



# The Concept of the Police

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## Abstract

The organization of the modern police is a contingent social choice about how to engage in the process of governance when regulating public order on the street. The police are the agency authorized to act upon the state's duty to govern in response to public emergencies. The duty to govern exists when there is some urgent social need that could be resolved by acting, and some person or institution has the resources and ability to do that act. The duty is impersonal: anybody with the relevant skill set is obligated to act to address the relevant need. Problems can arise, however, when too few individuals respond or too many compete to resolve the need. A core feature of governance, then, is to create publicly recognized institutions with special authority, resources, and abilities to address the demand for public services when someone needs to step in and do something to the exclusion of ordinary members of the public. Police agencies are further characterized by various powers and duties. These powers are normative powers to change the legal status of the people with whom the police interact, rather than physical powers to use some amount of violence to coerce individuals to comply with police demands. The core powers of the police include the powers to make authoritative determinations about how to respond to an emergency, to detain individuals, and to trespass upon their person or property, along with conjoined duties to govern, to protect, and to intervene at risk to themselves. The dominant approach attempts to distinguish the police from other institutions using the police ability to use violent to respond to public emergencies. On the governance based model of the police, however, the ability to use force is simply one of the resources available to the police, and does not mark them off as different from other public governance agencies.

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The police are agents authorized to act to undertake one part of the state's duty to govern, that is, to secure public order and otherwise to protect the public and enforce the (public) law. The police have three characteristic powers to aid them in undertaking this duty to govern: the powers to displace civilian's reasons for action; to detain (or arrest) individuals who obstruct the police; and to trespass upon property without legal sanction.<sup>1</sup>

These powers are normative ones: they modify the both the officer's and the civilian's ordinary rights and duties.<sup>2</sup> These powers are not necessarily material ones: the police may have the legal ability to arrest and detain a civilian or to trespass upon some civilian's property, but lack the physical means by which to do so. Even so, a government official possessing the relevant normative powers is nonetheless a police officer.

The emphasis on the police as primarily agents who undertake the state's duty to govern on the street, backed by normative powers to displace, detain, and trespass, contrasts with the more usual characterization of the police as defined by their material power to physically disable offenders. That currently dominant approach attempts to distinguish the police as an organization from other public and private institutions by identifying the police ability to use force—by which proponents mean physical violence<sup>3</sup>—to respond to public emergencies as their distinguishing feature.

Perhaps the most famous definition of the police is Egon Bittner's claim that the police are simply "a mechanism for the distribution of situationally justified force in society."<sup>4</sup> However, this definition is both over- and under-inclusive of individuals who have historically been identified as police. For example, it does not distinguish the police from private citizens using self-defense to resist attack, nor from gangsters coercing the public to accede to their demands; and Bittner's definition fails to include a variety of individuals who are delegated the power of the police without becoming members of a paramilitary organization.

What does distinguish the police from gangsters are the normative powers the police wield, along with the various duties that apply to the police role: the duties to govern, but also to protect, promote public order, and act even at risk to their own safety. The governance approach suggests that the police duty to enforce the

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<sup>2</sup> See, e.g., JOSEPH RAZ, PRACTICAL REASON AND NORMS 101 (1990); Leslie Green, *Authority and Convention*, 35 PHIL. Q. 329, 330 (1985) (describing a normative power as "the ability to change an agent's reasons for action, to alter their permissions, prohibitions, and requirements."). On the power to arrest as a normative power, see, e.g., H.L.A. HART, ESSAYS ON BENTHAM 200 (1982); John Gardner, *Justification under Authority*, 23 CAN. J. L. & JURISPRUDENCE 71, 90–91 (2010).

<sup>3</sup> Perhaps the foremost theorist of the criminal law and violence is Alice Ristroph. See, e.g., Alice Ristroph, *Read Thyself*, 74 ALA. L. REV. \_\_\_\_ (forthcoming 2022); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182 (2017); Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017 (2014); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011). See also DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021).

<sup>4</sup> EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 39 (1970).

criminal law is but one feature of their powers in combination with social needs. Police ethnographers and sociologists have long realized that non-criminal-law aspects of policing dominate the police role. The police most often use their authority to resolve minor disputes<sup>5</sup> and serve as non-violent, first-responders to community disruption.<sup>6</sup> From the punishment-oriented perspective of criminal law, these governance activities are overlooked or treated as not-policing.

A corollary of the duty to govern is that the justification for a police intervention terminates when some other person or group is better able to enforce the law or resolve the social need than are the police. The police adopt a version of this governance approach in justifying their presence on the streets. The police envision themselves as a professional, twenty-four hour, three-hundred-and-sixty-five-days-per-year street-patrol-and-response organization. The sorts of disparate, public needs that arise on the streets combined with the police ability to resolve those public needs justifies the police in asserting their authority, thereby preempting others acting upon their own duties to govern.

However, the governance approach suggests that, where other public officials or social institutions or individuals are better able to enforce the law, then the police should defer to those officials, institutions, or individuals and use their authority to support these others in their efforts to govern effectively. To the extent that the state has the resources to create differently skilled specialized agencies capable of deploying non-violent responses, the state itself fails in its governance obligations if it tasks organizations that are primarily trained and outfitted to respond with violence to fulfill these roles. To the extent that the state seeks to govern disputes and disturbances through a heavily armed, paramilitary force, it may fail to govern appropriately and may even embrace one or more forms of authoritarianism. Appreciating how the state undertakes its duty to govern helps to explain some of the present orientation of the police as a paramilitary force in modern industrialized municipalities. These features also explain the characteristic ways in which the police go wrong.

## 1 The Governance Model

More often than is wise, contemporary debates about policing and the police proceed without a settled understanding of the nature and role of the police as a public institution. Sometimes these discussions assume that anyone who patrols the streets in uniform must be members in good standing of the police organization; and whatever actions they perform, they do so in conformity with their role as members of that organization. On other occasions, a somewhat parochial identification of the use

<sup>5</sup> See, e.g., Maurice Punch, *The Secret Social Service* in *THE BRITISH POLICE* 103–114 (M.R. Chatterton, ed., 1980).

<sup>6</sup> See, e.g., Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police* in *POLICING: KEY READINGS* 150, 162 (Tim Newburn, ed., 2005); P.A.J. WADDINGTON, *POLICING CITIZENS: POLICE, POWER AND THE STATE* 41 (2002); DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 17 (1994); CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 203 (1980).

of physical violence as the core skill of the police substitutes one prominent feature of police work in the United States for a theory able to determine who counts as police that applies universally, to all police everywhere.<sup>7</sup>

It would be much better to begin with a general description of the police role to identify different types of individual as properly included within or excluded from or existing on the margins of this special type of social institution. This approach simply seeks to establish those characteristic features possessed by any police official, such as the power to arrest or to search for evidence of a crime. Once we have a handle on just who counts as a police officer, we can better grasp the normative or evaluative question of just what qualities make a social institution or role a justifiable or good one.

One way of putting this is to raise the questions of institutional and moral legitimacy: in addition to determining what makes this candidate official *institutionally* valid as a member of the police, we can additionally ask what makes this officer an adequate or exemplary example of someone occupying this role.<sup>8</sup> In the context of policing, John Gardner has distinguished these approaches as asking: what makes this individual a police officer *in name only* as opposed to a *real* police officer, one whose actions are morally defensible as a representative member of the police organization.<sup>9</sup>

Some people may think that my approach gets things back-to-front. Before asking what makes an individual a police officer, we must first establish what is the police as a public organization.<sup>10</sup> This view often takes it as important that the police are a particular *type* of organization: a paramilitary force entitled to use violence against civilians and other officials to enforce criminal laws and rules of civility. The justification for having that sort of organization in turn derives from a particular account of public authority: we require some way of keeping the public in line if we are to establish the basic feature of any society, which is shared, public, enforceable rules of conduct. These shared rules enable us to act cooperatively and collectively. However, because some people may violate the rules, a system of public violence is necessary to keep everyone in order.

In what follows I shall develop a theory of public authority, and the police, that is independent of (though compatible with) this violence-oriented model of public authority. Instead, I shall suggest that the nature of police authority resides in their

<sup>7</sup> EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 39 (1970).

<sup>8</sup> See, e.g., Joseph Raz, *Legal Validity* in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 1–15 (1979).

<sup>9</sup> See John Gardner, *Criminals in Uniform* in *THE CONSTITUTION OF THE CRIMINAL LAW* 97–118 (R.A. Duff et al., eds., 2013). Stephen Galoob and Ethan Lieb make fundamentally the same distinction in terms of breaches of duties and “defalcations.” Stephen R. Galoob & Ethan J. Lieb, *Motives and Fiduciary Loyalty*, 65 *AM. J. JURIS* 41, 61–62 (2020). In the latter case, an office-holder, despite appearances (wearing the uniform and asserting the authority of the police), fails to “act within the role of [police officer] at all.” *Id.* at 61.

<sup>10</sup> See, e.g., Peter K. Manning, *Drama, the Police and the Sacred* in *POLICING: POLITICS, CULTURE AND CONTROL: ESSAYS IN HONOUR OF ROBERT REINER* 173, 174 (Tim Newburn & Jill Peay, eds., 2012).

right and duty to govern by preempting and replacing civilians' reasons for action with their own.

### 1.1 Public Authority and the Duty to Govern

The police are public officials granted limited plenary authority to govern on behalf of the state. The police exercise their public authority in service of the state's duty to govern.<sup>11</sup> Accordingly, I shall begin by providing a brief account of public authority and the state's duty to govern.

Authority is often a good thing: it helps to resolve a lot of social conflict. Where people live in groups and are prone to disputes and even conflict, there are important reasons, not least security (but also coordinating public action or setting public goals), for us to seek to have some non-partisan, public authority to resolve disputes among individuals.<sup>12</sup>

Authority is a status relationship. Some person or official is authoritative for a group of people if they have the power to get what they want by demanding that the members of that group defer to *their* directives, and not those of someone else, when deciding what to do.<sup>13</sup> An official is a *normative* authority if the fact that the person has issued a directive to do some act is a binding reason to do that act irrespective of the group members' own reasons for doing that act.

Normative authority is both content-independent and exclusionary: it depends upon the official's status as an authority counting as a reason to preclude other sources of reason from operating to determine how to act. This normative aspect means that an authoritative person or official is not simply some uncommanded commander who rules through threats or habituation. Normative authority is not reducible to material power.<sup>14</sup> Rather, a normative authority is one who has the power to change the normative status of their subordinates (not simply their behavior) by supplanting the reasons to act that they would otherwise have with the authority's reasons.

<sup>11</sup> My account of the obligations structuring the role of the police tracks some of the points made by Jake Monaghan. See Jake Monaghan, *The Special Moral Obligations of Law Enforcement*, 25 J. POL. PHIL. 218, 224 (2017).

<sup>12</sup> For some Lockean accounts that seek to provide justifications for police authority, see, e.g., JOHN KLEINIG, *THE ETHICS OF POLICE* 12–14 (1996); LUKE WILLIAM HUNT, *THE RETRIEVAL OF LIBERALISM IN POLICING* 3, 49–53 (2019). Other recent accounts include VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* 46 (2019); NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* 207–208 (2007).

<sup>13</sup> See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 12–18 ((1979); Joseph Raz, *Authority, Law and Morality* in *ETHICS AND THE PUBLIC DOMAIN* 218 (1994); ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 115 (1992); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 233–34 (1980).

<sup>14</sup> Normative power exists even in the absence of material power to make it effective. The normative question addresses who has the right to issue directives; the material question addresses who has the ability to make those directives effective. One classic discussion of the difference between normative and material power occurs in Plato's *Republic*, when Socrates is accosted by Thrasymachus on his way home from attending a religious festival at the Piraeus. Thrasymachus points out that he has a superior force to deploy to make Socrates join him. Thrasymachus thus exerts material, but not normative, authority over Socrates. See PLATO, *REPUBLIC* 2 (1992).

The *right* to govern includes the right to issue laws and other directives binding on the public. Different political theories explain the nature of the state's right to create enforceable obligations: for example, as deriving from the fact that the law or the state is just<sup>15</sup>; or from the common good of the society<sup>16</sup>; or from the consent of the governed to obey the law<sup>17</sup>; or from the fact that the law or the state is likely to identify the applicable moral reasons for action more accurately than ordinary members of the public.<sup>18</sup>

More recently, however, legal theorists have identified a *duty* to govern, applicable to both individuals and the state.<sup>19</sup> The duty to govern exists when there is some social need that could be resolved by acting, and some person, official, or institution has the power to do that act. In those cases, the person, official, or organization ought to step in and use their powers. One of the duties of a *government* is to make this power to act effective in society or to develop that power to act where it is absent, by creating resources and organizing and distributing skills according to needs, and filling gaps where there are needs but no resources or skills.

The duty to govern does not precisely track the right to govern. The right to govern establishes what powers some public institution or official may possess and when they may permissibly (or excusably) exercise those powers. Plausibly, though the government may have a duty to resolve some need because it is one of the institutions or individuals best placed to respond, the government may nonetheless have no right to respond to that need, either because some other individual or institution is better placed to do so, or because a government response would undermine other, more important social values.

States have many different ways of fulfilling this duty: how the state discharges the duty to govern will tell us what sort of state it is. The state may fill the needs itself, with public officials, or create opportunities for non-state parties to fill the need. The state may be more or less effective at creating and distributing skills to address needs. Nonetheless, responding to social problems by addressing public needs is the core of the duty to govern, and that duty continues to exist even when needs go unmet.

It is not only the state that has a duty to govern: we all do. The duty is impersonal, based on need and ability. Anybody with the relevant resources and skill set is obligated to act to address the relevant need. Consider Leslie Green's example of a traffic accident, in which some person, call her Jo Public, "arrives at a crossroads and finds a serious automobile accident dangerously obstructing traffic. [Jo Public] could drive on but is in no rush and can without danger to herself pull off the road

<sup>15</sup> See, e.g., PLATO, *REPUBLIC* 94–122 (G.M.A. Grube, trans., rev. by C.D.C. Reeve, 1992).

<sup>16</sup> See, e.g., ARISTOTLE, *POLITICS* (C.D.C. Reeve, trans., 1998).

<sup>17</sup> See, e.g., THOMAS HOBBS, *LEVIATHAN* 120 (Richard Tuck, ed., 2012); JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (2012) (1689); JOHN KLEINIG, *THE ETHICS OF POLICE* 12–14 (1996).

<sup>18</sup> See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 54–58 (1986) (discussing the "normal justification" of authority).

<sup>19</sup> See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 246 (1980); Leslie Green, *The Duty to Govern*, 13 *LEGAL THEORY* 165, 173 (2008).

and safely wave oncoming traffic around the collision.”<sup>20</sup> In that case, Jo Public has a governance duty to help out: to stop and wave traffic around the collision. Not everyone has this capability. Someone who does not know the relevant traffic laws has no duty to govern here. Nonetheless, so long as we have the ability (that is, the social power) to accomplish the relevant tasks necessary to address the urgent social need that someone direct the traffic, then all of us have a duty to govern here.<sup>21</sup>

Leaving things up to the public can, however, create problems. There may be too few individuals willing to act upon their duty and stop to help out. Or too many members of the public may stop and compete over who gets to direct the traffic. Resolving these gaps or conflicts requires some publicly recognized authority that is, on the one hand, required to stop and restore order and has, on the other hand, the power to preempt the actions<sup>22</sup> of individuals who themselves have ordinary governance duties to help out at the scene of an accident.

The state has a duty to govern by making laws that treat all people equally and promote the public welfare, as well as to create institutions to ensure these laws are effective and which can adjudicate disputes and otherwise aid the public when unforeseen emergencies and other problems arise. Often, these problems need some public official to provide clear authority to resolve confusing situations, or adjudicate certain types of disputes among civilians, or to act on behalf of the state in protecting civilians from harm. These just are the characteristic roles performed by the police.<sup>23</sup>

## 1.2 Police Governance Roles

The police are state executive agents delegated limited authority to represent and enforce state authority in public in certain cases of social need by preempting civilian action and directing the appropriate response. If we are to provide an account of the police, it is worth briefly reminding ourselves of the sorts of officials that we need to account for in describing that institution. Clear cases of the police include sheriffs, constables, nightwatchmen, and in the contemporary era, detectives, patrol officers, and senior administrative officials, as well as individuals deputized to serve as police officers. The police may take the form of “citizens in uniform,” or an armed paramilitary bureaucracy, or the agents of violent state-controlled race- or class-oppression.

It is also worth reminding ourselves of the range of activities that the police are called upon to undertake. Certainly, one function of the police is enforcing the criminal law both pre-emptively, through street patrol to deter crime, and retroactively, by taking into custody people the police have reason to suspect of violating the law. However, the police also maintain public order and public welfare independent of

<sup>20</sup> Leslie Green, *The Duty to Govern*, 13 *LEGAL THEORY* 165, 173 (2008).

<sup>21</sup> Leslie Green, *The Duty to Govern*, 13 *LEGAL THEORY* 165, 170 (2008).

<sup>22</sup> More accurately, their reasons to act. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 39 (1990).

<sup>23</sup> See, e.g., Maurice Punch, *The Secret Social Service in THE BRITISH POLICE* 103–114 (M.R. Chatterton, ed., 1980); P.A.J. WADDINGTON, *POLICING CITIZENS: POLICE, POWER AND THE STATE* 41 (2002).

their criminal law responsibilities. One of the most influential of modern police theorists, the sociologist Egon Bittner, regarded the police as officials whose primary task is responding to social disturbances—“events [that] contain[] ‘something-that-ought-not-to-be-happening-and-about-which-somebody-had-better-do-something-now.’”<sup>24</sup> In other words, the police are a sort of generalist first responder, taking care of disturbances or emergencies that range from the quotidian to the exotic. This form of emergency governance may require the police to:

rush accident victims to the hospital; bring alcoholics indoors on a winter’s night; break into a locked house or apartment to see whether an elderly occupant is alive and well; persuade a mentally ill person who has barricaded himself in his apartment to return to the hospital; administer emergency first aid to a heart attack victim while waiting for the ambulance to come. Police also get cats down from trees, chauffeur dignitaries around town, rescue the drowning, talk suicidal people out of killing themselves, direct traffic, and provide advice and help to the sick and elderly, as well as to otherwise healthy people who simply cannot cope with some pressing problem.<sup>25</sup>

We may think that the police are ill-suited to undertake some of these activities. Nonetheless, they are characteristic of the modern police.<sup>26</sup> Even if they were not, we would need an account of the police that could explain why the police are, in fact, allowed and even required to perform these activities as part of the process of patrol. The answer lies in the nature of the powers of the police and the state’s duty to govern.

## 2 The Nature of the Police

Scottish legal philosopher John Gardner has provided a brief but helpful guide to establishing who counts as police. We can determine whether someone is a police officer from two perspectives. On the one hand, we can identify the police simply as government officials with specific powers to act. This sort of evaluation does not depend upon the merits of either the role itself, or some individual’s performance in that role. All that matters is that the police have certain characteristic powers,

<sup>24</sup> Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police* in *POLICING: KEY READINGS* 150, 162 (Tim Newburn, ed., 2005).

<sup>25</sup> CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 203 (1980). See also DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 17 (1994) (“Patrol officers spend the rest of their time discouraging behavior that officers view as disruptive or unseemly, such as drunks sleeping in front of doorways, teenage boys lollygagging on a street corner, prostitutes soliciting in a blue-collar residential neighborhood, or men urinating against a wall around the corner from a busy bar.”).

<sup>26</sup> See, e.g., EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 36–39 (1970); P.A.J. WADDINGTON, *POLICING CITIZENS: POLICE, POWER AND THE STATE* 4–15 (1999); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 4–5 (4<sup>th</sup> ed., 2011); RICHARD V. ERICSON, *REPRODUCING ORDER: A STUDY OF POLICE PATROL WORK* 6–7 (1991); ROBERT REINER, *THE POLITICS OF THE POLICE* 144 (4<sup>th</sup> ed., 2010).



which I will identify as the powers to displace (authority), to detain (arrest), and to trespass.

On the other hand, we can identify the police through the role-based duties—Gardner calls them moral duties—that come along with these police-characteristic powers. Here, we might think of characteristic police duties, such as the duty to protect, to promote public order, and to act at risk to their personal safety. The police can fail in their role-based duties to such an extent that they are no longer “really” police officers, but officers in name only. In that case, they become gangsters or vigilantes in uniform: people who claim the legal powers of the police only to abuse them.

## 2.1 A Normative Account of the Police

The police are executive agents delegated limited authority to restore public order whenever it is disturbed, if necessary by preempting civilian action and directing the appropriate response.

There are three ways in which the police exercise their institutional normative authority. First, the police exercise their authority to take charge of a situation by issuing binding directives that exclude or displace the individuals’ ordinary, all-things-considered reasons for doing some action. On this view, the police have a plenary displacement power to have others “butt out” when responding to public emergencies or otherwise taking charge to restore public order.

Second, the police exercise their power to detain some person by preempting the detainee’s liberty rights (their freedom to leave). This is the characteristic police power of arrest. Third, the police exercise their power to trespass by preempting a civilian’s right to exclude them from their property. These last two powers may also be thought of as conferring immunities upon the police which preempt civilians’ rights to certain legal remedies, such as criminal or tortious claims of kidnapping or trespass against the officer who takes the detainee into custody or interferes with their property.<sup>27</sup> Here, the police have the power to preclude certain reasons or processes that the public might otherwise possess to challenge the fact of detention or trespass.<sup>28</sup>

<sup>27</sup> That the power to detain removes these rights is not equivalent to suggesting that detention removes all the detainee’s rights to resist.

<sup>28</sup> The police power to interpret the laws, and so, along with it, the nature of police discretion, falls under this power to displace another’s reasons for action. On the police power to interpret the law, *see, e.g.*, JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 135 (1990). The issue of police discretion is a fraught one: for a very brief sampling of the literature, *see, e.g.*, JOHN KLEINIG, *HANDLED WITH DISCRETION: ETHICAL ISSUES IN POLICE DECISION MAKING* (1996). *See also* LUKE WILLIAM HUNT, *THE RETRIEVAL OF LIBERALISM IN POLICING* 46–52 (2019). For many theorists, the presence of discretion entails not just the possibility but the presence of discrimination. *See, e.g.*, David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 *Geo. L.J.* 1059, 1062 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 *VAND. L. REV.* 333, 373 & n.176 (1998); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 *ST. JOHN’S L. REV.* 1271, 1277–78 (1998). On the governance model, the relation between police discretion and racial (and other) discrimination is in part a question of the sort of order that the police are tasked with enforcing and the other powers the police are given to enforce it.

This general authority to restore order is, however, a *public* authority. The police, as state agents, are public officials: they exercise their power in the interests of the whole polity under an obligation to respect each member of public equally. They are not permitted to pick and choose among the interests of particular communities or individuals, so as to favor some groups over others. This is one way in which the police are distinguished from civilians, and especially from vigilantes and gangsters.<sup>29</sup>

## 2.2 Private Police and Impersonal Reasons

So far, I have insisted that the central case of the police is the public police who act as state executive officials with the power to arrest and detain. There are, however, other ways in which a society may engage in policing, one of which is to provide private police.<sup>30</sup>

John Gardner rejects the claim that, necessarily, the police are public officials. He suggests a range of non-moral criteria for identifying who counts as police, but rejects the requirement that the police “work[] in the public sector” as one of those criteria.<sup>31</sup> My claim is not that the police are necessarily public officials, but that the central case of the police—the one that enables us to elaborate its core features<sup>32</sup>—recognizes that the police are, characteristically, a public institution and that their public nature explains a central element of their authority: that it is generally a *public* authority.<sup>33</sup> Private police there may be: nonetheless, they are, conceptually, a more marginal instance of the police, and one whose authority stands in need of explanation.

The issue of private police officials is a complex one. The difficulty resides precisely in the manner in which the state itself is organized. Certainly, the state may be able fulfill its governance functions by delegating them to private agents. However, quite apart from the success of that delegation is the question of the nature of that delegation. What sort of authority, if any, does the state grant to private police? Does the state deputize those officials to act as agents of the state? Or does the state simply allow for the possibility that private security forces can fulfill the role of the public police in certain ways, perhaps by engaging patrol and surveillance on behalf

<sup>29</sup> See, e.g., Eric J. Miller, *The Police as Civic Neighbors* in *THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES* 104, 110 (Tamara Lave & Eric J. Miller, eds., 2019).

<sup>30</sup> I want to thank, in particular, Andrew Bottrell for pushing me on this point.

<sup>31</sup> “How about working in the public sector? That would be a turn up for the books—privatization of the police is conceptually impossible!—but I doubt whether it could be sustained.” John Gardner, *Criminals in Uniform* in *THE CONSTITUTION OF THE CRIMINAL LAW* 97, 105 (R.A. Duff et al., eds., 2013).

<sup>32</sup> See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 16 (3<sup>rd</sup> ed., Penelope A Bulloch & Joseph Raz, eds., 2012). For a useful discussion of this method of analysis, as developed by others including Joseph Raz and John Finnis, see JULIE DIXON, *EVALUATION AND LEGAL THEORY* 51–70 (2001).

<sup>33</sup> See, e.g., Otwin Marenin, *Parking Tickets and Class Repression: The Concept of Policing in Critical Theories of Criminal Justice*, 6 *CONTEMPORARY CRISES* 241, 258–260 (1982). For a different view criticizing this Gardner-based approach, see, e.g., Malcolm Thorburn, *Justifications, Powers and Authority*, 117 *YALE L.J.* 1070–1130 (2008).

of a particular community or corporation but without the state granting special powers to displace and arrest and detain.

Consider, for example, the power of the private “mall cop.”<sup>34</sup> That person is not a government official and (let us assume) does not have the special powers of the public police. Any powers that the mall cop does possess are granted by the property rights of the corporation which owns the mall, or are general governance powers possessed by all of us. The mall cop *does* have police duties: a duty to ensure public order in the mall, to protect the mall’s denizens, and to do so at some risk to themselves. But their police powers to displace and arrest and detain derive, not directly from the state, but derivatively from the property interests of the corporation.<sup>35</sup> That difference in institutional source also marks a difference in the nature and scope of their authority to bind civilians by giving directives.<sup>36</sup>

The problem of the private police highlights one feature of the police more generally. The power to detain, at least, may operate as a coercive power. The power to detain is, in effect, the power to negate liberty and property rights: to turn them into what Hohfeldians would call “no-rights.”<sup>37</sup> Accordingly, the power to detain entails that the civilian has no legal right to flee or to resist (for example, to stand and fight).

There is an important difference between normative coercion and physical coercion: the notion of “force” obscures this difference. According to Leslie Green, one person coerces another when they intentionally direct the other’s power to choose in a particular way.<sup>38</sup> Coercion is thus a form of disempowerment: a power to disempower another’s free choice in ways chosen by the person exercising the power. Certainly, a person can effect coercion through physical violence. However, a person can *normatively* coerce another by having the power to take away some of a civilian’s ability to (choose to) exercise their rights and liberties. It is this normative form of coercion that is expressed through the power to detain.

Accordingly, we can regard the detention power as power to coerce the recalcitrant that operates in service of the other two powers: the displacement power to require individuals to defer to police authority and the trespass power which allows the police to search their property or person. Accordingly, a central feature of the police is that they have the normative power to coerce obedience, even if not the material power to inflict physical violence. In deploying their coercive power, the police must have some impersonal reason that binds the public and justifies limiting their usual rights in this way.

<sup>34</sup> I use this term, not to denigrate the role or powers of the mall cop, but to distinguish private from public police.

<sup>35</sup> The state could directly empower private civilians if it so chose: one obvious way is by temporarily deputizing them. For example, feudal police achieved this through the practice of hue and cry. *See, e.g.*, 2 MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* 98 (1736); 4 WILLIAM BLACKSTONE, *COMMENTARIES OF THE LAWS OF ENGLAND* 292 (1791); 4 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 176 (1797).

<sup>36</sup> Joseph Raz argues that the practice of issuing directives is the usual way in which authority is exercised. *See* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 26 (1986).

<sup>37</sup> Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 743–46 (1917).

<sup>38</sup> *See, e.g.*, Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *RATIO JURIS* 164–181 (2016).

Public reasons provide this sort of impersonal justification: they are reasons that take into account the interests of all the subjects of the state, not just some parochial subgroup within it.<sup>39</sup> In the absence of some public reason, there must be some alternative source of interpersonal reasons to justify the authority of private police. If the police officer's directive to someone is to function as something more than a prudential reason for the civilian to avoid the possibility of arrest or detention, then the police need some objective, impersonal reason to justify civilians in following police orders and doing as they say—a reason that applies to the civilian as much as to the police.<sup>40</sup>

Institutional validity on its own does not provide this sort of impersonal or generally applicable reason. Instead, the institution must make some further claim to justified authority. Private police may claim a legal source for their authority deriving from the various property laws that permit private individuals to take steps to exclude individuals from their property. Appeals to the authority conferred by the law on a corporation or a community or to the private police themselves are often, however, limited, parochial, and partisan in ways in which appeals to public authority are not. Put more crudely, the private police owe their allegiance to their employers and not to the general public. Accordingly, the mall cop's claim to authority is quite different to the central case of the public police. The institutional-legitimacy worry goes the other way too, however. To the extent that the police lack public reasons, and act on behalf of a community or the institution of the police itself,<sup>41</sup> then the police act more like mall cops than public officials.

The institutional-governance question then becomes: when the police tell a civilian to butt out, do the police provide the civilian with an all-things-considered moral or political reason for doing so, or only a prudential one? Is the civilian morally and politically justified in ignoring or resisting the police, even if doing so violates norms of the mall (when confronted with a mall cop) or the law of the state (when confronted with a public police officer)?

This question of legal and moral-or-political resistance addresses a deep question: are the police acting as officials of the state, or of some parochial or partisan group? The source-of-authority question is an important one because it is one way in which we can tell the difference between the police and vigilantes. Vigilantes claim to enforce order, often on behalf of one community and (implicitly or explicitly) against another community.<sup>42</sup> They may wear uniforms and swear oaths to uphold

<sup>39</sup> See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 5 (1986) (“The only interest a government is entitled to pursue is that of its subjects.”).

<sup>40</sup> They have legitimate authority only if and to the extent that their claim is justified and they are owed a duty of obedience. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 26 (1986).

<sup>41</sup> See, e.g., Otwin Marenin, *Parking Tickets and Class Repression: The Concept of Policing in Critical Theories of Criminal Justice*, 6 *CONTEMPORARY CRISES* 241, 258–60 (1982).

<sup>42</sup> The practice of vigilantism has become, once again, a major phenomenon across the United States with the return to the public space of private, right-wing, militias and other groups. In the United States, vigilantism is historically associated with public or private militias created to police and subordinate Black people. Indeed, some theorists go so far as to identify this form of policing with the nature of the police (in the United States, at least). See, e.g., Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, 13 *PERSPECTIVES ON POLICING* 1, 1–16 (1990); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017).

the lawful constitution. They may even be supported by the police. What distinguishes vigilantes from the public police is not their uniforms or their oaths, nor even whether they are formally state officials or not. That which distinguishes “real” police from vigilantes is, among other things, the nature of their authority. When the police claim to act on behalf of the community rather than the state, they fall prey to one of the temptations that is characteristic of the police, which is to act as private partisans rather than public officials.

### 2.3 Executing Authority

The police are distinguished from other government officials in part by their general powers to trespass and to detain those who disobey their authority. The power to detain, especially, distinguishes the police from, for example, other emergency responders. Other officials or professionals may have a limited power to detain: for example, to resolve a particular emergency by taking custody of and removing people from burning buildings, or by requiring people with physical or mental impairments to obtain treatment in hospitals or other institutions. However, the police have a general power to detain individuals who might get in the way of their legitimate exercise of authority, and this general power is distinctively a police power.

The power to detain is not an unlimited one. It requires only that the normative legal status of the detainee be sufficiently altered that they lack the right to leave or to physically resist the police officer. The old common law of arrest was relatively clear about this feature.<sup>43</sup> A lawful arrest conferred the power to detain free of a charge of kidnapping; the arrestee had no right to flee or to use force to prevent detention.

The common law reflects an important feature of the police power to detain: the power to arrest also changes the detainee’s status by precluding them from asserting certain legal claims to kidnap, battery, and assault.<sup>44</sup> In other words, the police power to arrest confers an immunity from certain criminal and tort defenses—and, more profoundly, transforms the normative status of the agents so that the police officer in detaining the civilian is no wrongdoer: it is the civilian, if they choose to fight or flee, that is the wrongdoer.

<sup>43</sup> See, e.g., THOMAS SMITH, *DE REPUBLICA ANGLORUM* 103–09 (1583); EDWARD COKE, *INSTITUTES OF THE LAWEES OF ENGLAND*, Ch. 29 at 52 (1642); MATTHEW HALE, *HISTORIA PACITORUM CORONAE* 83–97 (1736); WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, Ch. 21, 286–292 (1769); JOEL PRENTISS BISHOP, *CRIMINAL PROCEDURE* (1880).

<sup>44</sup> In his discussion of the police power of arrest, H.L.A. Hart notes that the power to arrest is often matched by a rule making it an offense to resist arrest. H.L.A. HART, *ESSAYS ON BENTHAM* 200 (1982).

## 2.4 Normative v. Material Powers

Finally, it is worth emphasizing once again that the powers to displace, detain, and trespass are *normative powers*. They do not depend upon the police possessing the *physical* ability (the material power) to detain or trespass.<sup>45</sup>

An alternative model of the police asserts that the police are best understood first and foremost as an *organization*, and in particular, an organization that is *entitled to use physical violence*. On this model of policing, the police are, characteristically, a paramilitary bureaucracy. This paramilitary-bureaucracy model was popularized in the mid-20<sup>th</sup> Century by Egon Bittner,<sup>46</sup> and has come to dominate both conservative justifications of police violence<sup>47</sup> as well as abolitionist accounts of the police as inherently violent and racist.<sup>48</sup>

This paramilitary-bureaucracy model gets three things wrong about the police. First, it assumes that the police are simply an adjunct of the criminal process and, in particular, the process of punishment. Policing is thus the starting point for a process that is organized around a process of public condemnation located in the courtroom, or a process of sentencing and punishment pointing towards the prison. Policing that begins and ends on the street is not part of this process. This sort of policing is, however, an everyday feature of the police as order-maintainers and first-responders.

Second, the paramilitary-bureaucracy model treats the police as a essentially violence-deployers, rather than a set of government officials with specific powers. Because the model is centrally concerned with public condemnation or punishment, it requires some sort of government institution tasked with corralling recalcitrant individuals into the jailhouse and the courthouse. The paramilitary-bureaucracy model identifies the police as just that institution, organized around the deployment of violence necessary to overcome the recalcitrant. Once again, this model ignores the other functions of the police in which violence is not a core element of police authority. Third, the penal approach mistakes the normative, preemptive authority of the police for material, overwhelming violence. Because the penal approach recognizes the police as a primarily penal agency, acting under color of the criminal law, it cannot imagine other functions for the police—and by cannot, I mean that, e.g., civil functions for police institutions are conceptually excluded from this bureaucratic, paramilitary, criminal organization.

All of this is compatible with an institutional account of the role of the police. However, whereas the professional-paramilitary account of the police presupposes that the police are a criminal-law-enforcing paramilitary organization, institutional

<sup>45</sup> It is worth noting that an arrest may be effected without using or even threatening physical violence. An individual is arrested when they are not free to leave; or when they voluntarily submit to a display of public authority (they stop when the police shout, “Stop! Police!”); or when they are physically touched by the police (that touch need not be violent). *See, e.g.,* Torres v. Madrid, \_\_\_ U.S. \_\_\_, 141 S.Ct. 989 (2021).

<sup>46</sup> *See* EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 39 (1970).

<sup>47</sup> *See, e.g.,* James Q. Wilson & George L. Kelling, *Broken Windows* in CRITICAL ISSUES IN POLICING 455, 456 (7<sup>th</sup> ed., Roger G. Dunham & Geoffrey P. Alpert, eds., 2015).

<sup>48</sup> *See, e.g.,* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

accounts need not. For the institutional account, the criminal, paramilitary, and organized character of the police is the result of a series of contingent governmental-institutional choices, not a necessary feature of the police themselves.

While the police may need to use some form of physical coercion to compel obedience to their orders under the displacement power, or to arrest civilians under their detention power, or to gain access to property under their trespass power, the police are still *police* even in the absence of their ability to physically enforce their powers. Indeed, the police's normative powers may still be exercised even in the absence of material enforcement: the civilian may now have an obligation to defer to the police, to remain and not resist, and to allow the police to interfere with their property unmolested despite the civilian's material ability to prevent the police from doing any of these things. Physically ineffective police are still police and are still normatively effective police at that.

In fact, there is no necessary connection between the normative and material power of the police. None of the powers to displace, detain, and trespass requires that the police use violent, debilitating force to accomplish their goals. All they require is that civilians' legal status is altered by restricting civilian liberty to disrupt the police when the police go about their business.

Giving the police the material power to accomplish these goals is a separate matter. The state can, and does, give the police the material power to use physical violence to coerce compliance with their normative powers. However, they need not. Perhaps, for example, the police could exercise psychological coercion to achieve the same end.<sup>49</sup>

Certainly, to the extent that the police *are* granted the power to use violence to displace, detain, or trespass, the police should only be given and use material violence proportionate to those goals. However, there is no direct relation between the material power a state chooses to confer upon the police—whether the police are armed, and what armaments they wield—and the normative powers of the police: that relation is a contingent one. How much violent, physically debilitating power the police have depends solely upon how much material power the state wishes to grant the police to back up their normative powers. And it is the normative powers of the police that tell us whether the state grants of material power are excessive or misused by the police.

Accordingly, the definition of the police that I propose consists in possessing the following powers:

*The police are officials who claim (1) legal authority (2) to preempt or displace civilian reasons to govern and to (3) trespass on property or (4) arrest or detain others.*

<sup>49</sup> This is the claim of the “procedural justice” movement. See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 94, 20–24 (2002); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 20–26, 161–65 (1990). For an explanation of “procedural justice” as really an account of psychological coercion, see Eric J. Miller, *Encountering Resistance: Non-Compliance, Non-Cooperation and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 344–55 (2016).

In addition to these features that identify which individuals are properly identified as police officers, we might suggest that the role of the police includes three other features which distinguish the police from civilians and other public officials. These are duties that apply to the police in the exercise of the powers identified above.<sup>50</sup>

*In addition, the police are individuals who use their powers in accordance with duties to (5) promote public order and (6) protect the public, (7) even at risk to the officer's own safety.*

### 3 An Institutional and Bureaucratic Account of the Police

To sum up the argument so far: the organization of the modern police represents a contingent social choice about how to engage in the process of governance. The delegation of certain powers to use force and their location within the criminal, judicial, and other processes are mutable features of the police as an agency authorized to assert the exclusionary power to govern in the face of public disorder. The choices characteristic of modern, municipal police are rather related to other features of our society, including the specific forms of state and community organization, and the resources available for other institutions to engage in governance activity.

The police are one set of resources that the state has at its disposal to engage in governance. However, the particular organization of the police depends upon the type of state that deploys the police, their location with the broader state apparatus, and the functions delegated to the police by the state.<sup>51</sup>

Recently, Michelle Dempsey has articulated what she calls an institutional-bureaucracy account to explain the role of legal officials in the criminal process. She asks:

what kinds of reasons, if any, can do the normative work required to justify the conduct of criminal justice officials?' According ...to the institutional-bureaucracy account—any adequate response to that question must attend to the particular roles that officials hold within the institutional bureaucracy, the actions that those roles make possible in virtue of the bureaucratic division of labour within the institutions, the identity of those represented by those officials... and the kinds of values that officials can realize through performing actions in those roles.<sup>52</sup>

<sup>50</sup> For a somewhat different account of the duties owed by the police as stemming from fiduciary duties to the public, see, e.g., Malcolm Thorburn, *Justifications, Powers and Authority*, 117 *YALE L.J.* 1070, 1121–22 (2008); Stephen Galoob, *A Fiduciary Principle of Policing* in this volume.

<sup>51</sup> Otwin Marenin, *Parking Tickets and Class Repression: The Concept of Policing in Critical Theories of Criminal Justice*, 6 *CONTEMPORARY CRISES* 241, 258 (1982).

<sup>52</sup> Michelle Madden Dempsey, *Public Wrongs and the "Criminal Law's Business": When Victims Won't Share* in *CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 254, 263 (Rowan Cruft, Matthew H Kramer, & Mark R Reiff, eds., 2011).



The police are generally defined by the duty to govern, and more specifically the powers to displace, detain, and trespass, as well as the duties to protect, to ensure public order, and to risk injury. Depending upon the mode of governance adopted by the state, the police may be organized as the most visible part of the modern bureaucratic criminal process we now take for granted or deployed as part of a more personal system of legal authority and organization characteristic of, e.g., a feudal society. The police powers to displace, detain, and trespass are certainly congenial to fulfilling the needs of a large, bureaucratic, criminal-regulatory system.

While the police are often large municipal bureaucracies tasked with enforcing the criminal law, they may also take the form of small organizations (including organizations no larger than a sole officer) acting on behalf of public or private entities, tasked with officiating criminal *and civil* nuisances. Indeed, historically and currently, the public police have filled a need to enforce civil orders by impounding property.<sup>53</sup> There is nothing about the definition of the police that limits or requires them to serve as officials ensconced only within the criminal process. In fact, historically, the law-enforcement role pursued by police officials such as the sheriff, constable, and watchman may have operated in service of civil laws as well as criminal ones.<sup>54</sup> Furthermore, the police may also operate to staff public-facing government institutions, such as courts, or private-facing institutions, organizations, and events, when those are likely to be disrupted by obstreperous civilians or other social disturbances.

How the state and the police regard their authority tells us a lot about the state and its use of the police as a public or private institution. The thick normative structures that constitute police roles within a system of governance depend upon shared norms of public order, as well as the public and private institutions' right to call upon a variety of agents to exact sanctions for non-conformity to their directives. Not just any political or social institution has the right to govern through the law and its enforcement apparatuses. The sort of public and private institutions that rightfully command our support are just those institutions which promulgate socially valuable rules and enforce those rules in a manner that justifies our support of those institutions. The means matter as much as the ends.

<sup>53</sup> On the civil use of police officials, including sheriffs, entitled to arrest, *see, e.g., Torres v. Madrid*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 989, 1010 (2021) (Gorsuch, J., dissenting) (“Before bankruptcy reforms in the nineteenth century, creditors seeking to induce repayment of their loans could employ bailiffs to civilly arrest delinquent debtors and haul them off to debtors prison.”).

As Joseph Raz notes,

[Th]e use of force according to law [is not] confined to its use as a sanction. In fact it is rarely used as a sanction. Most often the use of force is provided for as an enforcement measure to ensure compliance with ordinary law (for example, compliance with building regulations or public health requirements which involve the destruction of property and the forcible confinement of animals and humans) as well as compliance with sanction-imposing orders (for example, seizing property when a fine is not paid or using force to prevent an escape from prison).

JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 157 (1990). Since the police are most often the institution authorized by legal systems to use force (in service of their power to arrest and detain), the police are often deployed in service of these civil functions.

<sup>54</sup> *See, e.g., Torres v. Madrid*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 989, 1010 (2021) (Gorsuch, J., dissenting).

The governance model does not dictate the institutional position of the police in a given society. It does, however, encourage us to ask what are the consequences are of the various ways we seek to justify the police as a social institution.

The institutional account asks (1) (conceptually) what is this institution? and (2) (normatively) why is this institution best placed to solve this problem? But it also allows us to put institutions in their (historical, sociological, cultural) place, meaning we can and ought to ask: what sort of social and political culture produced this (variant of this) institution? The institutional account thus helps us identify, not only core and peripheral varieties of police, but also ways in which policing can go wrong, and public officials can misuse the authority they claim for themselves in partisan ways. In encouraging us to go beyond some general justification for the police, the institutional account helps us to attend to the rules of historically, socially, and culturally specific instances of policing institutions if we are properly to understand the police role within that society.

Governments choose to interact with their subjects in a variety of ways. For example, the United States has become a society of racially disproportionate mass incarceration and overcriminalization. Federal, state, and municipal officials have chosen to “govern through crime,”<sup>55</sup> and to distribute the benefits and burdens of the criminal law unequally as to race, class, and gender.<sup>56</sup> The police, as an institution within the state and criminal process bureaucracy, could take a number of different forms. In the United States, the police take the form of an institution with a paramilitary organizational structure and ethos increasingly organized around the racially biased use of force. Hence, a pragmatic and distributive political approach that seeks to defend the practice of policing in maintaining social order in the contemporary United States must account for the use of an increasingly racially biased, hyper-militarized, and violently disabling police force that operates within our current criminal justice process.

We cannot just shrug and say that this is just what the police, conceptually, are, for they have been and can be something else. That the police *have* been a non-paramilitary organization logically entails that it is possible for them to be something other than a paramilitary organization, which further entails that they are not necessarily a paramilitary organization. It also entails that if the police have been a non-paramilitary organization, it is not sufficient to count as police to be a paramilitary force. All of this suggests that, conceptually, the police are not a paramilitary bureaucracy organized around the enforcement of the criminal law.

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<sup>55</sup> JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2006).

<sup>56</sup> See, e.g., LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 195–208 (2009).

## 4 Some Abolition Adjacent Normative Implications for Police and Policing

One core question of governance is to determine whether the police as an institution are necessary for policing, the activity of maintaining public order in the name of the state. That question must be answered in part by recognizing that an important aspect of governance is permitting people to police themselves in certain aspects of their lives. For example, self-government is essential to the vitality of those social roles that depend upon carrying out duties owed to other people, whether as a parent, friend, colleague, and so on. These private duties are often undermined when informal and personal obligations to regulate each other's conduct are given an impersonal, formal, public cast. One reason is that these roles are *supposed* to be partisan: they impose duties of loyalty and support for our children or friends or colleagues that conflict with and even exclude other reasons we might have to act more formally or more impartially. These reasons explain the dilemmas we face when our children, friends, or colleagues behave sufficiently badly that formal, public authorities have to be called in.

In addition to butting out of matters that are better handled privately, the police are often insufficiently skilled compared to other professionals to handle certain tasks. That is because the police are, conceptually, generalist emergency responders. Where there is an emergency that would be better served by a specialist (a fire, a medical problem) or some member of the public, then the police should step back and let that other person respond. If, for example, a civilian is suffering a mental health crisis, then a mental health professional should help out. If none are available to respond, the state has failed in its governance duty to fill this gap. If the state defaults to an emergency response team that is primarily organized around the use of disabling violence to respond to these sorts of circumstances, then the state has failed in a particularly egregious manner. If the state *directs* violence-deploying officials to respond to emergencies or disorder involving vulnerable and marginalized individuals, and to use force against these vulnerable or marginalized people as a means of keeping them vulnerable or marginalized, then the state is engaged in an authoritarian form of governance. When the state, by possessing an excess of violent power or deploying it in arbitrary ways, dominates its subjects whether through oversight or intent, then the state deserves our resistance to it.

The violence-constitutive definition of the police creates a dilemma between policing and police that abolitionists are correct to expose, premised on the claim that deployment of physical violence should, if at all possible, be a marginal feature of governance. Either the police as a violence-deploying organization should be a marginal tool of governance; or if the police are not constitutively a violent force organization, then the police as currently constituted in the United States are under qualified and ill-fitted to many of the governance roles currently assigned to them, and so those governance roles should be reassigned to other government agents.

What is not the case is that the police are, necessarily, an authoritarian institution, nor that they necessarily express their authoritarian dominance in specific,

and specifically racist ways. Some abolitionists would reject this claim. For example, Paul Butler argues that:

what happens in places like Ferguson, Missouri, and Baltimore, Maryland—where the police routinely harass and discriminate against African Americans—is not a flaw in the criminal justice system. Ferguson and Baltimore are examples of how the system is supposed to work. The problem is not bad apple cops. The problem is police work itself. American cops are the enforcers of a criminal justice regime that targets black men and sets them up to fail. ... This is why efforts to fix “problems” such as excessive force and racial profiling are doomed to fail. If it’s not broke, you can’t fix it. Police violence and selective enforcement are not so much flaws in American criminal justice as they are integral features of it.<sup>57</sup>

If the argument is that anti-Black police violence is not a flaw in the police but definitive of them, not an example of a failed state but constitutive of an anti-Black police state, then a few things follow. The claim that the role of the police is to oppress Black people entails that the police act in an exemplary manner when they oppress Black people, for example by choking them. If this is the purpose of the police—to oppress the vulnerable—then the “real” police are the violently oppressive officers, and the marginal case is the officer who refuses to go along with this practice and who acts out of a sense of justice to de-escalate, and so on.

I tend to think that the crude abolitionist critique—the one that claims the police are functioning properly when they engage in racial (or class, or homophobic, and so on) repression—is thought, by its advocates, to be an especially harsh critique of the police. In fact, that critique is too soft. It criticizes the system of policing itself as inappropriate when it operates in a racially subordinating way but treats the officers as acting virtuously, in terms of their institutional role, when they respond violently to people of color. It indicts the institution but lets the individual officer off the hook. Worse, under the crude abolitionist critique an officer who de-escalates an encounter with a person of color acts viciously, at least in terms of their institutional role, and deserves to be disciplined.

The crude abolitionist approach effectively endorses the paramilitary-bureaucracy model and ignores those duties that define the police role and constrain the police in the use of their normative powers. On this view, one can be, legally, a police officer, yet fail to live up to the moral obligations imposed by that role. To be legally a police officer is to have certain powers: to arrest, to search, and to enter onto property. To be morally a police officer is to act on impersonal reasons as part of a duty to govern; to protect the public; and promote the interests of the public; even at the risk of the police officer’s own safety. On this view, the virtuous police officer will respond to public exigencies in a skillful manner, ensuring that no harm comes to the public, even at risk to the officer’s own safety. That officer will try to match the civilian to the resources necessary to meet their needs. The vicious police officer will target socially disfavored groups for harassment and violent intervention

<sup>57</sup> PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017).

to keep them in their place. All of this is to say that how the police appear—how they interact with the public, how much material force they have, and how they use that force—is a contingent matter dependent upon the societies in which the police are deployed.

The institutional-governance model recognizes that a police officer who responds with violence towards people of color to promote racially subordinating policing violates both their duty to protect and their duty to maintain public order. They are police officers, certainly, but they are, first and foremost, terrible police officers who are failing in their police role. Their institution is *also*, however, terrible: it is an authoritarian, racist, institution. On the institutional-governance model, however, the individual officer is both terrible—authoritarian and racist—all on their own *and* part of a terrible—authoritarian and racist—organization. Both the individual officer and the organization fail in their duty to protect; and often misunderstand or ignore the duty to risk safety. They misuse their powers to displace and arrest and detain. They are vigilantes in uniform.

Furthermore, the institutional model suggests that communities cannot simply avoid the police by doing self-policing. The police are not, conceptually, a paramilitary, bureaucratic organization empowered to use violence to overpower the recalcitrant. Individuals or institutions not specifically denominated “police”—such as social workers or mental health workers—may also be police if they possess the powers to displace, detain, and trespass.<sup>58</sup> For example, some health-care workers have the power to enter upon property to remand people experiencing a mental health crisis to an institutional care facility, whatever the person in crisis or the public might say.<sup>59</sup> These individuals, for their specific purpose, have the powers of the police: many neuro-divergent people recognize that, and seek other interventions when they are in crisis. It would help to recognize these normative police powers rather than obscure them by pointing out that the health-care workers lack the violence-deploying material powers of some police officials.

I have argued that a core feature of the police is that they are a coercive, if not violent, institution. If the community takes on the role of the police, then community officials who take on the role of the police must justify coercing the public. It will not do to suggest that, just because the community has done away with a physically violent iteration of the police, then they have solved all the problems of contemporary policing. The community may have solved some of the problems—those contingent problems addressing how much material power to inflict physical violence has been conferred by the public upon the police. There remains, however, the pressing problem of replacing once coercive institution with another—of replacing the visible police with a series of invisible police agencies that exercise coercive control over the public. Some social services, I have suggested, already operate in this

<sup>58</sup> For example, nurses and teachers sometime serve as police surrogates when disciplining people in their care. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) *New Jersey v. T.L.O.*, 469 U.S. 325 (1984). See also Ji Seon Song, *Cops in Scrubs*, 48 FLA. STATE. L. REV. 861 (2021).

<sup>59</sup> The same goes for social workers’ powers to displace family reasons, search for signs of abuse, and detain and remove children into care or foster homes. Social workers, too, may misuse these powers in authoritarian ways.

way.<sup>60</sup> The problem is compounded if the new services respond, not to impersonal public reasons, but to the partisan group reasons of local communities. Relying on local communities with individuals empowered—officially or unofficially—to keep the peace by enforcing community, rather than state, norms of conduct just is James Q. Wilson’s communitarian theory of policing.<sup>61</sup> The baleful history of extra-judicial lynchings and race massacres should warn us that individual communities can be as violent, racist, and authoritarian as much of contemporary municipal policing in the United States.

## 5 Conclusion

The role of the police creates police-characteristic temptations. The police are street-level officials wielding public authority to respond to social exigencies. These powers create a standing temptation on the part of the state, local communities, or the police themselves to use their powers in partisan and authoritarian ways. At best, the state or local communities may use the police to fill in gaps in the public or private provision of social welfare; at worst, the state or local communities may use the police to operate as the tip of the spear of an authoritarian state—including a racially authoritarian state.

However, a violent, partisan, racist police force or police officer is not a good or virtuous police force or police officer. That is, violent, partisan, racist police officers are not fulfilling their roles in a way that lives up to the values appropriate to the role. Furthermore, because employing physically debilitating violence is independent of the police role, then getting rid of the police does not entail getting rid of officials or individuals with the power to use physically debilitating violence in a racist manner.

None of this is to deny that the police in the contemporary United States may be violent, racist, authoritarian public officials. Indeed, given the centrality of public authority to the police role, the police everywhere may be prone to authoritarianism, especially when given material power that enables the police to overwhelmingly dominate the public.<sup>62</sup> Nonetheless, violence and racism are particular, contingent features that derive from the racial violence baked into United States politics and

<sup>60</sup> I suggested that mental health officials possess the characteristic powers of the police; other social service agencies, such as child welfare agencies, may do so as well. Not only are they subject to the same powers as the police, they are also bound by the same duties when acting in this role. The fact that they may have other roles granting other powers and imposing other duties does not mean that they are any less police. It simply means that they have multiple roles within some particular system of governance.

<sup>61</sup> See, e.g., JAMES Q. WILSON, *THINKING ABOUT CRIME* (rev. ed., 2013) (1975); James Q. Wilson & George L. Kelling, *Broken Windows* in *CRITICAL ISSUES IN POLICING* 455 (7<sup>th</sup> ed., Roger G. Dunham & Geoffrey P. Alpert, eds., 2015).

<sup>62</sup> I have argued against this sort of dominating authority, from a civic republican perspective, in Eric J. Miller, *The Police as Civic Neighbors* in *THE CAMBRIDGE HANDBOOK OF POLICING IN AMERICA* (Eric J. Miller & Tamara R. Lave, eds., 2019); Eric J. Miller, *Reasonably Radical: Terry’s Attack on Race-Based Policing*, 54 *IDAHO L. REV.* 479 (2018); Eric J. Miller, *A Fair Cop and a Fair Trial* in *OBSTACLES TO FAIRNESS IN CRIMINAL PROCEEDINGS: INDIVIDUAL RIGHTS AND INSTITUTIONAL FORMS* (John Jackson & Sarah Summers, eds., 2018); Eric J. Miller, *Encountering Resistance: Non-Compliance, Non-Cooperation and Procedural Justice*, 2016 *U. CHI. LEGAL F.* 295 (2016); Eric J. Miller, *Police Encounters with Race and*

society and its public and private systems of governance. Too often, an excessive focus on the police is one way of avoiding the fact that non-state individuals often fill the role of the police in violent and racially authoritarian ways.

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Footnote 62 (continued)

*Gender*, 5 U. IRVINE L. REV. 735 (2015); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521 (2015); and Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1 (2010).