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Rethinking Police Expertise

ABSTRACT. This Article examines a counterintuitive phenomenon: cases where claims of police expertise do not bolster but undercut police authority in court. Assertions of unique insight, training, and experience have long provided officers with a reliable claim to deference, deflecting a range of challenges to police misconduct. Yet in a variety of disputes, from coerced confessions to entrapment to excessive force, police officers' comparative expertise emerges in the opposite posture, stoking judicial discomfort with enforcement tactics and driving adverse holdings against the state. The gap between these strategies, I argue, reflects a tension between two fundamentally distinct conceptions of expertise: what this Article identifies as seeing expertise as a professional virtue or a professional technology. The virtuous view imagines expertise as a *de facto* institutional good, commanding authority either because it presumptively improves enforcement outcomes or, simply enough, because it is valuable in itself. The technological view, by contrast, imagines expertise as an asset that facilitates the successful performance of investigative tasks, expanding police power in the field and thereby—like more familiar police technologies, from aerial surveillance devices to location trackers—reconfiguring what courts see as the proper balance of power between the individual and the state. Far from invariably deflecting criticism, by this view, the significance of police expertise rests on its interplay with the specific values animating the courts' procedural doctrines: what the police are expert at and how those skills intersect with the goals of a given genre of review.

The courts' dual approaches to police expertise illuminate debates about institutional competency and deference in and beyond the criminal law. For one thing, they expose the moralistic assumptions undergirding our shared intuitions about expertise as a source of institutional authority, urging greater skepticism of a range of legal doctrines grounded on judicial self-abnegation to ostensibly more expert actors. At the same time, they complicate the conventional link between expertise and authority itself, revealing the ambiguous relationship between competency and legitimacy in a system administered by multiple, often conflicting agents of the law. Not least, they invite us to confront our commitment to certain government tasks, like so many apparently entrusted to the police, that inspire less controversy, ironically, the less masterfully they are performed.

Building on these insights, this Article contends that courts should take a technological view of expertise in all their encounters with law enforcement, a shift that will yield more rigorous scrutiny of a broad range of police behaviors. In a legal system populated by an increasingly professionalized police force, we must do away with the assumption that more expert policing is, invariably, more lawful policing, and recognize how this development raises new issues for—and imposes novel obligations on—judges committed to the protection of individual rights.



AUTHOR. Assistant Professor, Harvard Law School. For helpful comments and conversations, I'm grateful to Niko Bowie, Molly Brady, Adam Davidson, Ryan Doerfler, Ben Eidelson, Lee Fennell, Marie-Amélie George, John Goldberg, Genevieve Lakier, Daniel Hemel, Aziz Huq, Orin Kerr, Richard McAdams, Anthony O'Rourke, David Pozen, John Rappaport, Daphna Renan, Dan Richman, David Sklansky, Kevin Stack, Carol Steiker, Matthew Stephenson, Seth Stoughton, David Strauss, and the participants of the University of Chicago Law School Public Law and Legal Theory Workshop, the Vanderbilt Faculty Workshop, and the Law of Policing Conference. I thank Rachel Casper, Eric Halliday, Nick Hine, Jessica Hui, Nora McDonnell, Monica Sharma, and Jacob Steinberg-Otter for terrific research assistance. Special thanks to the editors of the *Yale Law Journal*, and especially to Jackson Skeen, for their thoughtful edits on the piece.



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INTRODUCTION

At Mitchell Lawrence's 2006 trial for selling marijuana to an undercover agent—charges procured, the defense protested, through unlawful police entrapment—an attorney invited the arresting officer to share his extensive background in the investigative work at issue. Detective Aguirre, he repeatedly reminded the jury, was “an experienced undercover cop” who had spent six years in narcotics, and indeed specialized in hand-to-hand sales as his area of “expertise,” having participated in some six to seven hundred prior arrests. The officer, he emphasized in closing arguments, is “very good at what he does.”¹

That anecdote should sound familiar. It comports with a well-recognized pattern of prosecutors invoking the expertise of law-enforcement agents in a bid to impress judges and jurors, boosting the authority of police witnesses and strengthening their cases in court. Primarily associated with Fourth Amendment challenges to unlawful searches, appeals to expertise abound in a variety of disputes over the legitimacy of policing, diffusing challenges to unlawful evidence, defraying claims of entrapment and unreliable identification, deflecting allegations of excessive force, enhancing the credibility of police testimony, and even appeasing criticism of vague criminal statutes. Critics have questioned the merits of these outcomes, not least the contested—to some, indeed, insulting—presumption that police officers have any expertise to speak of.² But the underlying link between expertise and deference remains unquestioned. That connection seems obvious, emblematic of our intuitions about relative competency and judicial decision-making well beyond the criminal law.³

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1. Jury Trial Transcript at 1-117, 2-38 to -39, 2-46, 2-158, *Commonwealth v. Lawrence*, 870 N.E.2d 636 (Mass. App. Ct. 2007) (No. 06-P-983).
 2. See, e.g., Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 533 (2015); Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 86-87 (2015); Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 10-11 (2010); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 268 (2012); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1282 (1998). See generally Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 970 (2017) (discussing criticism of police deference); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997-98 (2017) (same).
 3. See, e.g., Eljalill Tauschinsky, *Performativity*, in Marija Bartl et al., *Knowledge, Power and Law Beyond the State* 6, 7 (Univ. of Amsterdam, Working Paper No. 03, 2016); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1085 (2008); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 944, 947-48 (1999); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1771-72 (2012).

At Mitchell Lawrence's trial, however, there was a twist. The lawyer pressing Detective Aguirre on his "expertise" in hand-to-hand transactions was not the prosecutor. He was the defense attorney.

This Article examines a counterintuitive phenomenon: cases where claims of police expertise—the notion that trained, experienced officers bear unique skills and insights into their investigative work—do not bolster but undercut police authority in court. Looking beyond the familiar canon of Supreme Court opinions and toward the broader universe of judges' daily confrontations with law enforcement,⁴ it surveys a range of disputes where prosecutors and officers downplay police proficiency—where defendants, civil plaintiffs, and sympathetic judges, ironically, find themselves aggrandizing such skills. In some cases, those arguments are underrecognized but not unprecedented. Echoing a dynamic standard in disputes over professional liability,⁵ for instance, plaintiffs in excessive-force cases commonly emphasize police credentials to establish that an officer should have exercised greater prudence, insight, and restraint—suggesting, in effect, that the defendant failed to live up to his expertise in a given case. Often, however, it is precisely an officer's demonstrable proficiency in an encounter that fuels legal concerns. In debates over coerced confessions, officers' manifest expertise in the interrogation room, from their rarefied psychological insights to their talents at eliciting admissions, routinely convinces judges to exclude the ensuing statements, fueling concerns that those officers overbore a suspect's will in violation of the Fifth Amendment. At trials raising claims of entrapment, too, an undercover agent's training and experience often crop up as tools of the defense, simultaneously raising the risk that she veered into illegal enticement methods and, simply enough, entangling her in a fundamentally distasteful enforcement practice. In all these scenarios, though responding to distinct doctrinal and persuasive pressures, challengers look beyond the familiar association between expertise and authority, examining how an officer's professional proficiency might actually heighten the court's appetite for scrutiny.

These divergent strategies are not simply a matter of creative lawyering, exploiting similar rhetoric as either a shield or a sword against the police. Rather,

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4. This Article thus joins recent scholarship emphasizing the value of looking beyond appellate opinions about the police. See, e.g., Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2052-53 (2016); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2191-92 (2014); Lvovsky, *supra* note 2, at 2000-01.
 5. See, e.g., Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627, 641-42 (2016) (discussing negligence); *Heinrich v. Sweet*, 308 F.3d 48, 63 (1st Cir. 2002) (discussing malpractice); *People v. Hall*, 999 P.2d 207, 223 (Colo. 2000) (discussing criminal recklessness). See generally Linsey McGoe, *Strategic Unknowns: Towards a Sociology of Ignorance*, 41 ECON. & SOC'Y 1, 2-4 (2012) (discussing the political value of ignorance in deflecting responsibility for harms).

their persuasive power reflects a tension between two fundamentally distinct conceptions of police expertise – and, by extension, expertise more generally – that pervade judicial reasoning about law enforcement: the difference between seeing expertise as a *professional virtue* or as a *professional technology*. Echoing popular accounts of expertise as a prized currency in a technocratic culture,⁶ the virtuous view imagines expertise as a presumptive institutional good. By this account, the expertise of public servants like policemen intrinsically entitles them to authority, either because it guarantees desirable enforcement outcomes or, simply put, because it is an achievement worth rewarding in itself. The technological view, by contrast, imagines expertise as a professional capacity that does no more – and no less – than facilitate the successful performance of investigative tasks, expanding the police’s practical power in the field. Severing any direct link between expertise and legitimacy, this approach treats expertise as courts have long treated the more familiar technologies of policing, from thermal imaging devices to computer algorithms to sophisticated location trackers: as developments that reconfigure the delicate balance of power between the individual and the state, straining the constraints erected by the Constitution in a way that may predictably increase the need for oversight.⁷

This latter account may be thought of as an institutionally realistic view of expertise⁸ – which is to say, it takes the notion of police expertise seriously, peering behind the technocratic veil to examine the particular content and context of such claims. Rather than embracing expertise as a generic good, that account examines how specific refinements to police proficiency shift the operations of law enforcement in any case. And rather than presuming a consistent relationship between expertise and legality, it examines how such refinements interact with the precise objectives served by judicial oversight, acknowledging that the

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6. See, e.g., RAPHAEL SASSOWER, KNOWLEDGE WITHOUT EXPERTISE: ON THE STATUS OF SCIENTISTS 101 (1993) (noting the common view of “expertise as a privileged, divine-like attribute”); E. JOHANNA HARTELIUS, THE RHETORIC OF EXPERTISE 1-3 (2011) (discussing expertise as a form of social capital); James Fleck, *Expertise: Knowledge, Power and Tradeability*, in EXPLORING EXPERTISE: ISSUES AND PERSPECTIVES 143, 145-46 (Robin Williams, Wendy Faulkner & James Fleck eds., 1998); Evan Selinger & Robert P. Crease, *Introduction to THE PHILOSOPHY OF EXPERTISE* 1, 1-2 (Evan Selinger & Robert P. Crease eds., 2006).
 7. See, e.g., *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (noting how technology may “alter the relationship between citizen and government in a way that is inimical to democratic society” (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring))).
 8. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 3-4 (distinguishing between a “formalist” view of legal institutions, defined by theoretical presumptions about their properties, and a “realist” view, examining how they operate in any given case).

courts' own criminal-procedure doctrines defend a variety of values, from accuracy to autonomy to fundamental fairness, that may respond very differently to the introduction of an "expert" police force. The technological view recognizes, in short, that in a legal system administered by multiple agents of the law, each guided by their own internal goals and pressures, the significance of police expertise cannot be presumed, and certainly not taken as a *de facto* right to deference. It rests, rather, on the interplay between such expertise and the values animating a given challenge: what it is that officers are expert at and how those proficiencies intersect with the goals – constitutional and institutional – upheld by judicial review in any case.

The courts' competing views of expertise illuminate debates about institutional competency and deference beyond the realm of criminal procedure. For one thing, those views reveal the extent to which our familiar associations between expertise and deference rest on an essentially virtue-based vision of expertise as a presumptive institutional good, one at odds with prevailing defenses of judicial deference to begin with. From legal philosophers to scholars of the administrative state, commentators have long distinguished between *epistemic* and *authority-based* theories of judicial deference: the former built on an agent's superior ability to ensure correct legal outcomes, while the latter rest purely on that agent's institutional status.⁹ Given a choice, commentators universally embrace the first as the more legitimate, alone consistent with the courts' duties to vindicate the demands of the law.¹⁰

This Article reveals the instability of that distinction, demonstrating how readily, in a culture that valorizes technocratic achievement, claims of professional expertise accumulate a legitimating aura that supports their own essentially identity-based bid for deference. Well past the criminal law, in disputes ranging from prisoners' rights to university matters to disability-related challenges, critics have protested the tendency of expert claims to exact uncritical deference from judges, often despite the meager nexus between those claims and the legal questions at issue.¹¹ The virtuous model offers a novel lens on these

9. Horwitz, *supra* note 3, at 1068-69; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270-71, 1278 (1996); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 739 (2002); Lawrence Solum, *Legal Theory Lexicon: Standards of Review*, LEGAL THEORY BLOG (July 15, 2018, 1:57 PM), <https://lsolum.typepad.com/legaltheory/2018/07/legal-theory-lexicon-standards-of-review.html> [<https://perma.cc/SG7R-FZD7>]; Meazell, *supra* note 3, at 1772-76; Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1619-20 (1991). For further discussion, see *infra* Section IV.A.

10. See sources cited *supra* note 9.

11. See, e.g., Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 699-715 (1992) (discussing a range of underinterrogated grants of deference to expert judgment).

disputes, attributing such judicial deference not to the courts' simplistic readings of institutional incentives or to their misunderstandings of the legal disputes,¹² but to the hagiographic draw of expertise itself, which may distract us from thinking more critically about such claims.

At the same time, judicial encounters with police expertise sever the link between expertise and deference itself, illustrating the extent to which even conceded claims of competency do not necessarily provide advantages in debates about institutional authority, but might serve as active liabilities. Historians and sociologists of knowledge have long examined the contingent process through which professional groups aspire to the status of "expert," a process shaped by numerous social, cultural, and institutional factors beyond technical mastery.¹³ Most writers, however, still cast successful claims to expertise as reliable sources of authority.¹⁴ Critics who do question experts' entitlement to deference tend to mount broader political attacks on expertise writ large, decrying the inherent elitism or subjectivity of such hierarchies.¹⁵

The treacherous legal status of "expert" policing suggests an additional wrinkle: the extent to which even successful bids to expertise may not boost an actor's institutional authority, or even have a net-neutral effect, but provide direct sources of resistance and mistrust. And it reveals that they may do so not only because of the substantive limits of expertise or any ideological skepticism of expertise per se, but because of the thorny implications of what it means to be an "expert" at certain inherently controversial professional tasks. The skepticism inspired by expert officers using their prodigious skills to entice wary suspects into crime or gain the trust of vulnerable individuals illuminates the range of

12. *Id.*

13. *E.g.*, Brian Wynne, *Misunderstood Misunderstanding: Social Identities and Public Uptake of Science*, 1 *PUB. UNDERSTANDING SCI.* 281, 295-98 (1992); STEPHEN HILGARTNER, *SCIENCE ON STAGE: EXPERT ADVICE AS PUBLIC DRAMA* 5-7 (2000); Michael Lynch, *The Discursive Production of Uncertainty: The OJ Simpson 'Dream Team' and the Sociology of Knowledge Machine*, 28 *SOC. STUD. SCI.* 829, 830-33 (1998); Sheila Jasanoff, *The Eye of Everyman: Witnessing DNA in the Simpson Trial*, 28 *SOC. STUD. SCI.* 713, 715-16 (1998); Steven Shapin, *Cordelia's Love: Credibility and the Social Studies of Science*, 3 *PERSPS. ON SCI.* 255, 257, 260-61 (1995); Robert J. MacCoun, *The Epistemic Contract: Fostering an Appropriate Level of Public Trust in Experts*, in *MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY: THE ROLE OF INSTITUTIONAL TRUST* 191, 191-97 (Brian H. Bornstein & Alan J. Tomkins eds., 2015).

14. See sources cited *supra* note 13.

15. *E.g.*, MORRIS E. CHAFETZ, *THE TYRANNY OF EXPERTS: BLOWING THE WHISTLE ON THE CULT OF EXPERTISE* 124-33 (1996); TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* 209-38 (2017); Harry Bruininis, *Who Made You an Expert? Is America's Distrust of 'Elites' Becoming More Toxic?*, *CHRISTIAN SCI. MONITOR* (Aug. 27, 2018), <https://www.csmonitor.com/USA/Politics/2018/0827/Who-made-you-an-expert-Is-America-s-distrust-of-elites-becoming-more-toxic> [<https://perma.cc/A94Y-9BV2>]; see also *infra* notes 79-87 (discussing critiques of expertise generally).

objections – constitutional, statutory, and moral – that can sever expertise from legitimacy, even among seemingly role-limited decision makers like the courts. It also compels us to confront our commitment to certain government functions, like so many entrusted to the police, that the law has apparently decided that it wants its agents to perform only if they do not become too good at them.

If these debates invite further exploration, the ramifications for the courts' criminal-procedure cases are more direct. Whatever their prior approach, this Article argues, courts should import a technological view into all their encounters with law enforcement. Only that granular analysis, after all, comports with the underlying goals of judicial deference to police expertise, a practice justified as better vindicating the law's demands on the facts of each case. A technological approach will invite more honest and more searching oversight in a range of disputes about police misconduct, not only refining challenges to police brutality, entrapment, and coerced confessions, but also importing similar strategic insights to other sites of litigation, such as debates over nonconsensual police searches. It may even recast the value of expertise in those arenas most closely associated with deference: assessments of criminal suspicion under the Fourth Amendment. The implication is not, certainly, that a technological view will eradicate deference to police judgment. Given the myriad values driving the courts' criminal-procedure doctrines, even that thicker account may sometimes justify a deferential approach. At the very least, however, taking police expertise seriously means that courts must never defer to the authority of expert officers without some meaningful account of how their credentials impact the legality of their tactics. We must do away with the assumption that more expert policing is, invariably, also more lawful policing, or even more socially desirable policing – an assumption blind to the realities of many police-civilian encounters today. And we must recognize the extent to which a legal system populated by expert law-enforcement agents raises novel questions for – and imposes novel obligations on – judges committed to the protection of individual rights.

Before proceeding, a point of clarification: this Article defines *police expertise* as that broad constellation of insights, training, and experience that makes officers especially adept at what the courts take to be their core professional tasks. To downplay police expertise, by this view, is to disavow an officer's sophistication, skill, and proficiency in his duties as an investigator or peacekeeper.¹⁶ This phenomenon is distinct from the risk that police departments may train their officers to exploit legal loopholes, or that savvy policemen will abuse their skills to de-

16. This view of police work is, of course, significantly skewed by the types of disputes that reach the courts and does not necessarily capture the heart of police work in reality, of which criminal investigation is a fairly small part. NAT'L RSCH. COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 73 (2004).

liberately flout the courts – becoming experts, in effect, at the very work of evading the law.¹⁷ The focus, at all times, is on skills catering to police institutions’ own affirmative, internally defensible theories of “good” enforcement. That phenomenon is also distinct from the familiar pattern of officers avoiding criticism by downplaying their aptitude for legal analysis, a type of knowledge that courts have long deemed beyond their professional competency.¹⁸ This Article is concerned, rather, with cases where the same skills that officers have traditionally avowed – and that judges have acknowledged – as squarely within their domain undercut police legitimacy in court.

This Article proceeds as follows. Part I lays out the traditional account of police expertise as a tool of the prosecution, maligned by critics but presumed, if it does anything at all, to boost police authority in court. Part II begins to dismantle that account, surveying a range of cases in which litigants have repurposed the trappings of expertise to hone their challenges to police conduct. Part III explains these counterintuitive cases as the products of a distinct conception of expertise: not as a professional virtue worthy of respect, but as a professional technology that expands police power, predictably sharpening judicial scrutiny. Part IV examines what the courts’ encounters with police expertise reveal about the institutional politics of both expertise and policing more broadly, recalibrating our familiar intuitions about technocracy and institutional legitimacy well beyond the courtroom. Part V ends, finally, by endorsing the technological view as the only defensible account, offering some examples of how that view may refine a range of legal challenges to police misconduct.

I. EXPERTISE AND POLICE AUTHORITY

In the summer of 1967, as the Supreme Court in *Terry v. Ohio*¹⁹ prepared to lower the standard for a constitutional stop in deference to the experienced judgment of veteran policemen, Anthony Amsterdam of the NAACP Legal Defense

17. See Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1409-10 (2011); Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 434-35 (2013).

18. This is the case, for example, in disputes concerning the good-faith exception, see *United States v. Leon*, 468 U.S. 897, 920-21 (1984), and reasonable mistakes of law, see *Heien v. North Carolina*, 574 U.S. 54, 66 (2014). See generally Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261 (2010) (discussing judicial doctrines founded on the presumptive limits of officers’ legal reasoning).

19. 392 U.S. 1 (1968).

Fund warned of the dangerous “mysticism of police expertise” — a trope, he cautioned, that did not help appraise police behavior so much as hang a smokescreen over it.²⁰

In the years since, judicial encounters with police judgment have largely borne out Amsterdam’s prediction. From suppression hearings to civil suits, invocations of expertise have emerged as a common and highly effective method for demanding deference, a type of *open sesame* parting the gates of judicial scrutiny. That dynamic is most commonly associated with determinations of criminal suspicion, such as the existence of probable cause or reasonable suspicion. But it has also pervaded courtroom debates about excessive force, coerced confessions, unreliable identifications, entrapment, the credibility of specialized and lay police testimony, and even the validity of criminal statutes. Sometimes, such invocations go directly to the legal standards at hand, but often their appeal is more impressionistic, aimed less at rebutting specific doctrinal challenges than at endowing officers with the broad halo of authority that hovers over expert claims in court.

This pattern of deference has come in for extensive criticism, decried as simultaneously unconstitutional and naïve about the realities of law enforcement. But it is also unsurprising. After all, such deference echoes a longstanding intuition about the role of relative competency in governance: that the technology of government perfects itself, in essence, by entrusting public functions to those most knowledgeable and skilled in their performance.

A. *The Expansion of Deference*

The early history of policing in the United States did little to suggest that officers would ever enjoy such a measure of respect in court. Echoing the widespread mistrust that greeted the rise of municipal police departments in the nineteenth century, the Supreme Court’s first criminal-procedure cases evinced a notable skepticism of the professional orientation of law-enforcement agents, decriing the flights of “arbitrary power” inherent in unchecked police discretion.²¹ When, in the early twentieth century, judges began to take a heavier hand in regulating police practices, it was again in response to the profession’s worst

20. Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 41, *Sibron v. New York*, 392 U.S. 40 (1968) (Nos. 63, 74).

21. *Boyd v. United States*, 116 U.S. 616, 630 (1886); see *Weeks v. United States*, 232 U.S. 383, 391-92 (1914); see also MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 13-19 (2003) (discussing widespread public criticism of police violence and corruption in the nineteenth century).

pathologies, from the pervasive violence of the Prohibition Era²² to the public's growing awareness of police abuses of Black suspects.²³ The prototypical police officer, in that context, was hardly a thoughtful professional. He was a zealot "engaged in the often competitive enterprise of ferreting out crime."²⁴

Around the 1960s, that prototype began to fade, replaced by an increasingly virtuous vision of the nation's police officers. That turn owed partly to political pressure, not least the conservative backlash that accompanied the Warren Court's criminal-procedure revolution.²⁵ Yet it also reflected the judiciary's shifting view of police officers themselves: a growing tendency, driven by reformist chiefs aiming to "professionalize" local departments, to recast officers as public servants worthy of respect. Reformers advocated a series of administrative changes, centralizing command and streamlining internal discipline, but they also emphasized the professional competency of the individual officer, endowed by his extensive training and experience with "expertise" in his own domain.²⁶ And they marketed that new and improved vision, in key part, to the courts, whose restrictive holdings often fueled their reformist project to start with.²⁷

Over the coming decades, that more optimistic account would pervade the judiciary—tied sometimes more and sometimes less directly to the legal standards at play. It emerged in the first instance in the law of evidence, as judges in the 1950s embraced police officers as "experts" on a range of topics uniquely within their professional experience.²⁸ Today, prosecutors commonly offer policemen as expert witnesses, trusted to educate jurors on subjects including drug-trafficking patterns, street slang, gang activity, forensics, ballistics, and the indicia of criminal intent.²⁹ While appeals to training and experience go hand in hand with expert testimony, however, they are hardly limited to that context. Even when officers testify as regular fact witnesses, prosecutors often invoke

22. Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 449 (2010).

23. Jon O. Newman, *Watching the Judiciary Watch the Police*, 81 MICH. L. REV. 1185, 1189-90 (1983).

24. *Johnson v. United States*, 333 U.S. 10, 14 (1948); see Albert W. Alschuler, "Close Enough for Government Work": *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 351-52.

25. RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, 216-18 (2016).

26. Lvovsky, *supra* note 2, at 2003-08.

27. *Id.* at 2008-12.

28. *Id.* at 2016-25.

29. DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* § 4.2.2(a) (3d ed. 2021) (describing how police officers often play the part of "dual-role experts," combining eyewitness testimony with their specialized knowledge).

their credentials to bathe their observations in the aura of authority, walking the court through an officer's years on the force, number of previous arrests, and courses of academy training, taken and taught.³⁰ Judges and jurors routinely embrace such credentials as bolstering the weight of police testimony, crediting officers' "training and experience"³¹ in resolving credibility contests in the state's favor.³²

Beyond the witness stand, courts have embraced police expertise as a core principle in analyzing searches and seizures under the Fourth Amendment. A trained, experienced officer, as the Supreme Court has repeatedly explained, "views the facts through the lens of his police experience and expertise,"³³ attuned to potential malfeasance in "conduct which would be wholly innocent to the untrained observer."³⁴ Applying these principles, lower and state courts have sanctioned searches and seizures on increasingly thin grounds, including a trained officer's ability to smell unlit marijuana³⁵ or to identify drugs in suspects' pockets on the basis of "plain feel."³⁶ They have also extended that deferential posture to a range of other investigative judgments, from the assessment of exigent circumstances (which must yield to the perspective of "experienced officer[s]")³⁷ to the risk of danger justifying a frisk (which should accommodate the policeman's unique "training and experience").³⁸ In civil suits and prosecutions alleging excessive force, too, police defendants demand deference to a variety of specialized insights, from the proper deployment of weaponry³⁹ to the

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30. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 500-01 (1999).
 31. *State v. Anderson*, 34,670 (La. App. 2 Cir. 5/9/01); 786 So. 2d 917, 925; see *People v. Chambers*, 766 N.E.2d 953, 954 (N.Y. 2002).
 32. *E.g.*, *Dane Cnty. v. Baxter*, 2007 WI App 203, ¶ 14, 305 Wis. 2d 378, 738 N.W.2d 191; *United States v. Williams*, 979 F.2d 186, 186-87 (11th Cir. 1992); *United States v. Jones*, 689 F.3d 12, 18 (1st Cir. 2012).
 33. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).
 34. *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979); see *United States v. Cortez*, 449 U.S. 411, 418 (1981); *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983).
 35. *E.g.*, *Bunnell v. State*, No. 21S-CR-139, 2021 WL 3927263, at *3-4 (Ind. Sept. 2, 2021); *State v. Goff*, 239 P.3d 467, 470 (Kan. Ct. App. 2010); *United States v. Elkins*, 300 F.3d 638, 659 (6th Cir. 2002).
 36. *May v. State*, 780 S.E.2d 455, 457-58 (Ga. Ct. App. 2015) (emphasizing unique "expertise"); accord *United States v. Pacheco*, 841 F.3d 384, 395-96 (6th Cir. 2016); *United States v. Greene*, 927 F.3d 723, 726 (3d Cir. 2019).
 37. *Chamberlain v. City of White Plains*, 986 F. Supp. 2d 363, 381 (S.D.N.Y. 2013).
 38. *State v. Vandenberg*, 2003-NMSC-030, ¶ 29, 134 N.M. 566, 81 P.3d 19.
 39. Appellants' Brief and Addendum at 23, *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005) (No. 04-1377).

appropriate pacing of an intervention⁴⁰ to the necessity of a particular quantum of force.⁴¹ Judges often warn against “second guess[ing]” the judgment of “trained,”⁴² “experienced”⁴³ officers in such encounters.

That principle also reaches beyond the Fourth Amendment. In rebutting charges of entrapment, prosecutors commonly appeal to plainclothes agents’ skills and training. Sometimes, such appeals go to investigators’ proficiency at avoiding entrapment itself: the experienced agent’s caution against excess prodding⁴⁴ or reliable insights into criminal predisposition.⁴⁵ But many appear aimed less at resolving specific doctrinal challenges than at celebrating the agent’s general investigative mastery—her “specialized training” in role-playing,⁴⁶ for instance, or her impressive aptitude for trust-building⁴⁷—as its own entitlement to recognition in court. Judges sometimes begin their opinions by avowing a posture of respect for such sophisticated police work, not as a matter of any direct legal significance but as a type of scene setting for the subsequent analysis. “In the context of undercover, clandestine drug investigations,” as one appellate court explained, “courts must be careful not to ‘second guess’ the strategy decisions of experienced, skilled and trained law enforcement officers.”⁴⁸

So too with claims grounded in due process. Judges dismissing challenges to eyewitness identifications frequently invoke police expertise to assuage concerns about overly suggestive procedures, insisting that encounters impermissible with lay witnesses may be permissible—and indeed desirable, “consistent,” in one court’s words, “with good police work”⁴⁹—when they involve a “specially

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40. Appellees’ Brief at 29-30, *Watson v. City of San Jose*, 765 F. App’x 248 (9th Cir. 2019) (No. 17-17515).
41. Brief of Defendants-Appellants at 39-40, *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016) (No. 15-2460).
42. *Cunningham v. Hamilton*, 259 F. Supp. 2d 457, 461 (E.D. Va. 2003) (quoting *McLenagan v. Karnes*, 27 F.3d 1002, 1007-08 (4th Cir. 1994)).
43. *In re E.G.*, No. A152332, 2019 WL 1292492, at *2 (Cal. Ct. App. Mar. 21, 2019).
44. Brief of Appellee at 25, *United States v. Gamache*, 156 F.3d 1 (1st Cir. 1998) (No. 97-2418).
45. *United States v. Fadel*, 844 F.2d 1425, 1431-32 (10th Cir. 1988).
46. *E.g.*, Transcript of Trial, Day I at 42-43, *United States v. Rutgerson*, No. 14-60083-CR-DRG (S.D. Fla. Aug. 25, 2014).
47. *E.g.*, Transcript of Proceedings at 554, *United States v. Mohamud*, No. 3:10-CR-475-KI (D. Or. Jan. 14, 2013).
48. *United States v. Mabry*, 809 F.2d 671, 677 (10th Cir. 1987); *cf.* *Bailey v. State*, No. 08-08-00023-CR, 2009 WL 3152876, at *1 (Tex. Ct. App. Sept. 30, 2009) (opening its review of the facts by noting that the officer was a “twelve-year veteran”).
49. *People v. Morales*, 333 N.E.2d 339, 346 (N.Y. 1975) (quoting *United States ex rel. Cummings v. Zelker*, 455 F.2d 714, 716 (2d Cir. 1972)).

trained, assigned, and experienced officer.”⁵⁰ Similarly, courts have appealed to police expertise in declining to impose evidentiary safeguards such as recording interrogations with key witnesses—a requirement, the Connecticut Supreme Court protested, that “would amount to an unwarranted intrusion . . . into the professional practices chosen by our trained law enforcement personnel.”⁵¹

Expertise has even deflected due-process challenges to controversial criminal statutes. Rejecting a stream of vagueness claims against broad quality-of-life laws since the 1970s, judges have repeatedly invoked officers’ skill in ferreting out suspicious conduct as a safeguard against unfettered police discretion.⁵² “Just as we trust officers to rely on their experience and expertise” to assess probable cause, as Justice Thomas has reasoned, “so we must trust them to determine [who] threaten[s] the public peace.”⁵³ That principle has never quite commanded a majority of the Supreme Court, and unsurprisingly so, considering that it hardly resolves the structural concerns driving the vagueness doctrine, aimed less at the accuracy of police judgment than at the legislature’s role in setting criminal policy.⁵⁴ But it has repeatedly triumphed among the lower courts, salvaging a line of broad criminal laws that dramatically expand police discretion in the field.

It is important to recognize which professional talents these appeals to police expertise invoke. The suggestion is not, crucially, that judges should defer to police officers because those officers bear special expertise in complying with constitutional or other legal constraints—that they are experts at the task of *lawful* investigation. To the contrary, courts often concede officers’ presumptive inadequacy at such nuanced legal analysis.⁵⁵ The claim, rather, is that officers’ skill at the work of *proficient* enforcement itself assuages legal concerns, demonstrating a level of professional sophistication and regularity that might redress the “competitive” instincts that once troubled the courts.⁵⁶ This genre of professional showmanship functions as a type of *Trust me*, inflating an officer’s status in his own field and undercutting the courts’ appetite for—and confidence in—

50. *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977); accord *United States v. Jones*, 689 F.3d 12, 18 (1st Cir. 2012); *Commonwealth v. Polizzotti*, No. 1581CR0436, 2016 WL 8458775, at *3 (Mass. Super. Ct. Dec. 21, 2016); *People v. Schiffer*, 785 N.Y.S.2d 789, 790 (App. Div. 2004).

51. *State v. Johnson*, 951 A.2d 1257, 1285 (Conn. 2008).

52. Lvovsky, *supra* note 2, at 2042-51.

53. *City of Chicago v. Morales*, 527 U.S. 41, 109-10 (1999) (Thomas, J., dissenting) (citing *Ornelas v. United States*, 517 U.S. 690, 695, 700 (1996)).

54. Lvovsky, *supra* note 2, at 2074-75.

55. Foley, *supra* note 18, at 275-326.

56. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

questioning the validity of his decisions.⁵⁷ It is that largely impressionistic argument that allows judges to invoke the quality of police judgment in dismissing structural challenges to vague criminal laws. “Expert” enforcement, the reasoning goes, must be good enforcement, and good enforcement must be constitutionally permissible enforcement.

B. The Appeal of Expertise

Critics decry this trend as an outrageous abdication of authority to the police, the proverbial fox allowed to guard the hen house. The promise of police expertise has ushered in a “posture of extreme deference” that, Barry Friedman and Maria Ponomarenko observe, is “difficult to explain as a matter of constitutional theory.”⁵⁸

As a matter of political economy, of course, there is hardly anything to explain. That prosecutors and judges so often rely on the totem of expertise to legitimate police conduct is, in some sense, overdetermined.

To begin with, there is the unavoidable fact that some judges want to vindicate the judgments of police officers, an instinct reflecting a range of political and institutional pressures entirely divorced from professional competency. Inclined toward a presumption of regularity for their fellow public servants,⁵⁹ judges often sympathize with the prosecution’s case, hesitating to invoke legal technicalities on behalf of seemingly guilty defendants or to undercut effective tactics in the field.⁶⁰ More self-servingly, inflating police authority allows judges to mitigate their own workloads, raising the bar on judicial remedies, stemming the tide of procedural challenges, and simplifying their analysis in those cases that remain.⁶¹ Not least, some judges might genuinely believe that intervening in the

57. If, after all, criminal procedure has long accommodated what some courts regard as necessary police practices, William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 842-44 (2001), then all the more reason to accommodate “expert” practices, deemed by those most knowledgeable to be especially useful.

58. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1890 (2015) (citing Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 192, 248-49 (1993)).

59. Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 669 (1985); Lvovsky, *supra* note 2, at 2055.

60. Lvovsky, *supra* note 2, at 2053-54; Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 836-37 (2014).

61. Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 30-32, 53 (2015); Lvovsky, *supra* note 2, at 2054.

daily work of law enforcement strains their professional role,⁶² offending principles of judicial restraint and entangling them in the discretionary decisions of a more politically accountable institution.⁶³

Yet at the same time, explaining judicial deference to expert officers requires resort to no such ulterior motives. The courts' attempts to bend their analysis to the greater wisdom of executive agents is, after all, a familiar phenomenon, one that aligns with some of our most deeply held intuitions about the role of expertise in governance. Over the past several decades alone, judges have invoked institutional competency to transfer authority to a range of decision makers, including administrative agencies, military officials, universities, prosecutors, prison officials, and professional groups like doctors and attorneys.⁶⁴ That recent trend itself is only the tip of the historical iceberg, part of a broader pattern of public servants and private actors exploiting the rhetoric of expertise to wrest greater political power, from nineteenth-century penitentiary workers resisting legislative interference⁶⁵ to Progressive-era reformers exalting technocracy as the solution to urban mismanagement.⁶⁶ The preeminent example of the law's infatuation with expertise, of course, came during the New Deal era, when proponents of the administrative state embraced expert discretion as the anchor of good government.⁶⁷ That vision won over the judiciary by the 1940s, as the Supreme Court made its peace with broad policy making discretion vested in executive agencies based primarily on their unique competency in their domains⁶⁸ — a principle that, though later sidelined for Congress's structural prerogative to delegate its authority, has never strayed far from its analysis.⁶⁹ The expertise of

62. See, e.g., Friedman & Ponomarenko, *supra* note 58, at 1891; Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. STATE L.J. 213, 227 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2063 (2011).

63. See Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 767-68 (2007); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 419-20 (2007) (explaining the principles of judicial deference to agency decision-making).

64. Horwitz, *supra* note 3, at 1069-71; Solove, *supra* note 3, at 944, 964-66.

65. See Ashley T. Rubin, *Professionalizing Prison: Primitive Professionalization and the Administrative Defense of Eastern State Penitentiary, 1829-1879*, 43 L. & SOC. INQUIRY 182, 183-85 (2018).

66. See Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113, 125-27 (1982).

67. See, e.g., Schiller, *supra* note 63, at 404-06; Meazell, *supra* note 3, at 1771-72; James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 363-65 (1976).

68. Meazell, *supra* note 3, at 1772; Schiller, *supra* note 63, at 406.

69. See, e.g., Meazell, *supra* note 3, at 1770-72; Kent Barnett, *Improving Agencies' Preemption Expertise with Chevmore Codification*, 83 FORDHAM L. REV. 587, 590-91 (2014).

public actors, in short, has long been touted as the handmaiden of good governance, a natural entitlement to institutional autonomy and a shield against external criticism.

Why this wide-ranging, indeed intuitive, deference? Part of the explanation, again, may be political. Particularly when expertise accrues in other public agencies, deferring to expert actors guarantees greater accountability for the complex, inherently contestable policy choices involved in governance, placing responsibility for those decisions (as well as, conveniently, blame for any missteps) in the hands of more politically responsive groups.⁷⁰ It also enables judges to conserve their own resources, announcing broad legal principles without wading into the tedious, if not downright counterproductive, work of micromanaging the daily operations of coequal branches of the state.⁷¹

More basically, however, the courts' embrace of professional judgment reflects the intuition that expert decision-making is, simply enough, *better*—that the technology of government perfects itself by liberating those most expert at a given task to use their discretion to perform that task well.⁷² Echoing Max Weber's early meditations on bureaucracy, which lauded the technocrat's unique "[p]recision, speed, unambiguity, knowledge," and "strictly 'objective'" outlook,⁷³ defenses of expert authority stress a range of regulatory virtues. Foremost among those are the greater insight and experience of specialists in their own fields. From officials at the Environmental Protection Agency to narcotics agents with the Los Angeles Police Department, by this view, trained professionals are better positioned to resolve thorny or ambiguous problems in their domains, well-versed in the demands of their work,⁷⁴ prepared to respond flexibly to novel issues as they arise,⁷⁵ and often boasting superior resources than the generalist judges who review their decisions possess.⁷⁶ At the same time, expert decision-

70. See, e.g., Meazell, *supra* note 3, at 1772, 1774-76; David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REGUL. 327, 363 (2000).

71. See Solove, *supra* note 3, at 1000-02.

72. Tauschinsky, *supra* note 3, at 7 (noting the presumption that expertise makes "law more rational, more objective or more functionally effective" (internal quotation marks omitted)).

73. MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 214, 216 (H.H. Gerth & C. Wright Mills eds. & trans., 1948).

74. See Schiller, *supra* note 63, at 402-06.

75. See, e.g., Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 277-79 (2004) (arguing that the need for responsiveness to changing conditions has led to delegations of power to administrative experts); Russell L. Weaver, *A Foolish Consistency Is the Hobgoblin of Little Minds*, 44 BAYLOR L. REV. 529, 558 (1992) (urging deference to agencies in light of their expertise and need for flexibility).

76. Meazell, *supra* note 3, at 1772-73; Solove, *supra* note 3, at 1006.

making is often commended for its impartiality: the suggestion that the expert's laser-like focus on technical correctness crowds out less legitimate concerns.⁷⁷ Honed by a process of rigorous training and socialization, the expert acquires a professional identity defined by pride in her own talents and a "singularity of purpose," interested less in the outcome of any case than in maintaining the reputation and integrity of her role.⁷⁸

Certainly, these celebrations have not gone unquestioned. For one, critics assail the presumption that expertise ensures better-informed, more rational decisions. Touting the virtues of formal training and scientific analysis, the mantle of expertise masks the subjectivity of the most rigorous professional knowledge, setting aside the persisting risk of sloppiness or manipulation,⁷⁹ and devalues more informal authorities.⁸⁰ Produced through complex institutional and disciplinary channels, it is vulnerable to ossification, reflecting stale interpretative frameworks, underinterrogated assumptions, and outdated methods.⁸¹ And even the most impressive shows of rationality never fully exclude confounding influences, from methodological frailties like selection bias to exogenous pressures like personal prejudice.⁸²

Not least, critics deride the notion of the "objective" expert as an antidemocratic myth, an attempt to sell the people a dictatorship under the guise of technocratic neutrality.⁸³ They decry the inevitable penetration of partisanship into expert decision-making, both through external lobbying and through individual experts' cultural priors.⁸⁴ They warn of the institutional pressures that often skew expert discretion, from a concern with maintaining professional relationships to a desire for public support to, most basically, the internal politics of any

77. Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRIT. J. SOCIO. 173, 187 (1992) (noting the popular view of experts as "embodying neutrality" and "operating according to an ethical code 'beyond good and evil'").

78. Meazell, *supra* note 3, at 1778; accord Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1759 (2007).

79. See, e.g., Katherine A. Trisolini, *Decisions, Disasters, and Deference: Rethinking Agency Expertise After Fukushima*, 33 YALE L. & POL'Y REV. 323, 337-38 (2015) (discussing pathologies of expert decision-making).

80. See, e.g., Ilya Somin, *Libertarianism and Judicial Deference*, 16 CHAP. L. REV. 293, 300-01 (2013); JAMES C. SCOTT, *SEEING LIKE A STATE* 309-11 (1998); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 849-54 (2021) (discussing the importance of democratic knowledge in the criminal system specifically).

81. Solove, *supra* note 3, at 1014-15.

82. *Id.* at 1012-14.

83. See, e.g., CHAFETZ, *supra* note 15, at xiii-xv.

84. See, e.g., Schiller, *supra* note 63, at 422-24; Marija Bartl, *De-localisation of Knowledge*, in Marija Bartl et al., *Knowledge, Power and Law Beyond the State* 18, 18 (Univ. of Amsterdam, Working Paper No. 2016-03, 2016).

complex organization.⁸⁵ Given these shortcomings, unsurprisingly, expertise has not always maintained its perch as an unquestioned marker of good governance. The 1960s are remembered as witnessing a crisis of expertise, as a series of elite failures, from the Vietnam War to the rise of malpractice litigation, alerted the public to the limits of professional judgment.⁸⁶ We are broadly witnessing a similar crisis again today.⁸⁷

Yet within the legal culture – part of the professional elite itself – there is a persisting sense that expert discretion is, if not an unalloyed good in debates over institutional legitimacy, nevertheless better than not.⁸⁸ Echoing in humbler tones the truism that the Constitution is not a suicide pact, there persists some notion that legal constraints should accommodate the skillful, proficient, or otherwise “good” performance of public tasks – that, assuming a particular function is worth doing, the way to get it done well is by entrusting it to those with the greatest skill and insight in the field. And it is that presumption that makes the use of expertise to boost police authority, if not appropriate as a matter of constitutional analysis, then at least intuitive as a litigation strategy.

C. Challenging Police Expertise

For most critics of judicial deference to the police, that broader survey of the virtues of technocratic government is perhaps interesting but ultimately irrelevant. Whatever the merits of empowering agency officials, university officers, or frontline bureaucrats, the courts’ self-abnegation to the professional judgments of policemen has inspired a particular wave of resistance.

Some of that resistance is purely legalistic, protesting not the merits but the constitutionality of deference. By this view, the duty of ensuring that the police comply with constitutional constraints rests with the courts. Deferring to an of-

85. See, e.g., Somin, *supra* note 80, at 298–300; Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 735–36 (2011).

86. See Freedman, *supra* note 67, at 367–71; Thomas L. Haskell, *Introduction*, in THE AUTHORITY OF EXPERTS, at xii–xiv (Thomas L. Haskell ed., 1984); Eliot Freidson, *Are Professions Necessary?*, in THE AUTHORITY OF EXPERTS, *supra*, at 4–5; HILGARTNER, *supra* note 13, at 4.

87. See Jonathan Chait, *American Death Cult*, INTELLIGENCER (July 30, 2020), <https://nymag.com/intelligencer/2020/07/republican-response-coronavirus.html> [<https://perma.cc/4CPW-9CYL>]; NICHOLS, *supra* note 15, at 2–3 (discussing growing skepticism of medical and scientific expertise among American citizens).

88. For scholars embracing deference to experts, see, for example, Coglianese et al., *supra* note 75, at 277–80; Krotoszynski, *supra* note 9, at 737; Barnett, *supra* note 69, at 591; Lawson & Moore, *supra* note 9, at 1302; and Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2233–34 (2009).

ficer's judgment about appropriate enforcement tactics abdicates that duty, betraying the courts' responsibility to protect individual rights against the pressures of the state.⁸⁹ Moreover, some invocations of expertise to assuage constitutional challenges seem to confuse the nature of the inquiry. The string of decisions exalting police judgment in dismissing vagueness challenges, for instance, ignores the fact that the vagueness doctrine does not seek to preserve the quality of law-enforcement practices. It seeks to preserve the legislature's authority over penal policy, a concern agonistic to the comparative competency of policemen.⁹⁰

The primary criticism of judicial deference to expert police officers, however, is far simpler. It is a deep-seated skepticism that police officers are experts to begin with.

For one thing, critics note the thin foundation underlying most policemen's claims to professional judgment: the cursory training offered in many departments, the haziness of officers' purported insights about crime, the innate subjectivity or plain inaccuracy of many pearls of wisdom offered by police witnesses in court.⁹¹ Even the most widely accepted examples of police knowledge—the officer's intimacy with “high crime” areas,⁹² for instance, or her ability to recognize criminal activities that “elude an untrained person”⁹³—are often grounded less in reliable data than in hunches and best guesses, easily retrofitted to justify searches after the fact.⁹⁴

More troublingly, critics protest, the police officer's professional judgment evinces a host of countervailing distortions. Researchers have amply documented the racial biases that shape police determinations of suspicion, priming officers to initiate more encounters with Black and Latino suspects and to be

89. Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 683 (1998); Claire R. O'Brien, *Reasonable Suspicion or a Good Hunch? Dapolito and a Return to the Objective Evidence Requirement*, 93 N.C. L. REV. 1165, 1178-81 (2015); Thomas R. Fulford, Note, *Writing Scripts for Silent Movies: How Officer Experience and High-Crime Areas Turn Innocuous Behavior into Criminal Conduct*, 45 SUFFOLK U. L. REV. 497, 497-98 (2012).

90. Lvovsky, *supra* note 2, at 2074-75.

91. Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause*, 12 U. PA. J. CONST. L. 751, 754-57 (2010); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1159-61 (2012); see David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 301; Maclin, *supra* note 2, at 1306; Catherine M. Grosso & Barbara O'Brien, *Grounding Criminal Procedure*, 20 J. GENDER RACE & JUST. 53, 72-76 (2017); Miller, *supra* note 62, at 214.

92. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

93. *United States v. Cortez*, 449 U.S. 411, 418 (1981).

94. Fagan & Geller, *supra* note 2, at 86-87; Taslitz, *supra* note 2, at 10-11; Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 350-52 (2019).

more violent in those encounters.⁹⁵ The unrelenting headlines of unarmed Black men killed by officers who nevertheless insist that they were frightened for their lives bear out both the limits and the tragic consequences of officers' ostensibly refined insight in the field. Those racial distortions are further compounded by a range of cognitive biases that blunt even well-intentioned officers' judgment, including an ingrained zealousness in securing arrests,⁹⁶ a culture of authoritarianism and insularity that skews citizen interactions,⁹⁷ and a paranoia that primes officers to perceive dangers in a range of unorthodox social conduct⁹⁸ — often inculcated by formal training exaggerating the hazardous nature of the police task.⁹⁹

The problem with prosecutorial appeals to police judgment, by this view, is that their assertions of police expertise are simply overblown. And the rightful solution, encouraging more skeptical judicial oversight, is to expose that fact, alerting courts to the limits of police competency. These critiques do profoundly important work in charting the failures of police training and professionalism today, chiseling away at the under-deserved authority that officers enjoy in court. But they do not question the underlying premise that an officer's genuine skill and proficiency would indeed bolster the presumptive legitimacy of her conduct. That expertise inflates judicial trust of other public actors, appeasing concerns about the legality of their tactics, is taken for granted.

II. POLICE EXPERTISE AGAINST THE POLICE

In fact, the link between police expertise and judicial deference is far from inevitable, and it is far from universal. The notion that officers bear unique skills and insights in the work of criminal investigation has repeatedly stoked the courts' discomfort with enforcement tactics, bolstering legal challenges to police

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95. *E.g.*, Richardson, *supra* note 62, at 2046-47, 2075-97; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Randall S. Suskind, Note, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 334-38 (1994); Grosso & O'Brien, *supra* note 91, at 75-76; Maclin, *supra* note 2, at 1282; Miller, *supra* note 62; Taslitz, *supra* note 2, at 18-22; Grunwald & Fagan, *supra* note 94, at 385-93; see also *infra* note 276 (collecting sources on the racial disparate impact and violence of policing).
96. Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 316-17 (2005).
97. Robert P. McNamara, *The Socialization of the Police*, in POLICE AND POLICING 10 (Dennis Jay Kenney & Robert P. McNamara eds., 2d ed. 1999).
98. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 44 (1966).
99. Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 637-39 (2019); Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 226-29 (2015).

conduct, driving adverse judgments against the state, and deepening qualms about the legitimacy of the prosecution. In such cases, ironically, it is the side adverse to the police – defendants in criminal cases or private plaintiffs in civil claims – that does its best to underscore the professional talents driving effective law enforcement, while prosecutors and officers do their best to deny those skills.

This Part examines three examples of this phenomenon: constitutional challenges to involuntary confessions, defensive claims of entrapment, and litigation alleging excessive force. In the first two cases, challengers emphasize police expertise to accentuate the apparent risk of a legal violation, suggesting that more expert officers are likelier to elicit coerced statements or manipulate wary suspects into crime. The third makes a structurally distinct argument, examining how claims of expertise may elevate the legal standard on permissible enforcement conduct, expanding legal liability for police violence.¹⁰⁰ Despite these differences, nevertheless, all three case studies exemplify a similar dynamic: all three reveal how casting our sights past the presumptive link between expertise and legitimacy, to examine the precise nature of an officer's expertise and its interaction with the legal issues at hand, may actually fuel concerns about unlawful enforcement.¹⁰¹

These disputes are not immune from more familiar invocations of expertise as a bid for deference by prosecutors and policemen. Sometimes, indeed, officers' credentials – including the very same skills – are marshaled by opposing parties for both purposes in the very same case. A core goal of the analysis below is to examine how these invocations exist alongside each other, alternately commanding the allegiance of the courts. Taken together, these cases do not simply demonstrate the surprising appeal – and frequent success – of police expertise as a tool for challenging police misconduct. They also illuminate the very different ways that different litigants ask judges to take expertise into account.

100. This Article focuses on three especially rich case studies, but these examples are not necessarily exhaustive. Other contexts theoretically lending themselves to similar dynamics include disputes over the validity of consent to search, which echo concerns about professional intimidation, *United States v. Garden*, No. 4:14CR3072, 2015 WL 6039174, at *9-10 (D. Neb. June 29, 2015); as well as disputes over apparent authority, *United States v. Griswold*, No. 09-CR-6174, 2011 WL 7473466, at *3-8 (W.D.N.Y. June 2, 2011); fruit of the poisonous tree, *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016); and qualified immunity, where courts commonly assess whether defendants should have known better, *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

101. In many of these examples, it is of course debatable whether police work genuinely lends itself to professional "expertise," either in theory or in the case at hand. The following pages do not presume the validity of such expertise so much as remain deliberately agnostic to it. The focus, at all times, is on how parties weaponize the trappings of expertise, rather than the validity of their claims.

A. Confessions

No example of the double-sided nature of police expertise stands as stark as the litigation surrounding coerced confessions since the 1960s. From Supreme Court opinions debating the risks of psychological interrogation to arguments before trial judges and magistrates, the problem of involuntary admissions has long proven a constitutional pathology exacerbated by the professional aptitude of policemen – both their practical skills in the interrogation room and their substantive insights into the psychology of their work.

1. *Debating Police Expertise in Miranda*

That debate began with the Supreme Court's most memorable encounter with police interrogation, 1966's *Miranda v. Arizona*.¹⁰² Often remembered for elevating the elite Federal Bureau of Investigation (FBI) as a model for reforming more primitive practices among local departments, that case in fact recognized the police's own increasingly sophisticated interrogation tactics as a core part of the constitutional concern.

The precise practices that rankled the majority in *Miranda* were a far cry from the interrogation methods that initially inspired the Fifth Amendment's bar on involuntary confessions. Historically, that provision responded to the use of physical force to extract incriminating statements, exemplified by the excesses of England's Star Chamber but still practiced widely in the United States well into the twentieth century.¹⁰³ By midcentury, however, widespread criticism led police officials to turn to more ostensibly humane interrogation practices, driven less by the infliction of physical pain than by the use of psychological pressures to encourage self-incrimination.¹⁰⁴

To perfect their powers of persuasion, police departments developed a host of calculated gambits for exploiting suspects' psychological vulnerabilities, refined by veteran interrogators and passed down to new recruits through both formal training and more casual in-service guidance.¹⁰⁵ The most common

¹⁰². 384 U.S. 436, 444-45 (1966).

¹⁰³. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 908-09 (2004); *Spano v. New York*, 360 U.S. 315, 321 n.2 (1959) (listing cases).

¹⁰⁴. See Drizin & Leo, *supra* note 103, at 908-10; Julia Simon-Kerr, *Public Trust and Police Deception*, 11 NE. U. L. REV. 625, 647-48 (2019).

¹⁰⁵. See generally Hayley M. D. Cleary & Todd C. Warner, *Police Training in Interviewing and Interrogation Methods: A Comparison of Techniques Used with Adult and Juvenile Suspects*, 40 LAW & HUM. BEHAV. 270 (2016) (analyzing how police learn and employ interrogation methods);

methods are modeled on the “Reid Technique,” a multistep process first popularized in the 1960s, although the precise strategies vary by region and department.¹⁰⁶ Such encounters generally start with the premise that an interrogation is not aimed primarily at gathering new information. It is aimed, rather, at eliciting incriminating statements from a suspect whose guilt has already been established by other means.¹⁰⁷ To that end, officers deploy a series of subtle pressures to command the conversation and convince reluctant suspects to come clean. Trained interrogators begin by “softening up” the suspect, expressing sympathy for his situation and emphasizing the informality of the ensuing conversation.¹⁰⁸ Next, they rely on a combination of “maximization” and “minimization” tactics, simultaneously inflating the suspect’s perception of the case against him – confronting him with evidence, asserting confidence in his guilt, rejecting protests of innocence¹⁰⁹ – and diminishing its social or moral consequences, downplaying the seriousness of the offense or offering “face-saving” explanations for technically illegal conduct.¹¹⁰ In addition to these standbys, experienced detectives exploit a range of supplemental tactics, from appealing to a suspect’s faith¹¹¹ to emphasizing the importance of cooperation¹¹² to playing good cop/bad cop.¹¹³

Proponents argue that such tactics are necessary to elicit statements from individuals with every incentive to deny their guilt.¹¹⁴ But by the 1960s, the Supreme Court began to fear that, far from avoiding the dangers of coerced confessions, psychological interrogation carried its own risks of abuse. The Court’s anxieties partly evinced a concern with the accuracy of criminal proceedings: the fear that overly persuasive pressures, compelling a suspect to implicate himself simply to satisfy his indefatigable interrogator, would lead to false confessions

Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1530-33 (2008) (explaining that police officers are trained in interrogations through a variety of means).

106. Weisselberg, *supra* note 105, at 1530-34; Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. PUB. INT. 33, 42 (2004).

107. See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 22-23 (2008); Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6-7 (2010).

108. See LEO, *supra* note 107, at 121-23; Weisselberg, *supra* note 105, at 1531-32.

109. LEO, *supra* note 107, at 134-40; Cleary & Warner, *supra* note 105, at 281; Weisselberg, *supra* note 105, at 1534-37.

110. Drizin & Leo, *supra* note 103, at 916-17.

111. *E.g.*, *People v. Adams*, 192 Cal. Rptr. 290, 294-95 (Ct. App. 1983).

112. Weisselberg, *supra* note 105, at 1535-36.

113. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1097-98 (2010).

114. Simon-Kerr, *supra* note 104, at 630.

and “ultimately . . . jeopardize[]” the “innocent.”¹¹⁵ Yet they also reflected the concern that even demonstrably true confessions procured through coercive methods taint the integrity of the proceedings, “undermin[ing] the individual’s will to resist”¹¹⁶ and thereby offending the law’s proper “respect . . . [for] the dignity and integrity of its citizens.”¹¹⁷ By this account, which has predominated the Court’s cases since *Miranda*,¹¹⁸ judges should exclude coerced admissions not because they “are unlikely to be true” but because they “offend an underlying principle in the enforcement of our criminal law,”¹¹⁹ sacrificing personal autonomy to the all-powerful incursions of the state.

To assuage these concerns, the Supreme Court crafted a new safeguard aimed at reining in the police’s coercive practices: the now-famous *Miranda* warnings.¹²⁰ The conventional reading of that development is as a celebration of the police’s professional competency.¹²¹ The warnings, after all, were not the Court’s own innovation but borrowed from the FBI, whose sophisticated methods the majority lauded as “exemplary . . . of effective law enforcement.”¹²² By contrast, the Court appeared to disavow prevailing police practices as beneath the dignity of the profession – not only potentially unreliable but also “lazy and unenterprising,”¹²³ far inferior to “evidence independently secured through skillful investigation.”¹²⁴ On this reading, the problem with contemporary interrogation was that interrogators were simply not that good at what they did. And the solution

115. *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) (quoting 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 309 (3d ed. 1940)); see *Miranda v. Arizona*, 384 U.S. 436, 442-43 (1966). For scholars emphasizing the risk of false confessions, see Drizin & Leo, *supra* note 103, at 907-08; Garrett, *supra* note 113, at 1052-53; and Laura Hoffman Roppe, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729, 753-57 (1994).

116. *Miranda*, 384 U.S. at 467.

117. *Id.* at 460; see also *Spano v. New York*, 360 U.S. 315, 320 (1959) (“The abhorrence of society to the use of involuntary confessions . . . turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . .”).

118. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1741 (2005); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 583-85 (1979).

119. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

120. *Miranda*, 384 U.S. at 444-45.

121. See Sklansky, *supra* note 118, at 1744-45.

122. *Miranda*, 384 U.S. at 483; see also *id.* at 483 n.54 (quoting J. Edgar Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 IOWA L. REV. 175, 177-82 (1952), on the proper role of the Federal Bureau of Investigation (FBI)).

123. *Id.* at 447 (quoting 4 NAT’L COMM’N ON L. OBSERVANCE & ENF’T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931)).

124. *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

was to encourage greater skill and ingenuity, both at the preliminary work of investigation and at the task of questioning itself.

At the same time, however, the Court's qualms about the injustice of wresting even reliable confessions from recalcitrant suspects rested on the intuition that police interrogators were, to the contrary, *too* good. Drawing liberally on instructional manuals used by contemporary departments, the majority opinion in *Miranda* is perhaps best remembered for its painstaking reconstruction of the realities of interrogation: the strategic isolation, the unrelenting recriminations, the cunning deflection of consequences.¹²⁵ But the majority also focused on the sophisticated nature of such practices, a combination of "psychological conditioning"¹²⁶ and "patient[] maneuver[s]"¹²⁷ drawn from the wisdom and "extensive experience" of veteran officers.¹²⁸ And the schism between the majority and the dissent came down, in key part, to the Justices' divergent estimations of these techniques at work. Far from the "effective psychological stratagems" decried by the majority,¹²⁹ Justice White insisted, most police-station questioning was "confused and sporadic," lasting no more than a half hour.¹³⁰ Such "minor pressures and disadvantages," echoed Justice Harlan, were hardly so coercive as to trigger the right to counsel—a right attaching at trial only due to the unfairness of "confronting an untrained defendant with a range of technical points of [law] familiar to the prosecutor but not to himself."¹³¹ The mere interrogation of criminal suspects, the suggestion went, entailed no such imbalance of professional skills.

The shadow of police expertise, in short, entered *Miranda* in multiple ways. On the one hand, the Court's exaltation of the FBI and its attempt to contrast interrogation with more "skillful" investigation pointed to local departments' failure to cultivate sufficient professional sophistication—a failure that the *Miranda* warnings themselves sought to remedy. Yet at the same time, it was the trained interrogator's demonstrable skill that compelled the majority to intervene to begin with, raising the risk of eliciting involuntary—even if often reliable—admissions.

125. *Miranda*, 384 U.S. at 448-55 & nn.8-9, 457.

126. *Id.* at 454.

127. *Id.* at 455 (quoting FRED E. INBAU & JOHN E. REID, *LIE DETECTION AND CRIMINAL INTERROGATION* 185 (3d ed. 1953)).

128. *Id.* at 449 n.9; see also *Spano v. New York*, 360 U.S. 315, 321 (1959) (emphasizing the need for greater scrutiny as "methods used to extract confessions [become] more sophisticated").

129. *Miranda*, 384 U.S. at 449 n.9.

130. *Id.* at 533 n.2 (White, J., dissenting).

131. *Id.* at 516-17, 514 (Harlan, J., dissenting).

2. *Expert Interrogators at the Supreme Court*

In the years following *Miranda*, claims about police proficiency would repeatedly emerge in the Court's opinions in that same adversarial role. From cases assessing the voluntariness of individual confessions to those announcing broad rules for police questioning, the outcomes of Fifth Amendment challenges have consistently reflected the Justices' warring appraisals of police interrogation as its own site of investigative mastery.

Take, for example, 1977's *Brewer v. Williams*, in which a defendant revealed the location of the victim's body after two officers, recognizing him to be a religious man, implored him to let the child's parents give her a "Christian burial."¹³² In a series of separate opinions, the five Justices who voted to suppress decried the so-called "Christian burial speech" as a masterful strategy,¹³³ a "sophisticated,"¹³⁴ "skillful and effective form of" questioning¹³⁵ "designed[] . . . to elicit information . . . as surely as [a formal interrogation]."¹³⁶ The dissenters gave the investigators less credit for cracking the case, describing Williams as "spontaneously" offering clues "without any prodding from the officers"¹³⁷—driven, per Chief Justice Burger, by "[t]he human urge to confess . . . normal in all save hardened, professional criminals."¹³⁸ As in *Miranda*, the Justices' votes essentially tracked their sensitivity to interrogation as an investigative skill: whether, as they saw it, Williams's admission was the product of investigative finesse or an inevitability of human nature.

So, too, in 1980's *Rhode Island v. Innis*,¹³⁹ a case concerned less with the voluntariness of a specific confession than the definition of an "interrogation" itself. The majority defined that term to include "any words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect,"¹⁴⁰ explaining that a more formalistic approach risked rewarding police "ingenuity" in developing "methods of indirect interrogation."¹⁴¹ Urging a narrower rule, Chief Justice Burger accused the Court of overestimating the

¹³². 430 U.S. 387, 392-93 (1977).

¹³³. *Id.* at 400.

¹³⁴. *Id.* at 408 (Marshall, J., concurring) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)).

¹³⁵. *Id.* at 412 (Powell, J., concurring).

¹³⁶. *Id.* at 399 (majority opinion).

¹³⁷. *Id.* at 434 (White, J., dissenting).

¹³⁸. *Id.* at 420 (Burger, C.J., dissenting).

¹³⁹. 446 U.S. 291 (1980).

¹⁴⁰. *Id.* at 301 (footnote omitted).

¹⁴¹. *Id.* at 299 n.3 (quoting *Commonwealth v. Hamilton*, 285 A.2d 172, 175 (Pa. 1971)).

sophistication of interrogators. “Few, if any, police officers,” he protested, “are competent to make the kind of evaluation seemingly contemplated” by the rule.¹⁴² Urging a broader one, Justice Stevens took a more generous view of police competency. Because “professionally trained police officers” may easily fashion “a few well-chosen remarks [to] induce” a seemingly spontaneous confession, he reasoned, an interrogation should include any and all such intentional encounters.¹⁴³ Once more, the Justices’ positions hinged on their assessments of the relative proficiency of police interrogators, as simple peacekeepers or sophisticated strategists maneuvering suspects into self-incrimination.

Other cases turn on a different hallmark of police expertise: not the power of an officer’s skills at interrogation, but the substance of his insights into suspect psychology. In *Innis* itself, indeed, the majority drew pushback not only for its definition of an interrogation, but also for its holding on the facts: its conclusion that police officers’ warnings that a disabled child might harm herself with the defendant’s gun, articulated without any reason to believe he was unusually sensitive to “the safety of handicapped children,” were insufficiently evocative to qualify.¹⁴⁴ Dissenting, Justices Marshall and Stevens lampooned that analysis as both “ludicrous” on its face¹⁴⁵ and, more importantly, contrary to the “practical experience embodied in [police] manuals,”¹⁴⁶ which endorsed the appeal “to confess for the sake of others” as “a classic interrogation technique” with immense persuasive power.¹⁴⁷ The majority’s failure to spot a constitutional problem ignored experienced officers’ own professional wisdom in their line of work.¹⁴⁸

This dynamic emerges perhaps most clearly in the Supreme Court’s repeated encounters with “two-step” interrogations: the practice of eliciting a statement prior to administering *Miranda* warnings and then attempting to reextract it afterward. That issue first reached the Court in 1985’s *Oregon v. Elstad*, where the majority denied that a spontaneous statement necessarily rendered a subsequent confession inadmissible,¹⁴⁹ dismissing any link between the two as “speculative

142. *Id.* at 304 (Burger, C.J., concurring in judgment).

143. *Id.* at 316 (Stevens, J., dissenting).

144. *Id.* at 302 (majority opinion).

145. *Id.* at 306 (Marshall, J., dissenting).

146. *Id.* at 315 (Stevens, J., dissenting).

147. *Id.* at 306 (Marshall, J., dissenting).

148. *Id.* at 315 (Stevens, J., dissenting).

149. 470 U.S. 298, 300 (1985).

and attenuated.”¹⁵⁰ Dissenting, Justice Brennan excoriated the Court for substituting its own “marble-palace psychoanalysis”¹⁵¹ for what he repeatedly identified as “expert interrogators[’]” superior insights on the topic.¹⁵² “[F]ar from . . . creating merely a ‘speculative and attenuated’ disadvantage,” he insisted, those “expert[s]” understood “that such revelations frequently lead directly to a full confession,” exerting pressures powerful enough to implicate the Fifth Amendment.¹⁵³

When the Court revisited the issue in 2004’s *Missouri v. Seibert*, unsurprisingly, its growing discomfort with two-step questioning reflected a growing receptivity to such professional wisdom.¹⁵⁴ In the years since *Elstad*, the practice of two-step questioning evolved into a common tactic of trained investigators, a deliberately deceptive strategy that five Justices now rejected as a dangerous circumvention of *Miranda*.¹⁵⁵ Inherent in that reasoning, however, was an embrace of the police expertise rejected in *Elstad*: the wisdom, echoed by police manuals and veteran instructors, that a skillful interrogator “with one confession in hand . . . can count on getting its duplicate, with trifling additional trouble.”¹⁵⁶ The Court’s growing alarm about two-step questioning between *Elstad* and *Seibert* was inseparable from its acknowledgment of – indeed, deference to – police interrogators’ professional insights in their own domain.

From *Miranda* to *Seibert*, the Supreme Court’s confrontations with trained, experienced interrogators turn traditional assumptions about expertise on their head. Far from assuaging concerns about coerced confessions, the notion that trained officers bear special skills or insights in the interrogation room – both the Court’s recognition of interrogation as the stuff of specialized training and its sensitivity to officers’ wisdom about that process – has fueled judicial skepticism of the ensuing statements, inviting the exclusion of individual confessions and imposing stricter constraints on police practices.

3. *Expert Interrogators at the Lower Courts*

Supreme Court case law, of course, hardly charts the limits of judicial confrontations with expert interrogators. Among the lower courts, too, the relative

150. *Id.* at 313.

151. *Id.* at 324 (Brennan, J., dissenting).

152. *Id.* at 328, 332, 357.

153. *Id.* at 328.

154. 542 U.S. 600 (2004).

155. *Id.* at 609–11, 617; *accord id.* at 620–21 (Kennedy, J., concurring).

156. *Id.* at 613 (plurality opinion); *accord id.* at 621 (Kennedy, J., concurring).

proficiency of police officers has stayed at the center of a range of challenges to involuntary confessions.

Among those challenges is a genre that rarely reaches the Supreme Court: claims sounding in *accuracy*, asserting that interrogators failed at their own avowed task of extracting reliable statements from recalcitrant suspects. Here, challengers typically make more familiar appeals to expertise. From defendants to sympathetic judges to scholars decrying the phenomenon of false confessions, critics have identified a range of ways that sloppy or “poorly trained”¹⁵⁷ officers may elicit false statements, from relying on “inappropriate psychological ‘motivators’”¹⁵⁸ to leaking confidential details¹⁵⁹ to misapplying intensive interrogation methods to young or mentally impaired suspects.¹⁶⁰ In doing so, practitioners tend to emphasize officers’ departure from the advice found in training manuals, contrasting the ineptitude of these particular examiners against the wisdom of the profession as a whole,¹⁶¹ while academics take a broader view, denouncing such missteps as emblematic of the weaknesses pervading all police interrogation.¹⁶² But both effectively attribute false confessions to the limitations of the investigating officers, to be remedied through greater training and professional skill building.

When, by contrast, defendants move to exclude presumptively *accurate* statements procured in violation of the Fifth Amendment, they take a different tack. Echoing the same rhetoric that drives victorious challenges at the Supreme Court, defendants often co-opt the trappings of professional mastery as a key part of their strategy, protesting that they were “the subject of skillful” questioning by “an experienced investigator,”¹⁶³ or that their statement was extracted by a “skilled examiner,”¹⁶⁴ or that “an experienced detective” (per one defense attorney) “played [his client] as an (sic) stradivarius (sic) violin.”¹⁶⁵ The record of one recent challenge exemplifies the dynamics of such arguments. Cross-examining the interrogating officer on his credentials, the defense attorney in *United*

157. *People v. Garvin*, No. Ho26723, 2005 WL 318818, at *3 (Cal. Ct. App. Feb. 10, 2005).

158. *Id.*; see *United States v. Preston*, 751 F.3d 1008, 1025-26 (9th Cir. 2014).

159. Garrett, *supra* note 113, at 1115-16; Drizin & Leo, *supra* note 103, at 1003 (noting the risk of contamination).

160. *E.g.*, *In re Elias V.*, 188 Cal. Rptr. 3d 202, 218 (Ct. App. 2015); see also Garrett, *supra* note 113, at 1116-17.

161. See, *e.g.*, *In re Elias V.*, 188 Cal. Rptr. 3d at 218; *Preston*, 751 F.3d at 1022-26.

162. See, *e.g.*, Drizin & Leo, *supra* note 103, at 1001-03; Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCH. 215, 216-25 (2005).

163. *Rodgers v. Commonwealth*, 318 S.E.2d 298, 300 (Va. 1984).

164. Transcript of Proceedings (Motions Hearing) at 83, *United States v. Mohamud*, No. 3:10-CR-475-KI (D. Or. Oct. 22, 2012).

165. *Whitehead v. Yates*, No. CV 08-3333-RSWL, 2011 WL 3564527, at *13 (C.D. Cal. July 13, 2011).

States v. Mohamud did his best to cast his client's statement as the product of specialized – even scientific – methods, pressing the witness to admit that he had “attended . . . trainings to learn techniques” of interrogation, used “principles of social science to advance” his work, and had himself “train[ed] younger agents” on effective questioning.¹⁶⁶ (The agent, meanwhile, downplayed the sophistication of his tactics – “techniques, I guess, if you want to call them” – insisting that he had received no instruction in “social sciences” and “was not a formal trainer” so much as “a mentor” to junior colleagues.)¹⁶⁷ Such invocations rarely dig deeper in explaining how trained interrogators elicit involuntary statements, and indeed defendants often invoke expertise much like prosecutors hail officers' rarified eye for crime: as a proxy for more discrete professional insights that (ostensibly) defy capture in court. Some have even ventured to offer expertise as *per se* evidence of coercion. The very fact that the police called in a “ranger trained in interrogation techniques,” as one defendant suggested, “raises the red flag” that his admission was involuntary.¹⁶⁸

Courts have, unsurprisingly, declined to go that far. But judges often accept the principle that interrogators' comparative training and sophistication exacerbate the coerciveness of an encounter, weighing, when all is said and done, in favor of suppression. Since even before the Court's decision in *Miranda*, judges excluding confessions commonly emphasized the credentials of the interviewing officers, objecting that a suspect endured “persistent interrogation by a skilled team of investigators,”¹⁶⁹ that “experienced interrogators” conferred in advance about their strategy,¹⁷⁰ or that a “specially trained interrogator” applied “special techniques” to guide the conversation.¹⁷¹ Even courts declining to suppress often embrace that principle in theory, acknowledging the fact that a suspect faced

166. Transcript of Proceedings, *supra* note 47, at 506–08; *see also* *People v. Ubbes*, 132 N.W.2d 669, 675 n.2 (Mich. 1965) (defendant eliciting that the officer was his district's “principal interrogator,” who “actually teach[es] a course” on the subject).

167. Transcript of Proceedings, *supra* note 47, at 506, 508; *see also* *People v. Oliver*, 991 N.Y.S.2d 260, 271 (Sup. Ct. 2014) (defendant eliciting and officer downplaying the extent of his training).

168. *People v. Adamson*, 849 N.Y.S.2d 674, 679 n.8 (2007).

169. *Mancusi v. United States ex rel. Clayton*, 454 F.2d 454, 455 (2d Cir. 1972).

170. *United States ex rel. Smith v. Yeager*, 336 F. Supp. 1287, 1295 (D.N.J. 1971).

171. *Ubbes*, 132 N.W.2d at 671; *see also* *Horne v. State*, 127 So. 3d 898, 903 (Fla. Dist. Ct. App. 2013) (emphasizing the power of “intense questioning by trained interrogators”); *State ex rel. A.W.*, 51 A.3d 793, 814 (N.J. 2012) (Albin, J., dissenting) (decrying “psychological pressures brought to bear by a skilled and trained interrogator”).

“two trained . . . detectives,”¹⁷² or was subjected to the “skillful tactics” of an “experienced interrogator,”¹⁷³ as a consideration favoring the defense. Meanwhile, panels that split their votes tend to diverge not only on the apparent willingness of the speaker but also on the professional talents of the examiner, disputing whether exhortations to a suspect’s religion, say, were a “calculated appeal to the emotions and beliefs”¹⁷⁴ or artless and “obvious” inquiries shepherded to success by man’s natural “compulsion to confess.”¹⁷⁵ More than just the interrogator’s own credentials, such appraisals rest on an implied imbalance of power between the officer and suspect. Accordingly, judges often contrast the former’s prowess against the comparative vulnerability of the latter, whose age, education, or marginalized racial background may leave him especially susceptible to police intimidation.¹⁷⁶ In one striking opinion, a trial judge decried the outrage of pitting an intellectually impaired youth from a “traditional Navajo” background against a “college-educated, professionally trained interviewer from the dominant culture” — suggesting, in effect, that an officer’s expertise may exacerbate more familiar racial and cultural inequities in the penal system.¹⁷⁷

Taken to its extreme, the link between expertise and coercion has even led to that seemingly unthinkable scenario: cases where interrogators’ *non*-expertise actively averts constitutional challenges, rendering a contested statement presumptively more voluntary. In *Garcia v. State*, for instance, the Florida Supreme Court dismissed a challenge to an un-Mirandized statement made to a policeman transporting a suspect between jails, emphasizing not only the conversation’s

172. *Giddens v. State*, 256 S.W.3d 426, 431 (Tex. Ct. App. 2008) (quoting *Vasquez v. State*, 179 S.W.3d 646, 656 (Tex. Ct. App. 2005)).

173. *Rodgers v. Commonwealth*, 318 S.E.2d 298, 300 (Va. 1984).

174. *People v. Adams*, 192 Cal. Rptr. 290, 300 (Ct. App. 1983).

175. *Id.* at 311, 308 (Woolpert, J., dissenting). A similar debate often attends cases involving juvenile or mentally impaired suspects. Compare *United States v. Preston*, 751 F.3d 1008, 1022-28 (9th Cir. 2014) (decrying the danger of “sophisticated police interrogation techniques” in suppressing a presumptively reliable statement), *with id.* at 1030 (Graber, J., concurring) (depicting the interrogation as a “benign” conversation consisting “almost entirely [of] open-ended questions”); compare *A.W.*, 51 A.3d at 807 (declining to exclude a confession given the lack of intimidation), *with id.* at 816 (Albin, J., dissenting) (surveying strategies used by “highly trained” interrogators in urging exclusion).

176. *E.g.*, *Commonwealth v. Strosnider*, Nos. R91F477-478 & 479, 1992 WL 884488, at *6 (Va. Cir. Ct. Feb. 10, 1992); *People v. Branch*, No. D067450, 2015 WL 2155696, at *17 (Cal. Ct. App. May 8, 2015); *In re Jimmy D.*, 938 N.E.2d 970, 979 (N.Y. 2010) (Lippman, C.J., dissenting).

177. *United States v. Woody*, No. CR-13-08093-001-PCT-NVW, 2015 WL 1530552, at *13 (D. Ariz. Apr. 6, 2015), *rev’d*, 652 F. App’x 519, 520 (9th Cir. 2016) (dismissing the district court’s rationale as “speculative”).

“desultory” nature, but also that the officer “was assigned full time to transporting prisoners and was not a trained interviewer or interrogator.”¹⁷⁸ In *Abbott v. Beto*, the Fifth Circuit denied that a contested confession was involuntary where the interview lasted “only a short time,” “[t]here was no evidence of threats, promises, or coercive tactics,” and – crucially – “the questioning officers were not trained interrogat[or]s.”¹⁷⁹ And in *United States v. Stamp*, the D.C. Circuit declined to extend *Miranda* to interrogations performed by IRS agents in key part due to the proficiency gap between trained interrogators and the officers in question: the “individuals conducting the interviews,” it reasoned, “were revenue agents who presumably were not trained in the interrogation techniques condemned by the Supreme Court in *Miranda*.”¹⁸⁰ Evidence of interrogators’ limited skill here directly deflects constitutional infirmities in the ensuing statements, mitigating the types of coercive pressures that concern the Court.

Taken together, these cases demonstrate a trend that is both consistent with and antithetical to conventional accounts of judicial encounters with police expertise. Before trial judges and magistrates as at the Supreme Court, Fifth Amendment challenges frequently turn on how much sophistication courts ascribe to officers in the interrogation room: whether they see such encounters as subtle, refined displays of psychological domination or as benign conversations resulting naturally (even fortuitously) in self-disclosure. From trained interrogators’ skills in eliciting statements to their unique insight into suspect psychology, the same hallmarks of investigative prowess that commonly fuel judicial deference rear up to undermine the validity of contested confessions.

B. Entrapment

Beyond Fifth Amendment challenges to incriminating statements, adversarial appeals to expertise suffuse another defensive strategy: claims that undercover agents entrapped suspects into crime.

Unlike coerced confessions, police entrapment has drawn limited scholarly attention over the past decades – partly owing, no doubt, to the perception that the defense is essentially useless, a courtroom gambit that is “rarely raised and . . . rarely succeeds.”¹⁸¹ But entrapment is far from a dormant legal doctrine. Exploiting the longstanding qualms raised by undercover policing – the concerns that such underhanded tactics strain not only the legal but also the moral

178. 492 So. 2d 360, 365 (Fla. 1986).

179. 409 F.2d 1324, 1325 (5th Cir. 1969).

180. 458 F.2d 759, 781 (D.C. Cir. 1971).

181. Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL’Y 1, 15 & n.36 (2005).

limits of policing – defendants routinely impugn the propriety of the police’s enticement methods, whether to establish a formal entrapment claim, to appeal for a downward departure at sentencing, or simply to undermine the prosecution’s moral high ground at trial. Here, too, the suggestion that plainclothes agents bring special skills to their work bolsters those defensive strategies, both raising the risk that agents veered into entrapment as a matter of law and, simply enough, entangling them in a fundamentally unsavory enforcement tactic.

1. *Undercover Tactics and the Limits of Legitimate Policing*

Emerging at the center of the regulatory landscape in the Prohibition Era, undercover stings today are a well-established tool of law enforcement.¹⁸² They are a mainstay of policing against sex crimes, including prostitution, public solicitation, and child exploitation.¹⁸³ They have accelerated, alongside the War on Drugs, in the investigations of narcotics offenses.¹⁸⁴ They stand at the heart of campaigns against suspected terrorists, whom federal agents commonly ease into committing “controlled” attacks.¹⁸⁵ The weight of such tactics is not shouldered equally. From drug stings targeting poor and Black neighborhoods,¹⁸⁶ to antiterrorism operations that cast indiscriminate suspicion on Muslim communities,¹⁸⁷ to prostitution arrests trading on race- and gender-based stereotypes about likely buyers and sellers of sex,¹⁸⁸ undercover work has long perpetuated the most abiding disparities of American policing.

182. GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* 29-32 (1988).

183. Jason B. Sheffield & Douglas N. Peters, *From Chat Room to Courtroom: The Internet, Experts, and Entrapment*, *CHAMPION*, Aug. 2015, at 34; J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 *AM. CRIM. L. REV.* 465, 469-70, 491 n.181 (2019).

184. Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 *CARDOZO L. REV.* 1401, 1402-03 (2013).

185. Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 *J. CRIM. L. & CRIMINOLOGY* 609, 666-67 (2015).

186. Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 *NW. U. L. REV.* 987, 990-91 (2021); see also ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 182-83 (2016) (discussing undercover patrol operations targeting poor, Black communities).

187. Wadie E. Said, *The Terrorist Informant*, 85 *WASH. L. REV.* 687, 690-91 (2010).

188. Elizabeth M. Johnson, *Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*, 92 *TEX. L. REV.* 717, 725-29 (2014); Joshua Kaplan & Joaquin Sapien, *NYPD Cops Cash in on Sex Trade Arrests with Little Evidence, While Black and Brown New Yorkers Pay the Price*, *PROPUBLICA* (Dec. 7, 2020, 5:00 AM EST), <https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price> [<https://perma.cc/SAA4-4SLA>].

Plainclothes work theoretically lends itself to a range of strategies, including simply observing criminal ventures. But most entails a more proactive approach: actively encouraging criminal transactions. A “necessary” tool, officials claim, for infiltrating criminal communities evading detection through more traditional means,¹⁸⁹ undercover stings aim simultaneously to identify genuine threats before they target a vulnerable public¹⁹⁰ and to amass unambiguous evidence against them, inducing wary suspects to yield to their criminal instincts in view of the police.¹⁹¹ To that end, agents rely on a range of investigative skills amassed through both training and on-the-job experience. Those skills include, to some extent, avoiding overreach in the field: investigators learn to ask “open-ended questions,”¹⁹² to allow suspects to take the lead in planning criminal ventures, and to retreat in cases of genuine hesitation.¹⁹³ As importantly, however, they include the art of effective enticement itself. Agents are taught to “play a role” convincingly,¹⁹⁴ imitating the speech patterns of teenagers or the professional habits of sex workers.¹⁹⁵ They learn to “build a rapport with anybody [they are] assessing,”¹⁹⁶ whether through sly flirtation or subtle psychological tactics like

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189. *Operations Manual*, DENVER POLICE DEP’T § 104.35(7)(a) (2020), https://www.denvergov.org/content/dam/denvergov/Portals/720/documents/OperationsManual/OMSBook/OM_Book.pdf [<https://perma.cc/L7F5-C8N3>]; see also *The Attorney General’s Guidelines on Federal Bureau of Investigation Undercover Operations*, OFF. ATT’Y GEN. 1 (2002), <https://www.justice.gov/sites/default/files/ag/legacy/2013/09/24/undercover-fbi-operations.pdf> [<https://perma.cc/D9G8-L645>] (prescribing guidelines for undercover operations); Thomas M. Burton, *Undercover Officer Safety*, NAT’L EXEC. INST. ASSOCS. (Oct. 1995), <http://neiassociates.org/undercover-officer-safety> [<https://perma.cc/8C55-NBRG>] (advocating for undercover operations from a safety perspective).
190. *Undercover Survival Techniques*, PRO. L. ENF’T TRAINING, <https://www.pletraining.com/undercover-survival-techniques> [<https://perma.cc/Z8SV-ATYM>].
191. Transcript of Proceedings, *supra* note 47, at 537-38; see Trial Transcript at 128, *United States v. Hochevar*, No. 98-Cr. 351 (S.D.N.Y. Nov. 3, 1999), 1999 WL 34841912 [hereinafter Trial Transcript, *Hochevar*]; Eric Lichtblau & William M. Arkin, *More Federal Agencies Are Using Undercover Operations*, N.Y. TIMES (Nov. 15, 2014), <https://nyti.ms/1EJmqXG> [<https://perma.cc/4UKK-2MCQ>] (discussing the expansion of federal undercover operations in various domains).
192. Trial Transcript, *Hochevar*, *supra* note 191, at 168; see Brief of Appellee, *supra* note 44, at 25; Brief for the United States at 6-9, *United States v. Dye*, No. 09-3410 (3d Cir. Oct. 22, 2010), 2010 WL 8924294.
193. See Brief of Appellee, *supra* note 44, at 25.
194. Trial Transcript, *Hochevar*, *supra* note 191, at 168.
195. Transcript of Trial, Day I, *supra* note 46, at 42-52; Brief for the United States, *supra* note 192, at 7.
196. Transcript of Proceedings, *supra* note 47, at 554.

“mirroring.”¹⁹⁷ They receive instruction in “cultural sensitivities” and religious customs, especially useful in antiterrorism cases.¹⁹⁸

The inherently deceptive nature of such tactics has long inspired some discomfort—what Judge Learned Hand decried in 1933 as society’s “spontaneous moral revulsion” at “using the powers of government to beguile innocent, though ductile, persons.”¹⁹⁹ Sharing those qualms, state courts began adopting some version of an entrapment defense by the late nineteenth century.²⁰⁰ The Supreme Court recognized it in 1932’s *Sorrells v. United States*, excoriating the “unconscionable” practice of instigating “crime in order to punish it” as inconsistent with the criminal code.²⁰¹

Much like the Court’s aversion to coerced confessions, criticisms of entrapment tend to fall into two camps. One line of criticism protests the inherent injustice of punishing innocent defendants, recoiling at convicting a man for an act he “never would have been guilty of if the officers of the law had not . . . lured him . . . to commit it.”²⁰² This is the rationale that prevailed with the majority in *Sorrells* and with winning coalitions at the Supreme Court since.²⁰³ The other, often rehearsed in concurring opinions, focuses less on a particular defendant’s moral deserts than on the intrinsic evils of police manipulation: the intuition, per Justice Frankfurter, that enticement offends our common standards “for the proper use of governmental power.”²⁰⁴ Sending undercover agents to entrap unwary suspects, critics object, undermines ideals of democratic government, calling up the shadow of a surveillance regime where all may be reporting to the state.²⁰⁵ It threatens the public safety, proliferating crime and multiplying the

197. *Jacobson v. United States*, 503 U.S. 540, 545 (1992).

198. Transcript of May 1, 2012 Motion Hearing at 59, *United States v. Mohamud*, No. 3:10-cr-00475-KI (D. Or. Oct. 22, 2012).

199. *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933).

200. Michael A. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 244-52 (1967).

201. 287 U.S. 435, 444 (1932).

202. *Id.* at 444-45.

203. *Sherman v. United States*, 356 U.S. 369, 376 (1958); *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992).

204. *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring in result); see also *Sorrells*, 287 U.S. at 457 (opinion of Roberts, J.) (“The doctrine rests, rather, on a fundamental rule of public policy. . . . It is the province of the court . . . to protect itself and the government from such prostitution of the criminal law.”).

205. See Jacqueline E. Ross, *Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint*, 4 ANN. REV. L. & SOC. SCI. 239, 248 (2008).

inevitable risk of collateral violence.²⁰⁶ Not least, it presents a moral hazard for law-enforcement agents themselves, entangling police institutions in unsavory, often-violent schemes²⁰⁷ and immersing individual officers in the foul work of “deception, betrayal, and the exploitation of human weakness.”²⁰⁸

These different theories support very different standards of entrapment. Operative in federal courts and a majority of states, the “subjective” test requires proof both that government agents induced a suspect into wrongdoing and that he was “otherwise innocent,” lacking any “predisposition” to commit the crime.²⁰⁹ Echoing Justice Frankfurter’s deeper concerns with unconscionable policing, however, some states have adopted the more defendant-friendly “objective” test, recognizing a defense whenever agents dangle enticements likely to draw a “normal and law-abiding” person into crime.²¹⁰ And even in jurisdictions hewing to the subjective test, lingering discomfort has led courts to experiment with ancillary doctrines, including a supplementary defense targeting “outrageous government conduct”²¹¹ and (of more practical use) a doctrine of sentencing entrapment, which recognizes manipulations short of an affirmative defense as mitigating factors at sentencing.²¹²

Not least, setting aside these legal arguments, courtroom disputes over deceptive plainclothes tactics may also operate in a more impressionistic manner — exploiting the sense that such gambits are, in the words of one *New York Times* journalist, potentially “legal” but not thereby “legitimate.”²¹³ The rarity of successful entrapment claims, as one public defender recently speculated, does not preclude the possibility of “equitable entrapments,” where “the jurors are just so irritated by the government conduct of thinking it up” that they nullify the

206. Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 112-13 (2005).

207. Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 188-89 (2009).

208. McAdams, *supra* note 206, at 112-13.

209. Andrew Carlon, Note, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1087-90 (2007).

210. *Id.* at 1090-92.

211. Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 NW. U. L. REV. 305, 352-54 (1996).

212. Tinto, *supra* note 184, at 1413-17.

213. David K. Shipler, Opinion, *Terrorist Plots, Hatched by the F.B.I.*, N.Y. TIMES (Apr. 28, 2012), <https://www.nytimes.com/2012/04/29/opinion/sunday/terrorist-plots-helped-along-by-the-fbi.html> [<https://perma.cc/A57R-F789>].

charge.²¹⁴ Reflecting that wisdom, police manuals sometimes advise agents to avoid aggressive enticement tactics that play poorly with juries, regardless of whether they qualify as entrapment per se,²¹⁵ while veteran defense attorneys emphasize those gambits as a core part of their defensive strategy.²¹⁶

For all those reasons, criticism of police enticement remains a common strategy in numerous prosecutions arising from the government's undercover campaigns. And such criticism often draws surprising support from the rhetoric of police expertise.

2. *Expertise and Legal Entrapment*

Most obviously, the expertise of undercover agents shapes defendants' efforts to meet the legal bar of entrapment: their uphill (but sometimes successful) battles to convince juries and judges that they were entrapped as a matter of fact or law. Both in debates about unlawful inducement and in disputes about predisposition, emphasizing the investigating officer's comparative proficiency has commonly emerged as a core persuasive strategy.

Such invocations include the familiar claim that an officer's credentials mitigate concerns about investigative overreach. As in so many disputes about police misconduct, prosecutors often tout investigators' superior skills as a defense against entrapment challenges, noting an agent's training to let suspects "dictate

214. Emma Whitman, *Entrapment Defense Is Seldom Successful*, GAINESVILLE TIMES (Jan. 26, 2014, 12:42 AM), <https://www.gainesvilletimes.com/news/entrapment-defense-is-seldom-successful> [<https://perma.cc/M5Z8-WAWD>]; see also Christopher S. Peters, James Michael Lampinen & L. Alvin Malesky, Jr., *A Trap for the Unwary: Jury Decision Making in Cases Involving the Entrapment Defense*, 37 LAW & HUM. BEHAV. 45, 45, 51-52 (2013) (reporting that study participants assigned lower guilt ratings where undercover agents initiated criminal encounters, regardless of the applicability of a legal defense); ANNA LVOVSKY, VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL 124-32 (2021) (discussing judicial resistance to solicitation charges brought through enticement tactics). Enticement tactics may thus violate what Tracey L. Meares and Peter Neyroud identify as standards of "rightful," as opposed to legal, policing. Tracey L. Meares & Peter Neyroud, *Rightful Policing*, U.S. DEP'T JUST. 3 (Feb. 2015), <https://www.ojp.gov/pdffiles1/nij/248411.pdf> [<https://perma.cc/5XJH-RFYK>].

215. See *State v. Nandy*, 2010 WL 3932793, at *2 (N.J. Super. Ct. App. Div. Oct. 8, 2010); Brief for the United States, *supra* note 192, at 6.

216. Sheffield & Peters, *supra* note 183, at 40-41; see also Kimberly J. Mitchell, Janis Wolak & David Finkelhor, *Police Posing as Juveniles Online to Catch Sex Offenders: Is It Working?*, 17 SEXUAL ABUSE: J. RSCH. & TREATMENT 241, 261 (2005) (noting the prosecutorial practice of pleading down cases due to entrapment concerns).

the tone” of an encounter,²¹⁷ or his “training and experience” in identifying genuinely willing suspects.²¹⁸ Such arguments assume that a skilled, experienced agent is skilled and experienced, in key part, at avoiding entrapment itself, capable of eliciting criminal commitments without undue manipulation. Frequently, however, prosecutorial appeals to expertise are also more atmospheric, doing less to emphasize an officer’s restraint than to celebrate his investigative prowess as its own claim to authority. Attorneys often elicit evidence of agents’ aptitude for effective undercover work: their special training in or experience with plainclothes stings,²¹⁹ their instruction in convincing roleplay,²²⁰ their rarefied skills at “build[ing] rapport,”²²¹ their involvement in dozens if not hundreds of prior investigations.²²² The prosecutor in *United States v. Rutgeron*, for instance, emphasized not only the officer’s care to let the suspect “set the tone, pace, and subject matter” of their conversation, but also his “specialized training” in running child enticement investigations, including identifying prostitution websites, posting convincing ads, and imitating the typographical style of teenagers²²³ — a host of talents reiterated on appeal despite the lack of any dispute about the credibility of his performance.²²⁴ More than rebutting any specific claims of illegality, such invocations make a broader play for deference, portraying plainclothes stings as a realm of specialized investigation, pursued by professionals worthy of institutional respect.

At the same time, invocations of police expertise commonly enter debates about entrapment in a different guise: as a weapon of the defense. Conceding that their arrests were procured by “sophisticated,”²²⁵ “highly experienced,”²²⁶

217. Brief for the United States at 2, *United States v. Rutgeron*, 822 F.3d 1223 (11th Cir. 2016) (No. 14-15536) [hereinafter Brief for the United States, *Rutgeron*]; see Brief for the United States, *supra* note 192, at 6-7; *Nandy*, *supra* note 215, at *1-2.

218. Jury Trial Transcript, *supra* note 1, at 1-199; see also Transcript of Proceedings, *supra* note 47, at 344-45, 488-91.

219. See, e.g., Transcript of Proceedings, *supra* note 47, at 801-02; Detention Hearing Transcript at 4-5, *United States v. Prine*, No. CR13-00013-CG-N (S.D. Ala. Feb. 25, 2013) (emphasizing an agent’s training in a specialized area of investigation).

220. See, e.g., Trial Transcript, *Hochevar*, *supra* note 191, at 128-29.

221. See, e.g., Transcript of Proceedings, *supra* note 47, at 554.

222. See, e.g., Brief of the Commonwealth, Appellee at 3, *Commonwealth v. Lawrence*, 870 N.E.2d 636 (Mass. App. Ct. 2007) (No. 2006-P-0983).

223. Transcript of Trial, Day I, *supra* note 46, at 42-51.

224. Brief for the United States, *Rutgeron*, *supra* note 217, at 2.

225. Transcript of Proceedings, *supra* note 47, at 296, 299.

226. *Commonwealth v. Lawrence*, 870 N.E.2d 636, 643 (Mass. App. Ct. 2007) (Brown, J., concurring).

“specially trained” agents,²²⁷ defendants insist that such hallmarks of professional proficiency do not boost the presumptive legality of the state’s operations. They help establish the punishing standard of entrapment.

Most commonly, that argument targets the requirement that government agents induced the defendant’s offense. Far from assuaging legal concerns, defendants suggest, an agent’s credentials raise the risk that she veered into impermissible enticement, empowering her to bring more powerful pressures to bear. Such claims are especially common in sexual exploitation cases, where defense arguments abound in allusions to the “skilled,”²²⁸ “experienced,”²²⁹ “well-trained”²³⁰ officers whose “masterful” and “expertly pursued” campaigns loosened their inhibitions.²³¹ But similar strategies also arise in a range of other investigations. Mitchell Lawrence’s 2006 defense, repeatedly reminding jurors that the agent was “a skilled narcotics police officer” with “significant experience” in undercover work, offers one useful example.²³² At Michel Pardue’s trial for murder for hire, too, the defense repeatedly emphasized the agent’s professional experience, pressing Officer Danzer to admit that he had worked as an undercover agent for “approximately 15 [years]” and had posed as a “hit-man for some time”²³³—even as the state tendered more modest appraisals, offering only that Danzer had gone undercover “off and on . . . for several years,”²³⁴ certainly not as “a real common occurrence.”²³⁵ Charged with a foiled terrorist attack, meanwhile, Mohamed Osman Mohamud inverted the common criticism that counterterrorism operations reflect insufficient psychological or cultural sophistication,²³⁶ painstakingly excavating the FBI agents’ “specialized training”²³⁷ in a

227. *Id.* at 642.

228. Petition for Writ of Certiorari at 7, *McPherson v. United States*, 135 S. Ct. 1445 (2015) (No. 14-760).

229. Appellant’s Reply Brief at 5, *People v. Whymys*, No. Ho29620 (Cal. Ct. App. Jan. 18, 2008); Appellant’s Petition for Rehearing at 3, *Whymys*, No. Ho29620 (Cal. Ct. App. Jan. 31, 2008).

230. Brief of Appellee at 21, *United States v. Prine*, No. 13-15054-CC (11th Cir. Mar. 31, 2014), 2014 WL 1400445 (describing defense arguments at trial).

231. Motion for Reconsideration of Defendant’s Rule 29 Motion at 11, *United States v. Prine*, No. 13-013-CG (S.D. Ala. June 13, 2013) (No. 59).

232. Brief of Appellant Mitchell Lawrence at 20, *Commonwealth v. Lawrence*, 870 N.E.2d 636 (Mass. App. Ct. 2007) (No. 2006-P-0983); see Jury Trial Transcript, *supra* note 1, at 2-39-47, 2-158-59.

233. Transcript of Criminal Trial at 257, 242, *United States v. Pardue*, 765 F. Supp. 513 (W.D. Ark. 1991) (No. 99-3177).

234. *Id.* at 257, 242.

235. *Id.* at 283.

236. See Said, *supra* note 187, at 736-37.

237. Transcript of May 1, 2012 Motion Hearing, *supra* note 198, at 58-60.

range of subjects, including persuasive roleplay, sensitivity in dealing with Muslim suspects,²³⁸ “psychology” and “behavioral analysis,”²³⁹ and “[c]ross [c]ultural [r]apport-[b]ased [i]nterrogation.”²⁴⁰ “Because . . . in assessing whether there has been inducement, one of the very important factors is . . . the sophistication of the agents,” Mohamud’s lawyer explained, “anything that shows their experience, training, ability to undertake this type of enterprise . . . is very significant and helpful to the defense.”²⁴¹

In part, these defensive arguments function by reenvisioning what it is the “expert” officer is expert at. The professional task perfected by the trained, experienced undercover agent, by this view, is not simply the work of eliciting evidence from cautious lawbreakers, and certainly not the work of avoiding entrapment itself, but also the far less noble labor of strategic deception and manipulation. Crucially, however, such defensive accounts are consistent with police officers’ own conceptions of undercover work, as a task comprised of such foundational skills as roleplaying, rapport building, and strategically encouraging self-incrimination. And the point remains that, as a matter of persuasive rhetoric, this strategy does not disavow but rather affirms the agent’s claim to expertise in her domain. The implication is not that the defendants’ arrests were procured by poorly trained or sloppy agents, exceeding the proper bounds of their professional role. It is that the involvement of “skilled” and “well-trained” agents, “masterfully” performing their designated task, itself feeds concerns about inducement, raising the risk that apparently subtle pressures or casual communications pulled a suspect into crime.

Judges are not unreceptive to this reasoning. In *Lawrence* itself, even as the district attorney belittled the defense’s strategy—“just because the undercover officer is experienced . . . I don’t think creates enough to give the entrapment defense”²⁴²—that argument directly shaped the appellate panel’s reasoning. Though ultimately concluding that Lawrence’s predisposition to sell drugs precluded a defense, the majority conceded that he had established inducement, singling out the imbalance of power between the defendant and “a skilled and

238. Transcript of Proceedings, *supra* note 47, at 390, 394-95.

239. *Id.* at 886-89; *see, e.g., id.* at 535-36.

240. *Id.* at 889; *see id.* at 506-07.

241. Transcript of Motion Hearing at 50, *United States v. Mohamud*, No. CR-10-475-KI (D. Or. June 27, 2011).

242. Jury Trial Transcript, *supra* note 1, at 2-149.

specially trained detective with substantial experience making undercover purchases.”²⁴³ In *Pardue*, similarly, the defense accomplished that rarest of feats: convincing a trial judge to enter a directed acquittal on entrapment grounds.²⁴⁴ Judge Waters reached that outcome largely by embracing the defense’s version of Danzer’s background, protesting that an “experienced FBI agent” who “had frequently . . . posed as . . . a hitman” dragged Pardue into the offense.²⁴⁵

That same reasoning even underlies a number of cases reversing convictions for attempted child exploitation, hardly a genre of prosecution that inclines judges toward the defense. In *United States v. Gamache*, while the state dismissed an agent’s overtures as “classic examples” of creating a mere “opportunity” — featuring “no arm twisting,” “no appeals to sympathy,” and no otherwise “coercive tactics”²⁴⁶ — the First Circuit read more sophistication into her “psychologically ‘graduated’” techniques, finding it “clear” that the officer’s “artful manipulation of appellant . . . drew him into the web skillfully spun by the detective.”²⁴⁷ On essentially identical grounds, a split panel of the Ninth Circuit found the defendant entrapped as a matter of law.²⁴⁸ In both cases, echoing the courts’ encounters with coerced confessions, the judges’ votes tracked their view of the effectiveness of the agents’ tactics: whether defendants’ overtures were, in effect, inevitable lapses into crime or reluctant concessions masterfully elicited by trained professionals.

In most jurisdictions, of course, proving inducement is only half the battle. Defendants must also establish that they lacked any predisposition to commit the crime — a claim that, once again, can derive powerful support from the trappings of police expertise. In the case against Mohamud, the defense’s repeated denunciations of the government’s skilled, “[e]xperienced,” and “sophisticated” agents did not just aim to establish inducement.²⁴⁹ They also cast doubt on the defendant’s predisposition, attributing his apparent enthusiasm for a violent attack to “the FBI’s sophisticated influence, molding, and manipulation.”²⁵⁰ In *Pardue*, too, the spectacle of an “experienced” FBI agent playing his “role to the hilt” did not just satisfy Judge Waters that Danzer had induced the offense, but also

243. *Commonwealth v. Lawrence*, 870 N.E.2d 636, 642 (Mass. App. Ct. 2007); *see also id.* at 643-44 (Brown, J., concurring) (commenting on the imbalance of power).

244. *United States v. Pardue*, 765 F. Supp. 513, 532 (W.D. Ark. 1991).

245. *Id.* at 532, 525.

246. Brief of Appellee, *supra* note 44, at 23.

247. 156 F.3d 1, 10 (1st Cir. 1998).

248. *United States v. Poehlman*, 217 F.3d 692, 705 (9th Cir. 2000).

249. Transcript of Proceedings, *supra* note 47, at 296.

250. *Id.* at 299; *see also Sheffield & Peters*, *supra* note 183, at 38 (echoing the same argument).

convinced him that the agent “implanted the criminal design and intent [in Pardue’s] otherwise innocent mind.”²⁵¹

Indeed, the specter of expert investigators manipulating hapless suspects into crime hovers over the Supreme Court’s last notable encounter with entrapment: 1992’s *Jacobson v. United States*, in which the Court voted five to four to reverse a child pornography conviction based on the defendant’s lack of predisposition to purchase such materials.²⁵² Writing for the majority, Justice White emphasized the planning and sophistication that went into the government’s campaign, in which a “prohibited mailing specialist” piqued Jacobson’s interest through a series of subtle techniques, including “a tactic known as ‘mirroring,’”²⁵³ that exerted “substantial pressure” on Jacobson to order the magazines.²⁵⁴ Writing in dissent, Justice O’Connor searched “the record in vain for evidence of ‘substantial pressure,’” dismissing the government’s overtures as a handful of casual letters that Jacobson “could easily [have] ignored or thrown away.”²⁵⁵ Once again, the Justices’ votes echoed how they appraised the investigation leading to Jacobson’s arrest: as the effective maneuvers of skilled investigators or as a series of artless communications resulting fortuitously in crime.

3. *Expertise and the Atmospherics of the Courtroom*

All these defensive strategies are strictly legalistic, aiming to establish the core elements of entrapment. Yet such technical arguments do not exhaust the defensive appeal of police expertise. In a field that has long inspired ethical qualms about the limits of state power, undercover agents’ proficiency at their own work also provides a more impressionistic weapon — one aimed less at satisfying legal standards than at feeding moral doubts about the “unattractive business” of enticement.²⁵⁶

Perhaps least surprisingly, such arguments arise at sentencing, a phase overtly concerned not with legal technicalities but with the demands of justice on the facts. Exploiting some courts’ lingering discomfort with manipulative decoys, defendants routinely tout the skill, experience, and training of the investigating agents to mitigate judges’ appetite for punishment. Some emphasize the sheer mismatch between such agents and their guileless targets — the injustice,

251. *United States v. Pardue*, 765 F. Supp. 513, 532, 527, 530 (W.D. Ark. 1991).

252. 503 U.S. 540, 554 (1992).

253. *Id.* at 545.

254. *Id.* at 552; *see also id.* at 543-48, 552-54 (describing the investigators’ tactics).

255. *Id.* at 558 (O’Connor, J., dissenting).

256. Joh, *supra* note 207, at 159 (quoting *United States v. Kaminski*, 703 F.2d 1004, 1010 (7th Cir. 1983)).

for instance, of raising a defendant's sentence for aggravating factors orchestrated by an officer who "received special training in role-playing young females in chat rooms."²⁵⁷ Others try to minimize their own culpability, insisting that the "overpowering pressure" of the "Government's well-trained agents" overwhelmed their natural resistance,²⁵⁸ or that "the deceptive tactics of a highly trained police detective . . . accelera[ted]" their criminal urges.²⁵⁹ The very skill and sophistication that went into the defendants' arrests, such arguments suggest, demonstrate their low likelihood of causing harm when left to their own devices, undercutting the need for lengthy sentences.

Beyond sentencing, defendants may highlight undercover agents' talents as factors weighing against the state at the merits phase. Echoing a deep-seated intuition that prosecutorial resources should prioritize those who spearhead antisocial conduct,²⁶⁰ for example, defendants may invoke police expertise to convince jurors that the state's own agent initiated a criminal encounter. That a policeman instigated the offense, of course, typically falls far from stating a legal defense, especially when it comes to crimes like child enticement.²⁶¹ But attorneys and officers alike acknowledge that, in practice, evidence of proactive instigation — that "the officer initiated the idea of sex and not the defendant" — can be disastrous for the state.²⁶² Emphasizing an agent's "trained and skillful"²⁶³ tactics can help defendants adduce such evidence, implying that "it was [the officer] who initiated and escalated the discussions" even if any express overtures came from the defendant.²⁶⁴

257. Brief for Appellant at 28, *United States v. Dye*, No. 09-3410 (3d Cir. Oct. 22, 2010), 2010 WL 8924295.

258. Brief of Appellant at 9-10, *United States v. Montgomery*, No. 03-1788 (2d Cir. Nov. 9, 2004), 2004 WL 3525380.

259. Brief for Appellant at 25, *Commonwealth v. Torres*, No. 387 EDA 2015 (Pa. Super. Ct. Dec. 4, 2015), 2015 WL 5440832; see also Jesse J. Norris, *Entrapment and Terrorism on the Left: An Analysis of Post-9/11 Cases*, 19 *NEW CRIM. L. REV.* 236, 250-52 (2016) (discussing skepticism of stings that entice crimes unlikely to occur without government intervention).

260. That intuition undergirds statutes targeting criminal persuasion, which require suggestion rather than agreement to criminal conduct. See *State v. Anderson*, 618 N.W.2d 369, 373-74 (Iowa 2000) (collecting cases).

261. *E.g.*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) ("[C]onsent is never a valid defense to child enticement . . .").

262. *Sheffield & Peters*, *supra* note 183, at 40; see *supra* notes 213-216.

263. Brief for Appellant, *supra* note 257, at 24.

264. *Id.* at 10; see *id.* at 7, 11; see also Appellant's Petition for Rehearing at 2-3, *People v. Whymys*, No. Ho29620 (Cal. Ct. App. Jan. 18, 2008), 2008 WL 1802272 (arguing that an "experienced FBI agent . . . pursu[ed]" the defendant, inducing him "to become more and more sexually frank").

Perhaps the most intriguing strategies exploit that other concern overhanging police enticement: the moral hazards visited on officers themselves. To the extent that entrapment has long been seen as tarring the agents of the state, after all, the comparative expertise of the investigating officers—the spectacle of trained, sophisticated agents applying their prodigious talents to the work of criminal enticement—directly exacerbates those qualms. Take, for example, *United States v. Hochevar*, where the defendant repeatedly echoed the prosecution’s own emphasis on the officer’s professional credentials.²⁶⁵ That he fell for a deceit “orchestrated and controlled by a trained agent” with “five years . . . doing that kind of work,” the implication went, made the government’s operation all the more concerning.²⁶⁶ Or take the Supreme Court’s majority opinion in *Jacobson*, which repeatedly placed quotation marks around its references to the government’s “prohibited mailing specialist,” simultaneously marking the agent’s immersive campaign of inducement as the work of a professional expert and conveying some skepticism about the nature of such expertise.²⁶⁷

Such concerns are especially acute in sex-related prosecutions, where a common strategy is not just to emphasize the state’s manipulations or defendants’ innocence, but to effectively shame the government for its entanglement in sordid sexual practices. Defendants frequently protest the time, planning, and emotional pretense that went into their arrests, denouncing the “multiple flirtatious and sexually suggestive emails” crafted by “a skilled FBI agent,”²⁶⁸ or the investigator’s “extended effort and persistent feigned interest” in sexual intimacies.²⁶⁹ Such arguments gesture at inducement, but they also expose the gritty realities of the police’s stings, which force officers to become near-native members of a seedy erotic underworld, spending months acting out prurient scenarios with sometimes-predatory but also often-gullible individuals.²⁷⁰

Central to this criticism is the intuition that sexual manipulation, specifically, is a bridge too far, both intruding into a sacred arena of human vulnerability and

265. Trial Transcript, *Hochevar*, *supra* note 191, at *128-30; Trial Transcript at 908, 916, 919, *United States v. Hochevar*, No.98-Cr. 351 (S.D.N.Y. Nov. 10, 1999).

266. Trial Transcript, *Hochevar*, *supra* note 265, at 906.

267. *Jacobson v. United States*, 503 U.S. 540, 544-45 (1992).

268. Petition for Writ of Certiorari at 7, *McPherson v. United States*, 135 S. Ct. 1445 (2015) (No. 14-760).

269. Brief for Appellant at 35, *State v. Bratton*, No. 07-99521-A (Kan. Ct. App. Sept. 25, 2008), 2008 WL 5007634; *see also* Brief of Appellant at 9, *United States v. Clarke*, No. 05-12303-F (11th Cir. July 2005), 2005 WL 4664969 (protesting that, to investigate sex tourism, “the FBI went into the business itself” and emphasizing the involvement of a “highly-trained undercover officer”).

270. *United States v. Poehlman*, 217 F.3d 692, 705 (9th Cir. 2000) (questioning the value of law enforcement “spend[ing] months luring . . . lonely and confused individual[s]”).

requiring especially undignified performances by law enforcement.²⁷¹ Accordingly, that critique extends well beyond sex crimes, to numerous offenses investigated through so-called “honeypot” schemes. After one woman sold drugs to an agent from a dating site, for instance, her attorney repeatedly denigrated the agent as “an experienced narcotics officer who sent ‘beef cake’ images of himself to . . . a lonely [woman] looking for companionship,” less as evidence of entrapment per se than as a general attack on the officer’s credibility.²⁷² Public critics sometimes mount similar attacks. Discussing a prominent case of a defendant seduced by an attractive informant, scholar Jesse J. Norris emphasized that the FBI supplied the informant “with a manual for manipulating suspects in romantic relationships.”²⁷³ In these cases, the notion that skilled, experienced agents engage in such Machiavellian tactics – that sexual manipulation is a tool of professional investigation and, indeed, sometimes the stuff of formal training – directly exacerbates critics’ discomfort with such operations, refining agents’ proficiency at a fundamentally unethical practice.

Combined with defendants’ more legalistic arguments, these examples reveal the centrality of expertise to debates about police enticement. Far from faithfully serving the prosecution, claims about the proficiency of undercover agents advance a range of defensive strategies, lending credence to formal claims of entrapment and exploiting some factfinders’ abiding aversion to police enticement in all its forms – let alone as the subject of professional expertise. This defensive rhetoric does not depict officers as overstepping their bounds or bungling their investigative duties, though many arguments could easily be repackaged in those terms. In an arena of scrutiny animated by the “unconscionable” prospect of punishing crimes orchestrated by the state, it is precisely officers’ professional skill – their conceded training, insight, and experience – that casts a shadow over their tactics, fueling qualms about both the legality and the legitimacy of the ensuing charges.

271. That critique often characterizes critical media coverage of sex-related stings. See, e.g., Aubrey Wieber & Jessica Miller, *One Rural Utah Detective Has Targeted Adults Seeking Sex with Other Adults. Is He Stopping Prostitution or Entrapping Men?*, SALT LAKE TRIB. (Sept. 16, 2018, 1:31 PM), <https://www.sltrib.com/news/2018/09/16/one-rural-utah-detective> [<https://perma.cc/MF28-4EZU>]; David Kroman, *Seattle’s Latest Prostitution Sting: Progressive or Misguided?*, CROSSCUT (Nov. 1, 2018), <https://crosscut.com/2018/11/seattles-latest-prostitution-sting-progressive-or-misguided> [<https://perma.cc/9527-5WTR>].

272. Appellant’s Reply Brief at 12, *State v. Reed*, No. 2 CA-CR 2012-0122 (Ariz. App. Div. Apr. 3, 2013), 2013 WL 1565057. For an additional example, see *Mosby v. O’Meara*, No. 9:12-CV-1543, 2015 WL 4871803, at *11 (N.D.N.Y. Aug. 13, 2015), which describes defense counsel’s argument that “two very attractive sophisticated, trained, manipulative Investigators” arranged the defendant’s offense.

273. Norris, *supra* note 259, at 248.

C. *Excessive Force*

A final example involves a very different site of litigation over police misconduct: cases where officers themselves are the defendants. Both in civil claims and in the rare criminal case charging the use of excessive force, the policeman's unique experience, skill, and insight commonly crop up as persuasive tools against him, invoked by plaintiffs, prosecutors, and judges to justify stricter liability for police violence.²⁷⁴

Compared to defendants' arguments in entrapment or confessions cases, of course, the notion that an officer's credentials might expand his legal liability may seem intuitive. In any legal arena aimed at holding individuals responsible for their professional misconduct, crediting defendants with special expertise predictably expands the scope of liability, elevating the bar on permissible behavior.²⁷⁵ Structurally, indeed, such arguments raise very different claims, not criticizing an officer's reliance on his expert talents so much as his failure to use them properly in a given case.

Nevertheless, any discussion of police expertise as a tool for challenging police misconduct must account for litigation over excessive force – and not only because police brutality stands at the heart of contemporary debates about police power. No less than Fifth Amendment or entrapment challenges, excessive-force cases complicate our traditional associations between expertise and deference, illustrating how a closer look at the precise operations of expert law enforcement may expand judicial skepticism of the police. These cases are also the arena where opposing litigants' appeals to police expertise most directly collide, with officers often trying to wring deference from the same skills that challengers invoke to question their judgment – a dynamic that sheds especially useful light on what these parties mean when they implore the court to take expertise into account.

274. Scholars have urged such an analysis in theory. See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 293 (2017); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1170-71, 1182 (2008). This Article is the first to examine its actual prevalence.

275. In resisting expanded liability, accordingly, other professions also deny their epistemic superiority to laypersons. *E.g.*, *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 344-45 (Cal. 1976) (discussing an amicus brief arguing that therapists have no unique abilities to predict violent ideations).

1. *Police Violence and the Disappearing Expert Officer*

It is impossible to discuss the state of policing in the United States without addressing the problem of police violence, a phenomenon whose greatest excesses fall, in case after case, on communities of color and especially Black men.²⁷⁶ The protests that sometimes follow such encounters are perhaps best remembered for the riot-gear response with which officers have met local crowds, a spectacular show of weaponry that exemplifies the excesses of police militarization on a broad scale.²⁷⁷ But what remains most vivid is the trickle of more daily, practically mundane moments of violence: the brutal arrests on city streets or the traffic stops and wellness checks escalating into fatal confrontations, all too rarely followed by meaningful accountability.²⁷⁸

The pain and profound outrage rightfully inspired by these visions of police violence, however, make it too easy to forget that the use of physical force by police officers is not simply a site of professional controversy. It is also—or it ought to be, in theory—a professional skill.

As detractors and defenders alike concede, some measure of violence is inevitable in the work of law enforcement. If, per one common formulation, the state

276. *E.g.*, Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 961, 989–99 (2020) (reporting that Black suspects are nearly twice as likely to be killed in police encounters); Robert O. Motley, Jr. & Sean Joe, *Police Use of Force by Ethnicity, Sex, and Socioeconomic Class*, 9 J. SOC'Y FOR SOC. WORK & RSCH. 49, 58–62 (2018) (reporting the intersecting impact of race and class in the use of force); Olugbenga Ajilore & Shane Shirey, *Do #AllLivesMatter? An Evaluation of Race and Excessive Use of Force by Police*, 45 ATL. ECON. J. 201, 205–10 (2017) (finding racial impact on the incidence of and discipline for police force). *See generally* MALCOLM D. HOLMES & BRAD W. SMITH, *RACE AND POLICE BRUTALITY: ROOTS OF AN URBAN DILEMMA* (2008) (examining social and psychological trends behind racialized patterns of police violence); JOHNSON, *supra* note 21 (examining historical cycles of police brutality and reform).

277. *E.g.*, Shawn Hubler & Julie Bosman, *A Crisis that Began with an Image of Police Violence Keeps Providing More*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html> [<https://perma.cc/2LAC-FCS2>]; Colleen Curry & Luis Martinez, *Ferguson Police's Show of Force Highlights Militarization of America's Cops*, ABC NEWS (Aug. 14, 2014, 1:11 PM), <https://abcnews.go.com/US/ferguson-police-small-army-thousands-police-departments/story?id=24977299> [<https://perma.cc/ZP7N-2D27>].

278. *See* Marcus R. Nemeth, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 989–91 (2019); Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465, 1467–68 (2018); *About the Data*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/aboutthedata> [<https://perma.cc/7YWU-VEKN>].

is defined by its monopoly over the legitimate use of force,²⁷⁹ then police officers are its primary and most dutiful soldiers, charged with imposing legal obligations on resisting individuals and proactively confronting threats to the public (and their own) safety.²⁸⁰ For those reasons, the effective use of force is a key part of the policeman's toolset, among the core skills taught to new recruits. Among the nation's largest departments, such training typically includes instruction in avoiding the gratuitous use of violence itself, from use-of-force continuums to more granular force matrices to harm-reduction measures like de-escalation and minimization.²⁸¹ Most instruction, however, does not teach officers to deploy force prudently so much as effectively, appraising and promptly neutralizing potential threats. Academy training focuses on honing recruits' aptitude for risk assessment: the officer's by-now-familiar ability to ferret out suspicion or danger in the field.²⁸² It imparts tactical skills for minimizing dangers once they are identified, using strategies of concealment to avoid immediate threats, selecting when and where to start a confrontation, and "control[ing] a scene" prior to initiating contact.²⁸³ Not least, it aims to improve officers' skills at the targeted application of force itself, from firearms training to instruction in so-called "combatives": the use of hand-to-hand contact and nondeadly weaponry to subdue threatening individuals.²⁸⁴

The very inevitability that officers will deploy force on the job, of course, provides all the more reason to impose legal restraints on its abuse. Those restraints include criminal charges, either under state law or under 18 U.S.C. § 242,²⁸⁵ but overwhelmingly they fall to civil suits under 42 U.S.C. § 1983, which authorizes damages for displays of excessive force in violation of the Fourth Amendment.²⁸⁶ Asking whether such force was "objectively reasonable" in light of the facts and circumstances," that legal standard is both objective and

279. MAX WEBER, *POLITICS AS VOCATION* (1919), reprinted in WEBER'S *RATIONALISM AND MODERN SOCIETY: NEW TRANSLATIONS ON POLITICS, BUREAUCRACY, AND SOCIAL STRATIFICATION* 129, 136 (Tony Waters & Dagmar Waters eds. & trans., 2015).

280. Michael Sierra-Arévalo, *Technological Innovation and Police Officers' Understanding and Use of Force*, 53 *LAW & SOC'Y REV.* 420, 422 (2019); Harmon, *supra* note 274, at 1150-51.

281. Garrett & Stoughton, *supra* note 274, at 219, 263-66, 269-72, 279; Seth W. Stoughton, *Policing Facts*, 88 *TUL. L. REV.* 847, 866 n.130 (2014).

282. *E.g.*, Brief in Support of Appeal at 20-21, 71-72, *Commonwealth v. Torres*, No. 1964 MDA 2016 (Pa. Sup. Ct. May 31, 2018).

283. Garrett & Stoughton, *supra* note 274, at 259; *id.* at 252-54.

284. *Id.* at 250-52.

285. See Georgina C. Yeomans, *When Cops Are Robbers: Reconciling the Whren Doctrine and 18 U.S.C. § 242*, 115 *COLUM. L. REV.* 701, 711-16 (2015); Harmon, *supra* note 274, at 1126.

286. Harmon, *supra* note 274, at 1126; Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 *FLA. L. REV.* 1773, 1798 (2016).

highly fact-specific.²⁸⁷ It is also, like the Supreme Court's standards for assessing criminal suspicion, profoundly deferential to police discretion. As the Court explained in *Graham v. Connor* in 1989, courts must appraise the record as "a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,"²⁸⁸ respecting that "officers are often forced to make split-second judgments" on deeply ambiguous facts.²⁸⁹

In one key respect, however, the Supreme Court's excessive-force standard diverges from its typical test of Fourth Amendment reasonableness. Unlike its assessments of criminal suspicion, most of the Court's opinions addressing excessive force are notably mum on the subject of police expertise.

The Court's earliest pronouncement on the topic would not have predicted this trend. Echoing *Miranda's* embrace of the FBI's elite interrogation tactics, the majority in 1985's *Tennessee v. Garner* delved into the police's own professional best practices, citing a range of publications by prominent agencies and police associations to bolster its conclusion that Tennessee's deadly-force policy violated the Fourth Amendment.²⁹⁰

Since then, the Court's opinions have appeared less eager to embrace the wisdom of professional law enforcement. That includes abandoning *Garner's* reliance on the judgments of police executives in favor of the Court's own commonsense analysis of high-risk enforcement tactics. In *Scott v. Harris*, for instance, in which the Court rejected an excessive-force claim arising out of a traffic chase that left a Black man paralyzed,²⁹¹ the majority neglected a wealth of evidence suggesting that the officer's maneuver contravened accepted professional standards and, indeed, that he lacked the training to deploy the maneuver at all.²⁹² In a move that should now feel familiar, the majority vindicated an officer's enforcement decision by declining to recognize it as the subject of professional authority, either requiring special instruction or lending itself to unique occupational insights.

Yet that silence also goes deeper, a dynamic best glimpsed in comparing the Court's excessive-force cases to its discussions of criminal suspicion. The Court's objective-reasonableness standard, after all, did not originate in *Graham*, but was imported from a rich line of jurisprudence interpreting the constitutional bar on

287. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

288. *Id.* at 396.

289. *Id.* at 397; see also *Scott v. Harris*, 550 U.S. 372, 383-85 (2007) (deferring to a police officer's decision to end a car chase by ramming into the plaintiff's car because of the risks to public safety and the uncertainties of alternative courses).

290. 471 U.S. 1, 9 n.8, 10-11, 18-19 (1985).

291. 550 U.S. 372 (2007).

292. *Garrett & Stoughton*, *supra* note 274, at 234-36.

“unreasonable searches” – a jurisprudence in which the officer’s rarefied judgment was, by the 1980s, a common refrain.²⁹³ As the Court emphasized in *United States v. Mendenhall* a few years earlier, “[i]n applying a test of ‘reasonableness,’ courts need not ignore the considerable expertise [of] law enforcement officials,” a core justification for trusting their discretion.²⁹⁴ The Court’s excessive-force cases urge a similar principle – with the element of expertise conspicuously stripped out. Rather than lauding its presumptive quality, the Court has consistently embraced police judgment purely on considerations of necessity, lamenting the uncertainties inherent in violent encounters in the field. Thus, the opinion in *Graham* eschewed any discussions of relative competency, emphasizing only the difficulty of “mak[ing] split-second judgments” in “tense, uncertain, and rapidly evolving” circumstances,²⁹⁵ and directing lower courts to take the perspective of “a reasonable officer”²⁹⁶ rather than the “reasonably well trained police officer” invoked in other cases.²⁹⁷ A similar avoidance pervades the Court’s analysis in the years since – not least in *Scott* itself, where the majority appraised the purported dangers posed by the fleeing defendant by personally reviewing video footage of the chase (that most ostensibly democratic form of evidence)²⁹⁸ with no mention of officers’ professional expertise in making such investigative judgments.²⁹⁹

Why this silence? It is difficult to say conclusively. But one factor worth acknowledging is that, unlike in debates over criminal suspicion, it is unclear which way police expertise in excessive-force cases cuts – an ambiguity debated far more explicitly among the lower courts.

2. *Police Expertise and Excessive Force in the Lower Courts*

Despite the Supreme Court’s reticence on the subject, claims of police expertise have hardly been absent from legal debates about excessive force. To the contrary, the recognition of police officers as trained professionals, bearing rarefied

²⁹³. See *United States v. Cortez*, 449 U.S. 411, 418 (1981); *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983).

²⁹⁴. 446 U.S. 544, 565-66 (1980) (Powell, J., concurring).

²⁹⁵. *Graham v. Connor*, 490 U.S. 386, 397 (1989); see also *Garner*, 471 U.S. at 32 (O’Connor, J., dissenting) (warning against “second-guessing . . . difficult police decisions that must be made quickly in the most trying of circumstances”).

²⁹⁶. *Graham*, 490 U.S. at 396.

²⁹⁷. *United States v. Leon*, 468 U.S. 897, 926 (1984).

²⁹⁸. See *Jasanoff*, *supra* note 13, at 726-28 (discussing the presumption that video evidence is self-explanatory).

²⁹⁹. *Scott v. Harris*, 550 U.S. 372, 378-81 (2007); see *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015).

skills and experiences in the field, has emerged as a key consideration among the lower courts – one that supports a variety of claims.

To start with the conventional position, expertise often enters excessive-force cases as a tool for insulating police judgment from scrutiny – invoked, this time, not by prosecutors, but by city attorneys or private defense lawyers representing officers at trial. That strategy typically splits into two approaches. Sometimes, defendants emphasize their credentials in a broad bid for institutional authority, contending that their actions accorded with academy instruction,³⁰⁰ department-wide policies,³⁰¹ or broader prevailing standards of professional conduct,³⁰² and so must have been reasonable on the facts. Such arguments demand deference less to the judgment of individual officers than to the expertise of police agencies as a whole, casting compliance with a department’s internal regulations and training as a type of per se proof of legality.³⁰³ (The corollary being, of course, that they demand deference to such standards regardless of their substantive merits, effectively calibrating the bar of legal reasonableness to whatever policies departments happen to enact. Thus, the striking but hardly unique argument in *Howle v. Ward* that a defendant’s training rendered his judgment defensibly less prudent, making him “more likely to perceive himself in imminent danger” and so “more likely to react with deadly force than an untrained civilian.”)³⁰⁴

Frequently, however, officers invoke their professional backgrounds to argue that their judgment was not just different but also superior, reflecting a “level of understanding and skill” that “exceeds exponentially” that of an untrained juror.³⁰⁵ In doing so, they appeal to a variety of talents, insisting, for instance, that “a trained and experienced officer who regularly patrol[s] a dangerous major city”³⁰⁶ can better assess the need for defensive force, recognizing threats that “an

300. *E.g.*, *Tanner v. San Juan Cnty. Sheriff’s Off.*, 864 F. Supp. 2d 1090, 1105 (D.N.M. 2012).

301. *E.g.*, Defendant’s Memorandum in Support of Motion for Summary Judgment at 13, *Witt v. City of Pocatello*, No. 11-cv-00484 (D. Idaho Apr. 3, 2014).

302. *E.g.*, *Rodriguez v. City of Modesto*, No. 1:10-CV-01370, 2015 WL 1565354, at *13 (E.D. Cal. Apr. 8, 2015).

303. Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 433-34 (2019).

304. Brief for Appellant at 17, *Howle v. Ward*, No. 99-31162 (5th Cir. July 18, 2000), 2000 WL 34430681; *see* Transcript of Trial at 1124-25, *Watson v. City of San Jose*, No. CV-15-04054 (N.D. Cal. Sept. 18, 2017).

305. Transcript of Trial Proceedings, May 25, 2017, at 151-52, *United States v. Matakovich*, No. CR-16-73 (W.D. Pa. July 19, 2017).

306. Brief in Support of Appeal, *supra* note 282, at 72.

ordinary citizen might normalize”;³⁰⁷ or that an officer trained in the use of firearms can more accurately appraise the wisdom of deploying weaponry, anticipating that bullets “would be contained in a pattern that would limit exposure [to bystanders]”;³⁰⁸ or that officers accustomed to handling volatile individuals are especially attuned to the urgency of initiating physical confrontations.³⁰⁹ These arguments sound primarily in the personal expertise of the individual officer, whose qualifications—the implication goes—enable him to react more wisely in a dangerous scenario, demanding deference from lesser-informed members of the court.³¹⁰

At the same time, police officers’ talents at handling volatile encounters also emerge in a very different role in excessive-force litigation: as a standby of prosecutors and civil plaintiffs. Such arguments exploit a central feature of legal reasonableness standards, from criminal self-defense to malpractice and traditional negligence claims: that the bar on what counts as reasonable rises with a defendant’s ability to have done better.³¹¹ In context, challengers insist, a defendant’s expertise directly broadens the scope of his liability, demanding more from “a professional, trained police officer” — as one plaintiff’s witness put it — than from just “any guy on the street.”³¹²

As among police defendants themselves, such arguments commonly take two forms. Echoing officers’ appeals to the institutional wisdom of the profession, some challengers rely on expert testimony, training manuals, and policy statements to aggrandize the competency of police departments as a whole, raising the generic benchmark of the “reasonable” officer against whom the defendant should be judged.³¹³ Inverting defendants’ own appeals to their rarefied eye for danger or their firearms training, they protest that a “professionally trained” officer should have perceived “that [he was] in no imminent danger”;³¹⁴ or that

307. *Id.* at 12; see Appellant Petition for Rehearing En Banc at 39, *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009) (No. 08-1222).

308. Appellants’ Brief and Addendum, *supra* note 39, at 13.

309. Appellees’ Brief, *supra* note 40, at 24-25.

310. For judicial support for this position, see, for example, *Carr v. Tatangelo*, 338 F.3d 1259, 1269 (11th Cir. 2003); and *Brown v. City of New York*, 798 F.3d 94, 105-06 (2d Cir. 2015) (Jacobs, J., concurring in the judgment in part and dissenting in part).

311. See *supra* note 5 and accompanying text.

312. Appellant’ Reply Brief on Appeal at 23, *Gutierrez v. Cnty. of L.A.*, No. B120959 (Cal. Dist. Ct. App. Feb. 2, 1999), 1999 WL 33901473 (quoting *Zuchel v. City & Cnty. of Denver*, 997 F.2d 730, 739-40 (10th Cir. 1993)).

313. *E.g.*, *Jones v. Allen*, No. PX-15-1173, 2016 WL 9443772, at *5 (D. Md. Oct. 24, 2016) (expert testimony); *Shannon v. Koehler*, 673 F. Supp. 2d 758, 764-65 (N.D. Iowa 2009) (manuals); *Baker v. Chaplin*, 497 N.W.2d 314, 318 (Minn. Ct. App. 1993) (policy statements).

314. *Nance v. Sammis*, No. 3:07-CV-00189, 2009 WL 308606, at *6 (E.D. Ark. Feb. 5, 2009).

“one trained in . . . tactical shoot/no shoot scenarios would have no difficulty ceasing firing when the danger ceased”;³¹⁵ or that a professional responder, privy to “particularly sophisticated training in the area of split-second decision-making,” should have maintained greater calm in an admittedly stressful scene.³¹⁶ Such appeals resonate with trial judges and appellate panels, featuring directly in their denials of summary judgment, rejections of qualified immunity, and dismissals of post-trial appeals.³¹⁷ As one panel speculated, one might expect “a trained police officer . . . to encounter and handle situations which would be extraordinary for the average person.”³¹⁸

In a key sense, these adversarial invocations of expertise are very different from those discussed in prior Sections. By inflating the presumptive competency of the police profession in order to suggest that a particular defendant deviated from those lofty standards, such comparisons recall the established strategy of criticizing an interrogator by emphasizing his departures from professional best practices—a strategy that affirms the essential link between legitimacy and expertise.

Yet the unique nature of police-misconduct claims also distinguishes such appeals from those more familiar attacks on police competency. In those cases, after all, challengers contrast an officer’s conduct against that of the prototypical “well-trained” policeman as a type of circumstantial evidence, an a fortiori argument that his behavior betrayed a department’s own internal standards and was thus all the likelier to violate the demands of the law. But such parties could (and often do) as easily deny the existence of any institutional expertise to speak of—insisting, say, that even the best-trained interrogators commonly elicit false confessions.³¹⁹ In cases claiming excessive force, by contrast, undermining the reasonableness of an officer’s judgment invariably requires contrasting his conduct

315. Answer Brief at 18, *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009) (No. 08-1222); see *McCue v. City of Bangor*, No. 1:14-cv-00098-GZS, 2015 WL 6848539, at *7 (D. Me. Sept. 22, 2015); Plaintiff’s Memorandum in Opposition to Defendants’ Motion for Summary Judgment at 14, *Richman v. Sheahan*, No. 98-C-7350 (N.D. Ill. Feb. 2, 2007); *Landa v. Twp. of Plainsboro*, No. 13-3082, 2016 WL 8677318, at *10 (D.N.J. Aug. 26, 2016).

316. MICHAEL AVERY, DAVID RUDOVSKY, KAREN BLUM & JENNIFER LAURIN, *POLICE MISCONDUCT: LAW AND LITIGATION* § 11:15 (3d ed. 2019).

317. *E.g.*, *Cordova*, 569 F.3d at 1191; *Maestas v. City of Albuquerque*, No. 15-0053-MCA, 2015 WL 13651240, at *4 (D.N.M. Sept. 30, 2015); *Hoffman v. Jourdan*, No. 14-cv-2736, 2017 WL 4547066, at *12 (E.D. Cal. Oct. 12, 2017); *Richman v. Sheahan*, 512 F.3d 876, 883 (7th Cir. 2008); *McCue*, 2015 WL 6848539, at *10.

318. *Heidbreder v. Northampton Twp. Trs.*, 411 N.E.2d 825, 828 (Ohio Ct. App. 1979) (affirming summary judgment on other grounds).

319. See *supra* notes 115 and 157-162 and accompanying text.

against a higher baseline of professional competency.³²⁰ In such cases, conceding—and even inflating—that presumptive baseline does not provide circumstantial evidence of unlawfulness. It substantively shifts the law’s standard of permissible police conduct in the field, meaningfully expanding the possibilities of liability.

Regardless, institutional appeals to the profession’s wisdom do not complete the universe of adversarial invocations of police expertise. For one thing, all the arguments reviewed above frequently draw on not just the idealized well-trained officer but also a defendant’s own credentials—the suggestion, say, that a decision to fire was “grossly reckless” for “an officer who has been fully trained on how to disarm individuals;”³²¹ or that an officer trained to “confront . . . life-threatening” situations was “better prepared to meet those situations than somebody who never had any training or experience as a police officer.”³²² In one case, indeed, a defendant’s own attempts to impress his professional background on the court worked against him. Rejecting the officer’s decision to fire at two tussling men as “objectively unreasonable,” the Eighth Circuit in *Craighead v. Lee* drew directly on the defendant’s own survey of his extensive firearms experience in his brief, reasoning that “[a] trained shooter, such as Lee, would have known that . . . the shot would hit both men.”³²³ In such scenarios, it is the defendant’s own skills as a police professional that suggest some legal remedy is in order.

Perhaps the most striking appeals to expertise, however, do not suggest that a skilled, trained officer should have exercised better judgment, more accurately assessing the necessity of force on the facts. Echoing the more interactive analysis used in entrapment and coerced confessions cases, they suggest that an officer’s skills and training are themselves among the facts weighing on that assessment: that an officer’s professional aptitude for navigating hostile situations shifts the balance of power in such encounters, rendering shows of force justifiable for a civilian unreasonable for him specifically.

320. This “reasonableness” inquiry governs both civil and criminal charges alleging denial of constitutional rights and more traditional charges of homicide or battery, where defendants generally claim they acted in self-defense. *E.g.*, Brief for Appellant, *supra* note 304.

321. Petition for a Writ of Certiorari at 22-23, *McLenagan v. Karnes*, 513 U.S. 1018 (1994) (No. 94-667); *see* Appellant’s Opening Brief at 6, *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009) (No. 08-1222); *Cordova*, 569 F.3d at 1191; *Witt v. City of Pocatello*, No. 11-cv-00484, 2014 WL 1343495, at *10 (D. Idaho Apr. 3, 2014).

322. *VERY ET AL.*, *supra* note 316, § 11:15 n.7; *see, e.g.*, Plaintiff’s Memorandum in Opposition to Summary Judgment at 14, *Richman v. Sheahan*, No. 98-C-7350 (N.D. Ill. Feb. 2, 2007) (emphasizing that the defendants had been specifically trained in use-of-force matrices); *Richman v. Sheahan*, 512 F.3d 876, 877 (7th Cir. 2008).

323. 399 F.3d 954, 961 (8th Cir. 2005); Appellants’ Brief and Addendum, *supra* note 39, at 13.

That includes, most basically, the appraisal of any danger posed by the suspect. Drawing on the longstanding principle that a policeman's physical advantage over a civilian attenuates any reasonable apprehension of harm,³²⁴ plaintiffs and sympathetic judges commonly treat an officer's professional credentials as essentially analogous to size or strength: something that boosts his sense of security in hostile confrontations. Take the plaintiff's insistence in *Welbig v. Hansen* that officers exceeded the limits of lawful force not only because there was "no reason to believe she was armed" or "had committed any crime," but also, in key part, because she "presented [no] reasonable threat to two well-trained law-enforcement officers, over twice her size."³²⁵ Or the district court's agreement in *Witt v. City of Pocatello*, denying summary judgment, that Witt was not just "apparently unarmed" and "well beyond striking distance," but also "outnumbered by two officers with the training to subdue him."³²⁶ Embracing the police's own insistence that law enforcement is an inherently dangerous profession, demanding a honed capacity for self-defense, such arguments suggest that an experienced officer may forfeit the right to feel reasonably threatened even in situations that inspire understandable fear in others.

By the same token, plaintiffs have argued – and judges agreed – that a trained officer need not resort to certain high-risk maneuvers, as they are uniquely capable of handling threats through less intrusive means. After two Fresno officers used a taser to subdue Angel Rios, for instance, Rios simultaneously decried their sloppy firearms training and emphasized their proficiency in combatives more generally,³²⁷ persuading the court that "two trained officers" should "have been able to take him down or gain control of him without any other unnecessary use of the taser or even an impact weapon."³²⁸ After two New York City policemen used pepper spray to arrest Imani Brown, Brown, too, stressed that "the officers . . . were trained in several [other] restraint techniques[,] such as the arm bar, wrist lock, and pressure points techniques," and had in fact "successfully

324. See *Tennessee v. Garner*, 471 U.S. 1, 21 (1985) ("Officer Hymon could not reasonably have believed that Garner – young, slight, and unarmed – posed any threat.").

325. No. 15-4085, 2017 WL 591132, at *6 (D.S.D. Feb. 14, 2017).

326. No. 4:11-cv-00484-CWD, 2014 WL 1343495, at *10 (D. Idaho Apr. 3, 2014); see also *Aguilar v. Rangel*, No. 13-CV-855-A, 2013 WL 6283965, at *1 (N.D. Tex. Dec. 4, 2013) (noting that the plaintiff was a "slender young female" and the police officer was "large, burly, [and] professionally-trained"); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994) (denying qualified immunity given a lack of evidence that the suspect "was a danger to the larger, trained police officer").

327. Reply to Defendants' Motion to Dismiss at 5, *Rios v. City of Fresno*, No. CVF-05-644 (E.D. Cal. July 25, 2005).

328. *Rios v. City of Fresno*, No. CV-F-05-644, 2006 WL 3300452, at *7 n.16, *10 (E.D. Cal. Nov. 14, 2006).

restrained [a larger] man” using similar tactics³²⁹ – an analysis directly adopted by the Second Circuit in reversing a grant of summary judgment.³³⁰ The officer’s professional talents at diffusing physical threats, these cases suggest, do not only affect how he should appraise risks to his safety. They also shift how he should respond to them, rendering certain high-risk tactics reasonable for less capable responders excessive in his case.

The sheer diversity of appeals to police proficiency in such cases demonstrates the importance of disaggregating “expertise” in legal debates about the police. More clearly than in any other field of litigation, disputes over excessive force showcase the numerous genres of professional skill that bear on an officer’s judgments in the field, which can push in very different directions in assessing the legality of his conduct. Where, for example, police defendants emphasize their expertise in using tasers even as plaintiffs highlight their combatives training to protest that there was no need to use a taser to begin with, the parties are not really disputing whether officers bear unique occupational skills or whether those skills should raise or lower legal scrutiny, so much as which professional talents are most salient.³³¹ Indeed, one might expect certain skills to more reliably advance one side or the other – anticipating that an officer’s de-escalation training, for instance, will typically bolster trust in his judgment, veering uncomfortably close to depicting him as an expert at avoiding excessive force itself.

Yet such warring strategies cannot be explained simply as appealing to different genres of expertise. Frequently, after all, litigants on both sides draw on the same occupational talents, from an officer’s heightened perception to his firearms training to his experience navigating hectic scenes. Even seemingly officer-friendly proficiencies like de-escalation training are sometimes weaponized

329. Brief for Plaintiff-Appellant with Special Appendix at 12-13 n.8, *Brown v. City of New York*, No. 14-2611 (2d Cir. Oct. 24, 2014).

330. *Brown v. City of New York*, 798 F.3d 94, 101, 102-03 (2d Cir. 2015); see also Brief of Plaintiff-Appellee at 14, *Richman v. Sheahan*, No. 98-C-7350 (N.D. Ill. June 25, 2007), 2007 WL 1924221 (arguing that the officers could have subdued the plaintiff using “‘verbal judo’ [in which they] were trained”); *Hoffman v. Jourdan*, No. 2:14-cv-2736 MCE KJN P, 2017 WL 4547066, at *10 (E.D. Cal. Oct. 12, 2017) (arguing that trained officers could have “respond[ed] tactically and avoid[ed] any direct physical contact”).

331. Compare Defendants’ Memorandum in Support of Motion for Summary Judgment at 13, *Witt v. City of Pocatello*, No. CV-11-484 (D. Idaho Apr. 3, 2014) (No. 51-1) (noting that an officer’s taser discharge “complied with the training, policies and procedures” of both officers present), with Plaintiff’s Memo in Opposition to Defendant’s Motion for Summary Judgment at 5, *Witt*, 2014 WL 1343495 (noting that the officers “had weapons and training to subdue” the plaintiff without resort to a taser).

against defendants, suggesting that they should have attempted a less intrusive intervention.³³²

In context, the primary distinction between plaintiffs' and defendants' arguments is not which types of police expertise they bring to the courts' attention. It is how they suggest such expertise should figure into the courts' analysis. Police officers invoke their training and experience as a type of appeal to authority: circumstantial evidence that they must have acted reasonably because they are experts and experts, generally speaking, do their jobs well. Plaintiffs, by contrast, ask courts to examine the specific content of an officer's skillset, scrutinizing how those skills alter what it would have meant for the officer to act reasonably in the circumstances. That argument exploits a key distinction between excessive-force cases and more familiar appeals to expertise at suppression hearings: that although the latter invariably involve cases where an officer's instincts led to evidence, seemingly vindicating his professional judgment,³³³ the former often entail injuries imposed on unarmed, innocent, or otherwise vulnerable individuals—situations suggesting, in hindsight, that this particular expert got it wrong. But it also reflects a different theory of what it means to account for a police officer's expertise in assessing the legitimacy of his conduct: not simply crediting him for his superior professional talents, but also expecting him to *use* those skills in the field, recalibrating the legal standard accordingly.³³⁴ If officers emphasizing their professional credentials seek to amplify their status as experts while downplaying the higher responsibility that attaches to such status, plaintiffs urge judges to examine the substance of their skills and how they affect the encounter at issue—to take a hard look inside what policemen and prosecutors present as a professional black box.

III. POLICE EXPERTISE: VIRTUE OR TECHNOLOGY?

Conventional accounts of police expertise as a reliable claim to deference, in short, hardly exhaust the courts' encounters with law enforcement. To the contrary, in a range of jurisprudential areas, from coerced confessions to entrapment to excessive force, challengers have embraced—and often gone out of their way to aggrandize—police officers' expertise as a useful weapon for questioning the legality of their conduct.

332. *E.g.*, Brief of Appellant at 4-9, *Est. of Armstrong v. Vill. of Pinehurst*, 810 F.3d 892 (4th Cir. 2016) (No. 15-1191).

333. See Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 437 (2012).

334. In this sense, as noted, excessive-force cases raise structurally distinct arguments from entrapment and coerced-confession cases, faulting individual officers for *failing* to use their conceded expertise. See introduction to *supra* Section II.C.

That resourceful litigants may co-opt the hallmarks of police expertise to their advantage is, of course, consistent with the nature of legal argument, which takes its allies where it can find them. But making sense of the gap between these challenges and prosecutors' more traditional appeals to expertise – as well as, for that matter, the familiar intuition that expertise presumptively elicits deference in court – is not simply a matter of appreciating competing rhetoric. Rather, that gap rests on a tension between two fundamentally divergent understandings of expertise itself: the difference between seeing expertise as a *professional virtue* and as a *professional technology*.

The virtuous account, exemplified in prosecutors' expansive demands for deference, imagines police expertise as a de facto institutional good. Echoing the vernacular view of expert status as a type of professional endorsement, it sees that feature as an accomplishment presumptively entitling its bearers to some measure of authority – either because it proxies other institutional values, assuaging concerns about unlawful or unethical enforcement, or, simply enough, because it is valuable in itself.

The technological account, by contrast, imagines expertise essentially as a professional capacity: an instrument salient to the courts' analysis only to the extent that it facilitates the performance of investigative tasks, expanding police power and thereby – like so many other instruments of policing – reconfiguring the law's delicate balance between the individual and the state. Breaking from the technocratic presumption of expertise as a generic good, this view examines how refinements to police proficiency shift the operation of law enforcement on the facts of each case. And it recognizes that, to the extent that the job at which the police are expert is not coextensive with the goals of judicial review, expertise may not assuage but predictably exacerbate concerns about police legality – not, necessarily, through the risk that expert officers will abuse their skills to deliberately evade the law, but because even their good-faith pursuit of their own institutional goals may conflict with the very different goals served by the courts.

In isolating these two distinct paradigms, this Part does not mean to imply that individual judges – or even individual cases – always hew faithfully to either view. In many instances, the virtuous and technological models of expertise may coexist and even work alongside each other in shaping case outcomes, exerting varying degrees of influence on the courts' encounters with expert policemen. Nor does it suggest that judges self-consciously see themselves as espousing either approach. The pages below aim, rather, to excavate the intellectual presumptions that underlie judicial reasoning, often buried – sometimes more and sometimes less deeply – in the courts' more deliberate justifications.

A. Expertise as a Professional Virtue

Take, once again, the common presumption that expertise boosts police authority, dissuading judges from meddling in the work of professional officers in their own domain. That presumption hangs over numerous courtroom arguments and opinions over the past decades, from invocations of police “training and experience” to bolster confidence in police witnesses,³³⁵ to warnings against “second-guessing” the strategies of “experienced, skilled, and trained” agents,³³⁶ to celebrations of police expertise in dismissing due-process challenges to vague criminal statutes.³³⁷ Frequently lacking any additional explanation as to how those skills assuage the legal challenges at issue, such invocations are essentially talismanic: articles of faith urging the courts against imposing their own judgment, as one government attorney warned, on how officers “perform the work for which they are specially trained.”³³⁸

Why, though, should officers’ expertise at their work defray concerns about legal constraints on police power? Why, that is, should the suggestion that policemen know how to do their jobs *well* suggest that they should be free from judicial oversight, a form of review that serves interests distinct from the proficiency of law enforcement?

Sometimes, the precise nature of an officer’s training or experience may suggest a link between more expert and more constitutional enforcement—a proposition examined further below. Yet many of the state’s broad bids for deference also reflect a particular vision of expertise more broadly: the notion that the achievement of “expert” status, endowing public actors with superior knowledge, experience, and skill in their line of competency, is inherently an institutional good, to be respected and rewarded by other institutional agents. And it may be so for either of two reasons, both of which have pervaded judicial reasoning over the past decades: either because expertise provides a reliable proxy for other virtues that we see as the groundwork of “good” government, assuring a measure of not only effective but also legitimate performance, or because expertise is, in effect, a virtue in itself.

335. See *supra* notes 30-32.

336. See *supra* notes 46-48, 219-224.

337. See *supra* notes 52-54.

338. Appellant’s Brief at *37, *Pinter v. City of New York*, 448 F. App’x 99 (2d Cir. 2011) (No. 10-3789-cv), 2011 WL 379455.

1. *Expertise as a Proxy for “Good” Outcomes*

From the initial appearance of an “expert” police force at midcentury, judges have not simply celebrated professional police officers’ investigative proficiency. They have also evinced a growing faith in those officers as reliable servants of the law, partners in the courts’ own labors of administering justice. As David Jaros observes, the judiciary’s high regard for professional officers may rest as much on their investigative skills as on a certain “strength of character,” compelling them to respect constitutional constraints as part of the occupation’s own “moral code.”³³⁹

The link between expertise and some measure of professional altruism, of course, is hardly limited to the police. As early as the New Deal era, proponents of technocratic governance identified expertise as carrying a certain moral cleansing quality, an assurance of not only technical proficiency but also objectivity and service orientation in the performance of public tasks.³⁴⁰ Skeptics have disparaged this notion as a variant of the “benevolent despot model” of government, a faith-based belief that those in charge happen to have society’s best interests at heart.³⁴¹ But the positive claim is somewhat more complex. The notion that experts will use their expertise to advance the public welfare, maximizing legitimate public aims rather than any baser personal or institutional commitments, does not assume that experts happen to be attuned or loyal to the common good. It presumes that their professional identity *as* experts, achieved through an extensive process of training and socialization, instills such altruism within them, orienting them toward the highest public values of their field.³⁴²

That sociological account has drawn its share of derision, but it continues to inform the courts’ encounters with expertise, from administrative officials to university executives to medical professionals.³⁴³ Certainly, it has stood at the heart of the courts’ expanding deference to law enforcement. The historical emergence of police work as its own field of expertise, performed by professionals boasting unique training and experience, did not simply supplant the courts’ earlier anxieties about overzealous investigation. It directly redressed those concerns, recasting officers as respectable public servants dedicated to the aims of substantive and procedural justice.³⁴⁴ “If,” as Jennifer E. Laurin has surmised, “the individual officer is concededly engaged in the ‘often competitive enterprise

339. David Jaros, *Criminal Doctrines of Faith*, 59 B.C. L. REV. 2203, 2231-32 (2018).

340. See Meazell, *supra* note 3, at 1771-72; Schiller, *supra* note 63, at 417-18.

341. Somin, *supra* note 80, at 298-99.

342. See *supra* Section I.B.

343. Stefan, *supra* note 11, at 642-44.

344. Lvovsky, *supra* note 2, at 2005; Moran, *supra* note 2, at 963-65.

of ferreting out crime,” judges nevertheless presume that “the organizational and professional vehicles for imbuing her with training and expertise might still mitigate that bias.”³⁴⁵

Among police departments as beyond them, the precise link between expertise and virtue orientation is contentious, but there are a number of ways in which it may be drawn. Partly, that link might be a matter of *exposure*. By this account, the same channels of training and credentialing that go into the making of an “expert” investigator also educate officers about legal constraints on their conduct, refining not only their efficiency but also their procedural regularity in the field. The rise of academy instruction and hourly training requirements—proliferating around and partly responding to the Warren Court’s criminal-procedure revolution—always entailed some training in the legal aspects of policing.³⁴⁶ Those same developments, scholars and judges have suggested, are precisely what give procedural constraints like the exclusionary rule their bite, “mak[ing] officers aware of the limits imposed by the [F]ourth [A]mendment and emphasiz[ing] the need to operate within those limits.”³⁴⁷ In practice, of course, both the quality of police instruction and its effect in shaping officer conduct—mitigated, not least, by the often-contrary influence of veteran colleagues—are subject to debate.³⁴⁸ But the expectation remains that a trained, experienced policeman is trained and experienced, at least in part, in complying with judicial restraints on his authority: that the same credentials that teach officers to do their jobs effectively also instill some intimacy with and respect for the demands of criminal procedure.

Alternately, that association may reflect a sense of psychological *investment* in the expert’s work. Setting aside any personal regard for procedural regularity, by this view, the sheer time and effort expended on the job inculcate in the expert officer a deep commitment to the success of his investigative labors, gauged not simply in terms of arrests but also the outcomes of any ensuing prosecutions. That goal, in turn, requires respecting the courts’ procedural restrictions. This presumption undergirds numerous strands of criminal procedure over the past decades. Whether admitting unlawfully obtained statements for impeachment

345. Laurin, *supra* note 60, at 816 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

346. Lvovsky, *supra* note 2, at 2009-10.

347. *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984); see *Hudson v. Michigan*, 547 U.S. 586, 599 (2006); O’Rourke, *supra* note 17, at 452-53; Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050-52 (1987).

348. Lvovsky, *supra* note 2, at 2013-14.

purposes,³⁴⁹ declining to impose stricter duties on the preservation of evidence,³⁵⁰ or sanctioning controversial identification procedures³⁵¹ – as well as, for that matter, erecting the basic edifice of the exclusionary rule – the Court has insisted that officers’ investment in successful prosecution gives them “significant incentive to . . . comply with the Constitution’s demands.”³⁵² Naturally, that view reflects highly idealistic beliefs about the priorities of professional policemen, who (numerous critics protest) are typically far more sensitive to arrest rates and internal performance metrics than to conviction rates.³⁵³ But that very idealism is part and parcel of traditional conceptions of expertise from the New Deal onward. It is the professional officer’s investment in his task and desire for institutional vindication, ostensibly, that urge him toward legal compliance, aligning his own interests in performing his job with the constraints imposed by the courts.

Most fundamentally, however, that association may be seen as a core symptom of professional *identification*: the notion that the process of acquiring expertise in one’s field socializes an actor into some measure of pride and purpose in his work, inspiring him to perform it not only effectively or even efficiently but also, in some sense, ethically.³⁵⁴ Beyond any instrumental interest in case outcomes, the Supreme Court’s cases have long presumed that professional officers internalize the public values shaping constitutional criminal procedure. Take, for example, its assurance in *United States v. Leon* that police training programs will endure regardless of judicial incentives because they “are now viewed as an important aspect of police professionalism,” a valued identity with institutional benefits beyond the admissibility of evidence.³⁵⁵ Or consider the Court’s much-cited observation in *Hudson v. Michigan* that remedies like the exclusionary rule have grown less necessary because the internal norms of modern police departments – not only subject to internal discipline but also staffed by “professionals”

349. *Kansas v. Ventris*, 556 U.S. 586, 593 (2009).

350. *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988) (Stevens, J., concurring); Laurin, *supra* note 60, at 821-22.

351. *Manson v. Brathwaite*, 432 U.S. 98, 112 & n.12 (1977).

352. *Ventris*, 556 U.S. at 593.

353. See, e.g., Stoughton, *supra* note 281, at 877-81; Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1625-26 (2012). *But see* Orfield, *supra* note 347, at 1042, 1047-49 (finding that some officers experience suppression as a professional setback).

354. Cf. Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, 2019 MICH. ST. L. REV. 1177, 1189 (suggesting that a professional’s concern with reputation and “craft” may lead her to place “intrinsic value” in “doing things in the right way”).

355. *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) (quoting Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412-13 (1977)); see Laurin, *supra* note 60, at 817.

sensitive to their institutional status—guarantee that “police forces across the United States take the constitutional rights of citizens seriously.”³⁵⁶ Such faith rests on an essentially naïve view of the institutional pressures operating on police work, assuming that trained officers will embrace not only some higher principles of their field but also, conveniently, the same principles served by the courts’ criminal-procedure doctrines.³⁵⁷ Regardless, by this account, the officer’s identity as a professional investigator, endowed by his credentialing with both rarefied skills and a deeper commitment to his work, curbs the institutional pathologies that once made him deserving of judicial oversight, rendering officers simultaneously more effective and more mindful of their legal obligations in the field.

Here is one sense in which courts and other commentators over the past decades have imagined police expertise as an institutional good. Echoing a deep-seated association between professional refinement and professional altruism, this account associates the process of expert credentialing with not just the skillful performance of one’s duties but also their “proper” performance—in the case of the police, enforcement that is not only effective but also lawful.³⁵⁸

2. *Expertise as a Good in Itself*

At the same time, there may be a simpler sense in which police expertise is seen as an institutional good, fueling the instinct that judicial deference to expert officers is, for better or worse, the way of things. It is the notion that expertise *deserves* deference: that, setting aside its consequentialist advantages in guaranteeing lawful enforcement, expertise is an inherent virtue, worthy of celebration in itself.

In scholarly debates, expertise increasingly figures as a site of struggle, a deeply politicized and contested bid for power. But in ordinary parlance, it generally retains a less complicated association: it is, in effect, a compliment.³⁵⁹ Inside and outside the legal academy, designations of expertise often function as

356. 547 U.S. 586, 599 (2006).

357. In fact, there are numerous reasons why the police’s normative goals may diverge from those of the courts, from the pressures of the adversarial system to the inherent cognitive biases of criminal investigation. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 198 (2017); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292–95, 322–25. See generally O’Rourke, *supra* note 17, at 433–34, 451 (protesting that judicial deference to police officers underestimates the gap between the institutional incentives of police and the courts).

358. Cf. Stephenson, *supra* note 354, at 1189 (identifying “propriety” as an inculcated value of professional workers).

359. SASSOWER, *supra* note 6, at 101.

status markers, hallmarks of value and authority in a technocratic culture that prizes relative competency.³⁶⁰ There is a reason, after all, that when the police sought to climb their way out of a public-relations crisis in the mid-twentieth century, they did so not only by pledging their commitment to discipline and public service, but also by rebranding themselves as “experts,” endowed with rarefied talents in their field.³⁶¹ “The crux” of modern-day debates over expertise, as sociologist Johanna Hartelius writes, “is that being recognized as an expert generates not only status and power but considerable influence. Those [so] labeled reap the financial and symbolic benefits. . . . Their voices are heard above others.”³⁶² Simultaneously a promise of exceptional skill and a testament to the human capacity for self-refinement, expertise taps into the appealing proposition that human talent and effort are worthy of reward. More than simply an avowal of technical proficiency, expertise is a relational bid for social standing, an assertion of superiority over the “ordinary” layperson.

How strongly that assertion lands, of course, varies by audience, reflecting the numerous cultural, personal, and political vectors that prime a group’s receptivity to such claims.³⁶³ But there is reason to believe that judges — as well as, for that matter, lawyers and scholars warning of the inexorable “mysticism of police expertise” — might be especially susceptible.³⁶⁴ For one thing, those groups are generally highly educated, a quality often found to correspond with greater respect for the authority of specialists in their professional fields.³⁶⁵ They also tend to occupy the middle-to-high economic tiers, a demographic historically likely

360. See Fleck, *supra* note 6, at 145-46; Maureen McNeil, *Gender, Expertise and Feminism*, in *EXPLORING EXPERTISE: ISSUES AND PERSPECTIVES* 55, 55-57 (Robin Williams, Wendy Faulkner & James Fleck eds., 1998). See generally Selinger & Crease, *supra* note 6 (discussing the social and political capital of expertise).

361. See Lvovsky, *supra* note 2, at 2003-06.

362. HARTELIUS, *supra* note 6, at 1.

363. E.g., HILGARTNER, *supra* note 13, at 3-4; Shapin, *supra* note 13, at 260, 269-70; Wynne, *supra* note 13, at 281-86, 292; Brian Wynne, *Establishing the Rules of Laws: Constructing Expert Authority*, in *EXPERT EVIDENCE: INTERPRETING SCIENCE IN THE LAW* 23, 28 (Roger Smith & Brian Wynne eds., 1989).

364. Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, *supra* note 20, at 41; cf. Brest, *supra* note 59, at 664 (noting how the unique demographics of judges structure decision-making).

365. Lawrence C. Hamilton, *Conservative and Liberal Views of Science: Does Trust Depend on Topic?*, CARSEY RSCH. 4-5 (Summer 2015), <https://scholars.unh.edu/cgi/viewcontent.cgi?article=1251&context=carsey> [<https://perma.cc/C5YP-6Q2B>]; Sara Bleich, Robert Blendon & Alyce Adams, *Trust in Scientific Experts on Obesity: Implications for Awareness and Behavior Change*, 15 *OBESITY* 2145, 2152 (2007). But see Michael J. Saks & Roselle L. Wissler, *Legal and Psychological Bases of Expert Testimony: Surveys of the Law and of Jurors*, 2 *BEHAV. SCI. & L.* 435, 445-46 (1984) (finding that more educated jurors are more skeptical of expert testimony).

to benefit from and take comfort in the promise of professional problem solving.³⁶⁶ Not least, lawyers and judges identify as members of their own highly skilled and credentialed expert group, a designation that many regard as central to their own effective performance³⁶⁷ and that (conveniently) entitles them to significant social and professional privilege.³⁶⁸ Enjoying what they see as the fruits of their own technocratic authority, they may simply be likelier to regard expertise as a distinction worth respecting.

Perhaps fanciful when stated so baldly, this hagiographic view has in fact long hovered over the courts' encounters with police expertise. Repeatedly over the past decades, judges have celebrated officers' skills and insights not simply as guarantors of legal investigation, leading to more reliable evidence or more restrained encounters in the field, but also as investigative goods in themselves – hallmarks of especially proficient and therein inherently desirable police work.

That suggestion arises, for instance, in the courts' frequent pains to compliment the talents of arresting officers, not just as tools of constitutional enforcement, but as their own causes for celebration. Prosecutors who parade officers' years of experience or "specialized" training as a type of analytic backdrop, after all, are not attempting some unprecedented persuasive strategy. They are directly echoing the lead of judges, who routinely note the complex nature of police investigation as an independent claim to the status of good policing. Take the suggestion in *Nettles v. State* that a "trained law enforcement officer" recognizing criminal activity based on clues "meaningless to the untrained [person]" engaged not just in constitutional or even "reasonable" enforcement – a term itself recalling a legal standard – but also, as importantly, in "good police work";³⁶⁹ or the dissent's observation in *State v. Eleneki* that an officer's reliance on his "special expertise concerning [criminal] patterns, practices, and habits" not only properly informed the court's analysis of probable cause, but also constituted the

366. *E.g.*, Andrew Cunningham & Bridie Andrews, *Introduction* to WESTERN MEDICINE AS CONTESTED KNOWLEDGE 1, 10–11 (Andrew Cunningham & Bridie Andrews eds., 1997).

367. See James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 217 (2019) (noting a judicial belief in judges' epistemic superiority over lay jurors); Leah M. Christensen, *The Paradox of Legal Expertise: A Study of Expertise and Novices Reading the Law*, 2008 B.Y.U. EDUC. & L.J. 53, 54–56 (reporting differences between the legal interpretation of novices and trained jurists).

368. J. WOODFORD HOWARD JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 89 (2d ed. 2014).

369. *Nettles v. State*, 435 So. 2d 146, 150 (Ala. Crim. App. 1983) (quoting *United States v. Cortez*, 449 U.S. 411, 419 (1981)); see also *People v. Soto*, 599 N.Y.S.2d 538, 540 (App. Div. 1993) (Kupferman, J., concurring) (terming "good police work" an incident in which officers' "experienced analysis" led them to conclude that an individual might be carrying a weapon).

very “essence of good police work.”³⁷⁰ Or consider the recurring claim among courts appraising eyewitness identifications that showups involving “trained and experienced” officers are constitutional not only because they are “not ‘unnecessarily suggestive,’” as demanded by the doctrine, but also (independently) because they are “consistent with good police work.”³⁷¹ The point, in all these cases, is not simply that the officers’ skills empowered them to parse criminal signals more reliably or to comport better with constitutional constraints. Rather, the very fact that officers drew on rarefied talents in pursuing their investigations establishes that they were engaged in what should be recognized as “good” enforcement, measured less in terms of compliance with specific legal values than in terms of the masterful performance of a difficult task, worth acknowledging as a job well done.

That same instinct hangs over the numerous cases in which courts invoke the skillfulness of officers’ investigative methods as a dividing line between permissible and impermissible policing. From psychological interrogation tactics to plainclothes enticement, judges commonly suggest that certain methods are problematic in key part because they depart from genuinely impressive field work: that confessions elicited from wary suspects are a cheap alternative to “evidence independently secured through skillful investigation,”³⁷² or that manipulative stings present a meager “substitute for skillful and scientific investigation.”³⁷³ More than any inherent concerns about its accuracy or quality,³⁷⁴ such criticisms suggest that evidence derived through police skill – some meaningful investment of personal talent, labor, and diligence – stands in a position of innate superiority to that garnered through cruder means. The corollary being, of

370. 102 P.3d 1075, 1092 (Haw. 2004) (Nakayama, J., concurring in part and dissenting in part) (dissenting from the ruling that a traffic stop was unlawful at its inception (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000))).

371. *E.g.*, *People v. Morales*, 333 N.E.2d 339, 345-46 (N.Y. 1975) (quoting *People v. Logan*, 250 N.E.2d 454, 455 (N.Y. 1969)); and then quoting *United States ex rel. Cummings v. Zelker*, 455 F.2d 714, 716 (2d Cir. 1972)).

372. *E.g.*, *Watts v. Indiana*, 338 U.S. 49, 54 (1949); *United States v. Mandujano*, 425 U.S. 564, 597 (1976) (Brennan, J., concurring) (quoting *Watts*, 338 U.S. at 54); *State v. Rutan*, 479 A.2d 1209, 1212 (Conn. 1984) (same); *People v. Dunbar*, 958 N.Y.S.2d 764, 770 (App. Div. 2013) (same).

373. *United States v. Russell*, 411 U.S. 423, 444 n.2 (1973) (Stewart, J., dissenting) (quoting Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 *YALE L.J.* 1091, 1111 (1951)); *People v. Barraza*, 591 P.2d 947, 954-55 (Cal. 1979) (same); *State v. Walker*, 521 P.2d 215, 219 (Wash. Ct. App. 1974) (same); *Rivera v. State*, 846 P.2d 1, 17 (Wyo. 1993) (Urbigkit, J., dissenting) (same); *United States ex rel. Hall v. Illinois*, 329 F.2d 354, 359 (7th Cir. 1964) (same).

374. Although some cases do tie the unskilled nature of interrogation to the risk of inaccuracy, *e.g.*, *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964), many do not, *see supra* note 372.

course, that the criticized tactics are inherently excluded from the realm of “skillful” policing—a proposition that does less to describe the demands of such enforcement methods, as the cases above demonstrate, than to maintain a clean link between skillful and permissible investigation. In all these cases, the impression is that an officer’s reliance on professional talent and sophistication to advance his case carries some legal value in itself, making the ensuing evidence presumptively more constitutional.

Not least, the instinct to reward expert policing emerges in the common language of “entitlement” that pervades judicial deference to the police. From suppression hearings to excessive-force cases, judges routinely suggest that officers called to account for their discretionary decisions should enjoy the privilege of their own expertise without the indignity of being “second-guessed” by less qualified critics: that officers determining probable cause “are entitled to rely on their special knowledge and expertise,”³⁷⁵ or that policemen spotting evidence in plain view “are entitled to rely on their specialized knowledge, training, and experience,”³⁷⁶ or that a patrolman deploying his weapon “is entitled to rely on his experience and specialized training.”³⁷⁷ That an officer’s professional insights should inform his enforcement decisions, of course, is an unremarkable proposition; ostensibly, such refinements improve the quality of law enforcement for officers and private individuals alike. It is that promise of superior enforcement, indeed, that justifies the Supreme Court’s deference to police judgment to begin with.³⁷⁸ Crucially, however, the lower courts’ rhetoric of entitlement does not posit such expert judgment as a tool of better policing, accruing to the benefit of all the varied stakeholders in the criminal-justice system. It posits such judgment as the personal privilege of policemen in court: something those officers have *earned* through their experience and training, and therefore should be credited for before the bench. Not unlike judges’ appeals to “good police work” and “skillful” law enforcement, such rhetoric seems as concerned with facilitating lawful investigation as with respecting hierarchies of professional expertise at trial, recognizing a police officer’s skills and training as entitling him to some reprieve from external criticism.

375. *United States v. Savides*, 665 F. Supp. 686, 690 (N.D. Ill. 1987) (quoting *United States v. Garza-Hernandez*, 623 F.2d 496, 499 (7th Cir. 1980)); see *United States v. Breit*, 429 F.3d 725, 728 (7th Cir. 2005); *People v. Bibbs*, 531 N.E.2d 75, 77 (Ill. App. Ct. 1988); *People v. Nice*, 202 Cal. Rptr. 3d 860, 868 (Ct. App. 2016) (quoting *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000)).

376. *State v. Gordon*, No. 14-CA-13, 2014 WL 5840178, at *5 (Ohio Ct. App. Nov. 10, 2014).

377. *Boston v. Harris Cnty.*, No. H-11-1566, 2014 WL 1275921, at *15 (S.D. Tex. Mar. 26, 2014).

378. *E.g.*, *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *United States v. Cortez*, 449 U.S. 411, 417 (1981).

Such laudatory rhetoric suggests another reason why judges may be hesitant to second-guess the judgments of experienced, trained investigators. In a technocratic culture inclined to respect expert status as a professional accomplishment, the promise of expert policing—the accumulation of rarefied skills and insights in the performance of an important public task—emerges as a refinement inherently deserving of respect.³⁷⁹

This is, to be sure, a very different account of expertise as an institutional value: one that figures expertise not as a proxy for other virtues, assuaging concerns about unlawful conduct, but as a virtue in itself. Both these accounts, however, posit expertise as essentially correlated with authority and respect, justifying a default posture of deference. And it is this view that emerges in prosecutors' (and many courts') reliance on police skill as a presumptive salve against judicial skepticism—often without much inquiry into its precise relevance to the dispute at hand.

B. Expertise as a Professional Technology

Yet it is also possible to imagine expertise differently: not as a virtue of any sort, but, simply enough, as a professional technology—one that increases the proficiency of expert actors without any inherent bearing on the legality or legitimacy of their conduct.

This is the view at the heart of arguments abounding in references to the impressive skills and training of policemen crossing the lines of permissible enforcement: defendants' protests that "well-trained" undercover agents, "expertly" executing their "masterful" stings, induced a criminal proposal,³⁸⁰ or judges' recurring concern that the "pressures brought to bear by a skilled and trained interrogator" overbore a suspect's will.³⁸¹ Conceding the genuine proficiency displayed in such encounters even as they denounce those encounters as ultimately unlawful, these accounts do not take police expertise as coextensive with any higher ideals of constitutional or ethical enforcement. They take it simply as an institutional asset that expands officers' investigative capacity, rendering them especially adept at their assigned tasks.

379. That judges presume policing to be a legitimate government service, of course, is crucial to this inference. Expertise at, say, devising terrorist operations would presumably strike no one as a default good. See *United States v. Pugh*, 945 F.3d 9, 27 (2d Cir. 2019); *id.* at 29 (Calabresi, J., concurring) (emphasizing defendants' military skills as an aggravating factor in the terrorism prosecution); *cf.* *United States v. Wilson*, 345 F.3d 447, 449 (6th Cir. 2003) (discussing the use of "special skill . . . that significantly facilitated" fraud as an aggravating factor in a fraud-related sentencing).

380. See *supra* text accompanying notes 228-241.

381. See *supra* text accompanying notes 169-177.

Seen in that light, it should be clear that any presumptive leap from police expertise to police legitimacy skips a step or two. Stripped down to its foundations, as a professional capacity that does no more (and no less) than facilitate the work of successful investigation, expertise does not necessarily defray challenges to police misconduct. In some cases, it may exacerbate those challenges, tipping the balance of power between the state and the individual in a way that invites judges to tighten their reins. Which is to say, expertise may step into the courts' analyses in the same posture long occupied by the expanding technologies of police power, from wiretaps to aerial cameras to thermal scanners: as an investigative tool that renders the police "more competent to interfere with individual liberty,"³⁸² predictably calling for greater oversight to protect the law's due regard for individual rights.

This is what may be seen as an institutionally realistic view of expertise: one that attends to the actual content and internal operation of such claims. Casting aside any assumptions about the inherent value of professional refinement, this model examines how any given advance in an officer's skillset shifts the operation of police power on the ground. And casting aside the naïve presumption of some institutional convergence between what judges and policemen regard as "good" enforcement, it examines how refinements to the police's institutional goals intersect with the discrete, often-variable legal ideals served by the courts' criminal-procedure doctrines—ideals that may respond very differently to the promise of an increasingly expert police force.

1. *Police Proficiency and Criminal-Procedure Values*

That legal agents may, in good faith, optimize divergent and even conflicting public values is hardly novel. Setting aside the gaps separating judges from police officers, even within the judiciary itself, disputes about the bounds of police power often entail a choice among an array of normatively defensible social, legal, and institutional interests, from the relative weight of "autonomy, privacy and fairness" to the "appropriate tradeoff between accuracy and efficiency."³⁸³ Numerous scholars have ascribed what they see as missteps in the Court's crim-

382. SKOLNICK, *supra* note 98, at 243.

383. Christopher Slobogin, *Having It Both Ways: Proof that the U.S. Supreme Court Is "Unfairly" Prosecution-Oriented*, 48 FLA. L. REV. 743, 744 (1996); see also Hock Lai Ho, *The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence*, 10 CRIM. L. & PHIL. 109, 109-10 (2016) (noting that some thinkers prioritize truth while others prioritize government accountability).

inal-procedure cases to its failure to appropriately discern or prioritize such metrics: its emphasis on privacy over the protection of the innocent, for example,³⁸⁴ or its commitment to procedural fairness over the accuracy of trial outcomes.³⁸⁵

The many objectives animating these judicial disputes, however, do not simply mean that good-faith actors may disagree on where the lines of criminal procedure should be drawn. They also mean that different doctrines themselves prioritize different values. At the highest level of generality, the Supreme Court's procedural cases unite around a common goal: preserving "a fair state-individual balance" by constraining the permissible exercise of police power.³⁸⁶ But they do so, crucially, by serving several distinct values seen as constitutive of that balance, from the accuracy of penological interventions, to the law's respect for the autonomy and dignity of persons, to the fundamental fairness of policing tactics, to the reduction of state-imposed harms. And these values can react very differently to the introduction of police expertise.

In some cases, the subjects of police training and experience may coincide with what the courts regard as proper limits on state power, suggesting that more expert officers are in fact likelier to comply with legal constraints. This is often the case with rules centered on the *accuracy* of the state's penal interventions. Take the arena most traditionally associated with deference to police expertise: assessments of probable cause and reasonable suspicion. Those standards, the Supreme Court has repeatedly affirmed, aim to maintain an adequate buffer between the public and the state by ensuring that police intrusions are genuinely justified by the demands of law enforcement, keeping the government "out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed."³⁸⁷ These are essentially probabilistic inquiries, protecting citizens from unnecessary invasions and "unfounded charges of crime."³⁸⁸ Against that backdrop, at least theoretically, a police officer's

384. GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* 49-50 (2008).

385. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 818-19 (2006).

386. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (quoting 8 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* 317 (3d ed. 1940)).

387. *Berger v. New York*, 388 U.S. 41, 59 (1967); see also 2 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.1 (6th ed. 2020) (surveying case law that imparts the Supreme Court's philosophy toward probable cause); Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 619-20 (2016) (discussing conceptual justifications for the probable-cause requirement).

388. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

investigative expertise may logically bolster the presumptive validity of his conduct. The reliability of an officer's judgment that crime is afoot, after all, is precisely the type of thing that police training and experience are (as courts see it) expected to hone, both because of their substantive impact in exposing officers to the hallmarks of crime³⁸⁹ and due to officers' own presumptive interest in optimizing their time by focusing on promising leads.³⁹⁰ In that context, the promise of more "capable" policing does not expand the footprint of law enforcement; it makes policing more targeted and efficient, limiting its scope. A similar dynamic pervades Fifth Amendment challenges emphasizing the risk of false confessions, where defendants tend to stress the limits of police experience and training, conceding some convergence between "expert" and reliable interrogation.³⁹¹ In such cases, too, where the goals of judicial review appear to align with those presumptively driving the police's training, refinements in police proficiency may rationally be expected to appease the courts' procedural concerns.

Many arenas of judicial oversight of police conduct, however, are steered by values other than accuracy. And within those arenas, there are numerous ways that police expertise might not assuage but exacerbate the concerns animating a given doctrine.

When, for example, constitutional scrutiny is aimed at protecting individual *autonomy*, preserving the integrity of the individual against the compulsions of the state, the specter of expert law enforcement does not disarm concerns about investigative overreach. It directly inflames them, deepening the risk that a trained, experienced officer exerted such powerful pressures as to undermine a suspect's autonomous will. This is the case, most obviously, with the constitutional bar on coerced confessions, which has long reflected a principled stance against all involuntary statements, truthful and otherwise, as an affront to personal autonomy—a concern directly fueled at midcentury by interrogators' growing proficiency at their work.³⁹² The turn against psychological interrogation in *Miranda*, as David Alan Sklansky has observed, sprang from the Supreme

389. Cf. *Heien v. North Carolina*, 574 U.S. 54, 72-73 (2014) (Sotomayor, J., dissenting) ("[T]he leeway we afford officers' factual assessments is rooted . . . in our understanding that police officers have the expertise to 'dra[w] inferences and mak[e] deductions . . . that might well elude an untrained person.'" (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981))).

390. That police work aims primarily to investigate crime is, of course, itself contested. See, e.g., Stoughton, *supra* note 281, at 877-82 (discussing the incentives that police face to increase arrest rates and disregard conviction rates); ALEX S. VITALE, *THE END OF POLICING* 31-34 (2017) (asserting that the objective of policing is social control rather than crime prevention). My goal here is to reconstruct the courts' prevailing views of police training and incentives, irrespective of whether those views map onto reality.

391. See *supra* notes 157-162 and accompanying text (discussing challenges to alleged false confessions).

392. See *supra* text accompanying notes 114-121.

Court's concern with protecting suspects "against increasingly sophisticated efforts to 'subjugate [them] to the will of [their] examiner.'"³⁹³ Or, as Justice Stevens more bluntly put it, with shielding "laypersons . . . from overreaching by more experienced and skilled professionals."³⁹⁴ In that context, recognizing a confession as the product of specialized, sophisticated tactics predictably renders that confession less presumptively legitimate, deepening the power imbalance that drove the Court's discomfort to begin with.

In pitting police expertise against the Constitution's defense of individual autonomy, of course, the Court's confessions cases draw on a particular view of what expert officers are expert at. Were the established objectives of interrogation to ensure scrupulous respect for a suspect's will, after all, an officer's relative skill and experience might indeed assuage constitutional concerns. But those are not its objectives. As police veterans explain, the goal of interrogation is essentially prosecutorial, aimed at amassing incriminating evidence from presumptively guilty suspects by eliciting trust and disarming natural compunctions against self-disclosure.³⁹⁵ To be especially "good" at interrogation, by this view, is not to be good at minding the limits of personal autonomy, or even at parsing good from bad evidence—a professional talent that sounds, once again, in accuracy, aligning with at least one value served by the bar on coerced confessions. Rather, it is to be good at persuading reticent suspects to overcome their understandable instinct toward silence—a professional talent that sounds, in effect, in the exercise of power. Against that backdrop, the promise of increasingly expert policing runs headlong against the dignitary concerns animating the Court's Fifth Amendment framework—not, crucially, because expert interrogators may slyly evade the Constitution (though, of course, some might), but because even their avowed goals teeter on the precipice of what the courts see as permissible policing.

A similar dynamic arises when judicial oversight ensures that the police do not offend broader principles of *fundamental fairness*, compromising the integrity of the legal system through immoral or otherwise controversial methods. Where police tactics raise fundamental qualms about the integrity of law enforcement, after all, an officer's specialized training and experience in those tactics do not assuage but exacerbate the courts' concerns, making the officer increasingly proficient, in effect, at an essentially dubious mode of investigation. This is the case with undercover stings, a practice that has always implicated not just the injus-

393. Sklansky, *supra* note 118, at 1741 (quoting *Miranda v. Arizona*, 384 U.S. 436, 457 (1966)).

394. *McNeil v. Wisconsin*, 501 U.S. 171, 188 (1991) (Stevens, J., dissenting).

395. See *supra* notes 103-108 and accompanying text (discussing internal justifications of interrogation tactics).

tice of punishing “innocent” suspects but also the inherent evil of police manipulation. To the extent that skilled, experienced agents learn to respect the limits of the entrapment doctrine itself, avoiding unfair inducement or scrupulously seeking evidence of predisposition, their credentials may well quiet such concerns. Much of their credentialing, however, is concerned less with legal restraint than with investigative proficiency, teaching undercover agents to roleplay persuasively, to elicit wary suspects’ trust, or to urge suspects to yield to lingering criminal temptations. Like the expert interrogator’s powers of persuasion, such displays of professional skill directly raise the risk of impermissible manipulation, empowering agents to maneuver suspects into acts they would not otherwise commit. And, setting aside the legal limits of entrapment, they feed deeper qualms about the propriety of plainclothes policing, impugning the morals and motives of public servants who commit their substantial professional talents to mastering an innately unsavory tactic. In all these cases, an undercover officer’s conceded expertise runs into the underlying reality that judges and juries retain the prerogative of passing both legal and moral judgments about the proper limits of law enforcement, and they can decide that there exist certain effective—even skilled—forms of investigation that the police should not engage in to begin with, much less become “expert” at.

Finally, the dangers of expertise arise when a legal inquiry aims to prevent *abuses of power* by state agents, ensuring that police officers do not exploit their profound authority over the public to inflict gratuitous harm. This is the case, most notably, in disputes over the use of excessive force, whether raised in civil claims or in the rare criminal charge. Like the Fourth Amendment’s standards of criminal suspicion, debates over the reasonableness of police force sound partly in the accuracy of police judgment, and accordingly, defendants often invoke their own training and experience to ward off external criticism. But the innately comparative nature of that inquiry, both as a bar against gratuitous violence and as one holding officers accountable to the broader wisdom of the police profession, means that an officer’s professional skills do not necessarily bolster his authority in court. They also substantively expand the scope of his legal liability, subjecting “expert” policemen to a higher legal standard than would apply to laypersons in the same position.³⁹⁶ It is precisely the officer’s unique training, insight, and experience that invite judges and jurors to expect him to act with greater prudence and agility in concededly stressful encounters, whether more accurately assessing threats, more diligently avoiding injuries, or simply remaining calmer in situations that might rattle civilians. In a legal framework aimed at restraining unreasonable displays of violence by the trained agents of the state, that is, an officer’s expertise provides a source of not only professional authority

396. See *supra* Section II.C.2.

but also professional obligation, requiring public servants who bear superior skills to use those skills to minimize the violence implicit in their work.

Once we divorce expertise from any attending presumptions about the virtue of expert actors, in short, it becomes obvious that police expertise does not necessarily defray concerns about the legality of police conduct. Depending on its convergence with the values animating a given genre of review – both the courts’ legal constraints on police power and our more affective intuitions about the limits of permissible policing – it may actively exacerbate those concerns, raising the likelihood that an encounter violated the law, shifting the substantive bar on lawful conduct, or simply fueling discomfort with controversial enforcement tactics. Crucially, in all these cases, the suggestion is not that expert officers will abuse their skills to maliciously subvert judicial constraints. It is that even good-faith attempts to perform their professional duties, reflecting officers’ own normative account of “good” policing, may undercut police authority when that account differs from the courts’ own view of just enforcement.

2. *Police Technologies, Human and Otherwise*

It is important to recognize how precisely this analysis conceives of police expertise. If the prospect of professional officers downplaying their proficiencies in court might seem unusual, after all, the core principles behind that strategy are far from unprecedented. They stand at the heart of a familiar debate about policing in the United States: judicial scrutiny of novel surveillance technologies.

Starting with the courts’ earliest encounters with police technology, judges have recognized devices that expand the police’s capacity to surveil the public, gathering indisputably reliable evidence, as not antidotes but invitations to judicial scrutiny – advances that disrupt the precarious balance between state power and individual liberty and thereby demand the attention of the courts. Even in the early twentieth century, when the Supreme Court’s trespass test foreclosed successful challenges to gadgets like wiretaps, searchlights, and detectaphones, judges routinely warned that the “progress of science” in refining the state’s tools of investigation threatened to violate the Constitution’s limits on permissible policing, auguring those “invasions of individual security” that the Fourth Amendment was adopted to prevent.³⁹⁷ In 1967, the Court in *Katz v. United States* embedded those concerns into the heart of its Fourth Amendment jurisprudence, reorienting the bar on unreasonable searches around an individual’s “reasonable expectation of privacy”³⁹⁸ and unleashing a stream of challenges to surveillance

397. *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

398. 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

technologies like beeper monitors,³⁹⁹ aerial photography,⁴⁰⁰ and thermal imaging devices⁴⁰¹ (as well as, less successfully, binoculars⁴⁰²). If the Fourth Amendment aims to protect society's expectations that certain spaces or objects remain shielded from public view, the reasoning went, any investigative tool that empowers the police to breach those barriers more effectively, ushering in "the increased ability of police agencies to spy on private conduct," directly implicates that provision.⁴⁰³ As the Court explained in *Kyllo v. United States*, the "power of technology to shrink the realm of guaranteed privacy" is precisely what triggers the Fourth Amendment's restraints,⁴⁰⁴ and all the more so the "more sophisticated" such technology becomes – not because such methods lead to inaccurate or ineffective investigations, but because of how very effective and reliable they are.⁴⁰⁵

Against that backdrop, it should come as no surprise that police officers who rely on cutting-edge technologies do not necessarily come to court claiming credit for those innovations. To the contrary, over the past ten years alone, law-enforcement agencies have both acquired and done their best to sweep under the rug a parade of specialized investigative tools, including GPS location-tracking programs, cell-site simulators, and computer programs used to search hard drives through peer-to-peer sharing networks.⁴⁰⁶ Some do so by omitting any references to such technologies from police reports, warrant applications, and affidavits.⁴⁰⁷ Others resort to more artful strategies, papering over the use of surveillance tools by reverse-engineering "parallel" investigative paths yielding the

399. See *United States v. Knotts*, 460 U.S. 276, 277 (1983).

400. See *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986).

401. See *Kyllo v. United States*, 533 U.S. 27, 38-40 (2001).

402. E.g., *United States v. Whaley*, 779 F.2d 585, 592 (11th Cir. 1986); *United States v. Christensen*, 524 F. Supp. 344, 347 (N.D. Ill. 1981).

403. Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1, 2 (1989).

404. *Kyllo*, 533 U.S. at 34.

405. *Id.* at 36. See generally Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011) (arguing that Fourth Amendment doctrine adjusts to equalize power imbalances as public and police technologies advance).

406. See, e.g., Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants, & the Right to Notice*, 54 SANTA CLARA L. REV. 843, 888-95 (2015) (cataloguing some such technologies).

407. E.g., *United States v. Patrick*, 842 F.3d 540, 544 (7th Cir. 2016).

same evidence.⁴⁰⁸ Even officers who admit the use of such investigative aids frequently downplay their power or sophistication, characterizing advanced tools like cell-site simulators, for instance, as generic “cellular tracking devices” essentially analogous to the cruder pen register.⁴⁰⁹ The motivation for such modesty is obvious. Obscuring the existence or effectiveness of the police’s tools prevents defendants from challenging them, whether by keeping those methods beneath the courts’ radar altogether⁴¹⁰ or by underplaying how much they expand police capacity, tipping the constitutional balance between the individual and the state. In that context, it is entirely predictable that the police would undersell their professional arsenal – not because it does not genuinely improve their ability to solve cases, engaging in what might be coded as “good” policing, but because it offends the broader values of privacy at the heart of the Fourth Amendment.

That intuition is not generally seen to bear on claims of police expertise: refinements not to external technologies, but to the human proficiencies that facilitate police investigations. Yet once we take a technological view of expertise, not as a professional virtue of any inherent worth but as a tool for expanding the capacity of law enforcement, it becomes harder to draw any categorical distinction between the two. Both advances in surveillance technologies and refinements to officers’ own skills are, at heart, institutional assets that enhance the power of the police. Both render law-enforcement agents more proficient at their designated tasks, facilitating what may be regarded as accurate, efficient, and successful investigations. And, in doing so, both threaten to upend the precarious “state-individual balance” guarded by the courts’ criminal-procedure doctrines – breaching, through their very proficiency, what courts see as valuable sources of obfuscation between the police and the public, from the walls of a home to a suspect’s dignity in the interrogation room. From interrogators’ strategies for eliciting confessions to undercover agents’ skills at building rapport to officers’ talents at self-defense, police expertise expands officers’ dominance over the civilians with whom they come in contact, at an inevitable cost to countervailing interests of autonomy, dignity, or fairness. To the extent judicial restraints safeguard individual rights in the face of the state’s ever-shifting capacity to infringe them, after all, those restraints would intuitively respond to shifts in

408. See Natasha Babazadeh, *Concealing Evidence: “Parallel Construction,” Federal Investigations, and the Constitution*, 22 VA. J.L. & TECH. 1, 8-9 (2018); Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981, 1042-43 (2014); Claire Powers, *Surveillance Remedies: Stingrays and the Exclusionary Rule*, 96 OR. L. REV. 337, 351-52 (2017).

409. See, e.g., *People v. Gordon*, 68 N.Y.S.3d 306, 309 (Sup. Ct. 2017); *Jones v. United States*, 168 A.3d 703, 713 (D.C. 2017); *State v. Andrews*, 134 A.3d 324, 339-41 (Md. Ct. Spec. App. 2016).

410. See Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 108-09; Fairfield & Luna, *supra* note 408, at 1042-43; Toomey & Kaufman, *supra* note 406, at 848-49.

the police's personal proficiencies as well as their technological or institutional assets.⁴¹¹

The proposition that police expertise may drive rather than defray legal challenges to their cases, in short, is hardly unprecedented. It is simply another iteration of the fundamentally antagonistic relationship between state power and individual rights at the heart of some of the Court's most high-profile criminal-procedure cases. A relationship, indeed, that is generally seen as obvious.

If, in context, that intuition has not been seen to apply to police expertise – if there persists some abiding sense that police technology and police expertise *must* be different, one naturally raising and the other assuaging concerns about unlawful policing – that reaction may be the strongest evidence yet of the virtuous view that has dominated discussions of police expertise since midcentury. If refinements to police officers' investigative skills and refinements to external gadgets of surveillance strike us as categorically distinct, it may owe in key part to our instinct that, unlike technology, with its dual associations of utopian progress and authoritarian abuse, expertise is an inherently virtuous feature – a professional accomplishment that experts should be entitled to use in the field. Our moral intuitions surrounding expertise as a virtue have blinded us to the extent to which expertise is, essentially, just another tool of the police, raising the same concerns about state power as thermal-imaging devices or cell-site simulators. And the extent it can, and often does, play an analogous role in court.

IV. RETHINKING EXPERTISE AND DEFERENCE

Recognizing the rival paradigms of police expertise that have pervaded judicial reasoning goes some way toward explaining the cases above, as debates hinging on substantively different theories of how expertise shapes judicial encounters with police professionals. It also stands to enrich ongoing debates about institutional competency and legitimacy extending well beyond the criminal law.

This Part examines how judges' accounts of police proficiency recalibrate our broader presumptions about expertise as an institutional value. For one thing, taking stock of those accounts forces us to confront the moralistic assumptions undergirding our shared intuitions about expertise as a source of institutional authority – assumptions that complicate traditional defenses of judicial deference to experts to begin with. Blurring the lines between what are typically seen as “epistemic” and “status-based” claims to deference, the courts' virtuous view

411. See David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 443 (2016) (attributing the warrant requirement to the growing institutional capacity of police).

of police expertise reveals the deceptive allure of expertise as a source of legitimacy in a technocratic legal culture, urging greater skepticism of a range of doctrines grounded on judicial self-abnegation to ostensibly more expert actors.

At the same time, judicial encounters with expert law-enforcement agents complicate the link between expertise and deference itself, illuminating the ambivalent relationship between institutional competency and institutional authority in a system administered by multiple, sometimes-conflicting agents of the law. Recognizing the extent to which concessions of expertise may undercut police legitimacy in court demonstrates the value of taking a more granular view of both expertise and the police. It exposes the many factors that might sever institutional competency from institutional authority, enriching theoretical debates about the politics of expertise in and outside the legal realm. Not least, it casts an uncomfortable light on our legal system's commitment to certain public services that seem to inspire less controversy, ironically, the less proficiently they are performed.

A. *Virtue and the Instability of Epistemic Deference*

Begin with the virtuous account of expertise, as an institutional good. Whether embracing expertise as a proxy for other values or as a value in itself, this approach imagines that feature as commanding a presumptive measure of authority. By this view, one's status *as* an expert, established to a court's satisfaction, entitles one to a default posture of deference, precluding additional inquiry into its content or significance in a given case.

Given the halo that often hovers over expert claims in our society, that deferential posture is perhaps intuitive. But it is important to recognize how it departs from the theoretical justifications driving deference to experts to begin with.

Despite the myriad accounts of precisely what expertise contributes to legal decision-making, defenses of deference tend to center on a solitary principle: that empowering experts to rely on their discretion improves legal outcomes in substance, better vindicating the interpretive principles that ought to guide a court's own analysis.⁴¹² Building on that view, critics have long distinguished deference to expertise from alternatives based purely on the identity or institutional posture of another actor. Among the most abiding principles in discussions of judicial deference is the line between *epistemic* and *authority-based* claims: cases where courts accept the judgments of other agents based on a belief that

412. Horwitz, *supra* note 3, at 1085-86; Krotoszynski, *supra* note 9, at 754; Lawson & Moore, *supra* note 9, at 1302.

those agents bear some superior insights or capacities that elevate their reasoning, on the one hand, and those where they do so based on the agents' formal role in the structure of government, on the other. Scholars have described the dichotomy in different terms – epistemic versus legal authority,⁴¹³ epistemological versus legal deference,⁴¹⁴ epistemic deference versus deference to authority⁴¹⁵ – but the core distinction remains the same. In the former case, courts abnegate their own discretion from the sense that another actor's unique competencies – whether training, experience, or greater proximity to relevant facts – make her more qualified to tackle a dispute, raising the likelihood that a legal question will be resolved correctly. In the latter, by contrast, they do so simply on the ground that the actor's status, whether grounded in constitutional imperatives or institutional norms, demands obedience to her decisions.⁴¹⁶

This is a distinction with some significance. Authority-based deference is essentially deference on principle, or perhaps on faith, making no claim to increase the likelihood of improving the law's application. Such deference may carry its own institutional benefits: greater efficiency or consistency, greater finality around nonjudicial determinations, greater simplicity for the courts. Only epistemic deference, however, makes any claims to improve the outcome of a legal dispute *endogenously*, based on the same principles that guide the courts' own analysis.⁴¹⁷ Accordingly, when there appears to be any choice among them, commentators overwhelmingly support epistemic deference as the more legitimate of the two, alone consistent with the courts' role in upholding the integrity of

413. Horwitz, *supra* note 3, at 1068–69.

414. Lawson & Moore, *supra* note 9, at 1270–71.

415. Solum, *supra* note 9; *see also* Krotoszynski, *supra* note 9, at 739 (discussing shifting rationales for *Chevron* deference).

416. Legal theorists often identify a similar distinction in discussions of deference by both private and public actors beyond the courts. *E.g.*, Hurd, *supra* note 9, at 1619 (drawing an analogous distinction between “theoretical” and “practical” authority); Scott J. Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 382, 401 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004) (distinguishing “authority of law” claims from more “epistemic” “expert”-based claims); *cf.* Clifford I. Nass, *Bureaucracy, Technical Expertise, and Professionals: A Weberian Approach*, 4 *SOCIO. THEORY* 61, 61 (1986) (discussing forms of bureaucratic authority). As these examples suggest, the terminology itself is slippery; while often distinguished from expertise-based models, the term “authority” is sometimes used to describe essentially epistemic accounts. *E.g.*, JOSEPH RAZ, *THE MORALITY OF FREEDOM* 70–71 (1986) (grounding “authority” in the promise of optimizing preexisting decision-making principles).

417. Efficiency, finality, and simplicity may, of course, themselves be seen as “principles” guiding judicial analysis, but they are principles that stand outside, and must be justified independently of, the directives driving the legal dispute at hand.

the law.⁴¹⁸ A core selling point of epistemic deference is its rejection of more talismanic bids for authority, ensuring that judges limit their own discretion only when another actor substantively improves on their appraisal of the issues.

The virtuous view that pervades both judicial encounters and our own intuitions about police expertise suggests that the dividing line between epistemic and authority-based claims is less clear than we might like to think. Far from presenting a reliable counterpoint to status-based bids for authority, it reveals, appeals to expertise themselves bifurcate into two distinct paths to deference: one genuinely grappling with the endogenous value of such expertise and the other operating strikingly akin to more identarian claims. Although trading in the language of epistemic authority, after all, the virtuous model does not facilitate a substantive reckoning with the nature of policemen's professional talents and their bearing on the dispute at hand. It presumptively entitles those who bear expert status to a measure of institutional authority, based on a deep-seated perception of expertise as worthy of trust and respect. In a legal culture that celebrates technocratic achievement as its own value, identifying certain public actors as "experts" in their domains may accumulate its own legitimating aura, ossifying claims of unique insight, skill, or experience into essentially identarian bids for deference.

Appreciating the legitimating draw of expertise illuminates the diverse foundations of status-based deference in court. Discussions of that phenomenon typically ground it in narratives about political accountability, as in the case of executive agencies,⁴¹⁹ or else in claims about legal authorization: say, structural commands in the Constitution, as with disputes about foreign affairs, or Congress's own powers of delegation.⁴²⁰ Yet in the case of the police – a prominent arm of government but by no means a democratic or a constitutionally mandated one – the ideology of expertise itself supplies the necessary foundation for such claims, no different from political responsiveness or constitutional structure. Recognizing expertise as an alternate basis for authority-based deference deepens our understanding of both the scope and the character of that phenomenon, as driven not only by the obligatory demands of the law but also by a range of more subjective, contestable public values, from popular responsiveness in a democratic society to professional skill and experience in an essentially technocratic culture.

418. *E.g.*, Barnett, *supra* note 69, at 589; Krotoszynski, *supra* note 9, at 754; Lawson & Moore, *supra* note 9, at 1302; *see also* RAZ, *supra* note 416, at 53 (identifying, in the nonjudicial context, the "normal," but not sole, "way to establish [authority]" as "showing that the alleged subject is likely better to comply with reasons which apply to him . . . if he accepts the directives of the alleged authority as authoritatively binding").

419. *See supra* note 70 and accompanying text.

420. *E.g.*, Horwitz, *supra* note 3, at 1079-85; Krotoszynski, *supra* note 9, at 742-43.

At the same time, acknowledging how the virtuous view blurs the line between epistemic and authority-based deference illuminates the danger of such slippages. Scholars have speculated that epistemic and status-based claims may overlap when, for example, the courts' duty to apply the law obliges them to defer systematically to superior decision makers,⁴²¹ or when the Constitution deliberately confers authority on more qualified actors.⁴²² All these suggestions assume, however, that the ensuing grants of deference genuinely improve legal outcomes, transferring discretion to those decision makers best suited to vindicate the law. The case of police expertise, inversely, reveals how readily *underinterrogated* claims of expertise may ossify into status-based demands for authority, eroding judicial scrutiny without any claim to refining legal analysis or buttressing constitutional rights.

Well beyond the courts' encounters with law enforcement, in disputes ranging from administrative law to prison administration to due-process challenges to antidiscrimination provisions, respect for expert decision makers is a mainstay of judicial reasoning today – sometimes, critics object, despite the absence of any clear nexus between such expertise and the legal dispute at hand.⁴²³ Judges have, for instance, invoked the academic expertise of university administrators in rejecting the need for consistent standards of dismissals or expulsion under the Due Process Clause.⁴²⁴ They have lauded the managerial wisdom of prison officials – as well as, sometimes, the psychiatric expertise of doctors – in dismissing Fourth and Eighth Amendment challenges to intrusive restraints and treatments.⁴²⁵ They have embraced the rarefied insight of professional educators as insulating their (essentially legalistic) judgments about the availability of reasonable accommodations from scrutiny.⁴²⁶ Critics have ascribed such expansive,

421. Lawson & Moore, *supra* note 9, at 1278-79.

422. Horwitz, *supra* note 3, at 1093.

423. Stefan, *supra* note 11, at 641-43 (critiquing deference to professional expertise as collapsing the distinction between “quality” of services and “an individual’s negative right against invasive state action”).

424. *E.g.*, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-28 (1985).

425. *E.g.*, *Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982) (officials); *Santana v. Collazo*, 793 F.2d 41, 45 (1st Cir. 1986) (officials); *Wells v. Franzen*, 777 F.2d 1258, 1261-62 (7th Cir. 1985) (doctors); *see* Stefan, *supra* note 11, at 703-06.

426. *E.g.*, *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82, 89 (D. Mass. 1998); *see* Stefan, *supra* note 11, at 713-14; *see also* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2068-69 (2011) (criticizing judicial deference on legal questions beyond institutional purview).

arguably unearned flights of deference to a range of sources, from judges' optimism about public actors' institutional incentives,⁴²⁷ to their sloppiness in importing analytic habits across doctrinal fields,⁴²⁸ to a liberal "assumption of benevolence" in appraising government agents.⁴²⁹ The virtuous model that has inflected debates about expert policing suggests another potential explanation: the long-recognized mysticism of expertise itself, which may distract technocratically minded decision makers from thinking more critically about such claims.

Recognizing the tendency of epistemic authority to solidify into essentially status-based bids for deference invites us to look with renewed skepticism at a range of doctrines grounded on judicial deference to "professional judgment," illuminating how such claims can take on excess power in court. And it suggests that, going forward, maintaining the proper boundaries of epistemic deference will require staying alert to the moralistic biases undergirding such rhetoric, mindful of both the legal significance of expertise in any case and its tendency to reach beyond its jurisdiction.

B. Technology and the Political Limits of Expertise

At the same time, the courts' dual encounters with expert policing upend our intuitions about the value of expertise itself: the presumption that expertise is a trump card in disputes about comparative authority, or at least an institutional advantage. If the virtuous model exposes the legitimating power of expertise when examined too cursorily, the technological view reveals that feature as something that might actually undermine institutional legitimacy—something that may, in fact, be a liability.

Most basically, the technological account reveals judges' surprising appetite for thinking cynically about expertise as a professional feature. Over the past decades, critics have portrayed the courts as instinctively deferential to claims of institutional competency, liable to equate technical skill with professional virtue and disinclined to second-guess the affairs of public servants in their own domains.⁴³⁰ Yet in a range of disputes over police proficiency, judges have taken a far more critical approach, embracing investigative prowess as consistent with—and even conducive to—the risk of ultimately unlawful enforcement. And they

427. See Stefan, *supra* note 11, at 644-45.

428. See Lvovsky, *supra* note 2, at 2001-02.

429. Somin, *supra* note 80, at 298-99.

430. On judicial sensitivity to relative competency, see Schiller, *supra* note 63, at 419-20; and Solove, *supra* note 3, at 1005-06. On the police specifically, see Friedman & Ponomarenko, *supra* note 58, at 1890-91; Wayne R. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 586-87 (1965); Miller, *supra* note 62, at 227; and Richardson, *supra* note 62, at 2063.

have conceded, with unusual if not indeed disarming ease, that this tension is entirely consistent with the promise of institutional competency itself: that the acknowledged expertise of public actors can coexist with and even exacerbate the risk of legal infirmities in how they perform their tasks, without being any less “expert” for that fact. Far from instinctively abnegating themselves to professionals in their own field, judges can—and often do—scrutinize the goals and values underlying a given genre of expert performance, celebrating such proficiency only to the extent it serves what they regard as just regulatory regimes.

Recognizing how police expertise may harm the interests of police officers in court demonstrates the value of adopting a more granular approach to familiar concepts like expertise, often taken for granted as a source of authority among networks of closely related actors. Sociologists of science and technology have long sought to complicate the value of expertise, not as a self-fulfilling claim to status and legitimacy, but as a deeply contested and contingent bid for power—a negotiation over both an ostensible expert’s claim to superior knowledge and her commitment to some shared foundation of public values, goals, and norms.⁴³¹ Such insights might feel increasingly intuitive in today’s world, where scientific fact and professional opinion are commonly dismissed as irrelevant and untrustworthy, if not as blatant power grabs by the elite.⁴³² Yet the judiciary is still often imagined as a bastion of technocratic hierarchies, inclined by some combination of demographics and pragmatic incentives to reward claims of relative competency by other legal actors.⁴³³ The courts’ cynical confrontations with police expertise demonstrate the importance of wresting free of those technocratic biases—the extent to which our understanding of judicial reasoning still stands to learn from the richer sociologies of knowledge and power produced in other fields.

At the same time, those confrontations have something to contribute to the sociology of expertise itself. Scholars examining the contingency of expertise have typically focused on how cultural, political, and institutional pressures may lead lay audiences to resist the epistemic claims of so-called “experts,” declining to recognize professional knowledge as improving on their own commonsense abilities and so meriting the prestige associated with expert status.⁴³⁴ Commentators generally presume, however, that successful claims of expertise remain reliable sources of institutional and public capital. Critics who challenge the leap

431. E.g., Wynne, *supra* note 13, at 295–301; Shapin, *supra* note 13, at 257–61; MacCoun, *supra* note 13, at 191–98; Michael Lynch, *Circumscribing Expertise: Membership Categories in Courtroom Testimony*, in *STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND THE SOCIAL ORDER* 161, 167–70 (Sheila Jasanoff ed., 2004).

432. See sources cited *supra* note 15.

433. See *supra* notes 62–63 and accompanying text.

434. See sources cited *supra* note 13.

from expertise to legitimacy tend to mount broader attacks on the ideology of expertise, as a bid for authority incapable of delivering on its epistemic promises, or unlikely to stay within its jurisdiction, or adverse to democratic values even if it does.⁴³⁵ The case of police expertise unearths another wrinkle: the extent to which audiences can fully concede an assertion of expertise but nevertheless take that concession not as a claim to authority or trust, but as a source of active *mistrust*, scrutiny, and resistance. And they may do so not only due to their skepticism of the substantive limits of expert knowledge or any broader political qualms about the elitist trappings of expertise per se, but also due to deeper qualms about the subject of such professional refinements – the thorny implications of what it means to be an “expert” at certain controversial public tasks.

The courts’ diverse encounters with police expertise illuminate the many factors that may sever the link between institutional competency and institutional authority, from the demands of the Constitution to common-law constraints on police overreach to jurors’ moral intuitions about the limits of state power. Even in seemingly role-limited arenas like the courts, they demonstrate, negotiations over the authority of experts never rest simply on those experts’ claims to technical proficiency, but invariably implicate broader debates about public and institutional buy-in into the services at stake. The persistent discomfort inspired by police officers using their skills to gain the trust of wary suspects or entice men into sexual proposals exemplifies the ambiguous significance of expertise in a realm of public service that is, on the one hand, broadly accepted as common – indeed, often celebrated as important⁴³⁶ – and yet, nevertheless, lends itself to ethical concerns.

C. *Debating Expertise, Debating Policing*

In that, the courts’ adversarial encounters with police proficiency do not just raise thorny questions about the value of expertise. They also raise questions about the value of police services themselves. The ambiguous status of police expertise in court invites us to grapple with the ethical status of government functions that, as some cases above suggest, appear to us to be most legitimate when performed with only moderate institutional skill.

435. See *supra* notes 79–87 and accompanying text.

436. *E.g.*, Project Veritas Action Fund v. Rollins, 982 F.3d 813, 837 (1st Cir. 2020); State v. Earls, 70 A.3d 630, 632 (N.J. 2013).

Disputes about the value of policing today are hardly limited to struggles over institutional expertise. To the contrary, recent years have witnessed an expanding debate about the status of policing as a public good.⁴³⁷ Critics have decried the community costs and the physical violence latent in penal solutions to public disorder. They have denounced the seemingly intractable problem of selective enforcement and discrimination by policemen. They have protested the failure of police reform and training to redress those lingering abuses.⁴³⁸

In all their particulars, such critiques are, nevertheless, generally seen as a political rather than legal analysis. Even as public criticism of policing gains momentum, observers have commonly characterized the courts as naïve institutional champions of the police, all too ready to defend not only officers' competency but also their commitment to the public welfare.⁴³⁹ The implication is not, certainly, that judges are unaware of misconduct or bad faith among officers, or even of the theoretical disconnect between effective and legal enforcement.⁴⁴⁰

437. *E.g.*, VITALE, *supra* note 390, at 1-4, 50-54; Ravi Mangla, *Policing Is Not a Public Good*, OTHERWORDS (July 1, 2020), <https://otherwords.org/policing-is-not-a-public-good> [<https://perma.cc/Q8C3-SFST>]; Derecka Purnell, *What Does Police Abolition Mean?*, BOS. REV. (Aug. 23, 2017), <http://bostonreview.net/law-justice/derecka-purnell-what-does-police-abolition-mean> [<https://perma.cc/P9QX-J48V>]. That critique has also gained momentum among legal scholars. *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057-68 (2017); Simonson, *supra* note 80, at 784-87; Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1785-88 (2020).

438. In addition to the sources above, see, for example, Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/RXX6-LGWF>]; Simon Balto, *How to Defund the Police*, PUB. BOOKS (Nov. 20, 2020), <https://www.publicbooks.org/how-to-defund-the-police> [<https://perma.cc/5JM3-BYRM>]; Mychal Denzel Smith, *Incremental Change Is a Moral Failure*, ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/police-reform-is-not-enough/614176> [<https://perma.cc/Q8ZV-8Q3E>]; and Sam Levin, *'It's Not About Bad Apples': How U.S. Police Reforms Have Failed to Stop Brutality and Violence*, GUARDIAN (June 16, 2020, 11:31 AM EDT), <https://www.theguardian.com/us-news/2020/jun/16/its-not-about-bad-apples-how-us-police-reforms-have-failed-to-stop-brutality-and-violence> [<https://perma.cc/C2WF-W975>].

439. *E.g.*, Jaros, *supra* note 339, at 2207 (categorizing criminal-procedure doctrines as “doctrines of faith,” grounded in “the Court’s fundamental belief” in the police’s good intentions); Moran, *supra* note 2, at 954-56 (ascribing judicial trust to the myth of the good cop); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 650-51 (2016); Laurin, *supra* note 60, at 789; Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 173 (1994) (attributing police-friendly criminal-procedure doctrines to courts’ “presumption of rectitude” in police work).

440. *E.g.*, *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (“balancing” interests in privacy and dignity “against . . . governmental interests in effective law enforcement”).

But the overall impression remains of the courts as arenas for legitimating policing practices, not pushing the boundaries of public critique.⁴⁴¹

The cases above tell a different story. They suggest that the courts—those stages of continuous, often creative debate about the legal and moral limits of state power—are themselves fertile grounds for rehearsing trenchant and often novel critiques of the underlying value of policing. Looking past public objections focused on the limitations of police performance or on the failures of professional training, courtroom debates about police legitimacy illuminate the public costs of even concededly proficient, expert law enforcement, isolating the human and democratic harms inherent in certain pervasive police practices. And looking beyond the rudimentary, low-skill tasks often centered in public critiques, they cast a spotlight on the collateral costs of more specialized, sometimes glamorized investigative strategies, from sophisticated interrogation tactics to immersive undercover stings.

Judicial encounters with police expertise over the past decades, in short, provide a perhaps unexpected invitation to expand debates about police legitimacy beyond the inherent inadequacies of law enforcement, or the historic failures of training, or the recurring deviations from formal regulations, to the operations of policing in its best-regulated, best-trained, and indeed most *expert* form. Recognizing that it is not only bad or overzealous policing, but also proficient, skilled, and (in a word) “good” policing that may stand orthogonal to legal values offers a powerful reminder that the trouble with many police practices today is not that officers are bad at what they do. It is what they are doing to begin with.

V. TOWARD A TECHNOLOGICAL VIEW OF POLICE EXPERTISE

Such policy questions are a matter for public debate. This Article, however, began in the courtroom, and it is in the courtroom that it concludes. If the questions above may draw a range of opinions, after all, the consequences for the courts’ criminal-procedure doctrines are less ambiguous. Recognizing the courts’ competing visions of expertise for what they are should lead us to demand that judges import a technological view into all their encounters with law enforcement, forswearing blind faith in technocratic virtue and examining how an increasingly skilled, sophisticated police force shifts the possibilities of—and proper constraints on—police power.

441. Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. (forthcoming 2022) (manuscript at 7-11), <https://ssrn.com/abstract=3785373> [<https://perma.cc/7E4M-Q3CB>].

That both the virtuous and the technological accounts have inflected judicial reasoning does not mean the two are equal. To the contrary, despite the common allure of the virtuous model, the technological view of expertise is—when it comes to the police, at least⁴⁴²—by far the more legitimate approach. Only that view aligns with the purported basis of judicial deference to experts: that such humility helps the courts better resolve legal disputes, more faithfully vindicating the legal principles and restraints that govern a regulatory field.⁴⁴³ To the extent that expertise is deemed even a generic institutional good, after all, it is because it presumptively improves the expert’s actual ability to perform her task, an appraisal that requires assessing both the nature of that task and how a given skill will impact its performance.⁴⁴⁴ The technological view of expertise is the only one to engage in that type of granular analysis, accounting for how particular proficiencies both shift the operation of police power and intersect with the broader values animating judicial review. Unlike the virtuous view, it also does not rest on any contestable premises about the link between technical proficiency and value orientation, or on a naïve presumption of shared institutional motives among the judiciary and the police.

A technological approach to expertise will not entirely eliminate judicial deference to law enforcement, nor will it change the outcome of each case. But it will hold police officers and prosecutors to their proof, demanding that those who seek to benefit from the promise of police expertise not only establish that officers have expertise to speak of, but also explain how those skills advance the goals served by judicial review. And in many cases, it will provide strong grounds for revising judicial practices, encouraging both more rigorous legal standards and more searching analysis in a variety of disputes about police misconduct. Without claiming to provide an exhaustive overview of new litigation strategies, the pages below begin to chart a path forward, offering several examples of how embracing expertise as a technology may sharpen legal oversight of police practices—popularizing the strategies discussed above, identifying new and useful lines of analysis, and illuminating unrecognized targets of constitutional scrutiny.

442. In other areas of judicial review, one may imagine contexts where the greater costs of under-deference than over-deference, coupled with the difficulty of pinpointing the substantive limits of expertise, might justify a looser approach.

443. See Krotoszynski, *supra* note 9, at 754; Lawson & Moore, *supra* note 9, at 1302; Barnett, *supra* note 69, at 589; Magee, *supra* note 439, at 174 (arguing that the Supreme Court’s grants of deference to law enforcement are presumed to be “designed to advance constitutional requirements”).

444. See Pildes, *supra* note 8, at 4 (“[Because] [c]onstitutional democracies . . . are institutionally designed with an eye toward substantive performance . . . [f]or those charged with implementing this system, including judges, not to take into account how these institutions function in fact would be, at the least, odd . . .” (emphasis omitted)).

A. Carrying Over

Most obviously, recognizing the defensive appeal of police expertise can proliferate the types of challenges examined in this Article, refining the effectiveness of judicial oversight in the face of an increasingly skilled police force.

Take the case of entrapment. Despite the perhaps surprising number of cases in which defendants have successfully marshaled police expertise in their favor, numerous examples persist of prosecutors unilaterally invoking an agent's skills and training as presumptive grounds for deference, *de facto* demands that judges respect specialists in their own sphere.⁴⁴⁵ Defendants in such cases often opt for a traditional defense, emphasizing the limits of an officer's training or her documented missteps in the field.⁴⁴⁶ But such litigants may be neglecting a valuable alternative. Far from conceding the prosecution's case, leaning into the expertise of undercover agents might shift how judges and jurors perceive such investigations, forcing them to confront what it means for officers to bring their rarefied training, skills, and insights to the work of criminal enticement. Whether illuminating the power imbalances that allow officers to manipulate vulnerable suspects or fanning moral qualms about inherently deceptive tactics, embracing undercover enticement as a subject of expertise may offer a powerful tool for the defense.

Or take litigation surrounding excessive force. Here, too, judges still commonly credit officers' own talismanic invocations of their training and experience, rewarding defendants for their status as professional officers without any thicker analysis of what it would have meant for those officers to act professionally in the field. In one relatively recent case, for instance, the district court simultaneously insisted that judges assess an officer's reactions deferentially in light of his "trained" judgment and rejected as immaterial the plaintiff's expert testimony that a "prudent and professionally trained" officer would actually have reacted differently.⁴⁴⁷ A more substantive view of expertise would bring more rigor to such cases, requiring courts to grapple with officers' training in the use of violence as something to be not only credited at the bench but genuinely used in the field.

Treating police expertise as a professional tool rather than simply a source of professional capital will deepen the courts' analysis of excessive-force challenges

445. See, e.g., Transcript of Trial, Day I, *supra* note 46, at 42-51; Brief for the United States, *Rutgerson*, *supra* note 217, at 2.

446. E.g., Transcript of Trial, Day I, *supra* note 46, at 19-30; Trial Transcript, at 486-89, *United States v. Hochevar*, No. 98-CR-351 (S.D.N.Y. Nov. 8, 1999).

447. *Nance v. Sammis*, No. 3:07-CV-00119 BSM, 2009 WL 308606, at *11, *6, *9 (E.D. Ark. Feb. 5, 2009) (quoting *United States v. Gannon*, 531 F.3d 657, 661 (8th Cir. 2008)), *aff'd*, 586 F.3d 604 (8th Cir. 2009).

in multiple ways. Most basically, it will raise the bar against which police officers' use of force is measured, demanding that officers live up to the greater experience, skill, and judgment with which their credentials endow them.⁴⁴⁸ Simply by appraising officers against a higher standard of reasonableness, a technological approach—one that does not conflate expertise with legality but examines its precise interactions with the legal standard at play—can meaningfully expand judicial remedies for police violence. At a time of rising outrage over the specter of unchecked police brutality, such an approach will encourage judges to hold officers responsible for their training, demanding that they apply their professional skills to reduce the harms inherent in their work.

At the same time, a technological approach may push courts to think more critically about the institutional objectives shaping police skill building surrounding the use of force and how those objectives may diverge from the courts' own. After all, unlike policemen assessing evidence of probable cause or reasonable suspicion, who are at least theoretically motivated to preserve their time for genuinely promising leads,⁴⁴⁹ officers contemplating the use of force have every incentive to prioritize speed and efficiency in disarming threats over the avoidance of gratuitous harm to civilians—especially if they expect leniency from the courts.⁴⁵⁰ The possibility of such divergence between “expert” and constitutional policing is elided by the virtuous view, which tends to conflate officers' assertions of greater training or experience in handling volatile encounters with some broader claims to handling those encounters “well.” Examining the precise incentives shaping expert training and experience in the field will yield a more complex account of the relationship between police proficiency and police violence, alerting courts to the many ways that expert and legally compliant enforcement may part ways. Avoiding debates about whether police defendants are experts to begin with, a technological view will free judges to recognize particular encounters as simultaneously informed by genuine experience and training and yet, nevertheless, beyond the limits of the law.

B. Branching Out

Beyond popularizing existing strategies, a technological approach to expertise will allow litigants to unearth as yet underexploited lines of legal attack.

448. See, e.g., Garrett & Stoughton, *supra* note 274, at 290–99 (urging courts to consider tactical training).

449. See *supra* text accompanying note 390.

450. See Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me*, WASH. POST (Aug. 19, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me> [<https://perma.cc/6U7E-NLMS>].

Consider the case of coerced confessions. Clever defense attorneys have long used the rhetoric of skilled, trained interrogators to their advantage. Yet even here, crystallizing the inverse relationship between expertise and legality may sharpen such arguments, illuminating how precisely police proficiency may rub against the values of the Fifth Amendment. Over the past decades, critics of interrogation have identified a range of ways that trained officers may break down a suspect's defenses, evading the spirit if not the letter of *Miranda*. Experienced interrogators may convince individuals to undervalue their rights, "warming up" suspects through seemingly casual conversations that disarm the effectiveness of *Miranda* warnings.⁴⁵¹ They may play on personal weaknesses, such as religious feeling, to pose questions that undermine suspects' resolve without seeming "calculated to exploit particular psychological vulnerabilities."⁴⁵² Minding the rule against overt promises of lenience, they may use subtle cues to communicate tacit assurances as powerful as any promise.⁴⁵³ Capitalizing on the principle that *Miranda* only applies in custodial settings, they may initiate exchanges that appear noncustodial on paper but feel highly coercive in practice⁴⁵⁴ — a problem especially pronounced in confrontations with Black suspects, who often feel less free to walk away from a police encounter.⁴⁵⁵ These are all strategies used by experienced officers to extract incriminating statements, but their very subtlety and specialized nature have rendered them invisible to the courts.⁴⁵⁶ A more critical discourse about the nature of these practices, acknowledging them not as pseudopsychology or crude bullying but as the stuff of genuine professional skill, could go a long way toward sharpening judicial qualms about such methods, opening the courts' eyes to their coercive character.

451. Mark A. Godsey, *Shining the Bright Light on Police Interrogation in America*, 6 OHIO ST. J. CRIM. L. 711, 719 (2009).

452. *People v. Kelly*, 800 P.2d 516, 529 (Cal. 1990); see also *Commonwealth v. Cartright*, 84 N.E.3d 851, 865-66 (Mass. 2017) (declining to suppress testimony based on appeals to religious sensibilities that did not "[take] advantage of . . . the defendant's personal religious beliefs, or of any special susceptibility he might have had to religious appeals").

453. Kassir, *supra* note 162, at 222, 225.

454. Weisselberg, *supra* note 105, at 1546-47; see, e.g., *United States v. Tummins*, No. 3:10-cr-00009, 2011 WL 6819050, at *1 (M.D. Tenn. Oct. 24, 2011).

455. See, e.g., *United States v. Knights*, 989 F.3d 1281, 1295 (11th Cir. 2021) (Rosenbaum, J., concurring) ("[S]tudies suggest that Black and white individuals do not equally feel 'free to leave' citizen-police encounters").

456. Weisselberg, *supra* note 105, at 1562 (noting that the power of warming up suspects, "well known to police, . . . appears lost on judges"); see also Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 764-65 (2011) (emphasizing the coerciveness of tactics technically compliant with legal requirements).

By the same token, embracing a technological approach can import these principles to entirely new fields of litigation. Coerced confessions and entrapment, after all, are hardly the only fields concerned about power imbalances between experienced investigators and civilians. Claims that a suspect voluntarily consented to a police search—a common rebuttal offered by police officers at Fourth Amendment suppression hearings⁴⁵⁷—frequently entail similar debates over whether the officers “intimidated,” “coerced,” or otherwise manipulated a suspect into acquiescing.⁴⁵⁸ Allusions to the impressive professionalism and credentials of such officers often enter these cases on the side of the prosecution, minimizing defendants’ claims of undue pressure.⁴⁵⁹ Yet here, too, recognizing police experience and training as something that skews the balance of power in such encounters, making civilians more vulnerable to police coercion, may actually offer a weapon for the defense.

Not least, a technological approach may hold policemen to a higher standard not just in the context of excessive-force claims, but also in a range of other disputes concerned with the reasonableness of police conduct. That includes due-process challenges to procedural irregularities, where, as at least one court has recognized, the involvement of “a specialized professional police unit” “highly trained in all aspects” of investigation may weigh directly against the state, supporting a finding of recklessness.⁴⁶⁰ It also includes disputes over those most familiar touchstones of criminal procedure: determinations of probable cause or reasonable suspicion. Forty years ago, in *United States v. Mendenhall*, Justice White speculated that, just as a trained officer may recognize suspicious signs “wholly innocent to the untrained observer,”⁴⁶¹ so too his “experience . . . may . . . negat[e] any reasonable inference” of suspicion when exculpatory evidence comes his way.⁴⁶² That entreaty has gone mostly ignored at suppression hearings—even as judges often implement precisely such a principle in assessing excessive force. But there is no principled reason why the two should

457. See Gerard E. Lynch, *Why Not a Miranda for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 235 (2007); Bar-Gill & Friedman, *supra* note 353, at 1662; Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 2 & n.4 (2001).

458. E.g., *United States v. Garden*, No. 4:14CR3072, 2015 WL 6039174, at *7, *9 (D. Neb. June 29, 2015); *State v. Barnes*, 96 N.E.3d 969, 978 (Ohio Ct. App. 2017); *Cleveland v. Liberty Cnty. Sheriff’s Dep’t*, 626 F. App’x 540, 543 (5th Cir. 2015).

459. See cases cited *supra* note 458.

460. *Daniel v. Kelly*, No. CIV-78-830E, 1990 WL 130523, at *3, *5 (W.D.N.Y. Aug. 31, 1990) (quotations omitted).

461. 446 U.S. 544, 573 n.10 (1980) (White, J., dissenting) (quoting *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979)).

462. *Id.*

differ. Certainly, alerting judges to exculpatory evidence at suppression hearings poses unique challenges, given that such hearings typically involve genuine evidence of crime and that excessive-force cases often rest on expert testimony beyond the resources of criminal defendants.⁴⁶³ Yet the examples above suggest that this strategy is at least worth trying, whether through defense-side expert testimony on the ambiguous nature of a defendant's conduct or simply by alerting judges to inconsistencies within police officers' own accounts of criminal suspicion.⁴⁶⁴

C. Changing the Question

Perhaps most tantalizingly, recognizing police expertise as an asset that expands police capacity may not just shift how courts at suppression hearings analyze the reasonableness of a search. It may alter what qualifies as a search to begin with.

One might mount a similar challenge to any number of police practices, but I want to focus on one controversial, still relatively recent phenomenon: the practice of police officers arresting suspects first encountered in investigative stops on the basis of evidence detected through "plain feel." Recognized by the Supreme Court in 1993, the plain-feel doctrine holds that, just as officers may seize contraband left in "plain view" without offending a defendant's reasonable expectations of privacy, so too may officers who palpably identify contraband hidden on a suspect's person during a stop arrest the carrier (and seize the evidence) without recourse to any further process.⁴⁶⁵ That doctrine hinges on the promise of police expertise: the notion that experienced policemen drawing on their "training and expertise" – even if not ordinary persons – may identify marijuana joints, rocks of cocaine, or ecstasy pills in someone's pocket as reliably as seeing them laid out.⁴⁶⁶ It is the officer's unusual proficiency at recognizing contraband that guarantees the accuracy of his judgment, rendering any subsequent arrest supported by probable cause.

But imagine, now, that the officer detected the drugs not based on his own expertise, but using a device that revealed the inside of the suspect's pockets.

463. Hannah Jacobs Wiseman, *Pro Bono Publico: The Growing Need for Expert Aid*, 60 S.C. L. REV. 493, 501-02 (2008).

464. See Crespo, *supra* note 4, at 2070-85 (discussing how courts' internal stores of data can reveal inconsistencies).

465. See *Minnesota v. Dickerson*, 508 U.S. 366, 374-76 (1993).

466. See *May v. State*, 780 S.E.2d 455, 457-58 (Ga. Ct. App. 2015) (quoting the lower court); see also *Campuzano v. State*, 771 So. 2d 1238, 1244-45 (Fla. Dist. Ct. App. 2000) (reviewing cases).

Would his reliance on that device to justify an arrest now deflect any potential Fourth Amendment concerns?

In that situation, it seems clear enough that dwelling on the reliability of the officer's determination of probable cause skips a crucial step: the use of the device itself likely qualifies as a search, raising its own constitutional infirmities. Indeed, a variety of such investigative aids – drug-sniffing dogs⁴⁶⁷ or the administration of breathalyzers to individuals stopped on suspicion of another crime⁴⁶⁸ – have inspired ongoing litigation in recent years, often leading to the imposition of some greater procedural thresholds beyond the reasonable suspicion necessary for the initial stop.

Taking a technological view of expertise suggests that the same principle should apply here. Determinations of probable cause based on otherwise imperceptible data rendered perceptible by an officer's unique expertise – no less than data revealed through rare surveillance tools – raise the same concerns driving Fourth Amendment scrutiny of technological advances: a fear of the state's growing ability to peer into that which was previously hidden, laying “bare secrets that society had (erroneously) assumed to lie safely beyond the perception of the government.”⁴⁶⁹ And the rarefied nature of those professional judgments, allowing expert officers to recognize what a mere civilian would not, is not a saving grace but all the more grounds for concern, directly implicating the Supreme Court's warning in *Kyllo v. United States* that surveillance tools are especially troubling when the “technology in question is not in general public use.”⁴⁷⁰ Embracing a technological view of expertise reveals that an officer's reliance on his own rarefied skills to justify greater intrusions on a suspect's person, like his reliance on any other instruments of police power, does not simply bolster his determinations of probable cause. It may constitute its own intrusions of Fourth Amendment significance.

Formal symmetry notwithstanding, of course, there may be reasons for treating an officer's sense of “plain feel” differently from, say, thermal-imaging devices. Given the rapid pace of technological development, for one thing, advances in external technologies may seem to rest atop a slippery slope, inexorably leading to ever more insidious and powerful tools of surveillance. Allowing officers to wring every advantage out of a trained sense of touch might not raise similar concerns. Moreover, an officer who learns to identify contraband based

467. Anna Lvovsky, *Fourth Amendment Moralism*, 166 U. PA. L. REV. 1189, 1231 (2018) (discussing the imposition of varying procedural requirements, including probable cause, on canine sniffs of persons).

468. *Seiser v. City of Chicago*, 762 F.3d 647, 654 (7th Cir. 2014); *United States v. De Santiago-Acosta*, Crim. No. 15-614, 2016 WL 11188459, at *3 (D.P.R. July 20, 2016).

469. *United States v. Cusumano*, 83 F.3d 1247, 1261 (10th Cir. 1996).

470. 533 U.S. 27, 34 (2001).

on feel may not be able to prevent himself from using that skill in the same way he can choose not to deploy a particular technology. Taken to its extreme, barring officers from relying on any investigative insights beyond those of the ordinary person would prevent them from relying even on visual observations to make stops or arrests. At a certain point, one may argue, society must give the police the benefit of some professional improvement.

Whether a conceded violation of a suspect's reasonable expectations of privacy is the start of a slippery slope or the end of it, however, the fact of the invasion on her constitutional rights remains the same. And, in fact, officers can do something to avoid relying on "plain feel" to identify contraband: they can instigate fewer stops aimed at detecting such evidence. A key consequence of the plain-feel doctrine, after all, is to proliferate the rate of daily encounters between the police and (typically male, typically Black) members of the public, rewarding officers for identifying contraband and thus encouraging a regime of pervasive, highly intrusive tactile stops aimed at putting them in a position to do so.⁴⁷¹ Rejecting the resulting evidence in court would help eliminate such questionable incentives, reducing an overused and profoundly invasive pattern of street patrol.

Regardless, these are precisely the types of debates in which the courts could engage, drawing on thoughtful briefing and argument by both parties, if they adopted a technological account of police expertise. Embracing expertise as an unalloyed good, categorically different from more sinister advances in police technology, short-circuits these debates before they can begin.

* * *

The above are just some examples of the new questions raised by adopting a technological account of police expertise. The final answers to these questions are debatable. This Article does not pretend to offer them in every case.

At the very least, however, taking expertise seriously as a professional technology, wielded by institutional actors whose incentives often diverge from those of the courts, means that judges must never defer to expert policemen without grappling with the actual content of their professional skills and how they interact with the courts' own frameworks of review. It means doing away with the talismanic assumption that "expert" policing must also be constitutional policing, or at the very least legitimate policing—policing that threatens fewer affronts to human dignity, or fewer insults to basic fairness, or fewer displays of gratuitous power. And it means forcing litigants who trade on claims of expertise to show why those claims weigh in their favor, not simply proving that officers bear unique skills in their own sphere but also providing a thick account of how

471. *Minnesota v. Dickerson*, 508 U.S. 366, 376-77 (1993) (emphasizing intrusiveness).

those skills impact the likely performance of their tasks. In a criminal-justice system staffed by an increasingly professionalized police force, bearing so many hallmarks traditionally associated with institutional competency, challengers must learn to pry police expertise from the hands of the police – to recognize the greater proficiency of law enforcement as something that not only refines but also rightfully constrains the operations of policing.

CONCLUSION

Conventional criticisms of the “mysticism of police expertise” as a reliable claim to deference in court are thus both correct and incomplete. In fact, there exists a range of legal disputes in which claims of expertise do not insulate police judgment from judicial scrutiny but directly fuel legal challenges to law-enforcement conduct. In debates involving coerced confessions, entrapment, and excessive force, critics of the police have consistently found themselves trying their best to alert the courts to officers’ impressive skills, insights, and experiences – leaving policemen and prosecutors, ironically, to downplay such professional credentials.

The gap between these seemingly conflicting trends, this Article contends, reflects two fundamentally divergent views of expertise: the difference between seeing expertise as a professional virtue and seeing it as a professional technology. The former presumes that police expertise is inherently worthy of deference as a professional or institutional good. By contrast, the latter examines how each expert claim substantively expands police capacity, shifting the delicate balance between the state and the public that the courts are tasked with guarding. And it concedes that, to the extent the institutional goals served by the police depart from those served by the courts, increasing the expertise of law enforcement can easily exacerbate rather than assuage the concerns driving judicial review. Recognizing these two approaches for what they are enriches debates about expertise and deference well past the criminal law, exposing the moralistic foundations buttressing our familiar associations between expertise and authority and illuminating the complex institutional politics attending grants of expert status, in and beyond the legal academy. It also suggests that judges should import a technological view into all their encounters with law enforcement – a shift that will yield a more realistic view of police practices and allow the courts to better implement the law’s constraints on police power.