Policing Vulnerable People

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The Tasmanian Institute of Law Enforcement Studies (TILES) publishes regular Briefing Papers on topics related to the Institute's research program. Our fourteenth Briefing Paper, prepared by Dr Bartkowiak-Théron and Dr Asquith reviews and critically examines the meaning - as well as the policy and practice implications - of the term 'vulnerability' in the context of policing. The authors illustrate the relevance of current debates on the policing of vulnerability through a number of vignettes drawn from other key policing scholars. They conclude by pointing to new conceptualisations of 'vulnerability' emerging in the field of law enforcement and public health.

Professor Roberta Julian - Co-editor, Director of TILES

Introduction

Vulnerable people, in their capacity as victims, witnesses or offenders, are involved in 75% of police interactions in most international jurisdictions. It is only natural, then, to assume that consideration of community members' vulnerabilities in everyday police work dominates discussions of policing business and quality assurance. We turn our attention to current debates as to how police interact with vulnerable people, and to the policies and legislation that underpin these interactions. This paper outlines the major international paradigms that address the definitional nature of vulnerability, and discusses the ways in which applied policy discussions are relevant to police practice in the field. The authors reached out to scholars on policing vulnerability to contribute illustrative vignettes on the questioning and positioning of vulnerability at the centre of contemporary policing debates.

Saying that vulnerable people are central to current policing priorities is an understatement. Interactions with vulnerable people, in their capacity as victims, witnesses or offenders, constitute 75% of police interactions in most international jurisdictions. It is only natural, then, to assume that consideration of community members' vulnerabilities in everyday police work dominates discussions of policing business and quality assurance (Coliandris, 2015). This is all the more relevant when taking into account issues such as family violence (where children and women are mostly victims or witnesses of abuse) or counter-terrorism (where religious minorities are often the subject of profiling or, vice-versa, the subject of hate crime), which are both placed high on police agencies' strategic priorities.

If vulnerability is omnipresent in the policing world, our scholarly attention needs to inform current debates as to how police can do better at interacting with vulnerable people, as well as drafting policies that are more encompassing of vulnerabilities' ubiquitous and fluid nature. The authors address the major international paradigms that attempt to articulate the definitional nature of vulnerability. They also discuss the various ways in which applied policy discussions are relevant to police practice in the field. Some of the most prominent scholars in policing vulnerability provided their input (included as vignettes) on the questioning and positioning of vulnerability at the centre of contemporary policing debates.

Grass-root and scholarly definitions of vulnerability

There are a number of things to establish in any debate about vulnerability. First, the topic of vulnerability is not new in discussions about policing. At its core, the over-representation of vulnerable people in police interactions, custody, and subsequently in prison, has fuelled a debate about some sections of the population as 'police property' (Reiner, 1998) and as overly-stigmatised in what has been labelled an unfair, essentially white European-based criminal justice system (Cuneen, 2001; Muncie, 2008; Bartkowiak-Théron & Asquith, 2015). What is new is how the concept has slowly permeated the policy context of policing, and how it has slowly been operationalised in most western democratic jurisdictions (Bartkowiak-Théron & Asquith, 2012). Second, vulnerability is not so much a criminological concept; for the most part, as it has its origins in philosophical discussions relating to bio-ethics and to the acknowledged universal fragility of being human (Macklin, 2012; Luna, 2009). Vulnerability became more prominent when these conceptual discussions seeped into legislative considerations of equality and equity before the law. Third, it is important to highlight that the term (preferred by the authors and discussed in Howes, Bartkowiak-Théron & Asquith, 2017) remains contested, although getting traction around the world. Other terminology includes expressions such as 'at risk', 'with complex needs', etc, which all borrow from various disciplinary backgrounds and are also problematic.

	Conceptualising our understanding of vulnerability across attributes
Vignette One	

Faith Gordon, Monash University, Australia

Vulnerability is a contested concept (Walklate, 2011). The definition of 'vulnerability' most commonly relied upon in the criminal justice system in Northern Ireland is that found in the legislation governing the use of special measures in court (1999 Order Art 4). It is the same as the definition used in England and Wales (Ministry of Justice, 2015). The definition relies on a conceptual understanding of vulnerability as being based on mental and physical characteristics rather than the risk of victimisation or the risk of harm caused by victimisation. This fails to take into consideration factors that may be impacting on the resilience of a victim, such as the nature of the crime; a lack of support network; or mental or physical ill-health that does not reach the threshold of that outlined in the legislation. Our research study which analyses the relationships between vulnerability, resilience and access to justice for older victims, challenges the current conceptual understanding of vulnerability as applied to older people within the justice system (Brown and Gordon, 2018). We argue that a key impediment to better support for vulnerable older victims of crime is the outdated and misleading definitions of 'vulnerable' and 'intimidated' found within the legislation. These definitions cause confusion amongst practitioners and older victims, leading to a narrow interpretation of who should have access to special measures and other support. In

interviews and focus groups with older people, there was a rejection of the idea that older people as a group should be categorised as 'vulnerable'.

Featured reference: Brown, K & Gordon, F 2018, 'Older Victims of Crime: Victimisation, Vulnerability and Access to Justice', *International Review of Victimology*, pp. 1- 21.

The terminology clutter does not help with the consolidation of international discussions around evidence-based practice and policy. However, it helps understand the various premises under which practice has been discussed, and the level of risk-aversion that has infused siloed operational practices across a range of individual attributes. We address these points below.

Conceptual origins, terminology and operationalisation

It should come as no surprise that policing scholars and practitioners struggle to agree on a definition of vulnerability (CoP, 2014; Keay & Kirby, 2017). The term has seeped into policing jargon by way of a long history of knee-jerk policy making, which, for the most part, developed in response to policing or political scandals, or emotionally charged and traumatic events. The progressive operationalisation of the term in policy and legislation has always been awkward. Often opposed to the notion of 'resilience', the discourse of vulnerability has traditionally been one of deficiency and risk (Stanford, 2012).

At its core, the word 'vulnerability', from the Latin 'vulnus', denotes a capacity for being wounded psychologically, emotionally or physically, and is often associated with various negative connotations of weakness, lack of agency, and dependency. In the UK, her Majesty's Inspectorate of Constabulary, in 1997 and 1999, published two influential reports that reflected the need to better embrace the diverse nature of communities (Metropolitan Police Authority, 2001). These reports show a terminology shift in government circles from 'hard to reach groups' to 'vulnerable people'.

With a lack of definitional boundaries, policy makers, instead of working on a definition, engaged in a normative exercise of categorisation, and listed a variety of attributes that can make a person vulnerable (Stanford, 2012; Coliandris, 2015; Keay, 2017). In Australia, depending on jurisdictions, categories of vulnerability can be as limited as five, or be as numerous as 15, with attributes added to the burgeoning list on a regular basis. The most common categories of vulnerability include young people, indigenous people, people living with a mental illness or disability, and people who do not speak the primary language of the country in which they live. In addition to these 'core' groups, one may also find, in policy or legislation, such attributes as addictive behaviours (inclusive of alcohol, drugs or gambling), homelessness, unemployment, sexuality or gender identity, pregnancy, old age, etc.

In observing the futility of list-making, and the non-exhaustive nature of ongoing classifications, some jurisdictions, like Queensland, have observed similarities between vulnerability categories and anti-discrimination

legislation, and have dropped lists altogether, to adopt more encompassing and fluid policies aimed at identifying the individual, social, and institutional contexts of vulnerability.

Vignette Two ▶ How do the police define, identify and respond to vulnerability?

Scott Keay, University of Central Lancashire, UK

In the UK, austerity measures have meant that the police have had to think carefully about how they focus their resources. There has been a struggle to close the gap between increasing demand and a reducing supply. Focusing on the people with specific vulnerabilities who generate the most demand has been seen as one way of closing this gap. During this time there has been a significant rise in research into vulnerability in a policing context and the term 'vulnerability' is becoming pervasive in policing. However, this is not being translated consistently into practice. Part of the problem has been a lack of clarity from senior leaders, and yet, practitioner views are consistent with academic research, particularly around the issues of definition. The value of research on vulnerability can help in providing some clarity towards understanding it and directing the most appropriate resources accordingly. Put simply, tackling vulnerability is not a single agency response. Mapping out layers of vulnerability provides a method of understanding and diagnosing need, which is a precursor to tailoring services to meet need.

Featured article: Keay, S & Kirby, S 2018, 'Defining Vulnerability: From the Conceptual to the Operational', Policing: *A Journal of Policy and Practice*, vol. 12, no. 4, pp. 428–438.

While vulnerability is increasingly used to evaluate policing and criminal justice responses, we are still a fair way from defining vulnerability consistently across jurisdictions. However, there is recognition across jurisdictions about the fluid nature of vulnerability, and that vulnerabilities can be transient, enduring, overlapping, progressive, or cumulative. It is therefore important to focus on how vulnerability is experienced and embodied, as opposed to a strict label applied permanently to particular types of people.

Socio-legal considerations

One of the foundational principles necessary for a state to be governed under the rule of law is the notion of equality for all citizens before the law. Although a lofty and arguably unachievable goal, legislatures (both federal and state) and the courts have recognised certain classes of citizens to be at increased risk of being vulnerabilised (eg: indigenous persons, people with mentally illness and children), with the criminal justice system often an exacerbating factor to their vulnerability (for example, isolation in custody has been proven to exacerbate existing symptoms of mental illness; incarceration of young people often comes with an increased risk of the young person being further introduced to a criminal career). Accordingly, legislative measures have sought to address this imbalance by creating mechanisms to minimise vulnerability such as

granting increased rights to certain classes of vulnerable citizens, and by introducing bespoke precautionary support mechanisms for categories of vulnerability.

For example, in realising the potential vulnerability of all persons in police custody, basic legislative safeguards have been enacted in most democratic jurisdictions to reduce the associated risk of those detained by police, and to increase diversion or referral pathways for vulnerable people. In New South Wales, these safeguards can be found in Part 9 of the *Law Enforcement (Powers & Responsibilities) Act 2002* NSW (LEPRA) and Part 1C of the *Crimes Act 1914 C'wlth*. Basic safeguards include the right to: communicate with a lawyer; use an interpreter; contact a friend or a relative; communicate with a consular officer; access medical assistance, and rest and refreshment. Further precautionary support mechanisms are added to this list, to cater for any additional unforeseen vulnerability, or according to special circumstances.

It is the contention of the authors that although a legislative response is one method to redress equity imbalances, individualised assessments of vulnerability may be critical but not practical, especially in light of emerging categories of vulnerable populations. The fast-paced, and occasionally volatile nature of police interactions with members of the public in crisis do not allow for any comprehensive 'tick-in-the-box' approach to immediately and holistically address vulnerability in the field. Furthermore, the pervasive, sometimes hidden nature of individual vulnerabilities (such as acquired brain injury or mild forms of cognitive disability), often prevents in situ assessments of individual circumstances. Yet if we take universal human fragility seriously, we can infer that any individual, at any point in time - but particularly during criminal justice encounters - may be vulnerable. Furthermore, one would be hard-pressed to find a person who, in the presence of police, would not be under duress in some way (unless the person is only asking for directions or information during a chance street encounter). Being in touch with police usually means that something, likely traumatic, has happened.

Vignette Three ▶ Assessing risk in intimate partner violence

Romy Winter, University of Tasmania, Australia

The prediction of interpersonal violence is still a relatively young science. Many police jurisdictions around the world use brief assessment tools to assess the likelihood of increased risk of intimate partner violence. However, the accuracy of assessment via these brief, often single page tools, and the capacity of front line officers to predict future violence based on an interview with the victim remain points of contention. A high score on these tools switches risk posed by the offender into vulnerability for the victim. Assessments that combine offender criminogenic needs with historic and static risks essentially conflate needs with risk factors. This method should only be used if doing so significantly improves an instrument's ability to predict recidivism in a specifically targeted population. Using

the same instrument at all intimate partner violence incidents creates too much ambiguity. A broader application of risk assessment has the potential to identify protective factors as well as the risks and vulnerabilities of child and adult victims and to signpost issues for program intervention. The police preference for using short tools with loosely defined variables, masks the complexity of intimate partner violence as well as the intersectional vulnerabilities of victims.

Featured article: Winter, R 2017, '(Gender) and Vulnerability: The Case of Intimate Partner Violence'. In *Policing Encounters with Vulnerability*, pp. 199-220, Palgrave: Cham.

Taking a universal capacity for vulnerability as a stepping off point, we suggest that operationally, it may be best for police to assume that everyone is vulnerable, unless proven otherwise. While the individual assessment of the vulnerability of individuals is the gold standard, it would be resource intensive and unnecessary in the majority of matters (because yes: people are vulnerable). At later stages of the policing process however, and especially when additional support services become necessary, then individual assessment of vulnerability should assist in balancing the goal of equality/equity before the law with the legitimate security concerns of a state, along with a greater chance for admissibility of confessional evidence in court.

Vignette Four

How LGBT young people and service providers think riskiness informs LGBT youth-police interactions

Angela Dwyer, University of Tasmania, Australia

Lesbian, gay, bisexual, and transgender (LGBT) people are now widely viewed as a vulnerable population, with young people in this category specifically viewed as being "at-risk" of victimization and/or legally "risky". Extensive research discusses the growing victimisation and discrimination that LGBT young people are subjected to in many spheres of their lives. LGBT young people around the world routinely experience homelessness, drug use, self-harm, suicide, and sexual abuse are issues raised. It is almost impossible to think about LGBT young people as anything but vulnerable as the assumption is they will experience victimisation before they become adults. Importantly, a now growing body of research is starting to show that, as these young people experience these forms of victimisation, it will mean that they end up in conflict with the law and police. But what does it mean to only view LGBT young people in terms of vulnerability and risk? The social construction of risk around LGBT young people is a growing area of concern, but relatively few scholars challenge the mainstream discourses of risk and vulnerability that come to be associated with LGBT young people. While there is a need for recognition of LGBT youthful vulnerabilities, there can be unintended outcomes of these forms of risk discourses. LGBT young people and service provider staff in one study in Brisbane, Queensland, Australia, noted how they thought looking at-risk (and in need of police protection) and/or looking risky (and in need of police regulation

and control) shaped how their interactions with police officers unfolded in public spaces. LGBT young people in particular discussed how they embodied riskiness: in terms of looking at-risk, and disavowing proper personal risk prevention; and in terms of looking risky, and continuing to enact suspicious subjectivities that caught police attention in public spaces. This highlights how, although risk factor paradigms are useful, we need to train police properly so they can respond appropriately to these intersecting vulnerabilities and consider "the contingency of life biographies" (MacDonald 2006: 380) amongst LGBT young people, as well as encouraging police to think about how youthful vulnerabilities are not necessarily riskier than others.

Featured article: Dwyer, A 2014, 'We're not like these weird feather boa-covered AIDS-spreading monsters': How LGBT young people and service providers think riskiness informs LGBT youth-police interactions, *Critical Criminology*, vol. 22, no. 1, pp. 65-79.

The principle of legal egalitarianism was expressed by AV Dicey in his landmark work *Introduction to the Study of the Law of the Constitution* as being '…the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts…' (1982). In reality, equal application of the law does not result in equal outcomes from the law, in part due to the different social contexts each person brings to these encounters. Equal application, in this sense, results in differential outcomes depending on factors such as class, social status, race, religion, gender, illness, disability and age. The vulnerability of Australians (and others living in democracies) is substantially reduced through the advantages of living in a privileged world economy - access to subsidised health care, medication, education and support are all provided by the government - though, increasingly less so under the pressures of neo-liberal economics. However, and just as with other nations in the global South, Australia has its share of deprived areas where access to services such as transport, education, legal aid, or even basic medical services creates systems of inequality that exacerbate vulnerability. Vulnerability exists in many ways and forms. It also is prevalent in areas where systems of disadvantage and deprivation have been enduring, and there is a legacy of discriminatory practices, such as those experienced by First Nations Peoples (Hazelhurst, 1995; Cunneen, 2001).

It has long been recognised that certain classes of people, who encounter higher levels of vulnerability, are not able to either have equal access or the internal defence mechanism to deal with the legal system, and are at a greater risk in their dealings with police. In 1976, the landmark High Court decision in R v. Anunga identified numerous factors which made Indigenous Australians more vulnerable than the rest of the population and set out guidelines for their treatment during interviews with investigating officials. These guidelines were reiterated and reinforced in the 1987 Royal Commission in Aboriginal Deaths in Custody, and included measures to ensure that Indigenous Australians in police custody (Ligertwood, 2004), are: not intimidated by police interviewing; properly treated in police custody; aware and understand the right to

silence; able to access legal advice which understands their cultural sensitivities; able to access an interview friend/support person, who may be able to provide independent, and responsible advice during the police interview.

The rationale behind the common law's 'unequal protection' of Indigenous Australians in police custody was founded on a number of vulnerabilities (categorised as special problems - ALRC, 1995) requiring special protection. Although potentially paternalistic (NTLRC, 2002), these mechanisms '…remove or obviate some of the disadvantage from which aboriginal people suffer in their dealings with police.' These vulnerabilities are particularly relevant in so far as their understanding of their right to remain silent and not make self-incriminating statements can be forestalled, and have been identified as including (ALRC 1986):

- difficulties in language, communication and comprehension;
- differences in conception of time and distance;
- health problems leading to disadvantageous behavioural patterns;
- customary law inhibition; and,
- poor aboriginal – police relations.

In the recognition that inequality exists, steps have been taken, firstly by the common law and then the legislature, to try and redress this imbalance. Legal egalitarianism has been applied in statute and in the common law's vigilance to ensure fairness in the adversarial context of a criminal trial, through the development of well settled doctrines of law such as the presumption of innocence, burden of proof, rules of evidence and, most importantly for our purposes, the accused's right to silence. Even from this point of view, however, the system in practice can exacerbate vulnerabilities. For example, bail conditions are meant to be equally applied but are imposed sometimes in arbitrary ways that can significantly undermine a person's living conditions; especially when these are based on perceptions of fairness that do not take in account poverty (Bartkowiak-Théron et al, 2013). The way the verbal police caution (known in the US as the 'Miranda warning') is delivered does not always take into account levels of literacy, or the capacity of an individual to fully comprehend what is being articulated. Support systems (such as specialised medical services or translation services) are not available 24/7, and not available at all in some remote locations where First Nations Peoples are more likely to live. Much progress is being made to address inequity. Yet, Indigenous Australians continue to die in custody (441 since the Royal Commission into Black Deaths in Custody; Allen et al 2018) and, as evidenced by the recent cases of Ms Dhu and Kearah Ronan in Western Australia, detained for non-payment of fines and other minor "offences" against the system (such as failure to appear as a witnesses) (Hennessy, 2019).

Major paradigms

For the most part, the concept of vulnerability has been operationalised in policing in two distinct ways. In the first, the UK model, vulnerability is assigned to specific people; most commonly to those who have reduced capacity for consent such as the infirmed, and those with reduced cognitive abilities. Mandated by law - the *Safeguarding Vulnerable Groups Act 2006* - UK practitioners must comply with agreed standard operating procedures for any person who 'is or may be in need of community care services by reason of mental or other disability, age or illness, and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm…'. Operationalised by way of regulating who can and cannot work with vulnerable people, this approach hampers the ability of policing services to (a) address other vulnerabilities arising from different characteristics, and (b) address the changing nature of individual vulnerability over time, and in different social contexts. Once labelled, a person is vulnerabilised whether they experience vulnerability or not. This approach marks out some people as pathologically vulnerable, while others who are also ontologically vulnerable, evade the increased surveillance and miss out on the service enhancements.

In the second, Australian, model vulnerability is increasingly adopted in policy and practice as an alternative lens to that of 'marginalised people'. Addressing both the operational concerns of working with victims, witnesses and offenders, as well as the engagement necessary with some estranged communities, this approach serves two purposes. On the one hand, it enables policing services to identify critical tipping points in the policing process (such as detention, interview, etc) where individual vulnerability may impact on the outcomes; and on the other hand, to identify communities that may experience vulnerability generally, and as such, may have difficulty in engaging with police. In recognising that vulnerability can arise not only due to individual or social characteristics but also by way of the criminal justice system itself, this shift from 'marginalised people' to vulnerability enables policing organisations to holistically address situations as they present themselves in the policing encounter. Focussed on processes that may vulnerabilise - rather than people who may be vulnerable - this approach opens up the opportunities to (a) address vulnerabilities that may not be immediately obvious, and (b) lay the ground work for a more universal approach to managing vulnerability in policing.

Applicability to policing

At the 2018 Law Enforcement and Public Health conference, someone in the audience pointed out that 'since interactions with vulnerable people represent 75% of police interactions with the public, then it is only logical to make 75% of police recruit curriculum just that'. There is some merit and some logic to this. However, close review of police education in several Australian jurisdictions already points to the increasing time and resources allocated to readying police recruits for their work in the field. A significant component of police recruit education revolves around 'volume crime', which mirrors the bulk of work undertaken by police in their field. It also focuses on sections of the population that are most in need of police protection and safety. Understandably, a large component of the curriculum is

dedicated to the legislative requirements of working with Indigenous peoples, children and young people, and 'behavioural health vulnerabilities' (Wood & Beierschmitt 2014), such as mental health, addictions, communication difficulties and cognitive impairments more generally. While these vulnerabilities are often integrated within the curriculum and considered in a variety of policing contexts, other vulnerabilities such as class, sexuality, gender, race/ethnicity are commonly considered by way of siloed 'awareness raising' sessions that are often not assessed nor considered in operational terms. There is some way to go before the other recognised vulnerabilities arising in policing encounters are integrated in the police curriculum in the same way as indigeneity, age and behavioural health vulnerabilities.

Current curriculum dynamics create a system of inequality that is potentially problematic and further stigmatising to vulnerable people. The allocation of so many hours to one group and twice that number, in some instances, to another has the potential to create the perception that some groups are 'more problematic' and therefore need more attention than the others. It also creates an impression of 'hierarchy of suffering' (cited in Mason-Bish, 2012), when allocation of specific time slots may only be a result of more effective political capital than an increased susceptibility to harm for scrutinised groups. To our knowledge, the Tasmanian jurisdiction is the only one to have adopted a more flexible way to teach police recruits about vulnerability, having departed from siloed vulnerability teaching.

The pigeon-holing of vulnerabilities also creates unrealistic expectations on police to meet demands in terms of recruitment, community representativeness, and retention. Representative quotas imposed by policy makers following inquiries into policing services (such as studies of Police-Maori relations in New Zealand) have rarely been reached by police organisations, who meet resistance from targeted communities, and retention problems at recruit levels (Rowe, 2009). These quota approaches fall foul to the misconception that membership of traditionally 'dis-privileged' communities automatically gives them the capacity to negotiate or address issues by virtue of the cultural attribute they possess. They are also built on the false assumption that being vulnerable in some sort of way automatically makes you more able to understand the experiences of other marginalised communities (APMAB 2005). Even when these quotas are used in a targeted fashion to create stronger links between policing services and specific communities (such as the creation of positions for Indigenous Australian police officers), these officers are required to manage the conflicts between their two communities (policing and Indigenous).

Conclusion

There is nothing wrong - quite the contrary - with the intent to 'democratise' the policing process, and make it fairer. However, the approach taken (stemming from a normative clustering exercise, as opposed to an individual approach to lived experiences) has backfired, particularly in relation to the secondary stigmatisation that comes from being at the receiving end of a nomenclature exercise, and of mandatory specialised services. It has also created a framework that lends itself to the constant addition of new attributes to legislation and policy, and has entrenched a process that, whilst well-meaning and aimed at meeting the needs of new communities, has duplicated responses that are similar in practice and intent.

The language of vulnerability is now pervasive. Conference presentations, as well as scholarly papers, if not specifically addressing the concept of vulnerability, use the terminology as anything goes. Often, the word 'vulnerable' is juxtaposed to other nouns or adjectives that further blur the conceptual identity of vulnerability in the criminal justice system, and in the policing process. This is not conducive to consolidating practice, or feasible and streamlined risk assessments, especially if these are intended to protect the rights and the health and well-being of those entering the policing process. At the time the authors submitted this article for review, there exists a slow movement, worldwide, to consolidate discourse around vulnerability, with scholars from the UK and Australia trying to bridge the conceptual gaps that exist across these two jurisdictions. The arena of law enforcement and public health is particularly conducive to such an effort, in the recognition that the health and policing professions often encounter the same individuals, albeit at different times of their lives (Asquith & Bartkowiak-Théron, 2017). As such, the movement acknowledges that discourses about vulnerability strongly borrow from discussions that are aligning the determinants of criminal victimisation/offending with the social determinants of health. This approach consolidates the critical theorising undertaken in bio-ethics, and initially considered by the authors, with the emerging interest in addressing vulnerability in policing practices.

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