact arrests were evidence of factual guilt. Courts only made matters of policing more complicated by making it harder for the police to do their jobs. But those judicial fetters did not mean that police were any more or less motivated by criminal convictions.

[745] Barry Friedman, *Unwarranted*, 81.

[746] *Olmstead v. U.S.*, 277 U.S. 438 (1928), 470 (Holmes dissenting).

conviction of a private criminal—would bring terrible retribution."[747] Excluding illegally obtained evidence, according to these views, is a matter of principle for a society governed by the rule of law.[748]

Mapp offers evidence for this position as well. Indeed, in writing for the Court, Justice Clark uses language from those Holmes and Brandeis dissents in *Olmstead.* "Nothing can destroy a government more quickly," he declared, "than its failure to observe its own laws, or worse, its disregard of the character of its own existence."[749] Not unlike Holmes, Justice Clark jettisoned Cardozo's sympathy for the blundering constable. "The criminal must go free, if he must, but it is the law that sets him free," he wrote in a move that further signaled a commitment to and concern for the sovereignty of law by presenting it as an autonomous entity.[750] Thus did *Mapp* attempt to close that "ignoble shortcut to conviction" that warrantless searches and seizures represented, refusing to "permit [the Fourth Amendment] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."[751]

Years later, Justice William Brennan, who joined the majority opinion in *Mapp*, underscored this principled rationale by declaring in a speech that "it is a mistake often made that deterrence of unlawful police action is the underlying basis of this rule. The true reason is that exclusion is necessary to vindicate the right itself, whether or not that vindication also operates to deter."[752] Brennan's language of vindication represents another way of framing the exclusionary rule as a matter of legal principle. It is axiomatic in Anglo-American jurisprudence that a right implies the ability to enjoy its guarantees and levy claims for redress against those who have infringed upon it. Remedies for the damages incurred by warrantless searches are a peculiar puzzle of fourth amendment doctrine precisely because they take the form of excluding evidence collected pursuant to the illegal search, which is then engulfed by the tension between 'coddling criminals' and hamstringing law enforcement. While consideration of remedies has taken a bit of a third string position behind the deterrence and principled-government rationales, it has been the subject of significant judicial discussion. Yet, importantly, the question of remedies—which is really at the beginning of the exclusionary rule's origin story—is ancillary to those other rationales. Importantly, however, it is congruent with the principle that government ought not to benefit from its own wrongdoing insofar as it maintains that a legal right its only meaningful if its accompanied by a corresponding legal remedy.

If there is a meaningful legal process argument in *Mapp*, it is at best derivative. To be sure, the Court does close its opinion by claiming that warrantless searches and seizures threaten the "judicial integrity so necessary in the true administration of justice."[753] That threat, of course, would be realized by reading the Fourth Amendment to guarantee more "than that to which honest law enforcement is entitled."[754] Hence, from the legal process perspective, Justice Clark was preserving that zone of authority to which the judiciary was properly entitled, namely, the fair trial, free from the influence of

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[747] *Olmstead v. U.S.*, 277 U.S. 438 (1928), 485 (Brandeis dissenting).

[748] Yale Kamisar, "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an 'Empirical Proposition?'," *Creighton Law Review* 16 (1983): 604 (arguing that "the Holmes-Brandeis dissents underscore that the exclusionary rule is based on principle.")

[749] *Mapp*, 659.

[750] *Mapp*, 659.

[751] *Mapp,* 660.

[752] Quoted in Graham, *The Self-Inflicted Wound*, 145.

[753] *Mapp*, 660.

[754] *Mapp*, 660.

unconstitutional evidence.[755] Yet it is not clear that the legal process perspective can sustain either the deterrence or principled-government arguments that animate the exclusionary rule—even in *Mapp*. For instance, if the exclusionary rule exists to deter police misconduct, the legal process argument that wagers deterrence functions to preserve the integrity of an independent judiciary begs the question of misconduct *against whom*? Trials might be tainted, but it was individuals – and their rights to privacy and due process – that *Mapp* construed the right to protect. Likewise, if exclusion is the necessary cost of preserving legal legitimacy, then the legal process itself is constrained by that principle, not the other way around. Put a different way, a principle under the rule of law that says the state must obey the law in enforcing the law can serve as the basis for the legal process – we partition law's enforcement from its adjudication to ensure everyone is playing by the rules – but the legal process can't serve as a basis for that principle. Running the tape backwards would lead to a sort of legal fetishism contending that everyone must play by the rules to ensure the integrity of each player's part for *the purpose of ensuring each player's part*; beyond functionalism, there is no there, there.

Due Process Beyond the Process

Seo abandons the legal process framework for the Due Process Revolution in favor a different explanation in her book *Policing the Open Road*. In that text, her argument pursues the evolution of the concept of public and private spheres of regulation and intrusion from a substantive to a procedural legal framework. In part, the principle of liberal legality that requires government agents to obey the law in enforcing the law draws on, and gathers much of its force from, this public/private binary. The threshold of legitimacy, so the theory goes, differs with respect to each sphere. Where the state might have a claim to regulate conduct in public, the bar is set substantially higher when the state seeks to intrude upon a citizen's strictly private life. John Stuart Mill, for example, famously reinforced this separation between the public and private spheres by way of the harm principle. It was not legitimate, he argued, for government to interfere upon an individual's affairs if they did not harm another's. For him, harm was a derivative of individual liberty, and thus the state did not so much invade a private *space* as it did a private, individually held *capacity*—liberty—when it sought to intervene if no harm had been done.

Others, by contrast, have construed that threshold spatially, usually by way of some Lockean notion of private property. James Boyd White, for example, contends that "the historical roots of exclusion lie in a conception of property which holds that even where a search is procedurally reasonable, the government simply has no right to seize the property of the citizen for use against him in a criminal proceeding."[756] For him, "property is jurisdictional in character," meaning that private property was both "what one had not yielded to the government" as well as "an extension of the person."[757] This is a view that imbricates property and liberty and, importantly, understands the original substance of the public/private distinction not in terms of "grants of power or capacity" by the government but as "true entitlements" for which claims to the public, to the common, or to general welfare have no purchase.[758]

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[755] *Mapp,* 657 (citing *Rochin v. California*, 342 U.S. 165 (1952), 173).
[756] White, *Justice as Translation*, 204.
[757] White, *Justice as Translation*, 206.
[758] White, *Justice as Translation*, 206.

Seo argues that "the dominant approach in Fourth Amendment doctrine" up to the advent of the automobile adhered to this public/private binary, and took as its archetypes one's house – a spatially, propertied zone of privacy – and one's person – an individually held entitlement to the exercise of liberty, free from unwarranted intrusion.[759] Her book offers a rich history that traces how the proliferation of private automobile ownership in the U.S. "democratized law enforcement" through the collision and hybridization of that traditional legal framework, reworking the contours of Fourth Amendment doctrine—and perhaps legality itself—such that demands for public safety outstripped claims to privacy. The personal car fused together both logics of the classical liberal conception privacy. It was one's personal property. It was also an expression, literally and metaphorically, of one's freedom, drawing from the rationale that liberty ought not be impaired without evidence of harm. The privacy that individuals expected within the propertied confines of theirs homes thus extended to the propertied confines of the car, which by virtue of mobility was, paradoxically, not spatially confined beyond the state's reach at all. Indeed, because it operated in a public space—state roads and interstate highways—states could claim, in the name of public safety, the right to intervene in one's movement because of the potential dangers (and novelties) that vehicular traffic presented to others on the roads. Put differently, the *threat* of harm replaced *demonstrable* harm as the threshold for legitimate state intervention. Significantly, Seo argues, the logic of Fourth Amendment car cases, which she names the "automotive Fourth Amendment," supplied the roadmap for state intrusion beyond the family car, extending that license to power to any street encounter between private citizens and public law enforcement officers.[760]

According to Seo, the holy trinity of the Due Process Revolution – *Mapp*, *Miranda*, *Terry* – is the result of a legal trajectory that began in the 1920s. *Mapp* and *Miranda*, she argues, are the culmination of a set of legal dilemmas that captivated the Supreme Court in the 1940s. *Terry*, on the other hand, borrows from the logic of a single car case from nearly two decades earlier. What did those cases decide? How did they rework the balance between the public and private spheres? According to what jurisprudential theory? And why do they matter for the broader problem of police discretion?

Policing the Open Road pursues answers to each of these questions. The legal history that unfolds is, according to Seo's central thesis, virtually unintelligible without the role of the automobile in American society. For while those car cases, which "form the underbelly of Fourth Amendment doctrine," take up a concrete social phenomenon, namely, automobility, they have profound implications for police power and, consequently, for the theory of law and legal legitimacy that orients a society of 'ordered liberty.' Seo's case and point begins with the 1925 case of *Carroll v. United States*, which, coincidentally, is "the Supreme Court's first car search case."[761] In that case, police interdicted suspected bootleggers on a rural Michigan road, forcing their car into a ditch and searching the vehicle for contraband liquor without a warrant. As simple as these facts may first seem, Seo's analysis shows how they were caught up in a matrix of legal forces. Prohibition's nationwide constitutional ban on the production, transportation, and sale of liquor was in full effect. The Supreme Court had only eleven years prior applied the exclusionary rule for the first time on Fourth Amendment grounds. And cars were everywhere. Together, Seo argues, the confluence of these factors "raised one of the most

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[759] Seo, *Policing the Open Road*, 125, 127.

[760] See Seo, *Policing the Open Road*, chapter 3.

[761] Seo, *Policing the Open Road*, 116 (citing Carrol v. United States, 276 U.S. 132 (1925)).

contentious questions in twentieth-century criminal procedure: when did the Fourth Amendment require a warrant to stop and search a car?"[762]

In holding that the police did not violate the Fourth Amendment by searching Carroll's car without a warrant, the *Carroll* case, according to Seo, "heralded the beginning of the problem of police discretion in constitutional criminal procedure."[763] And it did so by "shift[ing] Fourth Amendment jurisprudence from a categorical analysis—is the automobile, as a category, public of private?—to an individualized determination of reasonableness—was this particular search reasonable?—to determine the warrant question."[764] But how did the Court accomplish this shift? And why is it a problem of police discretion? The answer, at the risk of telescoping Seo's thorough analysis, is that the Court treated *Carroll* "as a case not about liquor but about how the automobile had completely transformed American society."[765] Importantly, *Carroll* posed a deep problem for the theory of liberal legality. Its facts implicated two distinct laws, and not just any laws but constitutional provisions. Where conflicts between federal or state statutory laws and the Constitution could usually be resolved by way of their hierarchical arrangement—that is, by subordinating statutory law to what the Constitution required—dueling constitutional doctrines presented a much more cumbersome legal problem. When neither could claim the higher ground of legal supremacy, what determined which one would govern?

Carroll, for his part, invoked the Fourth Amendment's protection against warrantless search and seizure. The state, on the other hand, invoked the Eighteenth Amendment's prohibition against the transport of alcohol, an act Carroll was clearly committing. Yet siding too closely with one risked undercutting the legal integrity of the other. In Seo's words, "at stake was the rule of law. The dilemma was that it cut both ways."[766] To the extent that *Carroll* marks the birth of police discretion in constitutional form, then, it is a problem born out of a question of legal indeterminacy and, we might echo Hall, a deep concern for the sovereignty of Law.

The Court's opinion was not based on a theory of the legal process. In fact, as we'll see, its reasoning flies in the face of that theory and renders it a near impossibility. Nor did it follow liberalism's trenchant public/private distinction. Seo puts the point forcefully: "the public/private division provided no principled way for determining whether a warrant would be required whenever an officer suspected that a car contained contraband."[767] Liberal legality's central analytical fulcrum, she writes, "proved unhelpful when cars simultaneously demanded greater policing for the public's safety and heightened individuals' expectations of privacy."[768] The Court's way around this "fundamental incongruity" between liberalism's traditional legal categories and the "Automotive Age" hinged on the unique, exigent circumstances that vehicular transportation presented for policing. One of these was temporal. Simply put, criminals could flee by car beyond a police agency's jurisdiction in the time it would take to obtain a warrant. "Time had been a measure for reasonableness" in other cases, Seo notes, so there was nothing jurisprudentially innovative to the argument that it was not unreasonable—as the strict language of the Fourth Amendment requires—to "dispense with the

[762] Seo, *Policing the Open Road*, 119.
[763] Seo, *Policing the Open Road*, 142.
[764] Seo, *Policing the Open Road*, 141.
[765] Seo, *Policing the Open Road*, 124.
[766] Seo, *Policing the Open Road*, 123.
[767] Seo, *Policing the Open Road*, 136.
[768] Seo, *Policing the Open Road*, 136.

[warrant] requirement" if the time needed to satisfy that requirement also allowed the wrongdoer to evade the law.[769] Here, again, is yet another instantiation of the sovereignty of law problem.

Rather than holding that the legality of a warrantless search and seizure of a vehicle depended on whether the officer had enough time to get a warrant, Justice Taft's opinion in *Carroll* "took Fourth Amendment jurisprudence in an entirely different direction."[770] In Justice Taft's words, "the measure of legality of such a seizure is ... that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."[771] Significantly, this power is severed from actual wrongdoing. While a warrantless search incident to arrest had long been an exception to the warrant requirement, Justice Taft went even further. "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."[772] Seo refers to this line of reasoning as the "automobile exception to the Fourth Amendment":

> ...allowing officers to seize a car and then search it *with reasonable or probable cause for believing* that the driver may be violating Prohibition laws, many of which were misdemeanor offenses, went beyond what existing laws permitted. Under the common law for misdemeanors, warrantless arrests required actual knowledge through personal observation, not cause *for believing*. The difference in adding the phrase "for believing" was the difference between knowledge and suspicion. Outside the context of a car, an officer needed to witness a misdemeanor crime taking place. But when a car was involved, *Carroll* now authorized officers to take action if they believed that the situation at hand called for it. And with a suspicion-based seizure of a car and its driver, the same officer could then conduct a warrantless search. The *Carroll* rule thus established the 'automobile exception' to the Fourth Amendment, for it not only dispensed with the warrant for the search and seizure of this travelling 'effect.' It also relaxed the standard from knowledge to belief.[773]

In the absence of adequate time and legal cause, *Carroll* "had created an entirely new rule,"[774] one "with a lower standard that empowered officers to pull over any car that seemed reasonably questionable to them."[775] In doing so, Seo argues, "the *Carroll* rule constitutionally legitimized police discretion."[776] Constitutionally or legally 'legitimizing' a power that belies strict legal regulation, for reasons that we'll explore at the end of this chapter and throughout the next, is a bit of a conceit—

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769 Seo, *Policing the Open Road*, 137.

770 Seo, *Policing the Open Road*, 137.

771 *Carroll*, 156. Taft argues in the next paragraph, tautologically and as a harbinger for the self-referential standard that reasonableness in policing has become, that the "line of distinction between legal and illegally [seizures]," which is based on reasonable belief, is "certainly a reasonable distinction."

772 *Carroll*, 159.

773 Seo, *Policing the Open Road*, 138. Italics in original.

774 Seo, *Policing the Open Road*, 138. On this point, Seo documents telling correspondence between Taft and his son "admitting...this holding established 'some rather new principle.'"

775 Seo, *Policing the Open Road*, 139.

776 Seo, *Policing the Open Road*, 139.

one that is constitutive of legal and political liberalism itself. For now, however, it is important that we begin, as Seo did, with the *Carroll* case for two reasons. In creating "some rather new principle," Taft's reasoning in *Carroll* sets the stage for Court's rationale in *Terry*. That is the thrust of Seo's argument here. But there is another reason for starting with *Carroll*: it helps us to connect the dots from the scholars of police discretion with which this chapter began to the debate over legal rules and legal principles with which this chapter will end. Put a different way, precisely because the collision of constitutional provisions in *Carroll* imperiled the coherence of rule of law, Taft's opinion, not unlike Hall's lectures, Skolnick's study of criminal investigations, and Wilson's typology of police discretion, is concerned with the sovereignty of Law, its determinacy, absolutism, completeness. We are thus left to question what sort of principle "reasonableness" is—or, perhaps, the sort of sovereignty that reasonableness portends—by carving out a legal zone for police discretion.

According to Seo, the Court's ruling in *Terry* was guided by the logic Justice Taft had laid out in *Carroll*.[777] But how? *Carroll* was a car case. *Terry* was a case about an officer's decision to stop three individuals he suspected of casing a jewelry store for a future robbery. In neither case did the officers have proof of demonstrable harm or criminal wrongdoing. Yet, as Seo's analysis of *Carroll* makes clear, the car outmoded the factors animating the traditional legal framework for warrantless searches and thus required a new one. Could the same really be said for street pedestrians? Significantly, the answer to this question broached a different area of law than did *Carroll*. Rather than grappling with the validity of warrantless car searches relative to its private status and public character, an officer's ability to stop, question, and search a private individual treading upon public sidewalks without either a warrant to do so or probable cause as justification implicated the law of arrests. In other words, where *Carroll* queried the legitimacy of state power based on whether the car was private or public, *Terry* was forced to question whether an officer's decision to stop, question, and search was as an arrest—or whether it constituted something else in need of a new sort of legal legitimation.

Terry's turn toward thinking about the Fourth Amendment in terms of the law of arrest already enjoyed some inertia within other legal circles. For Seo, this is best illustrated by the Interstate Commission on Crime, which tasked Harvard Law School professor and former Wickersham Commission member, Sam Warner, with studying the law of arrest and determining whether they were amendable to the demands of modern policing.[778] Not unlike *Carroll*, police practices and the law of arrest presented a rule of law problem. Police regularly violated the law of arrest because the actions taken in order to "do their job" and "protect society" belied strict legal compliance. The existential demands of security and order, to put it differently, outgunned what the law proscribed as legitimate state intervention. The issue was, in Seo's words, "twentieth century police had outgrown the limits of well-established laws and often found themselves work on unsettled legal terrain."[779] Warner, in a comment presaging Skolnick's concerns, considered this a first-order problem, writing that the "existence of one common situation in which it is obviously necessary to violate the law reduces their respect for all law."[780] The result of Warner's study was a proposal for a new statement of the law of arrest that "narrowed the definition of arrest by taking out detentions, interrogations, and frisks."[781]

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[777] Seo, *Policing the Open Road*, 155.
[778] Seo, *Policing the Open Road*, 143.
[779] Seo, *Policing the Open Road*, 148.
[780] Quoted in Seo, *Policing the Open Road*, 149.
[781] Seo, *Policing the Open Road*, 147.

And Warner's rationale both for *why* such narrowing was needed and for *what* justified and restrained that vision for more extensive state power relied on *Carroll*, Seo says.

Indeed, as Seo details, *Carroll* was the only authority Warner cited for those proposals.[782] Though a car case, it stood for the proposition that the law needed to adapt to the realities of modern society. That cars were a recent technological innovation forgave the fact its legal status was initially unclear. But the law of arrest hadn't been substantively updated since the eighteenth century, and that "historical lag" was less forgivable.[783] "Redraw[ing] the boundaries of lawful policing," as Seo describes Warner's project, was not only a historical necessity if the law was to be a reflection of and congruent with realities of modern society. It was also needed to imbue modern law enforcement practices with legal legitimacy. So, concrete circumstance explained why the law of arrest should yield to a lower threshold. And, following *Carroll*, the police conduct that would now be licensed was justified so long as it was *reasonable*. Combined, this meant that, for Warner, revising the law of arrest wasn't so much an *is* justifying an *ought*. Instead, it was based on the "reasonableness" of police practices "in light of contemporary conditions."[784] And contemporary conditions, it seems, were freighted with exigent circumstances that made it reasonable for police to intervene short of arrest—to stop, question, and frisk—in order to maintain order.[785]

Thus did *Terry* legitimize stop-and-frisks, per Seo, "in the exact same way that Warner had done... which was what Chief Justice Taft had done in *Carroll*."[786] Like Warner's project to "redraw the boundaries of lawful policing," *Terry* distinguished a stop-and-frisk from an arrest by creating a new legal category for stops short of arrest. Like *Carroll*, such street-stops "did not require the police to have actual knowledge but only 'reasonable suspicion.'"[787] By so doing, this also meant that the traditionally magisterial function of determining probable cause was delegated to the police officer through the lower standard of reasonable suspicion. In both *Carroll* and *Terry*, the police officer was the judge "in the first instance"[788] of whether the Fourth Amendment protected private citizens from state intrusion. This means that *Terry*, contra Seo's essay, cannot be a legal process case. Patrolling the streets may not have been a magisterial function, but determining probable cause to search was; consequently, focusing on the action—police patrol—misses the form of justification—probable cause. Put a different way, by inventing the new standard of reasonable suspicion, what *Terry* had in effective done was redistribute the authority that the legal process school sought to partition. Law's enforcement was no longer safely distanced from its adjudication if it was the police, not a magistrate, determining whether the Fourth Amendment's protections were action-limiting.

Reasonableness and the Sovereignty of Law

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[782] Seo, *Policing the Open Road*, 148.
[783] Seo, *Policing the Open Road*, 148.
[784] Seo, *Policing the Open Road*, 148.
[785] Seo, *Policing the Open Road*, 148 (writing of Warner: "That police officers regularly questioned, detained, and frisked suspects proved to Warner that such practices were essential and—the keyword—reasonable.")
[786] Seo, *Policing the Open Road*, 151.
[787] Seo, *Policing the Open Road*, 151.
[788] Seo, *Policing the Open Road*, 139, 152.

A critical question is raised by this reading of *Terry*. What grounds this "jurisprudence of reasonableness"?[789] Seo's book never fully answers this question. Curiously, throughout *Policing the Open Road* she ponders the "jurisprudential philosophy [that] could both enable and limit police discretion."[790] Liberalism's standard fare – the public/private distinction that Seo refers to as "classical legal thought" – is presented as outmoded by the imbricated exigencies of cars and crime control, thus inaugurating the turn to reasonableness. Yet those categories stubbornly persisted in cases like *Mapp*, serving to distinguish both arbitrary from lawful policing, and arbitrary policing from discriminatory policing, when the sanctity of the home was at stake. "Reasonableness functioned as a deferential standard," she writes, and "rather than settling on a principle, judges deferred to the police."[791] Descriptively, this seems unobjectionable enough. But what of normatively? What theory of law and legal legitimacy could justify such deference? If police conduct – not unlike the automobile during Prohibition – posed a threat to the rule of law, then how is the Law sovereign when it yields to police discretion? And to the extent that reasonableness is imagined as a limiting principle, what is its content? How does it govern police behavior?

To answer these questions, it is crucial to see that reasonableness begins where the exclusionary rule ends. For the majority in *Terry*, the purposive ends of the exclusionary rule were both practical and principled. Though they understood the "major thrust" of the rule was to discourage "lawless police conduct," thereby serving a deterrent function,[792] the Court also noted that "the rule serves another vital function – 'the imperative for judicial integrity.'"[793] That integrity, however, is substantiated not just by way of protecting the purity of the fair trial and the separation of law's enforcement from its adjudication, as the legal process school might contend. It hinged on legal principles as well. "Without [the exclusionary rule]," the Court wrote, quoting *Mapp*, "the constitutional guarantee against unreasonable search and seizures would be a 'mere form of words.'"[794] In part, this echoed Brandeis's argument that for the Fourth Amendment to mean anything it had to be accompanied by a remedy. After all, that was *Mapp*'s substantive contribution to the doctrine. It also resounded the sentiment that legitimate government can't benefit from its own wrongdoing—the exclusionary rule was thus the cost of having an intelligible Fourth Amendment.[795] "Courts which sit under our Constitution cannot and will not," the Court wrote, seemingly combining each of these rationales, "be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[796]

However, the Court does not express its fidelity to the exclusionary rule because it governed Terry's case. On the contrary, the exclusionary rule, in both its pragmatic and principled instantiations, was jettisoned altogether. On one hand, "the limits of the judicial function in controlling the myriad daily situations in which policeman and citizens confront each other on the street," as the Court framed the issue, were functional.[797] Sometimes the rule was simply "ineffective as a deterrent." Not

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[789] Seo, *Policing the Open Road*, 153 (arguing that "the core of the Fourth Amendment had shifted from a question of warrants to a jurisprudence of reasonableness").
[790] Seo, *Policing the Open Road*, 19.
[791] Seo, *Policing the Open Road*, 19.
[792] *Terry*, 12.
[793] *Terry*, 13 (citing Elkins v. U.S.).
[794] *Terry*, 12 (citing *Mapp*, 655).
[795] Friedman, *Unwarranted*, 81.
[796] *Terry*, 13.
[797] *Terry*, 12.

only were street encounters unpredictable, some were "wholly unrelated to a desire to prosecute for crime."[798] The exclusionary rule was "powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal."[799] If that were the limit, then all the more reason to underscore the principled value of the exclusionary rule. Yet, on the other hand, "determining the admissibility against [Terry] of the evidence uncovered by the search and seizure" did not present an issue regarding the "abstract propriety of the police conduct."[800] This meant that the principled argument for the exclusionary rule was not in play at all. Indeed, by pointing out the practical limits of the exclusionary rule, the Court reoriented the question such that the principled argument would be essentially question-begging. Precisely because some police stops served "some other goal" besides "successful prosecution," the Court reasoned, it was necessary to "scutin[ize] the initial stages of contact between the policeman and the citizen."[801] If the problem were only a matter of the government benefitting from its own wrongdoing then those initial stages would be beyond reach.

So, the exclusion of evidence could not prevent the petty injustices wrought by police discretion. Nor did it serve to benefit society's greater good. "A rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime," the Court warned.[802] If these read like mixed signals it is because they are. Here, the exclusionary rule came to the aid of neither the individual citizen nor a secure society. Somehow, though, it still had value—just not here. In some sense, freeing the analysis from the traditional understanding of the exclusionary rule, which regardless of its pragmatic or principled motivations was either triggered by a breach of the Fourth Amendment's warrant requirement or by the law of arrest, opened the door to question the propriety of those prosaic street encounters like stop-and-frisks. It was a move that foregrounded a dynamic in police-citizen relations—a dynamic that was constitutive for many of the very relationship between the citizen and her government—that might easily fail to rise to the level of serious legal concern. Worse still, if the Court had pursued a "rigid and unthinking application of the exclusionary rule" that, for instance, ignored the exigencies of modern policing and strictly adhered to either the warrant requirement or the law of arrest, the outcome might have only sufficed to displace the same rule of law problem. After all, if police weren't all that interested in securing convictions, then what good was judicial condemnation of a common police practice that only occasioned judicial oversite when a conviction was pursued? Whether in principle or in practice the exclusionary rule had reached the end of its rope.

The significance—or perhaps *insignificance*—of the exclusionary rule here cannot be overstated. In a strict doctrinal sense, seeing to it that a stop-and-frisk is different from an arrest removes the possibility for the probable cause requirement to breathe life anew into the exclusionary rule. Likewise, placing that police conduct beyond the Fourth Amendment's warrant clause as they did also veers the analysis away from exclusion's wheelhouse. But that's not really the point. On the contrary, by "sketch[ing] the perimeters of the constitutional debate over the limits on police investigative conduct" in terms of the exclusionary rule's "limitations," the Court foreclosed that rule's ability both to meaningfully govern the present case and to subordinate police to the rule of law. This is the key:

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798 *Terry,* 13.

799 *Terry,* 14. This is what turns their attention to the initial interaction because that's how they can discern the "goal."

800 *Terry,* 13.

801 *Terry,* 17.

802 *Terry,* 15.

because the Court predicated its reasoning on the assumption that the exclusionary rule would not make much difference in preventing interactions like the one between Mr. Terry and Officer McFadden it had, by logical necessity, to redraw the boundaries of lawful policing in order to avoid undermining the sovereignty of law. That Mr. Terry was ultimately found in possession of an illegal firearm is little more than a historical accident.[803] The exclusionary rule had already reached its terminus. By the Court's own admission, it could not deter the sort of police-citizen encounter in which Mr. Terry found himself. And where criminal convictions weren't the motivation for those encounters in the first place, it neither supplied a remedy nor tendered any principled value.

The argument here is that everything that *Terry* has to say about exigent circumstances, articulable facts, and, ultimately, reasonable suspicion, ought to be understood in light of the limits of the exclusionary rule. To be sure, this argument raises no objection to Seo's rich historical accounting of the cases that lead to *Terry*. Nor does it present a critique of her overarching claim that the "automotive Fourth Amendment" enlarged the zone of legitimate policing by redrawing the boundaries of legality to accommodate rather than limit discretion. In fact, this chapter reaches a similar conclusion—but by way of a different mode of analysis that, this chapter argues, better illuminates the stakes of the problem of police discretion and the limits of legal theory. What interests us here is, in other words, the theory of legality that justifies such accommodation and engorgement. Reasonableness is the conclusion, not the theory. From where does a doctrine of reasonable suspicion gather its legal force?

According to the Court, reasonableness is an objective standard that is animated, on one hand, by the exigent circumstances constitutive of policing the streets and the specific, articulable facts that evidence such exigencies, on the other. Its objectivity is opposed to the "simple good faith on the part of the arresting officer," a subjective standard that would, in their view, "evaporate" the protections of the Fourth Amendment, leaving the people to "be secure in their persons, houses, papers, and effects, only in the discretion of the police."[804] Discretion that amounts to "nothing more substantial than inarticulate hunches" lacks a legal tether. Precisely because such discretion does not articulate a legal cause it is not amenable to legal restraint. As an objective standard, by contrast, reasonable discretion was predicated upon "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant intrusion."[805] According to this standard, the test was whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate.'"[806] Yet, if the risk of unfettered discretion was occasioned by its lack of legal cause, and therefore legal restraint, then what sort of legal cause was "reasonable caution" and "belief"? How was an officer's individual "belief" any different than subjective discretion?

For the majority in *Terry*, reasonableness was an objective standard that served as the fulcrum that balanced two competing interests. "There is no ready test for determining reasonableness," they wrote, "other than by balancing the need to search [or seize] against the invasion which the search [or

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[803] If we follow Seo's analysis of *Brinegar v. U.S.*, she would likely argue that Terry's firearm possession furthers the standard that that Court had set out, which framed arbitrary and lawful policing as a question of whether the police got the right guy.

[804] *Terry*, 22.

[805] *Terry*, 22.

[806] *Terry*, 22 (citing *Carroll*).

seizure] entails."[807] That the officer must point to "specific and articulable facts" was owed to the need to establish a legitimate government interest. And this is where things get interesting. For defining the legitimate government interest at stake in this case defined what the Court saw as the role of policing in modern society. Here we might be forgiven for thinking that this interest was in crime control and deterrence. After all, that is how the Crime Commission—writing only a year prior—defined the purpose of policing. From the Court's perspective, however, there was another governmental interest at stake: the safety of the officer and, perhaps, the public as well. "In addition [to investigating crime], there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."[808] Officer McFadden was not just investigating suspicious behavior that might have been a harbinger of criminal wrongdoing. Under this view, he was apprehending danger as well.

Exigent circumstances were thus not only characterized by that "entire rubric of police conduct [that entailed] necessarily swift action predicated upon on the spot observations of the officer on the beat"[809] but also by the threat of existential danger that those observations discerned. The priority order between these interests in difficult to disentangle. If officer safety takes priority, then reasonableness edges closer to subjective discretion. If criminal investigation takes priority, then the traditional place of probable cause under the law of arrests eliminates the need for that lower standard. What ensues is a sort of chicken-egg problem: In order to exercise investigative due diligence, which may furnish the legal grounds to search, the officer first needs the right to search in order to safely exercise such diligence. Is there a way out of this loop? For the Court in *Terry*, *un*reasonableness provided the short circuit. "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," they argued, "it would appear to be *clearly unreasonable* to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."[810] In the face not of real and present danger but merely the possibility thereof, reasonableness was defined not so much in terms of what is *was* than what is *was not*.

"The neutralization of danger to the policeman in the investigative circumstance," as the Court put it, is the centerpiece of *Terry*'s invention of reasonable suspicion as the new legal threshold for police discretion.[811] There are two important aspects to this rationale. First, the focus on danger allowed the Court to rein police conduct that may not necessarily be motivated by the desire to secure a criminal conviction. At the same time, a stop-and-frisk, defined now as a "limited search for weapons," could be substantively severed from the probable cause that the law of arrest required. Put a different way, the mitigation of danger supplied both a basis to search disconnected from arrest and a legitimate interest in doing so. Legally, this meant that police need not have any interest in criminal prosecution *per se* in their encounters with citizens on the streets.

The second aspect to seize upon is the extra-legal logic that this move requires. To be sure, this is not to say that it licenses police to do anything they wish, to whomever they wish, without any sort of limitation. Rather, the extra-legal character of this logic is owed to the existential force of the rationale. The balance that the Court struck in *Terry* was between the officer's safety and the limited

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807 *Terry,* 21.
808 *Terry,* 23.
809 *Terry,* 20.
810 *Terry,* 24. Emphasis added.
811 *Terry,* 26.

intrusion of a search for weapons. In a funny way, this doesn't really implicate law at all. The individual's Fourth Amendment rights do not, practically or otherwise, suffer a significant imposition, the Court reasoned. And because it was unreasonable to require police officers to expose themselves to the threat of danger as they pursued their reasoned suspicions, a search for weapons was therefore objectively reasonable. Such danger is an existential concept belies legal approximation. There is no way of setting out in advance a rubric for what is dangerous and what is benign. By implication, this means that what is reasonable, or even unreasonable, cannot be proscribed in advance.

"The issue," the Court reminds readers, "is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[812] And that determination required specific, articulable, particularized facts that would signal to a similarly situated "reasonably prudent man" possible criminality and a threat of danger. At worst, reasonableness serves a sort of self-referential standard. What is reasonable depends on facts that another cop would find reasonable. In this sense, it is legally restraining only inasmuch as an officer fails to recite facts within his working environment that apprehend danger. But perhaps we don't need to go that far. Reasonableness, on its better footing, is instead essentially interpretive. Precisely because it is a particularized rationale it will not be the same in all cases. What signals danger to some may not to others. What may look like suspicious activity to someone or in some place may not to someone else or in some place else. The key point is that though purportedly an objective standard, reasonableness is not a uniform rationale—and its dependence upon the unique, existential particularities of each case renders the basic legal principle that like cases be treated alike all but a logical impossibility.

What, then, does it mean to say that the "core" of the Fourth Amendment is a "jurisprudence of reasonableness"? That the justification for reasonable suspicion is imbricated with the reasonable apprehension of danger means not only that it belies antecedent legal approximation. It means that reasonableness has no independent content as well. It is entirely conditional, and its conditions are colored from the perspective of the police officer whose working environment, as we learned from Skolnick, apprehends danger constantly and everywhere. This is not to say, to be sure, that we should expect the type of conduct determined to be reasonable to be dramatically different from one case to another. Rather, it is to say that because reasonableness relies on circumstantial particularities – which will change case by case – and existential danger – which is impossible to legally approximate – its content will always be provisional. In a paradoxical way, reasonableness as a principle is an abstraction that has no content independent of its concrete considerations. If *Terry* redrew the boundaries of legality by way of reasonable suspicion, then what is the distinctively legal character of an authority that has no unconditional, uniform standard? How to account for the essentially protean "core" of the Fourth Amendment?

III. HART, DWORKIN, AND POLICING'S CHALLENGE FOR ANALYTIC JURISPRUDENCE

The struggle to subordinate discretionary authority to the sovereignty of law that we've so far traced in the sociological literature and constitutional jurisprudence of police discretion both is made

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[812] *Terry,* 27.

possible by and is a certain inevitability of the discourse of liberal legality itself. Nowhere is this displayed better than in the debate over the supremacy of legal rules and legal principles between H.L.A. Hart and Ronald Dworkin. While both Hart and Dworkin are preeminent figures in contemporary Anglo-American analytical jurisprudence, the positions they occupy within this terrain are almost diametrically opposed, and precisely because of this opposition their respective theories of law have come to shape the entire field of legal philosophy. Though there is much to be said about the particularities and nuances of these theories, we will focus here more narrowly on what they referred to as "hard cases," or those legal disputes for which the codified law offered no clear resolution. In the face of such hard cases, what determines the correct legal outcome? On what grounds is that outcome legally legitimate if determined without codified law? What guidance might the first-order disputes of legal philosophers offer us, and what implications might they reveal to us, in our quest to understand the legality of police discretion? What, in short, vitalizes law as the ultimate authority in situations about which the law is apparently silent?

These may seem like lofty philosophical questions that operate at a level of theoretical abstraction far afield of the otherwise concrete problem of police discretion. In fact, however, the answers to these questions that Hart and Dworkin offer to us are developed in light of a very similar dilemma. They, too, were captivated by the question of discretion. Rather than the police, however, they considered the role of judges. Yet, as we'll see, the Hart-Dworkin debate over judicial discretion illuminates, while fundamentally unsettling, the discourse of police discretion. Whereas by the 1960s police science had established the necessity of police discretion as a central tenet, legal philosophy, catalyzed by Dworkin's critique of legal positivism, repudiated the notion that judges exercise discretion. The anxiety over legal indeterminacy that Hall put on full display, and that Skolnick and Wilson demonstrate in their own ways, is at the heart of this turn. Yet, where Dworkin affirmed legal determinacy and denied judicial discretion, scholars of policing—and their judicial counterparts—affirmed police discretion and thus denied, by implication, the determinacy of law. To understand how this works we need first begin with Hart's brand of legal positivism.

H.L.A Hart argued that law was a system of rules. In *The Concept of Law*, Hart advanced the case that social rules rather than moral principles form the basis of what we call 'law.' Famously, he said that law is the union of certain primary rules of obligation and secondary rules of recognition. As Leslie Green has helpfully distilled the point, primary rules "guide behavior by imposing duties or conferring powers on people" while secondary rules "provide for the identification, alteration, and enforcement of the primary rules."[813] Legal validity, and therefore legal legitimacy, depends on an ultimate secondary rule, which Hart named the 'rule of recognition,' that enables legal actors to determine and identify what counts as law. Understood in this way, law is not dependent upon abstract or external justifications or considerations, though Hart had in mind severing law's dependence upon moral justifications in particular, but instead depends upon social practices and the conformity and acceptance they engender.[814] This meant that rules have two sources of authority. On one hand, a rule may be binding, and thus legally authoritative, if through their practices a particular group accepts the rule as a standard of conduct. On the other hand, a rule may be binding because it was created pursuant

[813] Leslie Green, "Introduction," in H.L.A Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), xx.
[814] Hart, *Concept of Law*, 56-57.

to and in conformity with a secondary rule that lays out and stipulates the process for creating and enacting valid rules.[815]

So, social facts generate social rules, and social rules form the content of law. Under Hart's brand of legal positivism—what he refers to as 'soft positivism'—the origin of law remains independent of moral considerations, even if particular laws and legal decisions reflect certain moral positions. Contextually, it is important to signpost that Hart's concept of law was taken up in contrast both to legal formalists and to the brand of legal positivism pursued by utilitarian thinkers like Jeremy Bentham and John Austin. Legal formalists and 'hard positivists' alike believed that legality was separate from morality. Hart agreed with them on that much. But whereas the formalists thought that the law was completely determinate, Hart's theory embraced the indeterminacy of law. For the formalists, there is always a right answer and every legal question, and the judge is obliged to discover that answer without reference to moral considerations. In this respect, the idea of 'judicial decision making' isn't quite intelligible. Judges don't engage in making decisions but in legal reasoning, which means that, because the law is fully determinate, judges are little more than enlightened vessels that are required to find and apply the law that already exists using tools of deductive reasoning specific to law. Hence Scott Shapiro's instructive insistence that "we might express Hart's point by distinguishing between 'legal reasoning' and 'judicial decision making.' The object of legal reasoning is the discovery of law; the aim of judicial decision making, on the other hand, is the resolution of a dispute."[816] Against formalists and hard positivists alike, Hart wagered that judges might rely on moral considerations in resolving legal disputes for which the codified law offered no positive instruction; in other words, because he embraced legal indeterminacy, when presented with a gap or inconsistency in the law, a judge could resolve the dispute by reference to authorities external to law—morals, policy goals, social aims, and so on. What is important is that law is a social construction generated out of a set of social practices. This is an admittedly synoptic account of Hart's theory of law. But it should suffice to lay the foundation for understanding what he has to say about the role of judicial discretion in 'hard cases.' From there we can then more fully appreciate the impact of Dworkin's critique for understanding the stakes of turning to legal abstractions to cabin police discretion.

Because for Hart law was a social fact, this meant that the law was partially, if fundamentally, indeterminate. Simply put, there were limits to the guidance that social rules could provide.[817] If, to put it a different way, law was the result of a process of social construction, then there would inevitably be disputes for which the law was silent because it had neither been previously anticipated nor contemplated by the social group. These moments need not be extraordinary legal novelties, however. In fact, Hart's preferred illustration of this point is rather mundane. It involved a seemingly trivial legal rule that forbade vehicles from public parks. "Plainly this forbids an automobile," he said, "but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?"[818] Hart's point here is that while there might be a more or less settled meaning of the term vehicle—"plainly this forbids an automobile"—there is also a

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[815] Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967). *Reproduced in Philosophy of Law 7th edition, edited by Joel Feinberg and Jules Coleman, 82-99.* (Arguing that "Hart's fundamental distinction" is that a rule's authority stems from its acceptance or its validity"), 86.

[816] Scott Shapiro, *Legality* (Cambridge: Belknap Press, 2011), 248.

[817] Shapiro, *Legality*, 250-51.

[818] H.L.A. Hart, "Positivism and the Separation of Law and Morals," Harvard Law Review 71, no.4 (1958): 607.

terrain of uncertainty, riddled with 'fact situations,' that calls into question the application of that rule relative to the meaning of the term 'vehicle.' Here's how he summarized this point:

> Human invention and natural processes continually throw up such variants on the familiar, and if we are to say that these ranges of facts do or do not fall under existing rules, then the classifer must make a decision which is not dictated to him... The toy automobile cannot speak up and say, "I am a vehicle for the purpose of this legal rule," nor can the roller skates chorus, "We are not a vehicle." Fact situations do not await us neatly labeled, creased, and folded nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.[819]

By way of this simple example, Hart reasoned that "there must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out."[820] This is a centerpiece of Hart's legal theory. Precisely because law is a social construction it will always be partially indeterminate. Thus law, according to him, is partitioned in two. On one side, there is the core of positive law, or the settled and determined meaning of a legal rule. On the other, there is the penumbra, an area of uncertainty surrounding all legal rules that invites legal actors to grapple with the meaning of the rule itself. In determining the meaning of the law in the penumbra, judges exercise discretion and render a judgement based on considerations that are not, in a formalist sense, strictly legal.

Significantly, this move allowed Hart to distance himself from legal formalists, who believed that law was fully determinate and that reasoning through novel legal questions involved only the logical deduction of premises already latent in the law, as well as utilitarians and 'hard positivists,' who argued for a strict separation between law and morals. This is an especially important nuance of Hart's legal theory. Against formalists, Hart argued that the "rationality" of legal decisions in penumbral cases "must lie I something other than a logical relation to premises."[821] Indeed, if such cases call into question the meaning of a rule, then the rule cannot itself be logically conclusive. "The intelligent decision of penumbral questions," Hart wrote, "is one made not mechanically but in the light of aims, purposes, and policies."[822] This meant that judges, when presented with a situation of legal indeterminacy, exercised a quasi-legislative power by determining *what the law is*. The penumbra thus allowed Hart to dull the edge of the legal positivism that preceded him because penumbral questions invited considerations of value—aims, purposes, and policies—without abandoning the traditional positivist rebuke of the idea that "some fused identity between law as it is and law as it ought to be."[823]

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819 Hart, "Positivism and the Separation of Law and Morals," 607.

820 Hart, "Positivism and the Separation of Law and Morals," 607.

821 Hart, "Positivism and the Separation of Law and Morals," 608.

822 Hart, "Positivism and the Separation of Law and Morals," 614. As Scott Shapiro points out, what is important about Hart's critique of legal formalism is that it is *comprehensive*: "Because Hart's critique of formalism is conceptual, it extends beyond the mere confines of the United States to every possible legal system. There can be no legal system in which the formalist dream of complete determinacy is achievable," in *Legality*, 260.

823 Hart, "Positivism and the Separation of Law and Morals," 615. Put a different way, the problems that emerged in the penumbra demonstrated that the classical utilitarian insistence that there be a strict separation between considerations of

What separated these brands of legal positivism was, among other aspects of his thought, Hart's claim that answers to penumbral questions relied on "some concept of what law ought to be." The key is that this system of thought is anchored to a "core" settled law, which meant that there was still an intelligible distinction between law as it is and ought to be as a matter of positive law.[824]

So, for Hart there was a core of settled law but, because of the "open texture" of language, there was also a penumbra of uncertainty surrounding it in which law was indeterminate. In response to Hart's rebuke of formalism, Dworkin launched a twofold campaign, the first in his early book *Taking Rights Seriously*, the second in his later work *Law's Empire*. We will forego a thorough exposition of Dworkin's legal theory on its own terms to take up only those aspects that highlight with maximum clarity his contrast with Hart, and what the gulf between them offers us for understanding what is stake in a the Fourth Amendment's jurisprudence of reasonableness. Consider two key premises that underlie both critiques and form the nucleus of Dworkin's legal theory. First, he contended, there was a distinction between legal rules and legal principles. Whereas rules are dispositive, principles offer only a standard with which to evaluate a legal question. Principles in other words, as we noted earlier, have "weight" that helps to tilt an outcome one way or another. The distinction here is logical. Weight and import are integral components to the concept of a principle. Rules do not have that dimension. Dworkin turned to examples like the rules of baseball to argue, for instance, that "we cannot say that one rule is more important than another within [that] system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight."[825] Only by reference to some principle might we resolve such conflicts.

Second, Dworkin was committed to the formalist belief in the complete determinacy of the law. He thought there was one right answer to every legal question, and that judges were under a duty to determine that answer. Sometimes, he pointed out, they spoke in terms of rules, other times in terms of principles, but at no time of cores and penumbras. Combined, this basic premise of Dworkin's legal theory meant that judges do not exercise discretion—they are not relying on their own beliefs or values, nor do they consider social policy aims in deciding novel legal questions. Instead, they 'discover' an answer that was already pre-immanent to law. "Even in cases where the clearly applicable rules have run out," according to Scott Shapiro's reading, "legal principles exist which determine the

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law as it from law as it ought to be was "misleading." As Hart put the point: "It seems true to say that the criterion which makes a decision sound in such [penumbral] cases is some concept of what the law ought to be; it is easy to slide from that into saying that it must be a moral judgment about what law ought to be. So here we touch upon a point of necessary 'intersection between law and morals' which demonsrates the falsity or, at any rate, the misleading character of the Utilitarian's emphatic insistence on the separation of law as it is and ought to be," at 608.

[824] Importantly, this also distances Hart from the legal realists that came before him. To be sure, Hart credits the realists as preparing the ground for his critique of formalism by "opening men's eyes to what actually goes on when courts decide cases" and pointing to the contrast between "the actual facts of judicial decision and the traditional terminology for describing it as if it were a wholly logical operation." Hart, "Positivism and the Separation of Law and Morals," 606-607. He parted from them, however, in their belief, inspired by Holmes and Llewelyn, that the nature of law was predictive and the law was merely a matter of prediction what courts will do in a given dispute. Thus, as Shapiro points out, "Hart's rebuttal of legal realism has the same universal scope" as his critique of formalism. "The partial determinacy of language and the concepts it expresses ensure that some form of communicated guidance will be effective and, thus, the law in every system will regulate some, although not all, cases." Shapiro, *Legality*, 260.

[825] Dworkin, "Model of Rules," 89.

right answer to the legal question at issue."[826] Where Hart saw law as a social construction, Dworkin thus saw law as essentially interpretive.

Dworkin illustrated this point through the case *Riggs v Palmer*. In that case, a beneficiary killed his testator before they could change their will. In a strict legal sense, the testator had died, and thus his beneficiary was entitled to what was proscribed to him in the testator's will. Yet the court relied on the principle that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong."[827] In other words, despite the fact that there was no positive rule establishing that heirs who murder their testators may not collect their inheritance, the court in *Riggs* reached its conclusion by appealing to a legal principle, not deciding via fiat. *Riggs*, in Dworkin's estimation, taught us something about law, not the judge's values.

For Dworkin, *Riggs* was a better demonstration of what judges were up to in so-called 'hard cases' than Hart's law forbidding vehicles in parks. In his view, Hart's example showed the weakness of legal positivism, namely, its "semantic sting," which is Dworkin's critique for theories of law that reduce legal practice to arguing "mainly or partly about which criteria [to] use" to answer a legal question.[828] Lon Fuller, Hart's regular sparring partner in the pages of the Harvard Law Review, raised a similar critique in his analysis Hart's penumbral 'vehicle.' For Fuller, this hypothetical demonstrated the problem of understanding law only as a function of pedigree. In his words, "the most obvious defect of [Hart's] thesis lie in its assumption that problems of interpretation typically turn on the meaning of individual words."[829]

Yet neither of these critiques were comprehensive of Hart's legal theory. Indeed, Hart dealt with Dworkin's first challenge by wagering that it only went to show that his *own* theory was all the more correct! Any properly 'hard case' might well give rise to multiple, competing legal principles, Hart claimed. As a result, "a judge will often have to choose between them, relying," he argued, "like a conscientious legislator, on his sense of what is best and not on any already established order of priorities prescribed for him by law."[830] Thus did Dworkin revise his criticism of Hart, and of legal positivism more broadly, in his later work.

In *Law's Empire*, Dworkin pursues a "theoretical disagreement" that shares a logical architecture similar to Hart's core and penumbra. For Dworkin, theoretical disagreements about law illustrate a distinction between propositions of law, on the one hand, and grounds of law, on the other.[831] Whereas propositions of law entail "all the various statements people make about what the law allows or prohibits or entitles them to have,"[832] grounds of law determine, in Dennis Patterson's words, the "validity conditions for legal propositions."[833] While this resembles Hart's distinction between primary

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826 Shapiro, *Legality*, 263-264: "Contrary to Hart's claims," Shapiro argues, "when judges resort to principle in hard cases, they are not extending the law; they are finding it. And if they are finding the law, then the principles that they applying must be legal norms."

827 Dworkin, "Model of Rules," 87.

828 Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986), 43-46.

829 Lon Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review* 71, no.4 (1958): 662.

830 Hart, *Concept of Law*, 273.

831 In Shapiro's words, "these Dworkinian distinctions...have analogues in Hart's theory of law. For example, the grounds of law are those facts set out in the rule of recognition...Similarly, theoretical disagreements are simply disputes about the content of the rule of rule of recognition, whereas empirical disagreements are disputes about whether the conditions set out in the rule of recognition have obtained in a particular case," in *Legality*, 285.

832 Dworkin, *Law's Empire*, 4.

833 Dennis Patterson, "Theoretical Disagreement, Legal Positivism, and Interpretation," *Ratio Juris* 31, no.3 (2018): 267.

and secondary rules, the novelty of this framework lies, in Dworkin's estimation, in its ability to furnish genuine theoretical disagreements.[834] Legal positivism, Hart's brand included, has "no plausible theory of theoretical disagreement," he says.[835] Unlike "empirical disagreements," which Dworkin sees as factual disputes, theoretical disagreements hinge on "whether statute books and judicial decisions exhaust the pertinent grounds of law."[836] The analytical fulcrum at work in this framework appears in Dworkin's claim that the grounds of law are what render propositions of law either true or false. Is it true, for instance, that the beneficiary in *Riggs* is entitled to collect though he killed his testator? Answering that question relies not only the weight of legal principles, as Dworkin first contended, but also on determining the "nature of truth in law."[837] What has subtly shifted here is that, against Hart's insistence that legal principle's only served to support his theoretical distinction between core and penumbra, Dworkin is claiming that "theoretical disagreements" inhere legal practice and, by consequence, answers to them reveal the nature of law itself.

The problem with the positivist theory of law is, on this account, that it reduces legal disagreements to what law "should be" rather than what law "is." In 'hard cases,' judges in Hart's penumbral region are not actually engaged in anything distinctively legal. Indeed, this is what made their authority discretionary in the first place. Dworkin thinks there is a deeper problem at stake in such hard cases, however. Echoing Hart's language of core and penumbra, Dworkin writes:

> The various judges and lawyers who argued our sample cases did not think they were defending marginal or borderline claims. Their disagreements about legislation and precedent were fundamental; their arguments showed that they disagreed not only about whether Elmer [*Riggs*] should have his inheritance, but about why any legislative act, even traffic codes and rates of taxation, impose the rights and obligations everyone agrees they do; not only whether Mrs. McLoughlin should have her damages, but about how and why past judicial decisions change the law of the land. They disagreed about what makes a proposition of law true not just at the margin, but in the core as well. Our sample cases were understood...as pivotal cases testing fundamental principles, not as borderline cases calling for some more or less arbitrary line to be drawn.[838]

A puzzle remains: how do judges decide such fundamental questions without exercising discretion? What sort of reasoning is involved in determining whether a proposition of law is true or false? For Dworkin, the sort of reasoning involved in Hart's penumbral region—reasoning that involves considerations external to law—is precisely the error. Here, his criticism relies on his theory of law as an interpretative practice. "Constructive interpretation," he writes, "is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre

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[834] Hart, we should also note, would also point out that the validity conditions for law, the grounds of law, are the practices themselves (hence the rule of recognition) rather than what Dworkin has in mind, which, as we'll see, are moral principles that place legal practice in its best light.

[835] Dworkin, *Law's Empire*, 6.

[836] Dworkin, *Law's Empire*, 5.

[837] Patterson, "Theoretical Disagreement, Legal Positivism, and Interpretation," 262.

[838] Dworkin, *Law's Empire*, 42-43.

to which it is taken to belong."[839] In the context of legal practice, specifically, this means that, in Patterson's words, "participants...decide what the law is by identifying a principle that puts legal materials...in their best light."[840] What makes a proposition of law true is thus "a moral principle which shows [legal] cases and statutes in their best light."[841] To put this point in Hart's terms, this means that there is essentially no "core" of law, no settled domain in which law is empirical or factual, because all law is matter of constructive interpretation. Rather, there is only "provisional agreement" as to a certain interpretative reading of law. Put another away, whereas for Hart the penumbra was at least constellated by and gathered around a core of settled law, a feature of his general jurisprudence that made the zone of penumbral uncertainty unthreatening to the enterprise of legal practice because it provided a secure anchor point for judicial discretion, for Dworkin, by contrast, the core is not so stable because it is the product of interpretation.

In Dworkin's attempt to anchor legal decisionmaking in principles already immanent to law, rather than on considerations external to it, he thus reveals a larger stake in legal theory. In David Dyzenhaus's words, the effect of Dworkin's second challenge to Hart "implodes legal positivism."[842] Here's Dyzenhaus:

> For if, as Hart indicates, a decision on the basis of an interpretation of legal principles is always ultimately unconstrained by law, and if all questions about what law is are interpretative in this sense, then there is no such thing as law. More precisely, there is no such thing as law in the positivist sense of set of rules whose content can be determined without resort to moral argument. The problem which positivists acknowledged as occurring only at the margins of legal order now appears throughout.[843]

In other words, in Dworkin's effort to establish law's inherent legitimacy he runs us into a tense crossroad that forces the discourse of discretion in an altogether different direction. Either it is the case that everything is penumbral, since the "core" of law in the positivist understanding is really only a matter of provisional interpretative agreement, or it is the case that there is no such thing as discretion, since deciding 'hard cases' does not rely on considerations external to law. From the positivist perspective, Dworkin says, everything must be discretionary and thus law ceases to have any inherent meaning. By contrast, judges do not, from the latter perspective, exercise power when determining the best interpretive fit to novel legal questions. To the contrary, they remain bound to law by virtue of rendering a judgment that is built upon the "grounds of law" that already inhere the enterprise. Thus does discretion, understood in terms of a decision-maker determining how to proceed in moments of legal unclarity by reference to considerations that belie law, disappear.

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[839] Dworkin, *Law's Empire*, 52.
[840] Patterson, "Theoretical Disagreement, Legal Positivism, and Interpretation," 265.
[841] Patterson, Theoretical Disagreement, Legal Positivism, and Interpretation," 265.
[842] David Dyzenhaus, "Why Carl Schmitt?," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (Durham: Duke University Press, 1998), 4.
[843] Dyzenhaus, "Why Carl Schmitt?," 4-5.

What does this heady philosophical dispute have to do with Skolnick or Wilson? Further still, how is it relevant for police practice? And what does it have on offer for us with respect to the constitutional jurisprudence of police discretion, and *Terry*'s doctrine of reasonableness in particular? Perhaps because Hart and Dworkin have been so influential in American legal discourse one might be tempted to impose an analogical structure upon these otherwise disparate groups of thinkers. Does Skolnick's understanding of discretion hew closer to Hart's or Dworkin's? Is Wilson's curious call for a 'single standard of justice' motivated by a belief in the immanent determinacy of law, or does it signal an affirmation that law and justice are separate, if corollary, matters? Is Skolnick, ever the sociologist, retreating from the social construction of meaning in his turn to the moral weight of the rule of law, or is he doubling down on a distinctly social process of generating a feeling of obligation and duty to the rule of law by way of social pressure, what Hart referred to as law's "inner aspect"? It would be a worthy intellectual-historical enterprise indeed to trace with analytical precision the emanations of Hartian and Dworkinian legal theory in the assumptions underpinning Skolnick's and Wilson's approach to the problem of police discretion. After all, because they dealt with police and not judges, with law enforcement rather than legal adjudication, the fact that they acknowledge discretion exists while also grasping at an abstract check-rein, if perhaps more palatable from a Hartian perspective than a Dworkinian one, makes a mess of analogizing neatly with either. In any case, such an enterprise is beyond the scope of this dissertation.

Rather, the import this dispute in analytical jurisprudence has for the constitutional jurisprudence of police discretion rests on the central conceit of liberal legality that it puts on display. That conceit is, simply put, that law is what establishes order by subordinating the political and casting legitimate authority in exclusively legal terms. Discretion is, as this dissertation opened with, the stress-test of this arrangement, for it consists in a zone of authority that acts by way of decision rather than by law. This is the test to which Hart and Dworkin respond as well. For Hart, discretion was an inevitable but nevertheless minor problem since the "core" of law was larger than the penumbra of uncertainty that occasioned discretionary judgments. For Dworkin, the inherent legitimacy of law meant that there is no occasion for discretion—law is sovereign. Dyzenhaus renders this dispute in Schmittian terms. According to him, we might understand Hart's penumbra as "a kind of mini state of emergency" because they represent questions that are not "resolvable by law."[844] To the extent that Dworkin's theory of law purports to show how such a state of emergency "becomes uncontainable and pervasive," it also risks offering, Dyzenhaus says, "no solution at all" since there is in legal practice "little consensus as to the principles [of law] and their content."[845]

For understanding *Terry*'s effects on policing in America, what this all means is that the "grounds of law" for police discretion are always provisional. Indeed, the doctrine of reasonable suspicion hews closer to a general jurisprudence that resembles Dworkin's framework than it does Hart's. One way of seeing this is to understand reasonableness, like Seo does, as the "core" the Fourth Amendment. Only here, "core" carries a sort of double meaning. It is not the core in the Hartian sense because it explicitly belies settled law. Yet, if it is penumbral, again in the Hartian sense, then there is in fact no "core" of law at work here, since it would require judicial discretion to legitimate

[844] Dyzenhaus, "Why Carl Schmitt?," 12.
[845] Dyzenhaus, "Why Carl Schmitt?," 12.

police discretion, a sort of pageantry that, per Dworkin, would only that neither enjoys any inherent legal authority. To the extent that this leads us closer to Dworkin's theory of law as interpretation, however, we are in fact not much better off. If all law is merely a matter of provisional agreement on interpretation, then a jurisprudence of reasonableness offers no constraint on police discretion at all.

Such an outcome is almost certainly objectionable. How can it be that the architecture of legal reason that legitimates police discretion offers no meaningful constraints on police behavior? Isn't precisely the point of Dworkin's legal theory—of liberal legality all together—to ward off power and authority that operates independent of law? The short answer is "yes, of course." But we must take care to see that, for Dworkin, law cannot be interpreted any which way. It is not the interpretation of the powerful or of the ruling class, for example. Rather, what is being interpreted, in Dworkin's estimation, is always some sort of moral principle. And such moral principles are deeply inflected with liberal values. This is how law can be an essentially interpretative practice while also not sliding into an abyss of uncertainty as to how such interpretations might game out: law as interpretation must exhibit the correct moral content.[846] Liberal commitments to fairness, equality, and individual liberty, to private property and to a harm-principle, are each at work here. But are these meaningful anchor points for police discretion? Is the legal standard set out by *Terry* one that interprets police conduct by reference to these liberal standards? In short, no.

Terry pursues a legal principle in theory. But in practice it effectively erases legal constraints on police power. Or, to put it the other way around, *Terry* recognizes police discretion in practice but by pursuing a legal principle for its restraint erases it in theory. Indeed, this is what Dworkin is after: legal principles inhere law's empire and thus there is no such thing as discretion. Thus, discretionary police power is not operating in the absence of law but involves instead the officer determining what the moral principles underwriting law would require of him. Not only does this seem rather fanciful, but it is also *not* how *Terry* contemplates discretion. For the Court, it is the risk of danger that justifies police intervention without strict legal cause. This is, as we've seen, an existential logic that does not depend on anything other than the officer's perception of threat and danger—both of which happen to be convenient precursors to criminality and furnish, if tautologically, 'reasonable suspicion' all the more. *Terry*, in other words, does not have anything at all to say about liberal moral principles. Indeed, we run into Schmitt's point once more: that these existential decisions belie the principles that liberalism presumes and serve only to establish political order.

This changes the stakes in what Seo rightly discerns as the constitutionalization of police discretion. A jurisprudence of reasonable does indeed function to enlarge police power. Rather than merely leading to the proceduralization of due process, to an account of why due process rights took the form they did, this jurisprudence, however, stipulates an extra-legal basis for police power. In Seo's reading, the procedural turn in Fourth Amendment jurisprudence is what marks off discretion from decisionism (though she does not use this term) because it creates a distinction between fettered and unfettered discretion. Procedures, this view holds, sufficiently fetter police power and thus distinguish it from unbridled authority. They are also what secures, as a result, the sovereignty of law. But if

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[846] Dyzenhaus sees Dworkin's premium on liberal standards as a common thread shares by positivists as well. He puts it this way: "Dworkin and contemporary legal positivists share on pivotal assumption: they assume that if the law is to be legitimate, it must meet the standards set by liberalism... their conceptions differ only in that Dworkin claims that liberal standards are also already immanent in the law, waiting to be brought to the surface in principled justifications for judicial decisions," in "Why Carl Schmitt?," 7.

determining whether procedures have been violated is always a process of constructive interpretation, always a matter of determining reasonableness, the sovereignty of law is merely a conceit.

Reasonableness is revolutionary not so much because of its legal but its political significance. Not unlike, as we saw in the previous chapter, Rawls's justice as fairness or Wilson's single standard of justice, reasonableness disguises an expression of power as an expression of right. Unlike the mechanics pursued by those thinkers, which ultimately stipulated a set of values and then derived the basis for discretion from them, *Terry*'s jurisprudence of reasonableness initiates a self-referential standard that grounds the legality of police conduct that deviates from law in terms set by police. As Carl Schmitt writes in *Legality and Legitimacy*, the plasticity of the concept of law comes down to a simple saying: "Law should above all be what I and my friends value."[847]

[847] Schmitt, *Legality and Legitimacy*, 14.

CHAPTER FIVE

REPROGRAMMING DISCRETION: COMMUNITY POLICING'S "QUIET REVOLUTION"

Do we want police officers to develop a 'What the hell' attitude toward disorderly and dangerous behavior, even if it's not technically illegal?

—George Kelling, *Acquiring a Taste for Order*[848]

What is characteristic of a police state is its interest in what men do; it is interested in their activity, their "occupation." The objective of police is therefore control of and responsibility for men's activity insofar as this activity constitutes a differential element in the development of the state's forces.

—Michel Foucault, *Security, Territory, Population*[849]

I. INTRODUCTION

POPULAR, ubiquitous, and mutable, community policing is the configuration of police governance that has dominated in academic literature and police practice, in police magazines, public relations strategies, federal initiatives, jurisprudence, and police science for the last forty years. With its ascendance, the predicaments of police discretion that vexed public officials, police executives, and legal scholars for nearly three decades were replaced by a renewed, more extensive, and conspicuously genteel police mandate. Rather than deterring crime and enforcing the criminal law through the power of arrest, and in contrast to the era of police professionalism that awarded priority to centralized command, bureaucratic police administration insulated from public input, and principles of legality, the mantle now claimed by community policing decentralizes authority and de-emphasizes law in pursuit of maintaining orderly communities and tailoring police services congruent with their wishes.

In this process, discretion, as this chapter will argue, is *reprogrammed*. No longer does it threaten principles of democracy, the rule of law, or social equality. It neither affronts the citizenry's right to due process nor offends standards of reasonableness. Nor does it smack of totalitarianism, unbridled power, or any of the other hangovers that haunted early post-War students of police behavior. Instead, discretion is enveloped by the paradigm of community policing such that it is celebrated, responsiblized, detached from any meaningful points of legal constraint, and wed to the authority of private social institutions. At the same time, discretion is relieved of its service to crime deterrence and animated instead by the goal of reasserting civic morality and enforcing propriety. So enveloped,

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848 George Kelling, "Acquiring a Taste for Order: The Community and Police," *Crime & Delinquency* 33, no. 1 (January 1987): 91.

849 Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-1978*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador, 2004), 322.

one result of this arrangement is what chapter one referred to as *the disappearance of police discretion*, a discursive erasure of discretion from the field of police reform, as was evidenced by the Obama Task Force's simultaneous premium on community policing and total absence of discretion as a predicament of modern law enforcement. This chapter attempts to lay out how community policing's normative form of reason makes that disappearing act possible, even as it, if paradoxically, trumpets the value of discretion. It does so by engaging with a collection of essays assembled by community policing's early purveyors, the academic researchers, consultants, and police executives responsible for popularizing and implementation community policing programs nationwide—what this dissertation will refer to as the Community Policing Thought Collective. By way of conclusion, the next chapter plumbs the implications and effects of that disappearance in a moment in which police reform is torn between police abolition and police apologetics, when police reform has never been more urgent and yet the paradigm of community policing never less dominant: the displacement of liberalism's standard coordinates of legitimacy; the fusion of moral authority and police power; the individuation of police violence; the impossible prospect for democratic police reform.

Community policing carries no settled definition. It is a bundle of values, projects, tactics, vocabularies, organizational strategies, myths, and technologies. It is described variably as a 'rubric,' a "plastic" concept,[850] a "crime control theology,"[851] a "new orthodoxy for cops,"[852] a "bandwagon,"[853] a "set of aspirations wrapped in a slogan,"[854] as "democracy in action."[855] Definitions that hew too closely to or analyses that expect too much of community policing as a unified, generalizable, or even fully coherent practice are often met with the distinction, popular among academics and police practitioners alike, that "community policing is a philosophy, not a program."[856] Combined with its rhetorical pleasantry, its conceptual promiscuity and practical malleability endow community policing with a constellating force that gathers liberals and conservatives, police administrators, scholars, public officials, and beat cops under its banner.[857]

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[850]J.R. Greene, "Community Policing in America: Changing the Nature, Structure, and Function of the Police," in *Policies, Processes, and Decisions of the Criminal Justice System: Criminal Justice*, vol. 3, ed. J. Horney (Washington, D.C.: U.S. Department of Justice, 2000), 301; National Research Council, *Fairness and Effectiveness in Policing: The Evidence* (Washington, D.C.: The National Academies Press, 2004), 85.

[851] John P. Crank, "Watchman and Community: Myth and Institutionalization in Policing," *Law & Society Review* 28, no. 2 (1994): 327.

[852] John E. Eck & Dennis Rosenbaum, "The New Police Order: Effectiveness, Equity, and Efficiency in Community Policing," in *The Challenge of Community Policing: Testing the Promises*, ed. Dennis P. Rosenbaum (Thousand Oaks, CA: SAGE Publications, 1994): 3.

[853] Rosenbaum, *The Challenge of Community Policing*, xi; Westly Skogan and Susan M. Hartnett, *Community Policing, Chicago Style* (Oxford: Oxford University Press, 1997): vi.

[854] David H. Bayley, "Community-Policing: A Report from the Devil's Advocate," in *Community Policing: Rhetoric or Reality*, eds. Jack R. Greene and Stephen Mastrofski (Westport: Praeger, 1988): 225.

[855] Bureau of Justice Assistance, *Understanding Community Policing: A Framework for Action* (Washington, D.C.: U.S. Department of Justice, 1994): 4. Hereafter referred to as "Consortium on Community Policing."

[856] J.A. Roth et. al., *National Evaluation of the COPS Program – Title I of the 1994 Crime Act* (Washington, D.C.: National Institute of Justice, 2000): 183; *Cf.*, National Research Council, *Fairness and Effectiveness in Policing*, chapter three; *Cf.*, Eugene McLaughlin, "Community Policing," in *The Sage Dictionary of Criminology*, eds. Eugene McLaughlin and John Muncie (Thousand Oaks, CA: SAGE Publications, 2001): 41 ("Definition: A policing philosophy that promotes community-based problem-solving...").

[857] *See*, e.g., Crank, "Watchman and Community," 345 (arguing that "given the right 'spin,' ideas of community-based policing are acceptable organizational theory for both conservative and liberal advocates of police change"); David Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society," *The British Journal of*

Community policing does by all accounts, however, portend a substantive transformation in the police mandate. Stephen Mastrofski summarizes that transformation like this:

> Community policing advocates propose a significant departure from the ways in which issues of role, control, and legitimacy are addressed. Order maintenance replaces law enforcement as the police mission; legalistic constraints on officer discretion are reduced; while direct linkages to the community are increased; and policies and actions are justified ... in terms of the sense of peace, order, and security they impart to the public.[858]

How is police discretion reconfigured in the era of community policing? How to explain its apparent political ambivalence? What are the legal and political coordinates of discretionary authority in the arrangement that community policing envisages? What is its relation to principles of legality, due process, and the rule of law? If not criminal wrongdoing, whether observed, reported, or suspected, then what precipitates police intervention? If not law, then what legitimates such intervention? Without law, does discretion cease to have a principle of limitation? Or does it take on a new limiting principle? What type of delimitation of police power follows from that principle?[859] And what are the effects that flow from it?

A Brief History of Community Policing

A telescoped view of community policing's ascendence demonstrates why these questions are important. To be sure, the historical record of community policing is scattered. The standard accounting of its rise to prominence eschews origin stories with any clear starting points and instead parachutes us somewhere between "the 1980s" and 1994. That accounting proceeds along two lines of development. The first points to the promises and pitfalls of the police professionalism movement that oriented police practice beginning in the early twentieth century and that carried into late 1960s and early 1970s. The second draws on a new, contradictory ensemble of governing doctrines that took hold of American politics in the 1980s and transformed the valence of state authority.

A telescoped version goes like this: the reform-era policing of the 1960s and 1970s that was enthralled with the determinates, administrative structuring, and legality of police discretion and that sought to distance police governance from a socially wayward and politically unruly public gave way to an enthusiasm for community involvement in setting police priorities. The problem facing police reform in that earlier period, this account goes, was a crisis of legitimacy.[860] What challenged the

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Criminology 36, no. 4 (Autumn 1996): 462 (arguing that the "roots" of programs like community policing, as a crime control policy, "lie in the political *ambivalence* which results from a state confronted by its own limitations).

858 Stephen D. Mastrofski, "Community Policing as Reform: A Cautionary Tale," in *Thinking About Policing,* 2nd edition, eds. Carl B. Klockars and Stephen D. Mastrofski (New York: McGraw-Hill, 1991): 515.

859 This formulation mirrors the way Foucault formulated the questions presented by the 'new programming' of liberal governmentality that neoliberalism entails. Michel Foucault, *Birth of Biopolitics: Lectures at the College de France, 1978-1979*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador, 2004): 121.

860 Crank, "Watchman and Community"; Mastrofski, "Community Policing as Reform."

legitimacy of policing in America was not, however, the fact that they wield discretionary power—which presented a separate but imbricated challenge to the understanding of police officers as ministerial agents—but rather the graft and corrupting influence of local politics on law enforcement.[861] Old school police professionalism mixed with administrative legalism to produce a regime of centralized control, insular and hierarchical management, and formal administrative rules of conduct.[862] Distancing police practice from public influence precipitated a new problem, however. In pursuit of administrative regularity, it led, in Tracey Meares's words, to "impersonal contacts between police and private citizens."[863] The legal estrangement and alienation that ensued between the police and the public was not only bad for police-community relations but also unproductive and detrimental to the police mission, which was to deter crime.[864] Plagued by mistrust, the police were perceived as an 'occupying force' both aloof to and disinterested in the real needs of the communities they served, further straining the already shaky democratic character of America's law enforcement agencies and, now without community cooperation, rendering the task of crime deterrence all but impossible.[865]

Worse still, amidst rising crime rates nationwide, police professionalism was found wanting for practical efficacy. The problem was not just that it produced "profound problems with police-community relations" but also that it "had failed by all accounts to accomplish its self-chosen mandate—victory in the war on crime."[866] Technical innovations in law enforcement, from patrol cars to radio communication to 911 to weapons of all sorts, did not lead to a corresponding decline in crime, and justifications for the federal expenditures they required soured. On top of this, the patrol techniques that the police professionalism movement held up as ideal standard operating procedures—random preventative patrol, reactive investigations, and rapid response to calls for service—were exposed as lacking any causal linkage to crime prevention.[867] From Kansas City to Minneapolis, Seattle, New York City, and New Jersey, studies demonstrated again and again that both traditional patrol practices and their professionalized instantiations were ineffective at accomplishing much of anything. "The 1970s research about police effectiveness was," as George Kelling put things, "uniformly discouraging."[868] One of the far-reaching implications of these exposures, chapter two

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[861] Tracey Meares, "Praying for Community Policing," *California Law Review* 90 (2002): 1599 (surmising that "reformers [in the 1960s and 1970s] saw local politics as the primary problem of policing" and intended their reform programs to "combat police corruption by instituting polices [sic] to separate police officers from the influence of local politicians"); Cf., James Q. Wilson, *Varieties of Police Behavior* (describing the corrupting effects of local politics on police service style).

[862] See *infra* Chapter One, pp.57-58.

[863] Meares, "Praying for Community Policing," 1600.

[864] Legal estrangement is Monica Bell's term for "a theory of detachment and eventual alienation from the law's enforcers" that "reflects the intuition among many people in poor communities of color that the law operates to exclude them from society." Bell, "Police Reform and the Dismantling of Legal Estrangement," *Yale Law Journal* 126 (2017): 2054. It is especially instructive here.

[865] This is an especially enduring theme in the discourse of police reform. Recall Johnson's letter to Congress calling for the creation of his crime commission (*infra* Chapter One, pp.43-44). In that text, community cooperation is the fulcrum that Johnson uses to leverage the otherwise state and local crime problem to national significance, and it is how he distinguishes his approach to that problem from Barry Goldwater's. Later, cultivating trust—and thus legitimacy—between the police and the public goes on to serve as the first of six pillars in the Obama task force report for policing in the 21st century.

[866] Crank, "Watchman and Community," 329.

[867] William Bratton and Peter Knobler, *Turnaround: How America's Top Cop Reversed the Crime Epidemic* (New York: Random House, 1998), 81; Crank, "Watchman and Community," 331.

[868] George Kelling, "Police and Communities: A Quiet Revolution," *Perspectives on Policing*, no. 1 (1987): 4. The National Academies report put things like this: "The research findings were accepted as true, despite methodological criticisms by

argued, was the political license it gave to police executives to experiment with new tactics and organizational strategies. Community policing, from this vantage, is a product of politically astute, professionally industrious, and highly educated police executives.[869] Amongst the ruins of police professionalism, such executives saw opportunity in "reinvolving the police in the life of the community."[870] Propped up by grants from the federal Law Enforcement Assistance Agency and augmented by various police foundations, the closer police became involved with community members the further away they drifted from their traditional law enforcement function. Maintaining order and securing neighborhood safety, previously the happy byproducts of enforcing the criminal law, now became the ends of policing.

How and why community policing emerged out of professionalism's double fault as the dominant paradigm of policing in America is where the storyline gets murky. Many gesture to something like the claim that "a well-documented analysis of the origins and development of community policing has not yet been written" and choose their own adventure.[871] For some, especially police administrators and reformers, that adventure is a reactionary product of the alienation and estrangement wrought by professionalism. Community policing is, on this account, simply an endeavor to reclaim a frontier that the era of police professionalism had forsworn, namely, close, intimate, casual, and proactive contact with and presence in communities.[872] For others, it is the rise of a "new federalism" under the presidency of Ronald Reagan, characterized by federal retrenchment both of social provisioning and of local crime control yet still hungry for law and order and eager to be tough on crime, that led police executives and local government officials to settle on community policing as a way to satisfy both functions.[873] That 'new federalism' is, for still others, allied with an insurgent neoconservatism that expressed a deep nostalgia for a time when streets were safe, neighborhoods were united by a common code of civility, families, churches, and school teachers rather than the state warded errant youth, and tradition and law counter-balanced one another to define and maintain order.[874] From this vantage, community policing is born of a "New Right politics" that couples, to "volatile and contradictory" effect, moral traditionalism and social authoritarianism

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other scholars, and became the basis for a profound rethinking of the police role in crime control and presenting in the 1980s. The new strategy that emerged in the 1980s is called community-oriented policing," in *Fairness and Effectiveness in Policing*, 24.

869 Skogan and Hartnett, *Community Policing, Chicago Style*, 9-10; Kelling, "A Quiet Revolution," 5.

870 Crank, "Watchman and Community," 331. Though Crank turns to the power of cultural mythology to sustain this claim, a frequent theme of early community-oriented policing proposals incorporates into the police mandate the task of channeling community members to the appropriate social service agencies, which will be discussed further below.

871 Edward Maguire & Stephen Mastrofski, "Patterns of Community Policing in the United States," *Police Quarterly* 3, no.4 (2000): 15; *Cf*., Meares, "Praying for Community Policing," 1599 (claiming that "the task of defining community policing is made more difficult by the fact that there is no existing history of the origins of community policing").

872 Lee P. Brown, "Community Policing: A Practical Guide for Police Officials," Perspectives on Policing, no.12 (1989); Consortium on Community Policing, *Framework for Community Policing*, 6; Barry Friedman, *Unwarranted: Policing Without Permission* (New York: Farrar, Straus and Giroux, 2017), 43-45.

873 Crank, "Watchman and Community," 341.

874 Kelling, "Acquiring a Taste for Order," 92; Kelling, "The Quiet Revolution," 2; Crank, "Watchman and Community," 342; Skogan and Hartnett, *Community Policing, Chicago Style*, 12 (illustrating the point like this: "community policing reminds us of a world we think we once had, but have now lost); Jonathan Simon, "They Died With Their Boots On: The Boot Camp and the Limits of Modern Penality," *Social Justice* 22, no.1 (1995): 26 (claiming that community policing, along with the death penalty, curfew laws, and the boot camp, is "an exercise in what some scholars have called 'willful nostalgia'...).

with a preference for disruptive innovation and market rationality.[875] Alternatively, still, other accounts associate the birth of community policing with the ascendance of a "customer service orientation in government agencies" that took hold as police administrators welcomed input from academic researchers, many from American business schools, on organizational management and strategy.[876]

With its various emphases and inflection points, most agree that by 1994 community policing had "undeniably... arrived in American law enforcement."[877] Between president Bill Clinton's 1994 State of the Union Address, which called for "more community policing,"[878] the Violent Crime Control and Law Enforcement Act, the signature criminal justice legislation of that decade which established funding for 100,000 "community-police officers," and the opening of the Office of Community Oriented Policing Services ("COPS") within the U.S. Department of Justice to "promote community policing in the United States,"[879] community policing had graduated from a soul-searching exercise amongst police practitioners to become America's brand of policing. Indeed, according to a 1994 survey of police departments administered by the National Institute of Justice, over 80 percent of police chiefs claimed that they were implementing or had plans to implement some sort of community policing program.[880] Likewise, a report published by the Bureau of Justice Statistics five years later revealed that over one quarter of America's law enforcement officers were employed as community policing officers or their equivalents.[881]

If community policing had fully "arrived" at the end of the twentieth century, it was revitalized twice over in the early twenty-first. Two key developments signal this revitalization. President Barack Obama's Task Force on 21st Century Policing galvanized community policing as one of the six key pillars of effective law enforcement in the new millennium. Tweaked only slightly by its emphasis on procedural justice, the task force report recommended that "community policing should be infused throughout the culture and organizational structure of law enforcement agencies."[882] Most recently, President Joe Biden established by way of presidential proclamation the first week of October as

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875 Pat O'Malley, "Volatile and Contradictory Punishment," *Theoretical Criminology* 3, no.2 (1999): 175-196; *Cf*., Crank, "Watchman and Community," discussing community policing's political mutability. While Crank's analysis is especially concerned with the cultural mythology that animates community policing, it does not grapple with that mythology's correspondence with neoliberal rationality, and thus does not so much evidence a claim about "new right politics" as much it does illuminate the institutionalization of neoconservative tropes by way of community policing.

876 Skogan and Hartnett, *Community Policing, Chicago Style*, 11; Mark H. Moore and Robert C. Trojanowicz, "Corporate Strategies for Policing," *Perspectives on Policing*, no. 6 (1988); National Academies, *Fairness and Effectiveness in Policing*, 24 ("The community policing movement reflected not only the willingness of scholars to work with, rather than simply on, the police, but also the acceptance by police of the value of such collaboration. Viewed with intense suspicion and often outright rejection in the 1960s, research by progressive scholars is now viewed as a tool of progressive management and innovation.")

877 Mears, "Praying for Community Policing," 1597.

878 William J. Clinton, "Address Before a Joint Session of the Congress on the State of the Union: January 25, 1994," 155. Accessed at https://www.govinfo.gov/content/pkg/WCPD-1994-01-31/pdf/WCPD-1994-01-31-Pg148.pdf.

879 Office of Community Oriented Policing Services, *COPS Office Report: 100,000 Officers and Community Policing Across the Nation* (Washington, D.C.: U.S. Department of Justice, 1997), 3.

880 Todd McEwen, "National Assessment Program: 1994 Survey Results," *Research in Brief* (Washington, D.C.: National Institute of Justice, 1995), 27.

881 Matthew Hickman and Brian Reaves, *Community Policing in Local Police Departments, 1997 and 1999* (Washington, D.C.: Bureau of Justice Statistics, 2001), 1.

882 President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (Washington, D.C.: Office of Community Oriented Policing Services, 2015), 43. See *infra* Chapter One. Hereafter Task Force Report.

"national community policing week." Echoing the sentiments of its early purveyors, Biden proclaimed that community policing "is a critical and proven tool [that] improve[s] public safety and forge[s] strong, valuable relationships."[883] The Biden administration's promotion of community policing as policing, American style, is not limited to the ceremonialism of 'national community police week' but is pursued as a matter of policy through proposals for increased funding for the U.S. Department of Justice's COPS office, Project Safe Neighborhoods, and by allocating $350 billion in funds from the $1.9 trillion American Rescue Plan to "hire law enforcement officers and advance community policing strategies."[884]

Though it remains resistant to clear definition, community policing today stands mostly for the proposition that law enforcement and community members should partner to "co-produce public safety."[885] The Obama task force put it this way: "law enforcement agencies should work with community residents to identify problems and collaborate on implementing solutions that produce meaningful results for the community."[886] Similarly, Biden's proclamation defined community policing as "the practice of law enforcement professionals working side-by-side with members of their communities to keep neighborhoods safe."[887] Both definitions put on display the current tendency to avoid naming the specific techniques community policing entails. Partnerships, public engagement, listening sessions, and problem-solving are each presented as community policing's standard fare without revealing much about what any of this look like in practice, how it tenders 'meaningful results,' or what sort of politics orients the partnering, listening, or problem-solving. Hence its approximation as "mean[ing] all things to all people."[888] Indeed, for more than few scholars, it is this very vagueness that explains community policing's popularity. In Bernard Harcourt's words, which array once more the sheer variety of practices associated with the concept, "the expression 'community policing' is far more effective for public relations purposes than other terms such as 'aggressive misdemeanor arrests,' 'stop and frisk,' or 'mass building searches.'"[889]

This chapter does not endeavor to clarify what is meant by or rewrite the history of community policing. Nor does it promise a more thoroughly chronological accounting of community policing at all. Rather, the point of sampling from that history's common signposts is to highlight how its points of departure are the pitfalls of police professionalism, on the one hand, and emergence of a new set of governing rationalities, on the other. It is rarely, if ever, contextualized against the early grapplings with police discretion even as it states, as a matter of fact, that community policing 'celebrates discretion.' Nor is it situated within the constitutional jurisprudence on policing and criminal procedure, from the Due Process Revolution to its 'community caretaking' progeny, that makes this

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[883] Joseph R. Biden, "A Proclamation on National Community Policing Week, 2021," *Presidential Actions* (Washington, D.C.: The White House) accessed at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/01/a-proclamation-on-national-community-policing-week-2021/

[884] Biden, "A Proclamation on National Community Policing Week, 2021."

[885] *Task Force Report*, 45. Tracey Meares characterizes such resistance as simply a variation in the ways the concept is defined and focuses her analysis instead on the "one central feature" of community policing that "most scholars agree" vitalizes the concept, namely, "police engagement, collaboration, or partnership with private citizens," in "Praying for Community Policing," 1598.

[886] *Task Force Report*, 45.

[887] Biden, "A Proclamation on National Community Policing Week, 2021."

[888] George Kelling and Catherine Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York: Free Press, 1996), 158.

[889] Bernard Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge: Harvard University Press, 2001), 47.

sort of discretion not only legally possible but also normatively desirable. It proclaims that discretion is responsibilized without being at all clear what for or in what ways. Yet those departures are instructive. They point both to a break and an emergence and, in doing so, underscore the importance of apprehending the discontinuity that community policing promises, the ways in which those new governing rationalities made that promise possible, and the ramifications that promise augers for discretionary authority in a democratic society.

II. DISCRETION BEYOND DECISIONISM

The analysis undertaken in this chapter departs from these broad trends by more narrowly focusing on the role of discretion within the community policing rubric. Though it is commonly observed that community policing "celebrates" and "enhances" discretion, these observations treat discretion as a nominal function. Put a different way, such observations present community policing as if it entails merely more discretion. But discretion, this chapter submits, undergoes a transformation not simply in form—as the 'more discretion' take would suggest—but a change in kind as well. Prior to community policing, discretion was framed as a 'puzzle' or predicament. The central challenge was to determine how to constrain its misuse, keep it from exacerbating social tensions, guardrail it from running afoul of civil rights, the rule of law, and standards of reasonableness, as each of the preceding chapters traced. With the advent of community policing, however, that challenge is jettisoned. In its place is a new task. Rather than asking "how do we constrain our officer's discretion?" the question for police administrators now becomes "how do we make discretion useful, productive?" This is a fundamental shift not just in organizational management but also in the source-code of discretionary authority in American policing, the effect of which is not only an operational redeployment but a normative reprogramming.

In combination, such redeployment and reprogramming marks a significant shift. Policing switches from an authority that communicates the behaviors that one should *not* do to the behaviors that one *should* do. Rather than enforcing the criminal law, policing is oriented according to an affirmative claim that seeks to produce a condition rather than enforce a standard. This is not a novel observation, and it draws on Michel Foucault's related notions of governmentality and political rationality, each of which is explored in more detail below. But part of the central claim pursued in this chapter is that this phenomenon is most conspicuous in community policing.

One way of understanding the shift that takes place under community policing is as a supplantation of a legal-political rationality with a moral-political one. Discretion, from the vantage of the former, is always to some degree or another at odds with the rule of law. Whether it is the positive law, administrative rules, or legal principles, some sort of external constraint endowed with at least a patina of formal equality and invested with at least nominal respect for individual liberties was required to cabin discretionary authority, to grant it license while also reining it within law's empire. Thus was the challenge of crime in a free society maneuvered with a blend of adversarial and administrative legalism. To the extent that discretion threatened the political integrity of a society governed according to the rule of law, embracing its necessity in law enforcement entailed rigging new legalistic guy-lines. Hence the turn, shared by analytical and constitutional jurisprudence alike, to legal principles to fill

the 'gaps' between legal rules.[890] The basis of police intervention must remain legal, this rationality holds, even if that means expanding the codified criminal law to increase the reach of law enforcement, on the one hand, and inventing new legal rationales to illuminate and justify the penumbral region of uncertainty surrounding them, on the other. Discretion, in short, though inimical to comprehensive legal regulation, could not exist in a universe not constellated by law.

By contrast, community policing's concurrent de-emphasis and tacticalization of law, devaluation of individual liberties, and valorization of civility, propriety, and family, reconfigures discretion in moral-political terms. Law is no longer the ultimate source of authority. It neither fully licenses, constrains, nor justifies police intervention. In its stead, legitimate police intervention finds its basis in traditional values that in turn define standards of civility, propriety, and order, in institutional locales outside of the state, and in enterprising technologies at odds both with these values and these locales.

Consider three theses that have been tendered to explain the source of community policing's legitimacy.[891] That source has been theorized as a resurgence of cultural myths, an adaptation of the expectations of penal sovereignty, or an alliance between neoconservative and neoliberal political rationalities.

Moral Mythmaking

John P. Crank locates the source of community policing's legitimacy in the institutionalization of "two contemporary myths."[892] The first is the myth of the night watchman, a streetwise figure with craftsman-like knowledge of his beat who infrequently invoked the criminal law. The second is the myth of community, of "groups of like-minded individuals, living in urban areas, who share a common heritage, have similar values and norms, and share a common perception of social order."[893] Emerging out of the failures of police professionalism, the legalistic style of policing that it entailed and the dispassionate contact between the police and the public it encouraged, community policing gathered its legitimacy, Crank argues, by drawing on these myths to "reinstitutionalize police as community protectors with broad authority, including authority to arrest, unconstrained by law enforcement or due process considerations."[894] Crucially, those myths "worked" for establishing a "new legitimating mandate," he writes, "because they evoked powerful metaphors of democracy, small-town morality, and local autonomy."[895]

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[890] See *infra* chapter four.

[891] To be sure, at least one of the theses considered here, namely, David Garland's 'limits of the sovereign state' thesis, is not explicitly aimed at community policing. However, what Garland's account grapples with is the devolution of responsibility for crime control services from state institutions to public-private partnerships and the mobilization of neighborhood watch groups to fill what was previously considered the constitutive provenance of police and law enforcement. In this respect, Garland describes the same architecture of reason that seeks to justify and maintain programs virtually indistinguishable from community policing's standard fare.

[892] Crank, "Watchman and Community," 325.

[893] Crank, "Watchman and Community," 336.

[894] Crank, "Watchman and Community," 325.

[895] Crank, "Watchman and Community," 335. On this point he turns to Durkheim to further the claim that myth "establishes, maintains, and expresses social solidarity."

Why myth? What does myth accomplish for reclaiming the legitimacy of the police function in modern society? What force does it supply that the force of law could not? In precisely what ways does it evoke democracy? What is its point of moral anchorage? Those myths worked, Crank answers, at the risk of begging each of these questions, because they "legitimate social institutions and imbue them with meaning." They accomplish this not by reflecting "cosmic events," nor because they draw on "mysterious impulses of the human soul."[896] Rather, they act as a "charter for social institutions" by validating "traditional customs, attitudes, and beliefs."[897] Importantly, the "mythos of community policing," as Crank puts it, is the product of *institutional mythmaking*. This means that myth is not a matter of mere symbolism, nor of ideology, which Crank defines as a "system of highly charged and articulated beliefs."[898] Instead, as an institutional myth, community policing portends a "form[] of organizational structure and activity" that "conformed to widely held ideas about the way organizations should act and work."[899]

One of the most valuable aspects of Crank's thesis is the recognition that community policing is legitimated not simply by activating the watchman myth within the conceptual and institutional framework for police work but also by transforming that myth in the process. "The paternalistic image of the police as tough and streetwise but fair underenforcers of the law... evolved," Crank writes, "into an image of the watchman as a no-holds-barred-aggressive order-maintenance superenforcer who would arrest, even in legally ambiguous situations, in the name of protecting the community."[900] The transformation at stake here is a *moral* one. It is a "prescription" for "how police work should generally be" rather than merely a "description" of a particular policing style. Put a different way, the watchman style police department like the one described by James Q. Wilson in *Varieties of Police Behavior*, which Crank credits for having "provided the basis for the later development of the watchman myth,"[901] is categorically different from the watchman myth that animates community policing because, unlike the former, it is expressly normative. Emphasizing order maintenance over law enforcement was "imbued with a 'moral rightness'" by reconceptualizing police work in terms of "protect[ing] the rights of the community, even if sacrifices to individual liberties were incurred."[902] It is this distinctly moral authority that "justified legal and extralegal tactics in the name of community preservation."[903]

A clear indication that the legitimacy of the police mandate under community policing resides somewhere beyond liberalism's principle of legality is present in Crank's suggestion that in "protecting

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[896] Crank, "Watchman and Community," 332.
[897] Crank, "Watchman and Community," 332.
[898] Crank, "Watchman and Community," 332.
[899] Crank, "Watchman and Community," 333.
[900] Crank, "Watchman and Community," 341-42.
[901] Crank, "Watchman and Community," 338. Indeed, in Crank's estimation, it is Wilson's typology of police styles that prepared the ground for community policing. It did so in two ways. First, it illustrated a concrete alternative to the legalistic police department that police professionalism all but required. In contrast to the centrally managed and administratively insular department that prioritized treating "commonplace situations as if they were matters of law enforcement" and acting as if "there were a single standard of community conduct—that which the law prescribes," the watchman style department emphasized order maintenance as its principle function and "judged the seriousness of infractions less by what the law says about them than by their immediate and personal consequences." See *infra* chapter two. This meant, second, that the alternative Wilson described affirmed the centrality of discretion and order maintenance to police work. "Wilson presented an image of police work that was," in Crank's words, "by its nature dominated by highly discretionary order-maintenance interventions and on an ethic of craftsmanship that infused this type of work with commonsense meaning."
[902] Crank, "Watchman and Community," 339-340.
[903] Crank, "Watchman and Community," 341.

the rights of the community," the police serve as "standardbearer[s]."[904] Precisely what standard do they bear? Were they not standard-bearers of *lawful* behavior prior to community policing? In short, no. Recall that part of the problem with the legalistic police model was the reality that police must often trespass the bounds of legality in pursuit of enforcing the criminal law. That paradox is at the heart of the *Challenge of Crime in a Free Society*, and it is the same tension that Skolnick hoped to solve through public pressure and Wilson through a 'single standard of justice.' It is important to note here that the idea of police as standard-bearers is an ideal that is only rendered logically coherent by relieving that standard from law, in the positivist sense, and planting it somewhere else. As we saw in the last chapter, the Supreme Court's Due Process Revolution accomplished that supplantation through the invention of 'reasonable suspicion,' a move that departed from legal rules and relied instead more abstract and capacious legal principles. Here, however, community policing does this through appeals to traditional morality, civic duty, and the preservation of 'order.' Not unlike *Terry*'s office McFadden, who bore that standard of 'reasonableness' for police activity, Crank's watchmen are the bearers of moral rather than legal standards. They do not represent law-abiding behavior but are representatives of good, upright conduct in line with the community's standards of civility. Police authority is thus considered legitimate within, and legitimated by, community policing's normative priorities to the extent that it comports with the standards of civility set by the community because, Crank argues, that is what policing's institutional myth entails.

Limits of the Sovereign State

David Garland sees in programs like community policing the devolution of the state's heretofore exclusive responsibility for crime control, and thus the erosion of one of the "foundational myths of modern societies: namely, the myth that the sovereign state is capable of providing security, law and order, and crime control within its territorial boundaries."[905] To be sure, his analysis is not tailored to community policing. Rather, he notes a broader "contradictory dualism" at the heart of contemporary penal policy, characterized, on the one hand, by "a more limited sense of the state's powers to regulate conduct and prohibit deviance," yet committed, on the other hand, to displays of "punitiveness."[906] Indeed, he observes this dualism in "official perceptions of crime, in criminological discourse, in modes of governmental action, and in the structure of criminal justice organizations."[907]

Garland's point of departure is not that the state has failed to control for crime but that "high crime rates have become a normal social fact... a taken for granted element of late modernity."[908] Thus although he shares with Crank and others the view that the 1960s and 1970s foregrounded the "failure of criminal justice agencies," he directs our attention not so much to the novelty of the mandate that emerged out of such failures but to the "adaptations" of state power that mandate entails. As safety from criminal depredation could no longer be guaranteed by the state, Garland suggests, the very idea of state sovereignty is at stake. The resulting predicament for penal policy appears as the need to both "withdraw or at least qualify [the government's] claim to be the primary and effective provider of

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[904] Crank, "Watchman and Community," 339.
[905] Garland, "Limits of the Sovereign State," 448.
[906] Garland, "Limits of the Sovereign State," 446-447.
[907] Garland, "Limits of the Sovereign State," 446.
[908] Garland, "Limits of the Sovereign State," 446

security and crime control" while also avoiding "the political costs" that such qualifications might incur.[909]

By tracing this shift in the framework of responsibility for crime control, Garland thus draws attention to the "strategies and techniques" that governments, particularly in the United States and Britain, have adopted in response to this predicament. In contrast to the assumptions undergirding "traditional criminology"—that, for instance, crime is a matter of deviance, explained by reference to individual pathology and controlled by the state and its actors—what Garland terms the "new criminologies of everyday life" pursue a strategy of "responsibilization."[910] As a matter of policy, that strategy "aim[s] to embed controls in the fabric of normal interaction, rather than suspend them above it in the form of a sovereign command."[911] "It's primary concern is," according to Garland, "to devolve responsibility for crime prevention on to agencies, organizations, and individuals which are quite outside the state and to persuade them to act appropriately."[912]

Responsibilization is not, however, "the simple off-loading of state functions."[913] Rather, it is a "new mode of exercising power" that aims to "activate action on the part of non-state agencies and organizations." Though it sends the message that "the state alone is not, and cannot effectively be, responsible for preventing and controlling crime," it relies on public-private partnerships, on "activating communities"' and "creating 'active citizens,"' to render these adaptations of the traditional valence of state authority legitimate. It is not difficult to situate community policing, even with all its variation, on this theoretical plane. Indeed, the broader responsibilization strategy that Garland limns shares a common predicament with the 'new federalism' that prepared the historical conditions for community policing (e.g., devolution and retrenchment coupled with a desire for law and order). Likewise, if community policing was born of police professionalism's failures, this responsibilization strategy is born of the larger failure of the state to control crime. What is important is that the "limits of the sovereign state" that Garland discerns signal a source of legitimacy that, not unlike Crank's turn to myth and morals, is located somewhere beyond the juridical horizon that animates decisionism.

New Right' Politics

Pat O'Malley understands both the moralizing power of cultural myths as well as the enterprising logic that emerges out the 'limits of the sovereign state' as "elements of a New Right politics."[914] What distinguishes that politics is the way that it allies neoconservatism and neoliberalism. "The nature of this political alliance," O'Malley suggests, "extends the repertory of penality simultaneously in 'nostalgic' (neo-conservative) and 'innovative' (neo-liberal) directions."[915] What sets community policing, as an outcome and indication of this alliance, apart from traditional approaches to crime

[909] Garland, "Limits of the Sovereign State," 449.
[910] Garland, "Limits of the Sovereign State," 452.
[911] Garland, "Limits of the Sovereign State," 451.
[912] Garland, "Limits of the Sovereign State," 452.
[913] Garland, "Limits of the Sovereign State," 453.
[914] O'Malley, "Volatile and Contradictory Punishment," 175.
[915] O'Malley, "Volatile and Contradictory Punishment," 175.

control policy is the way that it is not fully explained by either of these frameworks and thus marks a "changing paradig[m] in government" altogether.[916]

In contrast to Garland, O'Malley is dissatisfied by accounts of modern penal practices that rely too heavily on the "central principles of neoliberalism" to explain developments like community policing. Garland, to be sure, does not use the language of neoliberalism, but his focus on devolution of state authority and responsibilization of non-state agents places his analysis, in O'Malley's view, squarely within that framework. The problem with such analyses is that "they tend not to confront the contradictory nature of the diverse formulations and practices of penal policy that are presented as consistent with this rationality."[917] Neoliberalism, which for O'Malley is characterized by a preference "market and private sector governance" along with the "political rejection of welfarism," is simply invested with more explanatory value than it properly deserves.[918] It is treated as "an inclusive governmental discourse because it integrates a series of central concerns" in which contemporary penal policy is often bound up. Extending to and encompassing everything from "an attack on state-centered governance" to "an assault on welfarism," from advocating the "market as a model for most social order" to emphasizing "cost-effective, pragmatic, results-based government," "the reaffirmation of individual responsibility and of the responsibility of families and communities" to "an affirmation of freedom of choice," these central principles of neoliberalism are "held to explain all...criminal justice developments."[919]

For O'Malley, so much of what passes for neoliberalism is actually a "New Right politics" that "consists of two distinct and in some ways competing trends of thought: a neo-conservative social authoritarian stands, and a neo-liberal free market strand."[920] Neoconservatism is what explains, he argues, the "emphasis on order and discipline" present in programs like community policing. Within neoconservative political rationality, "allegiance and loyalty, and membership of traditional collectivities such as the family and the nation, are paramount. Obligations, whether to the family, the community, or the nation are in a sense given in the nature of social beings, rather than contractually, rationally, or voluntarily chosen by individuals on the basis of self-interest."[921] It is thus marked apart from neoliberalism by underscoring these collective obligations rather than lionizing individual freedom, responsibility, or autonomy. This does not mean the two rationalities are entirely antithetical to one another. What binds neo-conservativism to neo-liberalism, says O'Malley, is their "common aggressive support for a capitalist economy," which is a unity sustained not so much by virtue of that economy's premium on "consumer sovereignty" or the "unfettered play" it grants market forces, but because "the free market... is the site in which the neo-conservative virtues of a kind of social Darwinism are held to be demonstrated and delivered."[922] The "key points of articulation" between these two rationalities thus consist in a shared "hostility to welfarism," on the one hand, and the "natural selection" that drives the evolution of both traditional authority and market outcomes, on the other.

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916 O'Malley, "Volatile and Contradictory Punishment," 192.
917 O'Malley, "Volatile and Contradictory Punishment," 184.
918 O'Malley, "Volatile and Contradictory Punishment," 179.
919 O'Malley, "Volatile and Contradictory Punishment," 183-184.
920 O'Malley, "Volatile and Contradictory Punishment," 185.
921 O'Malley, "Volatile and Contradictory Punishment," 186.
922 O'Malley, "Volatile and Contradictory Punishment," 186.

O'Malley's recognition of a certain symbiosis between neoliberalism and neoconservatism in the field of criminal justice policy tenders instructive value for understanding community policing's source of legitimacy in at least two ways. First, rather than identifying its ascendance with one logically coherent political rationality, O'Malley shows how community policing—and penal policy more broadly—draws on two distinct rationalities. This should encourage any analysis of the role of discretion in community policing, and importantly the ways in which discretion is transformed and its stakes reprogrammed, to be mindful that more than one current may be at work in this arrangement. Yet the second instructive aspect of O'Malley's argument resides in the way he configures the relationship between these distinct rationalities. Neoconservatism and neoliberalism, in his account, are "allied." The regimes constituted by this alliance "amalgamate and combine rather contradictory rationalities" because they can withstand "potential for internal contradiction" and are not unsettled by the "volatility and inconsistency" such contradictions might generate.[923] Through "shared values and assumptions," points of unity between these two rationalities are possible.[924] But, O'Malley wagers, part of "the price of a better explanation of the volatile and contradictory nature" of this alliance requires that we recognize politics need not reflect a single political rationality. Thus, to the extent that O'Malley clues us to the distinct rationalities at work in community policing, his analysis also encourages us to think about how those rationalities interact, what relation they share, and whether, for the purpose of this dissertation, discretion is shared point of articulation between them.

Political Rationality and Police Discretion

Though arrayed across a spectrum of political inflection points, each of the preceding accounts locate the source of community policing's legitimacy in rationales outside of law. Together, they demonstrate that we must adopt a theoretical perspective that equips us to grapple with power outside of legal and juridical terms. What is required, in other words, is a political vocabulary that depends neither upon legality nor upon sovereignty to make sense of the way in which community policing reprograms discretion. Indeed, in the era of community policing, it is not fully satisfying to construe discretion in exclusively juristic terms. Wed to a juridical framework, the predicaments of police discretion are suspended between the lawful and the lawless, to rules and their exceptions. This mode of analysis seems not only outmoded by but altogether out of place if we wish to understand what makes a configuration of police governance that deemphasizes law enforcement possible.

To apprehend the constitutive elements within community policing that reprogram discretion we must adjust the political aperture. O'Malley's analysis helpfully points us in the direction we must head. Rather than analyzing discretion through the lens of decisionism, as this dissertation first advocated in the introduction and as the proceeding chapters pursued, we turn here to what Michel Foucault termed "political rationality," and how he discerned the elements and effects of *neoliberal* political rationality in particular. The stakes of the problem of police violence, brutality, supervision, and suppression cannot be fully grasped by reference only to decisionism, to "discretionary despotism," to "street sovereigns," to "petty states of exception," or any of the various attempts to theorize Police Power with capital P's. What each of these misses is the ways in which that power is shaped and conducted by logics, objectives, and forces external to the police. One critical missing

[923] O'Malley, "Volatile and Contradictory Punishment," 188.
[924] O'Malley, "Volatile and Contradictory Punishment," 188.

piece that is occluded when we see discretion only through the prism of the decision is the way in which community policing does not rely on existential threat in quite the same way as previous eras of police reform. Indeed, exorcised by the Watts Riots, the threat of existential danger was at the forefront of the Crime Commission. So, too, was such existential logic observed by the sociologists of police to saturate the entirety of the policeman's working personality and occupational environment. And it is existential danger that is literally the lifeblood of the doctrine of reasonable suspicion articulated in *Terry v. Ohio*. That existential register is what both the political and the decision operate on, according to Schmitt, and removing it is a matter of misunderstanding the stakes of political life. With community policing, however, discretion is not about operating independently of law to secure order but using law as but one among many other tactics to producing a specific type of order, namely, as we'll see, an order that prioritizes traditional values and private social institutions.

In arguing that discretion is *reprogrammed* within community policing's plane of normative reason, this chapter thus draws on two features of Michel Foucault's understanding of the ascendence and effects of neoliberal rationality. As a methodological orientation, reprogramming discretion involves a similar "re-elaboration of... basic elements of liberal doctrine"[925] that Foucault centers in his lectures on neoliberalism. To be sure, while Foucault's interest in the ways in which neoliberalism marks "a new programming of liberal governmentality"[926] focuses on the relationship between "an economy of competition and a state," and the "type of delimitation of government" that follows from neoliberalism's "complete superimposition of market mechanisms,"[927] the argument here is different. Rather than the relationship between the political and the economic, between state and market, this chapter is concerned with the process by which community policing breaks from the discourses, policies, techniques of organizational management, and overarching normative and juridical posture that configured discretion as a threat to liberal democratic ordinates such as individual rights, principles of legality, and government accountability. While those breaking points may certainly be occasioned by the process Foucault describes, the point is not to situate community policing somewhere in his genealogy of neoliberalism nor is it to argue that policing's liberal democratic ordinates are replaced with economic ones; instead, it is to identify the ways in which policing's relationship to those ordinates transforms such that they are recast in moral-political, rather than legal-political, terms.

Reprogramming discretion draws on a substantive theme in Foucault's work also. Political rationality, a concept that will be clarified in further detail below, involves examining the theory and practice of government as a programmatic schema. In Thomas Lemke's words, a 'programme,' as a technology of government, "designates a discursive field within which the exercise of power is 'rationalized.'"[928] What is distinctive about programs is that they "not only express wishes and intentions, but define an implicit knowledge." That a political rationality is what "permits a problem to be articulated and offers certain strategies for solving or managing it"[929] means, programmatically, that, in Colin Gordon's words, it "either articulates or presupposes a knowledge of the field of reality upon which it is to intervene and/or which it is calculated to bring into being."[930] In addition to

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925 Foucault, *The Birth of Biopolitics*, 102.

926 Foucault, *The Birth of Biopolitics*, 94.

927 Foucault, *The Birth of Biopolitics*, 121.

928 Thomas Lemke, *A Critique of Political Reason: Foucault's Analysis of Modern Governmentality* (London: Verso, 2019), 149.

929 Lemke, *A Critique of Political Reason*, 149

930 Colin Gordon, "Afterword," in Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 248. I am indebted to Lemke's instructive introduction to Foucault's

'knowing' "the objects upon which it is exercised," programs must also "rende[r] reality in the form of an object which is programmable."[931] Thus, arguing that discretion is reprogrammed is not just an echo of Foucault's language but is an effort to work out how the substantive transformation that community policing portends involves a process not just of recoding the normative form of reason that governs police behavior but of 'bringing into being' a form of knowledge that is applied to the field of policing.

The term "political rationality" that O'Malley uses to describe the form of reason that organizes an assemblage of social forces, institutions, and practices, that determines both objectives and techniques of government, and legitimates programs like community policing conveys not only a power-knowledge relationship but also suggests something more. Against Garland's suggestion that such an assemblage marks a limit of state sovereignty, O'Malley suggests that the "instability surrounding the state's monopoly of crime control" might actually be "a sideshow in a far bigger restructuring of governance."[932] Whether neoliberal, neoconservative, or some alliance between them, O'Malley's emphasis on political rationality in the space of criminal justice policy points to the importance of discerning the "mentality that underlies and orients the practice of governing"[933] as opposed to apprehending practices within that space as expressions of sovereign power. Put differently, Garland's focus on state sovereignty is a sideshow in a larger process of governmentalizing the state.

Political rationality is linked but not coterminous with Foucault's notion of governmentality. In a recent essay that endeavors to clarify the term, Lars Cornelissen argues that political rationality has moved overtime from a "'governmentality studies' phase" to "fulfil a significant role in the analysis and critique of neoliberalism."[934] As a "formalization and systemization of Foucault's methodological apparatus," Cornelissen writes, the governmentality studies phase "define[d] political rationality as a discursive field from which the tools and techniques of specific governmental regimes are forged."[935] Summarizing a great deal of literature, including Lemke and Gordon, he concludes about this phase:

> Political rationalities are consistently described as 'knowledges,' 'mentalities,' and 'ways of thinking' and are seen as that which must be studied if we are to capture the ways in which the objects of government are constructed and its techniques legitimized; how, in other words, specific political practices become possible.[936]

Wendy Brown presses more out of this understanding of political rationality. In *Undoing the Demos*, Brown offers an instructive chapter that clarifies several of political rationality's distinguishing characteristics. The change that marks governmentality, which appears as "a shift away from sovereignty and its signature—'do this, or die'—to what Foucault calls governing through 'the conduct

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concept of political rationality both for highlighting the distinctiveness of 'programmes' and for directing me to Gordon's equally instructive analysis.

931 Gordon, "Afterword," 248.

932 O'Malley, "Volatile and Contradictory Punishment," 182.

933 Lars Cornelissen, "What is Political Rationality?," *Parrhesia* 29, no.1 (2018): 130.

934 Cornelissen, "What Is Political Rationality?," 130.

935 Cornelissen, "What is Political Rationality?," 130.

936 Cornelissen, "What is Political Rationality?," 130.

of conduct'—'this is how you live,'" differs from political rationality beause the latter "does not originate or emanate from the state."[937] By articulating the "conditions of possibility and legitimacy" for the instruments of government, political rationality "circulates through the state, organizes it, and conditions its action."[938] But by positing "ontological qualities and relations"[939] it is also anterior to the "ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics" that governmentality entails.[940] Though political rationality represents a normative form of reason, it also something different, Brown says:

> Political rationality could be said to signify the *becoming actual* of a specific normative form of reason; it designates such a form as both a historical force generating and relating specific kinds of subject, society, and state and as establishing an order of truth by which conduct is both governed and measured.[941]

Whereas a normative form of reason articulates a certain of order of things, a range of imperatives that instantiate truths, interpellate subjects, establish principles of delimitation and so on, what sets political rationalities apart is that they are "hegemonic orders of normative reason."[942] Thus does the pursuit of examining political rationalities involve not only "working out terms and concepts, identifying objects and limitations, affording arguments and justifications," as Lemke put things, but also inquiring into the effects and consequences, ramifications and disclosures, that political rationalities carry. In Cornelissen's estimation, it is this "rendering of political rationalities as hegemonic forms of reason" that at once distinguishes Brown's critical intervention and removes her use of the term from "the choir of Foucaultian orthodoxy."[943] Yet, in comprehending the "constitutive elements and dynamics of our condition," approaching political rationality in this way, Brown argues, is what allows us to discern what is at stake in the ascendence of a particular political rationality.

Brown's work on neoliberal political rationality is especially instructive both for clarifying parts of O'Malley's analysis and for understanding what the ascendance of that rationality portends for democratic political life and culture. What's more, Brown's more recent work on the relationship between neoconservatism and neoliberalism offers a deeply illuminating and politically enriching alternative to O'Malley's suggestion that political developments which seem to draw on each are best understood as instantiating a "political alliance" rather than a coherent form of political reason. Before proceeding much further on that alternative, it is important to specify the key features that Brown discerns as the signatures of neoconservatism and neoliberalism, respectively. The goal here is to lay out the clues that we must look for as we revisit a collection of essays written by community policing's original purveyors—what this dissertation will refer to as the Community Policing Thought

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937 Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015), 117-118.
938 Brown, *Undoing the Demos*, 121.
939 Brown, *Undoing the Demos*, 116.
940 Michel Foucault, *Security, Territory, Population: Lectures at the College de France 1977-1978*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador, 2004), 108.
941 Brown, *Undoing the Demos*, 118. Emphasis in original.
942 Brown, *Undoing the Demos*, 121.
943 Brown, *Undoing the Demos,* 133.

Collective—as well as the different ways that these clues have been arranged, interpreted, and made sense of.

O'Malley foregrounds neoliberalism's "innovative" dimensions. Many of these dimensions are featured in Brown's analysis as well, both in her early article "American Nightmare" and her book *Undoing the Demos*. Neoliberalism's assault on state-centered governance and welfarism, enthronement as the market as the model of social order, and emphasis on profitability, individual responsibility, and economic freedom, for instance, are central aspects of neoliberalism one will encounter in both thinkers. In addition to these, Brown illustrates how neoliberalism also "features no intrinsic commitment to political liberty," reduces citizenship to "self-care... divested of any orientation to the common," produces the conditions for law's "routine suspension or abrogation" by rendering it "tacticalized or instrumentalized" and thus "radically desacralized."[944] These are especially important to signpost for understanding what is at stake in community policing. "Democratic principles and the rule of law," Brown writes of neoliberalism's "business approach to governing," "are neither guides nor serious constraints but rather tools or obstacles."[945] Each of these features are gleaned from Foucault's theory of neoliberal political rationality, which does not (and could not) account for the contemporary features of neoliberalism that Brown associates with "the age of financialization and governance."[946]

In contrast to neoliberalism's market-political rationality, neoconservatism represents a moral-political rationality. In O'Malley's telling, it is a sort of social authoritarianism that is energized by "allegiance and loyalty" as well as "membership of traditional collectivities such as family and the nation."[947] The state, rather than governing for the market, is "the preserver of order" in the neoconservative frame, and the "strong assertation of state sovereignty in turn privileges both law and order as crucial, more so than the market and the individual."[948] Broaching neoconservatism as a "politically practiced hybrid rather than [an] original intellectual conceptualization," Brown argues in "American Nightmare" that "neoconservatism as a political formation is neither ideologically nor socially unified."[949] By opening with the motley cast of characters and the "contingent convergence of interests" that gathers them, neoconservatism is displayed not as a set of 'foundational principles' but as a "strong, state-led and -legislated moral-political vision."[950] It entails an "open affirmation of moralized state power" and "identifies the state, including law, with the task of setting the moral-religious compass for society."[951] Orienting the state in this way is at once at odds with and enabled by neoliberal rationality. In Brown's words:

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944 Brown, "American Nightmare: Neoliberalism, Neoconservatism, and De-Democratizatoin," *Political Theory* 34, no. 6 (December 2006): 695.

945 Brown, "American Nightmare," 695.

946 Brown, *Undoing the Demos*, 70-72. It is beyond the scope of this dissertation to consider the ways in which Brown's theorization of neoliberal political rationality differs from Foucault's. It is worth at least acknowledging that some aspects of Brown's account are inherited from Foucault while others press more out of the concept, both as a theoretical and political matter and as a historical one, however, to the extent that this dissertation relies on both.

947 O'Malley, "Volatile and Contradictory Punishment," 186

948 O'Malley, "Volatile and Contradictory Punishment," 186.

949 Brown, "American Nightmare," 696.

950 Brown, "American Nightmare," 697.

951 Brown, "American Nightmare," 697.

> the neoliberal rationality of strict means-ends calculations and need satisfaction (and the making of states, citizens, and subjects in that image) clashes with the neoconservative project of producing a moral subject and moral order against the effects of the market in culture and oriented to the repression and sublimation rather than the satisfaction of desire.[952]

Yet because neoliberal rationality "does not aim to clear the state and society of moral and political norms" but instead "is available to promulgate and realize such norms through market mechanisms, through incentives rather than directives" it also enables "the moralism, statism, and authoritarianism of neoconservatism... even as the two rationalities are not concordant."[953] It does so, Brown says, by both by supplanting and displacing "liberal democratic nodes of state legitimacy" and also by debasing "the key principles and assumptions long associated with constitutional democracy."[954] Commitments to substantive political equality, to civil rights and liberties, indeed to the rule of law, each "lose their standing at the conjuncture of neoliberalism and neoconservatism, becoming instruments or symbols rather than treasures."[955]

Thus are we presented with, in Brown's "American Nightmare," a sort of political alliance similar to the one laid out by O'Malley. Yet, unlike the "volatile and contradictory" effects that this alliance incurs for criminal justice policy and penal practice, Brown highlights the "de-democratization" that occurs at this intersection. The "new political form" that is prepared and produced by these two rationalities devalues political autonomy, transforms "political problems into individual problems with market solutions," renders the "consumer-citizen as available to a heavy degree of governance and authority," and legitimates the statism that each of these moves require.[956] Though it is beyond the scope of this dissertation to unpack these in the detail they deserve, it is important to signpost these implications as not only features peculiar to the neoliberal-neoconservative alchemy but also left out of O'Malley's analysis. In signposting these, then, we must bear them in mind as we revisit the Community Policing Thought Collective as potential clues for understanding its political ambitions and effects.

In watching out for the political rationalities at work amongst community policing's original purveyors, however, we might also call into question what sort of relationship they share with one another. O'Malley's treatment of the two as a "political alliance" comes at the expense of accepting a great deal of incoherence. Indeed, he says, it requires shedding an analytical commitment to political rationalities being singular altogether.[957] In so shedding, however, political rationality loses it hegemonic purchase. To be sure, the point is not that there can *only* be one political rationality. Rather, as a "hegemonic orders of normative reason," one must dominate over others. This, it seems, is what invests such rationalities with their political significance. Allied in the way O'Malley suggests, however, it is not clear which is one is conducting the show. We are left to accept "a degree of potential for

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952 Brown, "American Nightmare," 699.

953 Brown, "American Nightmare," 700, 702.

954 Brown, "American Nightmare," 701.

955 Brown, "American Nightmare," 701-702.

956 Brown, "American Nightmare," 703.

957 On this point, O'Malley might well align with the Cornelissen's understanding of "Foucauldian orthodoxy" even as he blames "the background influence of Foucauldian theoretical work" for "the tendency to regard most changes prominent in conservative politics as reflecting a single political rationality," in "Volatile and Contradictory Punishment," 185.

internal contradiction that will not always be obvious to the participants."[958] O'Malley, of course, is not alone thinking that considerable overlap and even coherence can exist across otherwise disparate political rationalities. That hegemony is a constitutive part of political rationality is precisely, for instance, how Cornelissen charts the break between Brown's work in *Undoing the Demos* and the "choir of Foucauldian orthodoxy." But what is the potential for critique in O'Malley's otherwise thoroughly instructive accounting of the predicaments of contemporary penal policy? Beyond charting the contours and mapping the composition of the programs produced by this political alliance—this aspect draws on neoliberalism's emphasis on X, that aspect on neoconservatism's premium on Y—what are we to make of these arrangements? If political rationality is what prepares "the condition of possibility and legitimacy," of governmental practice, as Brown suggests, then how does an alliance of the sort set out by O'Malley avoid its own crisis of legitimacy? Partly the answer here may be that O'Malley tacitly holds on to some of the very ground he wishes to move away from—namely, the "tendency to regard most prominent changes in conversative politics as reflecting a single political rationality"—a withholding demonstrated, for instance, in his concluding suggestion that "neo-liberal techniques of government *are grafted onto* other rationalities."[959] Perhaps a similar dynamic is displayed as well in Brown's "American Nightmare," wherein she asks "what is supplanted by neoconservative notions and practices of governance *resting atop neoliberal productions of the political* and the citizen?"[960] Partly, however, the answer may be that more attention is owed to the contingencies of this alliance to better understand the relationship between them.

In more recent work, Wendy Brown has argued that traditional values and moral authority are situated at the heart of the neoliberal project. Though it moves away from the language of neoconservatism, her book *In the Ruin of Neoliberalism* theorizes how the neoliberal revolution "aimed at releasing markets *and* morals to govern and discipline individuals while maximizing freedom."[961] Rather than "distinct in origins and characteristics," here Brown's analysis shows the how entailments previously sorted out into neoconservatism and neoliberalism, respectively, form a coherent "architecture of reason" in Fredrich Hayek's political thought.[962] O'Malley, too, recognized something unique about Hayek. For Hayek, "amalgamating free-market individualism with an emphasis on the need for traditional values," O'Malley writes, "was seen not only as possible but even necessary."[963] O'Malley does not press this observation any further. Brown's *In the Ruins*, however, carefully maps Hayek's political thought in ways that are valuable for apprehending how community policing transforms discretion. Brown presents a brief overview of Hayek's thought like this:

> For Hayek, markets and morals together are the foundation of freedom, order, and the development of civilization. Both are organized spontaneously and transmitted through tradition, rather than political power. Markets can do their work only if states are prevented from encroaching on or intervening in them. Traditional morals can do theirs only when states are likewise restrained from intervening in that domain and

[958] O'Malley, "Volatile and Contradictory Punishment," 188.
[959] O'Malley, "Volatile and Contradictory Punishment," 192. Emphasis added.
[960] Brown, "American Nightmare," 701. Emphasis added.
[961] Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (New York: Columbia University Press, 2019), 11.
[962] Brown, *In the Ruins*, 12.
[963] O'Malley, "Volatile and Contradictory Punishment," 188.

> when expanding what Hayek calls the "personal, protected sphere" gives morality more power, latitude, and legitimacy than rational, secular social democracies otherwise permit. Thus, more than a project of enlarging the sphere of market competition and valuations... Hayekian neoliberalism is a moral-political project that aims to protect traditional hierarchies by negating the very idea of the social and radically restricting the reach of democratic political power in nation-states.[964]

Hayek accomplishes these aims, according to Brown, by figuring markets and morals as "equally important to a thriving civilization" and rooting both "in a common ontology of spontaneously evolved orders borne by tradition."[965] One of the most valuable and illuminating aspects of Brown's reading of Hayek is the clarity and precision with which she displays the systematic force of his thought. Of particular importance for present purposes is how Hayek refashions "traditionalism as freedom" and challenges, by way of the authority that tradition and traditional moral values carry, political sovereignty.[966] For community policing similarly depends, as we'll see, on tradition to justify and legitimate discretionary police power in a way that decisionism does not fully explain.

In Brown's reading, there are three pivotal moves that allow Hayek to cement traditional morality "*within* neoliberal reason."[967] The first consists in Hayek's definition of freedom. "Hayekian freedom," Brown says, "has nothing to do with emancipation from accepted social norms or powers. Rather, it is the uncoerced capacity for endeavor and experimentation within codes of conduct generated by tradition and enshrined in just law, markets, morality."[968] The "rules of morals" that tradition produces do not threaten Hayek's premium on uncoerced human capacity because, in Brown's words, "traditions that develop the best possible ways of living together emerge not from the sheer authority of the past, but from the experimentation and evolution that freedom permits."[969] The point is not only that traditions develop spontaneously and without intention in a particular membership group—family, church, neighborhood, for instance—but also that "it promotes individual freedom through voluntary compliance with its norms." Such "voluntary conformity" is the lynchpin that holds the authority of tradition in place as something separate from political sovereignty. "No mastermind, design, or enforcer imposes or secures tradition," Brown writes, because, for Hayek, "tradition produces conformity through habitual conduct, rather than 'conscious adherence to known rules,'" while "the voluntary nature of the conduct is what makes tradition dynamic, as well as a space for freedom."[970]

Spontaneity, evolution, and voluntary conformity prepare the second of Hayek's moves, which is to undo political sovereignty. Hayek claims that the "unlimited source of power" that sovereignty requires "simply does not exist."[971] Rather, Hayek maintains that "the basic source of social order... is

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[964] Brown, *In the Ruins*, 12-13.
[965] Brown, *In the Ruins*, 96.
[966] Brown, *In the Ruins*, 104, 102.
[967] Brown, *In the Ruins*, 96. Emphasis in original.
[968] Brown, *In the Ruins*, 97.
[969] Brown, *In the Ruins*, 99.
[970] Brown, *In the Ruins*, 99.
[971] Brown, *In the Ruins*, 101. Brown includes an instructive discussion of Hayek's relation to Carl Schmitt in the book's second chapter. Here, in developing how Hayek can account for traditions 'getting passed on from generation to generation,' she instructively reminds readers that "Hayek shares Schmitt's appreciation of the theological underpinnings

not a deliberate decision to adopt certain common rules, but the existence among the people of certain opinions of what is right and wrong."[972] By challenging "the anthropomorphized version of a divine will inscribed in political sovereignty," Brown writes, Hayek "fold[s] tradition into liberalism" and "withdraws authority from political life," conferring it instead to "religiously embedded norms and practices."[973] The outcome is not only that the "authority of tradition" is positioned to repel claims to equality, justice, and popular sovereignty. In addition, such authority limits the legitimacy of the state by licensing it to "secure only the prerequisites of moral life—freedom, property, universal rules of justice, and political deference to tradition."[974]

"Securing 'rule' by tradition" thus requires, among other things,[975] expanding "the personal protected sphere."[976] In Brown's words, "'expanding the personal protected sphere' is Hayek's novel contribution to neoliberalism and to reformatting traditionalism as freedom."[977] It constitutes "both a limit and a kind of state action" and it entails "designating ever more activity within it as private."[978] What is significant about expanding the private sphere is how extends "traditional mores beyond the family" and "allows traditional beliefs and mores... to legitimately reclaim and indeed recolonize, the civic and social where democracy once ruled."[979]

Hayek does more than supply a brief for personal freedom and traditionalism, however. Crucially, Brown points our attention to the "ontological symmetry Hayek establishes between moral codes and market rules. Both," she writes,

> are evolved practices, not simply natural, but are 'good' because they are evolved, adaptive, and have stood the test of time. Both "conduct conduct" (in Foucault's formulation) or produce "a high degree of voluntary conformity" (in Hayek's) without coercion. And both require the state to secure and protect them with laws and property, marriage, contracts, and inheritance while also constitution limits on state action.[980]

The significance of the way Brown charts Hayekian neoliberalism's "architecture of reason" for understanding what is at stake in community policing is that it allows us a way to make sense of the how its original purveyors leashed together "tradition and law" to generate a new kind of police strategy; how community policing was envisaged as a "corporate strategy" aimed at reestablishing "civic morality;" how individual civils rights and liberties were subordinated to the "rights" of

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of political sovereignty; contra Schmitt, however, Hayek also locates the profound error and danger of sovereignty in its theological formulation of power."

[972] Fredrich von Hayek, *Law, Legislation, and Liberty, Volume 3: The Political Order of a Free People* (Chicago: University of Chicago Press, 1979), 33, as quoted in Brown, *In the Ruins*, 101.

[973] Brown, *In the Ruins*, 102.

[974] Brown, *In the Ruins*, 103.

[975] I want to be careful not to shortchange the thoroughness of Brown's analysis, which dedicates chapters to the ways the Hayek's thought accomplishes this feat systematically through 'dethroning' the political and 'dismantling' the social.

[976] Brown, *In the Ruins*, 104.

[977] Brown, *In the Ruins*, 104.

[978] Brown, *In the Ruins*, 104-105.

[979] Brown, *In the Ruins*, 105.

[980] Brown, *In the Ruins*, 105-106.

communities to determine the character of order within their neighborhoods; what the "political authority" that community policing hinges on consists in; and how discretion transforms from a problem in need of restraint to an asset in need of proper management. To be sure, this is not to say that this chapter will pursue a specifically Hayekian reading of or engagement with the Community Policing Thought Collective. It is to say, however, that as the key points of articulation between democracy and policing, between law and order, neoliberalism and neoconservatism, emerge out of those texts there is a certain resonance with the "architecture of reason" Brown charts.

This is especially the case, as we'll see, in George Kelling's work on the subject.[981] For in his account of community policing, traditional values and private social institutions anchor police authority, marking off a zone in which police, and state authority more generally, ought to be excluded and justifying their interventions by reference to values that law literally cannot fully capture. In pressing for discretion beyond decisionism, then, the argument pursues, as a theoretical matter, how the authority to act independently of law, of legal constraints, regulations, or justifications, is neither an expression of unbound power nor an inevitability occasioned by the conceits of the liberal democratic form. Discretion is neither about warding existential threats nor securing order in the face of chaos, as Schmitt's decisionism entails, but about enforcing standards of behavior and wielding the state's monopoly of legitimate violence to buttress the traditions that generate such standards and the private social institutions responsible for cultivating, promulgating, and ordering them. As a genealogical matter, this argument requires that we attend to the ways discretion is configured in the political rationality that undergirds community policing.

III. ENCOUNTERS WITH THE COMMUNITY POLICING THOUGHT COLLECTIVE

While there is a substantial academic literature dedicated to 'testing the promise' of community policing's various instantiations, two publications stand apart as the richest archives available for understanding the forms of political rationality that congeal in this new police strategy. One is found in in the pages of *Perspectives on Policing*, a publication of the National Institute of Justice and the Program in Criminal Justice Policy and Management at Harvard's Kennedy School of Government that features essays and research reports written by "leading figures in American policing."[982] It consists of a series of seventeen papers authored by members of the "Executive Session on Policing" hosted by Harvard from 1985 to 1991. The Executive Session's membership included not only leading academic researchers but also "the U.S. Attorney General, the head of Scotland Yard, and police chiefs and mayors of several cities."[983] The other is a monograph published in 1994 by the Bureau of Justice Assistance entitled "Understanding Community Policing: A Framework for Action." Not unlike its NIJ counterpart, the BJA monograph is the product of the "Community Policing Consortium," a research group whose membership included representatives from the International Association of Chiefs of Police, the National Sheriffs' Association, the Police Executive Research Forum, and the

[981] Indeed, it may be a worthwhile future endeavor to explore the relation between Kelling and Hayek in more detail.

[982] See, e.g., the directors note on the first page of any of the articles published in 1988.

[983] "Executive Session on Policing (1985-1991)," The Program in Criminal Justice Policy and Management, Harvard Kennedy School, accessed March 25, 2022, https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/research-publications/executive-sessions/executive-session-on-policing

Police Foundation.[984] Together, these documents articulate community policing's conceptual framework and operational programming, proffered by the figures who would go on to be responsible for popularizing and implementing community policing programs nationwide. Put a different way, it is in these pages that we can discern the intellectual foundations for what takes shape, shifty though it may be, as community policing today.

A word of caution is in order. Part of what makes apprehending the ways in which community policing reprograms discretion difficult is the combination of the absence of a comprehensive history of the idea, on the one hand, and the lack of a definitive foundational text on which students of community policing, whether advocates or critics, may draw to understand its ambition, on the other. Confusing matters even further, or at the very least making them quite peculiar, is the extensive literature dedicated to community policing's empirical assessment without either questioning or clarifying its conceptual inputs. These difficulties are not totally overcome in the archive assembled here. Though both publications attune us to the role of "political accountability" in community policing, there remains a lack of systematic political thought throughout. We learn much from these pages about how the key players in the community policing movement envisioned a fundamental shift both in the police organization and in the sources of authority that legitimate police practices. Yet the politics on which this shift relies, the register on which "political accountability" operates—indeed, what makes it political at all—is an underdeveloped, even impoverished, line of reasoning. The point here is not that we are left guessing about what is entailed by the type of accountability, authority, and legitimacy community policing invokes. Rather, the point is that we must labor to stitch these ordinates together across several texts in recognition both of the fact that a unified authoritative text does not exist and of the fact that community policing's original purveyors were not serious political thinkers.

Enhancing Discretion, or There is No 'Right' Way to Implement Community Policing

Often operating at a high level of generality and trading in platitudes, the Consortium's monograph is significant not so much for what is has to say about the "core components" of community policing but rather how it articulates the implications those components have both for police managers and for the structure of the police organization. This is perhaps ironic given the fact that the Bureau of Justice Assistance tasked the Consortium with "developing a conceptual framework for community policing,"[985] a task of which we might expect clarity on such things as 'core components.' Indeed, the two components that the Consortium posits as the 'core' of community policing are, unsurprisingly, community partnership and problem-solving. At the time of their writing in 1994, this would not have been a novel take on community policing. It is what these components mean for street-level police work, however, that is our first point of interest in the Consortium's monograph.

According to the Consortium, community policing entails a "critical" shift in both the "status" and the "duties" of the patrol officer.[986] This is a twofold shift because it requires, on the one hand, emphasizing the "value of the patrol function" and of "the patrol officer as an individual," and, on

[984] Community Policing Consortium, vii.
[985] Community Policing Consortium, 1.
[986] Community Policing Consortium 22.

the other, the "mastery" of "new responsibilities."[987] Though street patrol has "traditionally been accorded low status," they write, within the framework of community policing they "assume managerial responsibility for the delivery of police services in their assigned area."[988] With their status so elevated comes "wide-ranging discretionary and decisionmaking power" and "broader freedom to decide what should be done and how it should be done in their communities."[989] But what sort of shift is this? What does investing "greater decisionmaking power [in] those closest to the situation" accomplish? Is this simply a rearticulation of how the Crime Commission saw discretion, as "necessary and inescapable"? Is this, to put things slightly differently, just a normative statement of what had long been taken as a matter of fact, that discretion increases as one moves down the police hierarchy? In exactly what ways is this anything more than a symbolic shift in the officer's "status"?

One answer to these questions appears in the Consortium's suggestion that the patrolman's "enhanced role" has "enormous organizational and managerial implications."[990] More than a symbolic elevation and not merely the transposition of description to norm, what is at stake in this shift is "the entire police organization." Whereas discretion was previously a problem that police executives must control for, under community policing those executives serve "to guide, rather than dominate, the actions of patrol officers" by ensuring that "officers have the necessary resources to solve problems in their communities."[991] This meant that the police organization "must be structured, managed, and operated in a manner that supports the efforts of the patrol officer" and fosters "creativity and innovation."[992] What shifts is thus not only the organization's command structure, with "decisions now com[ing] from the bottom up instead of from the top down." In addition, it is a mutation in the valence of discretionary authority. Departing from an authority that was 'necessary and inescapable' to the task of deterring crime, an inevitability occasioned by the limits of the legalism that guided police practice up to the Due Process Revolution,[993] the Consortium configures discretion in managerial terms. Rather than deterring crime or enforcing the criminal law, it is about "delivering police services."

Lest this be mistaken for a sort of semantic shift, recall the sociology of policing from chapter two. One way of discerning the significance of the shift that the Consortium proposes is by reference to their suggestion that the patrol officer plays an "enhanced role." In a funny way, it is not possible to enhance the street patrol officer's discretionary authority. This much was one aspect that Skolnick, Wilson, and Bittner each agreed on about the police organization: those lowest in the hierarchy enjoy the greatest discretion. Indeed, though they each pursued that insight in different ways, it was precisely its inversion of discretionary power that made the police organization stand out as unique and curious in the first place. Enhancing the role of the patrol officer, then, does not involve merely *maximizing* their discretionary latitude and decisionmaking authority. It involves, rather, *optimizing* that authority. "Effective solutions," "productive ties," the "overall performance of the agency," these are what discretion has on offer.

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[987] Community Policing Consortium, 22.
[988] Community Policing Consortium, 22.
[989] Community Policing Consortium, 22.
[990] Community Policing Consortium, 23.
[991] Community Policing Consortium, 23.
[992] Community Policing Consortium, 23.
[993] See *infra* chapter 3 and chapter 4.

Nested in an orientation to police work that takes partnership and problem-solving as its predicates, reprogramming discretion, precisely because it is 'necessary and inescapable,' as an asset to be managed rather than a liability to be controlled has a certain intuitive force. Indeed, the Consortium describes this arrangement as a "common sense approach to the problems of crime and disorder."[994] But it is important to ask what made this view of police discretion necessary. Precisely why must discretion be optimized? In precisely what way? And why that way? What prompts the full-scale reconfiguration of the police organization? Why is that reconfiguration a matter not only of duties but of status as well?

For the Consortium, part of what occasions the shift toward optimizing police discretion is the "changing character in American communities."[995] On top of the usual plagues of crime and disorder, they write, "the social fabric of our country has changed radically." What do such changes consistent in, and what makes them radical? Familial instability, immigrants, and fiscal austerity. "The family unit is not as stable as it once as. Single working parents find it extremely difficult to spend enough time with their children, and churches and schools have been unable to fill this void. Immigrants, ethnic groups, and minorities, while adding to the diverse nature of American communities," they continue, "often have different interests and pursue disparate goals."[996] The Consortium's monograph supplies no evidence to support these claims, nor does it define the "different interests" and "disparate goals" that non-white Americans "pursue." But this is one clue for understanding the shift in discretion: none of these driving forces implicates the criminal law.

If police are to "cope" with these problems then they must "help build strong, more self-sufficient communities." In such communities "crime and disorder will not thrive."[997] Yet, that self-sufficiency is not about crime deterrence. "Not all of the problems will involve criminal activity, and many will not even be considered a priority by the police agency," the Consortium says. In the absence of criminal activity, "the concerns and fears of *community members* should order the priorities of the agency."[998] What is striking about this orientation is how it not only departs from but reverses the relationship between policing and social change. Whereas the changing character of communities is what promotes and legitimates the legalistic framework for police discretion in the late 1950s up through the early 1970s, here, the fact that communities don't 'look' the way they used to means that police must partner with them. Though the base observation is the same, the effect is nearly opposite. In response to societal change, the former turns to the criminal law to establish standards of conduct while the latter, by contrast, turns to the concerns of the community. For the Consortium, the police are thus "no longer the sole guardians of law and order" because law is no longer the mechanism that triggers their intervention. Instead, the police must concern themselves with the "fears" held by members of the community and tender their service in such a way that enhances "security, safety, and well-being."

Changes in the social makeup of American communities do not fully explain why police discretion must be optimized rather than constrained, however. They clue us into the Consortium's understanding of the scope of the problem, and they set the stage for police authority to operate apart from strict legal considerations. But they do not account for why the police department must be

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994 Community Policing Consortium, 4.
995 Community Policing Consortium, 3.
996 Community Policing Consortium, 3.
997 Community Policing Consortium, 4.
998 Community Policing Consortium, 46. Emphasis in original.

restructured in such a way that both celebrates and optimizes discretion. And, by way of background, America's changing "social fabric" is all the Consortium gives us to work with to situate and contextualize the departmental overhaul it advocates. The difficulty for making sense of how the Consortium goes from a claim about a wayward public—a claim that is a common throat-clearing exercise in nearly all texts that grapple with the challenges of American policing—to a decentralized police force in which power is directed from the "bottom up" can be attributed to how the monograph flattens a great deal of police history. To be sure, it offers no historical reference points to anchor its claims about social change. But it does attempt to situate community policing in earlier experimental police practices. Its historical survey spans the Kansas City study on random patrol to the Minneapolis study of hot spots, the same studies discussed in chapter two. That survey also includes yet another study: the San Diego Community Profile Development Project. According to the Consortium, the San Diego experiment marks "the first empirical study of community policing."[999] What's more, "many of the findings from this study," it says, "have a direct bearing on contemporary community policing efforts."[1000] In developing its organizational framework for community policing, the Consortium tacitly relies on the central features and insights from the San Diego study. It is thus that study that provides the second clue for understanding the role of discretion in community policing.

Community Policing in San Diego

Surprisingly little is made of the San Diego experiment. While the Consortium's monograph dedicates two paragraphs to the study's outcomes, it overlooks the assumptions that informed the study's research design. The articles assembled in *Perspective on Policing*, by contrast, do not mention it once. Sponsored by the National Police Foundation, the program was specifically designed to "hold individual officers accountable for delivering services related to the expressed need of the community."[1001] Self-styled as portending a "major departure from contemporary styles of urban police work,"[1002] what is striking about the San Diego experiment is the way its stated goals jettison the assumptions about police discretion that colored police governance throughout the 1960s and 1970s. The study had all the signatures of the police science of that era: officers, units, and geographic beats divided into experimental and control groups, doggedly typological rubrics for treatment effects, and a general premium on discerning lessons for organizational management. Yet, unlike those earlier studies, which were targeted to the research agenda laid out by the Crime Commission and which put on display the limits of the Commission's central assumptions about crime control, the San Diego experiment departed from the commission's analytical framework altogether.

The Community Profile Development Project is foremost a "broad-based experiment in patrol innovation."[1003] The project's stated goal was to "improve police patrol practice." Unlike the studies which pursued that goal through centralized administration, the San Diego police department placed the onus for improvement upon the individual officer. It did so in three distinct ways: "by requiring

[999] Community Policing Consortium, 9.
[1000] Community Policing Consortium, 9.
[1001] John E. Boydstun and Michael E. Sherry, *San Diego Community Profile: Final Report* (Philadelphia: Police Foundation, 1975), i. Hereafter San Diego Community Profile Report.
[1002] San Diego Community Profile Report, 83.
[1003] San Diego Community Profile Report, 1.

each patrol officer to (1) systematically learn his beat, (2) identify and document the full range of beat problems, and (3) develop patrol strategies to solve these problems at his level."[1004] What is notable about these requirements is how they foreground an aspect often lost in the widespread focus on partnerships and problem-solving: that each is predicated on "making more productive use" of patrol officers.[1005] Indeed, the point of the "community profile concept" was to provide "a method and a perspective to guide patrol officers' exercise of discretion."[1006] Here, as we'll soon see, that the study focuses attention on the "community profile" should not be treated as a mere precursor to what goes on to be developed as the rubric of 'community policing.' To the contrary, the project's process and expectations for developing a community profile is what animates and underpins the police officer's discretionary authority within that rubric. Put differently, 'profiling' becomes a key operation of community policing though it is not coextensive with community policing itself. It thus helps understand more fully the significance of the "enhanced" discretion that the Consortium envisaged.

Two points of departure separate the San Diego experiment both from the central assumptions about police governance in the decade following the Crime Commission and from the central challenge of community policing from the 1980s onward. Recall that the Crime Commission established a legalistic framework for police governance and set about a research agenda for experimenting with various techniques for centralized police administration.[1007] What sustained that framework was the Commission's bedrock premise that the purpose of policing was crime deterrence.[1008] Likewise, recall that for advocates of community policing, the constitutive element of this new strategy is the partnership between the police and the public. Though the inflection points differ, those advocates locate the challenge that threatens the viability of such partnerships in the need for community members to recognize that police cannot provide order and security without their help and active involvement in defining community problems.[1009] In San Diego, both of these starting points are replaced. Rather than relying on centralized administration to guide police discretion, and against the view that community policing requires community buy-in, San Diego experimented with *decentralized responsibility* for and *officer acceptance* of community policing. By the study's own account, "the experiment focused primarily on measuring the *internalization* of a new patrol concept by the SDPD, and only secondarily on the external effects that resulted within the host community."[1010]

Like its two points of departure, two substantive themes are at the heart of the San Diego experiment. The first emphasizes the importance of "the beat officer's *personal* responsibility for his patrol work."[1011] The second underscores the role of knowledge production as part of that personal responsibility. Together these constitute the central elements of the "community-oriented policing

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[1004] San Diego Community Profile Report, 71

[1005] San Diego Community Profile Report, i.

[1006] San Diego Community Profile Report, iii.

[1007] See *infra* chapter two.

[1008] See *infra* chapter one.

[1009] The Consortium put that point like this: "All who share a concern for the welfare of the neighborhood should bear responsibility for safeguarding that welfare," in Community Policing Consortium. 4 By contrast, the Obama task force characterized that challenge in terms of deep mistrust between the police and the public.

[1010] San Diego Community Profile Report, 14. Emphasis added. At the opening of the report, the study's authors are also clear about its departure from the assumption that policing is the pursuit of crime deterrence: "The project was not conceived as a vehicle for testing the effectiveness of the Community Profile Approach from a crime-deterrence standpoint although the department believed that crime control would ultimately benefit from city-wide application of the new approach," in San Diego Community Profile Report, 1.

[1011] San Diego Community Profile Report, iii. Emphasis in original.

program" later implemented in the San Diego Police Department on the basis of the study's findings. "Responsibility" is a term used throughout the study's final report. Though employed in different contexts—from "responsibility for delivering police services" to "responsibility to learn more about the community" to "responsibility to increase contacts with the community" to "responsibility to act as a citizen advocate"[1012]—it is always qualified as "personal" or "individual" and often coupled with some reference to discretion. In addition to "greater acceptance" of these various responsibilities, for example, the study hoped to induce "greater acceptance of increased discretion."[1013] Indeed, the study defined the "expanded concept of the role," by which it meant the street-level police officer, through the prism of these two qualities, "responsibly and use of discretion."[1014] What is the correct comportment of discretionary authority in this "expanded" role? For what is it responsible? What function does "personal responsibility" serve for the police organization? And what differentiates this sort of responsibly from standard police duties?

To apprehend the significance of personal responsibility for community policing, it is crucial to understand how it is used in the San Diego experiment as a technique for organizational management. Generally, the patrol officer is responsible for "delivering police services." But that by itself is nothing new. After all, who else but the police officer is responsible for executing the tasks assigned to the police? That the responsibility contemplated by the San Diego experiment is "personal" signals a change not so much in the conduct that is expected of the officer but the type of injunction that directs it. It concerns both the officer's "initiative" as well as his "accountability." Configured as sharing a reciprocal relation, the officer's "personal sense of responsibility for the people and problems of his beat" is tethered to, and is the singular referent for, the study's understanding of "beat accountability."[1015] Though aimed a 'improving patrol practices,' the "principle of beat accountability" is what forms the basis for such improvement.[1016]

Beat accountability, a term of art amongst police practitioners, is a less than well-defined concept in the study's final report. Appealed to not only as a principle basis of, it is also invoked as an "integral dimension,"[1017] a "fundamental precept,"[1018] and a "critical factor"[1019] to the police officer's personal responsibility for "operational effectiveness." In the final report, it takes on a sort of 'know-it-when-you-see-it' quality. In its words, beat accountability is "characterized by a patrol officer's fully reasoned and responsive involvement in the neighborhoods and communities of his or her beat"[1020] and is "manifested by an officer's actual responsiveness to beat conditions, and by his increased willingness to get involved in the community and help people solve such problems as pertain to the police service function."[1021] Accountability is not evaluated by what the study saw as "standard measures of officer productivity," by which they meant for the most part "traffic citations and warnings, arrests, field interrogations."[1022] For the study's authors, policing's disregard for "actual beat

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[1012] San Diego Community Profile Report, 3.
[1013] San Diego Community Profile Report, 3.
[1014] San Diego Community Profile Report, 67.
[1015] San Diego Community Profile Report, 32.
[1016] San Diego Community Profile Report, 71.
[1017] San Diego Community Profile Report, 73
[1018] San Diego Community Profile Report, 32
[1019] San Diego Community Profile Report, 36
[1020] San Diego Community Profile Report, 38.
[1021] San Diego Community Profile Report, 32.
[1022] San Diego Community Profile Report, 75.

conditions" is owed to the emphasis that traditional police models, namely, orthodox police professionalism, place on those metrics. In place of those 'standard measures,' San Diego experimented with a new one: beat profiling. That measure is what connects 'beat accountability' to 'personal responsibility.'

If 'community involvement' and 'problem-solving' remain elusive terms in the San Diego study, "beat profiling" does not suffer from a similar lack of clarity. It is a "process" of both knowledge production as well as organizational management. In the study's words:

> "'Profiling' refers first to a method of data collection and analysis by patrol officer which yields a picture of the beat as a community. The officer's 'profile' of his beat should serve to identify community problems and priorities as well as the resources that can be brought to bear on the identified problems. As an information gathering method, therefore, 'Profiling work' requires daily and methodical observation, description, and analysis. The ever-growing product of this activity constitutes the beat officer's personal profile of his working community...Profiling is intended to promote a substantially different approach for doing police work that is demonstrated by the individual patrol officer's acceptance of beat accountability combined with his development of new patrol strategies to assist him in meeting his responsibilities... In every case, the officer's increased responsibilities are combined with increased discretionary decision-making."[1023]

We should be mindful here to note that the term 'profiling' is doing a different sort of work than what has come to be expected of it in contemporary parlance. It performs a more diagnostic function as opposed to the predictive one associated with the term today.[1024] Profiling entails increasing, in the study's terms, "beat knowledge."[1025] Such knowledge encompasses more than just a "growing awareness of the potential patrol capabilities and limitations to deal with a wide range of beat problems."[1026] It also makes up for gaps in an officer's "expertise and jurisdiction" by building "awareness of community resources which the officer could rely on to continue the problem-solving process."[1027] Profiling is thus directed toward knowing the beat's particularities as opposed to relying on generalizable patterns, stereotypes, or short-hand cues.

Because the patrol officer enjoys the most proximity to such particularities, it is his responsibility to develop their profile. But beat knowledge is also linked to accountability at the organizational level as well. "Organizationally," the study says, "the emphasis of the beat profiling process is on accountability. It facilitates an upward communication vehicle through which middle and top-level management become better informed about patrol practices."[1028] Beyond funneling information to police executives, beat profiling also "give[s] the officer a method of connecting his

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[1023] San Diego Community Profile Report, 6.

[1024] See, e.g., Bernard Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago: University of Chicago Press 2007), 19-28.

[1025] San Diego Community Profile Report, 38.

[1026] San Diego Community Profile Report, 38.

[1027] San Diego Community Profile Report, 38.

[1028] San Diego Community Profile Report, 83.

everyday activities to the larger goals of the department."[1029] There is an additional organizational component to beat profiling, however. By 'facilitating upward communication' it also serves as a "performance evaluation system."[1030] In contrast to assessing officer performance by reference to arrest rates or ticketing quotas, San Diego's community-oriented policing strategy "pays particular attention to areas of beat knowledge, community involvement, and problem-solving" in order to "motivate an officer to develop patrol approaches responsive to the people and problems of his beat."[1031] Personal responsibility and beat accountability are thus each achieved through "an alternative structure of performance evaluations, rewards, and incentives, which specifically encouraged patrol officer innovation and discretionary decision-making."[1032]

What is striking about this arrangement is the way it turns the legalistic model of police discretion on its head. By indexing officer performance against his own initiative, San Diego's model for community-oriented policing does more than abandon the legalistic preference for administrative guidelines. Discretion is individuated such that it is unmoored from liberal legalism's discursive points of anchorage as well. Those anchor points, as each of the previous chapters tried to trace, are anything but stable. Yet whether tethered to administrative rules, adversarial legalism, crime deterrence, or the partitioning of legal institutions, to due process, a 'single standard of justice,' or reasonable suspicion, in each of these transformations discretion is rendered intelligible through an appeal to a norm—the criminal law, articulable facts, or fairness, for example—as well as its deviation—arbitrariness, racial discrimination, undelegated authority, to name a few.[1033] Responsibility is thus encoded as a form of accountability only by altering the injunction that accompanies discretionary authority. Previously governed by a mandate to deter crime and enforce the criminal law, this injunction incorporates discretion as a performance metric that saddles the officer with demands to take initiative, even where he "lacks expertise and jurisdiction," to innovate solutions to "non-criminal problems," to "facilitate" knowledge production. Not only rewards and incentives but also sanctions and reprimands, as well as the types of misconduct deserving of blameworthiness, are consequently redefined in terms of the officer's *personal* responsibility to meet each of these demands, to his individual responsiveness to community concerns, rather than the department's goals or the police executive's vision for police services because those goals and that vision do not exist outside of the officer's beat knowledge.

Devolution does not capture the novelty of San Diego's model for community-oriented policing. Slightly different than what Garland parlays as one of the effects of the sovereign state 'withdrawing' its monopoly over provisioning security and not at all like Crank's account, which situates community policing as a contingency of federal retrenchment for police funding, the responsibility that the San Diego model portends does not simply displace an executive function but locates the success or failure of police services in the officer's personal initiative. That beat accountability is a "process" signals that the individual initiative and personal responsibility it requires are better captured in terms of responsibilization than devolution. It entails not just, as one scholar has described devolution, sending "decision making and resource provision down the pipeline of

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[1029] San Diego Community Profile Report, 83.

[1030] San Diego Community Profile Report, 84.

[1031] San Diego Community Profile Report, 12, 84.

[1032] San Diego Community Profile Report, 46.

[1033] Wendy Brown, in distinguishing "political rationality" from "discourse" instructively points outs that "'discourse' may be specified as an order or ensemble of normative speech acts that constitute a particular field and subjects within it; in discourses, norm and deviation are the means by which subjects and objects in any field are made, arranged, represented, judged, and conducted," in *Undoing the Demos*, 117.

power and authority."[1034] Beyond that, it entails "the moral burdening of the entity at the end of the pipeline." Here, it means that rather than extending officers a longer leash they are tasked with "discerning and undertaking the correct strategies" for delivering police services. It also means that, since performance evaluation is altered to prioritize these individual responsibilities, executing those tasks is a matter of "self-investment and entrepreneurship." Everything from promotional potential to beat assignments is conditioned on the officer using his discretion, not just when occasioned by 'gaps' in law or administrative rules, not 'reasonably,' not even fairly, but productively.

In light of these observations, the Consortium's brief for "enhanced" discretion gains texture: it involves not merely the devolution of authority but requires responsibilizing those to whom authority is devolved. It is occasioned not only by America's changing social fabric but by a transformation in the way the function of the street-level police officer is conceived as well. By responsibilizing discretion, the work that the San Diego study accomplishes in the background of the Consortium's monograph is to predicate the organizational changes community policing entails on the individual officer's acceptance of their role within this new strategy. Such acceptance is not achieved by elevating the officer's "status" alone. Instead, it is facilitated by conditioning the success or failure of officer performance on his responsible, productive use of his discretion.

Corporate Strategies and Quiet Revolutions

The same elements that give texture to what the Consortium called "enhanced" discretion form the basis of what George Kelling, Mark Moore, and Robert Trojanowicz, each members of the Executive Session on Policing, refer to as "corporate strategy" in *Perspectives On Policing*. Its reliance on a market-like idiom signals that the qualitative dimensions of this strategy both reconfigure the police organization on the model of the firm while also locating its source of legitimacy in a flattened network of beat cops, executives, and community members.[1035] For Kelling and Moore, the "concept" of a corporate strategy—a concept that they never actually define—supplies an "analytical framework" for distinguishing community policing from earlier "eras" of police practice. It does so by drawing attention to "the sources from which the police construct the legitimacy and continuing power to act on society" as well as "the definition of the police function or role in society."[1036] On top of these, that framework also features "organizational design," external relationships, "police efforts to market or manage demands for their services," operational tactics, and performance metrics.[1037] Approaching police practice from the perspective of a 'corporate strategy' is thus valuable, in their view, because it foregrounds the "tacit assumptions that define the business of policing."[1038]

Moore and Trojanowicz develop what distinguishes community policing's "corporate strategy" in an essay in *Perspectives on Policing* entitled "Corporate Strategies for Policing." Rather than providing a public service, a corporate strategy for policing is aimed using police resources to "produce greater

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[1034] Brown, *Undoing the Demos*, 132.

[1035] *See* Brown, *Undoing the Demos*, 126: "governance replaces hierarchical, top-down mandates and enforcement with horizontal networks of invested stakeholders pursuing a common end."

[1036] George Kelling and Mark H. Moore, "The Evolving Strategy of Policing," *Perspectives on Policing*, no.4 (1988): 2.

[1037] Kelling and Moore, "Evolving Strategy," 2.

[1038] Kelling and Moore, "Evolving Strategy," 2.

value for society."[1039] Relying on Harvard Business School Professor Kenneth Andrew's popular textbook on the concept of corporate strategies, they understand such strategies to "define for the organization how the organization will pursue value and what sort of organization it will be."[1040] A corporate strategy, they write, "tells outsides who invest in the organization what the organization proposes to do and how it propose to do it." Community policing opens onto this plane by emphasizing "the creation of an effective working partnership between the community and the police."[1041] It is in how Moore and Trojanowicz indicate the way in which such partnerships are produced that we get a clearer sense of what work the "corporate" part of this strategy is doing. "To construct the working partnership and build competent communities," they say:

> a police agency must view the community institutions as more than useful political allies and operational partners in the pursuit of police-defined objectives. They must see the development and protection of the institutions as partly an ends as well as a means. Moreover, the police must recognize that they work for the community, as well as for the law and their professional development.[1042]

An essential part of community policing's corporate strategy is that it requires the police organization to "become more open to community definitions and priorities of problems to be solved."[1043] What's more, it grants "greater status" to "the community's views" both about "what constitutes a serious problem" as well as about "what would be an appropriate police response" to them. What Moore and Trojanowicz have done here is not so much break new ground on what community policing is all about so much as they've displayed the subtle shift that takes place within this new strategy. Rather than the police answering to public officials or conducting themselves pursuant to enforcing the criminal law, they've figured "the community" and "community institutions," which in their account are comprised of "families, schools, neighborhood associations, and merchant groups," as shareholders in the enterprise of abating "urban decay."[1044] This, it seems, is what makes the strategy distinctively corporate: it entails establishing a particular, invested membership on behalf of whom the police agency orients and conducts its business, and it legitimates its actions by reference to their interests.

No longer only executors of the criminal law but figured as fiduciaries of community concerns as well, Moore and Trojanowicz are well aware such an arrangement "raises important questions about political interference" and presents a "risk that the police will be unduly influenced by illegitimate political demands."[1045] But, they say, this is really a different issue altogether, one that hinges, on the one hand, on "whether the police are accountable to the law and its impartial enforcement," or whether police are accountable, on the other hand, "to the community and its representatives who

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[1039] Moore and Trojanowicz, "Corporate Strategies for Policing," *Perspectives on Policing*, no. 6 (1988): 2.
[1040] Moore and Trojanowicz, "Corporate Strategies," 2, *citing* Kenneth Andrews, *The Concept of Corporate Strategy* (Homewood: Irwin 1980).
[1041] Moore and Trojanowicz, "Corporate Strategies," 8.
[1042] Moore and Trojanowicz, "Corporate Strategies," 9.
[1043] Moore and Trojanowicz, "Corporate Strategies," 9.
[1044] Moore and Trojanowicz, "Corporate Strategies," 9.
[1045] Moore and Trojanowicz, "Corporate Strategies," 9.

pass the laws and consent to be policed in a particular way."[1046] Here is how they suggest going about negotiating this tension:

> This tension, between legal impartiality and political responsiveness as the basis of police legitimacy, can be theoretically resolved by saying that the police are strictly accountable to the law except where discretion exists. In those areas of discretion, the police may properly be guided by the desire to be responsive to the legitimate expressions of neighborhood concerns. What this theoretical perspective leaves unacknowledged is that many of the most important questions facing police executives remain unanswered by law... As a practical matter, what the police must take from their legal foundation is the obligation to say no to the community when the community asks them to do something that is unfair, discriminatory, or illegal.[1047]

"Except where discretion exists" is doing a lot of work in this formulation. Indeed, as each of the previous chapters endeavored to show, discretion exists *every*where. Moore and Trojanowicz harken back to the Crime Commission's understanding of discretion's 'necessary and inescapable' role in police work when they say that "the most important questions facing police executives remain unanswered by law." But they seem altogether tone deaf to the rich sociological literature that demonstrated how the police officer's working environment itself creates conditions for officers to routinely violate the law.[1048] Nor do they seem attuned to the role that the doctrine of reasonable suspicion plays in the "legal foundation" for police discretion, which, as we saw in chapter four, establishes a self-referential standard for police intervention. Yet police discretion, in operating independently of law, is warded from "illegitimate political demands," they say, because of "the hard-won legacy of the strategy of police professionalism."[1049] This is a curious and underdeveloped point in Moore and Trojanowicz's essay. A strategy that is said to emerge out of the pitfalls of professionalism also relies on it to cabin its risks. How to make sense of the interaction between these two strategies? Why should we be confident that the legacy of police professionalism will serve as a check-rein to illegitimate political demands on police services? Where is the boundary between legitimacy and illegitimacy? On what sort of political assumptions does that boundary rely?

Though answers to these questions are not supplied in "Corporate Strategies of Policing," we are able to gather answers to them in a separate essay in *Perspectives on Policing* that Moore co-authored with George Kelling. Significantly, for them, community policing is not only a corporate but an "evolving strategy," they say, because it emerges out of the promises and pitfalls of earlier "eras of police history." That history is divided into three eras: political, reform, and community-oriented. The drawback of the "the political era," a period in which authorization came from local political leaders and the police provided a "wide variety of services"—what Wilson and Crank each refer to as the "watchman style" of policing—was that close integration with and responsiveness to the community came at the cost of rampant corruption, on one hand, and widespread abuses of authority, on the other. By contrast, the "reform era" that emerged in response to such problems, characterized most

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[1046] Moore and Trojanowicz, "Corporate Strategies," 10.
[1047] Moore and Trojanowicz, "Corporate Strategies," 10.
[1048] See *infra* chapter three.
[1049] Moore and Trojanowicz, "Corporate Strategies," 10.

notably by the movement toward police professionalism, standardized and regulated police authority at the expense of productive ties to the community.[1050]

Community policing "evolves" out of these early errors both by bearing their traces and by casting in relief the tensions between them. "The problem confronting police, policymaking, and academicians," according to Kelling and Moore, is that the "trends and findings" of contemporary police science, though especially problem-oriented policing, "contradict many of the tenets that dominated police thinking for a generation."[1051] They summarize those contradictions like this:

> Foot patrol creates new intimacy between citizens and police. Problem solving is hardly the routinized and standardized patrol modality that reformers thought was necessary to maintain control of police and limit their discretion. Indeed, use of discretion is the *sine qua non* of problem-solving policing. Relying on citizen endorsement of order maintenance activities to justify police action acknowledges a continued or new reliance on political authorization for police work in general. And, accepting the quality of urban life as an outcome of good police service emphasizes a wider definition of the police function and the desired effects of police work.[1052]

The evolution that takes place here is thus not simply that community policing represents the best of both worlds. Rather the change that occurs in the development of community policing's "corporate strategy" is a reconfiguration of, on the one hand, the function of the police and, on the other hand, the source of legitimacy for that function. Crime deterrence, the chief function of the police during the reform era, is replaced with problem-solving and improving the quality of urban life. Likewise, legal authorization is replaced in favor of citizen endorsement and political authorization. What is at stake in this evolution is, however, not the change in the police organization. On the contrary, and in contrast to both the Consortium's brief for organizational restructuring and the San Diego experiment that informs it, the stake is in what legitimates the new functions that such organizational changes hope to facilitate.

For Kelling and Moore, the key point of departure is not the patrol officer's responsibilities, as was the case in San Diego, but the role of law in community policing. Indeed, though their 'corporate strategy' does much to highlight the market-political rationality that overtakes the police organization in this "new era," the unique contribution that the articles assembled in *Perspectives on Policing* offer for discerning how a moral-political rationality inheres this strategy as well appears in what they have to say about its relation to law and legal accountability. Kelling and Moore do not leave much left answered on this point. Even the series editor felt it necessary to note that their paper "evoked some of the most spirited exchanges among Session participants."[1053] The legitimacy of the police function depends upon a "renewed emphasis on community, or political authorization."[1054]

[1050] Kelling put this point more forcefully in a separate article, also published in *Perspectives on Policing*: "Centralization, standardization, and remoteness may preclude many opportunities for corruption, but they may also preclude the possibility of good policing," in "Policing and Communities: The Quiet Revolution," 7.

[1051] Kelling and Moore, "Evolving Strategy," 10.

[1052] Kelling and Moore, "Evolving Strategy," 10.

[1053] Kelling and Moore, "Evolving Strategy," 2.

[1054] Kelling and Moore, "Evolving Strategy," 11.

That emphasis transforms the role of law from being that which not only orients but also constrains police discretion to "one tool among many others" used to maintain order.[1055] It "continues to be the major legitimating basis of the police function," they say, "but it does not fully direct police activities in efforts to maintain order, negotiate conflicts, or solve community problems."[1056]

Law, according to this formulation, serves two tactical functions. As a "major legitimating function" that "defines basic police powers," law might justify police intervention. It does not, however, "fully direct" what police do once they have intervened. As "one tool among many others" law, in other words, serves as tactical cover for police to intervene in situations that are not "strictly illegal," as Consortium put it, and not necessarily within their "jurisdiction," as the San Diego experiment made clear. Tacticalized in this way, law is thus both stripped of its rule-like features, because it no longer "fully" governs the exercise of police authority, while at the same time hollowed of its principled value, because it is instrumentalized. Kelling and Moore do not reach the same conclusion, however. In their view, the legalistic features put in place during the era police professionalism, if not law in either of its positivist or principled instantiations, keep police power from descending into the graft and abuse characteristic of the 'political era.' "The bureaucratization, professionalization, and unionization of police stand as counterbalances," they argue, "to the possible recurrence of the corrupting influences of ward politics that existed prior to the reform movement."[1057] Law's second tactical function, then, consists not in law in any proper sense, not in *the law*, but in the sort of institutional armatures that are animated and constrained by legal rationality.

Those institutional armatures are also what renews community policing's "emphasis" on "political authority." They are what differentiates the "political context" of community policing from merely 'political policing,' or, to put it the way Moore did when writing with Trojanowicz, from serving "illegitimate political demands." Legitimating community policing's 'corporate strategy' relies not on reactivating the old influence of local politics but on generating new "support and involvement" from neighborhoods and communities by developing "strategic alliances" with them.[1058] Though Kelling and Moore's perceived evolution of policing is clear both about the changing functions of police in modern society and about the changing role of law within those functions, "political authority" remains an elusive concept. 'Neighborhood' and 'community' are each presented as abstract entities, and in precisely what ways they exercise authority or supply authorization is entirely unclear. What theory of politics guides community policing's "political accountability"? Is it a communitarian politics? Republican? Plebiscite? A popular democratic one? Certainly, it is not a liberal democratic politics or else it would not downplay individual liberties in favor of order maintenance. But exactly how does such authorization depart from these liberal democratic ordinances? And with what are they replaced?

If Kelling and Moore's co-authored submission to *Perspectives on Policing* fails to offer a satisfactory answer to these questions, it is made up for in Kelling's other work, both those co-authored in *Perspectives on Policing* and sole-authored elsewhere. Indeed, the process of reprogramming police discretion receives its clearest articulation in Kelling's work. Of the seventeen articles assembled

[1055] Kelling and Moore, "Evolving Strategy," 11.
[1056] Kelling and Moore, "Evolving Strategy," 11.
[1057] Kelling and Moore, "Evolving Strategy," 11.
[1058] Kelling and Moore, "Evolving Strategy," 11, 12.

in *Perspectives on Policing*, Kelling is the author or co-author of seven.[1059] Unlike the focus that other members of the Executive Session placed on the concrete tactics, organizational configurations, and management techniques, Kelling turns to community policing's moral entailments. Only by identifying the locales of political authority in his thought can we understand fully the moral-political rationality within community policing and discern its effects and implications for democratic police reform.

In an essay titled "Neighborhoods and Police: The Maintenance of Civil Authority," Kelling and co-author James K. Stewart, attempt to clarify the question of political authority by constructing a framework for "neighborhood as polity."[1060] The term 'polity' is used two different ways throughout the essay. It is employed to suggest both a process of civil government and a particular organization of collective life. Neighborhoods are "sources of polity" but also they may "serve as a polity."[1061] As a unit of analysis for "civil authority," "neighborhood as polity" slides from, on the one hand, an attributive point of reference for understanding where police gather their legitimacy to, on the other hand, a normative justification for how the relationship between the police and the community ought to be properly configured.

Rather than a marked transition from one way of analyzing the problem to another, this oscillating use of 'polity' is a slippage that occurs throughout the essay. What grounds that slippage is the way in which neighborhoods "function as political units" without operating as "a true political system."[1062] As a political unit, neighborhoods consist of citizens representing residential and commercial interests who "lobby" and "unofficially govern in many dimensions" of civic life.[1063] They exercise "social persuasion" and "informal means of approval and disapproval." What they lack, however, is "the exercise of lawful coercive force." This is what differentiates civil from governmental authority, and it is the reason that Kelling and Stewart's essay ultimately concerns "alternate visions of the role of municipal police in neighborhoods."[1064] The dilemma for community policing appears therefore in the tension between the wishes expressed by neighborhoods, their call for "devolution of power," for "a self-help approach to problem-solving" and the powers reserved for "official government," namely "a monopoly on legitimate use of force."[1065]

In their defense of neighborhood as polity, Kelling and Stewart do not chip away at that monopoly so much as they reconfigure what directs it. Put another way, community policing, in their view, does not propose for the monopoly over the use of force to change hands but for it to respond to a different set of pressures. Rather than the force of law directing how and when that monopoly is exercised, here it is the force of private social interests. "Just as neighborhoods provide the informal political infrastructure that keeps government afloat," they argue, "neighborhood and private social

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[1059] The only contributor to come close to Kelling is Mark Moore's five authored or co-authored articles. Whereas Moore's primary concern is to take the lessons from business practice and apply them to the police organization, Kelling is more interested in establishing traditional moral authority as community policing's source of legitimacy. That the two co-authored "The Evolving Strategy of Policing" signals the way in which market-rationality and moral-political rationality are deeply imbricated in community policing's 'architecture of reason.'

[1060] George Kelling and James K. Stewart, "Neighborhood and Police: The Maintenance of Civil Authority," *Perspectives on Policing*, no. 10 (1989): 1.

[1061] Kelling and Stewart, "Neighborhood and Police," 3.

[1062] Kelling and Stewart, "Neighborhood and Police," 3.

[1063] Kelling and Stewart, "Neighborhood and Police," 3.

[1064] Kelling and Stewart, "Neighborhood and Police," 1.

[1065] Kelling and Stewart, "Neighborhood and Police," 3.

control provide the underpinnings on which public institutions of control build."[1066] They provision such underpinnings because, contrary to the Progressive era preference for centralized government, neighborhoods are best suited to "defend themselves."[1067] The proper question for government, the right way to think about the relationship between the police and the public, is a matter of "neighborhood competence." Neighborhoods are either more or less well equipped to defend themselves from criminal depredation—some have more citizens actively engaged in neighborhood watch schemes than others, some have stronger private social groups or private formal organizations that provide 'community development,' some have greater commercial activity and thus more firms with a vested interests in crime control—but the question for police always begins with how the community wishes to defend itself. What determines the *degree* of police service is the neighborhood's competence, but it is always the neighborhood that determines the *kind* of police service required to do so.

Precisely how neighborhoods go about determining the kinds of police service best suited to their needs is yet again left unclear. Do they gather as a township might and take a vote? Do local officials direct police on their behalf? Do police executives meet with neighborhood representatives? Neighborhoods, as polity in either sense of term, decide. But exactly what sort of political authority legitimates that decision? While these are similar questions raised by Moore and Trojanowicz's 'corporate strategy,' which were less than clarified by Kelling and Moore's essay, Kelling, writing now with Stewart, rather than leaving them entirely unanswered displaces those political questions. In place of a statement about how neighborhoods sort out their expectations for police, Kelling and Stewart instead articulate how a wide range of political problems is raised by this reconfiguration of the relationship between the police and the public. Featured now as violence-wielding executors of the neighborhood's interests, policing runs into series of problems, hazards, and dilemmas, from concerns overs fairness and equity to the plurality of interests that exist within and between neighborhoods, from an obligation to protect cultural diversity to the need to ward off the "tyranny of democracy" that might compromise minority interests, from enforcing a neighborhood's standards of civility to securing individual civil liberties.

These "dark side[s] of intimate neighborhoods"[1068] pose a problem for police services only so long as police are "depicted as a community's bastion against crime, disorder, and fear."[1069] Though police may find themselves caught up in the tensions they carry, these are not in fact problems that police must resolve. They are not "police business." What Kelling and Stewart have done here is parlay the predicaments raised by locating the legitimacy of police power in the "political authority" of the community, rather than in the authority licensed by law, into an indictment of state responsibility for crime control. For them, the metaphor of the police as the "'thin blue line' fortifying a community against predators and wrongdoers," as "a city's professional defense against crime and disorder," is "*deeply* mistaken" because it misunderstands the proper relationship between police and neighborhood.[1070] Effective crime control is a product of neighborhood competence, they say, and the police, properly understood, are "managers of relations" not fighters of crime. The error here is not simply in mistaking the police-community relation. In addition, assigning to police the primary responsibility for controlling crime puts them "in conflict with neighborhoods." Communities and

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[1066] Kelling and Stewart, "Neighborhood and Police," 4.
[1067] Kelling and Stewart, "Neighborhood and Police," 3-4.
[1068] Kelling and Stewart, "Neighborhood and Police," 7
[1069] Kelling and Stewart, "Neighborhood and Police," 7.
[1070] Kelling and Stewart, "Neighborhood and Police," 7. Emphasis in original.

neighborhoods do not desire the absence of crime but the presence of order. Police services aimed at crime control conflict with that desire. What has happened here, in other words, is that the predicaments of political authority over police introduced by community policing's corporate strategy are relieved by limiting the role, if not the power, of the police. Concerns over fairness, discrimination, and legality are worked over by reversing the hierarchy between the police and the community. Whereas Moore and Trojanowicz warned that the political influence community policing relies on might play demands on police to act in "unfair, discriminatory, and illegal" ways, Kelling and Stewart initiate a shift that repositions the police in relation to civil society. Rather than commitments to law or civil rights, private social control is precisely what draws the line between legitimate and illegitimate demands on policing.

Maintaining *civil* authority thus requires demarcating the civil from the governmental by stipulating the principles that "should shape the position of police in most communities."[1071] Such principles proscribe the boundaries of legitimate police action and hold, according to Kelling and Stewart, that "community self-defense against crime and disorder is primarily a matter of private social control." Significantly, private social control must be "supported, but never supplanted, by public police."[1072] Indeed, not just the police but "other agencies of government," they say, "should not do for citizens what citizens can do for themselves."[1073] This is a different sort of claim than the one advanced by Kelling and Moore. Whereas for Kelling and Moore community policing's political mandate required support from and strategic alliances with the communities police serve, for Kelling and Stewart the civil authority underpinning that mandate delimits the purview of police action. Both propose for police to "seek authority from residents to act on their behalf." But while a 'corporate strategy' places the accent mark over networked power, 'maintaining civil authority' seeks to preserve "the very kinds of experiences" that "lead [citizens] to 'acquire a taste for order' and develop their capacities as citizens."[1074] Put a different way, political authority goes from, in Kelling and Moore's essay, a claim that licenses police action independent of law to, in Kelling and Stewart's, one that withdraws police from problems best left to "private social control." One facilitates police intervention. The other marks off matters in which police shouldn't intervene.

How to make sense of these seemingly crossed signals? What is the point in de-emphasizing law and in celebrating discretion if the more expansive mandate that these transformations offer up is zoned off from those problems that citizens ought to solve for themselves? What qualifies as a problem of that sort, and how do police identify it? In addition to being left to wonder who decides, so, too, we might wonder what justifies rezoning police power in this way. Is this an articulation of the public-private distinction common to both legal and political liberalism? Or does this appeal to "private social control" change what is at stake in "public policing" such that the boundary that once marked that distinction no longer rests where it used to?

Kelling, writing independently in two separate essays, is clear on each of these questions. In "Police and Communities: The Quiet Revolution," which is the lead article in *Perspectives on Policing*, Kelling pursues the critique of police as crime fighters he developed with Stewart more forcefully. "Police are the first line of defense in a neighborhood? Wrong—citizens are!" Unlike his co-authored work, however, here Kelling does not treat neighborhoods, communities, or citizens as abstract

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[1071] Kelling and Stewart, "Neighborhood and Police," 8.
[1072] Kelling and Stewart, "Neighborhood and Police," 8.
[1073] Kelling and Stewart, "Neighborhood and Police," 8.
[1074] Kelling and Stewart, "Neighborhood and Police," 8.

entities. "Community institutions are the first line of defense against disorder and crime," he says.[1075] What makes up those institutions? "Church or school," "families, neighbors, and teachers," "aunts, uncles, grandparents"—each of these are the locales Kelling invokes as first lines of defense, as lines that "police are to stimulate and buttress."[1076]

What makes community policing revolutionary, according to Kelling, is the way "citizens and police ... join together to defend communities."[1077] It promises to overthrow not just centralized administration but also, he writes in a separate article, the "ideology of radical individualism."[1078] The rupture implied by the term revolution itself and advanced quietly by community policing, in other words, involves severing the legitimacy of police conduct from law and installing "civic morality" in its place.[1079] That some authority other than law underwrites police power in the era of community policing is a point that each of the texts surveyed so far agree on. What Kelling's thought captures that the others do not, however, is the way in which the break that this shift requires is not limited to traditional policing practices but includes as well the "individualistic ethos" that "emphasize[s] individual liberty over communal security, privilege over responsibility, self-expression over restraint, and egalitarianism over meritocracy."[1080] Thus does the quest for political authority that unfolds in the pages of *Perspectives on Policing* hinge on standards of propriety rather than accountability to the public.

Kelling illustrates how this works with a rather strange vignette: rollerskaters maneuvering down the crowded sidewalk of Chicago's Michigan Avenue. What if, he asks, such rollerskaters, as "they gyrated, dipped, and wove among pedestrians," refused to acquiesce to a police officer's request to stop skating in such a crowded area?[1081] They had not committed a crime, nor had they caused any damage or harm to persons or property. But they were the "source of some fear." "Citizens," as Kelling describes this scene, "moved against buildings; others stepped off of the sidewalk into the street; still others 'froze' in place."[1082] This otherwise innocuous situation contains "the seeds of mischief," he says, because the police officer has no legal right to "order roller skaters to slow down" or skate elsewhere and no recourse if his request to do so is "ignored or defied."[1083] What this scene illustrates is that, in Kelling's words, "other values are at stake." Instead of articulating what these values are, though, Kelling poses a series of questions that illuminate them:

> What if other youths decided that Michigan Avenue was a great place for roller skating and inundated the area? Do we want civil requests from police officers to be ignored with impunity? What about bystanders who would witness disrespect for a police officer and decide that they too, perhaps in more serious circumstances, could choose whether or not to abide by an officer's request? What of the response of the police

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[1075] Kelling, "The Quiet Revolution," 2.
[1076] Kelling, "The Quiet Revolution," 2.
[1077] Kelling, "The Quiet Revolution," 7.
[1078] Kelling, "Acquiring a Taste for Order," 92.
[1079] Kelling, "Acquiring a Taste for Order," 96.
[1080] Kelling, "Acquiring a Taste for Order," 92.
[1081] Kelling, "Acquiring a Taste for Order," 91.
[1082] Kelling, "Acquiring a Taste for Order," 91
[1083] Kelling, "Acquiring a Taste for Order," 91.

> officer being ignored? Do we want police officers to develop a "What the hell" attitude toward disorderly or dangerous behavior, even if it is not technically illegal?[1084]

Revealed in these questions is Kelling's foremost concern with "whether citizens and government can define, through tradition and law, what order is and devise methods to maintain it."[1085] Harboring the potential for danger and sowing the seeds of mischief, the rollerskaters demonstrate that the concrete stake rests in "whether reasonable levels of order can be maintained on city streets."[1086] But something larger is at stake as well. Notice how the skaters, with all their mischievous and dangerous potential, pose a problem not just for the safety of other pedestrians but for deference to authority figures as well. A concern for calm sidewalks suddenly morphs through this line of questioning into a concern about "disrespect for a police officer." And not only disrespect on part of the skaters, but on the witnessing bystanders. And not just on part of bystanders, but on the police officers themselves. What Kelling seems to want to say is that what is at stake in the parable of the Chicago roller skaters is deference to and for authority, but he couches that ambition in notions of "civility, order, and predictability."[1087]

Despite their union in Kelling's introduction to the problem, *tradition*, rather than law, does most of the heavy-lifting for securing that deference. It is also what allows him to transform a concern for disrespecting officers into a rebuke of all public policy that fosters, in his words, an "individualistic ethos." This ethos, coupled with an "academic and professional absorption with crime," is what occasions community policing. Unlike the orthodox account, which points to the pitfalls of police professionalism and to fiscal retrenchment, Kelling argues that a focus on the rights of individuals occluded neighborhood concerns for "quality of life problems."[1088] Conditioning police intervention on criminal activity ignored the problem of street disorder. "Prostitutes, gangs, hustlers, drunks and other lacking commitment to civic virtue" are the culprits of such disorder.[1089] But what allows these unruly characters to besiege communities with their "increasingly outrageous behavior" is the "ideology of radical individualism" which emboldens them to "asser[t] their 'rights' to say anything or behave any way they wish."[1090]

What is needed to reclaim neighborhoods and communities from such "street barbarism" is a reassertion of "civic morality." This reclamation requires, for Kelling, a clearer understanding about what is meant by the desire for "order maintenance" in the era of community policing as well as the process through which order emerges. "Unlike criminal laws that define *acts*," Kelling writes, "public disorder is a *condition*." Whereas criminal acts are both easy to define and to spot, disorder is a "perceptual threshold" that is far more plastic. It depends on "location, time, and local traditions" and it consists in a "violation of local expectations for normalcy and peace in a community."[1091] Because many of the behaviors that might be disorderly are not law-violative, the justification for police

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[1084] Kelling, "Acquiring a Taste for Order," 91.
[1085] Kelling, "Acquiring a Taste for Order," 92.
[1086] Kelling, "Acquiring a Taste for Order," 92.
[1087] Kelling, "Acquiring a Taste for Order," 92.
[1088] Kelling, "Acquiring a Taste for Order," 93.
[1089] Kelling, "Acquiring a Taste for Order," 93-94
[1090] Kelling, "Acquiring a Taste for Order," 94.
[1091] Kelling, "Acquiring a Taste for Order," 95.

intervention is "some vision of civic morality."[1092] The reason this justification is controversial, Kelling argues, is because "what has been lost" in the valorization of individual rights is "the realization and acknowledgement that community traditions are also a basic source of public authority."[1093]

Kelling's defense of tradition as a warrant for police intervention develops along two separate but nonetheless imbricated lines of reasoning. One hinges upon the premium on private social control that he pursued with Stewart. The other highlights the organicism of tradition in opposition to the deliberative planning of Progressive era police policy. Considering each in turn brings into relief the rationality that allows community policing to simultaneously expand the province of private social control while also detaching discretionary authority from law.

For Kelling, neither the law, categorially, nor the Constitution, specifically, are the "basic or sole repositories of society's values and virtues."[1094] He positions "informal social control systems" in competition with the "monolithic formal legal system" because the latter represents only "a small portion of the norms, mores, taboos, and traditions that define goodness, propriety, and ultimately, legal codes."[1095] Though he offers no indication about the theory of law at work here, it is important to see that traditions define "goodness" and "propriety," and it is these values that are reflected in the formal law. Traditions, so construed, are inflected with moral worth that the police and courts, which are tasked with 'shoring up' formal laws, are ill-suited to "encourage and enforce." Instead, the basic values and norms that traditions convey are "buttressed by the family, church, neighborhood, and community." "The power of these later institution," Kelling writes, "is found in their capacity to provide care, nurture, education, and opportunity, as well as structure and discipline."[1096] Police services are needed "when the informal controls exercised by families and neighborhoods break down and are in need of buttressing."[1097] Indeed, if done right, he says, "strengthening those institutions that have the primary task of social control," family and community, is precisely what policing offers society.[1098]

Asserting the "primacy of the community as a force shaping citizen's duties and rights" entails not only turning attention away from the formal legal system. On top of that, this assertion assumes an altogether different relation to 'rights.' Unlike the individual rights and responsibilities guaranteed by the formal law or the obligations that government owes to its citizens, 'duties' refer to the obligations shouldered by private social institutions—family, church, neighborhood—to encourage and enforce traditional values, while 'rights' refer to the title that citizens enjoy "to determine the character of their neighborhoods."[1099] That civic morality might from time to time conflict with the rights of the individual—rights construed in the formal legal sense of what we might think of as civil rights and liberties—is always a conflict between the right to communal self-determination and the "constitutional rights of *strangers*."[1100] Civility and order are what the union of 'tradition and law' hope to achieve, but "predictability in daily contacts with strangers" is equally fundamental to "all aspects of urban life," from commerce to communication, industry to education, transportation to public

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[1092] Kelling, "Acquiring a Taste for Order," 96.
[1093] Kelling, "Acquiring a Taste for Order," 96.
[1094] Kelling, "Acquiring a Taste for Order," 97.
[1095] Kelling, "Acquiring a Taste for Order," 97.
[1096] Kelling, "Acquiring a Taste for Order," 97.
[1097] Kelling, "Acquiring a Taste for Order," 99.
[1098] Kelling, "Acquiring a Taste for Order," 101.
[1099] Kelling, "Acquiring a Taste for Order," 101.
[1100] Kelling, "Acquiring a Taste for Order," 101. Emphasis added.

safety.[1101] Thus do the "darksides of intimate neighborhoods" to which Kelling and Stewart gesture, included among which was the "tyranny of democracy," part from a liberal democratic frame. Rather than a pluralist project that relies on a universal subject of rights as its unit of political analysis, the values encouraged and enforced by private social institutions imagine a homogenous collectivity whose right to self-determination is only ever at odds with strangers not properly belonging to it. Put a different way, the common caveat that a balance must be struck between the political authority of the community and the essential rights of citizens turns out not to be one that is struck by deference to formal law but to the makeup of private social institutions.

Unlike Kelling's co-authored essays, here he configures police as a 'buttress' and a 'back-up force' not to some vague notion of community or neighborhood but to the "informal controls exercised by families."[1102] Thus, the entire scheme of 'civic morality' is not anchored in the parochial concerns that he and others caution against, nor does is operate on the register of a democratic politics that takes equality seriously, but in a filial politics and the traditions, values, and moral authority that congeal within and emanate from the family unit.

Kelling's defense of traditional values and civic morality as the source of legitimacy for community policing is not, however, merely a neoconservative preference for social authoritarianism. In his view, traditional values, and the civic morality that they generate, encourage, and that are enforced by private social institutions, are what naturally emerge when the central administration, legalism, and technocratic policies characteristic of police professionalism, and Progressive era public policy more generally, are withdrawn from the police mandate. This is one of the more systematic lines of reasoning in Kelling's thought. He blames "deliberate political, governmental, and professional policies" for weakening the "political and moral authority of neighborhoods and communities."[1103] Those policies can be traced, he argues, to the early 20th century reform movement that sought not only to professionalize police departments but also to "protect [an] urban vision...by 'freeing' cities from politics." In its effort to ameliorate the problems of corruption and abuse, this reform movement "preempted the political authority of neighborhoods" by operating on the assumption that "urban services could best be planned and administered by professional managers serving the city at large rather than neighborhoods."[1104] The problem with this arrangement, he argues, is that "good" policing, and public services more generally, came to be understood in terms of "remote professionals acting independently with little or no investment in, or accountability to, neighborhoods."[1105]

Kelling discerns a more significant problem in "progressive forms of government," however. By "touting efficiency and clean government," they belie the "political fact" that "citizens do not want to delegate social control to strangers in their communities."[1106] For Kelling, this is an inexorable "political reality." This emphasis on "control over urban services" signals a shift away from the standard criticism of reform era policing. What Kelling is describing is not, as that criticism holds, a police-community relations problem marked by impersonal contacts and mistrust and made all the worse by the empirical reality that the policing strategies that produced these tensions were ineffective at controlling crime. Rather, he is pointing out that prioritizing efficiency and regularity hollows out

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[1101] Kelling, "Acquiring a Taste for Order," 92.
[1102] Kelling, "Acquiring a Taste for Order," 101.
[1103] Kelling, "Acquiring a Taste for Order," 97.
[1104] Kelling, "Acquiring a Taste for Order," 98.
[1105] Kelling, "Acquiring a Taste for Order," 99.
[1106] Kelling, "Acquiring a Taste for Order," 100-101.

civic morality by removing the agents tasked with enforcing it from the social institutions responsible for its generation. This is a confusing point that draws on his understanding of disorder as a "perceptual threshold" contingent upon "location, time, and local traditions," as well as "local expectations for normalcy." Centralized government errs by preempting the authority of private social institutions. But what Kelling is advocating here is not that "police should be accountable solely to communities," nor is he quite saying that "police behavior should be circumscribed by neighborhood interests."[1107] What embracing this "political reality" entails, rather, is the recognition that tradition, as a basis for police authority, loses its legitimacy in the hands of strangers. Entrusting police services to distant, if professional, outsiders is thus "felt most acutely when the informal controls exercised by families and neighborhoods break down" because such outsiders have no idea what values, mores, norms, or restraints are "in need of buttressing."[1108]

As a "political fact," intolerance to strangers clues us into what Kelling sees as the authoritative basis that tradition supplies for community policing. Not only do they embody values and mores organic to the community or neighborhood. What's more, they are also precisely the opposite of the "deliberate political, governmental, and professional policies" responsible for weakening private social institutions in the first place. Tradition, in other words, helps clue us into the "political authority" that eluded the other essays in *Perspectives on Policing*: their authority does not in fact rest in any overt political decision but in the fact that they are organic to the community and that they are not the result of deliberative planning. Indeed, the moral force that traditions harbor requires, Kelling says, educating, nurturing, shaping, and disciplining. That traditions are fungible constructs in need of cultivation and varying from one community to the next vests part of their authority in precisely the idea that they are outcomes of a shared process that, while congealing within family, church, and neighborhood, is not completely within the control of such institutions. Not unlike community policing itself, traditional authority is "evolving." Thus can Kelling assert, on the one hand, the primacy of private social institutions and civic morality while denying, on the other, that community policing is reducible to "local residents" dictating police behavior.

Tradition also provides a different sort of license for discretionary power. Rather than filling in the 'gaps' left open by law's ambiguities in pursuit of executing a law enforcement function, it involves "identifying excesses and encouraging citizen restraint."[1109] Not unlike the sociologists of police discretion discussed in chapters two and three, each of whom in their own ways saw discretionary authority as both a peculiar signature of the police organization as well as a constitutive aspect of the function of the police in modern society, Kelling argues that identifying excess and encouraging restraint is the "honor, privilege, and duty of police."[1110] Traditional values are what supply the standard for civic morality and highlight the boundary between moderation and excess. "The fact it is hard to define standards, reconcile competing values, and prescribe police activities to enforce them," Kelling writes, echoing James Q. Wilson at the end of *Varieties of Police Behavior*, "does not mean that individual citizens, groups, collectives, and police and other representatives of government should be free from the responsibility of trying to do so."[1111]

[1107] Kelling, "Acquiring a Taste for Order," 101.
[1108] Kelling, "Acquiring a Taste for Order," 99.
[1109] Kelling, "Acquiring a Taste for Order," 101.
[1110] Kelling, "Acquiring a Taste for Order," 101.
[1111] Kelling, "Acquiring a Taste for Order," 101.

Kelling does not posit, as did Wilson, however, a vision of civic morality. No 'single standard of justice' is stipulated here. His claim is both less singular and more evolved than Wilson's. Middle class values are the lodestar of Wilson's understanding of justice, but Kelling acknowledges that traditional values will be different for each community and depend on their 'standards of normalcy.' This clues us into two crucial features of Kelling's thought. First, it does not hew to and in fact is squarely at odds with Wilson's "single standard of justice." It is less at odds, to be sure, with Wilson's particular standard (middle class values) than with the idea that it is singular. As a consequence, second, it relies on organic elements of each community to determine the "condition" of order. Traditions, morals, propriety—each of these carries a certain organic quality. They are presented as seemingly natural and evolved (in that they are not result of "deliberate political, government, and professional policies") and non-universal (in that they change from community to community).

Police discretion acts on behalf of buttressing more than just private *social* institutions, however. A common theme throughout the essays assembled in *Perspectives on Policing* is that community policing responds to commercial concerns as well. Moore and Trojanowicz situate "merchant groups" alongside families, schools, and neighborhoods as one of the key private social institutions to which police must be responsive.[1112] Kelling, though wary of strangers, notes that "police serve to help citizens tolerate and protect outsiders who come into their neighborhoods for social or commercial purposes."[1113] Indeed, a "key element of the vitality, or competence, of neighborhoods," he says, writing with Stewart, "is commerce."[1114] James Stewart is even more forceful on this point:

> Reducing crime and its disruptive effect on community ties eliminates the largest and most devasting obstacle to development in many poor neighborhoods. And where businesses can develop, they encourage further growth and help create a community's cohesiveness and identity.[1115]

Kelling and Moore pursue this theme slightly differently, featuring the needs of the community that police respond to as "market demands"[1116] and the strategy of community policing as optimally suited to "market conditions."[1117] The Community Policing Consortium highlighted the need to reduce "fear in a business district" and consult with "the business community" to improve neighborhood conditions.[1118] In every single text that makes up the Community Policing Thought Collective one encounters some version of the claim that the police must secure the conditions for commerce. The priority, however, is not placed on eliminating the risk of criminal depredation. Rather, it is on the fact that strong commercial affairs are a vital part of good order. It is, in other words, tethered to civic morality because it is through eliminating 'street barbarism' that individuals feel safe to engage in communal, and likewise commercial, life.

[1112] Moore and Trojanowicz, "Corporate Strategies," 9.
[1113] Kelling, "The Quiet Revolution," 3.
[1114] Kelling and Stewart, "Neighborhood and Police," 6.
[1115] James Stewart, "The Urban Strangler: How Crime Causes Poverty in the Inner City," *Policy Review* 37, no. 1 (Summer 1986): 6.
[1116] Kelling and Moore, "Evolving Strategy," 7
[1117] Kelling and Moore, "Evolving Strategy," 9.
[1118] Community Policing Consortium, 19.

IV. CONCLUSION: DISCRETION, REPROGRAMMED

This encounter with the Community Policing Thought Collective, and especially with George Kelling, raises several important considerations for a genealogy of police discretion. Prior to the advent of community policing, discretion was occasioned by the limits of liberal legalism and took law enforcement as its legitimate aim. In this encounter, however, we observe how discretion is, as a technique of organizational management, responsiblized while, as part of a large order of normative reason, is legitimated by reference to traditional values and civic morality. Its aim is not to enforce the criminal law. Nor is it really to maintain order in the sense of preventing or limiting the potential for criminal depredations. Instead, it is tailored to buttressing private social institutions and enforcing the standards of propriety that they establish.

Not unlike the way Brown illustrates Hayek's techniques for fusing markets and morals as a unified project in neoliberal rationality, Kelling's thought displays a strikingly similar approach to establishing innovative policing strategies that are responsive to community demands and facilitate commerce but for which authority is derived from tradition rather than law. These are the two key prongs that constitute discretion's reprogramming within the framework of community policing.

By way of conclusion, this dissertation will pursue the effects that fusing the organizational management of police departments to a market rationality while wedding the legitimacy of officer conduct to standards of normalcy, propriety, and traditional morality has for democratic police reform, generally, and the way these forces help explain the current divide between police abolitionists and police apologists.

CONCLUSION

ABOLITION OR APOLOGY

Defund the police? Defund, my butt. I'm a proud West Virginia Democrat. We are the part of working men and women. We want to protect Americans' jobs and healthcare. We do not have some crazy socialist agenda, and we do not believe in defunding the police.

—Senator Joe Manchin[1119]

Today's political discourse on police reform is cleaved by the rhetoric of 'defund the police.' One side of this cleavage argues for the abolition of policing. Defunding the police, their argument goes, is an intermediate step towards a larger project of dismantling institutions that perpetuate state violence, social inequality, and political dispossession.[1120] Crossing this terrain, the other side comes to law enforcement's defense, appealing to reformism's standard fare—better training, education, and incentives, more transparency and public accountability, new technologies, community policing, reminders that 'Blue Lives Matter,' too.[1121] Of the many crises liberal democracy has endured in the last century, the critical juncture facing this political arrangement today centers the police as the fulcrum on which illiberal futurities tilt. Illiberal, on one hand, because of the death spiral toward socialism, the total abandonment of individual liberties, and thus the "absolute sameness"[1122] that a world without police allegedly produces. Illiberal, on the other, because of the continued persistence of the state violence, normalized brutality, affronts to personhood, suspension of civil rights and liberties, and unequal protection from and treatment by officers of the law—all harms experienced most acutely by people and communities of color—that our present world with police allows. Police abolition, from the vantage of the former, paves the road to an illiberal future. The latter, by contrast, points to an illiberal present facilitated by police and desires a future freed not only from the institution of policing but from the mindset that cements police as a necessary component of a stable society.[1123]

Defund the police thus promises two different futures, one which removes the causes of crime and one that is plagued by it. Precisely what is it about the discursive posture of "defund the police" that incites such radically opposing political imaginaries? Why does a world without police inspire visions of anarchy and chaos, on the one hand, and socialism and the tranquility of life in common, on the other? How does it sustain both at once? And why is it the police that catalyzes these political

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[1119] Mairead McArdle, "Joe Manchin Slams Fellow Dems' 'Crazy Socialist Agenda amin Intra-Party Battle: 'Defund, My Butt,'" The National Review, November 12, 2020, https://www.nationalreview.com/news/joe-manchin-slams-fellow-dems-crazy-socialist-agenda-amid-intra-party-battle-defund-my-butt/

[1120] Derecka Purnell, *Becoming Abolitionists: Police, Protest, and The Pursuit of Freedom* (New York: Astra House, 2021).

[1121] In President Biden's first State of the Union Address, for example, he struck this chord with special emphasis. "We should all agree," he said on this debate, "the answer is not to Defund the police. The answer is to FUND the police with the resources and training they need to protect our communities." Emphasis in original. Joseph Biden, "Remarks of President Joe Biden – State of the Union Address As Prepared for Delivery," (Washington, D.C. The White House, 2022) accessed May 4, 2022, https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/

[1122] Tucker Carlson, "Message From Team Biden: Shut Up and Obey," *Tucker Carlson Tonight* (Washington, D.C.: Fox News Network, November 6, 2020).

[1123] Purnell, *Becoming Abolitionists*, 124.

possibilities? This conclusion attempts to situate these questions in the genealogy of police discretion offered in the preceding chapters. What might it reveal about what is at stake in the answers to such questions? How might the shifting meanings of discretionary authority help explain this present conjuncture?

This dissertation offers two responses. The first affirms police abolition's opening salvo. The second points to the way in which that salvo misunderstands the political rationality that it is pitted against.

The deep political richness of police reform that this dissertation has sought to plumb is on full display in this moment. In some sense, the opening posture of the movements to defund and abolish the police renders moot the preceding analysis. If it has been successful to this point, *Policing the Demos* has shown how a range of legislative, presidential, doctrinal, academic, and administrative attempts to curtail police excess, violence, and racial discrimination have exacerbated each of those effects by widening the zone of discretionary authority that police enjoy. Police discretion, this dissertation has wagered, is both what enables and perpetuates police power and what thwarts police reform. To the extent that these perpetuations are owed to the faults of liberal democratic discourse itself, and the inability for political liberalism and liberal legalism to attend to decisionist power in an intellectually coherent and legally consistent way, then police abolition opens onto a plane free of such entanglements. Defund the police, to put this more directly, takes those observations as its starting points. 'Of course,' its advocates decry with exasperation, 'liberal police reform is bound to fail!' Hence Derecka Purnell's description of police reforms as "such tyrannical prizes."[1124] For Purnell, reforms are "relieving, never satisfying."[1125] Under this view, reform is presumptively futile and serves only to reinscribe the very harms they are intended to remedy. Though it is sometimes put differently, this is police abolition's baseline. "The problem is not police training or inadequate technology," writes Amna Akbar, "the problem is the institution of policing itself."[1126] Likewise, reforms may, in Naomi Murakawa's words, "discourage certain techniques of killing, but they don't condemn the fact of police killing."[1127] Thus do police abolitionists call not for a reimagination of law enforcement but for "the end of policing."[1128]

This posture may not use the same political vocabularies as those employed here—it does not appeal to Schmitt nor to Foucault to make sense of the imbrication of disciplinary and juridical power in policing, nor does it point to the impasses of analytic and constitutional jurisprudence and the decisionistic power that they veil—but it recognizes the fundamental inadequacies of the last half-century of police reform and explicitly names, objects to, and jettisons the underlying assumptions about state legitimacy that this dissertation has endeavored to trace. Thus is police abolition today a properly radical project. Rather than merely "tweaking the terms of...state sanctioned violence," Purnell writes, abolition entails "the founding of a new society" that "disrupts any allegiance to any republic for which it stands."[1129] "The possibilities are endless with abolition," she says, because its goal is to eradicate the very conditions that make police necessary. The aim is not to destroy police

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[1124] Purnell, *Becoming Abolitionists*, 67.

[1125] Purnell, *Becoming Abolitionists*, 67.

[1126] Amna A. Akbar, "How Defund and Disband Became the Demands," *The New York Review of Books*, June 15, 2020, https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/.

[1127] Quoted from an email exchange between Murakawa and Derecka Purnell in *Becoming Abolitionists*, 6.

[1128] Alex Vitale, *The End of Policing* (London: Verso, 2018).

[1129] Purnell, *Becoming Abolitionists*, 110-111.

departments but to undo the systems of inequality and oppression that cast the "purpose of police" in terms of "manag[ing] people who are locked out of schools, housing, health care, work, and social life."[1130] This is an understanding of the function of police in modern society that weds police to capital and the causes of crime to material exploitation.[1131] A world without police is a world of "interdependent relationships rooted in care, democracy, and accountability to each other."[1132] That such a world might be possible relies on the premise that, at bottom, capitalist exploitation is the cause of crime. The causal force at work appears in various ways. At times, the point is put in terms familiar to orthodox Marxism: that law reflects ruling class interests and that police are merely functionaries of them. Other times, it is presented as a matter of policy: by divesting police budgets and reinvesting in community resources the social and material inequality created by capitalism, which leads the downtrodden to criminal activity, might be quelled. Each of these are coupled with a functionalist critique of policing that points to the statistical reality that police are ineffective at solving and preventing crime in the first place.

Rejoining these critiques, political conservatives proclaim that defund the police marks not only the first step on the road to socialism but portends a future of lawlessness as well. To be sure, that rejoinder is more than a political reflex or partisan talking point. It is not simply a move that parlays political bugaboos of old into an apologia for police violence. Rather, it is an extension of the political rationality that features police as the executors of civic morality and as the buttress to the traditional authority exercised by private social institutions. As conservative Fox News host Pete Hegseth put things, defund the police imagines a "culture of lawlessness."[1133] Another commentator described this world without police as "anarchy and ruin."[1134] In this world, two possibilities stand before us. One is a return to a sort of Hobbesian state of nature in which we are ruled by the most violent among us. "How would Americans feel if they actually defunded the police?" Tucker Carlson asks. "Terrified, mostly," he answers.[1135] "Getting rid of the police doesn't solve the problem of homicide," according to conservative podcast host Ben Shapiro. To the contrary, he says, "it creates more homicide."[1136] Defund the police is thus, as one commentary for the Dailywire put it, a "suicide pact."[1137] Or, as one writer for the National Review admonished, "Kyle Rittenhouse is what you get when you defund the police."[1138]

[1130] Purnell, *Becoming Abolitionists*, 274.

[1131] Mark Neocleous's *A Critical Theory of Police Power* (London: Verso, 2021) makes this case the most forcefully, and Vitale's *End of Policing* pursues a similar materialist critique of the functions of police.

[1132] Purnell, *Becoming Abolitionists*, 121.

[1133] Virginia Kruta, "The Dumbest Slogan of 2021: Pete Hegseth Torches 'Defund the Police' Advocates for Creating 'Culture of Lawlessness,'" *The Daily Wire*, December 28, 2021, https://www.dailywire.com/news/the-dumbest-slogan-of-2021-pete-hegseth-torches-defund-the-police-advocates-for-creating-culture-of-lawlessness.

[1134] Dan McLaughlin, "Kyle Rittenhouse Is What You Get When You Defund the Police," *The National Review*, November 16, 2021, https://www.nationalreview.com/2021/11/kyle-rittenhouse-is-what-you-get-when-you-defund-the-police/.

[1135] Tucker Carlson, "Liberal Activists Now Want to 'Defund the Police,'" *Tucker Carlson Tonight* (Washington, D.C.: Fox News Network, June 4, 2020).

[1136] Ben Shapiro, "Dems go FULL Anti-Police as CRIME RISES," *The Ben Shapiro Show* (Nashville, TN: The Daily Wire, April 14, 2021).

[1137] Ben Johnson, "How 'Defund the Police' Became A 'Suicide Pact,'" *The Daily Wire*, date unavailable, https://www.dailywire.com/news/how-defund-the-police-became-a-suicide-pact.

[1138] Dan McLaughlin, "Kyle Rittenhouse Is What You Get When You Defund the Police."

What unites each of these warnings is "humanity's fixed defectiveness."[1139] Indeed, that defectiveness is "the fundamental premise at the heart of political conservatism." Nate Hochman grounds this view in Alexander Hamilton's *Federalist Papers*, which assumes "human institutions" will have "defects" because the "imperfection" of those who design them.[1140] But this is a sentiment that, as we've seen in each of the preceding chapters, appears in many conversations about crime and punishment. For the Crime Commission, such defect was presented in terms of "hardened criminals" that policing, no matter how efficient and effective, could never fully deter.[1141] James Q. Wilson, by contrast, posed this as a matter of class and status. For him, police discretion was both necessary and legitimate because some people neither possessed nor revered "middle class values."[1142] John Rawls followed a similar route, presenting criminality as a characterological flaw that defied rational approximation.[1143] George Kelling's defense of community policing likewise sought to legitimate police discretion by excluding "strangers" from those who might claim political authority over the police. The Community Policing Consortium struck this chord with only a slight difference when it rooted the demand for a new policing strategy in the "disparate values" held by immigrants. Whether presented in terms of some irredeemable abnormality, otherness, or xenophobia, each of these features some form of fixed point of difference that precludes a society of equals and thus requires police to maintain order between them.

Crime statistics following the uprisings in the summer of 2021 were ready fodder for this world view. More than just historically ignorant and politically naïve, these statistics proved the movement to defund the police was also downright harmful. "The senseless violence inflicted on urban communities over the past six months is," Hochman wrote for the National Review, "the direct result of the now-popular myths surrounding policing's origins, law-enforcement spending, and the variety of other lines of argument offered as rationales for slashing police budgets."[1144] Rising crime rates were explained as the "predictable consequences" of defunding the police,[1145] despite the fact that for many urban police departments budgets did not change at all.[1146] But the harm inflicted by defund the police was not entirely monetary. Indeed, it assaulted police morale as well, causing many police allegedly to resign or to retire. Thus did the rhetoric of defund the police precipitate the lawlessness and violence conservatives forewarned without ever actually shrinking a single police budget.

1139 Nate Hochman, "Why Are We Still Talking About Defund the Police?," *The National Review*, October 7, 2021, https://www.nationalreview.com/2021/10/why-are-we-still-talking-about-defunding-the-police/.

1140 Alexander Hamilton, "The Defence No I, [1792–1795]," Founders Online, National Archives, https://founders.archives.gov/documents/Hamilton/01-13-02-0217. [Original source: The Papers of Alexander Hamilton, vol. 13, November 1792–February 1793, ed. Harold C. Syrett. New York: Columbia University Press, 1967, pp. 393–395.]

1141 See *infra* Chapter Two, pp.73.

1142 See *infra* Chapter Three, pp.138-139.

1143 See *infra* Chapter Three, pp.129-130.

1144 Hochman, "Why Are We Still Talking About Defund the Police?"

1145 Jason L. Riley, "The Predictable Consequence of 'Defund the Police,'" *The Wallstreet Journal*, December 7, 2021, https://www.wsj.com/articles/consequences-of-defunding-the-police-libby-schaaf-violent-crime-rate-murder-public-safety-11638915238

1146 A recent study of 400 American cities showed, for instance, that "police departments in America got more or less the same amount of money in 2021 than they did in the previous three years." See Andy Friedman and Mason Youngblood, "Nobody Defunded the Police: A Study," *The Real News Network*, April 18, 2022, https://therealnews.com/nobody-defunded-the-police-a-study.

For police apologists, defunding the police is not just about crime. Police abolition is for them wed as well to concerns over American identity, civility, and tradition. Critically, it is about who is exercising authority over society. Tucker Carlson presented the "key" to understanding the left's desire to defund the police to his viewers like this:

> eliminating police does not mean eliminating authority. There is always authority... the only question is whether the authority is legitimate, whether or not the authority is accountable... In the absence of law enforcement, it means no. It means thugs are in charge. The most violent people have the most power...everyone obeys the violent people or they get hurt. The mob literally rules... The people pushing this idea don't see it as scary because they don't fear the mob, they control the mob. That's the key, and they see violence as an instrument of their political power.[1147]

Carlson's conservative fanaticism displays the schism at the heart of the right's rejoinder most plainly. On one hand, the end of policing foments a culture of lawlessness. Yet, on the other hand, "there is always authority." How can a world without police be anarchy and ruin if it is also lead by some sort of central authority? One clue appears in Carlson's emphasis on legitimacy. Indeed, that is "the only question" at stake in defund the police. The lawless violence that emerges in the absence of police is not pure anarchy because it is an "instrument" of the left's "political power." Moreover, because the mob is "controlled" it is not their violence that is illegitimate but the interests on behalf of which it acts. For authority to be legitimate it must, Carlson says, be accountable. The issue with defund the police is thus that it is constellated by the wrong forces. Police abolition is alarming not only because of the certainty that "thugs" will harm you but also because such thugs are the henchmen of the left's "socialist agenda." Without police, not only does crime run amok but the authority of traditional values disappears. This is the second option that stands before us: criminal depredation within "hours" and "Starbucks from now until forever."[1148]

Significantly, the conservative rejoinder to defund the police has nothing to say about police discretion. But, as chapter five argued, the political rationality that legitimates community policing's concurrent decentralization of authority and de-emphasis of law helps to explain how discretion is also de-problematized to the point of having nothing to say. For police abolitionists, the "function of policing" manifests in "any number of unpredictable forms of violence."[1149] This is a discretionary function that law facilitates, even legitimates, but never fully captures. For political conservatives, by contrast, policing is a buttress to private social institutions, and discretionary authority is not a matter of lawlessness but of norms, mores, and traditions that are organic to each community. Under this paradigm, the civic morality and traditional authority that legitimates police intervention independent of law are legitimate sources of authority precisely because they are "evolving" and not the result of "deliberative planning" that is imposed by strangers. As chapter five showed, these authorities are closely tied to a market rationality that links the conditions of commerce and community safety to one another. Yet the moral-political rationality that animates community policing cannot be explained in exclusively market-political terms. This is what the movement to defund and abolish the police fails

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[1147] Carlson, "Liberal Activists Now Want to 'Defund the Police.'"
[1148] Carlson, "Message From Team Biden: Shut Up and Obey."
[1149] Purnell, *Becoming Abolitionists*, 54.

to apprehend. By situating police power in the contradictions of capitalism, and the lack of imagination capable of rethinking public safety in the failures of neoliberalism, these moral-political forces are not fully accounted for.

For police abolitionists, in other words, not only can law not fix the problem of police violence. Law itself is what occasions such violence. In their demands to defund and disband, neoconservatives hear not only lawlessness but an assault on their values. Though these values may be conditioned by the capitalist society in which they evolved, they emanate from institutional locales beyond the state and market, in family, church, and neighborhood. The organicism of these values is what allows police at once to service the authority of private social institutions while denying the appearance that their behavior is dictated by the interests those institutions represent. Thus can neoconservative police apologists declare that 'Blue Lives Matter' while bludgeoning Capitol police officers with the American flag. A structuralist critique of police power cannot account for this.

The point is not that abolition is historically ignorant or political naïve, as some on the right would have it, but that by presenting its critique of police power in legal-political terms it occludes the moral-political rationality that drives the rancorous police apologetics we see amongst political conservatives today. If police violence is marshalled on behalf of traditional values, civic morality, and private social institutions, then what good is a critical posture that takes structural forces—law and capitalism—as its objects? What a genealogy of police discretion reveals, this dissertation submits, is that liberalism's failure to take decisionism seriously is ultimately what produces the conjuncture in which we find ourselves: abolition or apology. Here, one is either a police abolitionist or a police apologist; or, in affirming neither, one is simply bad at both.

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