

The Ostensible (and, at Times, Actual) Virtue of Deference

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ABSTRACT. In *Rethinking Police Expertise*, Anna Lvovsky exposes how litigators leverage judicial understandings of police expertise against the government. The article is rich not only with descriptive insights, but also with normative potential. By rigorously analyzing the relationship between expertise and authority in specific cases, Professor Lvovsky offers guidance as to how judges and lawyers should factor a police officer's expertise into an assessment of whether the officer's conduct is lawful. This Response argues, however, that *Rethinking Police Expertise's* normative potential is weakened by the sharp conceptual distinction it draws between judicial understandings of expertise as a "professional virtue" (which it condemns) and judicial understandings of expertise as a "professional technology" (which it applauds). This conceptual framework fails to capture a simple and well-grounded intuition that reformers should accommodate: while it may be an error for judges to treat expertise as an inherent virtue, it may in certain contexts be virtuous of them to defer to expertise.

INTRODUCTION

Rethinking Police Expertise upends conventional scholarly understandings of how judges and jurors evaluate invocations of police expertise.¹ In a previous work, Anna Lvovsky demonstrated how, over the course of the mid-twentieth century, judges became habituated to regard police officers as "experts" whose decisions merited deference, despite considerable evidence that such deference lacks empirical foundation and renders officers democratically unaccountable for

1. Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L.J. 475 (2021).

abuses they inflict.² But as the workaday strategies of legal practitioners reveal, litigators are capable of challenging and transforming judicial habits.³ Through traditional case research and a rigorous analysis of trial transcripts, Lvovsky offers a powerful account of how litigators adapt to—and sometimes subvert—judicial presumptions of police expertise. To be sure, prosecutors appeal to police expertise to demand deference to police officers’ judgments. More often than scholars realized, however, defense attorneys successfully deploy expertise as a ground for questioning the lawfulness of those same officers’ actions. On this latter view, expertise, like a gun, serves to strengthen a police officer’s power over those they encounter.

However, Lvovsky limits the considerable power of this insight by drawing a sharp distinction between two understandings of police expertise. *Rethinking Police Expertise* identifies “a tension between two fundamentally distinct conceptions of police expertise—and, by extension, expertise more generally—that pervade judicial reasoning about law enforcement: the difference between seeing expertise as a *professional virtue* or as a *professional technology*.”⁴

On one hand, judges who treat expertise as a “professional technology”—which Lvovsky regards as the better paradigm—recognize that expertise strengthens a police officer’s ability to accomplish any number of ends, some of which are unconstitutional or otherwise unlawful. Police expertise thus requires judges to engage in a careful and context-dependent analysis of whether, in a particular case, an officer’s expertise serves to vindicate or to undermine the objectives and values at stake.⁵

On the other hand, judges who adopt the traditional understanding of expertise as a “professional virtue”—which Lvovsky regards as mistaken—will simply assume that police expertise merits deference and lessens the need for constitutional oversight over law enforcement.⁶ Lvovsky identifies two distinct assumptions about police expertise that “pervade[] judicial reasoning,”⁷ both of which lead judges toward this mistaken understanding. First, judges may assume that police expertise is a reliable “[p]roxy for ‘[g]ood’ [o]utcomes,” because such expertise will lead officers to pursue and accomplish objectives that

2. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2003 (2017); see also *id.* at 2068 (summarizing scholarship that is “deeply critical of police expertise, both as an empirical matter and as a factor in the courts’ constitutional analysis”); *id.* at 2078 (arguing that judicial assessments of police expertise are distorted by structural biases which lead judges to “overdefer to police judgment”).

3. See Lvovsky, *supra* note 1, at 497-534.

4. *Id.* at 481.

5. See *id.* at 545-54.

6. See *id.* at 536, 539-40.

7. *Id.* at 536.

judges value.⁸ Second, judges may simply regard expertise as a “[g]ood in [i]tself” that is inherently worthy of deference.⁹

Lvovsky presents the professional-technology and professional-virtue conceptions of expertise as “distinct paradigms.”¹⁰ This Response questions, however, whether they are fundamentally distinct.¹¹ Significantly, both paradigms allow judges to publicly justify whether or not to defer to law enforcement based on outcomes that will result from according such deference.¹² The public justifications these paradigms provide are therefore structurally similar in that they link the value of deference to the substantive outcomes that it yields. As such, the difference between expertise as a professional technology and expertise as a professional virtue pertains to the *quality* of a judge’s decision-making process, rather than the *nature* of that process.¹³ Just as judges who understand expertise as a professional virtue sometimes regard it as a proxy for good outcomes, so too do judges who understand expertise as a professional technology. The principal difference between these judges is the depth of their analysis: the “professional virtue” judge will simply *assume* that deference to police expertise will facilitate a good result; the “professional technology” judge will reach that conclusion if a clear-eyed, context-sensitive, and “granular” analysis reveals that it is warranted.¹⁴ Both judges, however, justify their deference decisions instrumentally.

For two reasons, this structural similarity between the professional-technology and professional-virtue paradigms limits the power of Lvovsky’s framework to provide practical guidance to judges and other actors.¹⁵ First, because both paradigms offer plausible public justifications for deference, a well-meaning judge will have difficulty understanding why they should regard expertise as a professional technology as opposed to a professional virtue. Second, Lvovsky’s

8. See *id.* at 537; see also *id.* at 537-40 (explaining the position that police expertise is a proxy for professional competency).

9. *Id.* at 540; see also *id.* at 540-45 (explaining the position that police expertise is inherently virtuous, thus commanding deference).

10. *Id.* at 535.

11. Lvovsky draws a connection between the judicial embrace of police expertise and Max Weber’s praise of bureaucracy. *Id.* at 493. Yet Weber was famously ambivalent about the “iron cage” of “increasingly bureaucratic order from which the ‘spontaneous enjoyment of life’ is ruthlessly expunged.” Anthony Giddens, *Introduction to MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM*, at vii, xix (Talcott Parsons trans., Routledge 1992) (1930) (quoting WEBER, *supra*, at 166, 181).

12. See *infra* Section I.B. One account of “expertise as a professional virtue” indeed differs from the other conceptions in that it reflects tacit judicial ideology which does not serve as a public justification for judicial decision-making. See *infra* Section I.A.

13. See *infra* notes 45-51 and accompanying text.

14. Lvovsky, *supra* note 1, at 484.

15. See *infra* Part II.

account of expertise as a professional technology fails to capture a strong and well-grounded normative intuition that it is a virtue to defer to police expertise. Under Joseph Raz's service conception of authority, the legitimacy of an official's power is dependent on whether the official is in an epistemically superior position relative to others to make a decision.¹⁶ Under this account of authority—as well as other well-established accounts¹⁷—judges *should* defer to law-enforcement officials when their expertise is likely to lead to superior outcomes.

In other words, although it may be an error to treat expertise as an inherent virtue, it may nevertheless be virtuous to defer to expertise when the situation warrants it. That is, Lvovsky is correct to emphasize that there is nothing intrinsic to expertise that is “worthy of celebration in itself” once one “set[s] aside its consequentialist advantages in guaranteeing lawful enforcement.”¹⁸ However, judges may nevertheless have a *normative* reason to defer to a law-enforcement officer when doing so is likely to yield superior outcomes.¹⁹ Instructing judges to reject a “virtuous view” of expertise is thus likely to run counter to their normative intuitions. This might, in turn, obscure these judges from the fact that their normative intuitions are compatible with *declining* to defer to police officers when doing so will likely yield inferior outcomes.

For the purpose of providing practical guidance to judges, a more successful framework would validate the normative impulse to regard expertise as a virtue—or at least not offend it. Fortunately, the core theoretical and descriptive insights of *Rethinking Police Expertise* could be incorporated into a framework that embraces judges' normative intuitions about the virtue of deference, while still practically guiding them on how best to assess claims of police expertise.²⁰ Rather than advising judges not to treat expertise as a virtue, one might urge them to regard it as a virtue only to the extent that it is deployed toward virtuous ends. For example, Lvovsky's descriptive insights could be translated into what I call a “delegation framework” that provides judges with straightforward guidance for evaluating claims of police expertise.²¹ Under this framework, a judge must carefully and candidly articulate the constitutional policy objectives they are seeking to advance (by announcing, for example, the purpose of a specific

16. See *infra* note 64 and accompanying text.

17. See *infra* notes 63-71 and accompanying text.

18. Lvovsky, *supra* note 1, at 497-534, 540.

19. See *infra* notes 63-71 and accompanying text.

20. See *infra* Part III.

21. This framework is borrowed from a previous article. See Anthony O'Rourke, *Structural Over-delegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 470-71 (2013).

constitutional rule).²² Having articulated this objective, the judge must then decide how much discretionary authority to delegate to police officers based on evidence as to (1) whether law-enforcement officials are likely to share the constitutional objective and (2) the degree to which it is uncertain, given the relevant facts, that a particular course of action will yield the constitutional objective that the judge seeks to obtain.²³ Such a framework will help judges treat expertise as a professional technology without compelling them to reject a virtuous view of expertise.

This Response proceeds as follows. Part I identifies the structural similarities between what Lvovsky calls expertise as a professional technology and expertise as a professional virtue. Part II argues that these similarities limit the practical guidance that Lvovsky’s framework can offer to judges and other legal actors. Part III proposes an alternative framework that incorporates Lvovsky’s core insights, while recognizing the normative strength of claims that judges should defer to police expertise.

I. COMPETING VERSUS OVERLAPPING PARADIGMS OF EXPERTISE

Lvovsky contrasts the “traditional” understanding of expertise as a professional virtue that merits judicial deference with a more subtle understanding of expertise as a professional technology that merits judicial scrutiny. These two “paradigms” of expertise, she argues, are “fundamentally distinct” in nature.²⁴

Further elaborating on this taxonomy, Lvovsky identifies two ideologies that lead judges to subscribe to the traditional view of expertise as a professional virtue. First, judges who treat expertise as a professional virtue may valorize police expertise for its own sake, thus treating it as a good in itself.²⁵ Second, judges may reflexively assume that police expertise merits deference because it serves as a proxy for good outcomes.²⁶ The first of these understandings—the good-in-itself justification—is indeed conceptually distinct from the expertise as a professional technology paradigm. However, the proxy-for-good-outcomes justification overlaps with the professional-technology paradigm in ways that reveal

22. *Id.* at 468. The judge should also consider *which* law-enforcement actors it should use its doctrines to regulate. That is, given the huge variation the qualities and capacities of law-enforcement agencies nationwide, courts must decide whether to tailor their rules to the most “professional” agencies or the most incompetent ones. *See id.* at 470-71.

23. *See infra* notes 98-107 and accompanying text.

24. Lvovsky, *supra* note 1, at 481, 535.

25. *Id.* at 540-45.

26. *Id.* at 537-40.

an important normative intuition behind judicial approaches to law enforcement.

One can uncover distinctions and similarities between Lvovsky's understandings of expertise by examining whether and how judges use these understandings to publicly justify their decision-making. A central tenet of judicial decision-making is that judges must justify the outcomes they reach by providing "grounds of decision that can be debated, attacked, and defended."²⁷ One of Lvovsky's accounts of expertise — as a good in itself — is best viewed as a tacit ideology that cannot serve as a public justification for deferring to police officers.²⁸ However, the remaining understandings of expertise that she identifies offer the same (or at least structurally similar) public justifications for deferring to or withholding deference from police officers.

A. *Tacit Ideologies of Expertise*

Lvovsky's account of expertise as a good in itself is distinct from the others she presents in that it does not provide judges with a publicly acceptable justification for deciding to defer to police expertise. A significant theoretical insight of *Rethinking Police Expertise* is that judges may subscribe to an ideology of

27. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987); see also Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 496–513 (2015) (surveying philosophical accounts of the necessity of public reason-giving in a judicial system).

28. To be specific, Lvovsky demonstrates that judges' deference decisions are shaped by ideological commitments that judges may not be aware they hold, and which certainly do not publicly justify the judges' decision-making. See Lvovsky, *supra* note 1, at 535 ("Nor does [this Article] suggest that judges self-consciously see themselves as espousing either approach."). In presenting this argument, Lvovsky follows in the tradition of early legal realists, see, e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949), and more contemporary anthropologists of bureaucracy who examine how ideologies of professionalism serve to legitimate state violence, see, e.g., Charles Goodwin, *Professional Vision*, 96 AM. ANTHROPOLOGIST 606, 615–22 (1994). However, Lvovsky makes a particularly important methodological contribution to earlier scholarship in arguing that judges are shaped by ideological commitments that do not publicly justify their decision-making and of which they may not even be conscious. Anthropologists have long argued that American judges are driven by an ideology of professionalism to acquiesce in the extralegal violence inherent in policing. Charles Goodwin, for example, writes that legal argumentation can create a "professional vision" whereby police violence (such as the beating of Rodney King) is reframed into acceptable professional practice. See Goodwin, *supra*, at 606. Thus viewed, the role orientations of judges and police officers work as mutually reinforcing professionalisms that serve to legitimize police violence. See, e.g., MICHAEL TAUSSIG, *WALTER BENJAMIN'S GRAVE* 179–80 (2006) (arguing that judicial proceedings constitute a theatrical performance designed to mask the "public secret" that police operate independently from the laws that govern others concerning violence). *Rethinking Police Expertise*, like Lvovsky's previous work, helps integrate such understandings of judicial ideology into case-driven legal scholarship.

professionalism that has little to do with their substantive policy objectives. Specifically, Lvovsky's account of expertise as a good in itself draws on a wide range of scholarship to argue that judges' professional biases drive their attitudes toward police expertise.²⁹ On this view, judicial deference toward law enforcement is sometimes driven by an unarticulated belief that expertise entitles police officers to be protected from the "indignity of being 'second-guessed' by less qualified critics."³⁰

Although this view may inform judicial opinions involving police expertise, it does not provide a *public justification* for judicial deference to law enforcement. As Lvovsky observes, judicial opinions are often laden with praise for the professionalism and expertise of police officers.³¹ However, judges do not treat such praise as an adequate public reason in itself to defer to police officers. Instead, judges who value expertise as a good will purport to defer to police officers for instrumental reasons that will serve as an adequate public justification for their action.

Consider Lvovsky's discussion of cases invoking "good police work."³² As Lvovsky argues, the context of these opinions may reveal that judges treat expertise as a virtue in itself that merits granting special privileges to police officers. However, these invocations of good police work appear to be in the service of arguing that, as an instrumental matter, deference to police officers will balance the competing aims of crime control and constitutional compliance.

For example, Lvovsky observes that constitutional rules centered on accuracy, such as assessments of probable cause and reasonable suspicion, may provide occasion for judges to defer to police officers' assessments of the situations they confront.³³ One might regard the invocations of good police work in *State v. Elenki* and *Nettles v. State* as endorsements of this proposition. In *Elenki*, the dissenting judge argued that good police work required police officers to rely on their "commonsense judgments and inferences about human behavior" to determine whether they have reasonable suspicion to conduct an investigative stop.³⁴ Similarly, in *Nettles*, the court praised a police officer's good police work in the course of explaining that the "trained law enforcement officer[]" was entitled to

29. See Lvovsky, *supra* note 1, at 540-41 & nn.359-65.

30. *Id.* at 544 (quoting *United States v. Savides*, 665 F. Supp. 686, 690 (N.D. Ill. 1987)).

31. *Id.* at 542-45; see also Lvovsky, *supra* note 2, at 2015-22 (describing the judicial embrace of police expertise).

32. Lvovsky, *supra* note 1, at 542-43.

33. *Id.* at 547-48.

34. *State v. Elenki*, 102 P.3d 1075, 1092 (Haw. 2004) (Nakayama, J., concurring and dissenting in part) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

deference in his assessment of whether he had reasonable suspicion to pursue and stop a fleeing defendant.³⁵

These paeons to good police work seemingly reflect the assumption underlying Fourth Amendment doctrine that deference to police expertise will yield more accurate assessments of whether a stop was lawful.³⁶ This language may offer a clue that the judges' *underlying* motivation is that they simply value expertise for its own sake. But such language is not sufficient to publicly justify ruling against a criminal defendant.

In this respect, Lvovsky's account of expertise as a good in itself is distinct from the other understandings of expertise that she delineates. She outlines a remarkable and compelling account of how judges' professional identities shape their attitudes toward policing. However, her account fails to decouple *actual explanations* for judicial decisions from the *public justifications* for those decisions.

B. Public Justifications for Expertise

Important conceptual overlap exists between the remaining accounts of police expertise that Lvovsky presents: expertise as a proxy for good outcomes (which Lvovsky nests within the professional-virtue paradigm) and expertise as a professional technology. Both frameworks encourage judges to make pragmatic decisions about whether or not to defer to law-enforcement officials based on the outcomes that will result from their deference decisions. Specifically, both frameworks offer *public justifications* for deferring to law enforcement that turn on whether officers' expertise vests them with the skills and incentives needed to ensure that they comply with their legal obligations.

Consider the understanding of expertise as a professional technology. This understanding of expertise provides judges with an adequate public justification to determine when and under what circumstances deference to police officers is warranted. In some circumstances, judges may be correct to assume that the goals and training of police officers align with the constitutional objectives of the judiciary.³⁷ It would therefore be appropriate for a judge to publicly invoke expertise as a reason for deferring to a police officer's assessment of a situation.³⁸

35. *Nettles v. State*, 435 So. 2d 146, 150 (Ala. Crim. App. 1983) (quoting *United States v. Cortez*, 449 U.S. 411, 419 (1981)).

36. See L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1155-64 (2012) (documenting and critiquing this deference rationale).

37. Lvovsky, *supra* note 1, at 547-48.

38. *E.g.*, *Heien v. North Carolina*, 574 U.S. 54, 72-73 (2014) (Sotomayor, J., dissenting) (“[T]he leeway we afford officers’ factual assessments is rooted not only in our recognition that police officers operating in the field have to make quick decisions . . . but also in our understanding

By contrast, deference is not warranted where police expertise serves to strengthen officers' ability and incentive to achieve unconstitutional ends.³⁹ In *Miranda v. Arizona*, the Supreme Court could thus publicly invoke the success of the “most enlightened and effective” police interrogation methods—those formally adopted by the FBI—as grounds for imposing new obligations on officers before conducting such interrogations.⁴⁰

It is unsurprising that the understanding of expertise as a professional technology provides a public justification for judicial actions. After all, judges *should* adopt a nuanced understanding of expertise that does not necessarily compel deference to law-enforcement officials. But Lvovsky's “distinct paradigms” of expertise as a professional virtue also supplies a similar (if not identical) public justification for action. Consider what Lvovsky calls expertise as a proxy for good outcomes, which she regards as a misguided way of treating expertise as a professional virtue.⁴¹ Lvovsky persuasively argues that, in the minds of many judges, police expertise is linked to the achievement of good outcomes.⁴² According to this view, expertise instills in police officers a set of skills and values that ensure they will act according to their constitutional and legal obligations. In this way, expertise does more than serve as a “proxy” for good outcomes. It *facilitates* those outcomes by aligning the values and ambitions of police officers with those of the judiciary.

This understanding of police expertise provides judges with a plausible public justification for deferring to police officers. If such deference is likely to lead to good constitutional outcomes, then judges can publicly say so when according deference. As Lvovsky observes, the Supreme Court has repeatedly invoked this understanding of police expertise as grounds for deference on the basis that “professional officers internalize the public values shaping constitutional criminal procedure.”⁴³ Judges are often mistaken in their assumption that police expertise will facilitate desirable constitutional outcomes.⁴⁴ Indeed, judges may be

that police officers have the expertise to ‘dra[w] inferences and mak[e] deductions . . . that might well elude an untrained person.’); see Lvovsky, *supra* note 1, at 547-48 & nn.388-90.

39. Lvovsky, *supra* note 1, at 548; O'Rourke, *supra* note 21, at 435 (observing that “increased professionalism could . . . indicate that police officers have become increasingly adept at violating the Fourth Amendment without having a court detect the violation or impose a penalty”).

40. 384 U.S. 436, 449 (1966).

41. See, e.g., Lvovsky, *supra* note 1, at 491-92, 537.

42. *Id.* at 537-40.

43. *Id.* at 539-40 (first discussing *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984); and then discussing *Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006)); see also *id.* at 538, 539 & nn.349-52 (surveying several cases in which the Court presumed that officers are incentivized to “respect[] the courts' procedural restrictions”).

44. See *id.* at 540 & n.357.

insincere when they justify their deference to police officers by claiming that it is likely to lead to improved outcomes.⁴⁵ Nevertheless, it is well within the norms of judicial decision-making to publicly justify deference based on improved outcomes. In *Hudson v. Michigan*, for instance, the Supreme Court cited “the increasing professionalism of police forces, including a new emphasis on internal police discipline,” as a ground for not extending the exclusionary rule to knock-and-announce violations.⁴⁶ Such deference would be warranted if it were true (though it is not⁴⁷) that the professionalization of policing guaranteed that “police forces across the United States [would] take the constitutional rights of citizens seriously.”⁴⁸ The Supreme Court’s rationale in *Hudson* thus provides an plausible – if not satisfactory – public reason for it to rule the way it did.

The difference between expertise as a professional technology and expertise as a proxy for good outcomes thus has more to do with the *quality* of a judge’s decision-making process, rather than the *nature* of that process. When judges treat expertise as a professional technology, they engage in a factually grounded assessment of whether this expertise will lead officers to honor their legal and constitutional obligations. When judges reflexively invoke expertise as a proxy for good outcomes, the language of their justification is similar, but their underlying analysis is less clear-eyed. These judges may defer out of a sincere-but-misguided assumption that professionalization leads police officers to comply with constitutional norms.⁴⁹ Or they may simply assert that professionalization has this effect in order to rationalize an outcome they prefer – whether because they regard expertise as a good in itself or wish to achieve a particular policy outcome.⁵⁰ They might also have some other tacit motivation.⁵¹ But regardless

45. *Id.* at 555-59 (discussing “the tendency of epistemic authority to solidify into essentially status-based bids for deference”).

46. *Hudson*, 547 U.S. at 598-99; see Lvovsky, *supra* note 1, at 539-40.

47. See Lvovsky, *supra* note 1, at 539-40; O’Rourke, *supra* note 21, at 434-45.

48. *Hudson*, 547 U.S. at 599.

49. See Lvovsky, *supra* note 1, at 539-40.

50. See *id.* at 491-94.

51. It is plausible, for example, that trial judges may credit the testimony of and otherwise defer to police officers simply because they *like* them. This explanation owes to the fact that judges encounter police officers at their very best – when they are testifying. See Seth Stoughton, *Evidentiary Rulings as Police Reform*, 69 U. MIA. L. REV. 429, 450 (2015) (explaining that police officers typically receive formal training that “emphasizes being an effective, professional witness”). Police officers are trained as witnesses to win the favor of judges and juries by presenting themselves in court as respectful, calm, and credible. See, e.g., Michelle M. Heldmyer, *The Art of Law Enforcement Testimony: Fine Tuning Your Skills as a Witness*, FED. L. ENF’T TRAINING CTRS. 5-6, https://www.fletc.gov/sites/default/files/the_art_of_testimony_4.20.18.pdf [<https://perma.cc/YNJ9-FMK9>] (advising police officers to “form a bond” with the jury through techniques including making eye contact, remaining calm during cross-examination,

of whether the judge's understanding of expertise is sincerely held, it can serve as an adequate public justification for their decision.

Simply put, judges who treat expertise as a proxy for good outcomes engage in a form of reasoning structurally similar to that of judges who treat expertise as a professional technology. Under both frameworks, judges evaluate police expertise in terms of the outcomes it is likely to yield. And under both frameworks, judges may *publicly* justify their deference decisions in terms of those outcomes. This does not make it conceptually fallacious to taxonomize expertise in the way Professor Lvovsky does. However, it does raise the question of whether or not it is the best taxonomy for explaining doctrine and, through the guidance it provides to legal actors, improving doctrinal outcomes.

II. PROFESSIONAL VIRTUE VERSUS THE VIRTUE OF DEFERENCE

Rather than being “fundamentally distinct,” both of Lvovsky's paradigms of expertise — as a professional technology and as a professional virtue — can be invoked to justify deference to police officers. The question remains, however, whether this structural similarity matters, or whether it is flyspecking. In my view, the similarity matters because it limits the potential of Lvovsky's framework to provide practical guidance to legal actors. For all its descriptive power, *Rethinking Police Expertise* also aims to enable these actors, including judges, to better assess claims of police expertise.⁵² Drawing a sharp distinction between expertise as a professional technology and expertise as a professional virtue undermines that goal for two reasons.

First, because both understandings of expertise offer similar public justifications for deference, it is unclear why a judge should favor one view over another. On Lvovsky's account, judges frequently defer to law enforcement on the

and adjusting their “tone, attitude, and posture” as necessary). This training creates a stark contrast between police officers and other witnesses that judges are likely to encounter in a criminal trial — many of whom will have criminal records, unpolished demeanors, and greater discomfort in a courtroom environment. Hence, at suppression hearings and trials, judges will find themselves meeting officers who — unlike most lay witnesses — are well trained to be likable and to curry the favor of factfinders. In *The Judicial Presumption of Police Expertise*, Lvovsky argues that judges are likely to “synthesiz[e] their discrete encounters with officers in multiple sites of the justice system into broader assumptions about police competence.” Lvovsky, *supra* note 2, at 2079. But it also possible that judges will synthesize these encounters into a broader set of assumptions about whether police officers are *likeable*. This possibility might help explain those encounters where judges, under the auspices of deferring to expertise, rule in favor of a polished, courtroom-trained police officer who is obviously perjuring herself. See Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2201-08 (2015) (describing police perjury as a form of systemic lying that relies on judicial acquiescence).

52. See Lvovsky, *supra* note 1, at 563-72.

assumption that police expertise is a proxy for good outcomes.⁵³ Some judges use this justification as a smokescreen for what they are really doing—including (perhaps) treating expertise as a good in itself.⁵⁴ Such a judge will simply deny that they are motivated by this vision of expertise—indeed, perhaps they will even deny it to themselves⁵⁵—and would instead invoke an acceptable public justification for the outcome they prefer.

But other judges sincerely believe that expertise facilitates good outcomes. Sometimes, these sincere beliefs are warranted (such as when judges treat expertise as a professional technology). And other times, these sincere beliefs are mistaken (such as when judges use expertise as a proxy for good outcomes⁵⁶). It is therefore unlikely to improve the decision-making of even a sincere judge if one simply cautions them not to treat expertise as a professional virtue. The judge is unlikely to see any problem with adopting an understanding of expertise that serves as an adequate public reason for their decisions.

Second, the structural similarities between Lvovsky's understandings of expertise capture an important normative intuition that is lost by counterposing the understandings of expertise as a professional technology and as a professional virtue. Specifically, judges may have a well-founded normative impulse to resist the idea that there is no special link between expertise and virtue. While it may not be a virtue to *possess* expertise, there are good reasons to think it is in certain contexts a virtue to *defer* to expertise.

Lvovsky insists on a sharp distinction between treating expertise as a virtue, thus imbuing it with moral significance, and treating it as “just another tool of the police, raising the same concerns about state power as thermal-imaging devices or cell-site simulators.”⁵⁷ Consistent with a well-established literature on deference,⁵⁸ Lvovsky also draws a conceptual distinction between *epistemic* and *authority-based* grounds for deference.⁵⁹ Under this taxonomy, courts have an *epistemic* ground for deference when they believe that another institution has superior expertise with respect to a particular set of issues.⁶⁰ By contrast, courts have a *legal authority* ground for deference when the law requires that another institution, regardless of its expertise, be the ultimate decision maker with

53. *Id.* at 537-40.

54. *See infra* Part II.

55. *See* Lvovsky, *supra* note 1, at 535 (“Nor does [this Article] suggest that judges self-consciously see themselves as espousing either approach.”).

56. *Id.* at 537-40.

57. *Id.* at 554.

58. *See, e.g.*, Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008).

59. *See* Lvovsky, *supra* note 1, at 556.

60. Horwitz, *supra* note 58, at 1085 (discussing epistemic authority).

respect to an issue regardless of whether it has superior expertise.⁶¹ Lvovsky convincingly argues that, in terms of what actually motivates judges, “the dividing line between epistemic and authority-based claims is less clear than we might like to think.”⁶² But these dividing lines may be blurred as a *conceptual* matter as well as a practical matter.

On at least some well-accepted views, the expertise of an official (including a police agent) may justify their authority or, at the very least, provide others with a reason for submitting to their authority.⁶³ Most notably, Raz’s service conception of authority incorporates “epistemic elements” into the conditions of authority, such that an official’s knowledge and abilities are relevant to whether they have authority to direct the behavior of others.⁶⁴ His theory seeks to answer the “moral problem” of how it can be “consistent with one’s standing as a person to be subject to the will of another in the way one is when subject to the authority of another.”⁶⁵ Raz posits that officials can legitimately exercise practical authority over others.⁶⁶ This may occur when it makes sense to have an official coordinate the choices of many people (deciding, for example, which side of the road everyone should drive on).⁶⁷ But the expertise of an official as to a particular issue

61. See *id.* at 1079. In *Rostker v. Goldberg*, for example, the Supreme Court asserted a legal-authority-based ground for deference, rooted in separation of powers, when stating that “judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.” 453 U.S. 57, 70 (1981); see also Horwitz, *supra* note 58, at 1081-82 (questioning the rationale for the Supreme Court’s assertion of this legal-authority-based deference in *Rostker*).

62. Lvovsky, *supra* note 1, at 557.

63. In addition to the legal-positivist view presented here, natural-law theorists have offered similar content-based accounts of authority that would also be incompatible with a sharp distinction between legitimacy and epistemic deference to authority. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 317 (1980).

64. JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 151 (2009).

65. *Id.* at 136. For a lucid and more thoroughgoing summary, see Kenneth M. Ehrenberg, *Law’s Authority Is Not a Claim to Preemption*, in *PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* 51, 53-54 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

66. See RAZ, *supra* note 64, at 136-37 (restating the normal justification thesis); see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53 (1986) (“[T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him . . . if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them . . .”). Raz later added an “independence condition” requiring that the authority is issuing directives on a matter for which “it is better to conform to reason than to decide for oneself, unaided by authority.” RAZ, *supra* note 64, at 137; cf. Kevin Toh, *Some Moving Parts of Jurisprudence*, 88 *TEX. L. REV.* 1283, 1303 n.80 (2010) (reviewing RAZ, *supra* note 64) (questioning whether the independence condition is an improvement over the original normal justification thesis).

67. See RAZ, *supra* note 64, at 140-41, 153-54.

or group of people is, in most cases, relevant to whether the authority of that official is legitimate.⁶⁸ For example, one may better avoid endangering oneself by always conforming to pharmaceutical regulations that are crafted by experts rather than by deciding for oneself, on a case-by-case basis, whether a particular drug is safe to take.⁶⁹ Thus, the particular knowledge and abilities of an official – that is, their expertise – bear on whether they are a legitimate authority over others. In Raz’s view, expertise may not be a virtue in itself, but the question of whether an official *has* expertise is linked to the moral question of whether they are entitled to direct others’ behavior. The “moral problem” of political authority is thus solved by justifying that authority when a person is in an epistemically advantageous position to make decisions on behalf of others.

To be clear, it should not – and almost certainly does not – matter to judges whether a police officer’s expertise vests them with some sort of philosophical claim of legitimate authority. However, Raz’s service conception of authority provides normative reasons for judges to defer to expertise regardless of whether or not it provides a basis for justifying authority. For example, Stephen Darwall has argued that an official’s superior knowledge does not give them a right to exercise authority over others.⁷⁰ Nevertheless, this superior knowledge gives others a reason to act *as if* the official has authority over them.⁷¹

Or consider the Burkean view that judges have second-order reasons to defer to the practical wisdom that is reflected in the entrenched practices of other officials.⁷² For Burke, such deference to experience is rooted in the virtue of prudence, which “is not only the first in rank of the virtues political and moral, but

68. *Id.* at 153 (“[Political authorities] can satisfy the normal justification thesis not only by securing coordination, but also by having more reliable judgement regarding the best options, given the circumstances, and that in their normal activities, expertise and coordination are inextricably mixed.”).

69. *Id.* at 137.

70. Stephen Darwall, *Authority and Second-Personal Reasons for Acting*, in *REASONS FOR ACTION* 150-51 (David Sobel & Steven Wall eds., 2009).

71. *Id.* at 151 (assessing an example of expertise in Chinese cooking wherein “one would be foolish not to follow [the expert’s] instructions,” but where the expert does not acquire practical authority over another by virtue of their expertise). For further elaboration of this argument and an assessment of its strength, see Scott Hershovitz, *The Role of Authority*, 11 *PHILOSOPHERS’ IMPRINT* 1, 6-10 (2011).

72. See EDMUND BURKE, *Reflections on the Revolution in France*, in *THE PORTABLE EDMUND BURKE* 416, 456-57 (Isaac Kramnick ed., 1999); Cass R. Sunstein, *Burkean Minimalism*, 105 *MICH. L. REV.* 353, 356 (2006) (“Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices. Like all minimalists, Burkeans insist on incrementalism; but they also emphasize the need for judges to pay careful heed to established traditions and to avoid independent moral and political arguments of any kind.” (citation omitted)).

[also] the director, the regulator, the standard of them all.”⁷³ Again, the expertise of an official is not in itself a virtue, but deference to that expertise may be so.

Consistent with this view, judges may publicly recognize expertise not only as a ground for *epistemic deference*, but also as a basis for crafting doctrines that establish *authority*-based deference. As Paul Horwitz observes, courts may sometimes be so concerned with the consequences of their decision-making that they are inclined to defer to expert decision makers. In some of these cases, judges will construct doctrines that confer *legal* authority upon decision makers that, in their view, deserve as a matter of substance to be treated as *epistemic* authorities.⁷⁴ Specifically, in some of these cases, “the court[s] may conclude that, in those areas in which the real-world costs of error are likely to be especially grave, the Constitution has, not coincidentally, conferred legal authority on an institution that is also especially likely to have greater epistemic authority in this area.”⁷⁵ Hence, judges may also treat expertise as a reason to accord greater legal authority to police officers. This will, as Lvovsky has previously argued, lead judges to establish doctrinal rules that *overdefer* to police officers in a variety of contexts.⁷⁶ Judges will qualify police officers as expert witnesses, citing precedents that endorse dubious claims of unique expertise on forensic and operational matters.⁷⁷ They will credit officers’ testimony over defendants in suppression hearings (notwithstanding the well-known tendency for those officers to perjure themselves on the stand⁷⁸) and apply Fourth Amendment precedents to conclude that the officers’ searches and seizures were reasonable in light of their training and experience.⁷⁹ And, perhaps most remarkably, judges will invoke the professional discernment of trained law-enforcement officers to reject constitutional vagueness challenges to statutes that, in practice, enable officers to wield arbitrary power over vulnerable populations.⁸⁰

73. EDMUND BURKE, *An Appeal from the New to the Old Whigs*, in THE PORTABLE EDMUND BURKE, *supra* note 72, at 474, 476; see Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 553-54 (2019) (linking Burkean writings on prudence to a view of constitutional decision-making that heavily defers to law-enforcement officials).

74. Horwitz, *supra* note 58, at 1093.

75. *Id.*

76. Lvovsky, *supra* note 2, at 2078.

77. *Id.* at 2016-25.

78. See Simon-Kerr, *supra* note 51, at 2201-08.

79. Lvovsky, *supra* note 2, at 2025-37.

80. See *id.* at 2037-52.

This is a sound description of the Supreme Court's approach to many criminal-procedure questions.⁸¹ As Lvovsky observes, the Supreme Court leans heavily on the notion of police expertise in crafting its reasonable-suspicion doctrine.⁸² In *United States v. Brignoni-Ponce*, for example, the Court explained that a police officer is entitled to assess whether there is reasonable suspicion to conduct a border stop "in light of his experience in detecting illegal entry and smuggling."⁸³ This holding was the basis for the Court's subsequent and oft-cited admonition that, in assessing reasonable suspicion, "a trained, experienced police officer" will be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."⁸⁴ In these cases, the Court asserts that law-enforcement officers, by virtue of their expertise, are in an epistemically superior position relative to trial courts to decide which behaviors constitute reasonable suspicion.⁸⁵ This, in turn, imposes a doctrinal obligation to give police officers considerable discretion to make their own judgments as to what constitutes reasonable suspicion.⁸⁶

Indeed, deference to police practices is a hallmark of criminal-procedure jurisprudence. As *Rethinking Police Expertise* observes, the Court went so far as to constitutionalize the FBI's interrogation warnings in *Miranda v. Arizona*,⁸⁷ even as it sought to counteract law-enforcement officers' increased skill at conducting high-pressure and perhaps coercive interrogations.⁸⁸ More subtly, Aziz Z. Huq has given a detailed account of how the Court relies on existing and historical police practices to define the contours of Fourth Amendment jurisprudence.⁸⁹ Across a range of cases, the Court relies on what police actually *do* in order to

81. See O'Rourke, *supra* note 21 (arguing that for structural reasons, courts are inclined to accord excessive deference to police officers in criminal-procedure cases).

82. Lvovsky, *supra* note 1, at 526-27.

83. 422 U.S. 873, 885 (1975) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

84. *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) (first citing *Brignoni-Ponce*, 422 U.S. at 884-85; and then citing *Christensen v. United States*, 259 F.2d 192, 193 (D.C. Cir. 1958)); see also *United States v. Mendenhall*, 446 U.S. 544, 565-66 (1980) (Powell, J., concurring) ("In applying a test of 'reasonableness,' courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience.").

85. See *Brown*, 443 U.S. at 52 n.2; *Mendenhall*, 446 U.S. at 555-56 (Powell, J., concurring).

86. See Lvovsky, *supra* note 1, at 547 (describing "assessments of probable cause and reasonable suspicion" as "the arena most traditionally associated with deference to police expertise").

87. 384 U.S. 436, 467-79 (1966).

88. Lvovsky, *supra* note 1, at 499-502.

89. Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U.L. REV. 701 (2019).

define the content of the Fourth Amendment's protections.⁹⁰ This includes limiting the scope of the Fourth Amendment's protections and remedies on the ground that police professionalism renders them unnecessary to safeguard the public's interests.⁹¹

Judges not only build epistemic deference into the content of the law (thus creating a basis for authority-based deference), but also treat the question of whether deference to police is warranted in a particular case as a normative one. There are good reasons to reject these views of authority, or at the very least to reject that they have any implications for how judges should treat police expertise.⁹² Nevertheless, the widespread acceptance of these views challenges Lvovsky's claim that expertise as a professional virtue and expertise as a professional technology are competing paradigms. Under both understandings of expertise, judges publicly justify their deference decisions in terms of the outcomes they facilitate. Whether viewed as a professional virtue or professional technology, police expertise has a normative pull on judges. By recognizing (or, at least, not offending) this normative intuition, one might better attune judges to the fact those situations in which deference to expertise is *not* warranted.

III. REFRAMING RETHINKING POLICE EXPERTISE

The question remains as to how one might incorporate Lvovsky's descriptive and theoretical insights into a framework that better provides practical guidance to legal actors.

To begin, I believe it is compatible with Lvovsky's core account of judicial decision-making to concede that there is no sharp distinction between treating expertise as a professional virtue and as a professional technology. Under both views, judges are likely to recognize that there may be defeasible epistemic reasons to defer to police expertise.⁹³ In practice, it may be difficult for judges to distinguish between these two normative claims. And little would be accomplished by simply asking judges to suspend their moral intuition that there is

90. *Id.* at 722 (“[R]ather than measure observed official conduct against an extrinsic legal benchmark, the Court has *endogenized* the constitutional rule – which defines the minimum procedural obligations of officials regulated by the Fourth Amendment – to what officials do.”).

91. *Id.* at 731-34.

92. *See, e.g., id.* at 740-55 (evaluating and ultimately rejecting the Burkean argument for deference to established police practices in the Fourth Amendment context).

93. Specifically, judges would have a normative reason to defer to police expertise when doing so would enable judges to better achieve their constitutional objectives. Of course, it is a normative error to assume that police expertise is itself a virtue. However, under a Razian account of authority, it sometimes may be a virtue to *defer* to police expertise. *See supra* notes 64-69 and accompanying text.

some connection between virtue and police expertise. Instead, one can embrace this normative intuition, and use it to promote a more nuanced assessment of police expertise.

Accordingly, one might acknowledge that sometimes it is a virtue to defer to police expertise—but only when deference is accorded prudently. One of Lvovsky’s most important insights is that judges are often careless in assuming that deference to police expertise will facilitate good outcomes.⁹⁴ Judges often let their professional biases govern the decision to defer to police, thus mistaking “essentially identarian bids for deference” for claims based on “insight, skill, or experience.”⁹⁵ Other times, judges assume that police officers are socialized to share the judge’s policy values and sense of fidelity to the Constitution.⁹⁶ Finally, judges may reflexively imagine that professionalized training will endow police officers with the skills necessary to operationalize those shared policy values. Any one of these assumptions will lead judges to accord deference to police officers when they should not do so. Accordingly, it is a normative error—indeed, a lapse of virtue—to defer to police expertise without engaging in a careful analysis of whether it is warranted in a particular case.

One can translate Lvovsky’s core insights into a judicial decision-making framework for reaching the normatively correct decision when confronted with claims of police expertise. For example, I have previously argued that criminal-procedure doctrine involves delegations of discretionary authority to law-enforcement officials.⁹⁷ Specifically, criminal-procedure doctrines require judges to adopt particular constitutional objectives, and then to construct a set of decision rules and remedies designed to implement those objectives.⁹⁸ Through these decision rules and remedies, judges retain authority over how to implement their constitutional objectives, or they can delegate that authority to law-enforcement officials.⁹⁹ Courts may retain authority over criminal-procedure regulation by crafting restrictive decisions rules governing police behavior or by imposing strong remedies for violations of a decision rule.¹⁰⁰ Or judges may delegate considerable discretionary authority to police officers by crafting a permissive decision rule or a weak remedial rule.¹⁰¹ For any given constitutional objective, the

94. Lvovsky, *supra* note 1, at 537-40.

95. *Id.* at 557.

96. *Id.* at 538-40.

97. O’Rourke, *supra* note 21, at 417-27.

98. *See id.* at 417-20. For the standard account of constitutional decision rules and remedies, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

99. *See* O’Rourke, *supra* note 21, at 420-21.

100. *Id.* at 421.

101. *Id.*

optimal degree of delegation should depend on considerations such as how best to “minimiz[e] adjudicatory errors—that is, making sure that trial courts correctly identify conduct as either constitutional or unconstitutional—and promot[e] constitutional compliance among police officers.”¹⁰² However, judges will overdelegate authority to police if they fail to recognize that law-enforcement officials’ policy objectives diverge from those of judges.¹⁰³

For example, the Supreme Court’s decision in *Herring v. United States*,¹⁰⁴ which eliminated the exclusionary rule for Fourth Amendment violations involving ordinary negligence, overdelegates power to law-enforcement officials relative to the Court’s stated constitutional objectives.¹⁰⁵ A delegation analysis of *Herring* begins by identifying the precise sorts of police conduct the Justices believe the Fourth Amendment is meant to prevent. It then assesses any factors relevant to whether eliminating the exclusionary rule in cases of ordinary negligence would increase the incidences of such conduct. This would involve a comparative assessment of “(1) the deterrent value and social costs of the exclusionary rule and alternative Fourth Amendment remedies (such as civil liability) against (2) the training practices and cultural behaviors of local police department.”¹⁰⁶ The Court’s errors in *Herring*, on this view, included failing to consider how eliminating the exclusionary rule might systemically change training policies and practices of police departments.¹⁰⁷

This delegation framework maps well onto Lvovsky’s observation that judges should assess whether police expertise is likely to serve the judges’ preferred policy values. If there is a divergence in the policy values of judges and police, then judicial deference will serve the policy values of law enforcement rather than those of the judge.¹⁰⁸ In some criminal-procedure contexts, Lvovsky observes, it may be reasonable to assume that the policy values of judges and police align.¹⁰⁹ In such contexts, including those involving reasonable suspicion, it may be reasonable to assume that greater police expertise will advance the

102. *Id.* at 424.

103. *Id.* at 433-36. Less relevant to Lvovsky’s project, a judge will also overdelegate discretionary authority if they overestimate the degree of uncertainty as to whether a particular doctrinal rule will advance the judge’s preferred constitutional objective. *See id.* at 430-33.

104. 555 U.S. 135, 137 (2009).

105. O’Rourke, *supra* note 21, at 411-13, 421-22.

106. *Id.* at 412.

107. *Id.*

108. *See id.* at 433-36.

109. *See* Lvovsky, *supra* note 1, at 547-48.

policy interests of the judiciary.¹¹⁰ At the same time, however, courts should consider the possibility that increased police expertise might “indicate that police officers have become increasingly adept at violating the Fourth Amendment without having a court detect the violation or impose a penalty.”¹¹¹ In other contexts, including police interrogations, judges’ constitutional objectives are even less likely to align with the interests of law-enforcement officials.¹¹² Hence, greater police expertise will increase the chance that law-enforcement officials will undermine the judges’ policy aims. In these situations, increased professionalism only makes law-enforcement officials more skilled at flouting constitutional constraints.¹¹³

A delegation framework could thus preserve Lvovsky’s core insights as to the role of police expertise, while enabling judges to follow their normative intuitions that deference is sometimes a virtue. As a threshold step, a judge should first carefully and candidly articulate the constitutional policy objective they are seeking to advance.¹¹⁴ Having articulated this objective, the judge should then “evaluate (1) law enforcement officials’ attitudes toward the court’s constitutional objective and their competence to implement the objective, and (2) the extent to which conditions of uncertainty warrant delegation to the officials.”¹¹⁵

110. *Id.* This assumes that police officers are incentivized to make arrests that will actually prevent crimes and thus lead to convictions. *But see* Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 877-82 (2014) (observing that police officers lack incentives to optimize conviction rates, and thus do not have an incentive for making arrests that comply with Fourth Amendment standards). However, increased police expertise might enable law-enforcement officials to make arrests that violate the Fourth Amendment’s substantive objectives, but which do not run afoul of the decision rules the Supreme Court has created for implementing those objectives. *See* O’Rourke, *supra* note 21, at 434-35 (“[A]s police officers become more familiar with . . . Fourth Amendment doctrine, their knowledge may enable them to manipulate their encounters with suspects (and their testimony during suppression hearings) to ensure that any evidence they obtain will be admissible under one of the exclusionary rule’s many exceptions.”).

111. O’Rourke, *supra* note 21, at 435.

112. Lvovsky, *supra* note 1, at 548-50.

113. *Id.*; *see also* O’Rourke, *supra* note 21, at 454 (“Police departments may (and likely do) focus on training officers how to ensure that evidence is admitted, rather than on how to conduct legal searches and interrogations. Accordingly, even as police officers accept the reality of living with criminal procedure rules, they may become adept at circumventing them.” (footnotes omitted)).

114. O’Rourke, *supra* note 21, at 468. The judge should also consider *which* law-enforcement actors it should use its doctrines to regulate. That is, given the huge variation the qualities and capacities of law-enforcement agencies nationwide, courts must decide whether to tailor their rules to the most “professional” agencies or the most incompetent ones. *See id.* at 469-71.

115. *Id.* at 471.

Consider, for example, the question of whether to create more deferential rules regarding interrogation at the hands of police officers. As a first step, a judge should carefully articulate the constitutional value that is at stake. Following Lvovsky's analysis, the judge might clarify that the Fifth Amendment's right against self-incrimination is designed to protect individual autonomy.¹¹⁶ Next, the judge should consider whether a police officer's skill at interrogation will render them likely to share the judge's goal of protecting autonomy. The judge should easily conclude that, to the contrary, increased expertise will simply make the police officer more *adept* at undermining the judge's constitutional objective.¹¹⁷ Finally, the judge should consider whether there are any uncertainties that would weigh against crafting a detailed set of rules to govern law-enforcement behavior. In doing so, however, the judge should not underestimate the ability of courts, relative to that of law-enforcement officials, to craft successful rules of conduct under conditions of uncertainty.¹¹⁸

In substance, this application of the delegation framework should yield the same decision-making outcomes and deference assessments that Lvovsky favors. At the same time, however, the delegation framework guides judicial decision-making while embracing the intuition that judicial deference is, at times, a virtue. Certainly, it is compatible with the taxonomy of expertise that Lvovsky advances. But by acknowledging the structural and normative similarities between treating expertise as a professional technology and as a proxy for good outcomes, it also guides judges toward an understanding of expertise that better matches their decision-making instincts.

IV. CONCLUSION

This Response's critiques are ultimately a testament to the remarkable contributions of *Rethinking Police Expertise*. Lvovsky's article succeeds both in its descriptive project and in offering significant theoretical insights into the ways that judges understand police expertise. By challenging Lvovsky's characterization of the distinct paradigms of expertise, this Response ventures to make these theoretical insights more accessible and attractive to legal actors as they assess the litigation strategies that Lvovsky documents. However, Lvovsky's insights about how judges *actually* do their jobs are no less important than her arguments about how judges *should* do their jobs. As *Rethinking Police Expertise* shows, judges routinely conflate good reasons and bad reasons for deferring to police expertise.

¹¹⁶. Lvovsky, *supra* note 1, at 548-49.

¹¹⁷. O'Rourke, *supra* note 21, at 454.

¹¹⁸. *See id.* at 472-73.

But at the same time, Lvovsky demonstrates that litigators (and perhaps scholars) can powerfully influence judicial understandings of police expertise.

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