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ORIGINAL PAPER

Policing the Gaps: Legitimacy, Special Obligations, and Omissions in Law Enforcement

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Abstract
The ethics of policing currently neglects to provide a framework for analysing the morality of deliberate inactions to prevent harm, even though these are often adopted tactically by police as a means of preventing greater harms. In this paper we argue (a) that police have special moral obligations to prevent harm, grounded both in a contractarian account of police legitimacy and in the interpersonal morality of associations and (b) that police are morally culpable for failures to fulfil these special obligations when these are neither proportionate nor necessary to the prevention of greater crime-related harms. Our claims have implications both for the morality of policing and for its regulation and governance under human rights legislation, which we argue should be reformed so as to recognise police culpability not only for inflictions of harm, but also for failures to prevent it.

Keywords Policing · Omissions · Legitimacy · Proportionality · Undercover

1 Introduction

In 2016 a specialist covert unit in the Australian police took control of a child sexual abuse site on the Dark Net called 'Child's Play'. For 11 months it secretly hosted the site, monitoring its users, infiltrating its forums, and quietly gathering intelligence. During this time police watched but did not intervene while thousands of Child's Play members shared photos and videos of children being sexually abused. One member boasted of abusing children in his own family. Others met in person to commit abuse, which they filmed and shared on the forum.Police could have shut

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down the site at any moment. But instead they let it—and the abuse it facilitated—persist for nearly a year while they gathered evidence. Eventually the investigating team considered that the operational advantages to maintaining the site no longer outweighed the harms and took it offline. According to a government press release, the operation resulted in 200 arrests, the protection of 83 vulnerable children, and the launch of 309 child abuse investigations internationally.[1]

The Child's Play operation raises a number of difficult moral issues. In this paper, we focus on the justifying considerations for police decisions to *refrain from intervening* to protect people from harm.[2] Let us call this *deliberate inaction*. These considerations are key to the ethics of the Child's Play operation, because its success depended in large part on the willingness of the police to forego opportunities to interrupt or prevent abuse in the moment, in order to gain greater operational advantages.

The public debate about the Child's Play operation does not consider the moral implications of these deliberate inactions. Neither is the morality of police omissions to prevent harm addressed by the philosophical literature on policing, which focuses overwhelmingly on the tactical or punitive exercise of coercive state powers such as the use of force, deprivations of liberty, and state surveillance. Though an account of the morality of police omissions to prevent harm might be derived from the analyses of the function and legitimacy of policing developed by Kleinig (1996), Hunt (2018), or Miller and Blackler (2017), these works do not discuss the issue of deliberate inaction in the terms that we put forward here.[3]

One of the key contentions of this paper is that a coherent ethics of policing must include an account of both obligations to refrain from inflicting harm and obligations to prevent it.[4] In what follows we argue (a) that police have special moral obligations to prevent harm and (b) that they are morally culpable for failures to fulfil these special obligations when such failures are neither proportionate nor necessary to the prevention of greater harms. We claim that the special moral obligations of police arise both in virtue of the institutional role of police as an agency of the state, and from the actions of individual police officers. They are thereby usefully understood as grounded in both contractarian political theory and interpersonal morality. Attempts to ground them solely in the former cannot account for special obligations to specific individuals or groups, while attempts to ground them solely in the latter beg the question of legitimate police authority. Our arguments provide a framework

[1] Minister for Police and Corrective Services (2018) http://statements.qld.gov.au/Statement/2018/8/22/taskforce-argos-saving-innocent-victims

[2] Other issues raised by the case relate to the activities of undercover officers infiltrating the site. Not only did officers encourage and praise child abusers, they also shared images of child abuse in order to maintain their cover.

[3] Miller, Blackler, and Alexandra, *Police Ethics* (2nd edition, Waterside, 2006), ch. 2, does discuss, though in more practical terms, a case in which a suspected serial killer is not immediately arrested so that more evidence may be gained against him. See also Miller (2016, p. 153), which discusses individual police responsibility in the context of a collective police failure to carry out an obligation.

[4] As Randolph Clarke has argued, 'a comprehensive account of [moral] responsibility will cover omissions as well as actions' (Clarke, 2014, p. 106).

for moral analysis of complex cases such as the Child's Play operation. But they have broader implications for the moral and political theory of policing and the governance and regulation of policing under human rights law, which we argue should recognise explicitly the moral culpability of police for failure to fulfil special obligations to prevent harm.[5]

2 Why Focus on Omissions?

We can distinguish two kinds of case in which police might wrongfully omit to prevent harm, relating to the type of reason for the omission. The first involves a reason that appeals to police function. Call these *tactical* wrongful omissions. These are cases in which police deliberately omit to investigate or intervene as a means to achieve operational objectives. For example, in the Child's Play case, investigators adopted a policy of not intervening to prevent abuse conducted via the site, in order to enable them to gather intelligence. Indeed, undercover investigations routinely require officers to make fast choices about whether to step in to disrupt or prevent a harm when doing so risks compromising other imperatives, such as victim safety, the protection of informants, or the longer-term objectives of the operation.

The second type of wrongful omission involves a reason that is beyond police function. For example, consider the now-notorious 'Worboys' case, named after the London taxi driver who raped and sexually assaulted over a hundred women.[6] Despite strikingly similar reports of sexual assault by numerous victims, police failed to investigate properly, allowing Worboys to continue to offend with impunity for many years. Whatever the roots of the institutional failure that lead police to not investigate, the absence of investigation *was* a failure: the reason for it lies outside of policing function. Call these *non-tactical-* wrongful omissions.

While our analysis below deals with both kinds of omissions, in our view tactical omissions—or deliberate inactions—are the theoretically interesting case. Can police act wrongfully while acting in accordance with their proper function, allowing that proper police function is itself legitimate? The demands on the police are complex. It is possible for activity that meets one aspect of police function to be wrongful, all things considered. In principle, police may have a positive obligation to carry out some action, and fail to meet this obligation for the reason that they pursue a broader goal of crime-reduction. In particular, police may omit deliberately

[5] When we speak of police omissions, we refer exclusively to what Foot calls 'forbearing to prevent' (1994, p. 273). Our claims should therefore be acceptable whatever side one takes in contemporary philosophical debates about the metaphysics of omissions (Clarke, 2014).

[6] See the High Court judgment of Justice Green on 28/2/14 DSD & NBV v Commissioner of Police for Metropolis at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/dsd-and-nbv-v-met-police.pdf See the Norwegian online news provider VG for an in-depth investigative report of the case and a series of related articles https://www.vg.no/spesial/2017/undercover-darkweb/?lang=en.

to act to prevent some harm to an individual, so that a greater harm may later be prevented. This kind of case is the focus of this paper.[7]

Now it might be argued that we overstate the urgency of the need to pay philosophical attention to omissions to prevent harm, because doing harm is worse than allowing it. As Hosein (2014) has claimed, that 'greater weight should be given to ensuring that the state does not do certain bad things to people than to ensuring that the state prevent similar bad things from happening to them'. Yet police omissions to prevent harm are often just as wrongful, culpable, and frequent as police inflictions of harm. Accepting the moral distinction between doing and allowing demonstrates only that for an agent to inflict a specific harm is always worse, morally speaking, than for that agent to allow another agent to inflict *that specific* harm. It does not demonstrate that the infliction of *any and every kind* of harm is always worse than the *omission to prevent any and every kind* of harm. So the fact that some act or decision qualifies as an allowing or an omission rather than a doing or an infliction by itself tells us little about how morally wrongful it is, either in itself or as compared to other courses of action on offer.

3 Grounding the Special Moral Obligations of Police to Prevent Harm

Just like everybody else, police have general moral obligations to others arising from their status as moral agents; they also have a distinct set of special moral obligations towards civilians arising from their position or role as police officers. Thus, John Gardner (2013, p. 117) writes:

> [When officers] go on duty there are some adjustments in their moral positions, some new moral duties and some new moral permissions … *In this respect*, becoming a police officer or a soldier is just like becoming a lover, an architect, a pen-friend, a journalist, a plumber, a member of cabin crew, a polar explorer, a TV chef, a hillwalker, or a foster-parent.

Special obligations can be grounded in the moral value of the relationship from which they arise, the value of voluntary agreement by autonomous agents, the reciprocal value of an arrangement or contract, or a mixture of any of these. Most accounts of the special moral obligations of police begin by giving a grounding of this kind for the political and moral legitimacy of an institution that operates a monopoly on legal violence and coercion, an endeavour which inevitably involves specifying the purpose(s) or function(s) of policing. They go on to explain the specific moral obligations of police as broadly derivative of the police's legitimate

[7] As we outline in Sect. 2, we focus on the police function of harm prevention. We leave open the broader question of whether police omissions to prevent harm can be justified by other aspects of police function, or vice versa. For example, how far can a duty to facilitate the purely retributivist elements of a penal system justify police allowing some to face a risk of harm? And in what circumstances can police omit to bring forward a prosecution of a person who has committed serious crimes but is now believed to be harmless, where such a prosecution might undermine ongoing disruption of a criminal organisation?

pursuit of this overarching duty or purpose.[8] In what follows we also take this approach, adopting a broadly contractarian account of political legitimacy.[9]

While our principal aim in this paper is to analyse the morality of police omissions to prevent harm rather than to defend a specific account of police authority and legitimate purpose, doing the latter is, we believe, an essential step in any attempt to specifying the special obligations of police. The special obligations of police depend in part on the legitimacy of their special permissions—specifically the permission to use force on behalf of others and to prevent others using force to redress violations of their rights. Those permissions themselves require justification, which in turn involves specifying the purpose(s) for which the permissions can be exercised. In addition, being clear about the legitimate purposes of police is important when assessing the culpability of police omissions to prevent harm. Such clarity allows one to distinguish between omissions whose aims fall within a proper construal of police purpose or function from those whose aims do not, and again from those whose aims conflict with that purpose or function.

These points are worth stressing in light of a recent attempt by Jake Monaghan to ground the police obligation 'to see to it that citizens are safe and not at risk for physical harm or violation of property rights' in a moral framework that is based in the de facto roles and positions police officers occupy, and applies irrespective of whether these roles are themselves justified or legitimate (Monaghan, 2017). We disagree with Monaghan and discuss his position in Sect. 5 below. In our view it is doubtful that one can usefully give an account of the morality of police activity that is divorced from police legitimacy.

We adopt a contractarian view of police legitimacy, which can be expressed via Rawls' 'liberal principle of legitimacy', according to which, 'political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason' (Rawls, 2001, p. 41). This in-principle reasonable endorsement is the 'contract' underpinning policing which creates both

[8] Thus it has been argued that policing, properly understood as a legitimate institution, is: a contract with citizens for protection; concerned with protecting citizens from rights violations (Hunt, 2018); or a system for managing social relations and disputes (Kleinig, 1996). A different approach to ours is taken in Miller (2010), which provides what is described as a 'normative teleological' account of social institutions in general, including the police in particular. On this approach, the police exist to provide the social good of protecting people's rights. Special obligations flow from this function. Although at first blush the framework is different from ours, there is apparent scope for the two to combine. This is because Miller's will require a principled account, of the kind we provide, of why the police have one function and not another, and why some obligations and not others flow from this function. Alternatively, one might argue that the absence of explanatory grounding force means that the normative teleological account loses its power as a theory (see Agassi, 2013 for a critique along these lines).

[9] To be sure, police may also hold a general obligation to prevent harm. In extremis, this may be conceived along the lines of the duty defended in Singer's 'Famine, Affluence, and Morality' (1972), according to which failure to prevent a harm is morally equivalent to causing it. We focus here on the special obligations, since these are the cases that that will motivate what we described in Sect. 1 as 'tactical culpable omissions'. These give reasons for police, in carrying out their function of harm-prevention, not simply to minimise overall harm, but to provide further protection to those with whom they form associations.

exclusive permissions to use violence and coercion and legitimate public expectations of protection. The special obligations of individual police officers arise in part from this 'contract' and in part from their explicit, voluntary entrance to the profession, which involves taking an oath to use both their police powers and expertise to serve and protect without fear or favour.

The kind of contract just described can be grounded in the value for individuals and society of having an institution that (i) exercises a monopoly on the use of coercive powers and force; (ii) does so exclusively for and only as much as is necessary and proportionate to the prevention of harms; and (iii) in particular those harms associated with and resulting from criminal activity. The value of institutionalised policing lies in the reduced vulnerability of individuals to unjust violations of their rights, *and* the enforcement of those rights in a way that is both impartial and accountable to them—or at least, more impartial and accountable than it would be in the absence of the institution of the police. The legitimacy of policing is determined both by the extent to which police in fact fulfil this obligation to prevent harm and are perceived by the public as doing so, as well as the reciprocal value thus generated.

We have just said that the overarching professional duty and purpose of policing is to prevent and protect people from harm, specifically those harms arising from and associated with criminal activity and disorder. Our focus on harms *associated with* crime and disorder, rather than crime and disorder themselves, is motivated by a conviction that efforts by police to detect and prosecute crimes can result in greater harms, including harms to very vulnerable people, than it prevents, and that in such cases the prevention of crime-related harm should be prioritised over the direct enforcement of the criminal law. To illustrate, consider the police's role in the global war on drugs—a war which has become a notorious example of how aggressive enforcement of the law can be a key driver of violent crime, exploitation, and drug addiction (Husak, 2002). Our position would consider it well within their purpose for police deliberately to refrain from arresting people for buying and selling drugs in a particular part of a city, so that vulnerable drug users can be more easily identified and helped, and so that violent tensions between drugs suppliers are more easily managed.

Further advantages of our move to put harm prevention at the core of policing are that doing so provides (i) a clear source of constraint on the exercise of police powers, (ii) a basis for the resolution of moral dilemmas in the exercise of police discretion, and (iii) a guide for strategic decision-making. It helps to ensure that policing is oriented to prioritise the prevention of worse harms over minor ones, even in the face of popular or political pressure to do otherwise. Our focus on harm might be controversial in some policing contexts, but it is congruent with recent shifts in UK policing strategy (National Police Chiefs Council, 2016).

In offering this view we acknowledge that there is an ongoing debate about the proper scope and function of policing, which will continue to shift over time and

place.[10] We seek to be ecumenical with respect to possible positions in this debate. We do not specify exhaustively the kind of things 'crime-related harms' might include. Nor do we argue that the prevention of crime-related harm is the only legitimate purpose to which policing can be directed. Some may, for example, argue for a focus on rights rather than harms. For now, however, it is sufficient to show that people could reasonably agree to recognise the legitimacy of an institution that wields a monopoly on the legal use of force and coercion for the purpose of preventing crime-related harm.

4 The Special Moral Obligations of Police to Prevent Harm

Recall that our main aim in this paper is to establish the claim that police can be culpable morally for omissions to prevent harm, and in particular, that they can be so culpable even in cases in which the goal is to prevent a more significant harm. The reason this is worth doing is that the moral obligations of police to prevent harm are currently insufficiently articulated—a situation that impoverishes the moral philosophy of policing and leaves us ill-equipped to analyse the morality of complex operations such as the Child's Play case. We do not deny that many police omissions are culpable in virtue of their failure to bring about the best consequences, and that some such omissions can be adopted tactically in pursuit of legitimate policing goals. Our argument offers considerations beyond those immediate consequentialist concerns.

We will first set out police special obligations to prevent harm, and then show that omissions to fulfil these can be culpable morally. In the previous section we prepared the ground for the former of these aims, by asserting an overarching duty to prevent crime-related harm as a definition of legitimate police purpose.[11] In this section we explain the ways in which individual or corporate police actions combine with this general duty to yield special obligations to prevent harm to particular individuals or specific subsets of civilians.

Special obligations of police can arise in at least three typical ways, all of which we understand to be examples of associations of different kinds between police and civilians:

1. through commitments or agreements to protect taken on voluntarily by police;
2. through police occupying a position of care towards individuals;

[10] For example, some have argued that policing purpose includes 'secret social service' roles (Punch and Naylor, 1973). For positions on policing purpose see Kleinig (1996) and Miller (2010).

[11] It also gives rise to a distinct set of police obligations to prevent harm to civilians in general, or what might be called 'undirected duties'. Failures to fulfil undirected duties would include squandering police resources on a fleet of luxury cars for senior officers, allowing incompetence and corruption to go unchecked so that the police come to protect the interests of the powerful at the expense of the less powerful, or permitting systemic bias to become so rife that certain communities are left unprotected from crime. The aim of the present discussion is to underscore the importance of better understanding *directed* obligations in particular.

3. through causal responsibility of police for harms/threats or risks of harm to individuals.[12]

Moral obligations that are grounded in voluntary agreements as in (1) primarily take the form of commitments by police to protect people from crime or crime-related harm. Examples include promises to protect informants or witnesses from harm inflicted by those they have helped police to criminalise, and assurances by police to victims or others who report crime or threats that they will intervene or investigate. In such cases, the obligation arises both from the promise given, and from the creation by police of legitimate expectations of protection in those concerned.[13]

Special obligations to protect may also arise without express commitments, but in virtue of a relation between police and individuals, such as is constituted by police being in a position of care, as in (2). For example, those in police custody are under the power and control of the police, who for that reason have a duty of care towards them. Duties of care can arise further when police deal with vulnerable individuals such as children, drug users, people with mental illness, and victims of crime.[14]

Police can also take on directed obligations to prevent an expected harm when, through their actions or omissions, they have causal responsibility for that harm, or for the vulnerability of someone to it, as in (3). Informants, witnesses, or other kinds of collaborators who are at risk of reprisals because of their association with the authorities fall squarely into this category.

It will be noted that there can be overlaps between the associations that give rise to directed obligations to prevent harm. This reflects the fact that police can have obligations to protect even where they have not made express commitments to do so, and have yet stronger obligations where they have made such commitments. Overall, the stronger the association that police have with an individual (with 'association' being defined in the various ways we do here), the stronger their obligation to protect that individual from (relevant kinds of) harm.[15]

[12] One might wonder here whether an agreement is not itself a form of association, which is in turn a source of special obligations. This may be correct, but our aim is to clarify the varieties of special obligations, not to make claims about how they should be classified. Indeed, as we argue later, the source of an obligation is unlikely to be a deciding consideration in assessments of its moral stringency.

[13] Indeed, some defend the obligation to keep promises through the expectations thereby created. E.g., Scanlon (1998).

[14] As an anonymous reviewer of this paper notes, conflicts routinely arise between police duties to enforce laws instituted by democratically legitimate processes and special obligations to prevent harm to the vulnerable, as with the criminalisation of opioid drug-use. Our specification above of the role of police as preventing 'crime-related harm' rather than merely 'crime' is intended to provide one means of resolving dilemmas of this kind, by stating that police should use their discretion to prioritise the reduction of crime-related harm over the direct enforcement of the criminal law. Human rights law is another. However, we acknowledge that police complicity in harmful and unjust practices is a constant reality in most countries and that dilemmas of this kind are a persistent moral hazard of policework in general.

[15] Monaghan (2017) takes similar features to be sufficient conditions for police special obligations, whereas we argue (at length below) that they generally make existing special obligations weightier.

These categories help us to understand the prima facie wrongs in a central class of culpable police omissions. Where police can either prevent an imminent harm, or instead wait, and by waiting, accrue intelligence so that a greater future harm can be prevented, it will sometimes be the case that police have extra commitments, positions of care, or causal responsibility for the vulnerability of those involved in the imminent harm. This gives (non-decisive) reason over and above calculations of expected value to favour addressing the imminent threat (when imminence and associations depart, we have not given a reason to put a 'thumb on the scales' in favour of earlier preventive action).[16]

Our categories also help to explain the importance attached by the public to the need for police to follow up leads, and to address *specific* threats or vulnerabilities. Consider an analogy. Within public health, it is widely acknowledged both that far more resources are put in to rescue than prevention and that better overall consequences would be achieved were prevention given greater relative priority. This may be explained in part by the idea that we value specific lives more than we value statistical lives, and that this 'identified victim effect' itself can be grounded by appeal to associative values such as solidarity or empathy (Verweij 2015; Slote 2015). The intensity of public complaints where police fail to follow up a lead or to respond to particular threats or vulnerabilities—as opposed to failures to carry out broader intelligence work—is similarly explicable by the idea that police owe a further obligation to victims in those cases where the victim or the particular threat is identified. Of course, as in public health, it may be argued that this attitude is coherent only insofar as devoting greater resources to identified threats or vulnerabilities tracks expected utility. In any case, on our schema, it can be explained by the idea that the nature of the police role implies that they take on duties of care towards those who are identifiably vulnerable.

5 Interim Objections: Equality Before the Law and Corporate Moral Responsibility

It may be objected that the idea of equality before the law entails that police have the same obligation to prevent harm to each civilian. Therefore, there are *no* special cases of the sort that we have argued for here, for people's status as citizens dominates any association that, for example, an undercover officer forms with those he befriends to spy upon. To accept that police might have special obligations *to some* is to undermine the principle of impartiality, which itself is a kind of special obligation, and upon which police legitimacy is premised.

But impartiality and equality before the law need not imply that police have exactly the same strength of association with or obligations to everyone all the time. A general or undirected police obligation to protect all citizens as such is compatible with additional special obligations to protect those individuals whom they know or

[16] An anonymous reviewer invited us helpfully to reflect on the role of imminence here.

ought to know are at heightened risk of criminal harm, or to whom they have promised or agreed to provide protection.

The obligations we have specified in this section are *prima facie* obligations, whose stringency depends on the circumstances. In practice 'the circumstances' include many predictable considerations such as the gravity of the harm in question; its imminence; its foreseeability; the likely success of police intervention to stop it, and so on. Specifying the moral obligations of police in this way does not preclude granting police broad discretion to weigh the relevant considerations and prioritise harms and resources in ways that they consider to be reasonable and fair, given the overarching purpose of policing to prevent harm.

A further potential line of objection takes issue with the fact that our claims commit us to a notion of corporate moral responsibility. Some critics will maintain that the police cannot culpably omit to act, since only individuals can culpably omit to act, and 'the police' is not an individual (e.g., Narveson 2002). In response, we urge, first, that if this implication exists, it is advantageous, and second, that it need not follow. It may be an advantage of allowing our analysis to apply to the police as a corporate entity, since there are certain duties that are difficult to construct otherwise. For example, John Gardner (2013) argues that the police's monopoly on legal violence creates vulnerabilities to police brutality, because it 'leave[s] those whom they are there to protect, with nowhere else to turn'. It is not the case that any *individual* police officer renders it the case that citizens have nowhere else to turn; this is instead a consequence of the existence of an institution that exists purely for the purpose of protecting people from harm, and which holds the exclusive political right to use coercive means to do so.

Similarly, police bodies at a corporate level create legitimate expectations of protection amongst citizens, making public declarations through official spokespeople in the media pledging to reduce crime and catch criminals, discouraging and warning vigilantes, committing to respond to calls within specific timeframes, and so on. And certain moral criticisms of police, such as those relating to institutional racism, relate specifically to the way that the institution functions, and in order to be coherent need not refer to the intentions of its members or be disaggregated to individual failings.[17] If police cannot be collectively responsible, this kind of criticism is closed off.

More generally, we are quite used in law to an institution having an obligation that it has expressly taken on board, as in the case of limited liability companies. Of course, the fact that there are well-established norms of corporate legal personhood need not imply corporate moral personhood, because there may be practical reasons for creating a legal obligation where there is no moral one. But the view that

[17] The originators of the term 'institutional racism' did not emphasise the distinction between intentional and unintentional acts on the part of the individuals, but rather focused on the effects of the institutions as a whole (Hamilton and Ture, 2011). The term has come to denote such an emphasis, however (Lea, 2013). There is a rhetorical—if not theoretical—danger that a focus on collective responsibility undermines focus on individual responsibility.

institutions and collectives should be construed as having moral responsibility also enjoys considerable support.[18]

Still, it might be argued that the special obligations of police as a corporate entity is far more difficult to ground in the value of the relationships from which they arise. *Individuals* can form friendships, and so forth; insofar as institutions themselves can have obligations, it may be argued that they cannot be grounded in an ability to form relationships with people. There are two ways of responding to this. The first is to question whether the special moral obligations of police are in fact grounded in the value that they have for individuals. If they are not, then it is only a small leap to the notion that the grounding of associative obligations applies to entities that are made up of an aggregate of individuals, as well as to individuals themselves.[19] Even if we allow that at least some of the special moral obligations of police are grounded in the value of those relationships for individuals, we can accommodate them in our account, because it recognises relational obligations that fall on individual officers.

When Australian police infiltrated the Child's Play forum, they altered their moral relationship to those whose abuse the forum facilitated and enabled. By taking over the server and eventually running the site themselves they became causally implicated in the harm it facilitated (as in 3) and thereby took on moral obligations to reduce and prevent those harms. In addition, each time the infiltration revealed to police specific threats or acts of abuse, this gave rise to new obligations to address the threats and protect victims (as in 4). On our account, these moral obligations vary in stringency and are *pro-tanto* rather than absolute. Deciding which obligation to act on and when inevitably involves nuanced judgements: a failure to discharge an obligation in the present might be justified in order to better discharge it in the future; fulfilling a moral obligation to one victim could entail actions that impair or prevent the fulfilment of another.

Nevertheless, our view implies that police engaged in the Child's Play operation should not have made simple consequentialist calculations in conducting their investigation, since the operation itself burdened them with obligations that limited their (moral) freedom to pursue the best overall consequences. For example, it would have been wrong for police to use the operation as merely an intelligence-gathering mission and a real-world training exercise for undercover officers, even if this promised a more effective police response to child abuse in the future. Additionally, a decision to continue hosting the site for months when it could have been taken down at any moment should have been justified in terms that recognised the special moral obligations to those victimised through the site, and not only in terms of the benefits to public safety in general. The same applies to the multiple tactical decisions taken by the investigative team during the course of the operation, to refrain deliberately from protective intervention. In a moment, we will propose that the principles of proportionality and necessity provide a framework for the justification and defence of such instances of deliberate inaction, as well as of their culpability. First, however, we must distinguish and defend our approach against an alternative proposal.

[18] E.g., List and Pettit (2011). For a specific account applied to policing, see Miller (2010).

[19] Lazar (2014).

6 An Alternative Approach

In his 2017 article 'The Special Moral Obligations of Law Enforcement', Jake Monaghan rejects what he calls the 'dominant approach' to police ethics, which he associates with attempts, like ours, to ground the moral obligations of police in theories of political authority (Monaghan, 2017). According to this view, it is unnecessary either to appeal to theories of political authority, or define the 'purpose' or 'goal' of policing, in order to ground a theory of the moral obligations of police. Instead, he argues, the moral obligations of policing can be explicated in a way that is 'independent of an account of political authority' (p. 221). That is to say, on his view, the moral obligations of police officers are not dependent on the broader legitimacy of the state or of the police force, or of the particular form of that legitimacy, but arise in virtue of the position that the police in fact hold.

Monaghan sets out his position by identifying three conditions which, if met by anyone, would be sufficient to ground a special obligation 'to provide aid', and then argues that police 'nearly always' meet all three. This, he argues, provides the basis for a 'moral framework for law enforcement':

> If law enforcement officers are (1) particularly well situated to provide aid, are (2) causally responsible for another's vulnerability, or (3) have voluntarily committed themselves to provide such aid, then they have special moral obligations to do so. If all three criteria are met, then the special moral obligation is likely to be especially strong. (Monaghan 2017, p. 224)

According to Monaghan, police meet condition (1) in virtue of a combination of their specialist training and their de facto monopoly on the legal use of force. The police monopoly on the use of force also allows them to meet (2) because it 'contributes to the vulnerability of individuals by denying them a right to defend themselves with violence when threatened'. Condition (3) is met by police officers' voluntary entrance to the profession and in particular the explicit commitment to provide aid that this entails.

Monaghan's proposal is worth taking seriously for at least three reasons. First, it is ambitious in its theoretical parsimony. Taken together, Monaghan's three conditions are intended to ground *both* the general obligation of police to protect (which our account grounds in a combination of a moral contract and officers' voluntary entrance into the profession and parses as 'legitimate police purpose'), *and* the more specific, contingent obligations police take on while carrying out their duties. In doing so, he avoids utilising the kind of Rawlsian theoretical apparatus that some find unintuitive and idealising, relying instead on the familiar mechanisms by which individuals take on routinely obligations to each other. Second, by eschewing commitment to any particular account of police ethics or political legitimacy, Monaghan's approach is ecumenical with respect to philosophical theories of policing. Finally, by decoupling the special moral obligations of police from their legitimacy, his position holds the potential to furnish those sceptical about the legitimacy of policing per se with a line of response to the criticism that they say they want no policing and yet want the police to police fairly.

Each of the three conditions is proposed as sufficient for special police obligations. We focus on condition (2), the 'vulnerability principle'—that is, the claim that by making others vulnerable, one takes on an obligation to protect them—because of its theoretical interest. We will discuss conditions (1) and (3) at the end of this section.

Monaghan defends the vulnerability principle by way of the following analogy:

> If lifeguards at a beach coercively enforced a policy whereby others are not allowed to help swimmers who are drowning, those lifeguards thereby take on a stronger obligation to fulfill their lifeguard duties. This is especially true if the lifeguards are actively engaging in behavior that makes it harder for swimmers to tread water on their own. (*Ibid*., pp. 225–226)

Monaghan provides specific examples in favour of (2) involving the police being *morally* responsible for creating a vulnerability, such as the creation of criminogenic environments, say through the imposition of mass incarceration for minor drug offences. Note, however, that the view is not that police wrongfully seize citizens' means to defend themselves, and thereby owe citizens a duty of recompense in the form of protection. On such a view, even if police make appropriate recompense by providing commensurate protection, they would not erase the existence of the original and ongoing injustice inherent in policing. Rather, the vulnerability principle is meant to expand to mere 'causal' responsibility. It has effect whether the lifeguards are legitimately deployed as a part of a justified policy on rescue by a democratic local authority following a public consultation, or are a group of rogue individuals perversely bent on creating and meeting a need for rescue. The idea is that causing a vulnerability entails a special obligation to protect.

It does seem at first correct to say that if one makes others vulnerable, then one owes them protection. However, this is not always the case. If one holds a position in which one can *justifiably* render another vulnerable, perhaps one owes nothing, or at least, no more than anybody else. I might have the lock on my door removed, perhaps intending to have a new lock installed tomorrow. The locksmith does not have any special obligation to protect my house from burglary, since I have knowingly contracted in to the arrangement and taken responsibility for the risk.[20] Similarly, suppose I can only protect myself against a culpable attacker by making him vulnerable, and I can only protect the attacker from that vulnerability by imposing a cost upon myself. Again, it is not obvious that I wrong the attacker by defending myself while failing to protect him from the vulnerability that I create, especially where there are others who could protect him.

In general, it is plausible that one owes a lesser or no special obligation to a person who one has made vulnerable, where the person has in certain terms created the context of the possibility of vulnerability, or has in the right way consented to

[20] The house owner also plays a causal role, but the condition does not ground the obligation to protect in the *sole* cause of a vulnerability.

its creation.[21] How these complications play out in the case of the lifeguards or the police would depend on the specifics of the case, and the specifics of those qualifications. If citizens have agreed to give up their right to use force and coercion against those who violate their rights in return for protection, then any moral obligation of police to provide protection is the result of the agreement, rather than a result of their causal responsibility for vulnerability. Presumably the agreement is only valid if that monopoly reduces people's overall vulnerability to crime, relative to what life would be like in police-free society (as in our contractarian account above). If so, a failure by police to provide protection is a breaking of that agreement, *rather than a failure to meet a special moral obligation arising from previous actions*.[22] The problem is that there is not an exceptionless obligation to aid those whom one has made vulnerable, as Monaghan implies there is. On the contrary, the exceptions are multiple and live in the case of policing.

Similar problems arise in relation to the other two principles that Monaghan identifies as grounding police obligations to provide aid. His first principle states that an individual has an obligation to provide aid if they are well-placed to do so. It is proposed that the state's claim to a monopoly on violence necessarily puts police officers in such a position (Monaghan, 2017, p. 224). This would appear to apply as consistently to police as to vigilante groups, yielding unlikely implications. By attaching his victim to the train tracks, the Mafioso takes on an obligation to rescue, partly because he has acted wrongly in creating the vulnerability, and partly because he is especially well-placed to rescue. It is questionable whether we should see police obligations like this, since the primary analogous obligation is for the police to *disband*. If, alternatively, the police claim to a monopoly of violence is legitimate, one would expect the terms of the legitimacy to be where the action is in understanding the obligations that follow. Moreover, where an individual is the only person who can help another who is in dire need, or would incur a much lower cost than anyone else in helping a person in dire need, it would seem that a general duty of beneficence—rather than a special obligation—can explain why *that* individual ought to provide aid.

Monaghan's third principle states that by voluntarily committing to aid others one takes on a special obligation to do so, and that police of necessity make such commitments professionally and institutionally. This argument again runs up

[21] One way of understanding this argument is that the vulnerability principle, if valid, must be rephrased to incorporate defeaters, e.g. 'if one causes a vulnerability in a person, *and* that person is not culpable (in some sense to be specified) for, *and* that person has not consented (in some sense to be specified) to, the vulnerability, then one has a special obligation to protect against that vulnerability.' The reworked vulnerability principle does not so easily apply, since people can be construed as consenting to policing, and furthermore, we often take the view that police have special obligations towards people who have culpably made themselves vulnerable.

[22] There is a further problem relating to the scope of being 'causally responsible'. The vulnerability principle is more easily applied to specific police actions in which proximate causality is clear (the car chase, the kettling of protesters). The broader claim that police *in general* cause a vulnerability by restricting people's ability to defend themselves raises unintuitive questions. Are those who would be better off in a state of nature, or with a weaker, failing state that does not successfully monopolise violence, due lesser overall protection? This seems like the wrong kind of question to ask.

against problems when the question is asked whether the agent is acting legitimately. Voluntary commitments illegitimately to provide aid are not sufficient for special obligations, especially where the 'aid' can come in the form of coercion (through arrest, searches, surveillance, and so on) of those who are merely suspected of being a threat.

Monaghan's interpersonal account cannot by itself provide a grounding for specific obligations of police to prevent harm. We have argued that the special obligations that do arise when one or more of Monaghan's principles hold are ambiguous depending on whether police are illegitimate or not. We have also argued that if police are illegitimate those principles do not always give rise to a general obligation to protect, as Monaghan claims they do. Our account avoids the problems his faces by grounding the general or overarching moral duty of police to prevent harm in a social contract, and the specific or directed moral obligations to prevent harm in the more proximate, contingent associations formed and actions undertaken by police. We need both political theory *and* interpersonal moral theory to ground the moral obligations of police.

Now, it might be objected that the legitimacy of policing is, on the contrary, irrelevant to the justifiability of police actions because, in the words of Simmons: 'some things anyone may justifiably do in crisis situations. From this it follows that a state or government may also sometimes act with justification, even if that kind of state is not justified and even if that particular state is not legitimate' (Simmons, 1999, p. 770). We do not take issue with Simmons' point, insofar as rescue is what police are doing. But we do not believe this undermines our position. The reason is that all major philosophical theories of policing recognise that the police function goes beyond merely rescue.

Much of what police do in their daily work is to exercise coercive powers (such as powers to compel a suspected offender to turn out their pockets, powers to search someone's home or bug their car, or powers to detain and question someone and threaten further deprivation of liberty for non-cooperation) in order to investigate and prevent crime. In our view, it is not correct to say that 'anyone may justifiably' do these things. On the contrary, someone who wanted to do these things would need, in Simmons' terms, 'a special warrant or right or authority' (Ibid.). We need a theory of legitimacy to explain why the police are permitted to coerce others on behalf of civilians in contexts that do not qualify as 'crisis-response' or 'rescue'. Characterising policing as solely or chiefly emergency response, as Monaghan does, obscures this reason for seeking legitimacy.

7 Moral Culpability for Omissions to Prevent Harm: Cases and Implications

So far we have sought to demonstrate that police have special moral obligations to prevent harm, and to show how these arise. The remainder of this paper considers the implications of this claim for how we—and the relevant disciplinary bodies and courts—should allocate moral responsibility for police omissions. It explores these implications in relation to two kinds of cases in which police might omit culpably to

fulfil a special obligation to prevent harm. First, we consider cases in which harms are allowed deliberately as a means to further operational advantage, which we call tactical or strategic omissions to prevent harm. Second, we consider cases in which harms are allowed for illegitimate reasons, including but not limited to racism, prejudice, incompetence, laziness, or corruption. Acknowledging police culpability with respect to the latter implies an extension of legal liability for police officers who fail to investigate or otherwise respond to reports of crime. With respect to the former, it implies that the jurisprudence of human rights should no longer exclude police omissions to prevent harm from qualifying as 'restrictions on the rights of individuals'. Our arguments lend support to recent efforts by legal scholars to encourage courts to contemplate more readily the possibility of police liability for omissions or inaction under human rights law (Harrison et al., 2005; Burton, 2009).

Let us begin with cases in which police fail to fulfil special moral obligations to prevent harm for illegitimate reasons. A recent example from the UK is provided by the now-notorious 'Worboys' case. John Worboys was a London cab driver who raped and sexually assaulted over a hundred female passengers in his taxi.[23] Police failed to follow many basic investigative leads over many years, allowing Worboys to continue to offend.[24]

In both disciplinary and legal proceedings relating to the Worboys case, the relevant authorities acknowledged that the police had failed in their moral responsibility to provide justice (and in legal terms to provide a 'remedy') *for those victims who reported their assaults to police*. However, both legal and disciplinary bodies declined to consider police culpability *for omissions to prevent the harms Worboys inflicted on subsequent victims*, even though those harms would not have occurred had police fulfilled their original duty to investigate.

In our view, this was a mistake. *Both* victims whose reports of crime were not investigated *and* victims subsequently abused by Worboys have a legitimate moral complaint against police. The complaint is not identical. For those who reported the crimes, the complaint relates to the fact that police had committed to investigate the crimes reported (and therefore took on special obligations of type 1 above) but then failed to carry those commitments out. With respect to the latter, the complaint relates to the failure by police to fulfil a special obligation to protect them from serious harms vulnerability to which the police were causally implicated in creating through their failure to investigate.[25] The moral responsibilities of police extend beyond merely investigating crime to preventing it. While this paper is concerned

[23] See the High Court judgment of Justice Green on 28/2/14 DSD & NBV v Commissioner of Police for Metropolis at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/dsd-and-nbv-v-met-police.pdf.

[24] Systemic failures of this kind also characterise the long-term underinvestment in and under-investigation of domestic violence cases Her Majesty's Inspectorate of Constabulary report: 'Everyone's Business: Improving the Police Response to Domestic Abuse', 2014, at: https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/2014/04/improving-the-police-response-to-domestic-abuse.pdf.

[25] For those who may be sceptical of our interpretation of causality as extending to 'but for' omissions as in this case, we can also ground the special obligation in the fact that the harms were severe, imminent, foreseeable, and preventable, and that police had voluntarily agreed to take steps to address them when victims made their reports.

with the *moral* culpability of police for omissions to prevent harm, our arguments inform live debates about the proper extent of the police's legal liability for failures to protect. In many jurisdictions, including the UK, police have historically enjoyed freedom from legal liability for *any* failures to investigate and prosecute crime. The main reason given in support of this immunity is that it would not be 'fair, just and reasonable' to impose such a duty on police, because it would expose police to indeterminate claims brought by the public at large for harm inflicted by the criminal conduct of others (McIvor, 2010, p. 133). Moreover, it is argued that to admit such liability in principle would encourage police to devote excessive time and resources to investigating relatively minor or very difficult-to-prosecute crimes just in order to avoid liability, rather than exercising their professional discretion to prioritise resources in the public interest. These practical considerations have been taken by the courts to absolve police from liability for *any* of the kinds of omissions we have discussed so far, with the exception of cases in which police can be shown to have a (strictly defined) duty of care.

The approach of the courts is subject to ongoing challenge by advocates and scholars concerned about policy impunity for gross failures to protect victims of crime. We do not attempt to resolve this debate here. Nevertheless, our points lend support to their position by establishing distinct moral obligations to protect and pointing out that current legal arrangements fail to acknowledge these. In doing so, they provide a moral argument in favour of their current efforts to establish legal liability to protect.

But our account also has more concrete implications for law and governance of policing. We have just discussed police omissions to investigate crime that are explained by general police failings such as incompetence, corruption, prejudice, racism, and so on. But sometimes omissions to intervene or investigate are used by police deliberately as a means to the achievement of specific operational objectives. Strategic or tactical omissions to prevent harm are not unusual occurrences in operational policing. On the contrary, they are typical of undercover investigations, which routinely require officers to make fast, difficult choices about whether to step in to disrupt or prevent a harm when doing so risks compromising other imperatives, such as victim safety, the protection of informants, or the longer-term objectives of the operation. Such strategic or tactical omissions are key to understanding the ethics of the Child's Play case, in which investigators adopted a policy of not intervening to prevent abuse conducted via the site, in order to enable them to gather intelligence for future disruption and prosecution.

Police in many countries and contexts are currently required by policy and law to demonstrate the necessity and the proportionality to a legitimate policing aim of any exercise of their coercive powers, such as the use of force and covert surveillance. Indeed, principles of necessity and proportionality have in recent years been extended from the domain of just war theory to the moral regulation of state coercion (Caney, 2005; Ripstein, 2017; Letsas, 2018; Huscroft et al, 2014). But the same constraints are not normally applied to state agents when they refrain from intervening to prevent harm or rights-violations inflicted by third parties, even when refraining from intervening is employed as a means to achieve the same kind of legitimate state aim. We believe that they should. Furthermore,

existing human rights instruments can be adapted so that they take account of decisions not to intervene protectively.

The criteria for assessing the legal proportionality of a state measure that limits people's rights, as developed by domestic case law under the UK's Human Rights Act 1998, are as follows (note that necessity is also subsumed under these criteria in (2) below):

1. Whether the objective of the measure is sufficiently important to justify the limitation of a protected right,
2. Whether the measure is rationally connected to the objective,
3. Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
4. Whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

The above indicates that proportionality assessments are conceived as applying solely to cases in which relevant state agents are deciding whether to take a 'measure' that 'limits' people's rights. This would seem to fall squarely within the categories of 'doing' and 'acting' rather than those of 'allowing' or 'omitting'. In other words, proportionality considerations exist exclusively to constrain the infliction by the state of rights-limiting harms on individuals. They say nothing, on the face of it, about the failure by the state to prevent harms to citizens, rights-limiting or otherwise, when they are inflicted by civilians engaged in criminal activities. Similarly, while human rights law admits neither excuse nor justification for violating certain rights, such as the right against torture, there are no corresponding absolute prohibitions on *allowing* the infringements of such rights by third parties.

Currently, only those inflictions of harm that are serious enough to constitute limitations of human rights are subject to the stringent requirements of proportionality and necessity. One way of approaching the issue of how omissions to prevent harm might fit within this framework is to say that *under certain conditions omitting to act to prevent harm itself constitutes a 'measure' that 'limits' people's rights.* With respect to policing, this would only occur when police have a special obligation to protect specific individuals against violations of rights. In other words, both allowances and inflictions of harm should be subject to proportionality considerations, when they qualify as instances of rights-limitations and are used as means to the achievement of legitimate policing objectives.

This is distinct from, but not necessarily incompatible with, a deontological argument that tactical omissions of this kind are ethically questionable because they use victims as a means to an end. We do not have the space to consider that line of reasoning here, though it is worth pointing out that, unlike ours, it would have to provide an account of how omitting to act to protect a person qualifies as 'using' them.

Turning back then to the Child's Play case, we can see that it provides precisely the kind of scenario that might fall within the scope of the proposals put

forward here. As reports of that case describe, users of child abuse forums routinely invite others to view live streams of abuse, and even begin spontaneously streaming such abuse to fellow members. On our account, undercover officers who observe such abuse or put themselves in a situation in which they can expect to observe it, thereby take on special obligations to prevent it because their actions can be construed variously as participating in that abuse, or contributing causally to it, or placing themselves in a position of care for its victims. A decision not to fulfil those obligations for tactical reasons could be justified if it were demonstrated that this was necessary and proportionate to the prevention of more serious abuse. But it would not be sufficient for police to show merely that the Child's Play operation reduced more harm than it inflicted overall. Nor should it be sufficient for police to claim that, since the specific abuse would have occurred in the absence of the operation, they had no particular moral obligation to try to prevent it.

8 Conclusion

As both the Child's Play and the Worboys cases illustrate, the consequences of police decisions to refrain from intervening to prevent harm can have serious implications for the rights and well-being of vulnerable people. It remains unexplored both in scholarship and practice whether and when deliberate inaction by police and other omissions to prevent harm might need to be justified to those harmed, or indeed to the public in whose name and for whose benefit the police claim to operate. In this paper, we have addressed this gap, showing how the special moral obligations of police combine an overarching duty to prevent crime-related harm, alongside specific moral obligations.

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Conflict of interest The authors declare that they have no conflict of interest.

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