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Citation: Rowe, Michael (2020) Policing the Police: Challenges of democracy and accountability. In: Policing the Police: Challenges of democracy and accountability. Key Themes in Policing . Policy Press, Bristol. ISBN 9781447347057, 9781447348009, 9781447347064

Published by: Policy Press

URL: <https://policy.bristoluniversitypress.co.uk/polici...>
<<https://policy.bristoluniversitypress.co.uk/policing-the-police>>

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Policing the Police: challenges of democracy and accountability

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Chapter One: Police Accountability in the 21st Century, New Wine, New Bottles?

The 21st century poses distinct new twists for the very long-standing challenge of holding police to account and providing democratic governance of a range of law enforcement and regulatory agencies with considerable power over citizens. Web-based technology and Artificial Intelligence seem poised to transform policing and social regulation in fundamental ways just as swathes of other industries and services have experienced. Often characterised as ‘predictive policing’, the possibility that law enforcement and partner agencies might mine vast reserves of intelligence and data in order to forecast – with spectacular accuracy – the perpetrator, venue and timing of offences yet to happen offers a policing future by turns terrifying and exhilarating in criminological terms. Potentially, the reach of such technologies expand the scope and power of policing such that long-established moral, ethical and political concerns about democratic accountability are considerably more pressing. By 2020 the Chinese government plans to have fully deployed a social credit system that uses Big Data and principles of commercial credit scoring to assess the ‘trustworthiness’ and social standing of all citizens, using vast and complex systems of surveillance technology (Liang et al 2018). Not only does this new combination of policing, surveillance and regulation offer the possibility of identifying any individual anywhere in China within a matter of moments it provides the basis for high-level social sorting such that freedom of movement, access to services, and political and social participation can be permitted or denied via technological assemblages. These mechanisms seem to be particularly dystopian in the context of a totalitarian regime with scant regard for human rights – and in which democratic governance of policing is absent – the extension of similar principles and practices extends to western liberal democracies and so raises new challenges in terms of how the guards are guarded. The emerging problem for governance is not just that Big Data ‘predictive policing’ is more pervasive and intensive than the policing systems operating when current arrangements for accountability were devised – although that is part of the problem. What makes the challenge more significant is that these policing formations are deployed by new constellations of government agencies, private corporations, and a new cadre of technicians, business people and scientists – many operating in a global network outwith the oversight of national oversight agencies. Some of the products – the databases and software – created by these new policing systems are ‘self-learning’ and autonomous, making it difficult to interrogate and regulate future unknown bases of decision-making.

Policing the police becomes a more complex challenge as this technological transformation tests the capacity of principles and mechanisms for governance and accountability established (at last in England and Wales) in the mid-Nineteenth Century. Other foundational shifts have also moved the

terrain of police governance, particularly in relation to the increasing role of private and third party agencies in the delivery of policing. Regulation of policing activity can no longer (if ever it could) be considered solely or largely in terms of holding police officers and constabularies to account. For decades, scholars have focused attention on the expanding role of private security companies in the delivery of policing (Shearing and Stenning 1981; Johnston 1992; White 2012) and more recently focus has extended further to include a new conglomeration of agencies from public, private and third sectors engaged in a wide-range of regulatory activity. Banks, health services, universities, private landlords, and employers have become responsibilised in an age of security such that they are legally required to verify the identity and activity of citizens. Brodeur (2007) argued that the surveillance of citizens traditionally conducted by 'high' policing agencies of the state have extended, post-9/11, to inform 'low' policing, and it can be argued that there has been horizontal as well as vertical integration such that a plethora of 'non-police' organisations have been incorporated into such activity. As is outlined later in the book, some of these agencies and some of these activities are subject to regulation of various kinds, but these provisions tend not to be incorporated with more general provisions for police governance. The private security industry in Britain, for example, is subject to legal and professional regulation but this is not integrated into arrangements for the governance of policing, even though such companies can play significant roles in the delivery of policing in many forms. This book seeks to extend analysis of policing the police through considering the implications of new networks, including multinational partners, in the delivery of policing. It is argued that established arrangements of governance tend to be focused on institutions of policing and as such are not well-placed to address practices and power emerging from relationships among and between complex webs of providers.

A third set of challenges – in addition to technological changes and the pluralisation of policing – is similarly often over-looked in discussion of police governance. Passing any judgement – positively or negatively – about the effectiveness of the governance of policing entails, even if only implicitly, an assumption that there is some normative consensus or benchmark against which a particular action or outcome can be measured. To argue, for example, that a police officer acted with unnecessary violence against a member of the public requires that there is some shared understanding as to what degree of violence might have been legitimate. A claim that the policing of a particular crime is effective requires some view as to what constitutes an 'effective' response: is this that the crime is never committed, or that offenders are usually caught, or that victims tend to be satisfied with the police response? These are micro-level illustrations of a more fundamental challenge of identifying the appropriate mandate for policing. Crime control is usually central to defining the mandate (and the one to which politicians and the media often return (Loader 2014)), but it is widely established

that the public police perform a wide-repertoire of roles that have little or no link to law enforcement. Service roles, the maintenance of order and – more recently – a commitment to protecting vulnerable people and communities – offer alternative perspectives on the fundamental question of the purpose of policing. It is argued in more detail later in this text that there is a declining basis for consensus as to the appropriate mandate for policing in the face of increasing economic inequalities, and social and political marginalisation. Neo-liberal individualism in western societies has promoted a consumerist culture such that citizens are made responsible for their own security, but the grounds for collective provision or consensus are undermined. It is argued below that the problem identified by Bowling and Sheptycki (2012) in relation to global policing – that it is difficult to locate a set of collective norms and values that could develop a global civic society to provide for accountability – seems increasingly likely to apply within nation states characterised by high levels of division and inequality. Through considering changing problems in terms of ‘the public’, community and consensus, this book also broadens the critical approach to the challenge of police governance and argues that focusing on institutional and legal arrangements threatens to overlook difficulties of identifying the ‘ends’ that police governance seeks to fulfil.

The central themes of this book – exploring how policing is governed and held to account in complex contemporary societies – cover ground that is well-established but also emerging and cutting-edge. To adapt the old adage, there are both ‘new wines, and new bottles’ evident in contemporary debates. As is shown in later chapters, the central pre-occupations of political philosophers remain highly pertinent to considerations of how 21st century globalised societies can ‘guard the guards’. Central to this is the tacit social contract that free individuals in liberal democratic societies delegate responsibility to the state and afford to the police the right to exercise power, enforce the law, and apply the legitimate use of force against those free individuals. This gives rise to the fundamental political problem of how to ensure that the agencies afforded this power over the public are to be regulated such that their unique position is not abused. Much of what follows is a reflection on how these principles can and should be applied to policing services in an era when ‘modern’ police services first instigated in the nineteenth century are hugely transformed. To these long-standing debates are added distinctly new challenges emerging from a technological revolution that promises (or threatens?) to transform the organisation and delivery of policing. Similarly, and relatedly, globalisation shapes new crime problems and challenges in ways that provide new agendas, such as the migration of human beings and capital or climate change, for law enforcement to meet, as well as new formations of policing that themselves transcend national boundaries and so raise new challenges of governance. Shifts within many nation states have extended opportunities for private policing agencies and created environments in which a range of organisations – from public, private

and 'third' sectors – are required to regulate the behaviour of citizens, clients, residents, customers, students, patients, and the wider public in ways not previously part of their operational activity. Questions about police and policing require consideration of the role of a host of organisations that would not have featured in debates even just a decade or so ago.

Structure of the Book

The book begins by analysing accountability in terms of traditional approaches. First, in terms of the formal arrangements for governance and direction, and second, in terms of diverse mechanisms in place to scrutinize service delivery, investigate complaints and respond to areas of performance regarded as problematic. These two Janus-faced elements comprise the 'hard' modes of accountability: they are formalised in law and regulation, rely on investigatory powers delivered by dedicated staff, have codified powers of sanctioning, and are exclusive in terms of focus on delivering accountability.

Where the book extends analysis is by arguing that an increasing range of wider activities can be considered as 'soft' instruments that might deliver similar outcomes. Taking up Reiner's (1985: 296) point that 'all discussions of police policy and reform eventually lead to the fundamental issue of police accountability' it is argued that anything that seeks to influence the exercise of police officer discretion can be considered as a form of regulation and governance. As is outlined in the second chapter of this book, it is the central and inevitable role of discretion in policing that makes the principle of accountability so difficult and so significant. Given the legitimate capacity of police to use force against citizens and to intervene in ways that restrict their rights and that decisions to do this are highly contextual and impossible to pre-configure, the nature of a host of managerial and professional practices, and influences of external observers and agencies, can be considered as potential forms of accountability.

Further to this, the book considers the possibilities that some current policing strategies might have in terms of democratic oversight. Although moves towards Evidence Based Policing (EBP) or ethical practice are not usually explored in terms of accountability, the book argues that in theory and in practice, both offer models for directing officers since discretion and autonomy are delimited. The principle that policing ought to be delivered on the basis of scientific research or in keeping with a code of ethical practice have the potential to direct officers into certain forms of action or modes of delivery. Both approaches also raise questions about the extent to which policing ought to be delivered in terms of democratic demands, even if those are not evidence-based or consistent with integrity statements. This raises the challenge as to whether policing in broad terms should be

assessed in normative terms, or if technical scientific standards can provide a benchmark. Finally, technological change in the form of the use of 'big data', crime mapping, intelligence systems and the like, are considered as a form of 'soft power' that can direct and control police behaviour and provide retrospective accountability of police interventions.

Contemporary developments relating to EBP are critiqued on the basis that little attention has been paid to the impact of diverse forms of accountability on policing. While there is important research evidence on the link between public perceptions of police procedural justice and legitimacy, there remains little wider research into ways in which 'hard' mechanisms impact on police service delivery, operational effectiveness, or leadership and management. Some of the emerging work on Police and Crime Commissioners gives some insight, but this is nascent, and the impact of other formal systems on the general mandate is limited.

These broad themes and debates are explored throughout the chapters that follow. This and the following chapter, as outlined below, establish the conceptual framework applied throughout the rest of the book. Issues of accountability and governance are defined in general terms and classical political philosophical approaches to the 'guarding of the guards' problem are reviewed. A model of accountability developed by Romzek and Dubnick (1987) distinguishes between the 'hard' and 'soft', and 'internal' and 'external', dimensions that are applied as an organising framework throughout the rest of the text, and the model is introduced in Chapter Two. The following two chapters (Three and Four) review established mechanisms and institutional arrangements for police governance and accountability. Further to that, a series of chapters (Five, Six and Seven) consider new and emerging challenges, some of which were outlined earlier in this introduction. These include the implications of Big Data and Evidence Based Policing as new modes of delivery and strategic approaches to policing and might offer considerable improvements in terms of efficiency and the enhancing professional delivery but that which nonetheless raise significant questions about democratic governance. Chapter Eight reviews the underlying conclusions and challenges that emerge throughout the book. In particular it is argued that changing political economy and the declining power of the nation state in a global environment combine to weak established mechanisms of accountability. Moreover, the same processes decrease the possibility of creating social consensus in relation to the proper mandate and value of democratic policing. It is argued that fundamental attention to tackling marginalisation and inequality are vital if effective democratic oversight of policing is to be achieved.

Chapter Two draws on public administration, legal, and political science literature, this chapter establishes some of the conceptual framework necessary to understand 'accountability', including

the vexed notion of operational independence and the empirical evidence supporting the importance of legitimacy for effective practice. Different forms and practices of accountability are outlined and it is argued that the complexity and difficulty of defining the term needs to be recognised, since distinct forms and ends are reviewed in later chapters. The model of accountability introduced by Romzek and Dubnick (1987) that establishes a four-way distinction between hard and soft, internal and external approaches is reviewed since this provides an organising framework for the different levels and dimensions assessed in this text.

Chapter Three explores the governance and politics of policing. Multi-level governance of policing provides a range of statutory mechanisms to hold public police to account and the applicability of these models to contemporary policing is considered. Democratic policing is analysed in principle and in practice with reference to the four nations of the UK, other European countries, the US, and Australasia. In the UK context, the various roles of central government, PCCs, devolved and local government, and agencies such as Her Majesty's Inspectorate of Constabulary are critically analysed. It is argued in this chapter that the conventional distinction between local and national forms of governance, in England and Wales at least, continues to provide a useful way of conceptualising arrangements but does not easily accommodate emerging provisions that cut across these boundaries.

Chapter Four is focused on the significant and widespread challenges associated with investigating complaints and discipline. Established civil, criminal and legal routes that provide formal mechanisms for remedies and restitutions following police misconduct are reviewed. New data on trends in civil claims against police in England and Wales provides evidence to suggest that this remains a limited avenue for addressing wrong-doing. Impressionistically, at least, it seems that the adequacy of all complaints provisions is questioned in most liberal democratic societies, and efforts to provide robust, external and independent investigations are explored. In relation to England and Wales it is noted that a trend towards greater transparency in the response to alleged misconduct has been regarded as a means of securing greater trust and confidence in the system. Links between these provisions and the College of Policing Code of Ethics, which offers a different approach to improving officer conduct, are critically reviewed. Given the wider emphasis on pluralisation of policing, chapter four includes discussion on the legal, social and political measures that might provide some oversight of private security.

Chapter Five critically explores the growing recognition and promotion of science, evidence and police accountability in the age of Big Data. It is argued that the use of scientific evidence to develop improved policing services offers many advantages, and that Evidence Based Policing is a valuable

means of promoting professionalization for the public police. Nonetheless, it is argued in this chapter that these developments are inherently concerned with re-orienting police behaviour and practice, and their growing significance in contemporary policing means that it is of vital importance to consider the implications that they have in terms of democratic accountability and public oversight. Several examples are used to illustrate circumstances where policing outcomes shaped by science and the 'evidence-base' have been in tension with public expectation and demand. Although not centrally considered as means of regulation and governance, EBP and Big Data are addressed as 'soft' forms of accountability.

Similarly, Chapter Six considers other dimensions of internal management and leadership. Modalities and technologies of police leadership and management are considered in this chapter as 'soft' forms of accountability in the sense that while they are not intended as mechanisms of regulation and governance they nonetheless bear influence in such terms. Research on the impact of ethics and integrity programmes indicates how these often intend to promote forms of officer behaviour and decision-making, and so to delimit unfettered office discretion. This is a form of accountability. So too, the promotion of diversity within policing and cultural transformation is (among other things) heralded as a way of enhancing decision-making, again a method of shaping officer behaviour.

Chapter Seven focuses on external oversight of policing from the public through de-centred and unorganised activities associated with social media and online technology. As in other fields, the scope and capacity of 'citizen journalism' to monitor and reveal malfeasance among police is considered in relation to a number of high profile international examples. . From police involvement in fatal shootings in the United States to more mundane footage of excessive force or apparent misconduct there have been in recent years' numerous examples of members of the public recording and disseminating footage that has held police to account in ways previously unimaginable. The chapter questions the extent to which the external gaze on officers really offers a brave new world in which public scrutiny is a powerful mechanism of accountability. Not least of the problems outlined is that the independent free spaces of social media are disconnected from any formal mechanisms of accountability. Principles of justice, equity, and due process do not apply and so capacity is limited by the extent to which individual cases of wrong-doing can gather attention in the maelstrom of social media. While White (2016) rightly notes that 'critical public discourse' can be a mechanism for holding private security companies to account, and this model is critically applied in this chapter to the potential for social media to perform a similar role for policing.

Chapter Eight concludes the book by analysing challenges of police governance in relation to the twin processes of globalisation and neo-liberal Individualism. It is argued that greater attention needs to be paid to the changing context in which mechanisms developed (broadly) alongside the modern police in the 19th century currently operate. Key among these are arguments that the position of the nation state – the sovereign source of accountability in traditional models – is weakened in relation to transnational and networked policing (Woods and Shearing, 2007). Not only has this process meant that power (and so the subject of accountability) been de-territorialised, it has also meant that private and third-sector agencies have become embedded into practices of policing and regulation such that these become much more difficult to hold to account. As Wood and Shearing (2007) note, power increasingly resides in the relationships between the nodes in this networked environment, and not in the nodes themselves. The other main focus of the chapter takes the point made by Bowling and Skeptycki (2012), that a challenge for meaningful accountability of transnational policing is that there is not a coherent ‘demos’ or set of normative standards against which accountability can be applied. The chapter argues, following Reiner (2007), that this trend is true within the nation state and that neo-liberal individualism has brought the ‘end of consensus’. This might explain why private or citizen-led mechanisms of accountability (e.g. civil action against police) seem to have over-taken traditional public responses. These are not just preferred avenues for technical or financial reasons, but also representative of a decline in the possibility of *public* oversight of police work.