

# Policing in Times of the Pandemic – Police-Public relations in the interplay of global pandemic response and individual discretionary scope

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## **Abstract:**

The emergence of the COVID-19 pandemic in Europe during March 2020 marked a fissure in many areas of the society, including policing. As a means for containing increasing outbreaks of the virus, almost every government in Europe resorted to issuing strict lockdown measures, essentially halting all public life. Consequently, the police have been tasked with enforcing novel legal rules such as mask wearing, social distancing and curfews. However, due to the nature of the pandemic crisis, the enacted measures were often issued on short notice, leaving little time for legal scrutiny, nor for adequate communication – to the public or law enforcement agencies. The proposed paper – which is based on a project currently submitted for review – specifically looks at this intersection of hastily issued laws and their enforcement on the ground level through police forces and the subsequent issues that have resulted from this. Starting from an organisational studies point of view, we consider that the problems with “policing the pandemic” might emerge as a result from a three-level governance of pandemic response – the governmental/legal level; the organisational structure of the police; ground level policing. This means that issues that ensue due to unclear legislation might trickle down onto the ground level work of police, where individual officers need to enact these measures in the interaction with the public and within their own discretionary scope. Large scale pandemic response thus rests on the shoulders of ground level police discretion, which has the potential of creating frictions in the police-public relations. Problematising this issue and understanding how this might materialise in practice can help to better understand how these issues can be mitigated – in the current pandemic as well as for future instances of crisis as well.

**Keywords:** police discretion; police management; COVID-19 measures; pandemic, police-public relations

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## Introduction

The COVID-19 pandemic and the measures taken in response have been an immense shock to routine processes and operational sequences of societies all over the world.<sup>22</sup> The near spontaneous implementation of measures in the early hours of pandemic-response required almost synchronous action by the entirety of society, its institutions, and the different positions in organisational hierarchies. As the virus had been largely ignored by European governments in January 2020, the need for immediate action in Austria became urgent by March of that year. The complexity of the network of agents that had to act in a short time period, is likely not only to have tested the limits of routine chains of command and law-making, but also traversed these limits, rendering the existing system of checks and balances (temporarily) inoperable and bringing to light fissures in the relationship between the state, its institutions, and its citizens.

Despite complex differences between countries affected by COVID-19, a near universal reaction was the use of police as central agents in pandemic response. Arguably, we have witnessed what continues to be the first truly global policing event (Sheptycki, 2020) as many countries introduced police measures to contain the virus and gave police new powers and resources to implement them. This rapid mobilization of police has not, however, ensued without incurring challenges and resulting in significant problems:

- the hurried implementation of countermeasures has violated fundamental rights;
- the lacking precision in laws and statutory orders has granted vast discretionary scope to the police and has led to insecurity and confusion among the citizens,
- the use of police in pandemic response has raised questions on the structural (in)efficacy of addressing a health crisis by means of policing.

Currently, the pandemic measures are slowly being lifted across countries in Europe, while at the same time projections and models consider that pandemic measures likely will return at some point or another in the upcoming months. Against this backdrop, a critical reflection on the past events is considered crucial. Within this article, we develop a framework for such a reflection, which must encompass the complex interaction

between, and within, the three spheres involved during police use in pandemic response:

1. The sphere of governance, including an analysis of pandemic response strategies and communication.
2. The sphere of law and law-making, as a prerequisite for upholding democratic governance during the implementation of measures, and as the mediating instance between commands issued to police by the legislative branch.
3. The sphere of policing in practice, focusing on the organizational dynamics of police as an institution, and their relationship to the concrete actions of multi-level police work in pandemic response.

A central, cross-cutting facet of such an analysis is the scrutiny of the development of this interaction along a temporal dimension. The rapid onset of pandemic response represents a rupture of usual operational sequences, and the succession of actions and reactions in each of the three spheres also provides structural insights into their relationships and interaction. Undertaking an analysis of the complex interplay within and between these spheres along a temporal dimension will allow to address fundamental questions arising in this historic conjecture. This paper argues the necessity of adopting such an analytical approach and develops a conceptual and methodological framework that is able to address structural dimensions underlying the complex phenomenon of policing the pandemic. We will show that the sound empirical study of the development of activities on the levels of governance, laws and law-making, and police actions on each level of organizational hierarchies is necessary, to allow for the reconstruction of multi-level pandemic response and the identification of fundamental problems that occurred therein.

In our hypothesis section of this article, we consider that reflecting on the use of police in pandemic does not only provide us with learnings on how to manage a pandemic within these multi-level spheres: Particularly concerning the increase of police discretion during the pandemic, we hypothesise that this should be seen as a function of the limits of the democratic repertoire of action. The pandemic has provided a – short – window of observation into existing structures in governance and an ever-present discrepancy between law in books and law in action. We argue this discrepancy has presented both as a necessary tool for pandemic response, as well as serving to externalise problem-solving from policy level to ground-level policing.

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## Unravelling the pandemic measures – evidences of limits of the democratic repertoire of action

Analysing and reflecting upon the measures that followed the rise of COVID-19 infection cases across Europe in March 2020, significant limits of the democratic repertoire of action of these procedures have become visible. Along a temporal dimension, it has become apparent that the necessity of simultaneous responses has put a strain on the traditional chains of command and checks and balances. Many of the measures enacted by the Austrian federal government throughout the pandemic seemed to be defined by a constant time pressure. This led to necessary responses by various (state) institutions, which appeared to be largely informed by the same daily governmental press conferences and communiqués, partially interpreted differently by each institution. This synchronous action on the part of a most diverse group of actors - such as management levels of the police, uniformed officers on the street, entire hospitals, individual health-care specialists and providers, schools, kindergartens, places of work, and so on - caused the discretionary scope of individual actors to rapidly expand in the initial wave of countermeasures. Chains of command, accountability and, not least, the rule of law both from above and below, lagged behind.

These strains on the normal chains of commands are insofar problematic, as they also challenge the separation of powers, in the traditional conception of western democratic nation states (Berka, 2016). The legislative, the executive and the jurisdiction are intended to function independently of each other and to control one other, politically and legally. Though this indisputably lies at the core of modern state theory, the full realization of the separation of powers in practice is never fully achieved. Instead, the constant negotiation of this ideal in its practical implementation must be the focus of scrutiny for any analysis of democratic governance.

Particularly relevant to the pandemic crisis, one result of the principle of separation of powers as it pertains to the legislative and the executive, is that the power to pass statutory orders by the executive is strictly limited by laws. For such a legal system, it is rather unusual that measures containing fundamental rights infringements as broadly as the COVID-19 measures are passed as statutory orders by ministers who are part of the administration, rather than by laws passed in parliament.

This meant that parliamentary rights of the opposition were bypassed, and statutory orders could be passed (and changed) more quickly than laws.

This applies especially to the police, who cannot act without a legal basis that determines a purpose and a concrete competence to act. The classic role of the police as an institution of the executive is to implement the law. However, due to the powers of the police, the immediacy of measures in direct contact with citizens, powers of discretion, and the need to frequently make decisions quickly on the spot, the role of the police is never purely executive. Along those lines, Benjamin (1977) posits, that the institution of the police combines an executive and legislative power (*ibid.*, p.189). This tension within the role of police in a democratic system of separated powers and the blurring of lines and roles in the practice of policing are abundantly visible in the response to the pandemic, clearly demarcating the limits to the democratic repertoire of action. Pertinent examples for such limits are the disproportionate number, and partially wrongful issuance, of fines by police, lacking clarity and misleading communication of statutory orders (Kopetzki, 2020), brevity of time between issuance and enactment of legal measures, and the subsequent declaration of some legal measures as unlawful by the Constitutional High Court (V 363/2020-25, 14.07.2020).

The unclear and rushed law-making has also significant impact on the proper functioning of the rule of law in general, as citizens can only be subjected to laws that they can know and understand. In the course of the pandemic in Austria, multiple examples emerged in which citizens were on the receiving end of unclear and rushed law-making, with little possibilities to circumvent unlawful acting. In late August 2020, a last-minute executive order was issued, changing the requirements for entry into Austria, creating the necessity for extensive border checks. During the height of the summer travel period citizens living in Austria as well as European travellers just crossing through Austria were subjected to excessive waiting times at the southern border in Carinthia. As both the border police as well as travellers had no chance to prepare for the sudden changes in requirements, the waiting time for entry into Austria ran up to 12 hours, with police being understaffed to check every incoming vehicle and passport, and to issue quarantine orders for citizens living in Austria (ORF.at). Similar problems occurred in May 2021, when the ease of travel restrictions was

wrongfully communicated as the necessary executive order was not yet issued, leading to congestions at the borders and people travelling back to Austria still requiring quarantining at home (Tomaselli, 2021).

The process of understanding, the communication of information, news and media takes time. This means that laws must be public and understandable before they come into effect. To fine and punish behaviour without allowing time for citizens to get to know and understand the new rules, is fundamentally unjust. As the examples above show, this has been neglected in the case of COVID-19 measures in Austria. The same need of time for the understanding and putting into practice also applies to police. Here, additional time must be factored in for each step information requires to be communicated along the organisational hierarchy. How this was handled in practice when information about new rules came first through press conferences and only days later as a statutory order, is part of the questions that must be addressed.

Further evidences of limits of the democratic repertoire of action in the pandemic measures were observed through the role of the police and their practice of policing the pandemic. The constant change of pandemic containment measures, different rules on “who was allowed to do what where”, as well as the shifting epidemiological criteria have put a strain on the police, as well as their relationship with the public. Certainly, as a result of the – seemingly – novelty of the situation, it has been unclear to what extent certain containment measures would lead to positive results from an epidemiological point of view. For example, in Austria as well as elsewhere in Europe, in the early months of the pandemic, the criterion for “public health” was defined through the basic reproduction number, which needed to be kept below “1” at all costs. Later during the year, the 7-day incidence was used to provide an evidence of public health. Furthermore, the threshold of the required 7-day incidence also changed several times as means to justify measures. This example shows the – what we would call – experimental nature of the pandemic response, challenging the traditional democratic repertoire of action, where it is clear for citizens and law enforcement alike, why certain measures are issued and fined. In the case of the COVID-19 measures, the public has a hard time to follow the (il-) legality of their actions as well as the rationale behind the measures, hence also affecting the legitimacy of police intervention.

Which also appears to be connected to a mismatch between the problem of a health crisis and the actors to solve this problem in the form of the police. Police as an institution is not intended, and in many respects – like their training and focus on criminal behaviour and violent measures – ill-suited, for response to national health crises, and more so global pandemics. Nevertheless, one function of this institution makes it a logical candidate as an actor charged with policing the pandemic: Its role in the exercise of enforcing of public order. The specific, perceived necessity of social control in this historic moment appeared to relate to two functions in particular. Firstly, as a means of pandemic-response in itself, with the goal of inhibiting the spread of the virus, and secondly, its ability to deliver the maintenance of social order perceived as a particularly urgent necessity in a moment of fundamental disruption. Thus, by tasking the police as enforcers of public order and social control, governments across Europe have externalised the problem-solving to ground-level policing. The unclear laws and executive orders inevitably lead to a widened discretionary scope in policing. Again, examples have shown that this externalization has been deliberately chosen. In the policing of the November curfew ground-level police were explicitly charged with ruling over the credibility of citizens’ justifications for being outside on a case-by-case basis (derstandard.at, 31.10.2020).

The increase in police discretion and the externalization of problem solving adds additional strains on the police work in practice as well as on the police-public relationship. The responsibility for ensuring public health is contradictory to the – invisible – threat to the individual police officers’ personal safety and health (Alcadipani, 2020). At the same time, the public has lived through one of the rare cases of being under general suspicion, just by being outside. Again, certainly in the early stages of the pandemic, reports of individual officers fining people who were sitting outside on their own had emerged. This also shows in the number of fines issued – 17417 fines against COVID-19 restriction measures, solely in the first three weeks, from mid-March until early April 2020 (Rösner, 2020). Many fines, that were declared unjustified upon appeal (kurier.at, 03.07.2020), and to a similar extend the declaration of some of the general legal measures as unlawful, as shown above.

In combination, all these issues have certainly put a strain on the police-public relationship, which – in its

more extreme form – has shown in the partially violent protests that had emerged against the COVID-19 measures in late 2020 and early 2021. The collection of these evidences thus serves as our rationale of why it is not only necessary to analyse both the measures and their effects, but also try to address structural dimensions underlying the complex phenomenon of policing the pandemic.

### The three spheres of “policing the pandemic” and its temporal dimension: A methodological Framework

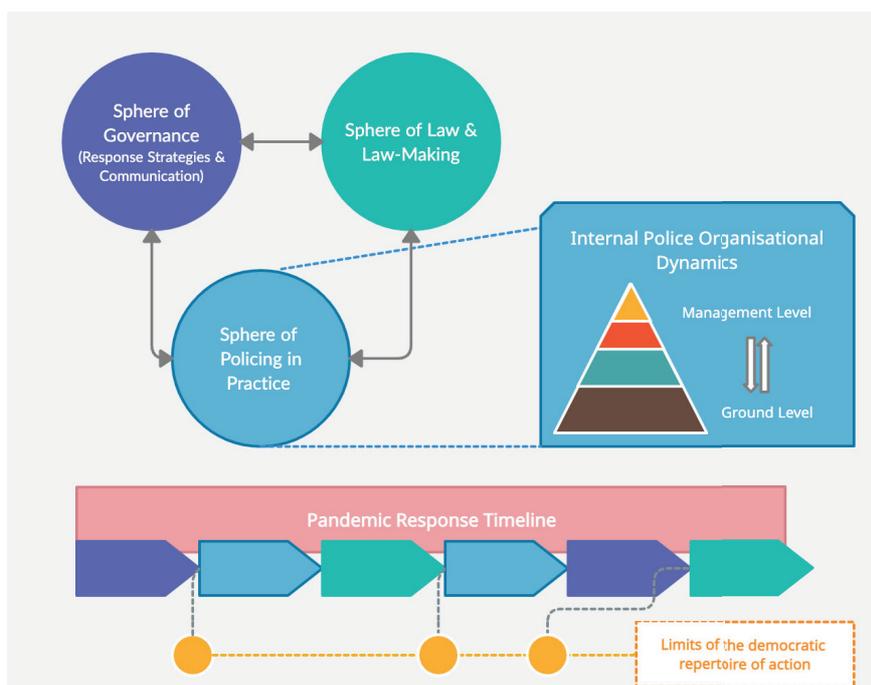
Contemporary theories of democratic governance have developed the idea of a multi-level structure linking agents from different sectors (public and private) and levels (from European to communal) to map the complex workings of incremental policy processes. However, in a crisis situation such as the COVID-pandemic, this model, based on mutual alignment and consensual coordination of different interests and rationalities, is put under severe stress. Declaring a (European, national) state of emergency, time consuming dispersed routines of coordination can be replaced by a top-down mode of governance, expanding executive powers and curtailing the constitutional division

of power. Elements of such a shift were visible in many countries, including Austria.

A sound methodological framework, able to do justice to the complexity of the developments within this multi-level structure, must include the analysis of three central dimensions of policing the pandemic (as shown in figure 1). Firstly, it must encompass the interaction between the spheres of governance, law and law-making, and policing in practice. The investigation of governing the pandemic must thereby include not only the specific response strategies developed on policy level, but also the modes of communication employed, as well as points in time and specific addresses of the communication of policy measures. Particularly in the early hours of pandemic response, the sphere of governance must be studied in its interaction with the sphere of law and law-making as a prerequisite for upholding democratic principles, and as the mediating instance for orders issued to police by the legislative branch. Only this context, can the sphere of police and practices of policing during the pandemic be adequately examined.

Secondly, an examination of the limits to the democratic repertoire of action as it pertains to police work during the pandemic, requires an analysis of the inter-

Figure 1: The three spheres involved during police use in pandemic response.



nal organisational dynamics of police as an institution. This must involve an investigation of the stress experienced by, and possible disruption of, chains-of-command and the system of checks and balances in the context of the rapid implementation of pandemic response measures. At the same time, such an analysis will afford insights into the centrality of on-the-ground problem solving conducted by police officers during the implementation of hurried response measures issued on policy level. Investigating the communication of ground-level police officers with superiors within police hierarchies, policy level and judiciary, as well as the interaction with citizens on ground-level, will make visible, not only into the structural significance of police discretionary scopes for the implementation of pandemic response measures, but also offer insights into challenges for public-police relations in times of COVID-19.

Finally, the third dimension significant to any analysis of policing the pandemic is the role and effect of temporality. This is central to an understanding of policing the pandemic, particularly in its causal relation to the limits of the democratic repertoire of action revealed in pandemic response. The synchronous action on the part of a most diverse group of actors necessitated a rapid expansion of the discretionary scope of individual actors during the initial wave of countermeasures. Chains of command, accountability and the rule of law, lagged behind. The specific condition of societies under threat by the COVID-19 virus has been a driver of “highly securitized measures, ... and increased powers of police enforcement” (Stott, et al. 2020: p 1). This resulted in the contradictory simultaneous manifestation of a top-down mode of governance on the one hand, and a radically increased discretionary scope in policing on the other. We hypothesise, that a significant portion of the problems emerging within policing the pandemic may be traced back to this contradiction.

To capture this dimension, temporality must play a key methodological role. Early measures in particular left insufficient time for implementation along routine chains of command and rule of law. In this context, the autonomous exercise of the police’s own power and a blurring of roles were plainly evident within the new discretionary scopes provided. As the months passed and the initial hurried reactions were afforded time for re-assessment and revision, problematic elements in the practice of policing the pandemic appeared to remain unaddressed. While the urgency of pandemic

response persisted, the necessity for spontaneity in processes waned. When working from the assumption that deficits in chains of command and the rule of law were an inevitable result of the necessary spontaneity of response, a gradual return to the democratic repertoire of actions over time would be expected. The fact that these problematic elements in the use of police remain the same during the subsequent curfews, suggests that more is being revealed than the mere result of necessary spontaneity.

An analysis of the limits of the democratic repertoire of actions must trace the progression and development of problematic elements in pandemic response over time. The focus must be on instances where such problematic elements persist, as well the question of whether this persistence reveals a limit to the repertoire of actions that cannot be explained solely through the necessary spontaneity of action. In short, the methodological application of temporality in this context reveals the origin of these limits in the structural relationship between the spheres of governance, laws and law-making, and policing within democratic rule of law.

### **Structural dimensions of policing the pandemic: Initial hypotheses on the role of police its effect on police-public relations**

The insight into the structural dimensions of policing the pandemic afforded by such a methodological framework, makes it possible to develop a series of initial hypotheses regarding topics such as the role of police discretion during the pandemic, the status of the democratic repertoire of action, as well as the condition of public-police relations in this context.

Our initial investigations employing the heuristic outlined above, for example, have led us to develop the hypothesis, that the limits to the democratic repertoire of action revealed by the pandemic, themselves provide insight into the structural relationship between the sphere of governance and the sphere of policing. As we have seen, the experimental nature of pandemic response appears to depend heavily on the discrepancy between law as drafted on policy level and law as it is implemented in action by ground-level police. Due to the urgency of action and lack of tried and tested responses, policy decisions are made without reliable

expectations of how these will play out, how effective they will be in curtailing the spread of the virus, or what the reaction of the public will be to sweeping measures that limit customary freedoms. The reaction to the pandemic within the sphere of governance depends on being able to match the volatility of the epidemiological developments in their policy making. However, the experimental nature of pandemic response does not only play out on policy level. It depends heavily on the insight and expertise of ground-level policing, as well as a flexible implementation of policy measures that is more in tune with real time developments and the variable acceptance of measures by the general public. The rapidly expanded police discretion and challenges to the separation of power during the pandemic should, therefore, be seen as a function of the limits of the democratic repertoire of action.

The structure revealed within policing the pandemic is strongly reminiscent of one theorised by the Canadian criminologist Jean-Paul Brodeur. Brodeur describes the relationship between police and the sphere of governance as following a structure he describes with the metaphor of the *grey cheque*. The relationship characterised by such a grey cheque, issued by state authorities to police, represents a tacit understanding which allows one party to communicate its decisions and desires without having to manifestly name these, and the other party to understand the same without having to openly display this. Instructions to police by the sphere of governance are therefore neither direct and unambiguous black on white orders, nor are police issued a *carte blanche* to proceed entirely at their own discretion (see Brodeur 1983). Drawing on Brodeur, Didier Fassin describes this relationship as a masquerade, "... in which one side pretends not to command and the other not to obey" (Fassin 2018, p. 136 - trans. by author). The discretionary scope within police work allows actors on policy level and within police management to plausibly deny actions they effectively authorised. At the same time, these orders must be specific enough, that ground-level officers are provided with a scope of action for which they can plausibly assert that these were implicitly afforded by upper levels in the chain of command. The grey cheque thus provides plausible deniability to both parties simultaneously (see *ibid.*). In his own studies, Fassin observes that providing police with a wide discretionary scope within specific areas of police work has become the most effective mechanism for instrumentalization of police by the sphere of governance. Moreover, Fassin maintains that specific

historic moments lay bare this structural relationship, where "...governing powers explicitly state what they expect of the police, while police openly exercise their own power in an autonomous way" (Fassin 2018, p. 136 - trans. by author). The early hours of police use in pandemic response during the onset of the COVID-19 crisis appear to be precisely such a moment.

Two conclusions can be drawn from observations of policing the pandemic through the methodological framework developed, and in the context of Brodeur's and Fassin's theories. First, the expansion of discretionary scopes in policing must be understood as an externalization of problem-solving from the sphere of governance to ground-level policing. Ground-level officers, armed with expanded discretionary scopes, are handed the task of finding the modes and spaces in which pandemic response measures can and must be enforced. The experimental nature of this task, however, means that enforcement of these rules will on the one hand frequently traverse boundaries of equitable, democratic rule of law as well as points of resistance to disproportionality by the general public. On the other hand, the discretionary implementation will at times inevitably both fall short, and traverse, the efficacy of the measures enforced. What this leads to, is an asymmetrical distribution of responsibility for the effects of counter-measures. Pandemic response drawn up on policy level is able to shift a significant portion of its inherent contradictions to the executive sphere. The reciprocal plausible deniability characterizing the *grey cheque* results in a "blame game", in which the inefficacy of many counter-measures may be concealed behind questions of (im-)proper enforcement.

Secondly, this structural role discretion plays for pandemic response, necessarily exerts a strain on public-police relations. This stems both from the experimental nature of the counter-measures put in place, which frequently lose their credible efficacy in controlling the epidemiological developments, and from the lack of understanding of the (volatile) COVID-laws and regulations by citizens, that are currently being enforced by police. In a very real way, ground-level police frequently become the face for murky policy measures.

Moreover, the universality of police mobilization in the context of what is fundamentally a health-crisis, was visible not only geographically, but also *felt* socially across all milieus of individual societies: For large swaths of the population, the police implemented cur-

fews, intended to control the spread of the virus, where the first personal experience of what it means to be under general suspicion by the police and wider public – an experience usually reserved for marginalised groups. The novelty and uncertainty of this situation was exacerbated by the immediacy of the transition from normal, known processes to a state of emergency. And while this intention to contain the virus holds true, a differentiation must be made between the intent and the impact of measures enacted in pandemic response on a deeper level.

*“In a society that is divided on class, ethnic, gender, and other dimensions of inequality, the impact of laws, even if they are formulated and enforced impartially and in a universalist manner, will reproduce those social divisions”* (Bowling et al., 2019, p. 16).

While the intent of police mobilisation may credibly be one of police being public health actors in pandemic response, a deeper, thorough analysis of policing the pandemic must nevertheless be sensitive to the difference between this intent and the impact of this implementation. Increased discretionary scopes also necessarily result in a wider confrontation of the public with disproportionalities in policing, particularly along the dimensions of race, class, gender and age.

## Conclusion

The global pandemic has confronted democratic governance, understood as a multi-level structure linking agents from different sectors, with challenges that have revealed limits of this system, both within and between the sectors it is comprised of. Rather than studying such limits as artefacts of the current crisis, we argue that a sound analysis of policing the pandemic is a necessary step to understanding the structural relationship between policing and democracy in moments of crisis, as well as the specific role police as an institution and the discretionary scopes of individual officers are given in such moments. As we have shown, such an analysis necessitates a methodological framework that is able to capture the dynamics both between the different spheres of governance, and within organisational hierarchies of police forces, along a temporal dimension. Adopting such an analytical approach, also facilitates a more complex understanding of problems arising in the practices of policing the pandemic: The widening of discretionary scopes for police can be understood as an element of the broader, experimental nature of pandemic response. In the context of hastily implemented policy, increased police discretion is revealed to be an externalization of problem-solving from policy- to ground-level policing. This role of policing, along with the resulting confrontation of a wider section of the population with the disproportionalities in policing, are important keys to understanding the role of police as well as shifts in police-public relations during the COVID-pandemic, as well as possible future crises.

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