

## The Shield Behind The Badge

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Rachel Moran, [Contesting Police Credibility](#), 93 *Wash. L. Rev.* 1339 (2018).

We are in the midst of a massive national protest, comprised itself of a wave of local protests, against the very institution of the police, or at least the widespread overuse of that institution to engage in actions beyond the crime-fighting competence that they claim for themselves. The distinction matters, because if the goal is not to abolish the police completely, but to defund and refocus their activities, some type of police reform is still necessary. Our attitude to the police, and our ideas about local and national means to control of the police, will profoundly shape what sort of reform we endorse. Rachel Moran's recent article, *Contesting Police Credibility*, argues that law enforcement oversight requires robust institutional measures to challenge, resist, and hold accountable the police when they inflict harm upon the public.

Moran reveals that accountability is not transparency. Transparency might demand that the police are open and public about the wrongdoers in their midst, and disseminate records of police misconduct. Accountability requires an adequate process by which to hold the police answerable when departments or individual officers are called out for wrongdoing. Professor Moran's focus is the lack of effective internal and external mechanisms of accountability. This lack of accountability, when combined with evidence of police wrongdoing, ought to subvert the presumption of reliability that the criminal process—judges, prosecutors, and juries—extend to the police as public officials. This presumption ensures that when the police are challenged on the streets or in the courthouse, the criminal justice process defers to the police as providing the only credible version of events.

As Professor Moran recognizes, demanding accountability from the police does not entail endorsing some carceral response to the problem of policing—her goal is not to send the police to jail. Instead, the point is to challenge the various presumptions of propriety that we extend to police conduct, and in particular, to challenge the presumption of police credibility and the idea that we ought to trust the police. Professor Moran's article demonstrates why, in a political democracy, we ought never to trust the police, in the sense of just taking their word for it. A defining feature of any democracy is the institutions it provides to its citizens to challenge and contest government policy. Accountability ensures our government officials work for the public, rather than work over the public: invigilation prevents the easy turn to arguments from authority where police hide behind badge, rather than having to justify their actions.

The failure of accountability, whatever the issues with transparency, reveals a deep problem with the criminal process that is supposed to function as a site of democratic contestation. On at least one account of the criminal process, the courthouse is the central location for challenging the police to justify what they do. If you can't contest policing in the courthouse, then the only place left is the streets.

The criminal process is supposed to be one of the ways in which the public can resist the state by challenging the state's version of events. In practice, this means calling into question the police officer's version of the facts on the ground. As the recent misdemeanor scholarship indicates, often the only evidence at the lowest level of the criminal justice system comes from police officers. Their word—and their relationship with the prosecutor—is determinative of the outcome. Higher up the penal pyramid, however, the criminal process obstructs criminal defendants' ability to challenge or call out the police.

The structure of the criminal process is famously asymmetrical in several different ways. As the Court in *Gideon v. Wainwright* recognized, the state wields a great deal of power in prosecuting individuals. Whilst the Fifth and Sixth

Amendments grant some rights to resist the police, by permitting non-cooperation through silence, and affirming the right to a lawyer, criminal trial, and to call and confront witnesses, these individualistic rights are often swamped by the structural features of pretrial detention, overworked defense counsel, and a variety of evidentiary rules that prevent defendants taking the stand to directly confront their accusers.

In the current battle for police accountability, trial practice may seem an odd place to emphasize reform. Defunding the police and prosecutors operates on the field of power, not of rights. Defunding directly undermines the structure of law enforcement, reducing its ability to reach into and disrupt the lives of civilians. Tinkering with the criminal process would seem to have much less of an impact.

Professor Moran's article reveals, however, just how deeply compromised is the criminal trial structure in the partisan activity of supporting police misconduct. She identifies the ways in which the police resist the public by engaging in misconduct and resist oversight by "expressly discourage reporting of police misconduct, or refuse to record complaints when civilians attempt to file them." Professor Moran—in this article and her work more generally—presents a picture of the police equivalent of civil disobedience. She reveals police disobedience is more widespread than is ordinarily acknowledged, in part because of official agencies elsewhere in the criminal process tolerate this type of workplace resistance.

In the spirit of the current Black Lives Matter and Blue Lives Matter confrontations on the streets, we could see these acts of discouraging of civilians from making or recording complaints as a form of ongoing, low-level protest against criticisms of the police. When the police engage in this sort of protest they are no longer acting on behalf of the government, but on behalf of their own partisan professional interests. Justice Jackson famously characterized the police as a partisan and oppositional institution engaged in an often competitive business that pits them against the public. Professor Moran's analysis includes, as partisans for the police, the prosecutor and the courts who could otherwise hold them accountable.

The structure of the criminal process ensures the police evade accountability. Legislators refuse to enact criminal discovery granting defendants a right to depose police witnesses. The police routinely decline defense requests for pre-trial interviews. Prosecutors use *Brady v. Maryland's* materiality standard to withhold exculpatory information from the defense, including information about police misconduct that could be used to impeach police witnesses. Courts balance police privacy considerations against the defendant's right to exculpatory evidence. Judges, many of whom are former prosecutors, often impose high standards of discovery upon the defense bar. The sunk costs of the criminal process in maintaining the integrity of prior convictions entrench non-accountability deep into the criminal process. Even when the courts and prosecutors are aware that the police engage in misrepresentation at trial, they do not keep records of which police engage in those practices to preclude them from testifying at subsequent trials.

The police are a complex institution: however, when it comes to external accountability, law-enforcement has a remarkable ability to reject oversight in a variety of ways: from top down and from outside in. Prosecutors and judges—two institutions we should expect to regulate the police—consistently align themselves with the police. From this perspective, the distinction between transparency and accountability looks like the grassroots movement's distinction between "reform reforms" that only legitimize the present system and "abolition reforms" that expose it to further criticism and pressure for change.

Characteristically, the street-level police see themselves as under attack from senior managerial officials, the public, the courts, or politicians. How they respond to this sort of regulation is a major issue in policing. Professor Moran's article reveals that the standard street-police claim that they are under attack from all sides, including from officialdom, is a mirage. On the contrary, the criminal process is overwhelmingly oriented towards shielding the police from accountability.

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