

Introduction

What constraints does a commitment to democracy place on the police? What implications, conversely, does modern law enforcement have for how we think about democracy? What is the relationship, in short, between democracy and policing?

Events of the past few years—particularly, for Americans, the years since September 11, 2001—have given these questions fresh importance. No one would suggest now, as George Berkley did in 1969, that the police pose one of the “least recognized problems of modern democracy.” In truth the suggestion was doubtful even then. The “problem” of democratic policing may not have attracted much notice in the early 1960s, but by the end of the decade things had changed. Jerome Skolnick’s widely influential analysis of the dilemmas of “law enforcement in a democratic society” appeared in 1966. Two years later James Q. Wilson published his landmark study tying police practices to local political traditions. Three separate presidential commissions were appointed between 1965 and 1968 to address problems associated

with the police. By the late 1960s and early 1970s, the special challenges of “policing in a free society” were very much a subject of public debate, and the debate has never really ended.¹

In two different ways, though, the debate over democratic policing changed radically over the past four decades, even before September 2001.

First, policing itself changed. Civilian oversight, once resisted tooth-and-nail by the police, became unexceptional. The old orthodoxy of police reform, law enforcement “professionalism,” gave way to a new orthodoxy, “community policing.” The homogeneous law enforcement workforces of forty years ago were diversified dramatically, if incompletely, by the hiring and promotion of large numbers of minority officers and female officers, and smaller but still significant numbers of openly gay and lesbian officers. Even the Los Angeles Police Department—once the very model of an insular, politically independent, starkly homogeneous and self-consciously “professional” police force—no longer bears much resemblance to its old, stylized image—the department dramatized in television shows like *Dragnet* and *Adam-12*. And police departments are no longer local monopolies: more and more policing is carried out by a patchwork collection of sworn officers and private security personnel.

Second, views about democracy have changed. The 1960s were still the heyday of the “pluralist” theory of democracy, an extraordinarily influential set of ideas, elaborated in great detail by social scientists beginning in the 1940s, about the nature and goals of American democracy. Those ideas, which in the 1950s became omnipresent not only among scholars but also in popular discourse, included a deep distrust of mass politics; faith in the leadership provided by responsible elites; and a tendency to see the jostling among interest groups, rather than reasoned discourse, as the lifeblood of democracy. By the late 1960s those ideas were already under sharp attack, and in the decades since then pluralism has been largely supplanted, both within and without the academy, by understandings of democracy that place more trust in ordinary people than in leadership elites and that emphasize participation and deliberation, rather than interest-group competition, as the secret of democratic success.

These two stories—the transformation of American policing over the past several decades, and the dramatic shift during the same period in ideas about American democracy—are almost never discussed together. The thesis of

this book, though, is that the two stories are closely intertwined, and that understanding the connections can help us think more intelligently about what “democratic policing” should mean today.

Democratic Theory and the Police

“Democratic policing” still resists easy definition. References to “democracy” and “democratic values” are common when judges, legislators, and local officials set limits on law enforcement, and when legal scholars and social scientists write about the police. Increasingly, moreover, efforts to create or to strengthen democracies overseas take for granted the need to establish police forces that are, in some important sense, democratic. Part of the retraining the American military conducted for Iraqi police officers, for example, involved asking them to come up with “words consistent with ‘democratic policing.’”² But it is hard to know how that question should be answered. After half a century of talk about “democratic policing,” we still lack a clear sense of the precise connections between policing and democracy.

We sometimes talk as though there were a simple trade-off between “democratic values” on the one hand and, on the other hand, security, order, and law enforcement—the objectives of the police. This way of thinking assumes both that we know what “democratic values” policing affects and that the relationship is straightforward. In fact, though, the values at stake and the nature of the relationship are anything but clear.

Sometimes, for example, democratic policing seems identified with procedural regularity and the “rule of law.” This was an important part of Skolnick’s account, which in turn echoed aspects of earlier arguments by Jerome Hall and Herbert Packer.³ At other times democracy appears tied to respect for certain substantive rights—right, for example, against unreasonable search and seizure and compelled self-incrimination.⁴ (An Iraqi village leader invoked this idea when complaining about home searches conducted by American forces, early in the occupation: “How do these soldiers have the right to come into my home like this? . . . Where is the democracy that the Americans promised?”)⁵ Sometimes democracy seems tied to popular participation in policing, either through some form of civilian oversight or through police practices that involve “partnering” with or “delegation” to

the “community.”⁶ At other times democracy is said to require placing police departments under a much more thoroughgoing form of community control.⁷ Democratic values are sometimes invoked in support of giving police officers *themselves* a degree of control over the nature of their work.⁸ (Not surprisingly, some Iraqi police officers took this view.)⁹ And sometimes democracy in policing seems simply a matter of dealing with the public in a particular way: what Wilson called the “service style”¹⁰ and now often is lumped together with “partnering,” “delegation,” and sundry other fixes under the ill-defined slogan of “community policing.”¹¹ (The American officials retraining the Iraqi police may have had something like the “service style” in mind when they talked about “democratic policing”; press reports suggest the Iraqi officers were urged to become more “polite,” “kind-hearted,” and “service-oriented.”)¹²

As for the trade-offs, we sometimes talk as though effective police are like punctual trains: something we need to sacrifice a little if we wish to live in a democracy. The goal is to strike the right balance between letting the police do their job and preserving our democratic liberties. The more of one, the less of the other. This is the assumption that has framed much of the discussion of “homeland security” measures since September 2001. At other times, though, we talk as though democratic policing is the same thing as effective policing—as though “democracies can, so to speak, have their cake and eat it, too,” because, with respect to the police, “‘democracy and efficiency in public administration are one and the same.’”¹³ A good deal of the discussion about “community policing” in recent years, for example, has proceeded from this optimistic assumption. Between the poles of strict trade-off and perfect convergence, of course, lie other, more complicated possibilities. But they remain largely unexplored.

The vagueness of most discussions of democratic policing is particularly striking given the efforts that philosophers, political scientists, sociologists, and legal scholars have made over the past half century to think carefully about the nature of democracy. Since the 1950s, “democratic theory” has been a rich, lively, and sprawling field of interdisciplinary inquiry. The field has attracted more than its share of gifted thinkers and has generated more than its share of arresting, influential work. But little of this work directly addresses the police. And few discussions of policing draw explicitly on democratic theory.

Certainly this is true of criminal procedure, the field of jurisprudence and legal scholarship concerned with how the police carry out their business. In often minute detail, criminal procedure law regulates how and when the police can conduct searches, seizures, and interrogations. Almost everybody appears to believe that these restrictions have important implications for democracy, but the nature of those implications is rarely examined with care, either by judges deciding cases or by scholars reviewing what the judges have done. As a result, invocations of democracy in these settings often seem to be little more than lip service.

Moreover, criminal procedure has almost nothing to say, in any direct fashion, about other questions of apparent pertinence to the relation between policing and democracy, such as the structure of decision making within police agencies and the arrangements by which the police are made subject to or insulated from external, political control. In part, but only in part, this selective silence reflects our collective decision to entrust the development of criminal procedure rules to courts, and our sense, which may or may not be well founded, that courts are ill suited to address questions of systemic design.¹⁴ Because thinking about criminal procedure has tended to focus on the questions taken up by courts, the unfortunate result has been not just that *judges* have largely failed to consider the systemic requirements for democratic policing, but that most of the rest of us have, too.

None of this is to say that democratic theory and criminal procedure have had nothing to say to each other. It is just that the conversation has been largely below the surface. This book unearths that conversation, dusts it off, and then suggests ways to improve it.

Organization of This Book

The eight chapters of the book divide roughly into two halves. The first four chapters trace the connections between the changing ideas about American democracy over the past half century and developments during the same period in how we think about and regulate the police. The second four chapters explore how our notions about the police and our strategies for police reform might change if they were rooted in a more explicit, and richer, set of ideas about democracy.

The first half of the book, the “how did we get here” part, brings together two stories of transformation—two different ways in which democratic policing over the past several decades has been in flux. One is the story of democratic theory: the rise during the 1950s of the pluralist theory of democracy, with its emphasis on the roles of elites, interest groups, and competition in sustaining American democracy; and then, beginning in the 1960s, the gradual shift away from this theory and toward accounts of democracy emphasizing popular participation, community, and deliberation. The other is the story of the police: the triumph in the 1950s and 1960s of the “professional” model of policing, which purposely distanced the police from the communities they patrolled and made police departments insular, homogeneous, and largely autonomous; and then the slow emergence, beginning in the 1970s and 1980s, of civilian oversight, a more diverse and less unified workforce, and the new orthodoxy of “community policing.” Telling these stories in tandem will help us see what has too often escaped notice: the important ways in which they are intertwined.

The book therefore begins, in Chapter 1, by describing the emergence in postwar America of a particular understanding of a democracy, an understanding alternately referred to as “democratic pluralism,” “analytic pluralism,” “pluralist theory,” or simply “pluralism.” Pluralism in this sense was not at bottom an embrace of diversity. It was not the “noetic pluralism” of William James, the “cultural pluralism” of Horace Kallen and Alain Locke, or the “reasonable pluralism” of John Rawls¹⁵—although it shared with them, among other things, the taste for multifaceted explanation that so exercised people like C. Wright Mills.¹⁶ Democratic pluralism was a nuanced, interrelated set of ideas about democracy that during the 1950s grew pervasive both among scholars and in popular discussions of American government. Those ideas included a distrust of mass politics, a preoccupation with social stability and the avoidance of authoritarianism, and a focus on group competition rather than reasoned discourse as the engine of democracy.

We will find the police, in an odd way, at the very heart of pluralism.¹⁷ For one way of understanding pluralism is to see it as a reaction against the “police state”—those European systems of totalitarianism that the pluralists took as the polar opposite of democracy and the paramount threat of modern political life. As the very phrase “police state” suggested, the pluralists viewed totalitarianism as the police unbound, and they tended to think of

democratic police forces—when they thought of them at all—as, more or less, totalitarianism tamed and controlled.

Given the pluralists' pervasive influence, and their preoccupation with the specter of the police state, it would be remarkable if democratic pluralism found no echoes in police studies and modern criminal procedure, both of which emerged close on the heels of pluralism, in the late 1950s and early 1960s. In fact, the echoes were extensive and profound. Chapter 2 of this book describes how pluralism helps to make sense of several interrelated hallmarks of criminal procedure and police studies in the 1960s, 1970s, and early 1980s. Among the most important of those hallmarks was a strong attraction to police professionalism, a reform agenda which predated pluralism but found new strength with pluralism's rise. Police professionalism dominated progressive thinking about law enforcement in the 1950s and 1960s in part because it fit so well with other themes of criminal procedure and police studies in this period, themes that themselves resonated with aspects of democratic pluralism. Those themes included a focus on the group psychology of the police, a concern with police discretion and a reliance on judicial oversight, an emphasis on personal dignity, a comfort with and attraction to modernity, a high premium on consensus, and a general disregard of institutional structure.

Chapter 3 of the book traces the rise, beginning slowly in the 1960s, of "participatory democracy" and later "deliberative democracy"—theories of democracy that were framed in explicit opposition to pluralism and that rejected most of its premises. The new theories were never as unified or as consistent as pluralism in its heyday, but they tended to include each of the following elements: an embrace of grassroots politics, a distrust of elites, an emphasis on cooperation and collective reasoning, and an appreciation for the intrinsic value of democracy, wholly apart from its utility as a rule of decision. And just as pluralism often took the rhetorical form of a reaction against a particular nightmare of policing—the Gestapo and the NKVD—the turn against pluralism represented, in significant part, a loss of faith in detached technocrats, epitomized in many ways by the kind of heavy-handed, "professional" law enforcement officer long embraced as the ideal by police departments across the country. Sergeant Friday, the aloof, coldly professional hero of *Dragnet*, may not have been pluralism personified, but he came close.

Chapter 4 of the book examines the various ways in which theories of participatory and deliberative democracy made themselves felt in jurisprudential and academic discussions of the police. The aversion to *Dragnet*-style police professionalism was matched by a mounting enthusiasm for community participation, a growing premium placed on transparency, a preoccupation with legitimacy, and a general retreat from modernity. All of these themes resonated with key aspects of the anti-pluralist turn in democratic theory. But criminal procedure jurisprudence and scholarship today also has important points of continuity with the 1950s and early 1960s. Now as then, the police are almost always treated as a breed apart, institutional structure is pervasively de-emphasized, and issues of equality receive relatively little attention. In part these continuing biases are the legacy of particular political battles fought in the late 1960s and early 1970s. In other respects, though, they reflect broader biases that participatory democracy and deliberative democracy, in their most common forms, share with democratic pluralism.

Identifying those biases helps to highlight important constants in our thinking about the police, and neglected avenues of reform. These loom large in the second half of the book. The question pursued there is what implications a richer, more reflective understanding of democracy might have on criminal procedure, and more broadly on our understanding of and expectations from the police.

Chapter 5 begins that inquiry by crafting a purposefully eclectic account of democracy, an account aiming less at elegance and simplicity than at minimizing blind spots. The account I develop incorporates the key insights of democratic pluralism, as well as of eighteenth-century political economy and 1960s-style participatory democracy. It also is sensitive to what the political theorist Ian Shapiro has called “the oppositional traditions of democratic politics”—those dimensions of democracy, that is to say, that have less to do with collective self-government than with ongoing resistance to “arbitrary hierarchy and domination.”¹⁸

The remaining chapters of the book explore the implications of this rounded account of democracy for a range of issues in contemporary policing. Chapter 6 focuses on the relationship between the police and the communities they serve, examining the broad array of programs now lumped together as “community policing,” and contrasting those programs with the more ambitious agenda, now aborted, of the “neighborhood policing”

movement of the late 1960s and early 1970s. Chapter 6 also discusses the recent, explosive growth of private policing, and the implications that trend may have for police accountability. Chapter 7 turns the focus to issues of equality: the controversy over “racial profiling,” the broader problem of biased policing, disparities in the protection the police provide to different communities (exacerbated in some ways by the spread of private policing), and the ramifications of the dramatic but still incomplete diversification of police workforces by minority officers, female officers, and openly gay and lesbian officers. Finally, Chapter 8 addresses what might be called the “internal” dimensions of democratic policing, reassessing the merit of calls made several decades ago for giving police officers themselves a degree of collective, democratic control over the nature of their work. Those calls were rejected in part because the rigidly homogeneous, politically reactionary police forces of thirty or forty years ago seemed exceptionally unsafe places for experiments in workplace democracy. Chapter 8 will explore whether, in the intervening time, police departments have changed enough to warrant revisiting that judgment.

Caveats at the Outset

In pursuing the ways that our ideas about democracy have helped to shape our ideas about the police, and vice versa, this book risks a kind of double myopia, exaggerating the influence in both directions. I am keenly aware of the tendency Ed Zern mocked years ago in his celebrated review of *Lady Chatterley’s Lover* for *Field & Stream*: the novel, he said, offered much of interest about “pheasant-raising, the apprehending of poachers, ways to control vermin, and other chores and duties of the professional gamekeeper,” but was weighted down with “many pages of extraneous material” that would prevent it from ever “tak[ing] the place of J R Miller’s *Practical Gamekeeping*.”¹⁹ Policing is about more than democracy, and democracy is about more than the police. I do not wish to suggest otherwise in these pages. But I do want to suggest the two topics are connected more closely, and in more various ways, than we generally acknowledge—and that closer attention to the connections would help us think more productively about the continuing challenge of democratic policing.

Not everyone agrees that careful thinking about democracy today is worth the effort. Plenty of thoughtful people, for example, suspect democracy is no longer, if it ever was, “a sensible tool of analysis or even a coherent ideal,”²⁰ but has become simply a term of “vague endorsement”²¹—a “‘hurrah’ word.”²² That position receives some support from the frequently remarked fact that almost every government in the world today claims to be democratic in some sense or another. Even if the concept of democracy has discernable content, moreover, it may lack modern relevance: it may be too bound up, for example, with the direct democracy of the ancient Greeks.²³ And even if democracy is a meaningful concept, and a concept with present-day relevance, the pursuit of greater democracy may be a mistake.²⁴ That might be particularly true when it comes to policing. Perhaps the last thing we should want is genuinely democratic policing; perhaps the whole point of constitutional criminal procedure is, and should be, precisely to remove politics from fundamental decisions about law enforcement.²⁵

I think these misgivings are unwarranted. I think the careless use of the term “democracy” is no reason to abandon the effort to use it more precisely; I think the concept of democracy has long transcended its classical origins; and I think the concept of democracy is rich enough to incorporate protections against the pathologies of simple majoritarianism. I also think that the concept of democracy has become so central to our thinking about institutions and society—W. B. Gallie called it “*the* appraisive political concept *par excellence*”—that we probably are stuck with it, like it or not.²⁶ But I will not pursue these matters in this book, at least not directly. My chief task in the first half of the book will be to trace the links between democratic theory and criminal procedure. If, as I conclude, our thoughts about the police have been bound up with our thoughts about democracy, or about things that we lump together with democracy, that seems worth knowing—even if the connections have been largely unhelpful. Much of the motivation for this analysis will be to lay the groundwork for the second half of the book, where I try to think carefully and systematically about what democratic policing should mean today. The various qualms I have described about the analytic usefulness of democracy do indeed throw doubt on this latter project. But each of these qualms amounts to a suspicion that there is no coherent conception of democracy worth pursuing today, at least not in the context of policing. That suspicion can be rebutted most convincingly, if at

all, by finding an account of democracy that is useful in addressing modern-day problems of law enforcement. And ultimately we will not know whether there is such an account until we look.

Our Place, Our Time

This book will do most of its looking in the United States, confining itself largely to the relationship between American democracy and the American police. This limited focus obviously carries its own risks of myopia, and not simply because there are important questions about police and democracy elsewhere around the globe. Even for purposes of understanding the American situation, a comparative perspective has many advantages: it lets us see what is truly distinctive about the challenge of democratic policing in the United States, and what aspects of that challenge we share with other nations.²⁷ I forego those advantages here largely for practical reasons. The American context is the one I know best, and it is quite enough to fill a book.

The American context in the first decade of the twenty-first century plainly includes the horrendous events of September 11, 2001. The terrorist attacks on the World Trade Center and the Pentagon, along with the reactions they produced, have touched virtually every aspect of American life. The effects on law enforcement have been particularly profound. Investigative powers have expanded, particularly at the federal level. Police agencies have shifted their priorities. Public attitudes have changed, too: ethnic profiling, for example, had many more defenders on September 12, 2001, than two days earlier.²⁸ Many people, including the President of the United States and his Attorney General, thought it obvious that the atrocities of September 11 should alter, permanently or at least indefinitely, our thinking about law enforcement, civil liberties, and the dictates of democracy.

As the decade has worn on, though, the lessons of September 11 have grown less and less clear. The implications of the attacks for policing, in particular, became heavily contested. Opinions increasingly diverge on how and to what extent the threat of terrorist attacks should shape criminal justice policies—especially, perhaps, at the local level, where the bulk of American policing takes place. Some of the escalating uncertainty has to do with the passage of time. Traditional concerns about crime, violence, police

misconduct, and workaday law enforcement practices have gradually resurfaced as the events of September 11 have begun to recede into history. But one reason for the uncertainty should have been obvious from the outset. The implications of terrorist threats for law enforcement depend not just on the nature and degree of those threats; they also depend, heavily and necessarily, on our baseline ideas about law enforcement—how it functions, what should be expected of it, and how it intersects with democracy.

No one who thinks carefully about policing and democracy in early twenty-first-century America can ignore the real and continuing threats of terrorism. Protecting against terrorism is not all the police do; it is not even most of what the police do. For local police agencies, in particular, anti-terrorism work remains something of a sideline—important, certainly, but not the mainstay of their work. But rules and practices devised for fighting terrorism can spill over into more run-of-the-mill policing, and vice versa. Some of the spillover may be beneficial. New challenges can spur fresh thinking about old problems.²⁹ But there are other possibilities, too. Heavy-handed anti-terrorism measures can, for example, wind up alienating groups on whom the police depend for their more conventional, day-to-day work—including, perhaps, groups that also might be important allies in the fight against terrorism. This was one reason many local law enforcement agencies were unenthusiastic about the federal government's dragnet questioning of Middle Eastern men in the wake of the 2001 attacks, and one reason many police departments remain reluctant to participate in crackdowns on illegal immigration.³⁰

Sorting through the daunting problems posed for policing by new forms of global terrorism will require, in part, a sophisticated understanding of the terrorists and their tactics. This book will not supply that understanding. But an intelligent response to the law enforcement challenges made horribly manifest on September 11, 2001, will also take a nuanced appreciation of the complicated relationship between American policing and American democracy. That relationship was in flux well before the attacks on the World Trade Center and the Pentagon, and its present contours and possibilities are best approached through a critical examination of its past. Examining that past, and assessing its lessons, are the central tasks of this book.