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## Good Faith as a Normative Foundation of Policing

*Abstract.* The use of deception and dishonesty is widely accepted as a fact of life in policing. This paper thus defends a counterintuitive claim: Good faith is a normative foundation for the police as a political institution. Good faith is a core value of contracts, and policing is contractual in nature both broadly (as a matter of social contract theory) and narrowly (in regard to concrete encounters between law enforcement officers and the public). Given the centrality of good faith to policing, dishonesty and deception on par with fraud are justified only as a narrowly circumscribed investigative tool that is constrained by institutional commitments to the fair distribution of security and the rule of law. The practical upshot is the preclusion of most dishonest and deceptive police tactics on par with fraud, leading to an institution that is less proactive and more reactive.

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### 1 Introduction

Consider this ruse in which I participated as a law enforcement officer: Over the course of an investigation, evidence of a crime is discovered leading to a sealed indictment charging the subject of the investigation with violations of federal criminal law. The subject needs to be arrested but is residing in a distant land making arrest difficult for various administrative and political reasons. Option 1: Contact the subject, explain the situation, and invite the subject to return and submit to arrest. Option 2: Think of a ruse that deceitfully induces the subject to return to the U.S., and then surprise the subject with arrest upon arrival in the airport. If we assume these are the only practical options, it seems reasonable to think that option 2 is the most appropriate. There are at least two good reasons for this: First, the subject could simply refuse to return, and—having been informed of the investigation—could destroy evidence of the crime.

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<sup>1</sup> I am grateful for the thoughtful suggestions from the participants in the “Political Philosophy and Policing Workshop,” organized by Jake Monaghan and Stephen Galoob in October 2021. This paper sketches some of the themes I am developing in a book project on police deception and dishonesty.

Second, depending on the nature of the subject's alleged crimes, other people could be at risk while the subject is at large.

Law enforcement officers of all stripes face these kinds of decisions to varying degrees. Although the above ruse is based on a federal investigation with an international connection, the scenario raises issues that are not unfamiliar at the state and local levels of policing. Federal agents, city detectives, and even patrol officers are often faced with situations in which they need (or want) a person to do something. It is often the case that a ruse (or some form of deception and dishonesty) is an effective way to get the person to do the thing. This is more or less how it's always been. Law and policing scholar Jerome Skolnick aptly noted—four decades ago—that the police consider deception “as natural to detecting as pouncing is to a cat.”<sup>2</sup> Given this convention, I will argue in favor of what may seem like a counterintuitive claim: Good faith is a normative foundation for the police as a political institution.

I will try to show that this is a plausible claim based on the following considerations: (1) Good faith is a core value of contracts, and (2) justified policing is contractual in nature.<sup>3</sup> This leads to the preliminary conclusion that good faith is a normative foundation for the police as a political institution. The first premise is relatively uncontroversial in the philosophy of contract law, and I will sketch briefly why that is so. The second premise raises a host of objections—both theoretical and practical—and will need to be explained and qualified in more detail. One objection is that policing is simply not something that is “contractual in nature.” I will thus consider why it is plausible to think of policing broadly as contract-like (in the context of social

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<sup>2</sup> Jerome H. Skolnick, ‘Deception by Police’, *Criminal Justice Ethics* 1 (1982): 40.

<sup>3</sup> I have included the term “justified” simply to distinguish unjustified policing from activity that is not policing at all: A constantly deceptive, fraudulent police force that governs outside the rule of law is, strictly speaking, still is a police force

contract theory), as well as narrowly (in the context of concrete encounters between law enforcement officers and the public).

A second objection is raised by the practical concerns noted in the ruse scenario above: Perhaps good faith cannot be a normative foundation for the police given that the practical nature of the police role entails enforcing the law through dishonesty and deception (which is inconsistent with good faith). I respond by qualifying my thesis such that dishonesty and deception are justified only as a narrowly circumscribed investigative tool constrained by institutional commitments to the fair distribution of security and the rule of law. The practical upshot is the preclusion of most dishonest and deceptive police tactics on par with fraud, leading to an institution that is less proactive and more reactive.

## **2 What is Good Faith?**

A familiar claim in the philosophy of contract law is—as Daniel Markovits puts it—that “good faith [is] contract’s core value.”<sup>4</sup> Claiming that something is a “core value” in the law need not depend on anything particularly mysterious. There need only be a normative backdrop recognized by the law, such as a collective, positive moral conception to which institutions have some sort of obligation. There is indeed a long history of practical, legal, and philosophical thought—including various social contract theories—based upon a disposition of good faith in our covenants and reciprocal dealings with others.

This normative backdrop has been codified widely. Richard R.W. Brooks has described the contractual duty of good faith as an “ancient doctrine” that was “[a]lready timeworn when it first appeared in the formal rules governing sales in Roman antiquity” and is now “broadly

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<sup>4</sup> Daniel Markovits, ‘Good Faith is Contract’s Core Value’, in Gregory Klass, George Letsas, & Prince Saprai (eds.), *Philosophical Foundations of Contract Law* (New York: Oxford, 2014), 272.

incorporated in national regimes, international law, and transnational legal orders.”<sup>5</sup>

Contemporary formalizations in the United States include the *Restatement (Second) of the Law of Contracts*, stating that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement,” and the *Uniform Commercial Code* (U.C.C.), stating that “[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.”<sup>6</sup> More broadly, the *United Nations Convention on Contracts for the International Sale of Goods* reads: “In the interpretation of this Convention, regard is to be had to ... the observance of good faith in international trade.”<sup>7</sup> Even where good faith has not been incorporated explicitly, similar principles have been adopted to exclude bad faith.<sup>8</sup>

But what, exactly, is good faith? Roughly, it is a disposition of honesty in contractual dealings, including reaching agreements and the faithful adherence to the scope, purpose, and terms of agreements.<sup>9</sup> And, obviously, good faith precludes bad faith—with bad faith calling into question whether the parties to a contract deal with each other honestly. I will say more about honesty below, but it helps to first consider what good faith does *not* entail.

Good faith does not require contractors to be altruistic Good Samaritans, so to speak. Suppose I want to purchase a rare baseball card valued at \$2,000. And suppose I have a friend who owns the card—and who would strongly prefer to keep the card—but who is in desperate

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<sup>5</sup> Richard R.W. Brooks, ‘Good Faith in Contractual Exchanges’, in Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin, & Henry E. Smith (eds.), *The Oxford Handbook of the New Private Law* (New York: Oxford, 2020), 497-512.

<sup>6</sup> *Restatement (Second) of Contracts* § 205 (Am. Law Inst. 1981); U.C.C. § 1-304.

<sup>7</sup> *United Nations Convention on Contracts for the International Sale of Goods*, S. Treaty Doc. No. 98-9, art. 7 (1983).

<sup>8</sup> In England, Lord Mansfield claimed that good faith underscores all contractual dealings, though generally “English common law is said to rely on other devices, particularly principles of estoppel and interpretation, to exclude bad faith in exchange settings.” Brooks (2020) (citing *Boone v. Eyre* [1777] 126 Eng. Rep. 148 (K.B.); *Carter v. Boehm* [1766] 97 Eng. Rep. 1162, 1164 (K.B.)).

<sup>9</sup> For example, Book 5, Title I, Section 1375 of the Civil Code of Quebec states that “[t]he parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.”

need of cash. If I leverage the situation, drive a hard bargain, and purchase the card from my friend for \$1,000, then there is no obvious way that I acted in bad faith. Why is this so?

If there was something wrong with the substance or terms of the agreement with my friend—or the procedures through which the agreement with my friend were entered—there are separate legal doctrines to deal with those concerns (such as the doctrine of unconscionability).<sup>10</sup> But as long as I dealt with my friend with a disposition of honesty—such that my friend could make a decision freely—then I have acted in good faith. I use “freely” simply in the sense that I did not disguise my intentions or manipulate my friend’s expectations regarding the terms of the agreement in a way that affected my friend’s ability to make an informed decision to close the deal. In other words, good faith does not require me to *look out* for my friend as if I were acting as his *fiduciary* (which is often said to require one “to treat his principal as if the principal were he”).<sup>11</sup> Instead of some sort of loyalty to my friend, good faith requires a disposition of honesty in reaching agreements and the faithful adherence to the scope, purpose, and terms of agreements.<sup>12</sup>

So one way to promote good faith is an emphasis on honest dispositions. This is in part based on the doctrine that contracts must generally be apparent from the terms of the agreement, rather than secret, hidden intentions of the parties. Accordingly, below I sketch how honesty

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<sup>10</sup> I examined unconscionability as it relates to policing in Luke William Hunt, *The Retrieval of Liberalism in Policing* (New York: Oxford University Press), chapter 4, arguing that agreements between the police and informants are unjustified to the extent that they deviate from the bargaining norms that underpin the doctrine of unconscionability.

<sup>11</sup> On these points, see Markovits (2014), at 277 (quoting *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 593 (7th Cir. 1991)), arguing that “[g]ood faith...does not require contracting parties to display substantive other-regard or altruism, preferring their partners’ interests over their own, or even weighting the two interests equally, within their contract.” For a broader analysis of fiduciary law as it relates to political theory, see Stephen R. Galoob & Ethan J. Leib, ‘The Core of Fiduciary Political Theory’, in D. Gordon Smith & Andrew Gold (eds.), *Research Handbook on Fiduciary Law* (2018), 401-17.

<sup>12</sup> See, e.g., *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, L.L.C.*, 50 A.3d 434, 440–41 (Del. Ch. 2012) *aff’d in part, rev’d in part on other grounds*, 68 A.3d 665 (Del. 2013).

promotes trusting interpersonal and institutional relationships, as well as how there is tension between honesty and the police role.

### 3 Honesty, Good Faith, and Fraud

The pursuit of security—discussed in the next section—is perhaps the central goal of policing, but it is not the only goal. Policing is also about the pursuit of truth, which creates a paradox given the police’s reliance on untruth. For if we assume that honesty is the virtue of being disposed to not purposefully distort the facts as one sees them for good motivating reasons—a virtue required in cooperative relations with others—then it may seem that honesty has little place in much of policing.<sup>13</sup> Policing often involves tactics that fall completely outside the spectrum of honest thoughts, statements, and actions. Consider law enforcement tactics such as the use of interrogation (intentionally misleading a suspect to get something from the suspect), informants (tasking a person to act as an agent of the state and acquire something under false pretenses), and ruse, sting, and undercover operations (constructing artificial scenarios to manipulate others).

These law enforcement tactics make it seem like the police role entails operating outside the entire spectrum of honesty—acting in ways requiring a *deliberate dishonest disposition* (“DDD”). And this raises the question of whether a DDD and treating persons with respect are mutually exclusive (and whether that matters to the police institution). The tension is obvious because a DDD seems necessary for the noted law enforcement tactics and yet it is also

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<sup>13</sup> This account generally follows Christian B. Miller, *Honesty: The Philosophy and Psychology of a Neglected Virtue* (2021), though other accounts of honesty are consistent with my argument. For a sample of other philosophical work related to honesty, see Sissela Bok, *Lying: Moral Choice in Public and Private Life* (1978); Bernard Williams, *Truth and Truthfulness* (2002); Thomas L. Carson, *Lying and Deception: Theory and Practice* (2010).

important (presumably) for the state to treat members of communities with respect and generate trust and legitimacy (which seems inconsistent with a DDD).

One way to assuage this tension is to consider motivations, beliefs, and goals that drive police dishonesty. It is plausible to think that we should evaluate police deception and dishonesty in light of the reasons for the deception and dishonesty—which are presumably motivated by the goals of security and crime reduction. Still, few would argue that the motivation to pursue these law enforcement ends always justifies deceptive and dishonest means. Consider the different questions raised by planting evidence to secure a conviction, lying about a colleague’s abuse of a criminal suspect (or lying during testimony), and, on the other hand, engaging in a deceptive operation to rescue a victim of sex trafficking.<sup>14</sup> In the context of policing, then, we will have to consider the paradox of whether dishonesty is sometimes compatible with good faith. If it is not, how do we characterize the value of honesty in policing when lying and dishonesty seem morally justifiable in some policing contexts but not others?

Taking a step back from specific (deceptive and dishonest) law enforcement tactics, one can see how honesty is important to the police broadly as a *political institution*. If honesty promotes healthy, trusting interpersonal relationships, then it is plausible to think that honesty promotes and strengthens trust and legitimacy at the societal and institutional levels.<sup>15</sup> This is an especially timely issue given recent fractures in police-community relationships, requiring us to think about broader cultural factors within policing that encourage dishonesty at the group level and shape its development in the police institution. An example is the phenomenon known as the

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<sup>14</sup> See, e.g., Collin O’Neil, ‘Lying, Trust, and Gratitude’, *Philosophy & Public Affairs* 40.4 (2012): 301-33, for an account of the differences between deception and lying.

<sup>15</sup> For recent work on how groups of people can cause epistemic harm by being opaque or lying, see T. Ryan Byerly, ‘Group Intellectual Transparency: A Novel Case for Non-summativism’, *Synthese* 200, no. 69 (2022): 2; Jennifer Lackey, *The Epistemology of Groups* (Oxford: Oxford University Press, 2020).

“blue wall of silence,” the informal code among some police officers not to report on a colleague’s misconduct but instead plead ignorance of another officer’s wrongdoing or claim to have not seen anything. The code is motivated by the view that (some) institutional dishonesty is honorable and is justified by the larger goal promoting security and reducing crime in society.

Good faith pushes back against these codes by standing for the principle that the police should fulfill their obligations in a way that protects the reasonable expectations of those being policed. I have alluded to examples in which the police seem to be justified in their departure from a good faith disposition (e.g., a deceptive operation to rescue a victim of sex trafficking), suggesting that good faith is not a binary concept inasmuch as there is a spectrum of good faith. Considering each end of the spectrum, we can safely say that good faith requires more than simply not engaging in fraud, but it requires less than fiduciary loyalty.<sup>16</sup>

Given the range and complexity of good faith, I want to narrow the paper’s scope and focus on a clear case of bad faith in the proceeding sections: fraudulent dealings. In addition to the obvious tension with honesty, fraud constitutes a clear case of bad faith in policing because it undermines the rule of law and the reciprocal stance of contracting parties.<sup>17</sup> First, though, we should consider the ways that policing may be construed as contractual.

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<sup>16</sup> See Markovits (2014), 272 (citing *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 594–5 (7th Cir. 1991)).

<sup>17</sup> More broadly, good faith raises the values of both honesty and transparency. Of course, these values do not necessarily mean that, say, party 1 must disclose the highest they are willing to pay for something that party 2 is selling. However, transparency does mean that the parties cannot rely on their hidden, undisclosed intentions to misrepresent or alter their outward, objective words and actions. See *Lucy v. Zehmer*, 196 Va. 493; 84 S.E.2d 516 (1954). Likewise, it may not be legally wrong to dishonestly tell someone the maximum one is willing to pay for something (though such lies may be morally wrong). However, it would be legally wrong to use deception or dishonesty to seek or obtain an unjust advantage—or to injure the rights or interests of others—that rises to the level of fraud. See Stuart P. Green, *Lying, Cheating, and Stealing* (Oxford: Oxford University Press, 2006), 150. The point is that while good faith and fraud are distinct doctrines, they share overlapping values that help define the outer limits of good faith. I avoid some of the grey areas by focusing on clear cases of bad faith (fraud).



#### 4 How is Policing Contractual?

Things don't have to be this way, but, as a matter of contingent fact, the police have been entrusted to promote that facet of justice that we broadly call security. As with other state institutions, the police institution is supposed to be based on legitimacy. Legitimacy is in part a function of authority, which is in part based on reciprocal public relationships generating rights and duties. Reciprocal relationships by their nature require good faith. But this presents a paradox in policing: Despite the necessity of good faith in reciprocal relationships, the police institution has embraced deception, dishonesty, and bad faith as tools of the trade for providing security—indeed, it seems that providing security is impossible without those tools.

This paradox is plausibly related to the erosion of the public's faith in the police institution and the weakening of the police's legitimacy: Good faith seems important to the police institution, but so does deception, dishonesty, and bad faith.<sup>18</sup> This section begins to sketch an answer to the puzzle by considering how some of our assumptions about policing and security might be unjustified. Deceptive, dishonest, and bad faith tactics are often unjustified because they undermine the fair distribution of security (and thus legitimacy), as when such tactics enhance the security of some at the expense of others.

We thus turn to considerations regarding how policing is contractual in nature in terms of, first, broad political dealings conceived through social contract theory and legitimacy; and,

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<sup>18</sup> Unfortunately, the empirical data regarding the narrow topic of this paper is often lacking. However, there is a growing body of empirical work that is relevant to proactive policing generally (and its relation to community trust specifically), which often involves the use of bad faith, deception, dishonesty. See, for example, National Academies of Sciences, Engineering, and Medicine, *Proactive Policing: Effects on Crime and Communities (Consensus Study Report)* (Washington: National Academies Press, 2018); David Weisburd and Anthony A. Braga (eds.), *Police Innovation: Contrasting Perspectives* (Cambridge: Cambridge University Press, 2019)

second, in the context of narrow political dealings, such as agreements between specific individuals and government agents.<sup>19</sup>

#### **4.1 Social Contracts and Legitimacy<sup>20</sup>**

A familiar account of police legitimacy is “a property of an authority or institution that leads people to feel that authority or institution is entitled to be deferred to and obeyed.”<sup>21</sup> Receiving explicit consent might be a surefire way to receive authority, but we know that receiving such consent from everyone governed in a community is a practical impossibility. As a practical matter, then, one might say that the police institution has authority inasmuch as there is reciprocity between the police and the community through honest communication and agreements—conducted in good faith—regarding the enforcement of applicable laws, regulations, and policies. The idea, then, is that good faith is fundamental to the legitimacy of reciprocal relationships within the polity and frames the correlative rights and duties forged by those relationships.

Although the state may in principle demand that persons do their part in law enforcement, persons are conceived as entrusting certain tasks (governing, judging, policing) to agents of the state in order to permit a mutually beneficial division of labor. It is thus plausible to think that

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<sup>19</sup> Markovits’ assessment of good faith is apt here: “Good faith...connects the solidarity of the contract relation...to the broader formal equality that lies at the bottom of the democratic...societies in which contract typically flourishes.” Markovits (2014), 292.

<sup>20</sup> It is worth noting doctrinal analogues to the social contract such as *relational contracts*. Relational contracts consist of long-term relationships and intentions that the respective roles of the parties will be performed with collaboration, communication, cooperation, integrity, mutual trust, and fidelity. These are the values and concerns that undergird long-term political and institutional relations between communities and institutions such as the police. In short, societal arrangements steeped in social contract—agreements between the government and the governed—are relational in nature even if they cannot be captured exhaustively in a literal, explicit contract. They are instead derived from long-term relationships based on roles that require communication, cooperation, and mutual trust steeped in honesty. See *Bates v. Post Office Ltd (No 3)* [2019] EWHC 606 (QB). These elements are different from those involved in a fiduciary relationship. *Ibid.*

<sup>21</sup> Jason Sunshine & Tom R. Tyler, ‘The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing’, *Law & Society Review* 37.3 (2003): 513-48.

good faith is connected to modes of political deliberation and agreement—such as public reason, a concept standing for the idea that government principles should be justifiable to all those to whom the principles are meant to apply—through which persons entrust the state with (legitimate) authority. It is through entrustment that the police can be thought of as having an obligation to promote security (and that persons can be thought of as having a correlative right to be secured by the state) in good faith.<sup>22</sup>

I assume that the security of all persons by social institutions is a basic component of justice and determining the extent to which a polity is justified. Security is a complex concept. It means much more than mere safety because security raises questions of depth (e.g., various *ways* of living, not simply staying alive) and breadth (the distribution of security across various groups).<sup>23</sup> Law enforcement and crime reduction are related to the facets of security that justify the polity over the state of nature: People often need protection from others, and one important way to provide security is through a centralized enforcer who can reduce and stop harm and violence by other members of the polity. Most people assume that political power and authority are limited, meaning that persons have a right to be secured legitimately within the bounds of authority. This suggests a moral foundation for limitations on the ways that enforcement may occur (security from enforcers).<sup>24</sup> The upshot is that states act illegitimately when they impose an unfair distribution of security on communities, relying on (deceptive and dishonest) tactics that affect the safety and security of some groups but not others.

. There is a strong presumption that failed reciprocation by community members (such as criminality) is dealt with in accordance with the rule of law and respect for one's personhood.<sup>25</sup>

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<sup>22</sup> Hunt (2019).

<sup>23</sup> Jeremy Waldron, *Torture, Terror, and Trade-Offs* (Oxford: Oxford University Press, 2010), 116-22.

<sup>24</sup> See generally John Locke, *Two Treatises*.

<sup>25</sup> See Lon Fuller, *The Morality of Law* (1969); Joseph Raz, *The Authority of Law* (2009).

It is this reciprocal relationship—and how the state deals with breakdowns in the relationship—that highlights the role of good faith. The police institution’s deceptive defection from cooperative relations—taking advantage of the community’s trust—is a correlative of force inasmuch as defecting from reciprocal arrangements leads to enmity.

A point of clarification: Although force is not the central topic of this paper, it does raise an important question regarding the police’s use of deception, dishonesty, and bad faith. I assume that some uses of police force and violence are clearly justified, with an easy example being an active shooter in a school. Can we thus say that whenever force would be justified to make an arrest, dishonesty and deception would be as well? And if so, then is good faith a foundation of policing similar to how principles constraining the use of force are? I think something like this is right, and the view is indirectly endorsed by the “emergency constraint” in my prerogative power test in section 5.

My point here is that the police’s pervasive use of proactive deception on par with fraud in non-emergency situations (e.g., to gather evidence against someone for using or selling illegal drugs) is a form of preemptive defection from good faith dealings. This is especially the case if one accepts the view that much criminal “deviance” is a (reasonable) *response* to bad faith policing that imposes an unfair distribution of security.<sup>26</sup>

#### ***4.2 Concrete Agreements and Fraud***

Now consider the relevance of good faith in narrow political dealings such as agreements between individuals and the police. Arrangements between prosecutors and cooperators and between police and informants are in many ways like a contract in that both sides voluntarily enter into an agreement with the intent that each side will assume certain obligations under the

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<sup>26</sup> See, e.g., Tommie Shelby, “Justice, Deviance, and the Dark Ghetto,” *Philosophy & Public Affairs* 35.2 (2007).

agreement. If this is accurate, then certain background norms and principles of contract law—including good faith—might have weight with respect to such agreements in addition to the more familiar sources of law.<sup>27</sup> We can see this by examining different conditions—including both procedural and substantive context—under which people agree to bargain with prosecutors and police.

For example, a cooperation agreement is an agreement under which a person agrees to plead guilty and testify for the government in exchange for leniency.<sup>28</sup> In *United States v. Khan*, the Second Circuit Court of Appeals noted that “cooperation agreements, like plea bargains, may usefully be interpreted with principles borrowed from the law of contract,” and, in *United States v. Hon*, the court noted that “ordinary contract principles apply to [the] interpretation of cooperation agreements.”<sup>29</sup> There is thus good reason to think that the normative principles of contract law might provide guidance in evaluating similar arrangements—such as those involving the police and informants, for instance

Although these exchanges are legal, the exchange relationship may be unjustified based upon norms and values that reach beyond legality.<sup>30</sup> Institutional embodiments of good faith represent important background norms given the history of practical, legal, and philosophical thought based upon a disposition of good faith in our covenants and reciprocal dealings with

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<sup>27</sup> See Hunt (2019), chapter 4.

<sup>28</sup> See Adina Schwartz, ‘A Market in Liberty: Corruption, Cooperation, and the Federal Criminal Justice System’, in John Kleinig & William C. Heffernan (eds.), *Private and Public Corruption* (2004), 176-77 (examining normative questions with respect to plea and cooperation agreements).

<sup>29</sup> *United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir. 1990), cert. denied, 499 U.S. 969 (1991); *United States v. Hon*, 17 F.3d 21, 26 (2d Cir. 1994); see also *United States v. Ganz*, 806 F.Supp. 1567, 1570 (S.D.Fla. 1992) (“The contract between the parties required Mr. Ganz to provide information, truthful testimony, and to work under the direction of Customs in an undercover capacity”).

<sup>30</sup> Schwartz emphasizes norms against “corruption” given that the state is the sole “buyer” in this human liberty market, meaning that the state can exploit the seller (defendant) because the seller has no other buyers. If the result is an exceedingly one-sided bargain in favor of the state, one might think the bargain is a form of corruption inasmuch as the state reduces the defendant’s sentence (increases defendant’s liberty) based on a “bribe.” (2004), 177-180.

others. The *investigation phase* of a case opens cooperators (or informants) to a wider range of assistance activities that raise issues of good faith given that informants are tasked with engaging in dangerous operations on behalf of the police. Consider informants who have been leveraged by the police. An arrangement between a leveraged informant and the police is in many ways like a contract in that both sides voluntarily enter into an agreement with the intent that each side will assume certain obligations under the agreement. Here is a sketch of how it might work:

- (1) The police indicate that they have evidence that a woman—Jane—committed a crime that exposes Jane to potential punishment (incarceration).
- (2) The police make Jane an offer: If Jane acquires evidence or information for the police (including through conduct that would otherwise be illegal) then the police will consider advising the prosecutor (responsible for prosecuting Jane’s alleged crime) of Jane’s assistance so the prosecutor can consider recommending that Jane receive a downward department from the punishment for which she is eligible.
- (3) Jane accepts the offer and performs according to the terms of the bargain.

Under this common formulation, it is plausible to think that broad principles of contract law have weight with respect to the underlying agreement between Jane and the police.

For example, (2) above expresses the police’s willingness to enter into an agreement with Jane and an invitation to Jane to conclude the agreement by expressing her assent to the deal in (3). If this is like an offer (and acceptance), then it is plausible to think that various norms of offers and acceptance are relevant here—such that Jane and the police knowingly and willingly agree to the overall arrangement and its specific terms. The above example also seems to suggest that something is bargained for by Jane and the police (“consideration”), namely: Jane will engage in certain activities to acquire evidence for the police in exchange for the police advising the prosecutor of her assistance. We can thus see how the above scenario is different from a

scenario in which Jane or the police simply make a gratuitous promise without consideration (without a bargained-for exchange).

The point is simply to suggest that the bargaining process raises the normative principles underpinning contractual relations and gives those principles weight regarding questions about the justification of agreements between the police and informants. This is especially relevant with respect to a contractual disposition of good faith that entails honesty. Legal philosophers such as Seana Shiffrin have taken the position that contracts raise moral obligations based upon promissory elements (in addition to legal obligations). In other words, parties cannot remove the promissory element of contracts—and any underlying moral elements—by simply declaring that one has done so (such as when the police state that they do not make promises to informants).<sup>31</sup> Irrespective of that line of reasoning, if one construes the agreement between Jane and the police as *contract-like*, then it raises bargaining principles of contract law such as good faith.

Suppose you are skeptical and think the connection between Jane's scenario and a background norm of good faith is tenuous. Let me, then, try to make the modest case that agreements such as Jane's require a disposition of good faith that minimally precludes acts by the police that are on par with *fraud*. Instead of a legal claim of fraud, I again have in mind a normative backdrop recognized by the law: a collective positive, moral conception to which institutions have some sort of obligation. In the case of fraud, one might say that the police institution is constrained by a background norm that precludes dishonesty and deception in the form of intentional or negligent misrepresentations of fact that the police use to obtain an unjustified advantage or to harm the interests of another (such as Jane, such that Jane in fact relies on the misrepresentation and is harmed).

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<sup>31</sup> Seana Valentine Shiffrin, 'Is a Contract a Promise?', in Andrei Marmor (ed.), *The Routledge Companion to Philosophy of Law* (2012), 241-57.

Here is an example. In *Alexander v. DeAngelo*, the police asked an informant (who was facing a lengthy prison term) to have oral sex for money with the target of an investigation so that the police could charge the target with soliciting a prostitute.<sup>32</sup> Upon agreeing, the police wired the informant for the encounter and gave her a napkin, instructing her to spit the target's semen into it to provide physical evidence of the sex act. The court ruled against the informant's subsequent legal claim—based in part on the informant's supposed bargaining freedom.<sup>33</sup>

Ironically, the court's rationale fails to consider how bargaining freedom is *undermined* given the facts of the case indicating a lack of good faith. This is particularly clear here because the police threatened the informant with a 40-year prison sentence. In fact, the informant's alleged crime would have made her subject to a prison sentence of only 6-10 years.<sup>34</sup> The police's lack of good faith—which is on par with the above description of fraud—enhanced their leverage over the informant and undermined the informant's bargaining freedom (by denying the ability to make an informed choice about whether to work with the police). A lack of good faith in such dealings can have profound consequences on those being policed.

## 5 Objections and Conclusions

The ruse scenario with which this paper began raises a central objection to my argument: Good faith cannot be a normative foundation for the police because the practical nature of the police role entails enforcing the law through dishonesty and deception, and that is inconsistent with good faith. To put it another way, good faith is not relevant (not a normative foundation, at least) because *policing isn't like that*. Policing is instead a gritty job that requires getting one's

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<sup>32</sup> *Alexander v. DeAngelo*, 329 F.3d 912 (2003).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*



hands dirty—including through dishonesty, deception, and the betrayal of trust—in order to promote security and safety in society. I address this concern by considering how bad faith is a narrowly circumscribed investigative tool constrained by institutional commitments to the rule of law.

### ***5.1 Policing Isn't Like That***

I have suggested that good faith is not a binary concept inasmuch as it falls on a spectrum (for example, between fraud and fiduciary). Although it would be impossible to account for the entire spectrum, I hope to provide reasons that show how good faith should be the rule and not the exception in policing. The question on which I want to focus is whether a deliberate dishonest disposition (DDD) is so enmeshed in the police role that the police may engage in bad faith and trust betrayal whenever it serves a law enforcement end (putting aside less controversial issues such as lying on the witness stand, planting evidence, and so on). As a practical matter, most law enforcement agencies require that certain thresholds be met before engaging in, say, a deceptive undercover operation. So even from a basic administrative perspective, law enforcement agencies cannot engage in all forms of deception willy-nilly. What is there to say for good faith as a deeper normative constraint?

We should note that—for many people—the police are the major connection between the community and the state. The police patrol streets and highways; they question people who seem “suspicious” and they write tickets; they respond to automobile accidents, emergencies, and domestic disputes; they conduct surveillance on foot and in vehicles. In short, they touch many parts of everyday life. And yet they are officially sanctioned to lie, deceive, betray trust, and break what would otherwise be the law. This not only occurs in sophisticated undercover or ruse

operations, but also informally while on patrol—as when a suspicious person is interrogated on the street (and perhaps then brought to the stationhouse for more formal interrogation).<sup>35</sup>

There are a number of cases showing how the police intentionally prompt confessions by misrepresenting the seriousness of a suspect’s crime.<sup>36</sup> For this sort of misrepresentation to violate a *legal* right, it must result in an *involuntary* confession.<sup>37</sup> However, general bad faith by the police regarding evidence in the police’s possession does not typically render a defendant’s confession involuntary.<sup>38</sup>

We can compare this sort of conduct to the doctrine of “puffery” in commercial sales.<sup>39</sup> Although a business may not engage in fraudulent advertising (misrepresenting specific facts), businesses are free from liability when using advertising tactics that invoke (exaggerated) opinions about the quality of their product.<sup>40</sup> Accordingly, one might argue that if it is okay to advertise the “best vacuum cleaner in the universe” on television, then surely it is okay for the police to engage in a bit of puffery to achieve a justified law enforcement end. But the examples that have been discussed are less like puffery (telling a suspect (insincerely), “I don’t think what you did is a big deal”) and more like fraud (telling a suspect (falsely), “You should agree to be an informant because you’re facing forty years”). Even if police conduct is more like puffery, there is reason to think police should generally refrain from such a disposition. To put it a bit glibly,

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<sup>35</sup> I examined deceptive interrogation techniques in Hunt, ‘Legal Speech and Implicit Content in the Law’, *Ratio Juris* 29.1 (2016): 3-22

<sup>36</sup> See, e.g., *State v. Walker*, 493 N.W.2d 329, 334 (Neb. 1992) (holding that a defendant’s confession was not invalidated because of the police’s misrepresentation that consensual sex with a minor is not a crime); *Conner v. McBride*, 375 F.3d 643, 653 (7th Cir. 2004) (denying relief to a defendant that confessed after police indicated that defendant’s conduct amounted to manslaughter, not murder).

<sup>37</sup> See, e.g., *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

<sup>38</sup> See, e.g., *Fraizer v. Cupp*, 394 U.S. 731, 739 (1969).

<sup>39</sup> See Seana Valentine Shiffrin, *Speech Matters* (2014), 188-91, for an illuminating discussion of this doctrine as relates to institutions generally.

<sup>40</sup> *Restatement (Second) of Contracts*, § 168, § 168 cmts. B& c, § 169 (1981).

state officials in liberal democracies should be more trustworthy than vacuum cleaner advertisements.

The question is whether the police should even be on a spectrum of bad faith given commitments of political morality—and, if so, when? Consider an analogy to police brutality. Police have a range of legal options regarding their use of violence and force—including the intensity and duration of that violence and force—to fulfill their law enforcement obligations. But even if a department justifiably relies on use-of-force continuums, it would be odd to say that the police may act on a spectrum of *brutality* because that is a very different kind of spectrum. We simply say that all brutality is wrong and that police should not operate on that spectrum. I will not make that strong a claim with respect to bad faith, but I will come close given the fundamental role of good faith in political arrangements discussed in the prior sections.

Shiffrin’s position about institutional duties of sincerity is apt here: “The police have institutionally grounded reasons not to lie, even effectively, to achieve their valid and admirable purposes. The practice of lying is in tension with the role the police play and should play in our scheme of epistemic moral cooperation.”<sup>41</sup> Shiffrin is referring to the role police play in promoting moral agency through what I have described in terms of the norms of reciprocal relationships. In other words, recognizing our moral duties involves collective action, cooperation, and reciprocation that requires a “reliable epistemic environment.”<sup>42</sup>

Shiffrin’s position helps show how a background norm of good faith underpins voluntary (institutional) arrangements in democratic societies. This is especially the case given that institutional commitments to legitimacy and the rule of law—which entail good faith interactions—are a way to promote respect for moral agency and personhood. If the police—as

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<sup>41</sup> Shiffrin (2014), 197.

<sup>42</sup> *Ibid.*

agents of the state—are sanctioned to engage in widespread acts of bad faith, deception, dishonesty, and (sanctioned) law-breaking, then there is a sense in which the police as an institution erode both the rule of law and trust within some communities—creating a culture of fear and suspicion in some (not all) communities.<sup>43</sup> The upshot is that by acting in bad faith, the police subvert the foundation of a particular type of political community, namely: community based on respect for the moral agency of persons engaged in reciprocal political arrangements.

### ***5.2 Justifying a Deliberate Dishonest Disposition***

The lingering question is when, if ever, there is what Shiffrin calls a “justified suspended context” in which the police’s bad faith might be permissible. By suspended context Shiffrin means that “the normative presumption of truthfulness is suspended because these contexts serve other valuable purposes whose achievement depends upon the presumption’s suspension and the fact that the justification of the suspension is publicly accessible.”<sup>44</sup> The important point here is her assumption about wrongdoers generally: the assumption that “we cannot do just anything to wrongdoers on the ground that they have strayed, even seriously strayed, from the moral path, and that we cannot entirely abandon them as members of our moral community.”<sup>45</sup> This assumption is uniquely relevant in the context of political morality and the state’s treatment of persons over whom it has power.

There are, for instance, a great many ways that the police could enhance their ability to enforce the law, reduce crime, and promote security. We can think of shocking tactics (such as torture and brutality) and less shocking tactics (a DDD consisting of bad faith, deception, and

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<sup>43</sup> See generally National Academies of Sciences, Engineering, and Medicine, *Proactive Policing: Effects on Crime and Communities (Consensus Study Report)* (Washington: National Academies Press, 2018); David Weisburd and Anthony A. Braga (eds.), *Police Innovation: Contrasting Perspectives* (Cambridge: Cambridge University Press, 2019).

<sup>44</sup> Shiffrin (2014), 16.

<sup>45</sup> *Ibid.*, 38.

trust betrayal). Assuming those tactics are unjustified in our interactions and agreements with others generally, then we have to answer why they are justified in the interactions and agreements between the police and those suspected of wrongdoing.

One answer is the value of security. However, we do not want security at all costs (torture, brutality, and so on). Again, the concept of security is also about how safety is distributed within society (equitably between various societal groups), as well as the maintenance of particular ways of living (rather than simply safety and staying alive).<sup>46</sup> In the same way we don't want security that means living with torture and brutality, we have to ask whether we want security that means living with a police institution that relies on bad faith that is on par with fraud and deviations from the rule of law with respect to some groups but not others.

Is there a grey area—a “justified suspended context”—in which the police may embrace a DDD on par with fraud? Although it would be impossible to discern a bright-line rule, I have elsewhere defended a broad framework (*the prerogative power test*) for determining when the police may deviate from rule of law of principles.<sup>47</sup> I think something along these lines might provide a rough framework here given the prior discussion regarding the connections between institutional bad faith, legitimacy, the rule of law, and fraud. The test suggests the police may use their prerogative power to deviate from the rule of law according to the following constraints:

- (1.) *Purpose constraint*: The power must be wielded for public good/national security;
- (2.) *Prudential constraint*: A legislative action is not viable;
- (3.) *Personhood constraint*: The power must not be an affront to liberal personhood;
- (4.) *Emergency constraint*: The power must be reserved for emergencies that involve:
  - (a) An acute threat of death or serious bodily harm, and
  - (b) The threat cannot be averted without wielding the power.<sup>48</sup>

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<sup>46</sup> Waldron (2010), 116-22.

<sup>47</sup> Hunt (2019), 189-200.

<sup>48</sup> *Ibid.*, 197. I develop and further explain the test's application to police deception and dishonesty in a forthcoming book project. I first invoked this framework (which draws on Locke's theory of prerogative power, coupled with the doctrine of executive emergency power explicated in U.S. Supreme Court jurisprudence) as a

It seems plausible that the framework is relevant in the present context regarding good faith given that the framework recognizes an institutional context (including through the prudential constraint), a substantive context (including through the purpose and emergency constraints), and a philosophical context (including through the personhood constraint). The test is strict for good reason. No one seriously questions the need and justification for discretion in policing; to be sure, limited discretion is consistent with the rule of law. But the actual deviation from rule of law principles should have a high bar given that legitimacy through governance by law (free from bad faith that is on par with fraud) is foundational to liberal (and other) societies.

Would the ruse scenario at the beginning of the paper be justified under the above framework? If we assume the first three components were met (the ruse supported a legitimate law enforcement purpose serving the public good; there was no viable way to legislatively sanction any underlying bad faith and fraud in the ruse; and the ruse was not an affront to the suspect's personhood), then it depends on the nature of the underlying crime. Was there an emergency—involving a threat of serious bodily injury—that could not be averted without bad faith and fraud? If so—if the case, say, involved crimes against children—then perhaps the ruse was justified. If not—if the case, say, involved the distribution of illegal drugs—then perhaps the ruse was not justified. Of course, two people might reach different conclusions on these questions given that the analysis is based on a rough framework and we need more facts about the case. The point is there are good reasons to radically reconsider the extent to which the police should have an open-ended justified suspended context to act in bad faith.

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model for addressing questions regarding the police's power to engage in Otherwise Illegal Activity, a power that is strictly speaking legal but that involves breaking what would otherwise be an array of substantive laws in an array of non-emergency situations.

On the other hand, how about the police's deceptive and dishonest threat in *Alexander v. DeAngelo*? Recall that the woman in that case was threatened by the police with a 40-year prison sentence when she was in fact facing only a 6-to-10-year sentence. Would such bad faith pass the prerogative power test? No. The police's threat was fraudulent, giving them an unjustified advantage in gathering evidence for the crime of soliciting a prostitute. Soliciting a prostitute involves no emergency or threat of serious injury that justified the police's bad faith; indeed, the fraudulent threat plausibly injured the rights and interests of the woman and was an affront to her personhood.

### ***5.3 From Proactive to Reactive***

I have tried to show that good faith is a core value of contracts and that policing is contractual in nature (both in the context of social contract theory and in the context of concrete encounters between law enforcement officers and the public). This has led to the conclusion that good faith is a normative foundation for the police as a political institution. A central worry about this conclusion is that the practical nature of the police role entails enforcing the law through dishonesty and deception, which is inconsistent with good faith. I have thus tried to show that dishonesty and deception are justified only as a narrowly circumscribed investigative tool constrained by institutional commitments to the rule of law and the fair distribution of security—precluding dishonest and deceptive police tactics on par with fraud outside of emergency situations.

To be sure, my argument leads to the conclusion that the police are not justified in pursuing many of the supposed security enhancements that we think are necessary, including many proactive tactics that rely upon lying, deception, and bad faith. Deceptively defecting from agreements—taking advantage of another's trust—is a correlative of force inasmuch as defecting

from cooperative arrangements leads to enmity. In the domain of policing, proactive policing (not all proactive policing, but some—including tactics that rely on dishonesty and deception to stop crime) can be a form of preemptive defection—a source of enmity between the police and some members of the community that can be observed in each side’s posture of anticipation and distrust.<sup>49</sup> The upshot is that the police institution should become a more reactive and less proactive institution.<sup>50</sup> If we are concerned about the erosion of the public’s faith in the police institution, then it stands to reason that we should hold the police to a disposition of good faith.

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<sup>49</sup> Of course, there is not always a clear distinction between proactive and reactive tactics, and, in any case, proactiveness (including tactics on par with fraud) can certainly be a justified depending on the context (such as emergency situations in which life is at stake). Here, though, it is worth nothing that—for every advocate of proactive policing—there are critics (and empirical data supporting their criticism) of proactive policing—even when the proactive tactics are not directly based on deception and dishonesty. See, for example, Rachel Boba Santos, ‘Predictive Policing: Where’s the Evidence?’ in David Weisburd and Anthony Braga (eds.), *Police Innovations: Contrasting Perspectives*, (Cambridge: Cambridge University Press, 2019), 366-98.

<sup>50</sup> This conclusion builds on my earlier work regarding the liberal limits of policing (Hunt, 2019), as well as recent work by philosophy and police scholars regarding “legitimacy-risk profiles.” Jake Monaghan, ‘Boundary Policing’, *Philosophy & Public Affairs* 49.1 (2021): 26-50.