Boundary Policing

Jake Monaghan

See published version in *Philosophy and Public Affairs.*

The structure of institutions—including the boundaries of their authority—can be as significant for securing just and legitimate outcomes as the rules that govern their operations.[1] For example, the separation of executive, legislative, and judiciary powers is widely regarded as necessary for good governance; the executive ought not to make the rules *and* enforce them. Without such institutional boundaries, the enforcement of rules is likely to become arbitrary or discriminatory, thus illegitimate, and the entity enforcing the rules is at risk of becoming illegitimate as well.

Executive power is subject to a number of additional boundaries that are well-entrenched yet more fine-grained. The powers of national defense are separated from the powers of domestic law enforcement. The power of making an arrest is distinct from the power to punish. Police are themselves subject to a variety of geographic and statutory boundaries. Federal agencies, for example, are much more specialized than city police departments or county sheriff's offices. Unlike the most foundational boundaries of political power, the organization of lower-level institutions like policing has often arisen in practice without theoretical examination. I'll argue that the political power in our institutions of policing is poorly allocated.

[1] I rely on a normative conception of legitimacy in this paper, following Buchanan's use of the term: "an entity has political legitimacy if and only if it is morally justified in wielding political power." Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112, no. 4 (July 2002): 689.

This paper aims to remedy that by developing a theoretical framework for evaluating institutional structures of policing.

Normative questions about the form of policing have recently taken center stage in political discourse as protests against police brutality have swept the United States.[2] Increasingly, the possibility of reorganizing, defunding, or even abolishing police institutions is being taken seriously. These responses to the ills of American policing are not focused simply on the behavior of police officers or the justice or legitimacy of the criminal code: they are more fundamentally about which agencies should be responsible for providing the services currently handled by local law enforcement agencies. They are, in other words, about institutional boundaries. Just as improperly bounded institutions can introduce illegitimacy at the level of the executive, legislature, and judiciary, so too can they render illegitimate the efforts of police agencies.

To this end, Section One develops the idea of a "legitimacy-risk profile" that illuminates which features of institutional arrangements make them tend towards illegitimacy. Sections Two and Three draw together common boundaries in policing with legitimacy-risk profiles to explain why certain kinds of policing are especially objectionable and to recommend separations of police power that make policing more legitimate. The resulting framework allows us to make more subtle distinctions about the legitimacy of political institutions than do theories about whether a state is legitimate overall, highlighting the importance of separations of power all the way down the political hierarchy. Section Four concludes.

---

[2] The Minneapolis police officer Derek Chauvin's killing of George Floyd on May 25, 2020 has led to perhaps the largest political movement in U.S. history, surpassing the civil rights movement of the 1950s-60s. Larry Buchanan, Quoctrung Bui, and Jugal K. Patel, "Black Lives Matter May Be the Largest Movement in U.S. History," *The New York Times*, July 3, 2020.

I Legitimacy-risk profiles

To help determine legitimate separations of power and understand some of the pathologies of policing, I propose legitimacy-risk profiles as a tool. This section will explain what a legitimacy-risk profile is, motivate their use, and detail some of the particular risks relevant to policing.

A legitimacy-risk is a characteristic of an entity that decreases the likelihood that its political power is permissibly exercised. This is of course quite broad; a police officer who enjoys violating civil liberties is a legitimacy-risk, as is an intemperate president. My focus in this paper shall be on the institutional structures that ameliorate or exacerbate risks to police legitimacy. Constitutional protections, for example, exist as institutional checks on the legitimacy-risks of ill-motivated police officers or presidents. The relevant risks for present purposes are those that can be addressed by appropriate separations of police power.

A legitimacy-risk *profile* is just the collection of legitimacy-risks associated with a political institution. Certain characteristics of an institution are high risk and others are low risk; additionally, the risks can interact and amplify one another. Legitimacy-risk profiles help match institutional arrangements to the particular normative constraints on their goals. This will become clearer after articulating the relevant components of the profiles.

The sense of legitimacy I am relying on is normative. An arrest, for example, is legitimate when it is morally permissible. Legitimacy is connected to justice, though less demanding. It does not require perfect justice.[3] Legitimacy-risk profiles, as I'll develop them, are composed of objective standards, combined with an element of democratic authorization. This contrasts with the descriptive sense of

---

[3] Cf. Buchanan, "Political Legitimacy and Democracy," 689; John Rawls, *Political Liberalism* (Columbia University Press, 1996), 137.

legitimacy found in most police scholarship where police activity is legitimate simply if it is widely accepted as justified by the people being policed.[4] Of course, democratic theories of legitimacy blend these together to some extent. But while I will take democratic authorization to be important for understanding the legitimacy-risks of policing, widespread acceptance is not the only relevant factor as descriptive theories of legitimacy might have it.[5]

To motivate the utility of legitimacy-risk in determining separations of power, consider the boundary between police and military. In some ways, the United States is founded on a reaction to illegitimate policing by soldiers. British soldiers were deployed for law enforcement in the colonies.[6] After the revolution, the Bill of Rights prohibited quartering soldiers in private homes, unreasonable searches and seizures, and required judicial approval of warrants. A standing army was controversial in early American political thought; domestic law enforcement *by soldiers* especially so.

This is not merely a parochial element of American politics. The very first of the "Peelian Principles" (principles apocryphally attributed to the founder of London's Metropolitan Police, Robert Peel) reads: "To prevent crime and disorder, as an alternative to their repression by military force and severity of legal punishment." Professional, domestic law enforcement has long been distinguished from military force.[7]

---

[4] Tom R. Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law," *Crime and Justice* 30 (2003): 283–358.

[5] Descriptive theories of legitimacy are so permissive that they do not even require democratic authorization.

[6] Radley Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces* (Public Affairs, 2013), 213.

[7] It is true that this is not the case everywhere. Some police functions are provided by a gendarmery—a branch of the military with domestic police power. Still, police functions are often separate from the military functions even when there isn't such a sharp institutional boundary. In the

There is good reason to sharply differentiate military and police activities, and the organizations that conduct them. Good policing requires the exercise of discretion.[8] Whereas soldiers can receive frequent and rather specific orders, police officers tend to be subject only to the kind of professional management other professionals are (e.g. performance metrics, contribution to agency-wide goals, etc.). Good police officers seek to deescalate situations and avoid the use of force. Military training encourages aggressive, lethal use of force. Police activity is also constrained by a set of civil liberties that do not constrain military activity.

For these reasons, asking standing armies to police the citizenry is highly likely to result in unjustified uses of force. In other words, using the military for policing has extremely high legitimacy-risk. One requirement for just and legitimate police power, then, is that domestic policing must be conducted by a separate agency.

If justice and legitimacy require not only separations of legislative and executive power, but further boundaries between kinds of executive power—police and military power—then this will likely entail a requirement for other boundaries. Some earlier police boundaries were very obviously unjust and illegitimate. Miami once had an entirely self-contained criminal justice system for Black citizens.[9] This is an unambiguously illegitimate institutional arrangement. But the legitimacy of other arrangements is less

---

Netherlands, some police functions predate the establishment of police departments and were isolated within a specific branch of the military called the Royal Marechaussee (*Koninklijke Marechaussee*). Policing in the Netherlands is also carried out by regional, non-military units; even the Royal Marechaussee answers to a civil, rather than military leader. What we see in these cases is a different method for achieving the institutional boundary between domestic police and defense military powers.

[8] James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (Harvard University Press, 1978), 83; David H. Bayley, *Police for the Future* (Oxford University Press, 1996), 64.

[9] W. Marvin Dulaney, *Black Police in America* (Indiana University Press, 1996), 68.

obvious. Consolidating police departments was thought by many police scholars and policy analysts to be an

attractive way to increase the quality of policing. Elinor Ostrom and others found that communities prefer

smaller, more geographically constrained police departments.[10] Legitimacy-risk profiles are a tool for

answering normative questions that parallel the ones Ostrom was interested in, ones concerned with the

form of police agencies.

One of the virtues of a risk-based framework is that actual political institutions are fallible. The

police and the courts will make mistakes, so the standard for legitimacy must accommodate that if any

political entity is permitted to exercise political power. It is also occasionally unclear from within the entity

when it is making a mistake. This further underscores the need for a framework that provides guidance

regarding such a risk.

Another virtue concerns the relationship between individual mistakes and an entity's overall

legitimacy. Enough unjustified action undermines overall legitimacy.[11] Yet it is hard to imagine a fully

specific account of what it takes for an entity to lose legitimacy. Legitimacy-risk profiles are one such tool

because they explain when an entity will tend to act without sufficient justification, and thus tend towards

overall illegitimacy, while remaining sensitive to the fallibility of institutions.

Having explained the function legitimacy-risk profiles are to serve and the virtues of the

framework, let's now canvas several of the risks relevant to policing. Risky power is characterized by

---

[10]Elinor Ostrom, Roger B. Parks, and Gordon P. Whitaker, "Do We Really Want to Consolidate Urban Police Forces? A Reappraisal of Some Old Assertions," *Public Administration Review* 33, no. 5 (1973): 423–32.

[11]This is a simplification for the purposes of the paper. While it seems intuitive that enough illegitimate actions render an agency itself illegitimate, the relationship is complicated. I leave the relationship unspecified beyond the claim that high levels of illegitimate activity calls into question the agency's overall legitimacy.

harshness, high burdens, proactivity, and weak normative mandates. The rest of this section characterizes these legitimacy-risks and concludes with a discussion of their interactions.

Harsh and lenient power. An institution or enforcement strategy is harsh insofar as it places burdens on those who do not deserve it, and lenient insofar as it fails to place burdens on those who do. If a police strategy requires officers to stop and search large numbers of people, most of whom are innocent, the strategy is harsh.

Likewise, a trial system is harsh when it burdens undeserving, innocent defendants, and lenient when it fails to burden deserving, guilty defendants. It is widely held that harshness is a more significant problem than lenience.[12] In order for a criminal justice system to be legitimate, we must be able to justify the force employed by the system, and false negatives, while regrettable, do not result in the use of force.[13] This helps illustrate the distinction drawn above between illegitimate acts of political power and illegitimate political entities. The unavoidable fallibility of a trial system requires that the system can be legitimate so long as its errors are appropriately patterned.

Policing ought to be generally lenient for similar reasons. After all, in the trial case we're interested in justifying political power, a consideration equally relevant in policing. One might object here that because the harsh/lenient distinction concerns a distribution of impermissible conduct, it is not properly understood as a risk factor for impermissible conduct. Responding to the objection helps to clarify what is meant by harsh policing.

---

[12]Cf. Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006), 63.

[13]This is an oversimplification, but I must set aside the problem of discriminatory non-enforcement in this article.

In the case of the trial system, the objection is right; a harsh criminal system *constitutes*, rather than being a *risk* for, illegitimacy. In the context of policing, on the other hand, harshness doesn't automatically entail illegitimacy. The reason is that while punishing an innocent person is impermissible, burdening an innocent person with police power is not always impermissible.

Consider surveillance power: if an officer parks her cruiser in a high crime area to keep an eye on things, she is subjecting everyone in the area to some kind of police power. Most of them will be innocent and will not deserve the burden. This is harsh, though not obviously impermissible. It is, rather, better understood as a risk to legitimacy. In both policing and the trial context, harshness concerns the distribution of burden. But only in the trial context is a harsh distribution necessarily in error.

That the patrol officer's surveillance is plausibly legitimate should not lead one to think that harshness is not a legitimacy-risk. Further reflections on surveillance suggest that harshness itself is a risk. *Widespread* surveillance is objectionable, and many think illegitimate, precisely because it subjects so many innocent people to political power without sufficient reason. In the above example, the police power is localized to a crime hot-spot, and thus the burden is more easily justified. But if we imagine citywide surveillance not isolated to crime hot-spot locations and times, the increased harshness poses a greater risk to legitimacy.

As a police strategy increases in harshness, the likelihood that it is legitimate decreases. An intermediate strategy between local hot-spot surveillance and comprehensive surveillance, such as stop and frisk strategies, is risky because of its harshness. Additionally, as we'll see, even low levels of harshness amplify other legitimacy-risks when they interact. We have to consider harshness's counterpart legitimacy-risk: the magnitude of the burden.

High burden power. The magnitude of the burden associated with being subjected to particular instances of political power also helps to determine the legitimacy-risk of police activity. The higher the burden, the greater the legitimacy-risk. In the case of a criminal trial system, the burden on those found guilty is so high that a harsh distribution undermines overall legitimacy. But the patrol officer's surveillance is low burden enough that it does not clearly undermine the legitimacy of the strategy.

The magnitude of the burden of political power determines how difficult we ought to make it to subject people to it. A death sentence is extremely high burden. For this reason, the legal path to administering the death penalty is long and expensive (if the path even exists). On the other hand, the burden associated with receiving a speeding ticket is comparatively low. Given that the burden is rather low, if an innocent motorist is the victim of an accidentally inaccurate radar gun, we take this to be an unfortunate rather than an illegitimate use of force.

We can think of this in terms of proportionality in self-defense or war.[14] Just as military force must be proportionate (the amount of force needs to match the expected benefits), so must other instances of political force.[15] The higher the burden associated with an instance of political power, the higher the legitimacy-risk, because the less likely it is to be proportionate. When the burdens are high, we institute other protections. These include raising the burden of proof in a criminal trial to increase its lenience, capping the penalty associated with criminal activity in sentencing guidelines, or rules prohibiting officers from firing at fleeing suspects.

---

[14]Helen Frowe, *The Ethics of War and Peace*. (New York: Routledge, 2016), 53.

[15]Jake Monaghan, "Legitimate Policing and Professional Norms," in *The Ethics of Policing: An Interdisciplinary Approach*, ed. Ben Jones and Eduardo Mendieta (New York: New York University Press, Forthcoming).

Proactive and reactive power. A third important component concerns proactive and reactive power. Exercising power proactively involves seeking out problems to address them without being invited to do so by citizens. Exercising power reactively, on the other hand, involves responding to existing problems, often at the request of citizens. Reactive police power, more often than not, amounts to third-party defensive force which faces no special justificatory burdens.

Frustrated by the perceived inability of merely reactive policing to deter crime, "problem-oriented policing" has become influential within law enforcement, making policing more proactive.[16] Though determining this with any confidence is difficult, proactive policing might in some cases be more effective than reacting to crime and disorder.[17] But it also comes with additional legitimacy-risks. This is because the police are *initiating* power. Reactive power, whether political or private, is lower risk. The special justificatory challenge of preventive warfare, for example, is rooted in the high legitimacy-risk of proactive coercive political power.[18]

Normative mandates. Consider, finally, strong and weak "normative mandates." When a law is especially controversial and not widely supported, it is weakly mandated, increasing the legitimacy-risk of certain modes of its enforcement. This legitimacy-risk is connected to democratic authorization and informs the legitimacy of police agency priorities and enforcement strategies.

Democratic decision-making in diverse societies is in part a way to overcome the difficulties of "perspectival diversity." Perspectival diversity refers to the fundamental moral and descriptive differences in

---

[16]Bayley, *Police for the Future*, 103; Michael D. Reisig, "Community and Problem‑Oriented Policing," *Crime and Justice* 39, no. 1 (January 2010): 1–53.

[17]Franklin E. Zimring, *The City That Became Safe: New York's Lessons for Urban Crime and Its Control* (New York: Oxford University Press, 2012), 142.

[18]Frowe, *The Ethics of War and Peace*, 75–83.

how we understand the world that underly our policy disputes.[19] When elections result in large margins of victory, we can say that either there is low perspectival diversity on the matter, or that despite the high level of perspectival diversity, the various perspectives converge on a political decision. This is why elections with large margins of victory tend to confer stronger justification. The degree of electoral support a candidate receives determines their "manifest normative mandate."[20]

Keeping in mind the connection between perspectival diversity and normative mandates allows us to distinguish mere tyranny of the majority from genuine democratic authorization and to see the legitimacy-risks associated with prioritizing and aggressively enforcing weakly mandated laws. If a policy is selected by a large majority but split along the lines of relevant political groups, such as when Jim Crow laws were widely supported by white voters, the lack of support across diverse perspectives weakens the law's normative mandate. Jim Crow laws also show that, in general, the enforcement of laws that will mostly burden the groups who declined to authorize the law are especially weakly authorized, if it all.

When we have significant perspectival diversity and thus a weak normative mandate for a particular policy matter, it is natural to conclude that we should tread lightly. This is close to the core of theories of liberal democratic justification. When we have little diversity and disagreement and thus a strong normative mandate, we have less cause for concern with respect to democratic authorization.

We need a connection between democratic authorization and legitimate policing that takes into account the variations in the strength of justification for laws. The relationship between representatives and

---

[19]Ryan Muldoon, *Social Contract Theory for a Diverse World: Beyond Tolerance* (Routledge, 2016), 3.

[20]Alexander A. Guerrero, "The Paradox of Voting and the Ethics of Political Representation: The Paradox of Voting and the Ethics of Political Representation," *Philosophy & Public Affairs* 38, 3 (2010): 274.

voters is underdetermined by an electoral victory.[21] The relationship between enforcement strategies and

democratic decisions is similarly underdetermined. Elections and legislative votes do not tell police agencies

how to police. But police agencies have to determine how to allocate their resources and pick their

enforcement strategies. In both cases, we can turn to the strength of the relevant normative mandate for

guidance. Doing so allows an agency's decisions to have greater democratic authorization rather than being

isolated and purely technocratic.

The stronger the normative mandate, the more trustee-like the representative may be.[22]

Analogously, the stronger the normative mandate for a law, the greater the strength of authorization for its

enforcement. When more strongly authorized, in general, a law's enforcement can be more aggressive, and

agencies are justified in making its enforcement a priority. Proactive enforcement strategies in particular are

more likely to be legitimate when the law being enforced is more strongly mandated. Whatever our

perspective, we will want police to deter and investigate murder, assault, rape, theft, and arson. Laws

prohibiting these acts therefore have a strong normative mandate. Indeed, we will want the police to *focus*

on enforcing these laws, and their aggressive enforcement has low legitimacy-risk.

On the other hand, when a law is weakly mandated, and especially when the burden of a law's

enforcement falls on the perspective(s) that objected to the law, aggressive, proactive enforcement

strategies are more likely to be illegitimate. That police decisions should be influenced by considerations of

democratic authorization is implicit in the current wave of "community policing" reform, though it dates

back at least to Robert Peel's conception of policing in which police legitimacy comes from the buy-in of

---

[21]Ibid. 278.
[22]Ibid. 283.

the policed.[23] Normative mandates help to understand how that can be achieved. We see here further

evidence that risk interactions are particularly important in determining the legitimacy-risk of enforcement

strategies and agency structure.

Risk interactions. In isolation, these risks might not pose significant risks to legitimacy. Taken

together, they interact to amplify (or mitigate) total legitimacy-risk. Recall the patrol example from above.

The magnitude of the burdens of power interact with the distribution of burdens to determine legitimacy-

risk. Harsh, but low burden policing, such as patrol officer surveillance of a crime hot-spot, is rather low

legitimacy-risk. Increasing the magnitude of the burden increases the risk; as the magnitude increases, we

need to reduce the strategy's harshness (hence constitutional restrictions on stopping and searching people

without probable cause or a warrant). Generally, political systems that subject citizens to high burden

political power had better be lenient, whereas harsh but low burden political power is more likely to be

legitimate.

Consider again the connection between normative mandates and proactive power. Reactive

policing has been characterized by political scientist David Bayley as making policing more democratic by

giving citizens a role in how resources are allocated and how police power is focused. As Bayley puts it,

technological advancements like the telephone meant that

> demand for police services no longer emanated solely from the state but was distributed across a
> multitude of individuals. Demand was disaggregated, and the police developed a new set of
> masters. The police became democratically responsible in terms of their day-to-day operations.[24]

---

[23]Gary Cordner, "Community Policing," in *The Oxford Handbook of Police and Policing*, ed. Michael D. Reisig and Robert J. Kane (New York: Oxford University Press, 2014), 148.

[24]Bayley, *Police for the Future*, 120.

Proactive power for this reason often, though not always, entails a weaker normative mandate. The proactive enforcement of weakly mandated laws is thus especially risky; its authorization is doubly weak.

Different police strategies will be characterized to different extents by these risks, and the risks all interact. Let us say, then, that legitimacy-risk increases when political power is harsh, high burden, proactive, and high diversity/weakly mandated. Conversely, when political power is lenient, low burden, reactive, and low diversity/strongly mandated, it tends to have a low legitimacy-risk. These risk factors are related, though can individually affect instances of political power. In other words, it is possible for power to be both reactive and conducted against a background of high perspectival diversity, and these simultaneously increase and decrease the legitimacy-risk.

As a disclaimer, it is worth emphasizing again that these profiles track *risk*; it is possible for a high-risk police unit to act legitimately and have overall legitimacy. But given the uncertainties of realized institutions and political power, the framework encourages policymakers (and voters) to opt for low-risk police agencies and strategies.

How likely we think there are to be unjustified uses of power largely determines how many safeguards we will want to erect. If elected officials were always well-motivated to respect civil liberties, we might not want a system that includes judicial review. If we imagined the most ideal soldiers, perhaps they would be talented and well-motivated enough to engage in both military action and domestic policing concurrently and in the same organization. Because actual soldiers are not ideal soldiers, and because changing one's rules of engagement drastically and instantly is incredibly difficult, we mitigate legitimacy-risk institutionally. Importantly, different kinds of policing have different legitimacy-risk profiles just as military and police power have different profiles. Hence, the need for a more fine-grained approach to separations of political power.

II Varieties of policing

Having laid out the ingredients of legitimacy-risk profiles, I now want to consider some varieties of policing to illustrate the application of the framework. What we will see in this section is that recent developments in policing have tended to blur together police goals, thereby blending—rather than isolating—high legitimacy-risk characteristics. This will put us in a position to see which separations of power the legitimacy-risk profile framework supports in the following section.

Modern police agencies have three main roles: administrators, patrol officers, and detectives. Originally, most early policing was aimed at *order maintenance*; crime investigation and *law enforcement* was reserved for private detectives.[25] The difference between the patrol officer and the detective roughly tracks the distinction between order maintenance and law enforcement.

By keeping their eyes on the street and rapidly responding to crimes in progress or calls for service, patrol officers should prevent crime from happening and mediate disputes that do not rise to the level of litigation. The patrol officer could conceivably do all of her work without making any arrests. In fact, only a minority of what they do is enforcing laws and making arrests. They aim to "handle the situation" or to provide "authoritative intervention."[26] That is not to say that patrol officers never enforce law: when they see or respond to criminal activity in progress they are expected to enforce law by making an arrest. But whereas enforcing law is the primary aim of the detective, it is only a secondary aim of the patrol officer.

Order maintenance patrol policing therefore tends to be low burden and characterized by wide discretion. The ill-defined and high perspectival diversity nature of the issues patrol officers are called to

---

[25]There is an important exception: slave patrols in the antebellum south were not maintaining order, but rather were enforcing (obviously unjust and illegitimate) laws.

[26]Wilson, *Varieties of Police Behavior*, 31; Bayley, *Police for the Future*, 34.

handle (e.g. disorderly conduct) are offset by the low burden nature of patrol policing. Given the costs of going to trial and conviction, the detective's work tends to be high burden and constrained by procedural rights. These procedural rights, combined with the clearly defined and typically strongly mandated nature of the laws enforced by detectives, compensate for the risk-increasing nature of the burdens of this kind of policing.

Historically, the patrol officer's and the detective's work are reactive, and this serves to further compensate for the relevant legitimacy-risks (the high burden associated with felony prosecution and the often-controversial nature of what counts as order). Rapid response to calls for service is of course reactive. Foot- or motor-patrol is proactive only in the sense that the officer is patrolling areas to deter crime and to be able to quickly react to problems. Similarly, homicide, violent, and property crime detectives rarely engage in work that someone has not specifically asked them to engage in. They react to reported crimes and proceed based on clearly defined legal authority to investigate, prosecute, and incarcerate serious wrongs.

As an illustration, consider the classic image of a police officer: Officer Friendly walking a "beat," waving or smiling at familiar faces, and providing reassurance that if something goes wrong, he will be there to intervene. If everything goes according to plan, the officer never needs to intervene. Those who would misbehave know that someone is standing by to stop them if they get into trouble. The officer is creating a secure and ordered environment simply by making the rounds. Such an officer is wielding a kind of counterfactual political power: they will intervene if called for. Typically, however, they do not intervene, and the power involved in occasionally coming under this officer's "surveillance" is rather easily justified.

But suppose a man stumbles out of a bar having had too much to drink and begins bothering passersby; the officer intervenes to send the man on his way. The kind of power involved here seemingly

requires no special justification, as a courageous bystander could sternly ask the man to keep moving, and no one would find this objectionable. This use of power is relatively widely accepted. Only the drunk would be bothered by this exercise of power, and then only while still drunk. When an arrest is not the go-to tool, the officer's power is low burden. And better still, those subjected to arrest power are likely to be guilty. So Officer Friendly's power is lenient. On most metrics of legitimacy-risk, the classic foot-patrol officer's is low.

Unfortunately, this kind of police officer has always been rare and is increasingly a relic of the past. Patrol officers often abuse their discretionary power to make disorderly conduct arrests for arbitrary—or worse, discriminatory—ends.[27] "Officer Friendly" is a term now used sardonically to refer to abusive patrol officers. Most citizens want a very fast response time to calls for police, so agencies have responded by moving the patrol officer into an SUV. This separates officer from citizen, depriving them of an important source of local knowledge.

There are other reasons that Officer Friendly is a relic and riskier kinds of policing are more common. Empirical investigation of patrol policing in the 1970s suggested that this kind of reactive patrol does little to deter crime.[28] By the 80s, there was general skepticism about the effectiveness of police agencies in reducing crime, with particular skepticism about reactive patrol. This motivated George Kelling and James Wilson to articulate the "broken windows" approach to policing which encouraged some

---

[27]James Forman, Jr, *Locking Up Our Own: Crime and Punishment in Black America* (Farrar, Straus and Giroux, 2017), 94; Sarah A. Seo, *Policing the Open Road: How Cars Transformed American Freedom* (Harvard University Press, 2019), 169, 183, 256.

[28]George L. Kelling et al., "The Kansas City Preventive Patrol Experiment," *National Police Foundation*, 1974.

aggressive police tactics. Many saw this as an improvement on overly passive patrol.[29] Increased federal

funding and asset forfeiture policies encouraged multi-jurisdictional narcotics task forces and changes in

local police priorities.[30] These changes contributed to the erosion of the boundary between patrol and

detective work.

Under Mayor Giuliani and NYPD Commissioner William Bratton, for example, low-level arrests

spiked. Partially motivated by the adoption of COMPSTAT, priorities in patrol work changed. Patrol

officers were to focus on making street stops and arrests; foot- and motor-patrol became *criminal* patrol.

This persisted after Giuliani left office with the stop, question, and frisk (SQF) strategy. Plenty of ink has

been spilled over the development and spread of broken windows policing, SQF, and related theories of the

growth, spread, and deterrence of crime. The important point in the present context is that transforming

the reactive patrol officer into a proactive stopping, questioning, and frisking officer, or into one concerned

with making arrests for "quality of life" violations, entails a substantial change into a different kind of

legitimacy-risk profile.

The SQF strategy employed by the NYPD was eventually found unconstitutional. Nevertheless, this

kind of proactive policing is now widespread, as is the use of COMPSTAT or similar programs.[31] The

LAPD's Metropolitan Division doubled in size in 2015, with many of the officers going to squads that

engage in proactive policing: traffic stops aimed at discovering guns and drugs. Referred to as "stop and frisk

---

[29]Kelling, George L., and James Q. Wilson. "Broken Windows: The Police and Neighborhood Safety." *The Atlantic Monthly*, 1982; Bayley, *Police for the Future*, 103

[30]Peter J. Boettke, Jayme S. Lemke, and Liya Palagashvili, "Re-Evaluating Community Policing in a Polycentric System," *Journal of Institutional Economics* 12, no. 2 (June 2016): 305–25.

[31]Peter Moskos, *Cop in the Hood: My Year Policing Baltimore's Eastern District* (Princeton University Press, 2009), 111–57.

in a car," the LAPD, like the NYPD, stop Black motorists at a disproportionate rate. Many of the people

stopped are stopped repeatedly, and while the rate of traffic stops went up as much as 14 times, felony

arrests merely tripled.[32]

SQF tactics rely on proactively stopping large numbers of people to search for evidence of certain

crimes. Most of the people stopped are innocent.[33] Some of the crimes targeted are controversial (like drug

possession). The tactic itself is controversial. Repeated stops can be costly in terms of individual

wellbeing.[34] In other words, the tactic is not only weakly mandated, it is also harsh and high burden. The

tactics' proactivity further amplifies its risk.

When order maintenance patrol turns into criminal patrol, the burdens increase in another way.

When stops result in arrests, the misdemeanor system becomes congested. This carries with it a variety of

ill effects. As Alexandra Natapoff documents, the misdemeanor system becomes more punitive when it is

congested, including overburdening public defenders and increasing the incentive for prosecutors to

expedite cases as much as possible. This results in lower quality pre-trial screening of cases, reliance on

coercive plea deals, and excessive deference to the arresting officer's testimony. This produces not only

punishment without crime, but punishment that doesn't match the crime.[35]

---

[32]Cindy Chang and Ben Poston, "'Stop-and-Frisk in a Car:' Elite LAPD Unit Disproportionately Stopped Black Drivers, Data Show" *Los Angeles Times*, January 24, 2019.

[33]Robert Apel, "On the Deterrent Effect of Stop, Question, and Frisk Stop, Question, and Frisk Practices," *Criminology and Public Policy* 15, 1 (2016): 57–66.

[34]Amanda Geller et al., "Aggressive Policing and the Mental Health of Young Urban Men," *American Journal of Public Health* 104, 12 (October 16, 2014): 2321–27.

[35]Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* (Basic Books, 2018).

Criminal patrol also bleeds one police goal into another, suppressing the original goal. The patrol officer who was supposed to mediate disputes and deter crime is now trying to make arrests and enforce the law. The traffic officer who was supposed to produce safe, ordered use of transportation infrastructure now uses their authority in service of a very different kind of policing. In a how-to manual for "aggressive criminal patrol," officers learn how to turn patrol into something that allows them to "pull off make-a-difference busts." These officers "regard themselves as first-line criminal investigators…*total-commitment* law enforcement officers."[36] The result is not only the familiar problems associated with SQF and "driving while Black," but an abandonment of a longstanding service of reactive, order maintenance patrol in favor of the much riskier proactive criminal patrol. The goal of stopping a vehicle carrying drugs substantially conflicts with the goal of maintaining safe roads and transforms a low risk kind of policing into a much riskier kind.

Consider now the changes in the detective's role. The homicide unit is low legitimacy-risk; it is reactive and strongly mandated. Though an arrest for homicide is very high burden, the procedural constraints help to ensure that the police power is not harsh. The same cannot be said for other kinds of detectives.

Alongside a more aggressive approach to patrol work, there was a rise in "vice" policing. In 1972, the Office of Drug Abuse Law Enforcement began conducting drug raids following Nixon's declaration that drugs are "public enemy number one" the year prior. In 1973, ODALE merged with the Bureau of Narcotics and Dangerous Drugs to form the Drug Enforcement Administration. Here too we see a rise in proactive police work. The vice or narcotics detective is perhaps uniquely proactive.[37] "Buy-bust" "sting"

---

[36]Charles Remsberg, *Tactics for Criminal Patrol: Vehicle Stops, Drug Discovery and Officer Survival* (Calibre Press, 1995), 9.

[37]Wilson, *Varieties of Police Behavior*, 9

operations, popular with narcotics and vice policing, are proactive. They set up the conditions for criminal activity, and when the encouraged crime is committed, detectives make an arrest.[38]

Vice and narcotics law enforcement is differentiated from the homicide or violent crime detective in terms of initiation and authorization:

> When a violent crime or a robbery or a trespass occurs, someone usually calls the police. There is a clear victim and perpetrator. Someone is hurt or harmed in some way and wants the offender punished. But with drug crime, neither the purchaser of the drugs nor the seller has any incentive to contact law enforcement. It is consensual activity. Equally important, it is popular. The clear majority of Americans of all races have violated drug laws in their lifetime."[39]

Similarly, a detective working in a vice unit might get information that a certain area sees high rates of sex work, and on the basis that a crime is likely to be committed, stake out part of the area. They might pretend to be a customer or sex worker to induce criminal behavior in the potential criminal and make an arrest. But as with drug enforcement, the laws being enforced are weakly mandated, and typically, those involved would like to be left alone. Vice work is therefore high burden, typically proactive, high diversity and weakly mandated, though unlike the move to criminal patrol, perhaps not harsh.

It is possible that the DEA or local narcotics divisions are behaving legitimately. In cases where police are reacting to complaints from citizens, there is a genuine conflict of interests that can be difficult to settle; determining which course of actions are legitimate is highly difficult in these contexts. Nevertheless, in most cases, the combination between high perspectival diversity, weakly mandated, high burden, and proactive law enforcement makes their work *highly* risky—perhaps the riskiest form of policing in the

---

[38]They also often involve law enforcement participation in illegal activity. This generates legitimacy-risks of its own. See Luke William Hunt, *The Retrieval of Liberalism in Policing* (New York: Oxford University Press, 2019), 172.

[39]Michelle Alexander, *The New Jim Crow* (The New Press, 2012), 104.

United States. One virtue of the legitimacy-risk framework is that it enables such a comparative evaluation without relying on foundational arguments against the legitimacy of narcotics or vice enforcement.[40]

It is worth noting that this kind of concern is not new. In the 1920s, influential police chief August Vollmer complained in a sardonic law review article about the public's expectation that police enforce vice and traffic law.[41] The automobile was new at the time, and the new traffic laws were increasingly used to target alcohol smugglers during prohibition. He saw vice enforcement as hopelessly ineffective and traffic enforcement as a distraction from real police work. The only things that have changed are the vices being prohibited and the now-widespread acceptance of police enforcement of traffic law. Vollmer was right that these activities detracted from more important police goals. Legitimacy-risk profiles help us to see how they produced a major shift in policing, and not only in its focus; policing has become more proactive, harsher, higher burden, as well as focused on weakly mandated laws, and employing weakly mandated tactics.

III Institutional boundaries

Legitimacy-risk profiles provide a tool for understanding how some problems of modern policing are rooted in insufficient boundaries between varieties of policing. In this section, I'll argue that the different legitimacy-risk profiles of various kinds of policing recommend certain institutional separations of police power. Some of the redrawn boundaries would undo the changes discussed in the previous section, but I'm

---

[40]There are of course many other kinds of policing that can be evaluated using the legitimacy-risk profile framework. SWAT, for example, is now used primarily for serving drug warrants, making it weakly mandated, proactive, and extraordinarily high burden. Specialized units for policing protests will be legitimate to the extent that they are low burden, reactive, and strongly mandated. Federal agencies that focus on human trafficking, for example, might be proactive and high burden, though very strongly mandated and lenient. Because it should be clear how the framework applies, I leave these cases unanalyzed here.

[41]August Vollmer, "Vice and Traffic-Police Handicaps," *Southern California Law Review* 1, no. 4 (1928): 7.

not motivated by nostalgia for early twentieth century policing. Legitimacy-risk profiles provide guidance

for improving the legitimacy and justice of policing beyond simply undoing the mistakes of the past. In

particular, boundaries motivated by the legitimacy-risk framework prevent the combination of high

legitimacy-risk factors, institutionally separate the enforcement of weakly mandated laws, and allow

agencies to focus on particular police goals to prevent certain goals from crowding out others. Drawing new

institutional boundaries reduces the risk of losing legitimacy and increases opportunities for developing

legitimacy. Because illegitimate police power is unjust, reducing legitimacy-risks will also tend to reduce

unjust policing.

The relevant boundaries are jurisdictional: geographical, professional, and legal. Geographic

boundaries of course concern the area an agency or division should have authority over. Professional

boundaries concern the methods and goals of the agency, including the tools at their disposal. Those tools

include the areas of the civil or criminal legal code the agency enforces. The framework developed in this

paper shows that legitimacy requires paying careful attention to each kind of boundary.

Geographic boundaries strengthen normative mandates. Only some policing is characterized by high

perspectival diversity and so weakly mandated. Violent, sex, and property crime law enforcement are

strongly mandated. Thus, there is no reason in principle to geographically constrain the jurisdiction of

detectives working on these matters; a state or even nationwide police force focused on investigating and

making arrests for violent and property crimes has a reasonably low legitimacy-risk profile. Considerations

of efficiency (in terms of clearing cases) should be weighed most heavily when thinking about the

geographic boundaries for these kinds of agencies.

Order-maintenance policing, on the other hand, is characterized by relatively high perspectival

diversity. Only the sticks-in-the-mud are bothered by open alcohol containers in New Orleans' French

Quarter, whereas open alcohol containers near an elementary school gives cause for concern. Similarly, one would have to be among the most obnoxious people the world has ever seen to complain about street musicians on Frenchman Street in the evening, whereas one would have to be comparably obnoxious to busk on a street corner in a suburban neighborhood at night.

What counts as order in a public space depends on a number of particular facts, and those particular facts can change from block to block and neighborhood to neighborhood. Thus, geographically constraining the jurisdiction of order-maintenance police forces is the only way to reduce the legitimacy-risks associated with under- or over-policing an area and to engage in strongly mandated policing. A statewide force is unlikely to produce legitimate order-maintenance policing because it is unlikely to react appropriately to a community's needs. Drawing district boundaries within an agency might help, though there is an ineliminable risk that administrators with authority over many districts will pressure officers on the streets to pursue standardized goals.

Right now, it is common for departments to divide patrol into geographic divisions and for professional specialization to occur outside the patrol division. There's room for professional specialization within these divisions that can lower legitimacy-risk profiles.

Professional boundaries isolate legitimacy risk. The legitimacy-risks of military power require professional, institutional boundaries. The same goes for different kinds of policing. But as discussed above, the proactive turn in law enforcement has spread risky strategies to most other facets of law enforcement.

Looking at one of the mechanisms by which classic patrol was transformed into criminal patrol, Operation Pipeline, will clarify the importance of certain institutional boundaries. The DEA's Operation Pipeline was a deliberate attempt to blur the institutional boundaries between federal drug law enforcement

and local patrol.[42] The DEA convinced highway patrol to target suspected drug trafficking (rather than mere moving violations) in part by providing the training for free. Asset forfeiture rules allowed sharing between the DEA and local agencies which provided additional motivation for criminal patrol.

This led to instrumental (or pre-textual) enforcement of traffic laws. This changed the focus of traffic officers from maintaining traffic safety to drug or gun interdiction (or better yet—cash to be seized and kept by the department). These kinds of stops are highly unlikely to result in relevant charges because it is not clear by looking at a vehicle that it will contain contraband, and only a small minority of them do. The result is that the kind of behavior we might be interested in deterring goes largely ignored, while large numbers of innocent (often Black) motorists are repeatedly stopped and harassed. The DEA's legitimacy-risks have infected local law enforcement making it harsher, higher burden, proactive, and weakly mandated. Institutional boundaries require not just separate agencies, but financial rules that maintain the boundaries.

If the drug war is an infection, its harmful de-legitimizing effects can be ameliorated and contained. One way to isolate legitimacy-risks is to institutionally separate the agents enforcing criminal law from the agents enforcing traffic laws. Narcotics divisions should not only be separated from the traffic division (as is currently the case), but perhaps traffic officers should have to call for a narcotics detective to conduct a vehicle search, just as homicide detectives have to be called in to conduct an investigation. This will surely make narcotics investigations more cumbersome. Given its high legitimacy-risk, that is a feature and not a bug.[43]

---

[42]Seo, *Policing the Open Road*, 256.

[43]Legitimacy-risk profiles can also recommend resource allocations within an agency or across agencies. A local department will want to allocate more resources to the homicide unit than the vice

Specialization changes selection effects. In light of the seemingly widespread endorsement of criminal patrol within the profession, it is also necessary to have officers interested in the kind of policing their unit is primarily tasked with. Informal norms are an important component of professional behavior. Fortunately, institutional boundaries are useful here as well. Institutional boundaries can foster goal-oriented specialization, changing the selection effects of employment within an agency. This in turn can have a substantial effect on the way an agency behaves.

The DEA may be partially responsible for eroding the boundary between traffic enforcement and drug interdiction, but it isn't entirely responsible for the move to criminal patrol. In criticizing the aggressive nature of patrol policing, former officer Peter Moskos remarks that

> Just as a culture of force gave way to a culture of arrest and "zero tolerance," the arrest culture needs to evolve into something better: a culture of crime prevention, problem solving, and police discretion. As laws against jaywalking do not fill the prisons with jaywalkers, laws against drug use did not and need not fill our jails with drug users. … To paraphrase a slogan of the National Rifle Association: drug laws don't arrest people, police do. [44]

Specialization can be a useful tool in changing the culture of arrest, replacing Remsberg's "first line criminal investigators" with (much-maligned by the police) "social workers with guns," thereby changing the legitimacy-risk profile of the patrol division.

The typical urban police department has specialized investigative units, though "the undifferentiated patrol division gets everything else."[45] The undifferentiated patrol division is not well-suited to focus on the incredibly complex and normatively difficult issues of order-maintenance. And as we become increasingly

---

unit; the federal government will want to allocate resources away from the DEA and towards the FBI's human trafficking task forces.

[44]Moskos, *Cop in the Hood*, 185.

[45]Wilson, *Varieties of Police Behavior*, 69.

aware of the ham-fisted way that patrol officers handle those with mental (or in some cases physical) illness, and the attendant cost to their life and/or wellbeing, this seems increasingly hard to justify. Of course, Wilson wrote this in the 60s and policing has undergone extensive change during this time. Nevertheless, while specialization has grown, law enforcement activities are highly specialized and order maintenance activities are less so. Splitting the patrol function and the detective function into different agencies, and then specializing the patrol division, would help to enable the kind of specialization within patrol that seems badly needed.

One mechanism for changing the nature of patrol policing depends on changing the hierarchy in police agencies. Nearly all police officers now start out in patrol. If they do well by the standards of the administration, they are promoted to the rank of detective. If they continue to do well, they might have a chance at promotion to administration. There are several noteworthy results.

One is that detectives enjoy a kind of prestige that patrol officers lack, in addition to greater pay and privileges. No one is promoted to patrol. This means that most of the people who seek promotion want to look like effective law enforcers. Given this career ladder, the metrics for evaluating patrol work are likely skewed towards identifying skills that make one a good law enforcer. So police departments end up selecting for people who want to arrest (and help punish) the bad guys, rather than people who want to provide the much-needed professional support in coordinating on the use of public space and the other various tasks patrol officers engage in that look much more like social work than stereotypical police work.

Punishment of some sort is plausibly a necessary condition for justice, so I don't mean to imply that having this as a career goal is vicious. The point is that individuals with punitive ambitions are suited for law

enforcement, and less well suited for patrol. To reduce legitimacy-risks, we want police agencies to select for people with helping and healing goals, not punitive goals.[46]

Further, specializing the separate patrol agency would allow officers who are interested in helping, say, victims of domestic abuse to focus on that kind of police work. It would also allow more specialized training, so that patrol officers who do wellness checks are better suited to handle those calls. As things are now, police training ends up looking like a zero-sum game with (e.g.) firearm training reducing resources for mental health training.

More radical versions of this proposal include removing traffic enforcement and wellness checks from police departments entirely and turning them over to civil servants without police powers (like parking enforcement officers) and medical professionals. I won't defend a specific version of this boundary redrawing proposal; I'll just note that legitimacy-risk profiles are consistent with more and less ambitious reform ideas.

Specialization increases democratic authorization. Lastly, in addition to drawing geographic boundaries to make agencies more sensitive to community needs and drawing professional boundaries to allow for specialization that remakes agency goals, selection effects, and training standards, we can also turn to specialization to increase democratic authorization. More specialization allows for more targeted democratic input in two ways: political approval of agency goals and methods, and democratic control over their funding.

---

[46]An additional benefit of separating the detectives from the patrol officers is that investigations of police brutality might be more impartial.

Now that killings by police are a national political issue, police officers take themselves to be under fire and disrespected. But in many cases, the targets are aggressive and exploitative patrol officers. By separating patrol from detectives, protesters can target certain agencies without being accused of general "anti-cop" sentiment. Members of one agency could plausibly support certain protests without feeling like they are also being "anti-cop." Legislators could campaign on remaking or reducing funding for badly behaved agencies without seeming to disregard the goals of policing. Politicians and activists today who want to eliminate ICE or the DEA are targeting certain kinds of objectionable policing; this only happens when different kinds of policing are separated institutionally. Given the drastic separation between a vote for a legislator and the power exercised by one officer, there is a need to reform political institutions such that they can authorize or de-authorize police power. Police specialization can help clarify the strength of the normative mandate for particular agencies and their strategies.

IV Conclusion

I have argued that the ills of contemporary policing are essentially connected to the poorly drawn boundaries of police power. Effective police reform will require further separations of power. Legitimacy-risk profiles composed of a measure of harshness, the magnitude of burden imposed by police activity, proactivity, and normative mandates, are a useful conceptual tool for understanding our current problems and for identifying legitimacy-enhancing separations of power. The main institutional boundaries recommended by applying legitimacy-risk profiles are those that isolate positive legitimacy-risk interactions, strengthen normative mandates and clarify which aspects of policing are weakly mandated, and match selection effects and training standards to the agency's proper goals. Practically speaking, this means increasing the institutional boundaries between order maintenance and law enforcement functions to

prevent the goals of apprehending and punishing criminals to overwhelm the goals of protecting and serving people, strengthening the boundary between traffic enforcement and other kinds of law enforcement, and specializing the patrol division. It also means separating particularly controversial kinds of policing to allow for greater democratic authorization. Thinking in terms of legitimacy-risk profiles suggests that we have so far paid insufficient attention to the relationship between legitimacy and separations of power.