

Asking the Right Questions about Police—and Scholarly—Expertise

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Anna Lvovsky, *Rethinking Police Expertise*, 131 *Yale LJ*. __ (forthcoming 2021), available at [SSRN](#).

Recently, an outstanding anonymized article and exemplar of a law journal student editor's peer review request landed in my inbox. This reflection covers both the article and the peer review request from the *Yale Law Journal* because they capture salutary trends in legal scholarship. The article is *Police Expertise*, which I learned only after submitting my peer review, is by [Professor Anna Lvovsky](#). It tackles an important issue for practice as well as criminal procedure scholarship—deference to asserted police expertise. The peer review request asked astute questions, three of which should be asked more often for such scholarship: (1) whether the author's account accurately tracks actual practice on the ground, (2) whether the key theoretical labels and distinctions make coherent useful sense, and (3) whether the theorizing is likely to have ramifications in practice, not just scholarship.¹

In this time of an acute crisis of trust in law enforcement, the topic of expertise is important—and apparently hot. Within about a week, I received peer review requests from two different leading journals with two different anonymized articles about the issue. The timing was fortuitous—it was about the time I had to select excellent scholarship to feature for this Jot. Professor Lvovsky's article illuminates this issue, which has sparked debates in scholarship and practice, from a fresh perspective, and with outstanding research that goes well beyond easily accessible, published sources. Lvovsky's *Police Expertise*, now forthcoming in the *Yale Law Journal*, examines the seemingly counterintuitive emphasis on police expertise by the defense rather than the prosecution, and to attack rather than to seek judicial deference to police claims.

The key insight of the article is to shift to the understanding of police expertise. Lvovsky argues that the police are strategic experts, and this kind of expertise can actually undermine the basis for deference to police claims. Lvovsky differentiates between what she terms “technological expertise” and expertise as a “professional virtue.” Expertise as a professional virtue has a normative dimension that encourages institutional deference to the police. In contrast, technological expertise is about police proficiency at certain strategies and tactics, such as trickery to elicit incriminating statements. Lvovsky illuminates how the technological expertise of the police should be cause for caution by the courts in crediting certain law enforcement claims, rather than a basis for the customary deference. For example, police expertise in tricking vulnerable suspects can be a basis for giving more credence to defendants' claims, potentially addressing the major imbalance of power in [police-said, defendant-said credibility contests](#).

The question posed by the student editors in their review request is one that I hope will be asked by all editors considering publishing a criminal justice piece that advertises some theory or reform of what happens in the system. Does the polished academic theory and resulting proposal accurately understand actual practice on the ground? Especially in the criminal justice context, a lot of practices that structure the system never make it into published case reports or other forms of laws on the book. To truly understand the phenomenon about which a scholar hopes to opine, the scholar must have actual practice experience—or do some excellent fieldwork or archival work, or some combination of the above. Lvovsky's piece is compellingly attentive to, and informed by, the pattern of arguments one regularly hears as an experienced attorney with frequent court experience.

Lvovsky's outstanding research collects common defense arguments before trial judges in motions to suppress and other motions practices. An outstanding historian, she brings her large toolkit of research talent to a contemporary important phenomenon. Reading the article's quotations of popular lines of defense arguments regarding alleged entrapment, coercion of incriminating statements, and improper use of force brings back memories of hundreds of

hours spent in courtrooms doing motions practices and hearing motions while waiting for cases to be called.

It is a pleasure to read a piece that looks beyond appellate opinions to the practices of motions hearings. Lvovsky illuminates counter-intuitive uses of police expertise by the defense—which is fascinating in itself. Heightening the piece's impact, Lvovsky explores the implications of these defensive use of police expertise for the broader question of how factfinders should evaluate police expertise. Rather than making a uniform case for deference, the nature of police expertise sometimes argues in favor of judicial caution or suspicion toward law enforcement claims.

A surprising upside of being a peer reviewer in the student-edited law review sphere, in contrast to social sciences journals, is that the astonishingly short deadlines compel you to read the piece nearly immediately. If you agree, you will read the piece at midnight when all the paying work is done, and the other members of the household are soundly asleep. You do this for a combination of reasons: karma, gratitude to amazing student editors running the mind-blowingly massive law scholarship system, and—perhaps most of all—the hope that you will read something outstanding and get to write a glowing review. The best part of peer review is when you get to read a great piece before the rest of the world, and to share your excitement about it.

Another hidden upside is seeing law student editors—the subject of [angsting](#), [consternation](#) and even [grief](#) in the legal blogosphere—asking important questions about the real-world relevance of legal scholarship that should be asked more often by the scholarly experts.

1. I took the liberty of paraphrasing questions from the student editor, the excellent Jackson B. Skeen. I am very grateful to the editors at the *Yale Law Journal* for the permission to blog about Professor Lvovsky's article.

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