Trust and the Rule of Law

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In New York, a unite of State Troopers – ‘the elite of the elite,’ as the Troopers have been called – was found to have been manufacturing evidence for over a decade. In New Jersey, a County Medical Examiner declared that a homicide victim had been beaten to death, failing to find in an autopsy two bullets in the victim’s brain. Many such examples can be found, and they are examples of failures by those in public service to meet the minimal conditions for trust that they are doing their jobs. It is part of what it is to be a professional civil servant, I shall argue, that those who occupy such a position, from police to those in a prosecutor’s office to legislative aides to civil service employees of, in the United States, the Budget Office, have special obligations. Indeed, it is arguable that such professionals are to be held to significantly higher standards than ordinary citizens.

Such an argument is not innocent of theoretical implications, for one’s view of professional civil servants, for instance, both depends upon and implies a particular conception of the nature of a legal system. The view I shall argue for regarding the minimal conditions for being a professional civil servant requires, for instance, some version of Lon Fuller’s principle of reciprocity. We need to begin by examining a case in some detail.

2 The County Medical Examiner failed to follow standard procedure in such cases, which calls for an X-ray of the brain (Jon Nordheimer, ‘New Jersey Autopsy Misses Two Bullets in a Man’s Head,’ New York Times (October 20, 1993), p. A1). The wife of the victim said, ‘You’re dealing with so-called professional people who miss two bullets in the brain after telling us he died from three blows to the head. How can this happen? They’ve robbed us of the knowledge of when he died and may have hampered the criminal investigation so the killer walks free’ (ibid., p. B5).
The standards for entry into the New York State Police are significantly higher than for any other police force in the State, and so it was no surprise that its superintendent, Thomas A. Constantine, would find it 'just unbelievable' that 'a sworn officer in...this agency...would be framing people with fabricated evidence.' In one Troop of the Police, three and possibly five officers have been fabricating evidence since at least 1982. It is possible that another Troop is involved as well. One of those who has pleaded guilty lifted a fingerprint for a suspect from a metal frame used to hold a fingerprint care in place while the suspect was booked.' The suspect 'was convicted in a 1986 double murder,' and the judge who, subsequent to the police officer's confession, ordered a new trial, said that 'the fabrication was "a form of official misconduct whose nature and extent place it somewhere between a nightmare and a disaster."' One officer was convicted of 'fabricating evidence in 21 cases.' At least 30 criminals cases over nine years' are now in question, the total may be many more, and a difficulty in determining how many cases are at issue is that some officers have tried 'to destroy evidence of their wrongdoing.'

One way to comprehend the magnitude of a moral problem is to track the harms that the problem has caused, harms that would not have occurred but for the problem. To assess the problem, we would at least need to weigh — by some moral measure — the harms against whatever good might result, but the magnitude of a problem, the measure of the need to ferret out whatever goods there may be to mitigate the harms, is readily enough determined by examining the harms. There were many in this evidence-fabricating scandal.

(1) Innocent people were found guilty. One woman 'served two years in jail for a crime she did not commit."

Others suffered the indignity and expense of being brought to trial, whether they were found guilty or not, when, according to 'the special state prosecutor appointed by [the Governor] to investigate the scandal, the

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1 Steinberg, Op. cit.
original criminal investigation could not be supported without the fabricated evidence."

(2) In some cases it will be too late to retry suspects whose original trials were tainted, but whom the State thinks it can convict with other, original untainted evidence. Witnesses have disappeared; memories have decayed; physical evidence has been destroyed, and so on. So one consequence of the fabrication of evidence is that suspects whom the State feels it would have had enough evidence to convict will not now be convicted. They will thus not serve the jail sentence they deserve to serve, and they will be free to commit new crimes or, at the minimum, put people in fear that they will commit new crimes.

(3) Guilty people may not have been apprehended, and, as a consequence, they still may be at large, not paying for the crime they committed and free to commit new ones. One effect of using tainted evidence to convict is that it guarantees that we cannot know that we have apprehended the truly guilty party, and it may thus leave unapprehended just those we would wish not among law-abiding citizens. If the person convicted of a double murder was not guilty of the crime, someone who did commit a double murder went free—without having to worry that the police would be after him or her.

(4) The trial is the legal equivalent of a lynching. What is wrong with a lynching is that the procedure is harmed. Someone is denied the benefit of a presumption of innocence and all that that presumption entails—that the State must prove its case, using evidence in a trial where an opposing attorney has a chance to cross examine, that the defendant is entitled in a criminal trial to a defense lawyer, and so on. The State undermined the entire process just as effectively as it would have undermined the process had it simply lynched those it wished to convict. The effect on the procedure was the same. The woman who was wrongly in jail for two years was convicted 'of being an accessory' to a 'quadruple murder.' All four bodies had been dosed with gasoline and set ablaze. She confessed only to using credit cards stolen from the house, but the State was able to 'prove' that her fingerprint was on a gas can in the house where the murders occurred: the fingerprints were actually lifted from one of the two restaurants where she worked. The evidence was fabricated, and the testimony supporting the evidence was false. So the integrity of the trial was shattered: the trial no more proved that she was an accessory to the murders than a lynching would have proven her guilty of them. This harm to the process is a double one. On the one hand, it harmed the actual trail of the woman: she was wrongly convicted. But, on the

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other, it puts into doubt the process itself. How, one wants to ask, can we ever be sure that evidence produced by the police is untainted when the ‘elite of the elite’ can fabricate evidence for over a decade with no one the wiser?" So the harm is to the practice of having trials in which the state controls the evidence.

(5) The entire police force has been tarnished by these actions. As would be expected, ‘prosecutors say that when they have called troopers to testify in recent months, defense lawyers have invoked the scandal to impugn their testimony.’ It is perhaps unfair that the trustworthiness of all should be put into doubt because of the actions of a few, but the argument for doubt is compelling. These were, after all, the elite of the elite, and the scandal caught the State Troopers by surprise in part because ‘top officials never imagined that a trooper steeped in the ethos of state police would stoop to doctoring a fingerprint.’ One effect of some of them being tarnished, and innocent people perhaps going to jail, is that any prosecutor will ask whether this trooper, testifying in this case, is one of the honest ones or one of the dishonest ones. Wearing a trooper’s uniform is no longer a surety of honesty.

(6) The entire episode will cost the State of New York enormous sums of money. It is now being sued for $500 million by the woman ‘who spent two years in jail after State Police investigators fabricated evidence against her.’ She is asking ‘$250 million for the State Police’s failure to train and supervise its officers, $150 million for the state’s failure to protect [her] civil rights and maintain an honest police force and $100 million for [her] wrongful arrest.’ She is not likely to get anywhere near that much, given the history of civil suits regarding police officers, but she will get something, and this is only the first civil suit against the State in the evidence-tampering scandal. It is likely to be followed by many more.

II

It might be supposed that the primary harm in this scandal is that the State Troopers charged with fabricating evidence failed to fulfil the special obligations they have as State Troopers. In that case, I would be assuming that what makes someone a State Trooper is that he or she has special obligations. But this analysis would be

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"Changes have now been made in ‘the way troopers handle evidence and verify fingerprints. All prints must now be photographed before they are lifted from objects, at least two investigators must sign off on all crime-scene reports and two supervisors must review any fingerprints that are discovered’ (Steinberg, Op. cit., p. B6)."


mistaken. In spelling out more fully what he means by having a liability, Hohfeld remarks that innkeepers, for instance, are under present liabilities rather than present duties. Correlative to these liabilities are the respective powers of various members of the public. Thus, for example, a travelling member of the public has the legal power, by making proper application and sufficient tender, to impose a duty on the innkeeper to receive him as a guest."

So the innkeeper is liable to have a duty imposed just as we are all, as citizens, liable to have a duty imposed to serve on a jury. We only have such a liability if certain conditions are satisfied: our names appear on the tax roles of a jurisdiction, we are presumed of sound mind, and so on. And that liability duty provided only that certain other conditions are satisfied: we are selected for a jury pool by some non-biased procedure, and so on.

One of the legal relations that distinguishes citizens of this country from those of another, or distinguishes citizens of one state in this country from those of another, is that they have such a special liability – a liability that gives rise to a special duty. If we say that citizens of the State of New York are distinguished from citizens of another State in the United States by having a duty to serve on juries within the State, a duty citizens of other States cannot have, then that is only a short-hand way of saying that what distinguishes us is that we have a liability to have such a duty. As we shall see, this way of putting the matter is of no small importance for understanding what is wrong with what the State Troopers did.

For in the same way, I would argue, part of what distinguishes State Troopers in New York from ordinary citizens and from other officials in New York and in other States is that they have special liabilities. This is only part of what distinguished them since, I would argue, they are also distinguished by being in a variety of other legal relations which ordinary citizens and other officials are not in. A State Trooper cannot sign a bill into law whereas a Governor is liable, by fastening his or her signature to a document of a certain form, and with a certain history, to make the substance of the document law. So a Governor is distinct from a State Trooper, I would argue, in the kinds of legal relations he or she enters into in becoming governor. The position entails certain legal relations, and so those who occupy that position are thus in those legal relations, whatever they may wish. So someone who is a State Trooper and is acting in that capacity is empowered to arrest someone, to carry and shoot a gun, to direct traffic when there is an accident, and so on. I am empowered to do none of these things, and neither is a governor.

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But State Troopers, as I have suggested, have more than legal powers that others of us do not have. To fasten upon a particularly telling example, given the scandal, they are liable to have a duty imposed to handle any evidence they receive in a way that will assure its integrity. If evidence should happen to fall into my hands, it is no part of my duty as a professor or even as a citizen to ensure its integrity. I thus have no duty to wear gloves when handling a weapon I find upon the pavement that I have good reason to suspect is associated with a crime. The police and others may well regret my not wearing gloves, and I may even be irritated at myself later for my stupidity. But I will not have failed in any duty, for I am not marked out from others, the way police are, by being liable to have a duty imposed upon me when evidence falls into my hands.

Of course, the State Troopers did not taint evidence in their hands, but created evidence, and this calls for a slightly more complicated analysis—though of the same form. For we can only understand how a State Trooper could have created evidence, and had it accepted as prima facie legitimate—capable of being disproved, but presumptively valid—by seeing that State Troopers occupy a position which legally empowers them to gather evidence, for instance. I might perhaps be able to go rummaging about a burned-out house hunting for cans that contained gasoline, but I would then be trespassing. A police officer can do it legally, is empowered to do it, and is in the special position vis-à-vis what is claimed to be found of having the claim have prima facie validity. It is because the officer has such special powers that an officer also has a special liability to have a duty to ensure, among other things, that what is gathered is carefully marked so that it can later be identified as having come from the place it is claimed to come from, carefully stored so that it is not damaged and so that its physical continuity can be proven (so that no one can replace it with anything similar, but proving something different, for instance), and so on. In particular, and especially germane to the scandal, a police officer is liable not only to have a duty to ensure the integrity of any evidence gathered, but, rather obviously, to have a duty to ensure that it is evidence that is gathered. These special duties are created when a police officer is investigating the scene of a crime, is asked to investigate a suspected fingerprint by a superior officer, and so on. An officer has a special duty not to create evidence, that is, because he or she is especially empowered and so specially liable.

In giving this form of explanation, I am presupposing that what uniquely marks out and distinguishes various civil officials—from police officers to a governor to a tax collector, for that matter—are distinct sets of legal relations. We can, in short, individuate positions and individuals both by the legal relations in which they figure and by the ways in which they figure in them. I am also presupposing, rather obviously, that we can make sense of the concept of a legal relation and can mark out
and distinguish various legal relations. So the claims I am making are not innocent of theoretical implications and thus need theoretical support – though more than I have provided or will provide here.

III

Yet, why, it may be asked, do State Troopers have special liabilities? If this is not to be an analytic claim, devoid of explanatory power, we need to provide some reasons for the attribution, reasons which connect up with the harms that we have sketched out. There are, I think, a variety of different and independent reasons for attributing such liabilities to State Troopers. Let me focus on two.

(a) As I have suggested, a State Trooper has special duties because he or she is specially liable and is especially liable because he or she is empowered in ways in which ordinary citizens, for instance, are not. But that is only part of the story for there being special duties imposed on a State Trooper. I suggested at the beginning that it is arguable that such civil servants can be held to higher standards than ordinary citizens. Proving this claim would require a detailed analysis of each kind of civil servant since, I suspect, no single overarching principle is appropriate for each of them: the sorts of standards each must exceed are different.

But the police do not just have powers ordinary citizens do not have. The exercise of these powers can cause enormous harm to ordinary citizens. Anyone who has been subjected to arrest in the United States has some idea of what it feels like to be dehumanized and put in a position of being powerless. A person whom a police officer decides to arrest is handcuffed and shaken down and enters a stream of procedures designed in part to strip him or her of any sense of personal integrity, and thus of personal strength, physical and mental, in order to embed a sense of helplessness. Worse, the power is to a large measure discretionary in certain cases. It is up to an officer to decide whether to give a ticket or not if someone is over the speed limit, and it is up to an officer to decide whether someone looks suspicious enough to be hauled in for questioning – a move that itself initiates a train of procedures that can be as horrendous as being arrested.

I am not suggesting that such discretionary power is arbitrary, though it may be in some cases, but that the decision whether or not to initiate an ordinary citizen into the criminal process, for instance, is largely up to individual officers. It is in part a response to this enormous power that police officers both are liable and ought to be liable for certain sorts of duties – a duty not to harm those who are subject to arrest, a duty to ensure that the arrest is itself triggered only by good reasons, a duty to ensure that the evidence for an arrest is clear, both to the suspect (if only to placate and so disarm the suspect psychologically) and to others who will review the act and who will need to examine the evidence to determine whether to
book a suspect, how to charge the suspect if booked and so on. With such enormous discretionary power comes a reciprocal responsibility, I am claiming – a responsibility to exercise the discretion carefully, for example. The underlying principle is that enormous harm may be done to individuals if that power is not carefully restrained by a reciprocal responsibility.

(b) But there is another reason for attributing liabilities to such special duties to the State Police – one that deepens our understanding of the relationship between citizens and the state. The underlying argument is Alexander Hamilton's in Number 84 of the Federalist Papers. He is there arguing against adopting a Bill of Rights with the Constitution, and though the argument may seem odd today, it has its own interesting logic. The Constitution, he argues, presupposes that political power lies with the governed, who give up certain powers to those they elect. Rights have traditionally been 'abridgements of prerogative in favor of privilege' and thus presume that the governors have power that needs to be abridged. So adding a Bill of Rights to the Constitution, he argues, sends a confusing message, namely, that the Constitution both vests power in the people and vests power in those who govern.

Hamilton adds a variety of additional arguments to support his view, but the important one for our purposes is his claim that the Constitution itself already embodies all the protection that is needed against the arbitrary power of those who govern. For it contains provisions providing the writ of habeas corpus, requiring a jury in the 'trial of all crimes, except in cases of impeachment,' denying titles of nobility, protecting citizens against ex post facto laws, and providing for impeachment and punishment for treason.18

The provisions are not idly inserted into the body of the Constitution, Hamilton argues, but are a carefully chosen set, there to protect citizens from the arbitrary power of tyrants -who cannot make the law mean what they wish, but must refer to a jury of citizens to convict, a jury who may, if they so choose, effectively decide what a law means in a particular case; who cannot elevate some above others to serve the tyrant's ends, but must treat all as citizens; who cannot arrest anyone without providing an explanation that is in accord with the law; who cannot act to imprison anyone without appealing to a prior law; and who, if he or she should act un-Constitutionally, is liable to impeachment and imprisonment.

In short, those who hold an office under the Constitution are disabled, to use Hohfeld's terminology, for certain sorts of actions and are liable, if they should act...

19 Ibid., p. 435 and the Constitution, Article IV, Section II
contrary to what is expressly forbidden, to impeachment. What the Constitution embodies in these provisions, that is, is a principle that those who are elected to public office under the Constitution have a reciprocal responsibility to abide by the underlying principle that Hamilton thinks animates the Constitution, namely, that the powers it invests in those who govern are derived from the consent of those who are governed.

This concept of a reciprocal responsibility I would parse out as a set of liabilities and disabilities. On the one hand, those who hold elected positions are unable to do certain things—like raise their salaries during their terms of office if they are in Congress. On the other hand, they have certain sorts of liabilities—like that of providing an explanation for an arrest upon demand.

Similarly, a civil servant like a State Trooper has a similar reciprocal responsibility to those he or she serves. The powers vested in the police are those powers citizens, through their elected representatives, have chosen to vest in police, and though that argument can look a little strained when we see the incredible difficulties tied to trying to change those vested powers in any way, it lies beneath our conception of how the police come to have the powers they have. And, just as elected officials have a reciprocal responsibility, so then do police officers. They are disabled from acting in certain ways—unable to arrest anyone without good cause (and so subject to suit if they do), unable to shoot suspected felons without certain specified conditions being satisfied, and so on. And they are liable in certain ways— to exercise their discretion carefully, to ensure that evidence not be tainted in any way, and so on.

Underlying the claim that State Troopers have special liabilities, in other words, is a view about the nature of the relationship between citizens and the State—a view, I understand, that would need arguing for on independent grounds.

**IV**

This analysis of the special relations such civil servants as police officers have is thus not without its implications for our understanding of the nature of a political authority and obligation—and thus of a legal system. I have suggested one implication in arguing that using a complex set of legal relations in order to understand a civil servant’s particular position presupposes that there is some such system of legal relations in any legal system. But there is another implication that we need at least to sketch to understand more fully the implications of the view I am pushing.

H. L. A. Hart has argued that there are two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the
criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials. It is the second condition I wish to focus on.

That condition requires that the officials of a system take the system's rules of recognition, change, and adjudication as standards and raise critically their own and each other's deviations as lapses. Adding this condition is a gain over Austin's conception in that at least the sovereign is subject to the laws of the state, whatever those may be, and not just, as for Austin, God's laws. Archibald Cox remarks that when he won the Supreme Court case requiring that President Nixon turn over his tapes, a Swedish scholar said, 'The chief of state can't be subject to the orders of the court. It can't be. It's unthinkable.' Cox responded, 'Well, I'm sorry. It can't be unthinkable, because Americans have been thinking it for quite a while.' And, on Hart's conception, it is thinkable as well: the President would be subject to whatever the rules of adjudication require and his actions would be appraised accordingly.

But Hart's conception is consistent with the rules of recognition, adjudication, and change having any content whatsoever. All that is required is that, whatever their content, the officials of the system accept them as standards for their official behavior. The view I think lies behind the claim that State Troopers -- and other civil servants -- have special obligations requires more than this. It requires, indeed, a different conception of the point of a legal system, one in which law 'is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian to the integrity of the system.'

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28 Ibid.
29 The New Yorker (January 20, 1975), p. 28.
30 Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1969), p. 210. I am not convinced that Fuller has fully appreciated that in Hart's concept of the law officials of the system are obligated to obey the rules of recognition, change, and adjudication of the system. Fuller says that he finds 'no recognition of this basic notion' that 'the legal authority [is] to abide by its own announced rules in judging the actions of the legal subject' (Ibid., p. 216, fn. 29). But that is just what Hart is saying, in fact: a system's rules of recognition determine its rules, and officials of the system are bound by those rules in all their actions. What I think has gone wrong is that Fuller has not properly articulated his own view. What he thinks is required for a legal system, as I go on to emphasize, is that officials have responsibilities not just to a system's rules, but -- however ultimately -- to citizens as well. It is this appeal to what he calls the principle of reciprocity that undergirds this conception of the nature of a legal system.
The implication of this view is that there are ‘interlocking responsibilities – of government toward the citizen and of the citizen toward government.’ In short, the officials of the system, including civil servants and surely including officers of the law, charged with enforcing the sanctions of the system, have a responsibility to citizens – even if mediated through other officials of the system – to ensure the system’s integrity. The State Troopers in New York failed to abide by their reciprocal responsibilities to ensure the integrity of the criminal process, the most invasive way in which the system enforces its norms. So, in that way, their conduct was ‘a form of official misconduct...somewhere between a nightmare and a disaster.’ Citizens have a ‘rightful expectation’ that such powerful officials of the system as State Troopers shall conduct themselves in such a way as to ensure the system’s integrity. For such officials are unusually wellpositioned in the system, as I have argued above, to do enormous harm. Without at least a ‘tacit reciprocity’ that such officials have special responsibilities, we risk undermining the very conception of the state which provides them with such potentially harmful power.

27 Ibid., p. 139

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