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Enabling and Constraining Police Power: On the Moral Regulation of Policing

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Abstract: In this paper we consider some of the ethical challenges inherent in the regulation of discretionary police power. Discretion is central to police policy and practice, but it also provides a level of freedom that opens up the space for injustice and inequity, and this is seen most vividly in recent debates about unfairness and racial profiling in the distribution and experience of police stops in the US and UK. How to regulate discretionary power is a challenging question, and this is especially so in the context of practices like stop-and-search/stop-and-frisk. The ability to stop people in the street and question them is central to policing as it is understood in many liberal democracies, but under conditions of unfairness and questionable efficacy – when the application of this particular police power appears unethical as well as ineffective – one can reasonably ask whether the power should be dropped or curtailed, and if curtailed, how this would work in practice.

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Dubber (2005) describes the police power as unlimited, and while he was referring to a concept of police much broader than the uniformed public police service that is our focus here, it is certainly true that the police remit is both broad in terms of its potential objects (threats to the stability of established social order) and wide in the set of means available to achieve its aims (up to and including the use of deadly force). The extent of the power vested in police, the fact that most officers operate in low visibility settings, and the discretion many of them wield – all these factors create significant problems of oversight, governance and, inevitably, ethics. That policing tactics and techniques are often only loosely constrained in law and/or are unavailable to other actors (Brodeur 2010) serves only to make these issues more pertinent and more pressing.

Our goal in this piece is to consider some of the ethical challenges inherent in the regulation of discretionary police power. Invoking the ability to address a situation either formally (evoking legal categories) or informally (using situated problem solving), discretion is central to police policy and practice, but it also provides a level of freedom that opens up the space for injustice and inequity, and this is seen most vividly in recent debates about unfairness and racial profiling in the distribution and experience of police stops in the US and UK. Police are able to use a huge range of tactics to address the problems they encounter, yet the low visibility and high discretion granted to street-level officers ensures that only relatively rarely will these solutions be ‘second-guessed’ by supervisors or, more pertinently, external review processes. This is arguably a characteristic of all police, but these issues pose particular problems in liberal democratic states where the power of the state over citizens is, at least from an ideological perspective, constrained. In such contexts, police indeed remain something of an exceptional power – one that poses a significant threat to liberties many would consider both well-established and inviolable.

How to regulate discretionary power, to channel it in ethically desirable directions, is a challenging question, and this is especially so in the context of practices like stop-and-search/stop-and-frisk. The ability to stop people in the street and question them is central to policing as it is understood in many liberal democracies, but under conditions of unfairness and questionable efficacy – when the application of this particular police power appears unethical as well as ineffective – one can reasonably ask whether the power should be dropped or curtailed, and if curtailed, how this would work in practice. Changing the legal landscape may help, particularly as it relates to racial profiling. One solution to the problem of inequitable policing outcomes may be to make the practices that produce them illegal, and then enforce such laws with established and/or new or novel mechanisms. But the empirical fact that police need to be able to deal at least provisionally with the huge range of problems with which they are confronted limits this possibility in important ways. Police officers are the first,

and often only, responders to a huge variety of situations and events; they require an ability to react to and (re)direct these events that is – due to the significant freedom and discretion required – by definition difficult if not impossible to codify within a set of legal rules. What is the ‘right thing’ to do, in a given situation, cannot be determined in such a manner.

How might these policies and practices be regulated? Whether the onus comes from a change in the legal landscape or from other cultural, social and political pressures, there are in our minds three main ways in which the ethical curtailment – or perhaps more precisely re-direction – of stop-and-search/stop-and-frisk practices might be achieved “on the ground.” First, the visibility of police activity could be increased – something that is already occurring as a result of the uptake of camera phones and other mobile technologies, the work of ‘citizen journalists’ and others, and policy movement toward officers using and wearing video cameras. Yet, while the importance of such developments should not be understated they are unlikely to provide a panacea; the camera can lie and there will always be a limit to what can and should be recorded.

Second, in a related but wider sense, extrinsic modes of bureaucratic regulation can be utilized that motivate either individual officers or police organizations to behave in a more ethical fashion, by which we mean acting in line with established norms of probity and right, in ways that respect the rights of citizens to be as free from intrusive state power as possible, being honest and transparent, and so forth. By extrinsic, we mean authority structures and processes either within police organizations, aimed at directing officer practice (e.g. reward and disciplinary schemes), or outside police organizations, aimed at directing the activity of the organization as a whole (e.g. civilian oversight, Police and Crime Commissioners etc.).

This is, by and large, the ‘traditional’ approach to corraling the power of the police and directing it in normatively desirable directions. It has claimed some success, with police practice in many developed countries changing for the better over the years as a result of regulatory change and related factors. While it may be impossible to come up with a definitive list of things police can and cannot do (see above), particular behaviours (such as aggressive interrogations) can be, and have been, curtailed and often prohibited. Such change has frequently been associated with extrinsic pressure on police organizations to change their practices or suffer a loss of material or symbolic capital.

Yet, despite these developments, present-day police practice is plainly still far from ideal – witness, precisely, the on-going scandals about police stop practices in contexts as diverse as Scotland (Murray, 2014), Spain (Añón et al., 2013) and the United States (Tyler et al., 2014). Simply banning (making illegal) particular practices does not mean that they do not take place, and as we describe below, there are two important reasons for the continued failure of regulatory change to rein in the power of the police and direct police activity in more desirable directions. Not only do external modes of regulation continuously run into the twin problems of discretion and (in)visibility, but most are premised on

instrumental understandings of human motivation that, evidence suggests, are not particularly well-suited to explaining the ways people actually behave in social settings.

Third, intrinsic modes of regulation can be encouraged or enhanced. Our central theme in this paper is the idea that the legitimacy that police command and require, both externally and internally, may be pivotal to this process. On the one hand, police at the organizational level are engaged in a continuous process of establishing and reproducing their legitimacy among those they police; this means that they must – to some extent – be responsive to, and in tune with, the communities they serve. Police cannot, in other words, simply do what they want. Legitimacy is founded in public perceptions of fairness, probity, honesty and lawfulness (although the situation in some developing countries may provide an interesting counterpoint, where effectiveness may be relatively or absolutely more important – Karakus, 2015; Jackson et al. 2014; Bradford et al. 2013; Tankebe 2009; although see Akinlabi, 2015; and Kochel et al., 2013) and the need for legitimacy acts as an empirical constraint on police power. If police wish to reproduce their legitimacy they are channelled toward behaving within certain limits; actions outside established normative frameworks will undermine legitimacy, and these limitations are likely to correlate closely with established ethical values – particularly in relation to notions of fairness.

On the other hand, legitimacy within police organizations can motivate officers to behave in certain ways. The argument here is that:

- a) Organizational justice encourages identification with the organization.
- b) Identification with the organization leads to legitimation of its practices and processes and internalization of its values and goals.
- c) Legitimation and internalization motivates compliance with organizational rules and values.
- d) This process encourage officers to see themselves as legitimate, strengthening self-confidence and opening up the possibility for positive policing styles.

Police organizations that have the right goals, that communicate these goals to staff, and that treat staff in organizationally fair ways may be able to motivate internal processes of legitimacy that are themselves constitutive of a check on police power, or at least will tend to channel it in desirable directions.

It seems to us that – in the absence of fundamental change to the role of police in liberal democracies (which is not quite as far-fetched as it might seem if contractual, private-sector type arrangements gain even greater traction than is currently the case) – and given the intractable problems associated with the application of extrinsic constraints on officer behaviour, questions of legitimacy should take centre-stage in efforts to exert constraints on police discretionary power and encourage ethical policing. In particular, the internal notion of legitimacy seems to offer significant possibilities, not least because it can bypass

currents in public opinion inimical to limits on police power (at least when this is directed at denigrated out-groups and ‘others’), yet is at the same time amenable to external influence from, for example, democratically elected oversight bodies. Which is to say, in addition, that legitimacy backed up by extrinsic modes of regulation (and greater visibility) is likely to be a particularly effective strategy. However, as we describe below this is not an entirely one-way street, and it is entirely possible that legitimacy also opens up the space for unethical behaviours.

In the following pages we consider the three strategies outlined above in the context of regulating stop and search/frisk and similar policing tactics. This is an example of the sort of police activities that raise questions about individual rights, of structural racism, procedural and distributive justice, and the limits of police power and legitimacy (and which many believe need to change), and to set the scene we first introduce the issue of stop and search/frisk. We focus primarily on the UK given the context in which we both work – but much of what follows will be relevant in other Anglophone contexts as well, perhaps, as more widely still.

STOP AND SEARCH/FRISK

The power to stop, question, temporarily detain, and search people ‘on the streets’ is one of the most controversial powers vested in the police in the UK, the US, and increasingly elsewhere (e.g. Open Society Justice Initiative 2009). Legally speaking, this police power is often relatively constrained, albeit wide-ranging. In most circumstances police cannot simply decide to ‘randomly’ stop and/or search people. But there are important exceptions in some contexts. In England and Wales, for instance, various forms of the power are enshrined in law, the most important of which is Section 1 of the Police and Criminal Evidence Act 1984, otherwise known as PACE. PACE applies a reasonable suspicion test, meaning police must have a justifiable reason for stopping someone with a view to searching them. But other pieces of legislation do not, notably s60 of the Criminal Justice and Public Order Act 1994, which allows officers to search a person without suspicion. Searches under these powers, although they occur in public spaces, can be relatively invasive; and individuals stopped are required by police to stay for the duration of, and acquiesce to, any search that follows, and officers can use force to ensure they do so.

Despite the existence of legal constraints, the conduct of street stops is a classically low visibility, high discretion, police activity. Street-level officers get to decide whom to stop, when and where, with very little possibility of external oversight (of individual stops – the overall number of stops is a potential target for external regulation, and police can be, and often are, encouraged to increase/decrease the number of stops they conduct). The importance of discretion here is magnified by the fact that police have a range of what might be termed sub-legal powers to ‘stop’ people and question them in the street. In some

countries, such as Scotland, it is known that the use of ‘consent’ searches is widespread, since many are recorded by police (Murray 2014). Elsewhere the use of ‘consent’ as an enabler of police activity is assumed to be widespread but its extent remains largely hidden (Dixon 2008). Sub-legal tools available to police to garner consent for a stop range from the inherent authority police command in relation to significant numbers of people – to whom a simple question from a police officer may be experienced as requiring a response – to the ability of police to draw other informal sources of power and influence to direct behaviour. Moreover, in continental Europe and elsewhere the ability of and often the requirement that police conduct ID checks offers a further range of opportunities for police to interdict and question people.

In a general sense, a power to stop, question and search people that is short of a full arrest is useful for both police and the policed (in the latter case mainly because of the well-known negative implications arising from being arrested – it is often argued that if police did not have the power to stop and search they would turn to the more invasive power of arrest as a means to achieving the same ends). Yet, public encounters with the police provide moments in which the legitimacy of the police is asserted, tested, and all too often undermined (Tyler & Fagan, 2008; Jackson et al., 2012a; Mazerolle et al., 2013; Geller et al., 2014; Tyler et al., 2014; Slocum et al., 2015). Whether governed by statute or based on the sociological power of police to intervene in people’s lives, stop and search/frisk encounters can take place in almost any of the contexts within which police and public interact. Officers conducting a stop are, implicitly or explicitly, making a claim as to the rightfulness of the authority vested in them. As a key part of the police ‘voice’ in the legitimacy ‘dialogue’ envisioned by Bottoms and Tankebe (2012), every stop and search encounter involves a claim that police are empowered to treat citizens in this way; that the nature and extent of this power is defensible; and that the ability of police to wield coercive force to ensure compliance is itself justified. The people stopped make judgements about these claims, asking whether the actions of the police were justified in this and similar cases; whether the officer acted proportionately and with the right intentions, or whether he or she was motivated by bias or prejudice; whether the laws on which this method of policing is based are themselves justified, in terms of the aims they embody and the fairness with which they are applied; and whether it is right that this officer can forcibly detain one if one resists.

Stop and search remains a highly charged, contested and in many ways deeply problematic aspect of police practice. The proximate reason for this is ethnic and other disproportionalities in the experience of police stop and search activity. Stop and search has been a controversial issue for many years, in part because it is a mode of police practice that seems consistently to be unevenly applied: socially, geographically and, particularly, ethnically (Smith and Gray 1985; Keith 1993; Bowling and Philips 2002; Medina Ariza 2014; Bradford and Loader 2016). People from some ethnic minority groups are more likely to experience this form of

police contact than their majority-group counterparts, a phenomena which has, we should note, been identified well beyond the UK (see Weber and Bowling 2012). Black people living in England and Wales are stopped at a rate around 6 times that which their proportion in the general population would suggest is appropriate, for example (Shiner and Delsol 2015). This is a practice intimately caught up in the debate around institutional and other forms of racism within the police service, and with wider currents of ethnic and racial exclusion and oppression.

Despite the underlying desirability of granting to police an investigatory tool that stops short of arrest, then, the wide-ranging power vested in police to initiate stop and search encounters poses problems for both parties involved. Police lose legitimacy when its use of power seems misdirected; the policed are dragged at least to the threshold of the criminal justice system; all lose when trust in the police is undermined. And these questions are made all the more pressing by the weight of evidence that the power stop and search/frisk can be, and is, misused and sometimes abused. There is the issue of ethnic disproportionality: racial profiling, and equally implicit bias and stereotyping, violate foundational principles of equality and citizenship, and such behaviours on the part of police serve as part of what Epp et al. (2014: 5) call a 'broad, continuing pattern in which racial minorities are disproportionately subjected to suspicious inquiries without any particular basis or justification.' Other disproportionalities have also been identified – by gender, age, social class and across other markers of exclusion (Bradford and Loader 2016) – and the typically low proportion of stop/searches that result in arrests is also an issue. The London Metropolitan Police Service (MPS), for example, has recently improved its 'hit rate' (the proportion of stops resulting in an arrest) to around 20 per cent, from previous rates as low as 9 per cent. But this means that something like four out of five searches in London do not result in an arrest (although a larger proportion does lead to some other criminal justice outcome, such as a drugs warning). There is a constant concern that this implies a misuse of invasive police power.

In sum, stop and search is a police power both necessary and in need of ethical constraint. While it is generally desirable that police have available to them investigatory powers that fall short of arrest, it is important that their use of these powers is restrained, appropriate and proportionate. Yet, evidence from a wide variety of contexts frequently suggests a lack of restraint, inappropriate application, and disproportionate outcomes.

FINDING THE BALANCE: ENABLING AND CONSTRAINING DISCRETIONARY POWER

All this raises a number of important questions about the legitimacy of the power and the wider set of police practices it represents (proactive, police-led, coercive criminal justice interventions, see Tyler et al., 2015; Bowling and Philips 2007;

Delsol and Shiner 2006; Jackson et al. 2012b; Miller & D’Souza, 2015). How can the practice be effectively regulated such that it is wielded in a more ethically sustainable manner? What mechanisms can be put in place to encourage (if not, in the final analysis, to ensure) restraint, appropriateness and proportionality?

In the rest of the paper we consider some of the ways in which constraint might be provided for, while at the same time recognizing that the existence of constraints on police activity also, perhaps paradoxically, enables the use of power – including in an unethical manner. In what follows we are interested in the regulation of police activity in its widest sense, as well as stop and search in particular, where much of this activity – including ‘police stops’ – occurs in settings either not governed by explicit law or, at least, where the police are given very significant discretion in how to apply the law. By regulation, we refer to setting the goal of an activity, monitoring it, and realigning it if it is found to be being misapplied or misdirected (Sanders 2008: 51) – of these, monitoring and realignment figure most prominently in the discussion – but, equally, we are concerned with the question of how to promote and maintain ethical standards within police organizations in a wider sense. By what mechanisms can police officers be encouraged to ‘do the right thing’?

LIMITING POLICE DISCRETION THROUGH CHANGING THE LAW

Most stops occur as and when officers, individually or in small groups, decide on whom to stop and for what reason – of course, the decision on whom not to stop is equally discretionary – albeit that such practice can also be directed by organizational policies and priority setting. Indeed, the extent of discretion available to police in this area seems likely to be one of the key factors driving ethnic and other disproportionalities in stop and search/frisk activity, not least because discretion – the ability to make decisions – enables and even motivates biased and stereotyped decision-making. Officers are often making differentiating or categorizing decisions at very short notice in low-information settings – it would hardly be surprising if they based these decisions on stereotypes, or were subject to implicit biases when doing so (Glaser 2015; Legewie, 2016).

On the face of it, one way to realign police activity in this and related areas would be to place legal limits on officer discretion. It might seem, at first glance, relatively easy to come up with a list of circumstances within which stop and search could and could not be used. But such a task would likely fail, for the simple reason that, as noted by Bittner (1974: 35, quoted in Reiner 2010: 144), the job of the police is to produce contingent solutions ‘to an unknown problem, arrived at by unknown means’. The task of policing is so diffuse and wide-ranging that is impossible to come up with an a priori list of possible problems, the corollary being that potential solutions might be applied in an almost limitless set of circumstances. Discretion on what solution to use and when to use it is fundamental to the practice of police, and to limit it would not only fundamentally

alter the nature of policing but would also make it less effective. As an important tool of policing, not least because it is less invasive than arrest, stop and search provides a potential ‘solution’ to an extremely large number of ‘problems’, and the ethics of its use – whether or not it is the right thing to do – will vary on an almost case-by-case basis.

Police discretion is also vital for another reason: it is impossible to enforce all laws, all of the time; or even for a fraction of the time (Goldstein 1963). Police are constantly engaged in the process of deciding when, where and on whom the law should be applied, and for all that this is a highly imperfect process (the law is misapplied, the ‘wrong’ people are targeted) it is also inevitable. As Goldstein pointed out, it is, first, simply not feasible to enforce all laws or sanction their transgression in every case, not least because resources are limited. Second, police have other aims, such as ‘keeping the peace’ and assisting people in need, which can and do conflict with any requirement to enforce the law. To return to the example at hand, it might be argued that police should be required to stop and search an individual when, for example, they have a strong suspicion of drug use, and that this requirement might be offset by raising the ‘reasonable suspicion’ bar in some way, such that discretion is limited at the top and the bottom of the scale. But to impinge on discretion in this way would create more problems than it solved, as when, for example, a ‘required’ search might increase the risk of public disorder. Police officers are constantly engaged in balancing these types of competing demands.

We do not, then, focus on legal solutions in this paper. This is not because we believe that the law has no place in regulating the power of the police, but rather because we take seriously the findings of 50 years of police research that have found legal regulation to be only one factor among many influencing police activity and, many would claim, a relatively minor one at that (Bittner 1990; Ericson 1982; Reiner 2010). We ask, instead, how and by whom can stop and search be effectively scrutinized, and how can change be effected, if its use is found to be out of kilter with norms of probity and justice? We discuss three possible ways that stop and search practice – and by extension other police activity – might be brought into and maintained within a set of ethical standards or constraints: (a) increasing visibility; (b) extrinsic motivation of individuals and organizations; and (c) legitimacy and procedural justice inside and outside the police. These three headings are intended as heuristic rather than determinative categories, not least because there will plainly be significant overlap and interaction between them. They do, however, provide for a relatively wide-ranging set of possibilities. It is important to reiterate that legal proscription will have a part to play here, but it will inevitably be just one element of a wider process that, we might further suggest, will often exert pressure on police via one or more of the pathways we explore below.

Increasing visibility

There is little doubt that policing is becoming more and more visible, in the sense that technological advances such as mobile phone cameras and internet connections mean that police activity that was previously visible only to those ‘at the scene’ can now be recorded, uploaded and viewed on-line more or less in real time (Goldsmith 2010). Social media ensure that the existence of any such recordings can be rapidly propagated, and there is an ever-increasing blurring of the lines between ‘traditional’ and ‘new’ media that can trigger significant repercussions from particular events, as witnessed most dramatically in the furore surrounding many recent police shootings in the United States. Sanders’ (2008) call for ‘anchored pluralism’ in the regulation of police resonates with the idea that multiple actors can and should be involved in the monitoring of police via enhanced visibility. Whether policing is made visible by change within the service, via body worn video or similar technology, or outside the service via citizen ‘sousveillance’ (Mann et al. 2003) of the police, this process may provide for more effective monitoring of police and constitute a lever through which to exert pressure for change.

Considering the full effect of these developments on police behaviour is beyond the scope of this piece. In a general sense, though, we concur with the argument that the advent of new communication technologies means it is ‘highly probable that the new capacities for surveillance of policing inherent in these technologies may increase the police’s accountability to the public, while decreasing their account ability’ – that is, their ability to provide definitive accounts of events that cannot effectively be challenged by other participants (Goldsmith 2010: 915). It is hard to imagine that such developments will not, to some extent at least, curtail and channel the power of police in new and in all likelihood more ethically desirable (less aggressive, more conciliatory) directions. As proponents of deterrence theory have long emphasized (Ariel et al 2015: 516), even the suggestion of being watched can influence behaviour, for example, if the revelation of non-compliance risks reputational damage or punishment. Yet new communication technologies do not offer a panacea, as the recent (at the time of writing in November 2015) string of recordings of aggressive, violent and lethal police actions in various parts of the United States attests. Being recorded on someone’s mobile phone does not always deter police malpractice. Moreover, police often retain the ability to shape perceptions (most pertinently, in court) of what was reasonable or unreasonable to do in a given situation regardless of whether it happened to be caught on video or not (Brucato 2015).

One specific example of technological change is worthy of a little more consideration, however, precisely because it often is presented as a panacea (Ariel et al. 2015: 510) that will resolve deep-seated issues in the relationship between police and publics – body worn video cameras (hereafter, BWV). These devices are increasingly being taken up by police organizations in the United States, United Kingdom and elsewhere (Jennings et al 2014), and they have been welcomed by

police and activist groups alike as a tool that will increase visibility and transparency, and thus enhance accountability (Brucato 2015) via a new system of monitoring mechanisms that was simply unavailable a decade ago. In terms of our example in this paper, one claim would be that stop/searches recorded by the police are less likely to escalate – since both parties are aware they are being recorded and adapt their behaviours to bring them in line established behavioural norms in relation to, for example, fair process (Ariel et al. 2015) – and if encounters do become more problematic as a result of the behaviour of either party, a record of what transpired will exist to aid any subsequent investigation.

Again, this idea has face validity and seems likely to have some explanatory power. It would seem perverse to argue that the greater visibility provided by BWV will have no positive implications whatsoever. However as Brucato (2015) and others (e.g. Ledderman 2014) have argued there is significant danger in over-emphasizing their potential benefits. First and most obviously, the people wearing the cameras choose when to turn them on and off. The decision on what to record and for how long will rest with individual officers, and while guidelines or more formal rules will obviously play some role (Kitzmueller 2014) the discretion vested in those officers will still grant them significant control over what gets recorded. Yet this is just one example of what Brucato (2015) argues is a much wider problem – the use of mobile recording technology does not obviate, and may even strengthen, the symbolic and actual power of police to ‘frame’ what is recorded, both literally (events recorded on BWV are by definition shown from the officer’s perspective) and figuratively. Despite increased challenges to their authority over recent years police remain ‘legitimate namers’ (Loader and Mulcahy 2001), with a significant ability to define events and shape their resolution. To reiterate the point made above, this means that recordings from BWV are likely to be viewed from a police perspective and in a way that favours police interpretations of what transpired.

In sum, while BWV and other ways of recording police activity are indeed likely to have made it more transparent and accountable, and possibly also more compliant with established norms of probity and fairness. However they do not constitute a magic wand, since they neither undermine the fundamental power of police to define events nor shift officer motivations much beyond reaction to a greater risk of being called out for inappropriate, undesirable or illegal behaviour. This last point is central. Almost all discussion of the influence of BWV and other recording technology on police officers has revolved around rational choice and deterrence theory – the presence of cameras deters them from behaviours they might otherwise have engaged in simply because the cameras increase the risk of censure and sanction. The emphasis is, then, on extrinsic motivations for behaviour that, we argue below, are not necessarily particularly strong or efficacious. On this basis alone increased surveillance of police is unlikely to solve on its own the problems thrown up by stop and search (and many other practices besides).

Extrinsic motivation of individuals and organizations

Extrinsic motivations relate in essence to enticements and punishments. Rational choice (risk and reward) models of human behaviour appear as dominant in the human resource departments of police organizations as they are in many other public- and private-sector organizations (Kohn, 1999; Tyler, 2011). Rewards (such as performance-related pay) and punishments (such as fixed limits on sickness absence) are frequently used to motivate staff. The core idea is that individual officers can be motivated to modulate or realign their behaviour by external pressures. First, they will comply with rules, or conform to priorities when they believe they will be punished in some way if they do not. Stop and search might be encouraged or discouraged, for example, by threatening front-line officers with sanction if they conduct too many, or not enough. Second, they will respond to the promise of reward, and comply and cooperate when they feel they will gain from doing so. Organizations can of course be influenced in cognate ways – by the threat of disapproval, opprobrium or sanction from external actors who are symbolically, economically or legally relevant, or by the promise of financial or other rewards from the same sources.

Tyler (2011: 27) contrasts such extrinsic motivations with intrinsic motivations that stem from personal values and moral beliefs (see below), and the efficacy of extrinsic motivations in relation to individuals is contested, albeit that their potential relevance in a hierarchical and quasi-military organization such as the police cannot be doubted. Police officers do act, and do refrain from acting, because they fear the threat of sanction or punishment. Perhaps more importantly, though, it seems almost certain that police organizations are open to influence via, in particular, the threat of sanction or disapproval from legally or politically relevant actors – particularly those with control legislation and/or budgets.

An example of just such a process has been observed in London in recent years precisely in the arena of stop and search. Following a peak in the numbers of stop and searches around 2011/12, and a corresponding upsurge in the level of dispute around the practice – some of which was shaped by the aftermath of London riots in 2011 – the Home Secretary Theresa May made a number of highly critical comments about the Metropolitan Police's (MPS) use of the power, which she repeated on numerous occasions over the next few years. In April 2014, for example, she said in Parliament that 'if the numbers do not come down, if stop and search does not become more targeted, if those stop-to-arrest ratios do not improve considerably, the government will return with primary legislation to make those things happen' (Guardian 2014). In the face of threats of an enforced change to its practice – and perhaps equally importantly to stigma associated with such a threat – it appears the MPS made significant changes in relation to the use of stop and search; or, at least, it encouraged its officers to do so. Over 468,000 stop and searches under PACE section 1 and associated powers were conducted

in London in 2011/12;¹ by the calendar year 2014 this had fallen to less than 200,000.² As noted above, arrest rates increased over the same period. It is important to note here that the use of power was not changed by legislation, but, apparently, by the mere threat of legislation, and the political pressure exerted by police not only by the Home Secretary but by activist groups as well (e.g. Release 2014).

Despite such apparent successes, however, it is unlikely that extrinsic motivations in relation to either officers or organization will be enough on their own to maintain an appropriate level of constraint on police power – or of ethical practice – in this or any other area. Notably, there was a previous reduction in the use of stop and search, and ethnic disproportionality, in England and Wales around the time of the Stephen Lawrence enquiry in 1999, and it is generally hypothesized that this reflected at least in part change in police practice in the face of significant public and political scrutiny in the wake of the scandal the enquiry uncovered (e.g. Shiner and Delsol 2015). However, as the political agenda changed and shifted focus in the early years of the new millennium the use of stop and search, and ethnic disproportionality, increased significantly. By the middle of the decade both had surpassed previous levels.

Extrinsic motivations are by nature short-lived and even transitory. Individuals shift back to previous behaviour patterns once threats and rewards lose salience. This is a key criticism of, for example, performance related pay (Frey and Osterloh 2012; Perry et al. 2009) – it does not motivate long-term change to attitudes and behaviours. It seems organizations are much the same. Moreover the overall effect of even fundamental changes to the legal framework around stop and search – that might be expected to generate changes in practice by shifting structures of risk – is contested. Sanders (2008) claims, for example, that the introduction of PACE actually did little to affect street-level police practice, certainly as the ‘shock’ of its introduction receded. Of course, we might also note that there has been few if any convictions or other sanctioning of officers for breaking the PACE guidelines (c.f. HMIC 2013) and, of course, that many ‘police stops’ occur entirely outside the framework it established.

Legitimacy and procedural justice inside and outside the police

Our third set of possible ways to regulate the power of the police and motivate ethical practice revolve around the relationship the police have with the policed, and the ways in which police behaviour affects this relationship. In our view, the need for police to retain a certain level of legitimacy among the populations they serve provides an important empirical constraint on their behaviour and, moreover that processes of legitimation within the police may be critical for understanding how police behave in relation to the police.

¹ <http://www.stop-watch.org/your-area/area/metropolitan>.

² MPS Stops and Searches Monitoring Mechanism, January 2015. Available at:

http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/borough/mps_stop_search_mon_report_january2015.pdf.

The most important understanding of the relationship people have with police and other legal authorities is currently provided by work conducted under the banner of procedural justice theory. Developed by Tom Tyler and colleagues in the US (Sunshine & Tyler, 2003; Tyler 2006a, 2006b; Tyler and Blader 2000; Tyler and Huo 2002) and increasingly applied in contexts across the world (e.g. Hinds and Murphy 2007; Tankebe 2009; Hasisi & Weisburd, 2011; Huq et al., 2011; Murphy & Cherney, 2012; Factor et al., 2013; Mazerolle et al., 2013; Jackson et al., 2014; Bradford et al., 2014; Slocum et al., 2015; Pennington, 2015; Cheng, 2015; Saarikkomäki, 2015; Akinlabi, 2015; Van Damme, 2015; Wolfe et al., 2015; Cavanagh & Cauffrana, 2015; Mclean & Wolfe, 2015; Reisig & Bain, 2015; Bieijersbergen et al., 2015; Murphy et al., 2016), procedural justice theory stresses the social connection between criminal justice agencies and the populations they serve. Studies of the general population have found that people regard the police as legitimate when and if they believe officers exercise their authority through fair and impartial means – that is, when they behave in a procedurally just manner (Sunshine & Tyler, 2003a; Tyler and Huo 2002; Jackson et al, 2013).

There is also some evidence of procedural justice effects among what might be termed ‘offender populations’ (Paternoster et al. 1997; Papachristos et al., 2012; Barrajon et al., 2015; Murphy et al. 2016) and in relation to other criminal justice agencies, for example prisons, which unlike the police deal primarily with such populations (Sparks et al. 1995; Robinson and McNeil 2008; Liebling 2004; Brunton-Smith & McCarthy, 2015). It seems that the associations between experiences of policing, trust and legitimacy described above are found among social groups or categories of individual who might be expected to be alienated from the police and thus uninterested in the expressive aspects of police behaviour, although this is not of course to claim that procedural justice effects are in any sense universal.

Procedural justice is marked and demonstrated by transparency, fair, equitable and respectful treatment, following correct procedure and not exhibiting bias, and a feeling of control over the processes through which people interact with authorities. People place particular value on voice (Hirschman 1970) during interactions, neutrality on the part of the authority, treatment with respect and dignity, and a sense of trust, meaning that the term ‘procedural justice’ refers to neither process in a technical sense – for example in terms of court process or police protocol – nor to justice in a normative or philosophical sense. Rather, what is at stake is individuals’ subjective judgements about the quality of interpersonal interaction with police officers and the openness of police decision-making processes that affect them. Treatment that is experienced as fair, decent and respectful encourages people to trust the police; a general perception that police behave in a fair way promotes a similar sense of trust. Despite the lack of formal correspondence between ‘procedural justice’ and more legally informed notions of ‘fair process’ it is an interesting feature of work on procedural justice that there is a strong correspondence between lay understandings of the way criminal justice

agencies should behave and institutional and legal structures intended to govern their behaviour – what in the US might be termed ‘due process’ and a respect for individual’s rights, for example – which are themselves oriented toward objective criteria of justice and probity.³

Importantly, research has failed to find consistent links between perceptions of the instrumental effectiveness of police and legitimacy (ironically, perhaps, if police officers believe that their legitimacy is earned by effectiveness not procedural justice, see Nix, 2015). While in some contexts, such as developing countries (Bradford et al. 2014; Tankebe 2009), it may be that efficacy and efficiency are strongly linked to legitimacy, studies conducted in developed countries regularly find only weak associations between measures of police effectiveness (for example in dealing with crimes or maintaining order) and measures of legitimacy (for an overview of the European context see Hough et al. 2013). Just as it seems that deterrence – the demonstration of effectiveness – has relatively little direct influence on offending (although it can have some), effectiveness has relatively little direct association with legitimacy (although, again, it can have some).

THE WORK OF LEGITIMACY

Police rely on the legitimacy they command to operate effectively (Tyler, 2003, 2004). If procedural justice theory is correct that legitimacy is founded most importantly in the use of fair process, then the constant need to establish and reproduce legitimacy may serve as an important check on police power (Sunshine & Tyler, 2003; Tyler, 2006a, 2006b; Hough et al., 2013). While such power may, in a conceptual sense, be ‘unlimited’ – since the police are the arm of that the State charged with confronting all possible internal threats to its integrity and effective functioning (see Dubber, 2005) – it is limited in an empirical sense by the need for police to ensure they do not behave in ways that consistently challenge their legitimacy and which might, in the long run, undermine or even remove it. Should this occur, the very existence of the organization would be called into question – the ultimate extrinsic motivation, perhaps. What this means is that police cannot simply ‘do what they want’, despite the extent of the power vested in them, and this is for reasons less to do with the law (although the law will of course be relevant in some circumstances) and more to do with the fact that every interaction they have with citizens is a moment in which legitimacy is tested, proved or undermined (Tyler 2011).

There are, however, some important provisos to this argument. First, it is obvious that police organizations can and do act in ways that run against dominant norms of probity and fairness without necessarily undermining their legitimacy in

³ Although we note, of course, that these regulations are often honoured more in the breach than in the observance, and that criminal justice agencies often behave in ways that are subjectively and objectively unfair.

any fundamental sense. There are too many examples to count, but one is the continued over-use and even abuse of stop and search/frisk, which all available evidence suggests has been used unjustly on many occasions in the UK and elsewhere. Not only has the legitimacy of the police not collapsed as a result of this; public support for the use of stop and search remains, in a general sense, high.

Second, and relatedly, police behaviour that runs counter to norms of procedural justice can be, and is, tolerated by some individuals and groups if it is directed at denigrated or excluded out-groups. Indeed, since procedural justice is not the only factor shaping legitimacy, there may be significant numbers of people who might in fact respond positively to police ‘cracking down’ on out-groups and grant legitimacy on that basis, at least to some degree (c.f. Harkin 2014).

Third, it is likely that legitimacy can create the possibility for acting beyond established norms, or against community wishes, since it creates a reservoir of goodwill on which police can draw and against which they may discount specific transgressions; a notion akin to Easton’s (1965) concept of diffuse support. There are historical resonances here, in that police abuses in the past were almost certainly facilitated by the unquestioning adherence of large sections of the population to the legitimacy of the police (see for example Royal Commission on the Police 1962): high levels of legitimacy created the space in which police malpractice could flourish. However, as the history of policing in a country such as the UK shows, this reservoir can be drained, not least by reports of police misbehaviour and corruption (Bradford 2011).

Fourth, the external notion of legitimacy positions the organizational need for legitimacy as a kind of ‘natural’ constraint on police power because this legitimacy rests on citizens’ experiences of the fairness of police activity. However, to the extent that the police do not rely on the policed for legitimacy (i.e. where it is granted directly by the state or by some other authority), the need to reproduce legitimacy will provide much less of a constraint on behaviour because it is less reliant on the quality of the police relationship with the policed.

ENCOURAGING LEGITIMATE POLICING

Provisos aside, it can be argued that the need to establish and reproduce legitimacy serves, at least in a country such as the UK, as an important check on police power. Because abiding by established norms of fairness is such an important factor shaping legitimacy, police have a strong motivation to engage in ethically desirable practice; yet this raises an important question. How can officers be encouraged to behave in ways that produce and reproduce legitimacy? It is highly unlikely that such behaviour will simply arise organically, not least because of the well-known disconnect between the ‘police culture’ emphasis on crime-fighting and thief-taking and the prioritization of procedural justice among large sections of the population (Jonathan-Zamir et al. 2014). It seems that for many police, the

way to generate legitimacy is to demonstrate firm effectiveness not treat people with procedural fairness. Equally, the pressures and conflicting priorities under which most police operate might seem inimical to the development of relationships with the policed based on fairness and shared interests – to police, that is, procedural justice often seems nice to do but not essential (Foster et al 2010). And if legitimacy as a motivating factor remains extrinsic, tied to external forces to which police merely respond, then as argued above it is likely to provide only a weak check on practice in the long run. An upswing in public concerns about fairness might affect police practice in the short term, but once the spotlight of media and/or political attention turns elsewhere things are likely to return to the status quo ante.

There is, however, an emerging body of evidence that police activity – the actions of individual police officers and the values that underpin them – can be influenced by procedural justice within the organization. Just as members of the public value fairness, openness, honesty and respect in their interactions with police, so officers value these same features of their relationships with their superiors (Bradford et al. 2013; Bradford and Quinton 2014; Haas et al. 2015; Myhill and Bradford 2013; Schafer 2013; Tankebe 2011; Wolfe and Piquero 2011). Research has shown that ‘organizational justice’, a term generally assigned a meaning very close to that of procedural justice (Colquitt et al. 2001; Colquitt et al. 2008), can enhance positive forms identification with the police organization, promotes commitment to organization goals and norms, and is associated both with positive views about procedurally just and community based modes of policing and lower levels of misconduct.

While little research thus far has directly addressed the issues at hand, it seems that one possible way to regulate the power of the police is to ensure that those wielding this power – street-level officers – are treated in as organizationally just manner as possible by their managers and superiors. Particularly striking is research that suggests fairness within police organizations is associated with greater ‘buy-in’ to organizational goals (Bradford et al. 2013; Bradford and Quinton 2014; Myhill and Bradford 2013; Tankebe 2011), and a diminished adherence to problematic beliefs and behaviours (Wolfe and Piquero 2011). On these accounts, if police organizations set the correct goals – for example in relation to the appropriate use of powers such as stop and search – and communicate these to staff effectively, then compliance with them will be promoted by use of fair processes within the organization. At one level, this appears as a version of social exchange theory – the ‘reward’ of fair treatment (as a form of emotional resource) is linked in a reciprocal relationship with behaviours that actors believe will stimulate the reward in the future. Much work on organizational justice, however, shares with procedural justice theory (e.g. Bradford et al. 2014) the idea that fairness at the hands of group authorities – in this case superiors within a work setting – promotes identification with the organization as a social group and, over time, internalization of its aims and values (Tyler and Blader 2000, 2003).

Organizational justice - and the positive identification with the police organization that it engenders - has also been directly linked to processes of internal legitimacy development (Bottoms and Tankebe 2012; Bradford and Quinton 2014). Processes of legitimation are intimately linked with processes of identification (Barker 1991) and those with power and authority in a particular context are constantly engaged in generating a narrative that both justifies their power – turning it into authority in their own minds – and elides the difference between the self and the role. ‘Self-legitimacy’, in these terms, is an important motivator of behaviour, enabling actions by providing them with direction and meaning. Behaviour that fits a self-legitimizing narrative reinforces the feeling of justified authority those with power require if they are to maintain an appropriate image of themselves and confidence in their own authority. This narrative also helps constitute a set of claims to legitimacy, and is a key part of the legitimacy dialogue envisaged by Bottoms and Tankebe (2012).

Bradford and Quinton (2014) found that identification with the police organization was very strongly correlated with officer’s confidence in their own authority (their sense that their use of power was justified), and that both identification and self-legitimacy predicted attitudes toward policing means, such as the appropriate use of force, and ends, such as protecting suspect’s rights. Working with a sample of police officers from an English constabulary, they argued that identification with the police force promoted ‘buy-in’ to its values, and promoting or acting on these values became an important part of the officer’s construction of self and understanding of themselves as figures of authority in society.

There is a possibility, therefore, that there is a virtuous circle that links organizational justice within the police organization, through officer’s identification as police, to their sense that their power and authority is justified. Identification and legitimation motivate attitudes and behaviours that ‘fit’ with the narrative of justified authority of which they are part. The obvious problem is that identification and legitimation within police organizations might, absent a clearly expressed and honestly held set of ethical goals and criteria for success, encourage officers to behave in ways different to those outlined above. That is, the narrative of policing has to be based on a more or less clearly expressed set of ends and means, and these have to be the right ends and means in an ethical sense for the above process to be considered ‘virtuous’. Police organizations need to communicate clearly to staff how they are expected to behave, and why, if organizational justice is to lead to or promote ethical behaviour ‘on the streets’. Because officers internalize the values the organization expresses to them as part of the process of identification and legitimation, it follows that if these are the wrong values then behaviours that reinforce the narrative of self-legitimacy might look rather different.

Stop and search again provides a useful example of this latter kind of process. As suggested above police organizations all too often over-stress, to both internal

and external audiences, the need for and desirability of instrumental effectiveness in relation to crime over other aspects of police-work, such as its more service- and even social service-related aspects (Punch 1979). Based in some of the classic elements of 'police culture', such as the thin blue line ideology and the emphasis on 'thief-taking' (Reiner 2010), and also the continued dominance of deterrence-based thinking in police policy and political discourse, this emphasis communicates to officers that what is really important is 'getting results'. This in turn becomes a value and an aim, working towards which is integrated into their identity as police officers and their sense of their own legitimacy. Stop and search practice – more or less pro-active policing aimed at solving or preventing crimes and asserting order on the streets – may then be an important element in both officer's self-legitimacy and the legitimization claims they make to others. Despite the problematic history of stop and search, this is a power that can nevertheless represent the activity of policing in important ways, its chance for success and the place of police in wider society. Stop and search may serve as a mechanism through which legitimacy is claimed; the need to make such claims, and the types of benefits they might bring for police if successful, may provide one set of reasons for its continued use.

It is also undoubtedly the case that there is significant support for stop and search – and pro-active and even aggressive policing styles more generally – among the general public, certainly in a general sense and, on occasion, in specific instances (Fitzgerald et al. 2002). Pro-active, and sometimes aggressive, policing is popular among a significant proportion of the population (Girling et al. 2000), at least as long as it is not aimed at them (*ibid.*), and it is not entirely unreasonable for police managers to respond to such preferences by encouraging officers to use stop and search. In other words, as well as pressure from within the service that can be both cultural and managerial, there are external factors that may encourage police to believe increased, or at least continued, use of stop and search is not only acceptable but desirable and supported by the communities they serve. Responding to community priorities is central to legitimization processes, at least in as much as these embedded in discursive or dialogical forms of legitimacy, and we should not imagine that such community priorities revolve only around procedural justice. Most obviously, significant numbers of people in many social settings will as noted wish police to target and control 'difficult', 'recalcitrant' or simply different population groups, and the extent to which they grant police legitimacy will be based, in part, on the perceived success or failure of such efforts.

The key to ethical practice in this area would thus seem to be promotion of organizational structures and processes that encourage appeals to notions of fairness, dignity and respect that cross the boundaries of the police organization (i.e. that are important both within it and in its relationship with external actors) while at the same time minimizing the valence of more atavistic strands of public opinion. Stop and search stands for a much wider set of police powers, practices and policies situated in the nexus formed by these competing forces. Indeed providing at least a provisional reconciliation of these forces – charting a course

between the need to be responsive to the desires and wishes of the policed and the need to resist some of those desires – is, arguably, a key task of the police: albeit one which it often fails to live up to.

SOME CLOSING WORDS

Our discussion has emphasized the need for those at the top of police organizations to promote ethical policing practice that will, in as much as it is based on fair process, serve to bolster legitimacy. Equally, the reconfiguration of internal structures along the lines of organizational justice should motivate individual officers to internalize such values and enact them in their day-to-day activity. These processes can and indeed possibly do place ethical constraints around the exercise of discretionary police power, and we have considered in this paper the idea that legitimacy inside and outside the police provides a useful source of moral regulation – particularly when the need or desire to reproduce legitimacy is operative within a context marked by high levels of visibility around policing.

Yet, while the quest to win and maintain legitimacy through fair, neutral and equitable policing may be an important constraint on police power, its usefulness relies to a significant degree on the extent to which police (a) understand and act on what people ‘really want’ from policing but also (b) are operating according to a set of normatively justifiable set of ends and means. The empirical legitimacy of the police is not an absolute limit on the exercise of police power; the extent to which (the need for) legitimacy constrains police action is conditional on the criteria used by the policed to assess the police. In as much as their assessments revolve around principles of procedural justice, police power will be constrained and channelled in ethically desirable directions. Where other factors become more important, this restraint may be attenuated and even removed. One obvious conclusion here is, unsurprisingly, that recourse to normative concepts of legitimacy is needed to ‘ground’ this relationship in a set of objective criteria against which police can be judged. It will not be enough to claim, or even demonstrate, that there is widespread public support for police activity – this activity must also be held up against ethical and legal norms that establish its legitimacy in a quite different sense.

Of yet more concern is the possibility that legitimacy also enables malpractice. Our claim that it is a useful constraint on police power is empirical rather than normative, and it is easy to envisage situations where there is ‘too much’ legitimacy, a state of affairs that would seem likely to open up space for, allow, and even encourage normatively undesirable police activity. As noted above, there is much to suggest that, historically, a broadly unquestioned legitimacy allowed the British police if not necessarily to get away with murder then often

something very close. Which is to claim that there is a significant, and probably irreconcilable, tension – or even paradox – at the heart of our argument. Police need legitimacy to survive, and are thus constrained in their use of power by the need to demonstrate procedural and other forms of fairness. But legitimacy also enables police to wield their power, provides a reservoir of support in the face of individual malpractice, and possibly even mandates problematic modes of policing. The interplay between these countervailing factors, and their particular configuration at any point in time, is likely to have a significant effect on practices such as stop and search – the ends towards which they are directed, how they are conducted, and the ways they are experienced by the policed.

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