

# UNWARRANTED

*Policing Without Permission*



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some occasions, just need us to trust them. To leave them to do their job. The problem, as Matt Topic would say, is where to draw the line.

## EARLY DAYS

Because of the muddled history of policing in this country, the question of how much autonomy law enforcement needs may seem tougher than it actually is. We've simply gotten into the bad habit of granting law enforcement more space than it requires.

Our Constitution does an inadequate job of regulating the police in large part because at the time it was written no one anticipated the sort of organized police forces we have today. The issues the Framers had with "policing"—and some were serious enough to be precipitating factors in the American Revolution, and to lead to ratification of the Fourth Amendment—were mostly about taxes and tax collection.

Early Americans didn't like being policed: law enforcement in the eighteenth century was, at best, a loose collection of sheriffs, constables, and night watchmen. They often lacked the most basic tools to do their job, as was evident in the case of the hapless Sheriff Hermanus Schuyler of Albany. A court fined Schuyler twenty pounds for failing to arrest two trespassers, though Schuyler kept trying to explain that the fellows really were quite dangerous. Proving Schuyler's point, court records indicate that the very day the fine was imposed, one of the men was sought for "assaulting and wounding the Sheriff of Albany, Hermanus Schuyler." (Poor Schuyler was then ordered to arrest him for that as well.) The night watch—a civic duty one could buy one's way out of in some jurisdictions—was the butt of many jokes. The *New York Gazette* of 1757 dubbed its watch a "[p]arcel of idle, drunken, vigilant Snorers, who never quelled any nocturnal Tumult in their lives . . . as ready to join in a Burglary as any Thief in Christendom." A half century later, the *Louisiana Gazette* said of the watch, "It is like setting wolves to guard the sheep."<sup>21</sup>

By the mid-1800s, though, civic disorder—or perceptions of it—led Americans to overcome their worries about "absolute police despotism." And so it "became necessary" to create urban forces, as an 1833 report explained, to have "in every large town . . . several intelligent and experienced men devoting their time and skill to the pursuit and arrest

of . . . Robbers, housebreakers, pickpockets and other felons.” The model—only loosely followed here in the United States—was London’s police force, which was created in 1829 under the guidance of Sir Robert Peel (hence the name “bobbies”).<sup>22</sup>

These early forces, though, were little better than the night watch. Police were given a uniform, a club, handcuffs, and a whistle, and sent out to patrol for crime. (Guns came later.) They were ill-paid, and so it was understandable if they took the chance to slip off for a drink or a little nap. When Theodore Roosevelt became one of the commissioners of the New York police force in 1895, he went out to observe the troops and was startled to find them “in restaurants, asleep, or otherwise away from their posts.” One late night, Roosevelt even found an officer “asleep on a butter-tub in the middle of the sidewalk, his snoring loud enough to be heard across the street.”<sup>23</sup>

Nineteenth-century cops could be incompetent and brutal both. Philadelphia’s first marshal of the city police had to let one-third of the force go only a year into the job, deeming his own troops “worthless, drunken, and totally unfit.” Almost twenty-five years later, an 1872 *Philadelphia Ledger* article described a certain type of officer, “the men who upon merest whim, or the slightest show of resistance, fly into a gust of passion, pull out their revolver and make a serious affray out of what might have passed off as an unimportant incident.”<sup>24</sup>

## THE SEEDS OF UNACCOUNTABILITY

As for how this ragtag bunch became today’s militarized, independent, and secretive forces—the die was cast on that roughly one hundred years ago. The trigger was corruption, which ran so deep and stank so bad that eventually it could no longer be ignored—corruption that threatened democratic governance itself.

On May 24, 1875, Inspector Alexander S. “Clubber” Williams retired from the New York police force. On March 25, 1917, he died. Both events occasioned long stories in *The New York Times*, for Inspector Williams was no ordinary officer.<sup>25</sup>

Williams got his nickname for his work on patrol and his “energetic action at popular gatherings.” Famously, he said, “There is more law in the end of a policeman’s nightstick than in a decision of the Supreme

Court.” He was placed into one of New York’s toughest precincts; on his first day on the job he tossed two of its biggest troublemakers through plate-glass windows. He didn’t like the moniker—he went by Alex, and enjoyed “Czar of the Tenderloin,” which is what the obituary called him—but he also defended his record when called “Clubber” by the mayor: “Just ask the Mayor if he can point to a single person I ever clubbed that did not deserve it. He can’t name one and he knows it.”<sup>26</sup>

When Williams retired from the force, however, he did not do so voluntarily, and clubbing was not the reason for his demise. It was the take. At the time he retired—on a half pension of \$1,750 per year—Williams was a wealthy man, with a net worth well beyond the sum of his modest wages. Among his properties was an estate in Connecticut, *avec* yacht. When asked by the Lexow Commission, charged to investigate vice and corruption in New York, how he came by all this, he replied only, “I bought real estate in Japan and it has increased in value.”<sup>27</sup>

Williams’s path to the Lexow Commission was complex, but if it was paved by any one man, that man was the Reverend Charles Henry Parkhurst. Parkhurst held the pulpit at the Madison Square Presbyterian Church at a time when the Democratic political machine Tammany Hall ruled the city. Parkhurst became the head of the Society for the Prevention of Crime, a group of do-good New York citizens appalled by sprawling vice. At first Parkhurst thought the police were simply not doing enough, and hoped publicity would fix that. But then, it “began to dawn on me” that the police “protect and foster crime and make capital out of it.” And that the corruption ran all the way to the top. In a sermon, Parkhurst called the mayor and his staff “a lying, perjuring, rum-soaked and libidinous lot of polluted harpies.” The Lexow Commission was appointed when growing indignation—particularly among Republicans—got a bill passed in Albany and funding from private sources.<sup>28</sup>

Once the Lexow Commission got going, it uncovered a level of violence and graft that was breathtaking. Nearly ten thousand pages of transcripts detailed a system of police “blackmail, extortion and corruption.” On a regular basis citizens were “abused, clubbed and imprisoned, and even convicted of crime on false testimony by policemen and their accomplices.” There were prices, fixed prices, for everything, from police jobs, to keeping open a brothel, to the “protection” money paid by honest business owners. Stolen property was “recovered” at a price set

to pay off the pawnbroker and the cops. Owners of houses of prostitution were forced to stay open even when they wanted to close, to feed the yawning maw of the police.<sup>29</sup>

But it was the next thing the Lexow Commission discovered that called for immediate attention: widespread electoral fraud. “[I]n a very large number of the election districts of the city of New York,” pronounced the Commission, “almost every conceivable crime against the elective franchise was either committed or permitted *by the police*, invariably in the interest of the dominant Democratic organization of the city of New York, commonly called Tammany Hall.”<sup>30</sup>

New York, it turned out, was one cesspool of collusion between the city’s machine and its police force. Cops bought their jobs, which they were placed into as a matter of political patronage. They then shook down the citizenry for money that feathered the nests of their superiors and fed back into the political machinery of the city, assuring its continued political domination.<sup>31</sup>

The phenomenon of a police force overly beholden to elected leaders was commonplace in many places in the country, even if Tammany’s malfeasance could not be matched. In places not nearly as corrupt, the connection between political leadership and the police was still thought to foster deep ills. August Vollmer, the first police chief of Berkeley, California, was one of the great police reform figures of his time. In a 1917 report, he condemned the “era of incivility, ignorance, brutality and graft,” noting that too often “the only requirement necessary for appointment as a policeman was political pull and brute strength.”<sup>32</sup>

### “PROFESSIONALISM” AND AUTONOMY

If the problem was that the police were corrupt, that they were uncivilized, that they were too close to the politicians, then the answer was clear: separate them from politics. Police forces would become autonomous, and above all else “professional.” The independence of a professional police from political control became the fundamental operating assumption regarding policing, one that—despite many reforms since—has proven difficult to shake off. To this day, it’s part of the reason we are so reluctant to govern and restrain the police. It’s one of the reasons we don’t have democratic policing.<sup>33</sup>

For reformers like Vollmer—and his protégé O. W. Wilson, the chief of several major police forces such as Chicago—the point of police professionalism was “scientific” and “efficient” policing. Much of what seems familiar to us today had its start in the early twentieth century. Police began formal recordkeeping, including the Uniform Crime Reports that still are kept. Crime labs were created and forensic technology was taking hold, the most ubiquitous aspect of which today is fingerprinting. Hiring standards for the police—and training once they got on the force—were on the upswing.<sup>34</sup>

Even if this new “professional” model was the right one, getting there wasn’t easy. As late as 1931, the National Commission on Law Enforcement and Observance, commonly named the Wickersham Commission after the Attorney General who was its chair, found that corruption pervaded Prohibition-era policing. Police regularly employed the “third degree”—extracting confessions by engaging in practices all too akin to torture. In New York, which supposedly had been rescued by do-gooders, the Wickersham Commission heard reports of “fixed” charges, “shake-down arrests,” and a force still all too in the thrall of Tammany.<sup>35</sup>

The cities were practically oases of professional policing compared with what went on in more rural parts of America such as the South or West, where vigilante justice often took on a nauseating form, particularly if the targets were African American. In 1936, in *Brown v. Mississippi*, the Supreme Court took what was then the remarkable step of overturning a state murder conviction. One defendant had been hung twice from a tree. He and others were whipped till their backs were in shreds, escaping further punishment only by confessing. Returning from the war, in 1946, Isaac Woodard became a rallying cry for the nascent civil rights movement after South Carolina law enforcement beat him to blindness for displaying insufficient deference to his white bus driver.<sup>36</sup>

Still, by fits and by starts, policing changed. “Professionalism” may not have been exactly the right word for it, conjuring as it does images of highly trained individuals who do their work free of supervision. In truth, police agencies were hierarchical bureaucracies, organized along military lines. Orders came down from above. But Progressive-era innovations such as the civil service allowed the police to break free of partisan politics. Officers could be hired on something approaching merit. When bipartisan police commissions proved an unwieldy

way to manage the force, the chiefs themselves were granted substantial autonomy as well.<sup>37</sup>

Gradually, these scientific, educated, efficient—professional—police were cut free from other responsibilities to focus their efforts single-mindedly on crime fighting. In the late nineteenth and early twentieth centuries, the police had been expected to deal not only with criminals, but also with the castoffs of an industrializing society. They performed a variety of social services, including even housing the homeless. But as the nation faced crime waves both real and manufactured—none more gripping than the tommy-gun-laden hijinks of Prohibition—society came to accept that the singular job of the police should be going after the bad guys.<sup>38</sup>

By the 1950s, if any single iconic image captured reform-era policing, it was the shiny squad car, with its two-way radio. Police patrolling their communities on foot was seen as passé. Mobile police would be freed up from their neighborhoods and all their social problems, and turned loose to quell crime and quickly nab offenders. Radio technology allowed a centralized HQ to maintain control, dispatching officers to answer emergency calls. Success could now be captured in measurable statistics: call response times and crime rates.<sup>39</sup>

## PROFESSIONALISM'S FAILURE

And then it all went south.

The façade of professional policing crumbled entirely during the turbulent 1960s. Between 1963 and 1968 America's ghettos were set ablaze by riots during a series of "long, hot summers." The Kerner Commission—charged by President Lyndon Johnson to assess what had happened—pointed a sharp finger: It found "deep hostility between police and ghetto communities as a primary cause of the disorders." Police were "not merely the spark": "abrasive relationships between the police and . . . minority groups have been a major and explosive source of grievance, tension and, ultimately, disorder."<sup>40</sup>

The situation on America's campuses was not much prettier; in the face of student protests, police struck out aggressively at the intelligentsia and children of the Establishment. A neoconservative academic described how "thanks to the New York City Police Department, a large

part of the Columbia campus had become radicalized” because of police who “simply ran wild,” giving the treatment not only to protesters but also to “[t]hose who tried to say they were innocent bystanders or faculty.”<sup>41</sup>

The obvious problem with “autonomy,” it turned out, was that it left the police free to make their own decisions, many of which were hardly “professional.” This was clear in a number of disasters brought to the nation’s attention courtesy of television. Viewers watched Southern police in Birmingham and Selma turn fire hoses, whips, and vicious dogs on peaceful protesters, adults and children alike. During the 1968 Democratic Convention, Chicago’s police—“professionalized” by O. W. Wilson—used Mace and “unrestrained and indiscriminate police violence” against people, especially reporters and photographers, who had “broken no law, disobeyed no order, made no threat,” in conduct an official report decided “only can be called a police riot.”<sup>42</sup>

Above all, having set up crime statistics as the metric of success, police failed by their own measure: Crime rates rose at levels that alarmed the public. Fear of crime seemed to skyrocket even faster than crime rates themselves; the subject gripped the nation so firmly it became one of the two defining issues in the presidential election of 1968. (The other issue was the Vietnam War.)<sup>43</sup>

And so, the hunt was on for a new paradigm, some other way to understand and implement policing.

## COMMUNITY POLICING

In the midst of all the chaos of the 1960s, “recognizing the urgency of the Nation’s crime problem and the depth of ignorance about it,” President Johnson appointed another blue-ribbon committee, his Crime Commission, to examine its causes and make recommendations. The report of the President’s Commission, *The Challenge of Crime in a Free Society*, was revealing of what professionalism and reform had wrought.<sup>44</sup>

The problem was a lack of trust brought about by police misconduct. “Police agencies cannot preserve the public peace and control crime unless the public participates more fully than it now does in law enforcement,” explained the Crime Commission. Yet “[t]here is much distrust of the police, especially among boys and young men, among the people the police often deal with.” As a result, “[i]t is common in those neighborhoods for

citizens to fail to report crimes or refuse to cooperate with investigations.” The Crime Commission was as clear as the Kerner Commission in stating the reason for the distrust: “Commission observers in high-crime neighborhoods . . . have seen instances of unambiguous physical abuse,” “[t]hey have heard verbal abuse,” they “have seen a certain amount of harassment.”<sup>45</sup>

The Commission was firm in insisting that the wounds had to be healed, that the police and the communities had to learn to work together. And while the Commission was clear that “[c]itizen hostility toward the police is every bit as disruptive of peace and order . . . as police indifference to or mistreatment of citizens,” still “the duty of taking the initiative clearly devolves on the police, both because they are organized and disciplined and because they are public servants sworn to protect every part of the community.” The Commission recommended creating community relations “machinery,” especially in minority communities. It also said there should be a “citizens’ advisory committee” that is “broadly representative of the community” to “work out solutions to problems of conflict between the police and the community.” “It is an urgent duty,” the commissioners insisted.<sup>46</sup>

Nothing in the policing world changes quickly, but by the late 1980s progressive forces were embracing the idea of “community policing.” Houston’s police commissioner Lee P. Brown—the first African American chief of a major city department—set this all out in a 1989 manifesto that was a complete rejection of what the earlier professionalism movement had stood for. Those squad cars buzzing through the metropolis responding to emergency calls, controlled by centralized management—they turned out to be the problem, not the solution. Officers spent their time racing from pillar to post when what they needed to do was get out of their cars, walk the beat, and engage with their communities. They should be “encouraged to initiate creative responses to community problems.” Police forces should “recognize the merits of community involvement,” and should decentralize authority so that officers can “interact with residents on a routine basis and keep them informed.” Brown also advocated “power-sharing,” meaning “the community is allowed to participate in the decision-making process.”<sup>47</sup>

This vision of community policing got a boost when, in his 1994 State of the Union address, President Bill Clinton vowed to put 100,000

new police officers on the streets. Later that year the Community Oriented Policing Services (COPS) office opened in the Department of Justice. Over the next six years nearly \$9 billion was disbursed to state and local government to support community policing efforts. By 1999, the Bureau of Justice Statistics was reporting that fully one quarter of the police were “community policing” officers or their equivalent.<sup>48</sup>

There was a new sheriff in town, and this one was talking a real good game of police-community partnership. Perhaps the wall between the people and the police was about to come down.

### THE FAILURE OF COMMUNITY POLICING

Even before Clinton focused national attention and resources on community policing, detractors rushed to call the concept into question. Manhattan’s crusty longtime District Attorney Robert M. Morgenthau poured cold water on all the optimism about policing’s new direction. To the extent “[c]ommunity policing . . . harks back to the halcyon days when an officer was permanently assigned to the same areas so that he came to know its residents and their problems,” then—he wrote in an 1990 op-ed piece in *The New York Times*—“[n]o sensible law enforcement official” could disagree. Reforms like these were “long overdue.”<sup>49</sup>

But community policing, Morgenthau argued, was asking too much of officers, more than their employers were prepared to train them to handle. “The new patrol cop is to be a municipal ombudsman—a conduit for the services of other city agencies and a catalyst for community self-help efforts.” “[F]or this awesome task,” Morgenthau proclaimed, “no one can seriously believe that five months at a police academy is adequate training.”<sup>50</sup>

Morgenthau was hardly alone in his skepticism. As numerous observers pointed out, community policing was, like beauty, in the eyes of the beholder. It was variously described as “a hodge-podge of unintegrated programs, absent central purpose or theme,” and “a buzzword,” for which “the variety of activities associated with it seem to have little in common.” Community policing programs came to be so amorphous, so all encompassing, that they even included hiring SWAT teams.<sup>51</sup>

To be sure, there was a buzz of activity, some of it admirable and effectual. With that much federal money being tossed around, one

certainly hoped so. One strand of community policing, perhaps its most prominent, emphasized problem solving, in which the police would work with the community to address root problems. For example, after lawsuits stopped the Colorado Springs Police Department (CSPD) from simply arresting homeless camp residents, a unit of the CSPD managed to eliminate the camps by leading a network of social service providers to help relocate residents. A remarkable collaboration in Los Angeles reduced gang violence in 2010. Police began athletic leagues; programs like Neighborhood Watch became regular features throughout the country.<sup>52</sup>

But community policing also had a dark side, what came to be known as “order maintenance” policing. In a game-changing article in the March 1982 issue of *The Atlantic* titled “Broken Windows,” George Kelling and James Q. Wilson argued that disorder cannot be left alone because it breeds more disorder. “[I]f a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.” Then, disorder breeds fear of crime, which in turn creates an environment in which crime can prosper—“many residents will think that crime, especially violent crime, is on the rise, and they will modify their behavior accordingly. They will use the streets less often, and when on the streets will stay apart from their fellows, moving with averted eyes, silent lips, and hurried steps.” The answer was to go after disorder the moment it showed its face.<sup>53</sup>

As applied, order maintenance policing’s aggressive approach served only to worsen police-community relations. In New York City, Mayor Rudy Giuliani brought it front and center, cracking down on turnstile jumpers and squeegee men, but also harassing local residents with the frequent use of stop-and-frisk. Measures like these, across the country, “undermine[d] the legitimacy of the criminal justice system” and bred yet further hostility in communities deeply in need of help from the police. As George Mason’s Center for Evidence-Based Crime Policy explained, not only was there a serious debate about whether order maintenance policing reduced crime, “there is the concern that any effectiveness of broken windows policing . . . may come at the expense of reduced citizen satisfaction and damage to citizen perceptions of the legitimacy of police.”<sup>54</sup>

Community policing, as people like Lee Brown promoted it, called for deep philosophical change, but most police forces simply did not

buy in. In 2008, Wesley Skogan, a Chicagoan and longtime student of policing, wrote “Why Reforms Fail,” a lament about the demise of community policing aspirations. “Police,” he wrote—echoing conclusions reached by many others—“are skeptical about programs invented by civilians.” He attributed this to “police culture”: “American policing is dominated by a ‘we versus they,’ or ‘insider versus outsider’ orientation that assumes that the academics, politicians, and community activists who plan policing programs cannot possibly understand their job.” In short, “[t]hey do not like civilians influencing their operational priorities, or deciding if they are effective.”<sup>55</sup>

As a result, the same lack of trust between police and policed communities that caused so much trouble in the 1960s once again reared its head publicly beginning in the summer of 2014, with the shooting of Michael Brown in Ferguson, Missouri. In the face of one “officer-involved” shooting after another, of riots and protests throughout the country, the distrust was plain to see. The country could no longer ignore the fact that policing still retained its “we versus they” perspective, aloof from the community, autonomous if not always professional, and not particularly welcoming to meddling or criticism.

And so, in the wake of the latest national turmoil over policing yet another president appointed yet another committee—the Task Force on 21st Century Policing—to make yet more recommendations. “Given the urgency of the issues,” said Barack Obama (perhaps unintentionally echoing Lyndon Johnson), the group would report back in ninety days as to what should be done. Those recommendations were telling. Finding there was still a severe lack of trust between police and the communities they police, the Task Force called on law enforcement “to establish a culture of transparency and accountability to build trust and legitimacy.” “[L]aw enforcement,” it emphasized, cannot build community trust if it is seen as an occupying force coming from outside to impose control on the community.”<sup>56</sup>

## SECRECY FOR SECRECYS SAKE

The problem is there will never be trust and accountability without transparency. Anyone who thinks otherwise is dreaming. To the extent we believe things are being hidden from us, we will not trust. And