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Lawful or Fair? How Cops and Laypeople Perceive Good Policing

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CRIMINAL LAW

LAWFUL OR FAIR? HOW COPS AND LAYPEOPLE PERCEIVE GOOD POLICING

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Legal authorities and the public live in two separate worlds. One world is suffused with law, and the other world is suffused with people's lived experiences that support their evaluations of fairness. When legal authorities consider whether police policies and practices are desirable, a framework regarding the lawfulness of the relevant policies and practices dominates the conversation. Police departments, their policies, and police officers' actions are viewed as right or wrong with reference to constitutional standards, as interpreted by prosecutors, judges, and other legal actors. In contrast, we argue that the public is generally insensitive to the question of whether police officers act consistently with constitutional standards. Instead, the public evaluates the propriety of police actions primarily by assessing whether police officers exercise their authority with "procedural fairness."

We rely on the results of an innovative nationwide experimental survey involving respondents from representative American cities. Each survey

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respondent completed a questionnaire and then watched and reacted to three videos of police–citizen interactions. We argue that the actual lawfulness of police action has at best a minor influence on public evaluations of appropriate police behavior. Public judgments about whether police officers should be disciplined for misconduct are largely shaped by people’s procedural justice evaluations.

We believe that these findings strongly support the need for police to broaden the framework within which they evaluate a variety of types of policing policy—racial profiling, zero tolerance policing, street stops, mosque surveillance, etc.—to include an understanding of how these policies and practices impact public views about the appropriateness of police conduct. Whether policies comport with constitutional standards alone is an impoverished way to judge the rightfulness of police action. Further, our findings point the way toward creating relationships between the police and the public that both enhance cooperative efforts to maintain social order and build people’s identification with and commitment to both the communities in which they live and to law and government. That broader framework requires evaluating police policies and practices with reference to public conceptions of procedural justice.

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INTRODUCTION

When police officers evaluate their own conduct, they typically consider their actions through a prism of lawfulness, asking what the law entitles them

to do.¹ Police officers are socialized into this way of thinking in police academies, where recruits memorize hefty volumes that define the legality of various police actions.² This learning continues through officers' careers when superiors, as well as state and federal prosecutors, judges, and defense attorneys, evaluate officers' actions by asking whether the police were following the law in any given situation. Law determines whether arrests are valid, whether searches are acceptable, whether shootings are appropriate, and whether the officers' actions are more generally sanctioned. Law is central to the way in which police are evaluated in the course of their everyday work lives. It is natural, then, for the police to approach any interaction with a civilian by focusing on what they are legally entitled to do. When can they stop someone on the street or in a car? When can they search a person? When can they draw a weapon, and when can they use it?

Police officers and those who work most intimately with them impose a framework of legality upon the actions the officers undertake, and the police legitimize their actions through adherence to the law. For example, when a controversy over mosque surveillance erupted in New York City, the mayor defended police actions by calling them "legal," "appropriate," and "constitutional."³ Similarly, a series of policing practices, including zero-tolerance policing, racial profiling, and aggressive street stops, have all been debated in extensive literatures that are concerned with whether they are legal, appropriate, or constitutional.⁴ Individual officers legitimate their actions with respect to lawfulness, too. Irrespective of whether an officer is making an arrest or justifying a shooting, an officer's attention is inevitably directed toward the letter of the law. An officer justifies her actions in terms of law, and the reactions of prosecutors, judges, and police superiors to her actions are defined in the same terms. Lawfulness, then, confers protection and leads to praise and promotion. Unlawful actions, on the other hand, are undone when possible and punished when egregious. Sanctioning flows from such lawfulness evaluations, and officers know that the key to avoiding punishment is to follow the letter of the law.

¹ See, e.g., Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 765–68 (2012) (articulating the "conventional paradigm" of police regulation).

² See *infra* note 71 (reporting the number of hours rookie police officers spend learning law in major police departments).

³ *Bloomberg Defends 'Legal,' 'Appropriate' NYPD Monitoring of Muslims*, CBS N.Y. (Feb. 24, 2012, 8:50 PM), <http://newyork.cbslocal.com/2012/02/24/bloomberg-calls-nypd-monitoring-of-muslims-legal-and-appropriate/>, archived at <http://perma.cc/M6WD-KQVD>.

⁴ See, e.g., Wesley G. Skogan & Tracey L. Meares, *Lawful Policing*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 66 (2004).

We argue that members of the public, when deciding whether the police have done wrong and deserve some form of sanctioning, are not particularly sensitive to whether police officers in general or the specific officers they observe and interact with are actually acting in ways that are consistent with constitutional standards. Instead, we believe public judgments about whether police officers were acting unlawfully and should be disciplined for misconduct are largely shaped by people's procedural justice evaluations about the demeanor of the officers during their interactions with them. Data we have collected from an innovative national study supports our position. We presented respondents with fact patterns that represent both constitutionally and unconstitutionally acceptable police behavior. We find that such variations have little influence upon judgments about whether the police have behaved appropriately.

The goal of our study was to improve our ability to identify key factors influencing public views about when police conduct is appropriate or inappropriate. Specifically, we sought to ascertain the relative influence of lawfulness and procedural justice in policing upon public judgments about the appropriateness of police conduct and the need to discipline police officers. Using an innovative factorial experiment incorporating thirty-second videos culled from police training tapes and YouTube.com, we presented videos of real-life interactions of varying intensity between police officers and citizens to our respondents in order to test how citizens perceive and evaluate these types of encounters.⁵ Each of our respondents completed a questionnaire and then watched and reacted to three videos after reading manipulated vignettes of real-life police–citizen interactions. The vignettes described the facts of the interactions respondents viewed on the videos and provided information about whether the police were acting in one of three ways: lawfully, unlawfully, or with ambiguous lawfulness. For example, in one case respondents were told that police stopped a motorist who was weaving across the traffic lanes on a highway (i.e., for a lawful reason). In another case, respondents were told that police stopped a person who was driving normally and within the speed limit (i.e., for an unlawful reason). And in the third case, we provided no information about the legal background of the stop.

In our study, perceptions of procedural justice were the most powerful predictors of whether respondents believed that the police had done wrong and deserved some form of sanctioning. In contrast, the actual lawfulness of a police officer's initial conduct in deciding to approach and interact with the person shown had, at best, a minor influence upon people's evaluations of

⁵ These videos are available upon request from the authors.

police lawfulness and culpability for subsequent behavior between the person and the officer during the stop. The public, it seems, does not react to the actual lawfulness of either the actions of the police in general or to the lawfulness of the decisions of specific police officers when evaluating their behavior.

Does this mean that the public is indifferent to police legality? Our findings suggest that, on the contrary, the public is strongly influenced by the *perceived* legality of police actions. However, *perceived* legality is only marginally connected to *actual* legality. Whether the police are, in fact, acting legally is not central to the judgments the public makes about the appropriateness of their actions or to the public's desire to punish the police.

This, of course, raises the question of what basis the public has for evaluating police behavior as appropriate. To answer this question, it is important to first note that a great deal of constitutional law is concerned with the justification of a legal actor's decision to take an action (or not).⁶ For example, is there a reason for stopping a person, for questioning him, for searching him, etc.? Is it acceptable for an officer to draw her weapon? If so, what type of weapon is justified (fists, club, Taser, gun)? And what level of force is allowable? While these are all legally central issues, they have little to do with the acting officer's demeanor. There are no constitutional standards about how respectfully the police are required to treat citizens. Our findings support the conclusion, however, that police demeanor strongly affects public inferences of legality and the resulting impulse to punish. In particular, a large body of social science research suggests that the public reacts to whether they believe police officers are exercising their authority fairly—something referred to in the literature as procedural justice.⁷

Thus, we argue that there is a fundamental disconnect between the lawfulness frame that characterizes police-thinking about the propriety of their conduct and the procedural fairness frame through which the public evaluates police and their actions. In colloquial terms, legal authorities and the public live in two separate worlds. In the police world, actual lawfulness legitimates the exercise of police authority, and the police punishment is linked to whether their conduct violates the law. In the public world, procedural justice leads to perceived lawfulness, and it is the unfair exercise

⁶ See, e.g., Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 337–42 (2014) (examining constitutional history of stop and frisk decisions).

⁷ The seminal work in this arena is TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990). For a recent review of this literature see Tom R. Tyler et al., *The Impact of Psychological Science on Policing in America: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCHOL. SCI. PUB. INT. 75, 75–109 (2015). See also *infra* Part I.B.

of police authority that leads to perceived illegality and the desire to punish police. Recognizing this disconnect is the key to understanding many of the problems that arise when police and community residents interact.

The remainder of this Article aims to explain the basis of this disconnect, offer empirical support for our conclusions, and suggest some implications of our research. Definition of terms comes first. The meaning of lawfulness is largely self-evident. In the first Part, we explain why lawfulness can be a problematic yardstick for measuring appropriate police behavior. Procedural justice is the foundation of our model of fairness, and that term likely is not self-evident, so we spend some time explaining that concept in depth. We follow our definitions with a description of a theoretical framework that illustrates the ways in which the procedural fairness of the conduct of authorities can be different from the lawfulness of it. We then lay out evidence from a large-scale experimental survey in an attempt to support this assertion: when people decide whether to punish police officers, they place greater weight upon their evaluations of the fairness of police conduct than upon its objective lawfulness. We conclude with some preliminary implications of the relationship between our findings and theory.

I. DEFINING TERMS

A. THE PROBLEMATICS OF LAWFULNESS

Law confers upon the state and its authorities, such as police, a monopoly on the use of coercion to enforce laws and maintain order. This idea famously underlies the Weberian notion of legitimacy in the exercise of police authority.⁸ Police compliance with the law, then, is one of the most important aspects of law within a democratic society. The rule of law actually goes hand-in-hand with the public's tolerance of the state's exercise of discretion. Consider the fact that it is the very existence of rules of law designed to limit the power police officers exert over us that justifies the claim that police compose a rule-bound institution, which we all agree should be empowered to make discretionary decisions to carry out the basic tasks we expect of law enforcement—the pursuit of justice, the protection of

⁸ We refer here to Max Weber's notion that police were created to operationalize the state's legitimate monopoly on physical force. The police have a monopoly on power to enforce the law. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., Free Press 1964) (1947). For an engaging explication of this idea and how it relates to the development of the modern police officer, see Rubén G. Rumbaut & Egon Bittner, *Changing Conceptions of the Police Role: A Sociological Review*, 1 *CRIME & JUST.* 239, 269–70 (1979).

individual liberties, and, of course, the battle against crime.⁹ This observation is almost banal, and yet it is critical: recognizing the centrality of law—and of the constitutional standards under which law is enacted—to the existence and mission of policing sets up the possibility that the proper, and perhaps even best, way to evaluate police conduct is primarily with respect to legal rules—especially constitutional ones.¹⁰ It is likely obvious at this point that we will take issue with this view.

Our goal in this analysis is to demonstrate that solely legal yardsticks are not the best, most complete way to evaluate what legal authorities do. At the very least, we show that most members of the public who engage in such evaluations when they deal with police in their everyday lives do not rely very much on the law as such when making those evaluations. Therefore, we think that lawfulness as a yardstick does not capture people's everyday experiences with police and police practices.

In making this distinction, we do not mean to argue that issues of law and legality are unimportant to the proper operation of policing as an institution. On the contrary, we view these issues as central to good policing. However, we regard public views about the propriety of police conduct as an equally important and, in our view, more widely neglected issue when thinking about police. Rather than examining the basis of public judgments about the rightness or wrongness of police conduct in the context of police discipline, legal scholars and policing professionals have both tended to assume that the public is focused upon whether police are acting lawfully.

Many assume that by following the law, police are building popular legitimacy in their communities.¹¹ As a consequence, police authorities frequently express puzzlement over the consistent finding of public opinion

⁹ The alternative is, of course, a despotic state, which is the reason why the concept of legality is a foundational principle of criminal law and why control of discretion, particularly police discretion, is one of the central problems of constitutional criminal procedure. For one of the best discussions of the role of legality and the justifications for the legality principle, including separation of powers concerns, notice arguments, and discretion control, see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985). For a discussion of the importance of controlling discretion in criminal procedure while also promoting individual rights, including a detailed history of the rise of criminal procedural rights in the context of the need for and dangers of police discretion, see Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

¹⁰ See Skogan & Meares, *supra* note 4 (discussing lawfulness and constitutionality in particular as a way of judging good police conduct).

¹¹ See NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH FOR PRACTICE: ENHANCING POLICE INTEGRITY 1 (2005); Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 318 (2004).

polls that perceived police legitimacy is at best moderately high; that levels of police legitimacy are constant across the past several decades; that minorities show strikingly lower levels of perceived legitimacy; and finally, that minorities have not increased their perceptions of police legitimacy in recent years.¹² Do these findings suggest that the police are not, in reality, following the law? Analyses of police performance suggest the opposite.¹³ So, actual lawfulness is not leading to popular legitimacy.

In our view, the key to understanding this seeming paradox is to understand that the public does not define lawfulness or determine the appropriateness of sanctioning the police through the same lens of legality that police and other legal authorities use. This clash between the way that the public assesses police conduct and the way that legal scholars and police professionals do reflects two different worlds within which different issues are central to evaluations of police wrongdoing. Our colleague, Bruce Ackerman, labels these two worlds as those of the “Scientific Policymaker” and the “Ordinary Observer.”¹⁴ Drawing upon their professional training, Scientific Policymakers apply rules about when and how they can appropriately impose their decisions on the community. Their focus is on the rules governing the decisionmaking that occurs based upon interpreting the situation *before a contact occurs*. In contrast, Ordinary Observers focus on the comportment and demeanor of the legal authorities. This means that public attention is paid to *how legal authorities act once they have decided to engage a person* and are implementing their decision by interacting with members of the public.

We argue that it is consequently important for police to focus upon *two* benchmarks of performance: (1) behaving in ways that are consistent with the law, and (2) acting so as to create and maintain the popular view that they are legitimate, and their conduct is appropriate, within the communities where they work when exercising their policing authority. The first

¹² See generally MARK PEFFLEY & JON HURWITZ, *JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES* (2010) (reviewing public opinion polls concerning minority views about the police in different years).

¹³ See NAT’L RESEARCH COUNCIL, *FAIRNESS AND EFFECTIVENESS IN POLICING* 252–90 (2004) (Wesley Skogan & Kathleen Frydl eds., 2004) [hereinafter *FAIRNESS AND EFFECTIVENESS IN POLICING*] (detailing studies of police compliance with various constitutional standards).

¹⁴ See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 4–5 (1977) (explaining that proper construction of the Constitution’s Compensation Clause depends on two ideal types of modern legal analysis: the perspective of the “Scientific Policymaker” or the perspective of the “Ordinary Observer”). Here, Ackerman’s scientific policymakers are police professionals, while ordinary observers are members of the public.

benchmark is about police awareness of the Constitution and the law; the second is about police comportment and demeanor on the streets.¹⁵

Our claim about the basis of public evaluations of police conduct is an *empirical* rather than a normative one. Simply put, if we examine how most people in their everyday lives actually evaluate the interactions that they have with police officers and agencies, it is immediately apparent that people do not rely on the framework of the actual lawfulness of police action when coming to conclusions about appropriate police behavior. Instead, they look to indicia of *procedural justice*. As we explain below, procedural justice and related factors provide the basis for social psychological determinations of legitimacy.¹⁶

This distinction is one that is familiar to psychologists who study a phenomenon they label the “fundamental attribution” error, which reflects the way in which people attribute intention, motivation, and character to actions they see in the foreground, in spite of mitigating situational factors that can also explain the actions and potentially diminish judgments about character, volition, and responsibility.¹⁷ Researchers find that people tend to focus upon a person and her behavior within a given situation while ignoring or underweighting the situational framework within which that person is acting. As an example, people typically believe the statements that people make reflect their true feelings, even when they speak under coercion or

¹⁵ There is potentially another relevant metric of good policing—whether police are effective at reducing or preventing crime. As one of us has explained elsewhere, this metric is of relatively recent vintage. See Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 WM. & MARY L. REV. 1865, 1871–75 (2013). However, while this piece focuses upon how the public assesses whether police have exercised their authority correctly in any particular instance, a strong argument can be made that police effectiveness at crime control simply misses the mark. As the Supreme Court has noted, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). The preceding quote indicates a potential clash between lawfulness on the one hand and effectiveness on the other as ways to assess good policing. Procedural fairness is yet another, which we explore in depth through empirical methods in this Article.

¹⁶ See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 14–15 (2002) (explaining the difference between and relevance of procedural justice and trust-based motivation to decision acceptance and voluntary compliance). It is important to note that David Beetham has offered a different view of legitimacy that is not as thoroughgoing in its empiricism as is Tyler and Huo’s. Indeed, Beetham includes lawfulness in his definition of legitimacy. For Beetham’s conception of legitimacy, see DAVID BEETHAM, THE LEGITIMATION OF POWER (1991). Beetham’s approach brings together the normative and the descriptive.

¹⁷ See generally RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980) (explaining and discussing fundamental attribution error).

receive incentives.¹⁸ Coercion and incentives are, to many, simply background factors that are overwhelmed by the central figure in the situation: the person who is speaking or acting. Applying these ideas to the context we describe in this Article, those who observe police officers interacting with citizens often ignore the situational cues provided when those officers undertake their actions, lawfully or not. Instead, people focus on what is more salient to them—the actions the officers actually engage in once they are dealing with a person. When people do this, they make inferences in a way that underweights the legally central question of whether the actions of the officers were legally justified to begin with.

In a series of papers and conferences, Harvard Law School professor Jon Hanson and his colleagues have highlighted the ways in which people underweight the influence of situational factors and focus too much on an actor's behaviors.¹⁹ When people make judgments of culpability and blameworthiness of punishment, they often fall prey to situationism.²⁰ Interestingly, commenting upon the same situationism Hanson notes, Craig Haney suggests a cure in response to people's tendency to focus on behavior in the situation and not the situational context: expanded public legal education. He argues that there is a need to "make law a salient part of the situation."²¹ Echoing the general argument that people underweight the background factors in a situation, including what the law is and whether it is being followed, Haney notes that if people were better trained in legal doctrine, they would be more effective in overcoming their natural tendency to focus on the demeanor of police and more sensitive to the context of the police's actions (i.e., whether that context legitimated lawful police actions).²² As it stands, however, Haney suggests that people naturally fall into a pattern of focusing on the highly salient behaviors of legal authorities,

¹⁸ *Id.*

¹⁹ See generally Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008) (showing that people focus upon inferences about the character of an actor rather than the situation); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) (same). The tendency to ignore situational cues also has been recently noted at Harvard Law School's Project on Law and Mind Sciences website. See *Situationist Materials—Links*, PROJECT ON L. & MIND SCI. AT HARV. L. SCH., <http://sites.harvard.edu/icb/icb.do?keyword=k13943&tabgroupid=icb.tabgroup43841>, archived at <http://perma.cc/N5G3-68MA>.

²⁰ See Lee Ross & Donna Shestowsky, *Two Social Psychologists' Reflections on Situationism and the Criminal Justice System*, in IDEOLOGY, PSYCHOLOGY, AND LAW 612, 613 (Jon Hanson ed., 2012).

²¹ Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8 PSYCHOL. PUB. POL'Y & L. 3, 11–13 (2002).

²² See *id.*

such as police officers, and underweighting situational issues, such as the fact pattern to which the officers responded before they took action and whether those facts merited state intervention.

In making our argument, we do not mean to suggest that people fail to understand the idea of rights or lawfulness. People do know that they have rights and that there are rules that constrain police behavior.²³ However, their perceptions do not line up with the interpretations of the lawfulness of police actions that those who have some degree of formal legal training, such as lawyers, prosecutors, judges, and even police officers, would make. It is no doubt true that *perceptions* of police lawfulness also impact the assessments that people make about the appropriateness of police behavior.²⁴ We will show, however, that such perceived police lawfulness is itself a reflection of judgments about the procedural justice of police actions. Based upon the findings that we present later in this Article, it is clear that people's judgments flow from the more salient police actions that they observe during interactions and less from the background factors that determine the actual legality of police conduct. It is evaluations of the fairness of police conduct, in other words, rather than actual lawfulness that shape assessments of the appropriateness of punishing police.

B. PROCEDURAL JUSTICE AS FAIRNESS

In the social psychological literature, judgments regarding fairness depend primarily upon a model of *procedural justice*,²⁵ and that model, in turn, has a few dimensions. First, whether people have opportunities for

²³ See Skogan & Meares, *supra* note 4, at 81. See generally THE PSYCHOLOGY OF RIGHTS AND DUTIES (Norman J. Finkel & Fathali M. Moghaddam eds., 2005) (discussing what research findings suggest about people's knowledge of their legal rights).

²⁴ Note here that we said "perceptions" of lawfulness. As we will demonstrate, our research suggests, importantly, that at least within the realm of the constitutionality of police conduct, there is little relationship between what people perceive to be lawful and constitutional and what is objectively the case. Instead, there is a strong relationship between perceived lawfulness and perceptions of procedural justice.

²⁵ See generally E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747 (2003) (presenting findings that provide evidence in favor of a hypothesized four-component model of procedural justice wherein people are influenced by two aspects of formal procedures of the group—those that indicate quality of decisionmaking and those that relate to quality of treatment—and concluding that people are separately influenced by two distinct aspects of authorities with whom they deal—the quality of the decisions authorities make and the quality of treatment they receive from authorities); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115, 158–59 (1992).

participation shapes their views about their experiences. People report higher levels of satisfaction in encounters with authorities if they feel that they have an opportunity to explain their situation and their perspective on it—i.e., to tell their story.²⁶ Second, people react to the fairness of officer decisionmaking.²⁷ That is, they look to signs that tell them about decisionmaker neutrality, objectivity and factuality of decisionmaking, and transparency and consistency in decisionmaking. Third, people care about how officers treat them. Specifically, people desire to be treated with courtesy and dignity, with respect for their rights, and with interpersonal politeness.²⁸ Fourth, in their interactions with police, people want to believe that authorities are acting out of a sense of benevolence toward them. They want to believe that the motivations of the authorities are sincere, benevolent, well-intentioned, and that the officers are trying to be responsive to people's concerns.²⁹ When we use the term “procedural fairness” as a shorthand term here, we are referring to this collection of ideas.

One important consequence of people's perceptions of procedural fairness according to these terms is that they lead to popular beliefs of legitimacy. Legitimacy is a term with many meanings in different contexts. When we use the term “legitimacy,” we mean a “property that a rule or an authority has when others feel obligated to voluntarily defer to that rule or authority [A] legitimate authority is one that is regarded by people as entitled to have its decisions and rules accepted and followed by others.”³⁰ Obviously, by using the term legitimacy in this way, we are not promoting a normative vision of it. Our argument is not aimed toward a normative model with a justification of when people *ought* to defer to authorities; rather, our claim is descriptive in the social-science sense that we examine here whether people *do* defer (or at least say that they do).³¹ A robust body of social-science evidence from around the world shows that people are more likely to

²⁶ See Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 94 (2004).

²⁷ See Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 255 (2004).

²⁸ See *id.* at 277.

²⁹ See *id.*

³⁰ FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 13, at 297 (citations omitted).

³¹ Our focus will be on perceived obligation as opposed to personal morality. It is true that personal morality has been shown to be an important motivator of compliance. However, the voluntary deference that results from public legitimacy is also powerful—especially as compared to deference resulting from fear of the potential imposition of formal punishment, i.e., from variations in the perceived likelihood of being caught and punished for wrongdoing. For the seminal work on this point, see TYLER, *supra* note 7, at 3–5.

voluntarily obey the law when they believe that authorities have the right to tell them what to do.³² Indeed, a finding that many readers may find odd is that people typically are motivated to comply with the law more by the belief that the authorities with whom they are dealing are legitimate than they are by fear of punishment.³³ And, as we outline below, legitimacy is linked to whether the authorities treat people with dignity and fairness when exercising authority—i.e., whether they are procedurally fair. Policing in ways that the public recognizes as legitimate is one of the many ways that legal authorities build and replicate a strong government.

There are many consequences of legitimacy in everyday policing. One that has been widely studied is the willingness to defer to the police.³⁴ Another, which is our focus here, has been less widely studied but is equally central to police authority—that is the extent to which people accept police intrusions into their lives as appropriate and legal. Empowerment of police to exercise authority within a community varies, ranging from endorsing officers' right to do whatever they think is appropriate when managing social order, to viewing police authority as limited. Our concern here is with the degree to which people accept various types of police conduct in their dealings with citizens. When the public does not accept such conduct, that disapproval manifests in the perception that police have exceeded their lawful authority and ought to be sanctioned in some way.

What predicts whether people will evaluate the actions of police as being legal, appropriate, and reasonable? As we have noted, one model is lawfulness, which is concerned with whether the police are acting in accord with the rule of law as framed by the Constitution, enacted by the legislature, and interpreted by the courts. According to this model, which is central to the professional judgments police make, acting according to the law leads to public support and the popular acceptance of police discretion when exercising authority.

Notably, research on the basis of public views about legitimacy of police and of police actions suggests that objective lawfulness is not the primary issue that people consider when they are evaluating a police officer's actions. Rather, people place the greatest weight on *how* that officer exercised her power as opposed to the justification of police intrusions—i.e., whether the

³² See generally LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES (Braga et al. eds., 2007) (exploring the impact of perceptions of legitimacy in criminal justice systems across the globe).

³³ See TYLER, *supra* note 7, at 44–45 (demonstrating the relative weight of deterrence and legitimacy as motivators of legal compliance).

³⁴ See, e.g., TYLER & HUO, *supra* note 16, at 126–29 (summarizing the factors underlying individual decision acceptance during interactions with police and judges).

officer's actions were fair as we have defined that term. This finding holds across a wide variety of authorities. Researchers have studied public evaluations of police officers, judges, political leaders, managers, and teachers, and the findings are consistent: conclusions regarding legitimacy are tied more closely to judgments of the procedural justice of actions than to objective lawfulness.³⁵ Thus, the dynamic of legitimacy that we are presenting is that people focus on how police act when dealing with the public rather than whether police are acting lawfully.

The model of legitimacy we offer reflects the reality that interactions with the police are interpersonal experiences. Research suggests that people focus upon police behavior because their treatment by the police provides them with important information about their standing and status in the community—information that shapes their identities and feelings of self-worth.³⁶ A key aspect of police authority, then, involves the impact of police actions upon people's personal identity and feelings of status and self-respect. For example, if a police officer treats a person rudely during an encounter, that person will understand that treatment as providing information relevant to how legal authorities view him or her, as well as the group to which he or she belongs. The conclusion likely will be a negative one.

According to this view, a key motivator to people is how they feel the authorities view them and others in their community. Are they respected as a person? Are their values and lifestyle respected? Do legal authorities care about their needs and concerns and view those needs and concerns as worthy of their attention and consideration? All of these issues, which are intertwined with personal identity and feelings of self-worth, are shaped by how people are treated by legal authorities. People feel valued and respected when they are treated with courtesy and politeness by police officers who listen to and consider what they say and who are seen as sincere in their desire to do what is best for them and for others in their community. People can feel respected and valued even when they are being punished if the police treat them in these status-affirming ways. For example, Tyler and Jeffrey Fagan show in their research that the police can give a person a ticket or even arrest that person, while simultaneously enhancing the legitimacy of the police in that person's eyes, if the officers are courteous, respectful, and fair to the person they are

³⁵ See Tyler, *supra* note 26, at 91 (collecting various studies); see also Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 *YALE L.J. F.* 525 (2014), <http://yalelawjournal.org/forum/justice-sotomayor-and-the-jurisprudence-of-procedural-justice>, archived at <http://perma.cc/TXG9-ZBDK>.

³⁶ See LIND & TYLER, *supra* note 25, at 140–43.

dealing with.³⁷ By affirming and enhancing a person's status within society, the police are giving that person something valuable—a positive sense of self and identity—which is more important to them than the material consequences of the outcome of their interaction with the police.

To sum up, when we say that people evaluate the conduct of legal authorities with respect to procedural fairness as opposed to lawfulness, we are referring to these notions of legitimacy and procedural justice and to the relational connections between people and legal authorities that underlie them. The fact that people have a relational connection to legal authorities provides those authorities with an alternative basis for creating and maintaining their legitimacy that is not linked to either the lawfulness of their conduct or the nature of any sanctions they threaten to deliver, which they may use to enforce the law. And as we will show, these issues of identity and status dominate people's evaluations of police officers' actions, rather than more abstract issues of lawfulness.

II. THEORETICAL FRAME

When lawyers, law professors, and criminal justice professionals observe what they consider to be the overexercise of state power in the form of stops and arrests—New York City³⁸ and Philadelphia³⁹ might provide ready examples—they move quickly to describe the problem as a *legal* one in which the police are not following legal rules as understood by scholars. Members of these groups typically frame their observations in terms of constitutional law—especially textual provisions of the Bill of Rights—to

³⁷ See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 255–56, 261 (2008).

³⁸ Between 2006 and 2009, New York City cops performed around 500,000 street stops each year, up from approximately 160,000 in 2003. See DELORES JONES-BROWN ET AL., JOHN JAY COLL. OF CRIMINAL JUSTICE, STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER 4 (2010), http://www.roosevelthouse.hunter.cuny.edu/devdev/wp-content/uploads/2013/11/PRIMER_electronic_version.pdf, archived at <http://perma.cc/PK6N-YURL>; Report of Jeffrey Fagan, Ph.D. at 18, *David Floyd v. City of New York*, 861 F. Supp. 2d 274 (2012) (No. 09-01034), https://ccrjustice.org/sites/default/files/assets/files/Expert_Report_JeffreyFagan.pdf.

³⁹ In Philadelphia, data for 2009 indicate that the Philadelphia police department made 253,000 pedestrian stops. Robert Moran, *N.Y. Mayor Takes Shot at Philly over Stop-and-Frisk*, PHILA. INQUIRER, May 25, 2012, http://articles.philly.com/2012-05-25/news/31839461_1_homicide-rate-stop-and-frisk-program-homicide-count, archived at <http://perma.cc/T45U-T84N>. Given Philadelphia's population, these numbers yield an even higher per capita encounter rate than New York City's. See *id.*

describe the police behavior that they find objectionable.⁴⁰ Arrests and stops become problematic *because* they do not conform to the Fourth (and sometimes Fifth) Amendments, which restrict and circumscribe the acceptable behavior of the police. If the constitutional violation is the problem, then the remedy, seemingly, is apparent. The architecture of law and rights both describe and solve problematic urban street policing by suggesting objective rules to which the police should adhere.

This tendency to describe problematic policing in legal terms is more than a bit striking in light of the realities of policing on the street. While it is true that various bodies of law—constitutional law among them—shape police authority, it is also true that the exercise of police power takes place largely at the discretion of individual police officers. Everything about the job makes this discretion difficult to monitor. Most police officers typically work alone and are not under the direct gaze of a supervisor.⁴¹ Heavily armed officers leave the station each day (or night) frequently alone or with a single partner.⁴² At the end of a shift when they return to the station, we know very little about what they did during the preceding eight hours or so except through the sparse reports they fill out before going home—unless, of course, they make an arrest, which turns out to be quite a rare event among the many tasks that cops perform on any given day.⁴³ Even when police officers document their actions, for example by completing street stop reports, their reports are minimal, and suspicion often persists that much police activity goes unrecorded.⁴⁴

Problems associated with knowing what the police do are exacerbated because police deal more with “unsavory characters”—criminal suspects, the

⁴⁰ Legal scholars and lawyers commonly reference the Fourth Amendment of the U.S. Constitution when looking to legal provisions to explain the wrongfulness of racial profiling. See, e.g., Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271 (1998) (arguing that more stringent Fourth Amendment standards would address problems related to racial profiling of African-American men on the street); Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398 (2001).

⁴¹ See generally JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS AND HATE CRIME* (2002) (discussing everyday police tasks in the context of the policing of hate crime).

⁴² See *id.*

⁴³ See Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 821–29 (2011) (reviewing studies of urban police workload and showing that patrol-and-stop activities are much more common than executing search and arrest warrants).

⁴⁴ See JONES-BROWN ET AL., *supra* note 38, at 4 (describing an estimate that New York police officers report approximately 70% of all stops on UF-250 forms (leaving 30% of stops presumably unreported)).

homeless, drunks, and prostitutes—in potentially troublesome situations than they do with “ordinary citizens.” This means both that those with whom cops interact are not likely to report much about encounters they have *and* that opportunities for corruption are higher than they might otherwise be. Finally, it is difficult to punish police officers that violate rules, given the strong union rules that constrain those who manage street cops.⁴⁵ In such a world, specifying strict rule compliance seems somewhat of a mismatch with the realities of everyday police activity. Broad discretion allows police to shape, redescribe, and recategorize situations and contexts in ways that defy strictly defined codes. This allows police officers to describe what actually happened in ways that they know meet acceptable standards of conduct. No police officer would ever say that they stopped someone on a whim or a hunch, nor would they say that they stopped someone because they were Black.

Recently, the way in which police manage their discretion has become a contentious point in policing as departments have developed strategies based upon the widespread use of stop and frisk approaches that bring officers into frequent contact with people on the street.⁴⁶ Increased police discretion has led to a series of public controversies over racial profiling, zero-tolerance policing, aggressive police stops, and covert surveillance.⁴⁷

⁴⁵ See DARREL W. STEPHENS, U.S. DEP'T OF JUSTICE, POLICE DISCIPLINE: A CASE FOR CHANGE 5 (2011), <https://www.ncjrs.gov/pdffiles1/nij/234052.pdf>, archived at <http://perma.cc/V77Q-U3M7>.

⁴⁶ Many municipalities argue that stop and frisk policies reduce crime. See, e.g., Heather MacDonald, Op-Ed, *Fighting Crime Where the Criminals Are*, N.Y. TIMES, June 26, 2010, at A19; Ray Rivera & Al Baker, *Police Cite Help from Stop-and-Frisk Data in 170 Cases*, N.Y. TIMES, July 17, 2010, at A15; Kate Taylor, *Police Street Stops Hit a Record, Rising 14%*, N.Y. TIMES, Feb. 15, 2012, at A21; Raymond W. Kelly, *Stop-and-Frisk Bill Imperils N.Y.: Ray Kelly Says Database Helps NYPD Protect Young Black Men*, N.Y. DAILY NEWS (July 13, 2010, 4:00 AM), <http://www.nydailynews.com/opinion/stop-and-frisk-bill-imperils-n-y-ray-kelly-database-helps-nypd-protect-young-black-men-article-1.468308>, archived at <http://perma.cc/J5FL-3WRC>; Heather MacDonald, *Stop & Frisk Facts*, N.Y. POST (May 22, 2012, 4:00 AM), <http://nypost.com/2012/05/22/stop-frisk-facts/>, archived at <http://perma.cc/EU2Y-CTSU>; Michael Howard Saul & Sean Gardiner, *Kelly Shifts Policy on Stop and Frisk*, WALL ST. J. (May 17, 2012, 11:11 PM), <http://www.wsj.com/articles/SB1000142405270230336054577410460162725248>, archived at <http://perma.cc/MP6F-G2VY>; *SF Mayor Considering Police Stop-and-Frisk Policy*, KCRA (June 28, 2012, 11:59 AM), <http://www.kcra.com/news/SF-mayor-considering-police-stop-and-frisk-policy/15334534>, archived at <http://perma.cc/Y6KX-LVYY>.

⁴⁷ Critics have filed suit alleging civil rights violations. See Al Baker, *City Minorities More Likely to Be Frisked*, N.Y. TIMES, May 13, 2010, at A1; Al Baker & William K. Rashbaum, *City Police Ask Panel to Review Crime Statistics*, N.Y. TIMES, Jan. 6, 2011, at A1; Al Baker & Ray Rivera, *Thousands of Street Stops by New York Police Were Legally Unjustified, a Study Finds*, N.Y. TIMES, Oct. 27, 2010, at A22; Tamer El-Ghobashy et al., *Judge Clears Stop-Frisk Class Action*, WALL ST. J., May 17, 2012, at A19; John A. Eterno, Op-Ed., *Policing by the Numbers*, N.Y. TIMES, June 18, 2012, at A23; James Forman, Jr. & Trevor Stutz, Op-Ed.,

These controversies in turn have led to efforts to address the constitutionality of police practices by, for example, trying to establish whether patterns of police stops reflect “racial” profiling or whether police are constitutionally justified in stopping the large numbers of people that they deal with on the street. There is now a considerable body of scholarly literature describing how issues of legality can be dealt with in the context of people’s efforts to control crime, particularly violent drug crime.⁴⁸

Efforts to define the appropriate limits of police behavior are further complicated by the fact that not everyone decries endowing the police on the street with more flexibility and discretion to do their jobs. Police discretion recently has been celebrated as a way to increase the utility of policing, training officers to be more flexible in methods of crime management and more responsive to community concerns and problems.⁴⁹ All of this means that good policing is more likely to be achieved by measuring cops against broad, subjective, and tactile norms and standards, as opposed to sharp-edged rules.⁵⁰

We think that relying on the lawfulness of police conduct (i.e., the compliance of police officers with laws and constitutional standards in order to satisfy public demand for good policing) inevitably misses the mark. Moreover, an emphasis on lawfulness is even more likely to lead to a dissatisfied public as we move toward greater efforts to train officers to be flexible and adaptive. The theory we have reviewed here strongly implies that lawfulness alone inadequately captures what the public cares about when validating good police conduct. The reason is that the aspects of police

Beyond Stop-and-Frisk, N.Y. TIMES, Apr. 20, 2012, at A23; Sean Gardiner, *Police Officer Sues, Alleging Quota System*, WALL ST. J., Feb. 24, 2012, at A17; Thomas Kaplan, *Cuomo Seeks Cut in Frisk Arrests*, N.Y. TIMES, June 4, 2012, at A1; Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1; Editorial, *Stop-and-Frisk Needs Reform*, PHILA. TRIB., June 24, 2011, at 10-A; Kate Taylor, *Gay Rights Groups Are Joining Opposition to Police Stops*, N.Y. TIMES, June 5, 2012, at A17; Christian Dolmetsch, *New York Police Lose Second Stop-and-Frisk Case on Appeal*, BLOOMBERG (July 3, 2012, 11:01 PM), <http://www.bloomberg.com/news/2012-07-03/n-y-court-tosses-second-stop-and-frisk-arrest.html>, archived at <http://perma.cc/24Y9-F4MP>.

⁴⁸ See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 496–99 (2000). See generally Andrew Gelman et al., *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813 (2007) (using data on the frequency of police contacts to address potential issues of bias in policing).

⁴⁹ See Skogan & Meares, *supra* note 4, at 68 (pointing out the value of police discretion to problem-solving policing).

⁵⁰ See Kahan & Meares, *supra* note 9, at 1169–71, 1182–83 (expressing concern about an older regime of constitutional discretion-skepticism and advocating a more relaxed approach to judicial review in the form of guided discretion).

encounters that people often find troubling typically have very little to do with the law. This is true even when people describe their negative experiences in terms that have accumulated a legal valence. The concept of racial profiling functions as a case study that motivates what we are trying to convey.

Ask a lawyer what constitutes racial profiling, and she will usually answer that racial profiling is police behavior motivated solely or even partially by the belief that members of a particular racial group are more likely than other people to commit a particular type of crime or crime in general (by a “stereotype”).⁵¹ Note, too, that if racial profiling is defined in the usual lawyerly manner, it is not racial profiling when an officer investigates a person because his race matches information about a perpetrator given to the police in, say, an incident report.⁵² Importantly, when the problematic conduct is defined as we have just described, then the illegal act is complete at the moment the encounter between the offending police officer and the targeted citizen begins. The on-the-ground reality of street encounters is not central to the legality of police actions.

In a study of the subjective experience of being profiled, as opposed to the objective (or, in terms of this Article, legalistic) one, Tom R. Tyler and Cheryl Wakslak show, however, that the judgments that people make about police procedural fairness during the stop influence whether the people dealing with the police believe they have been profiled in the first place. After all, the police do not tell people that they stopped them due to their race or age, so this is an inference that people must make. Those who believe police are neutral and who feel listened to are consequently less likely to believe they have been profiled.⁵³ Additionally, those whose encounters with police are characterized by respectful, polite treatment and an acknowledgement of

⁵¹ See Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002). Gross and Livingston offer this definition:

By September 10, 2001, virtually everyone, from Jesse Jackson to Al Gore to George W. Bush to John Ashcroft, agreed that racial profiling was very bad. We also knew what racial profiling was: Police officers would stop, question, and search African American and Hispanic citizens disproportionately, because of their race or ethnicity, in order to try to catch common criminals.

Id.; see also DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 11 (2002).

⁵² See Gross & Livingston, *supra* note 51, at 1415. *But see* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1096–99 (2001) (arguing that race-based suspect selection and investigation is little different from “classic” racial profiling in that pursuing minority suspects on the basis of physical descriptions results in an intentional use of a racial classification by state actors that disparately impacts innocent members of some racial minority groups).

⁵³ See Tyler & Wakslak, *supra* note 27, at 259.

their rights also are much less likely to believe they have been profiled.⁵⁴ And, we hope not surprisingly at this point, those who trust the motives of police are less likely than those who do not to believe that profiling has occurred.⁵⁵ In other words, people's inferences about why they have been stopped are based in large part on how they see the officers involved exercising their authority during the stop. If the officers listen to people, explain the basis of their actions, treat them respectfully, and acknowledge people's concerns in the situation, they are trusted and viewed as acting professionally. If not, they are viewed as acting based upon animus toward whatever potentially stigmatizable group to which the person belongs (i.e., age, race, gender). People do not focus on the legally relevant issue—whether police have valid reasons for making the stop in the first place. Instead, they react to police behavior during the stop.

This disjuncture between the subjective and the objective views of racial profiling accords nicely with the circumstances surrounding the explosive arrest of Professor Henry Louis Gates by a Cambridge, Massachusetts police officer in the summer of 2010. Briefly, the facts were these: Sergeant James Crowley radioed that he would go to the Gates residence after receiving at 12:46 p.m. on July 16, 2009, a dispatch that there was a possible breaking and entering in progress.⁵⁶ Crowley arrived to find Gates in his home, and from there, the stories diverge. Crowley's version of the events is that Gates was yelling and behaving in a "tumultuous" manner as Crowley attempted to ascertain enough facts to ensure that a crime was not occurring.⁵⁷ Gates's view, on the other hand, was that Crowley disrespected him by failing to respond when Gates asked him his name and badge number and for suspecting him, a slight, elderly man with a cane, to be a burglar.⁵⁸ Because Sergeant Crowley was sent to Gates's home in response to a 911 call, it is difficult to characterize his decision to have an encounter with Professor Gates as racial profiling according to the usual legalistic definition. Yet Professor Gates has described his experience in exactly these terms.⁵⁹ His

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See* CITY OF CAMBRIDGE, MISSED OPPORTUNITIES, SHARED RESPONSIBILITIES: FINAL REPORT OF THE CAMBRIDGE REVIEW COMMITTEE 1 (2010), http://www.cambridgema.gov/cityofcambridge_content/documents/cambridge%20review_final.pdf, archived at <http://perma.cc/ZCD5-GZSJ>. One of this Article's authors, Tracey Meares, served on the committee that drafted this report.

⁵⁷ *Id.* at 19.

⁵⁸ *Id.* at 19–21.

⁵⁹ *See, e.g.*, David Olopade, *Skip Gates Speaks*, THE ROOT (July 21, 2009, 5:34 PM), http://www.theroot.com/articles/culture/2009/07/professor_henry_louis_gates_jr_speaks_out_on_

experience does not easily fit the typical legal framework, but his description of his experience *does* fit well with the conception of fairness (or rather its absence) as we have described it here.

Consider Gates's own words, taken from the Gates Committee Report:

Gates said he asked for the officer's name and badge number on several occasions, but that the officer never responded or asked him if he was all right. Gates said that "the silence was deafening." Gates said he then said to the officer, "You're not responding because I am a black man and you're a white officer."⁶⁰

Professor Gates said he was greatly disturbed that Sergeant Crowley refused to formally give him his name and badge number. He interpreted this refusal as a racially motivated insult and an abuse of police power.

The point here is that regardless of the lawfulness of police behavior—and in this case the Committee acknowledged that Sergeant Crowley was acting legally—Professor Gates did not experience the sergeant's actions as fair. If Sergeant Crowley had been more willing to listen to Professor Gates, more open to explaining the reasons for his actions, and had made an effort to deal with an obviously upset person in a respectful and responsive manner, the entire incident, which emerged as a national event, might well have been avoided.

We think this incident demonstrates how a lack of procedural justice in encounters with police can change public perceptions of policing agencies, creating more negative perceptions that involve a lack of trust, ill will, and ultimately, less compliance. Professor Gates was convinced that he had been profiled. And so were many members of the public.⁶¹ The late Bill Stuntz offered a characteristically crystalline assessment:

Fourth Amendment law devotes an enormous amount of attention to the *fact* of searches and seizures, but almost none to how those searches and seizures are carried out. That ought to be reversed; sharp legal lines between "searches" and "seizures" and everything else ought to be replaced with hazier boundaries between decent police behavior and the indecent kind.⁶²

The Gates case illustrates how the experience of injustice and of disrespect provokes anger and resistance. Even a normally mild-mannered

racial_profiling_after_his_arrest_by_cambridge_police.html, *archived at* <http://perma.cc/VXE2-L44D>.

⁶⁰ See CITY OF CAMBRIDGE, *supra* note 56, at 20.

⁶¹ See Susan Saulny & Robbie Brown, *Case Recalls Tightrope Blacks Walk with Police*, N.Y. TIMES, July 24, 2009, at A1 (noting reactions from different people, including a professor, a lawyer, a diversity consultant, a housing authority agent, readers on websites and blogs, and more, all of whom concluded that some sort of racial profiling occurred).

⁶² See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141 (2002).

Harvard professor can become enraged when he feels that he is being disrespected. And if a person whose status in society is secure and validated by membership in an elite institution can feel that his status and identity are being undermined by a police officer's unresponsiveness and lack of explanation, imagine how a young minority male feels when he is stopped and frisked by police on the street. These young males are well aware that no Cambridge Commission will investigate their complaints of harassment and injustice on the street.

The Gates incident is hardly atypical. Irrespective of whether street stops are legal or good police policy, what young people typically complain about is how they are treated by police officers during stops.⁶³ Complaints include disrespect, use of ethnic slurs, physical intimidation, and a variety of other types of procedural injustice. These actions convey a negative social message, a message of negative identity, and marginal status.⁶⁴

The key to mapping our insights onto the ways that the public (as Ordinary Observers) and police (as Scientific Policymakers) evaluate the rightfulness of police action is to separate out two dimensions: lawfulness and procedural justice. In terms of lawfulness, the police should not undertake to arrest citizens (or even stop them) unless a statute or ordinance indicates that the conduct in question is unlawful. They should not move to arrest or engage a person unless they have gathered enough facts to constitute the constitutionally required level of suspicion that the Fourth Amendment specifies. Once an encounter has begun, an officer should endeavor to follow every state statute, city ordinance, and general order (administrative rule) relevant to the specific context.

Separately, when the police act according to procedural justice principles, they comport themselves in ways that confer dignity on those with whom they interact and, more broadly, treat people with respect. Examples here include high-quality interpersonal treatment,⁶⁵ offering citizens an opportunity to tell their side of the story during an encounter,⁶⁶ being

⁶³ See Wendy Ruderman, *Rude or Polite, City's Officers Leave Raw Feelings in Stops*, N.Y. TIMES, June 27, 2012, at A1.

⁶⁴ For ethnographic accounts of the experiences of young men of color during encounters with policing detailing such complaints, see Rod K. Brunson, "Police Don't Like Black People": *African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL'Y 71 (2007); Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUSTICE Q. 255 (2010); Carmen Solis et al., *Latino Youths' Experiences with and Perceptions of Involuntary Police Encounters*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (2009).

⁶⁵ See Tyler & Fagan, *supra* note 37, at 239; Tyler & Wakslak, *supra* note 27, at 278.

⁶⁶ See TYLER & HUO, *supra* note 16, at 14.

transparent about the reasons for the encounter, and explaining in advance what will happen during the encounter, thereby raising the probability that a citizen will conclude that the officer's decisions are fact-based and neutral, rather than arbitrary.⁶⁷

Putting the two parts together, we see that the best way for the police to behave is to be both lawful and procedurally just.⁶⁸ That is where one will find *rightful policing*.⁶⁹ We believe that a potential primary problem with street policing in urban cities, such as New York and Philadelphia, is that these cities exhibit examples of police conduct that is very likely objectively lawful but is also perceived by the citizen on the other side of the encounter as deeply, deeply unfair, using the term in the way we have defined it here.⁷⁰ If we are right, then it means that any attempted strategy to both describe and remedy a problem that exists in multiple dimensions will fail if the proposed strategy is one dimensional and considers either of these two dimensions alone.

We argue that this is the fundamental problem with the law-based approach to policing. The constitutional criminal procedure as it is written

⁶⁷ Cf. Tyler & Wakslak, *supra* note 27, at 278.

⁶⁸ It should be obvious that these two dimensions are not completely orthogonal to one another. Consider that one of the procedural justice dimensions, concern for dignity and rights, clearly implicates notions of lawfulness. Thus, there is likely some interaction among characteristics. The important point is to see that law—certainly as it stands today and possibly as it develops in the future—cannot capture all aspects of procedural justice. One suspects that legislated politeness, for example, ceases to be such. And to the extent that the dimensions capture different aspects of what people care about, the disjuncture that we describe here will continue to exist.

⁶⁹ Meares provides an illustrative “compass” detailing four quadrants of police action: Lawful and procedurally just in the northeast, lawful but procedurally unjust in the southeast, unlawful and procedurally unjust in the southwest, and, finally, unlawful but procedurally just in the northwest. See Meares, *supra* note 15, at 1878–79.

⁷⁰ There recently has been litigation in both Philadelphia and in New York based on the assertion that many of the police stops in New York City and Philadelphia are, in fact, unlawful under our terms, as opposed to lawful but procedurally unjust. See Sean Gardiner, *Judge Reins in Frisking by Police*, WALL ST. J., Aug. 13, 2013, at A1; Patrick Walter, *Philadelphia Police Are Sued over ‘Stop and Frisk’*, WASH. POST, Nov. 5, 2010, at A3; Joel Mathis, *New Lawsuit Challenges Credibility of Notorious Police Drug Unit, ‘Stop and Frisk’ Policy*, PHILA. MAG. (July 18, 2013), <http://www.phillymag.com/news/2013/07/18/lawsuit-challenges-philly-police-stop-frisk-tactics>, archived at <http://perma.cc/FA5V-HTJ6>; Justin Peters, *The Worst of Stop-and-Frisk Is Over. But Why Didn't the NYPD End the Racist Policy Itself?*, SLATE (Aug. 12, 2013, 4:57PM), http://www.slate.com/blogs/crime/2013/08/12/stop_and_frisk_ruling_judge_shira_scheindlin_s_decision_in_floyd_v_city.html, archived at <http://perma.cc/5D WV-Q85Q>. We do not mean to gloss over this issue. Rather, we simply want to point out that it is likely that even if both cities are outliers compared to others regarding the lawfulness of the street encounters there, it remains true that the vast majority of the street stops in these two cities are lawful. And yet citizens still are dissatisfied.

today has no capacity to tell police *how* to arrest or stop someone in a way that will tend to support procedural fairness and will lead those involved, as well as observers, to view police actions as legal, appropriate, and reasonable. There is nothing in law that says that officers have to treat members of the public in ways that they will experience as reflecting the just exercise of authority. More than this, police are rarely trained in the ways they should act to achieve these goals. Instead, rookie police officers spend hours and hours reading law and learning *when* they are legally allowed to stop, arrest, and search.⁷¹ They are not correspondingly trained about how to conduct themselves so as to create and maintain their legitimacy in the community.

III. SUPPORTING OUR MODEL EMPIRICALLY

This Part describes an experimental survey designed to explore citizen assessments of police conduct and engagement with other citizens with reference to these dimensions. We are concerned with public evaluations of the lawfulness of and the potential need to sanction police actions in several interactions between police officers and members of the public. While there are a variety of concerns that might be relevant in police–citizen encounters (e.g., public deterrence, resistance or conflict, impact upon legitimacy), we focus on one that is central to many after an interaction when they may question the behavior of the police: did the police act in ways that were lawful, appropriate, and reasonable? And, as a correlate, should the officers involved be sanctioned?

In addition to demonstrating that public perceptions of the procedural justice of police conduct (as well as perceptions of lawfulness itself) do not line up with lawfulness of police behavior as a lawyer would assess it, we also demonstrate another interesting finding. Police officers often find themselves in the “off diagonals,” where their conduct is lawful and procedurally unjust, or its opposite—procedurally just and unlawful.⁷² We contend that when given a choice, the public would prefer police to be procedurally just and unlawful as opposed to lawful and procedurally unjust. This finding should be unsurprising given the theory we have reviewed thus

⁷¹ We canvassed several policing agencies across the country, including the departments in Boston, Chicago, New Haven, and San Francisco. According to personnel with whom we spoke in these departments, the number of hours rookies spend learning the law ranges from a high of 258 hours out of 1040 hours of total training in Boston (approximately 25% of training) to 98 hours out of a total 1184 hours of total training in San Francisco (just over 8% of the total training hours).

⁷² See *supra* note 69 for an explanation of the four potential positions; see also Meares, *supra* note 15, at 1879 for an illustrative figure.

far. And yet, it is no doubt unsettling to many. After reviewing the results of our study, we offer what we hope are (somewhat) comforting conclusions.

A. STUDY DESIGN

To address the issues raised, a nationwide study of the influence of lawfulness and procedural justice on how the public judges the appropriateness of police conduct and the need to discipline police officers was conducted in March 2008. The goal was to improve our ability to identify key factors influencing public views about when police conduct is appropriate or inappropriate. Through the unraveling of interconnected individual, contextual, and situational factors, we sought to enhance our understanding of the salient pathways through which citizens make judgments about the appropriateness of police actions.

This study used two different components to assess the influence of demographic, experiential, situational, and contextual factors on citizens' perceptions and evaluations of police actions. One component was a questionnaire that measured factors we hypothesized would influence how citizens perceive and evaluate police–citizen encounters, such as their prior experiences with police, whether they were crime victims, their political commitments, etc.

The second component was an experimental design that tested how citizens perceived and evaluated these types of encounters when they experienced them through manipulated vignettes that combined actual videos of police–citizen interactions with background information that the respondents read prior to viewing the videotapes. In other words, the videos were framed for the respondents within prior information about the encounter they viewed.

The study used a multipart design to examine the factors shaping people's perceptions about police authority. First, every respondent was asked about their past experience and prior views about police and the influence of those priors were examined. Second, the social context surrounding the videos was varied along several dimensions, including the history of policing in the city in which the videos occurred and the history of the people involved in those videos, and the impact of context was evaluated. Third, the influence of varying social position (e.g., age, race, gender, income, etc.) was considered. And, finally the influence of the videos (presented in random order) was assessed.⁷³

⁷³ A critical feature of the study was to vary the order in which respondents completed these components. That is, one half of the respondents completed the questionnaire first, and the other half completed the experimental component first. Given the large sample (1361

The experimental component of the study leveraged video footage of actual police–citizen interactions. Specifically, our respondents viewed three videos in random order. In each video the police exercised some level of authority over the person stopped, ranging from verbal commands to the use of physical force. Respondents could determine whether the police actions they observed were lawful from details in the fact patterns we provided for them before they viewed the videotapes. However, respondents never were told, “The police acted lawfully in the video you are about see.” For example, respondents were told prior to viewing a video that the officers stopped someone because he was driving “erratically,” as opposed to “while he was driving appropriately and within the speed limit.” Respondents received fact patterns comprising one of three conditions: the police acted lawfully, the police acted unlawfully, or ambiguous information about police lawfulness.

After they viewed the videotapes, we asked respondents to evaluate the procedural justice of the police actions—for example, did the police listen to the person stopped? Did the police act neutrally? Were the police respectful, etc.? To conduct the analyses, we split respondents into two groups by dividing them at the mean into high and low procedural justice groups through a process we explain in detail below. Finally, we asked respondents to evaluate whether the police had acted illegally and whether they should be punished.

The questionnaire is outlined in Appendix A. The experimental design is outlined in Appendix B. The sample is discussed in Appendix C.

B. RESULTS

1. Comparing Lawfulness and Procedural Justice

We first utilized the nonexperimental results from our data to attempt to assess the factors that impact when a respondent who had an actual experience with a police officer would consider complaining about that officer’s conduct. A sample of 2183 respondents completed the nonexperimental questionnaire. Of those, 54% (1170) indicated having had a recent experience with the police. Of those, 25% had been stopped, 32% had called for help, 17% had called to file a complaint, and 26% had dealt with the police for other reasons. For complete information about this portion of the study, see Appendix A.

participants), this allowed us to assess whether respondents who completed the questionnaire first were primed by exposure to questions that might have influenced their vignette evaluations in the experimental component.

Those respondents who dealt with the police were asked questions corresponding to the issues addressed in this study. First, they were asked whether they had received the “outcome they deserved according to the law.” Eighty-two percent indicated that they had. They were then asked to rate the justice of their treatment by the police using a four-item scale. The items were: “police made decisions based on the facts” (86% agreed), “police cared about my concerns” (79% agreed), “police treated me politely” (91% agreed), and “police respected my rights” (91% agreed). Finally, they were asked whether they had considered complaining about the police, and 25% indicated that they had.

Our concern is with the factors shaping the belief that the police had engaged in inappropriate conduct about which they should complain. To examine this question we conducted a regression analysis considering the influence of perceived lawfulness and procedural justice of treatment on whether people considered complaining, controlled for race, age, and gender. We found that judgments about the procedural justice of police treatment shaped complaining decisions ($\beta = 0.40$, $p < .001$), but judgments about perceived legality did not ($\beta = 0.06$, n.s.). Demographic characteristics such as race, gender, and age have little influence upon whether people considered complaining.

While our central interest is in examining whether our experimental analysis indicates that people do not attend to the legality of police conduct; however, these nonexperimental findings provide an initial suggestion that “legality” may be an overrated framework for understanding public discontent. Therefore, this initial analysis sets the stage for consideration of our findings from the experimental portion of our research design by suggesting that legality may not be as important to members of the public making assessments of police actions as police official and legal scholars assume it is. Our data suggest perceived legality does not shape people’s reactions to their own police encounters.

While provocative, this finding has several limits. First, it is focused on the outcome of an encounter rather than the initial reasons for the encounter. Analysis of lawfulness of police decisions places an emphasis on whether the police had justification for dealing with the person in the first place. Second, in this first assessment of the data, we looked to how respondents perceived the lawfulness of their encounters. Obviously, police are not in a position to know if their behavior will be experienced as lawful by the people they deal with. Rather, they need to know whether people will respond differently based upon whether police follow the objectively correct legal actions about which they are aware and have been trained. For this reason, we designed an experiment that presents fact patterns that conform to or depart from legal

police conduct by providing respondents an opportunity to assess relevant facts about which an officer would be aware before deciding to engage a person.

A primary goal of the experimental part of our study was to determine how the actual lawfulness of a stop and people's perceptions of the procedural justice of police behavior during the stop influenced both their perceptions of lawfulness and their desire to punish the police officers for the conduct they observed in the videos. To do this, we used videotapes of police–citizen interactions so that we could present our respondents with the same event, but experimentally vary the fact pattern that framed that event. It is only through such an approach that we can clearly establish the influence of the legality of officer actions upon people's evaluations of the subsequently occurring interaction.

To effectively compare lawfulness evaluations and those based on procedural justice in the experimental part of the study, we needed to group our respondents into cells of a two-by-two chart: (1) those who witnessed a lawful arrest/stop and believed there to be a high level of procedural justice; (2) those who witnessed a lawful arrest/stop and believed there to be a low level of procedural justice; (3) those who witnessed an unlawful arrest/stop and believed there to be a high level of procedural justice; and (4) those who witnessed an unlawful arrest/stop and believed there to be a low level of procedural justice. We then had to calculate the average desire of each group to punish the police officers involved.

Table 1
Comparing Lawfulness and Procedural Justice Evaluations

		Perceived Procedural Justice	
		High	Low
Lawfulness of	Lawful	(1) Respondents who witnessed a lawful arrest/stop and believed there to be a high level of procedural justice.	(2) Respondents who witnessed a lawful arrest/stop but believed there to be a low level of procedural justice.
	Unlawful	(3) Respondents who witnessed an unlawful arrest/stop but believed there to be a high level of procedural justice.	(4) Respondents who witnessed an unlawful arrest/stop and believed there to be a low level of procedural justice.

Thanks to our experimental design, separating those respondents who witnessed an actually lawful arrest/stop from those who witnessed an unlawful arrest/stop was simple: we merely looked at the contextual description provided for each video. As we noted above, one third of respondents were given contextual descriptions that framed the arrest/stop as lawful, and one third were given contextual descriptions that framed the arrest/stop as unlawful. The other third were given ambiguous descriptions and were therefore ignored in our analysis.⁷⁴

Separating those respondents who believed there to be a high level of procedural justice from those who believed there to be a low level of procedural justice was slightly more complicated. We calculated the extent to which respondents perceived the police behavior to be procedurally just. We did this by looking at how much they agreed or disagreed with the following six statements:

- “The police made decisions about what to do in fair ways”;
- “The police allowed the citizen to express his views before making decisions”;
- “The police got the information about the situation needed to make good decisions”;
- “The police explained the decisions they made”;
- “The police treated the citizen with respect and dignity”; and
- “The police showed concern for the citizen’s rights.”

Respondents rated their level of agreement with these statements on a scale of 1 to 5, with 1 being “strongly disagree,” 2 being “disagree,” 3 being “neither agree nor disagree,” 4 being “agree,” and 5 being “strongly agree.” We split the group in half at the mean. Those above the mean became our high procedural justice group, and those below the mean became the low group.

Finally, after dividing respondents into the necessary four groups (lawful/high procedural justice; lawful/low procedural justice; unlawful/high procedural justice; unlawful/low procedural justice), we then measured their views about whether police had acted unlawfully. The response options were:

- “The police officers violated the law”;
- “The police officers engaged in serious misconduct”; and

⁷⁴ These contextual frames were developed by one of us. The respondents were not specifically told whether the facts constituted constitutionality in each case. Rather, they were given facts to review that would lead any lawyer (or budding lawyer) to confidently make a conclusion regarding constitutionality (or not).

- “The behavior of the police officers was atypical of police actions in a situation of this type.”

We also measured the desire to punish the police. To accomplish this, we analyzed on a five-point scale how they rated the following three statements:

- “The officers involved should be reprimanded or punished in some way”;
- “These officers should be put in jobs in which they do not patrol the streets”; and
- “It would be appropriate for the person involved to sue the police.”

The judgments of illegality and desire to sanction were highly correlated ($r = 0.76$), so they were combined into a single overall judgment for the purposes of our analysis.

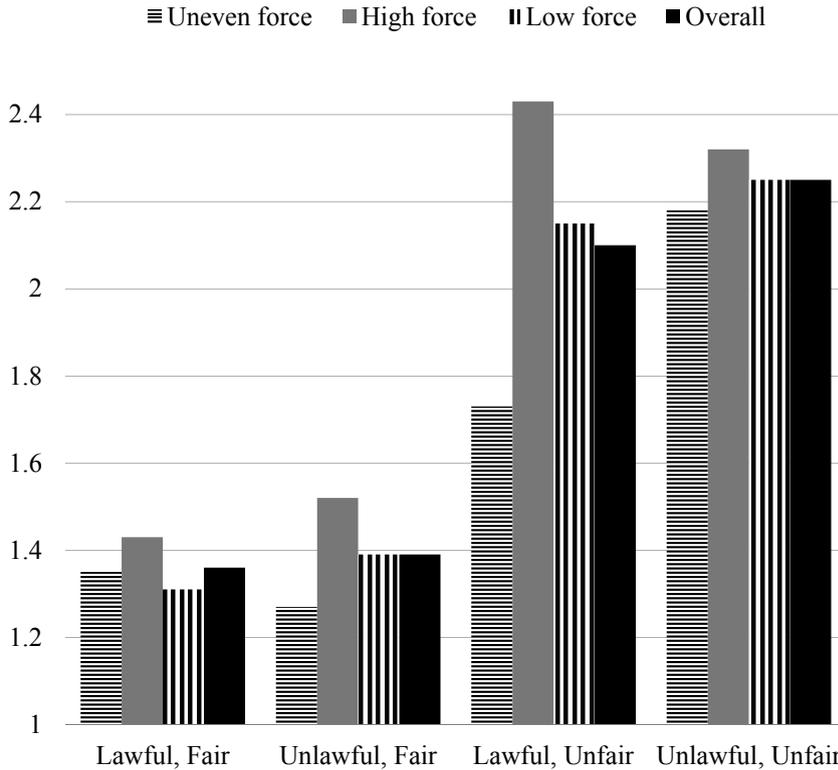
2. When Is Illegality Perceived and Why Punish the Police?

The best way to think about differences among groups is to divide people up in the two ways we outline above: (1) is the conduct lawful or unlawful, and (2) do the people feel that the police acted justly or unjustly? The average level of perceived illegality or punishment or both suggested for police can then be assessed within each group. Figure 1 shows such an analysis that results from the three videos.⁷⁵

⁷⁵ The numbers shown combine all three videos. There were three lawful conditions (lawful, unlawful, no information), and only the lawful and unlawful means are shown. The perceived procedural justice scale was divided at the mean to form two categories. High scores indicate a strong desire to punish the officers involved. The scale runs from 1 to 5. The entries are the mean for each group.

Figure 1

Mean Level of Perceived Illegality, Desire to Punish Police, or Both



In this graph, the rating moves closer to five as the respondents' view that illegality occurred or preference for punishment or both increases. The graph demonstrates clearly that procedural justice is a major factor in that determination. When procedural justice is high, lawlessness judgments and punishment preferences are almost one full point higher than they are when procedural justice is low. In contrast, the distinction between the lawfulness conditions barely registers.

3. Multilevel Modeling

The analysis outlined suggests that people's belief that illegal behavior has occurred and their desire to punish police derives from whether police act with procedural justice. The objective lawfulness of police actions is secondary. While we present these findings using simple statistics, it is possible to perform this analysis in a statistically more complex way that

considers possible confounding factors, such as race, gender, class, and education level.

The appropriate analysis is multilevel modeling, taking account of the fact that each respondent rated three videotapes.⁷⁶ We conducted such an analysis, and the results are consistent with our argument. The model first takes account of the multilevel nature of the data. It further controls for prior attitudes toward and experiences with police, including identification with the police and the nature of police actions during prior personal contacts.

The results of the multilevel model support the conclusions we have already outlined. This analysis was conducted in two ways: first, without controls for demographic characteristics and for prior views (column one), and second, with such statistical controls in place (column two).

A belief that illegal action occurred or a motivation to punish the police or both is linked primarily to the procedural justice of police actions (regression coefficient = 0.68 (standard error = 0.03), $t(796) = 26.06$, $P < .001$). There is no statistically significant connection between the unlawfulness of police action and the desire for punishment (regression coefficient = -.04 (standard error = 0.04), $t(1067) = 0.81$, n.s.). Because these results are found in an analysis with appropriate controls, the findings outlined are robust and are not the result of respondents' prior views about police.

⁷⁶ Multilevel modeling is a statistical technique that simultaneously considers individual- and group-level effects. So, for example, it is possible to consider the opinions of people, taking account of what country they live in. In this case, the analysis considers the participants' opinions while taking account of which of the three videotapes they are reacting to.

Figure 2
Multilevel Modeling of Police Punishment Judgments

	No controls		Controls	
Intercept	1.74(0.09)	t(1979)=19.61***	1.40(0.43)	t(1092)=3.28***
<i>Video Watched</i>				
Confused vs. Rude	0.03(0.04)	t(1331)=0.80	0.01(0.04)	t(738)= 0.30
Aggressive vs. Rude	-.24(0.04)	t(1374)=5.84***	-.26(0.05)	t(796)=5.57***
<i>Context</i>				
Lawful Police Action	-.03(0d.04)	t(1942)=0.84	-.02(0.04)	t(1093)=0.51
Unlawful Police Action	-.02(0.04)	t(1928)=0.53	-.04(0.04)	t(1067)=0.81
<i>Procedural Justice</i>				
Procedural Justice of Police Actions	0.72(0.02)	t(1900)=36.38***	0.68(0.03)	t(796)=26.06***

p < .05; **p < .01; ***p < .001.

Multilevel modeling was used (SPSS mixed procedure). Each respondent provided three evaluations, one for each video watched, and this procedure controlled for respondent effects. Controls were made for prior identification, political ideology, prior experience with police (outcomes and procedural justice), whether the person was a victim of crime, his or her fear of crime, neighborhood conditions, political efficacy, the fairness of government policies, and the willingness to let police use force.

4. Path Modeling

Because the post-video questions (e.g., procedural justice, police lawfulness, desire to punish the police) were all answered at one point in

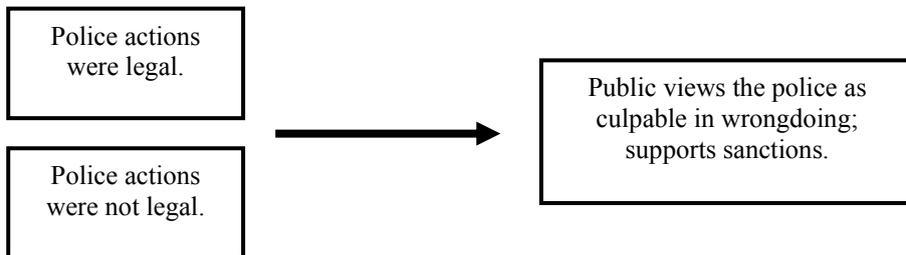
time, we have followed the conservative strategy of treating the variables separately in our analysis and not assuming any particular causal order among them. However, using path modeling allows us to explore the relationship among variables. In particular, we can develop a more nuanced model of legality.

In presenting the issue that frames this Article, we contrasted two concerns: whether police actions are actually lawful and whether police are acting in procedurally just ways. Figure 3 shows the effects that would be expected under each model. If people focus solely on actual lawfulness, then the fact patterns indicating lawfulness or unlawfulness should impact public views about culpability and sanctioning. If the procedural justice model is correct, it should be the demeanor and comportment of police officers (i.e., whether they acted fairly) that shapes culpability and sanctioning.

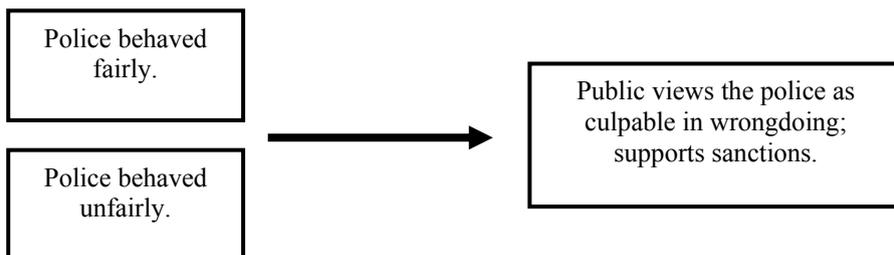
Figure 3

Conceptual Models

Model One: Lawfulness



Model Two: Procedural Justice



Our empirical findings suggest that respondents have very little sensitivity to questions of actual police lawfulness. However, there is an alternative model that we can evaluate. That model is that the public cares

about *perceived* lawfulness, but that perceived lawfulness is not strongly linked to actual lawfulness.

Our argument is that people do care about lawfulness, but they base their understanding of lawfulness on police procedural justice. We noted that people who are treated fairly are less likely to infer that the police have profiled them. Hence, the public potentially takes account of the legality of police behavior but infers it from police conduct. In other words, police actions shape public views, not whether their behavior is legal. This is consistent with the suggestion that behaviors in certain situations are highly salient, while contextual legality is in the background and is typically underweighted. We can test this idea through a path model.

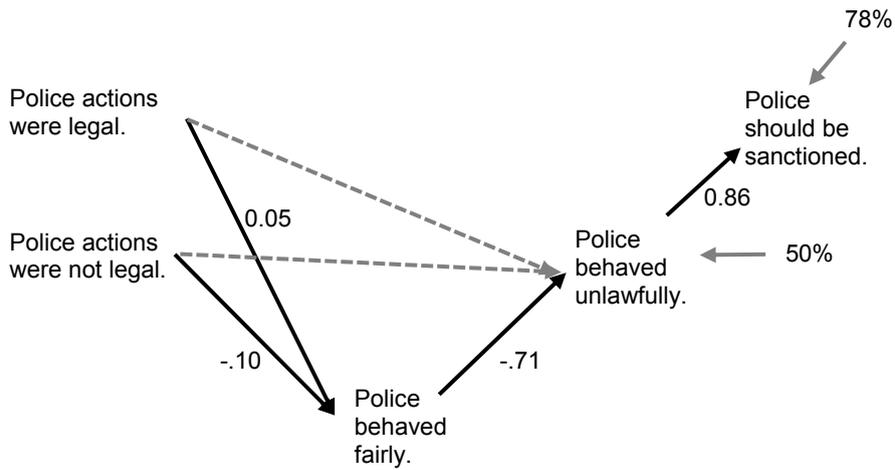
In the path analysis, we test the argument that people's perceptions of the lawfulness and procedural justice of police conduct potentially influence their assessments of the wrongfulness of police behavior, which in turn influences their conclusions about whether police should be punished. These are causal claims, and the data is correlational. However, the reasonableness of this causal order is based upon the psychological literature on perception, evaluation, and blame assessment.⁷⁷ Drawing upon that literature, we suggest that it is reasonable to view the causal order as flowing from evaluations of procedural justice and through them to assessments of blame⁷⁸ and then punishment.

The results of the path model are shown in Figure 4. The solid lines indicate significant paths, and dashed lines indicate no significant connection. The numbers associated with each one reflect the strength of the influence (i.e., the standardized regression coefficient). Consistent with our assumptions, the key antecedent of wanting to punish police is viewing their actions as culpable (i.e., legally wrong). It is this judgment that is central to punishment. Hence, the public is not indifferent to issues of legality. Clearly, people believe actions judged to be illegal should be punished.

⁷⁷ The literature is quite voluminous, but for two pieces that summarize it in a straightforward way, see Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992); Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556 (2000).

⁷⁸ Culpability was measured using three items: "The police violated the law"; "The police officers engaged in serious misconduct"; and "The behavior of the police was reasonable and fair."

Figure 4
Path Model



But perceived illegality is directly responsive to procedural justice, *not* to actual lawfulness. In other words, people are at best weakly influenced by actual legality. It is perceived legality that is central to punishment. It turns out, though, that perceived legality is based primarily upon procedural justice and not actual legality. If police are using fair procedures, people will infer that their actions are legal.

This does not mean, however, that actual legality is irrelevant. As is shown in Figure 4, one factor that people consider when evaluating the overall fairness of police actions is whether police acted illegally, with illegal conduct lowering perceptions that police acted using fair procedures. In other words, if people know before they view the video that the initial contact was not legal, they are less likely to interpret police actions as procedurally fair. This influence is small but clear and statistically significant.⁷⁹

⁷⁹ This model does not include prior views about police, but if they are included, the analysis further supports the suggestion that antecedent values shape people's evaluations of events. When people make judgments about the procedural justice of police conduct, they consider many factors, including whether police behaved lawfully. This is not surprising, because as Dan Kahan and his coauthors suggest, values shape perceptions of the facts, as well as evaluations of the actions of legal actors. *See, e.g., Dan M. Kahan et al., Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). Judgments about police are additionally shaped by people's prior level of identification with police and their overall political-social ideology (factors taken into account in the analysis shown in Figure 4). These prior values directly influence procedural justice judgments and evaluations of police wrongdoing, and prior ideology also directly shapes judgments about whether police should be punished. Hence, people's reactions to events are not only a function of what happens within those events. They also have an already-developed

The path results reinforce the results of the multilevel modeling analysis in suggesting that, while many factors matter, the primary factor shaping lawfulness assessments was the procedural justice evaluation. Once such procedural justice judgments are taken into account, the objective legality of police actions has no direct influence upon lawfulness assessments. However, this does not mean that illegal actions have no consequences. Officers who were presented as acting illegally were judged to have used procedures that were less fair, leading to judgments of wrongdoing and a heightened desire to punish.

While these path results help us to gain a better understanding of the nature of people's reactions to videos of police-citizen interactions, we caution that because the data upon which they are based are cross-sectional, they must be viewed as tentative. On the other hand, the experimental variations in objective lawfulness clearly suggest that when people have a prior understanding that police are acting in ways that the law defines as legal or illegal, this has little impact upon whether they are perceived as acting legally, whether they should be sanctioned, or both.

IV. IMPLICATIONS

The data confirms our core claim: when assessing the legality of police actions, procedural justice factors are more influential to people's judgments than the actual legality of police behavior. Or, to put it somewhat provocatively, although the lawfulness of police conduct has some effect on the public's desire to punish police, this effect is trivial compared to that of procedural justice. It is what police *do* during a stop that shapes perceived lawfulness, not the reasons on which they rely when deciding to engage a person. Additionally, of the many aspects of police behavior that might matter, what does matter is procedural justice.

What should we make of this? We think at least three points are important.

First. People's ordinary intuitions about rightful police behavior do not comport with the law. That is, people do not seem to care very much at all about police adherence to constitutional rules when assessing whether police should be punished. They care instead primarily about the procedural justice and fairness of the way police act when dealing with people in the community. This could result from at least two conditions. The first condition

value system that shapes event perception and evaluation. These other factors were controlled for in the multilevel analysis. For an examination of such fact-centered influences, see Anthony Braga et al., *The Salience of Social Context Factors in Appraisals of Police Interactions with Citizens: A Randomized Factorial Experiment*, 30 J. QUANTITATIVE CRIMINOLOGY 599 (2014).

is one in which people are aware both of legality and fairness factors but consciously choose to credit fairness over legality. A second condition is one in which people choose fairness over legality because they are unaware of, or perhaps more precisely, untutored in, legality. If this second condition holds, then we would expect people's assessments of legality and fairness to be coextensive. To put this point another way, people rely on fairness to evaluate police conduct because they do not know the law. As best we can tell, the second condition is a better descriptor of our data.⁸⁰ In our data, people did not put great weight on comparing the facts of the situation to the legal rules that dictated appropriate police conduct in the situations they observed. Instead, they assessed police behavior with reference to their procedural justice judgments.

The central point these findings support is the disjuncture between the authorities, who examine a situation through a prism of law when trying to decide what types of actions are appropriate, and the members of the public, who make judgments regarding law by analyzing the behaviors that police officers engage in during their interactions with them well after legal authorities have decided to act. Each party to the situation focuses upon the time point that is most salient to them based upon the issues that they care about. Law enforcement agents bring a framework of legal rules and categories to a decision point at which they classify the facts into what is needed to make a lawful judgment. Their concern is whether conduct comports with the law. The public reacts to intrusion of a state authority into their lives by trying to understand the meaning of police actions for them. In particular, they seek clues about the social meaning of police behavior—e.g., messages about their status and standing in their community; the rights that will be accorded to them; whether officers appear to be trustworthy, benevolent, and sincere; whether officers are trying to do what is right; and whether they are trying to consider the person's needs and concerns. These questions are at best peripherally addressed by the legality of conduct but are strongly influenced by *how* officers exercise their authority in the situation.

Second. Suggesting that people “know” fairness and not the law means, we think, that it is extremely important to separate lawfulness from unlawfulness on the one hand and fairness and unfairness on the other, while specifying a relationship between them as we do in the model presented above. Perhaps the most important reason to do this is that police are creatures of law and are trained in that law. Police, unlike some members of

⁸⁰ The key point here is that actual legality has no impact upon perceived legality. Whether police are actually following the law is not central to whether the public perceived them to be acting legally.

the public, are not everyday lawyers, but, rather, experts.⁸¹ They strive to conform their behavior to a set of norms and scripts heavily influenced by formal law.

As we noted earlier, the efforts of police to adhere to the law can leave the police confused about problems with public legitimacy. Trained from a legal framework, officers naturally infer that because they follow the law, their actions are legal and, more importantly, legitimate. If lawful action is legitimate action, it follows to a police officer that people should defer to her authority and not question her actions. Yet studies of the public reveal widespread perceptions of illegitimacy and suggest that efforts by police to be more professional in their conduct (defined in terms of greater adherence to the law) do not promote legitimacy within the community.⁸²

We suggest that effectively addressing issues of popular legitimacy requires police to expand the framework within which they understand their conduct. It requires them to include within their concerns both being lawful and being perceived by the public as acting fairly. This, then, means one concern governs officers' decisions about when to take action, and a second concern governs their decisions about what to do when they implement actions involving the public. A focus on either of these issues alone is incomplete. The bifurcation we see on the spectrum of evaluations that ordinary people make regarding police behavior represents a social-psychological disjuncture in police-citizen engagement that is damaging to citizens, counterproductive for policing agencies, and ultimately inconsistent with the police accountability project that is critical to so many cities today.

One way to respond to the fact that citizens are unaware of the law is to educate them about constitutional law in the hope that they may comport their internal assessment processes in ways that are much more consistent with that law. As we noted, authors such as Haney have advocated such a strategy

⁸¹ Here, it is useful to reprise Bruce Ackerman's contrasting categories of legal reasoning. His "Ordinary Observers" rely upon common practices and basic social expectations among members of society when judging individual situations, without regard to whether those judgments fit into a coherent pattern, and his "Scientific Policymakers" craft rules to realize particular goals. The goals of constitutional law, while coherent, simply do not match the expectations of well-socialized citizens, who, motivated by the social psychology of group membership, place value on interactions that confer them status. See ACKERMAN, *supra* note 14, at 1-40.

⁸² To see this result, compare PEFFLEY, *supra* note 12, with research demonstrating that police conduct has become more consistent with legal dictates when measured by lower levels of lethal force, physically coercive confessions, and the like become more legal over time. Peffley shows that there is a profound lack of confidence among minority groups in police, even while police seem to be improving along the legality dimension. For a summary of research about police compliance with law, see FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 13, at 252-90.

as part of a general effort to increase sensitivity to situational issues.⁸³ We believe that this strategy is unlikely to be effective. The resources involved would be enormous. In addition, it flies in the face of human psychology in two ways. First, in the situation itself, people focus on the salient factor, which is officers' behavior, and ignore background situational factors. As we noted above, this is consistent with research findings on fundamental attribution error, indicating a general tendency to ignore background information. Second, in terms of their concerns, people's focus on officer behavior is natural because the behavior of authorities provides information about their identity and status. Politeness and respect affirm status, and this is a central issue in interactions with authorities, as the procedural justice research indicates.

Constitutional law, as it is currently composed, does not emphasize the importance of quality of police treatment and does not discuss impact upon dignity, identity, or status. Instead, whether a typical discretionary police action, such as a stop or arrest, is constitutional depends upon the officer's observations of the potential suspect's behavior and actions, which, when evaluated in light of the officer's experiences, lead her to conclude with the constitutionally required level of certainty that the suspect has committed or is about to commit a crime.⁸⁴ Thus, the constitutionality of many police actions is centered on what the officers know before they exercise their discretion to engage someone. The values that the law protects are not those that ordinary folks, at least in this area, regularly look to when constructing individual or group identity, as decades of social psychology make clear. Nothing about constitutional law prohibits a police officer from being rude, and very little of constitutional criminal procedure promotes the kinds of dignity concerns that people tend to care about. In fact, constitutional law, because it places so much emphasis on police suspicion, is potentially at odds with concerns about human dignity.⁸⁵ When police deal with people in the community, their legal framing encourages them to look at people as potentially engaged in "suspicious" activity. It is identifying signs of such activity that justifies police officer intervention into people's lives. Hence, when people deal with police, their experiences are tinged with mistrust and

⁸³ See *supra* notes 19–21.

⁸⁴ See *Terry v. Ohio*, 392 U.S. 1 (1967) (basing the ruling upon the facts the officer saw before he acted).

⁸⁵ See, e.g., Tracey L. Meares, *The Distribution of Dignity and the Fourth Amendment*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE* 123, 123–29 (Michael Klarman et al. eds., 2012) (suggesting that the Fourth Amendment's suspicion requirement encourages police officers to invest in confrontational attitudes toward suspects in ways that are inconsistent with promoting procedural justice).

a potentially demeaning tone. Police already suspect those they deal with are “up to no good,” and they adopt the tone of inquisitors to gather data in support of these suspicions.

One possible reform strategy is to advocate change in the legal rules that shape police conduct—perhaps along the lines that Stuntz has suggested.⁸⁶ We worry that this approach is an exercise in futility. Thus, we may be better served by educating police officers about procedural justice. Police officers need to comport their behavior with constitutional rules, yes, but they also need to be encouraged to treat people with dignity and respect regardless of whether the rules require it.

Why would police do this? As we have noted, popular legitimacy carries a number of benefits for police. It promotes rule following and deference to police decisions. It lowers resistance and conflict. It motivates cooperation. And, as this Article shows, it leads people to view police decisions about discretionary actions as lawful and to support sanctioning police officers less often. Hence, treating people fairly is good police policy.

Moreover, as the creation and consumption of videos depicting police activity continues to increase, so does the importance of procedural justice. Indeed, cell phones and police body cameras are capturing a growing volume of police–citizen encounters, and such footage is reaching an ever-expanding audience online. Therefore, a police officer’s conduct has the power to shape perceptions of police legitimacy and convey messages of respect, or a lack thereof, far beyond those with whom she directly interacts. And because videos of police–citizen encounters are limited in their ability to convey the precise circumstances leading up to the encounters, the lawfulness of the police conduct becomes even less salient to the public than it might otherwise be.

Third. The finding that the approach we have outlined likely leads to safer streets is only one of its benefits. As British legal scholar Neil Walker notes, “[t]he police . . . are both minders and reminders of community—producer[s] of significant messages about the kind of place that community is or aspires to be.”⁸⁷ Taking Walker seriously promotes an understanding of the policing enterprise that is different from the usual conception that emphasizes the solution of collective action problems, which in turn emphasizes the role of police primarily as crime control agents. We do not

⁸⁶ See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (arguing for less discretion on the part of legal authorities and a more central role for local juries in making decisions as an alternative).

⁸⁷ Ian Loader, *Policing, Recognition, and Belonging*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 211 (2006) (citing Neil Walker, *Policing and the Supranational*, 12 POLICING & Soc’y 307, 315 (2002)).

doubt the positive benefits resulting from policing agencies casting themselves as necessary utilities for producing safe, functioning communities—akin to public utilities for well-lit streets, clean water, and cheap, widely available electricity. One must be careful in making the public utility analogy, however. A consequential conception of a public good, which the utility analogy clearly is, conceives of the good's production as one that can be enjoyed by individuals and aggregated up, so to speak. Thus, its benefits—and costs—can always be assessed in terms of efficiencies at the individual level that are simply aggregated up, and it is possible to imagine the good's production by some entity other than the state.

We think our account of the way in which people assess the rightfulness of policing behavior is more consistent with Jeremy Waldron's account of a public good, which acknowledges that “no account of [its] worth to anyone can be given except by concentrating on what [it is] worth to everyone together.”⁸⁸ Truly good policing, then, is enjoyed by all people in common, regardless of whether they experience positive outcomes as individuals. The unit of measurement here is not simply counting up and adding the experiences of individuals, but instead trying to understand what we experience at the community level.⁸⁹ Generation of good policing is “wholly, directly and reciprocally dependent upon its simultaneous generation for and enjoyment by certain others.”⁹⁰ It is the impact that the climate of policing has on the overall community that is key, as opposed to thinking about the relationship that particular individuals may or may not have with police.

We can go further and say that our argument not only implies a demand for policing that is assertedly social, as Waldron suggests, but *constitutive*, too, in the way that Ian Loader and Neil Walker claim. It is not enough for policing to simply solve collective-action problems associated with the project of crime reduction. Policing also can, and should, play a role in producing positive feelings of self-identity that help to “construct and sustain our ‘we-feeling’—our very felt sense of ‘common publicness.’”⁹¹ Legitimacy, then, can be a key driver of a healthy and properly functioning democratic government.

We need to do more work to fully justify this last potentially normative claim. No doubt many are made uncomfortable by the notion that police

⁸⁸ JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 358–59 (1993).

⁸⁹ See ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 59–60 (2012) (coining the term “ecometrics” to explain the measurement of social traits at the appropriate level of analysis, such as a neighborhood, that is distinct from measuring such processes at the individual level).

⁹⁰ IAN LOADER & NEIL WALKER, *CIVILIZING SECURITY* 154 (2007) (citation omitted).

⁹¹ *Id.* at 164.

should be involved in this work. What we know, however, is that they *are* involved in it. The empirical distinctions we demonstrate between lawfulness assessments of police conduct on the one hand and fairness assessments on the other powerfully suggest that people understand police treatment of citizens in the constitutive manner that Loader and Walker describe. Indeed, President Obama, in convening his Task Force on 21st Century Policing, made this point when he said, “When any part of the American Family does not feel like it is being treated fairly, it is a problem for all of us. It means we are not as strong as a country as we can be.”⁹²

The focus that people place upon the procedural justice of police actions points first to the potentially negative consequences of an exclusive focus on lawfulness. If police are not cognizant of, and responsive to, public concerns, they are blind to the source of public feelings that police actions are inappropriate and should be sanctioned. Further, police miss the opportunity to be involved in the broader effort to build people’s ties to their communities that create healthy and vibrant neighborhoods that are both more open to cooperation with police and better able to generate the types of social and other forms of capital that can help communities to “build their way out of crime.”⁹³

⁹² OFFICE OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 5 (2015).

⁹³ BILL GELLER & LISA BELSKY, U.S. DEP’T OF JUSTICE, A POLICYMAKER’S GUIDE TO BUILDING OUR WAY OUT OF CRIME: THE TRANSFORMATIVE POWER OF POLICE–COMMUNITY DEVELOPER PARTNERSHIPS 45 (2009).

Appendix A

Background Questionnaire

The background questionnaire asked respondents for information about their demographic characteristics, experiences with the police, exposure to crime, political beliefs, and prior attitudes towards law enforcement. Collecting this information was necessary to ascertain what factors accounted for differences across individuals and groups in their perceptions of the appropriateness of police behavior and the legitimacy of these legal actors in particular contexts. With a rich understanding of respondents' backgrounds, we could test our hypothesis that individuals form perceptions and evaluations of police-citizen interactions based on their own (direct) experiences and indirectly or vicariously through the experiences of others close to them. In other words, this personal data allowed us to assess people's psychological predispositions.

The information solicited in the questionnaire drew on work by Lawrence Bobo and Devon Johnson that identified a range of factors differentiating views among racial and ethnic groups on their experiences and views of criminal law and criminal justice.⁹⁴ Specifically, the questionnaire asked respondents about the following topics:

1. Basic biographical and demographic information;
2. Perceptions of crime in their neighborhood;
3. Attitudes toward their local police department;
4. Personal experiences with the police;
5. Experiences of friends and relatives with the police;
6. Views on appropriate police conduct;
7. Attitudes about race;
8. Perceptions of racial bias in the criminal justice system;
9. Crime victimization of themselves or other family members;
10. Political orientation; and
11. Major life events.

The questionnaire consisted of 124 questions. There was no standard question format. Rather, the format depended on what was being asked. Some questions were open-ended; some were yes/no; some asked for answers on various numerical scales; and some provided answer options that were specific to the topic.

⁹⁴ See Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151 (2004).

Appendix B

Experiment

In the experiment, we showed respondents three videos of different police–citizen encounters in randomized order. The videos, culled from police training tapes and Youtube.com, were each thirty seconds long, captured real interactions between police officers and citizens, and varied in the intensity of those interactions. The three videos can be summarized as follows:

Video 1: Resisting arrest. A courteous, but stern, police officer confronts a rude citizen during a nighttime traffic stop and attempts to place him under arrest, but the citizen resists.

Video 2: Violent struggle. Two police officers engage in a violent struggle with a large, aggressive citizen in a parking lot at night.

Video 3: Ambiguous arrest. A police officer questions a shirtless young man, who appears to be confused, and eventually leads him away in handcuffs.

A critical aspect of the experimental component was that before watching each video, respondents were provided with a brief paragraph description framing the police–citizen encounter. This paragraph varied the conditions under which the stop/arrest was made.

The manipulation had three possible states: good, neutral, and bad. Below is a summary of the three states associated with the contextual dimension, along with illustrative examples from the study (each video had a unique set of good, neutral, and bad states):

Table 1
Context of Arrest/Stop

	State	Example
Good	Legal arrest/stop	“After the police officer received a dispatch of an armed robbery committed in the area, the individual in the video was stopped as he was running from the location of the crime.”
Neutral	Ambiguous legality	“While the police officer was on routine patrol, the individual in the video was stopped after the officer observed him nervously looking at the patrol car and increasing the pace of his walk.”
Bad	Illegal arrest/stop	“The individual in the video was stopped after the police officer observed him walking down the street late at night.”

Appendix B

Continued

Before viewing each of the three videos, respondents were primed with a randomly assigned background description of the events in them. The contextual prime was designed to focus respondents on particular aspects of the context within which the encounters occurred, allowing us to assess the degree to which people's judgments about police behavior were influenced by how the incident was framed.

We asked respondents to answer thirty-eight questions about what had occurred in each video after they watched it. These questions required respondents to state whether they "strongly agreed," "agreed," "neither agreed nor disagreed," "disagreed," or "strongly disagreed" with each statement about the behavior of the police officer(s) and the citizen in the video. (Respondents were also given the option of answering that the statement "does not apply.")

We also asked respondents to make evaluations utilizing the same five-point scale:

- *recall basic facts* (e.g., "The police in the video displayed or used weapons (club, gun).");
- *assess the appropriateness of the citizen's conduct* (e.g., "The citizen involved behaved appropriately towards the police.");
- *assess the appropriateness of the police officers' actions* (e.g., "The police behaved appropriately toward the citizen.");
- *speculate as to the motivations of the police officers* (e.g., "The actions of the police officers were affected by the race of the citizen.");
- *evaluate the procedural fairness of the police officers' actions* (e.g., "The police in the video treated the citizen with respect and dignity.");
- *judge the legality of the police officers' actions* (e.g., "The police officers violated the law."); and
- *determine whether the police officers should be disciplined for their behavior* (e.g., "The officers involved should be reprimanded or punished in some way").

We designed these questions to explore the psychological processes underlying reactions to ambiguous events involving possible police misconduct that could warrant some form of punishment.

Appendix C

Sample

The study sample consisted of 1361 individuals age eighteen or older, drawn randomly from a demographically diverse panel assembled by Knowledge Networks (KN), an opinion research firm based in Menlo Park, California that specializes in video-based surveys using the internet. KN retains a permanent sample of approximately 40,000 individuals from which subsamples can be drawn to carry out specific surveys. The KN panel sample is representative of the U.S. population, which allows for stratification and representation across demographic groups. Recruitment into the KN panel takes place through a random digit dialing method to random samples of U.S. households. All members of the household are invited to participate in the panel. Surveys are answered electronically either on a computer or through a web-based TV connection. KN panel members receive free internet access and email accounts, including equipment if needed. In some cases, individuals are also paid a modest incentive fee to participate in the survey.

The 1361 individuals who participated in our study came from fifteen geographically dispersed American cities. The number of individuals from each city was: Baltimore (98); Boston (88); Chicago (94); Denver (89); Detroit (90); Houston (87); Los Angeles (94); Miami (89); New York (85); Philadelphia (91); Phoenix (96); San Diego (92); Seattle (90); and Washington, D.C. (89). These cities were chosen because they represent a diverse range of critical characteristics, such as demographics, crime levels, and police–community relations.

The respondents were *not* a nationally representative survey. Therefore, the appropriate baseline is not whether our respondents mirror the nation, but rather whether there were enough individuals with varied demographic characteristics to allow us to make plausible comparisons across groups. With this in mind, we stratified the sample by race, gender, and age to achieve a healthy mix of each.

The race of the sample was: Caucasian = 58.6%; Hispanic = 18%; African-American = 14.3%; Other = 6%. The gender was 47.7% male.

Ages were: 18–29 = 22.2%; 30–44 = 28.3%; 45–59 = 27.1%; 60+ = 22.3% (Mean = 44).

For education level, the sample included: less than high school = 8.5%; high school = 30.6%; some college = 26.7%; bachelor's degree or higher = 34.2% (Mean = some college but no degree).

Household incomes were: \$0–\$24,999 = 12.2%; \$25,000–\$49,999 = 23.2%; \$50,000–\$99,000 = 41.8%; \$100,000+ = 22.8% (Mean = \$60,000).

For employment status: Working = 64%.
