Spring 2011

American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative

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CRIMINAL LAW

AMERICAN POLICING AT A CROSSROADS: UNSUSTAINABLE POLICIES AND THE PROCEDURAL JUSTICE ALTERNATIVE

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As victimization rates have fallen, public preoccupation with policing and its crime-control impact has receded. Terrorism has become the new focal point of concern. But satisfaction with ordinary police practices hides deep problems. The time is therefore ripe for rethinking the assumptions that have guided American police for most of the past two decades. This Article proposes an empirically-grounded shift to what we call a procedural justice model of policing. When law enforcement moves toward this approach, it can be more effective at lower cost and without the negative side effects that currently hamper responses to terrorism and conventional crime. This Article describes the procedural justice model, explains its theoretical and empirical foundations, and discusses its policy implications, both for ordinary policing and for efforts to combat international terrorism.

I. INTRODUCTION

As victimization rates have fallen, public preoccupation with policing and its crime control impact has receded. Terrorism has become the new focal point of public concern. But the apparent satisfaction with ordinary police practices hides deep problems.

Public order successes have been achieved at great cost to politically powerless communities. As the controversy surrounding the recent arrest of Harvard Professor Henry Louis Gates illustrated,[1] our laws and the way they are enforced have resulted in public attitudes sharply polarized along racial lines,[2] a division that is scarcely surprising in a nation marked by conspicuous racial disparities in its prison populations.[3] And the costs of current strategic choices are no longer confined to minorities and the poor. Through its criminogenic impact, imprisonment has cross-cutting effects for the wider population, promising safety through deterrence at the same time as it increases victimization at the hands of former inmates.[4] These costs are compounded by fiscal consequences that are now impossible to ignore. In California, reliance on long-term imprisonment as a crime-control

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[1] Gates was arrested at his Cambridge home by a police officer who suspected him of a house break-in. Though circumstances were disputed, many whites assumed the officer would not have acted without good reason, while others (especially blacks) found it unlikely that a middle-aged professor, standing on the porch of his own home, would have been viewed with suspicion and then arrested if he had been white. *See* CAMBRIDGE REVIEW COMM., MISSED OPPORTUNITIES, SHARED RESPONSIBILITIES: FINAL REPORT OF THE CAMBRIDGE REVIEW COMMITTEE 16–21 (June 2010) [hereinafter CAMBRIDGE REVIEW COMMITTEE], *available at* http://www.cambridgema.gov/CityOfCambridge_Content/ documents/Cambridge Review_FINAL.pdf; Cambridge Police Dep't, Incident Report # 9005127, July 16, 2009, *available at* http://www.samefacts.com/archives/ Police report on Gates arrest.PDF (detailing the officer's account); Dayo Olopade, *Skip Gates Speaks*, ROOT (July 21, 2009), http://www.theroot.com/views/ skip-gates-speaks?page=0,1 (for Gates's view).

[2] In one careful survey, less than twenty percent of African Americans considered the American legal system fair. Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CALIF. L. REV. 1219, 1247 (2000). After President Obama criticized the officer's actions, a poll found that twice as many whites as blacks disapproved of the President's comments. *See* PEW RESEARCH CTR., OBAMA'S RATINGS SLIDE ACROSS THE BOARD 15–17 (2009), *available at* http://people-press.org/report/532/obamas-ratings-slide. Similar findings recur throughout the literature.

[3] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS (2010); MARC MAUER, RACE TO INCARCERATE (rev. ed. 2006).

[4] *See, e.g.*, Coleman v. Schwarzenegger, No. CIV S-90-0520, 2009 WL 2430820, at *84 (E.D. Cal. Aug. 4, 2009) ("[T]he state's continued failure to address the severe crowding in California's prisons would perpetuate a criminogenic prison system that itself threatens public safety."), *appeal docketed sub nom* Schwarzenegger v. Plata, 130 S. Ct. 3413 (2010); Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L. J. 1551, 1554 (2003).

strategy has choked off funds for education and pushed the state to the brink of insolvency.[5] Budget imperatives are forcing the state to reduce its prison population by 6,500 inmates, even in the face of recidivism rates of nearly 40%, among the highest in the nation.[6] One prisoner brought home the dilemma and triggered widespread alarm when he was released early but then promptly re-arrested for attempted rape.[7] In other places, incarceration policies generate fiscal burdens that, if less dire, are nonetheless patently unsustainable.[8] Highly stretched police forces from New York City to Tulsa, Oakland, Los Angeles, and elsewhere are facing cuts in personnel, even in their high priority units.[9]

The pressures have become especially acute because we can no longer subordinate conventional law enforcement to the newer preoccupation with terrorism. That domain was long seen as far removed from everyday policing. But government measures in this once-distant arena increasingly intersect with local efforts to control ordinary crime.[10] And, as we discuss

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[5] *See, e.g.*, Wyatt Buchanan, *Has the Golden State Gone Bankrupt?*, S.F. CHRON., Feb. 22, 2010, at A1, *available at* http://articles.sfgate.com/2010-02-22/news/ 17950763_1_bankruptcy-treasurer-bill-lockyer-golden-state; Larry Gordon, Gale Holland & Mitchell Landsberg, *Lowered Expectations for Model of Higher Education*, L.A. TIMES, July 31, 2009, at A1, *available at* http://articles.latimes.com/2009/jul/31/local/me-college-cuts31.

[6] Randal C. Archibold, *Driven to a Fiscal Brink, A State Throws Open The Doors to Its Prisons*, N.Y. TIMES, Mar. 24, 2010, at A14. In a 2005 analysis, the three-year recidivism rate for California offenders released from incarceration and returned to prison or jail after conviction for new crimes was 37%. An additional 32% of released offenders were returned to custody for technical parole violations. *See* Ryan G. Fischer, *Are California's Recidivism Rates Really the Highest in the Nation? It Depends on What Measure of Recidivism You Use*, THE BULLETIN, UC Irvine Center for Evidence-Based Corrections, Sept. 2005, at 2, *available at* http://ucicorrections.seweb.uci.edu/pdf/bulletin_2005_vol-1_is-1.pdf.

[7] Archibold, *supra* note 6, at A14.

[8] *See, e.g.*, Nicholas Riccardi, *Laws Loosen to Free Inmates*, L.A. TIMES, Sept. 5, 2009, at A20 (discussing states where cost constraints have forced prison releases; Kentucky granted early release to 3,000 inmates).

[9] *See, e.g.*, Joel Rubin, *LAPD Cuts Killed Terrorism Unit*, L.A. TIMES, May 6, 2010, at AA3; Maya Rao, *N.J. Layoffs Grow in Public Sector*, PHILA. INQUIRER, Apr. 13, 2010, at B04 (describing police force cuts in New Jersey); Nicole Marshall, *TPD Making Fewer Arrests*, TULSA WORLD, Mar. 28, 2010, at A1 (describing layoffs of 124 Tulsa police officers); Bobby White, *Cuts to Police Force Test a Safer Oakland*, WALL ST. J., July 11, 2009, at A4 (describing decision to lay off nearly 20% of Oakland police force and similar cuts throughout California and other states); *cf.* David W. Chen & Javier C. Hernandez, *Putting Blame on Albany, Mayor Unveils Budget With Heavy Cuts*, N.Y. TIMES, May 7, 2010, at A22 (describing a budget-driven plan to cut 892 police officers, later reversed—at the expense of teachers and other city employees—after the failed Times Square bombing plot); David Seifman & Dan Mangan, *A Cop Priority Thanks to Thug—NYPD Spared Slashes After Terrorist Bust*, N.Y. POST, May 6, 2010, at 4 (same).

[10] *See* TO PROTECT AND TO SERVE: POLICING IN AN AGE OF TERRORISM (David Weisburd et al. eds., 2009); Matthew C. Waxman, *Police and National Security: American Local Law*

below, the local policing practices currently favored in much of America not only have hidden costs for effective crime prevention but also can directly undermine sound responses to the threat of terrorism.

The time is ripe, therefore, for rethinking the assumptions that have guided American police for most of the past two decades. Zero-tolerance policies and the order-maintenance model, as well as their various cousins, for all of their apparent success must be reoriented to make room for different priorities. We see no need for a radical restructuring of the police function, but what we propose is nonetheless a significant shift in emphasis, a shift to what we call a *procedural justice model* of policing.

The procedural justice approach is grounded in empirical research demonstrating that compliance with the law and willingness to cooperate with enforcement efforts are primarily shaped not by the threat of force or the fear of consequences, but rather by the strength of citizens' beliefs that law enforcement agencies are *legitimate*. And that belief in turn is shaped by the extent to which police behavior displays the attributes of *procedural justice*—practices, described in more detail below, which generate confidence that policies are formulated and applied fairly so that, regardless of material outcomes, people believe they are treated respectfully and without discrimination. When policing approaches the procedural justice model, law enforcement can be even more effective at lower cost and without the negative side effects that currently hamper our responses to international terrorism. Indeed, the procedural justice model has direct relevance for the development of successful strategies within that domain itself.

In Part II of this Article, we situate the procedural justice approach by reviewing the principles that inform the police function and the ways they have changed over recent decades. Part III describes the procedural justice model and explains its theoretical and empirical foundations. Part IV focuses on concrete policy implications for ordinary policing and for efforts to combat international terrorism. Part V offers concluding thoughts.

II. CHANGING CONCEPTIONS OF THE POLICE FUNCTION

A. GOALS AND PRINCIPLES

From their beginnings in the early 1800s and for more than a century thereafter, urban police in America were a politically attuned branch of municipal government, charged not only with preserving order but also with relaying citizen requests for city services and delivering benefits to

constituents at the precinct and ward levels.[11]   As American cities mushroomed in size and density and as local political machines flourished, the police, deeply engaged in collecting and distributing patronage, occasionally brutal and often corrupt, became an indispensable arm of the ruling establishment.[12]   The title of one scholarly study summed it up: *Police: Streetcorner Politicians.*[13] The dilemma of "law enforcement in a democratic society"[14]—the need not only to endow officials with authority to deploy deadly force but also to preserve democratic control—precipitated a "preoccupation with legitimacy."[15]

The solution that began to emerge in the 1950s, prominently endorsed in 1967 by the President's Commission on Law Enforcement and the Administration of Justice, was *professionalization*.[16] Henceforth, police were to be organized and managed as a highly-trained civil service devoted to crime control, and were designed to be "insular, homogeneous, and largely autonomous," with guarantees of independence from politics, and "purposely distanced" from the communities they were assigned to protect.[17] The importance of gaining and holding the community's trust was widely acknowledged, and police leaders typically assumed that trust would flow from legitimacy. But legitimacy came to be identified with professional norms, a military style of leadership, and a detached, reactive mode in which officers responded when called for help but deliberately kept their distance from individuals in the local community.[18]

The professional model bolstered one sort of democratic legitimacy—political independence—but undermined another—the authority grounded in the needs and preferences of the polity itself. Just at a time when broad

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[11] *See* Eric Monkkonen, *History of Urban Police*, 15 CRIME & JUST. 547, 549–52 (1992). In Britain, where modern policing originated in 1829 at the behest of Sir Robert Peel, the emphasis was different, and the police function was not embedded in municipal politics. *See generally* WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON (1999).

[12] *See generally* JONATHAN RUBINSTEIN, CITY POLICE (1973); M. Craig Brown & Barbara D. Warner, *Immigrants, Urban Politics, and Policing in 1900*, 57 AM. SOC. REV. 293 (1992).

[13] WILLIAM KER MUIR, JR., POLICE: STREETCORNER POLITICIANS 271 (1977) (describing this phenomenon but by no means endorsing it).

[14] JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966).

[15] *See* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 93 (2008) (discussing "[t]he [p]reoccupation with [l]egitimacy").

[16] *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

[17] SKLANSKY, *supra* note 15, at 6.

[18] *Id.* at 93–94.

grassroots authenticity was becoming the hallmark of democracy,[19] police were reaching for an elite mantle of detached expertise.[20] Once again, their legitimacy suffered.

Two adjustments were brought to bear. One was substantive: the due process model through which the Warren and Burger Courts reaffirmed constraints on law enforcement power and insisted that they be enforced not only by the police bureaucracy but also by an independent judiciary.[21]

The other adjustment was strategic. Emphasizing concepts like "community policing" or "problem-oriented policing," law enforcement priorities were recalibrated.[22] Police effort henceforth would be guided (or would claim to be guided) by the expressed preferences of "the community," as revealed in listening sessions at the grassroots and meetings with acknowledged or self-proclaimed community leaders.[23]

A related model with a significantly different emphasis, "order-maintenance policing" made it a priority for police to address local problems, even those that did not rise to the level of grave crimes.[24] Its widely accepted watchword was that "'[b]roken windows' do need to be repaired quickly."[25] Unlike many versions of community-oriented policing, however, some versions of the order-maintenance approach assigned to the police themselves the responsibility for identifying disorder. Another conception of reform went a step further, from maintaining order to eliminating all forms of disorder. Its message was zero tolerance: even

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[19] *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1756–62 (2005) [hereinafter Sklansky, *Police and Democracy*] (describing the movement in favor of participatory democracy in the 1960s and 1970s).

[20] *See* Mark Harrison Moore, *Problem-solving and Community Policing*, *in* MODERN POLICING 99, 117 (Michael Tonry & Norval Morris eds., 1992) (noting that police "became cut off from the aspirations, desires, and concerns of citizens").

[21] *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 379–411 (2000) (summarizing case law); *cf.* Sklansky, *Police and Democracy*, *supra* note 19, at 1749 (noting criticism of Warren Court precedents).

[22] *See generally* JEROME H. SKOLNICK & DAVID H. BAYLEY, THE NEW BLUE LINE (1986) (describing police innovation in six American cities); *id.* at 10–11 (noting "the beginnings of a social reconstruction of American policing" and "a strong inclination to recognize the significance of community trust and cooperation"); *id.* at 211 (characterizing the new approach as "community-oriented policing").

[23] *See generally* Moore, *supra* note 20; Jerome Skolnick & David Bayley, *Theme and Variation in Community Policing*, 10 CRIME & JUST. 1 (1988). Despite its many purely cosmetic features, the community policing movement also wrought many real and important changes. *See* David Alan Sklansky, The Persistent Pull of Police Professionalism (July 2010) (unpublished manuscript) (on file with authors).

[24] GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 160 (1996).

[25] WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 75 (1990).

minor misconduct was to be systematically suppressed. Legitimacy would come not from participatory democracy but from effectiveness; police authority would be accepted and respected because it would achieve results.

Thus, for more than half a century, achieving and maintaining "legitimacy" has been a central preoccupation both for those who support law enforcement and for those who want to constrain it. But legitimacy has been understood in sharply different terms: alternatively constitutional (compliance with the rule of law), political (governance in conformity with community preferences), or instrumental (success in reducing crime). The politically-charged disagreements have produced profound transformations, but one thing largely missing from the debates has been any effort to define precisely what "legitimacy" means or how to measure it empirically. Instead, an apparent consensus about the importance of police legitimacy has masked radically different assumptions about what that is and how it can be achieved.

Conceptual ambiguity and a failure to study empirical data bearing on issues of broad policing strategy are mirrored in conclusory debates about appropriate tactics for individual officers on the street. The debates, roughly speaking, center on competing preferences for being tough or being fair.

B. TACTICAL CHOICES: TOUGHNESS VERSUS FAIRNESS

Tough cops are not automatically unfair, and civil libertarians are not automatically soft, but being tough and being fair are often assumed to be in tension. A perception that police must to choose between them arises almost everywhere in policing and in criminal law generally: street stops, surveillance, *Miranda* rights, and so on. In each instance, some people feel sure that social protection requires police powers that are unconstrained by procedural niceties, and others are equally convinced that harsh measures, if insensitive to individual rights, will prove counterproductive.

A similar argument arises in areas far outside of criminal justice. During the Vietnam War, the issue was framed as a debate about whether we should burn down villages sympathetic to the Viet Cong or focus instead on winning hearts and minds.[26] The same dilemma is now one of our military's biggest preoccupations in Iraq and Afghanistan.[27] A commentator who admires former President George W. Bush recently

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[26] The debate is vividly presented in the 1974 documentary film *Hearts and Minds*, directed by Peter Davis. HEARTS AND MINDS (BBS Productions & Rainbow Releasing 1974); *see also* Elizabeth Dickinson, *A Bright Shining Slogan*, FOREIGN POL'Y, Sept./Oct. 2009, at 29.

[27] *See, e.g.*, Lara M. Dadkhah, *Empty Skies over Afghanistan*, N.Y. TIMES, Feb. 18, 2010, at A27.

stated that we must "project global power and military might [or else our] hegemony will be challenged."[28] A recent op-ed in the *New York Times* derided our focus on hearts and minds in Afghanistan, arguing that it was more important to kill members of the Taliban than to worry about civilian casualties.[29] General Charles Krulak, a former commandant of the Marine Corps, takes exactly the opposite view. He claims that the United States military must use power sparingly because "the fundamental precept of counterinsurgency" is to "[u]ndermine the enemy's legitimacy while building our own."[30]

Many Americans have little doubt that in each of these areas the tough approach, whatever its moral drawbacks, at least will make them safer.[31] Another group feels equally sure that being tough can be counterproductive. The impact of toughness on effectiveness may be the most fundamental question in the whole field of social conflict and social control. Though the question is undeniably empirical, it is rarely treated as such; across the political spectrum, nearly everyone assumes that it can be answered on the basis of confident intuitions about the essence of human nature.

For police officers, toughness has not always been preferred. In the early days of modern urban policing, British Prime Minister Sir Robert Peel stressed that "[t]he police must secure the willing cooperation of the public" and that "[p]olice should use physical force . . . only when the exercise of persuasion, advice, and warning is found to be insufficient."[32] Yet in more recent times, a preference for toughness has long held sway. Indeed, toughness has often been defended as beneficial for everyone. Police scholar William Muir described the mindset of police who believed that "[t]he nastier one's reputation, the less nasty one has to be."[33] Skolnick and Fyfe observe the prevalence of the same way of thought, adding that "[c]ops and everyone else understand the reality of this paradox. And

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[28] Nile Gardiner, *Bush Demonstrates That Hard Power Matters*, DAILY TELEGRAPH, Dec. 27, 2008, at 33.

[29] Dadkhah, *supra* note 27, at A27.

[30] Charles C. Krulack & Joseph P. Hoar, *Fear Was No Excuse To Condone Torture*, MIAMI HERALD, Sept. 11, 2009, at 25A.

[31] *See* Herring v. United States, 129 S. Ct. 695, 700–01 (2009) (quoting Illinois v. Krull, 480 U.S. 340, 352–53 (1987)) (internal quotation marks omitted); City of Chicago v. Morales, 527 U.S. 41 (1999) (plurality opinion) (discussing Chicago crackdown on "gang-loitering"); Dadkhah, *supra* note 27, at A27 (arguing for aggressive use of airpower in Afghanistan); John F. Harris, Mike Allen & Jim VandeHei, *Cheney Warns of New Attacks*, POLITICO (Feb. 4, 2009, 6:12 AM), http://www.politico.com/news/stories/0209/18390.html.

[32] JOHN S. DEMPSEY & LINDA S. FORST, AN INTRODUCTION TO POLICING 8 (5th ed. 2010).

[33] MUIR, *supra* note 13, at 41, 44, 101.

whether or not they actually articulate it, cops develop styles of policing in response to it."[34]

The instinctive preference of the cop on the beat using the tough approach to policing style was potentially in tension with the notion that police agencies should be "problem-oriented" or "community based."[35] But that tension dissolved in certain versions of the "order-maintenance" approach, which emphasized aggressive street stops, along with "proactive enforcement of misdemeanor laws and zero tolerance for minor offenses."[36] In their seminal "Broken Windows" essay, Wilson and Kelling described the perspective of departments that made it a priority to prevent low-level disorder on the streets: "In the words of one officer, 'We kick ass.'"[37] A Chicago police officer who was "not prepared to stand by and watch gangs terrorize his family, friends, and neighbors" described "how he dealt with gang members who would not follow his orders: 'I say please once, I say please twice, and then I knock them on their ass.'"[38]

Even where police advocates of "community policing" were not committed to zero-tolerance or aggressive tactics, meetings with neighborhood groups evolved from the orientation required in community-based models—a reciprocal problem-solving conversation—into "a bland, one-sided, impersonal opportunity for city bureaucrats to manufacture consent" for measures they had already decided to implement.[39]

Although early assessments suggested that various order-maintenance approaches were "working" (i.e., reducing crime), more careful analysis revealed that aggressive street-level enforcement focused on quality-of-life offenses did not make cities safer.[40] Where genuine crime-control

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[34] JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 95 (1993). Skolnick and Fyfe are quick to note, however, that the tough style is not always successful. *Id.*

[35] See SKLANSKY, *supra* note 15, at 4, 123.

[36] BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 2 (2001).

[37] James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, March 1982, at 29.

[38] KELLING & COLES, *supra* note 24, at 166.

[39] *See* William Lyons, *Partnerships, Information and Public Safety*, 25 POLICING INT'L J. POLICE STRAT. & MGMT 530, 534 (2002) (describing Seattle experience); *cf.* WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 113–14 (1997) (describing the interactive nature of Chicago's community policing program "beat meetings").

[40] *See* HARCOURT, *supra* note 36, at 6–11, 59–121; *see also* Hubert Williams & Antony M. Pate, *Returning to First Principles: Reducing the Fear of Crime in Newark*, 33 CRIME & DELINQ. 53, 67 (1986) (noting that order-maintenance policies in Newark failed to achieve their goals); Frank Zimring, *The City that Became Safe: New York and the Future of Crime Control*, SCI. AM. (forthcoming August 2011) (manuscript on file with authors).

successes have been achieved, they seem attributable, at best, only to discrete, narrowly targeted programs that are unrelated (or antithetical) to order-maintenance enforcement of low-level crimes.[41] Similarly, research does not support the widely held belief that police are always wise to seek to dominate situations by force; when police react to perceived threats by displaying force, their actions often escalate the conflict.[42]

How could it be that energetic policing, with a high volume of street stops, searches, and arrests, was *not* helping to reduce crime or protect officer safety? One place to look for a possible answer is the tradition that sees the legitimacy of official authority not through the lens of constitutional law, politics, or economic efficiency, but rather from the perspective of empirical social psychology.

C. LEGITIMACY AS A PSYCHOLOGICAL ATTRIBUTE

The psychological model of legitimacy posits that people obey the law, irrespective of expected rewards and penalties, when they view the government as worthy of trust and respect. This model's theoretical foundation is found in the work of Max Weber, who argued that legitimacy in this psychological sense was the key to the effectiveness of the state.[43] People must believe "that some decision . . . is entitled to be obeyed by virtue of who made the decision or how it was made."[44]

In the context of criminal justice, a large body of research confirms the links between perceived legitimacy and willingness to obey the law. To be sure, potential criminals are sometimes influenced by straightforward material incentives. People who steal cars or rob banks often take into account the chances of getting caught. There is much evidence that criminals can be influenced to commit their crimes at different times or

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[41] *See* Zimring, *supra* note 40, at 30 (arguing that crime-control successes in New York City cannot be attributed to aggressive quality-of-life law enforcement, that in fact the NYPD, its rhetoric notwithstanding, de-emphasized this tactic, and that at most only one aspect of New York's aggressive street-stops approach (the targeting of certain "hot-spots") *may* be responsible for New York's crime-control gains).

[42] JOHN D. MCCLUSKEY, POLICE REQUESTS FOR COMPLIANCE: COERCIVE AND PROCEDURALLY JUST TACTICS 171 (2003).

[43] MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 336 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954) (noting that "every domination . . . always has the strongest need of self-justification through appealing to the principles of legitimation"); *id.* at 341 (describing legitimacy as prestige resting on beliefs of members of a political community).

[44] Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 377 (2006).

places. And sometimes potential sanctions induce them to commit the offenses less frequently or not at all.[45]

But research also finds strong support for the psychological legitimacy model. In many situations, people obey the law not because of fear of getting caught but simply because they view the legal authorities as legitimate and believe that legitimate authorities should be obeyed.[46] Perceived legitimacy is assessed by asking people to express their degree of faith in various public institutions, as measured by their belief that officials are trustworthy, concerned about the welfare of those with whom they deal, able to protect citizens against crime, and otherwise do their jobs well.[47] People who express a high degree of confidence in public authorities comply with the law either because of social influence (they want to avoid the disapproval of their social group) or because of internalized moral norms (they want to see themselves as decent people who do the right thing).[48] Legitimacy thus enables authorities to maintain social order almost automatically, without incurring the heavy costs required by instrumental strategies relying on arrest, adjudication, and incarceration.[49]

How can the police build this valuable attribute of legitimacy? Empirical research indicates that this sort of legitimacy is sustained not by an aggressive style that subordinates individual rights but rather by something closer to its opposite—practices that can be grouped under the heading of *procedural justice*.

III. THE PROCEDURAL JUSTICE MODEL

The procedural justice concept captures the fairness of the process used to make and apply rules and the quality of the personal treatment

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[45] Daniel Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 12–15 (1998) (summarizing studies on the effect of sanctions on criminal deterrence).

[46] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 59 (rev. ed. 2006) [hereinafter TYLER, WHY PEOPLE OBEY]; *cf.* Clemens Kroneberg, Isolde Heintze & Guido Mehlkop, *The Interplay of Moral Norms and Instrumental Incentives in Crime Causation*, 48 CRIMINOLOGY 259, 283 (2010) (suggesting that although normative mechanisms are more important, some people only respond to incentives).

[47] *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, 270–71 (2008).

[48] *See* Kroneberg, Heintze & Mehlkop, *supra* note 46, at 259 (using survey data to determine the influence of different factors upon compliance); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1997) (summarizing research that indicates an alternative explanation for obedience of the law because "fear of arrest and incarceration in prison is not effective in causing people to obey the law").

[49] *See* Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 309 (2009) [hereinafter Tyler, *Legitimacy*] (reviewing literature to this effect).

people receive from authorities.[50] Perceived fairness in decisionmaking has been found to be determined by such matters as whether police are viewed as unbiased and consistent and whether they give people opportunities to be heard before they take action. Perceived fairness of treatment, the research shows, is determined by such matters as whether police are courteous and respectful of people and their rights.

Conventional wisdom posits that the primary issue for people dealing with legal authorities is the outcome of the interaction. It is assumed, for example, that when a driver receives a traffic ticket, he is likely to be upset, but that if the encounter ends without issuance of a ticket, the driver is more likely to be happy. But empirical research tells a different story. An extensive body of data demonstrates that while people are happier when they do not receive an unfavorable result such as a traffic ticket, the principal factor shaping their reactions is whether law enforcement officials exercise authority in ways that are perceived to be fair.[51] This is true for both those who do and those who do not receive the unfavorable result. These findings have been replicated using a wide array of methodologies such as field research, panel studies, and experimental studies in "dozens of social, legal, and organizational contexts."[52]

The implications of this research for policing tactics are obvious but seldom appreciated. When police ramp up their arrest rates for low-level offenses like vandalism and vagrancy, the broken windows hypothesis suggests that neighborhood residents should be pleased by these efforts to combat disorder.[53] But opinion surveys often confound that expectation,

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[50] *See* TOM R. TYLER, PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS 36–43 (2007); Jason A. Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice*, 86 J. APPLIED PSYCHOL. 425, 426 (2001).

[51] *See* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND THE LAW (2002); Kimberly Belvedere, John L. Worrall & Stephen G. Tibbetts, *Explaining Suspect Resistance in Police-Citizen Encounters*, 30 CRIM. JUST. REV. 30 (2005); Ben Bradford, Jonathan Jackson & Elizabeth A. Stanko, *Contact and Confidence: Revisiting the Impact of Public Encounters with the Police*, 19 POLICING AND SOC'Y 20 (2009); 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 JUST. Q. 255 (2010); Lyn Hinds, *Youth, Police Legitimacy and Informal Contact*, 24 J. POLICE & CRIM. PSYCHOL. 10 (2009); Stephen D. Mastrofski, Jeffrey B. Snipes & Anne E. Supina, *Compliance on Demand: The Public's Response to Specific Police Requests*, 33 J. RES. CRIME & DELINQ. 269 (1996); Michael D. Reisig & Meghan Stroshine Chandek, *The Effects of Expectancy Disconfirmation on Outcome Satisfaction in Police-Citizen Encounters*, 24 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 88 (2001); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 431 (2003).

[52] Robert MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 173 (2005).

[53] *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 301–10 (1996) (emphasizing "the sector of the black law-abiding population that desires more rather than

finding that where arrest rates for these offenses rise or where other "crackdown" tactics are implemented, approval of the police has declined.[54] In light of the research we have canvassed, these results are not mysterious: tough measures, if implemented without fairness, are likely to arouse resentment rather than appreciation.

By contrast, toughness *with* fairness can be productive. In a study that interviewed New Yorkers both prior to and following a personal experience with the police, people who received a traffic citation from an officer who treated them fairly tended to view the police as *more* legitimate and were significantly *more* willing to cooperate with the police than they had been before that encounter.[55] As a result, the police can take actions to control crime and build legitimacy at the same time.

The assumption that there is a zero-sum trade-off between individual rights and public safety is therefore far too simple. When perceptions of procedural justice and legitimacy decline, people's willingness to obey also declines, but when authorities build their legitimacy, people are more willing to comply with the law.[56] And importantly, procedural fairness matters in similar ways for white, African-American, and Hispanic respondents, with only minor variations reflecting differences in the issues that are most salient to different ethnic groups.[57]

Few would argue that compliance can never be achieved in the absence of procedural justice. Obedience can still be obtained, but only through intensive enforcement and harsh punishment. And that route—the one America has largely followed since the 1960s—is not only expensive from the start, but it can also trigger a downward spiral. Harsh repression enhances material incentives for compliance, but it weakens perceptions of

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less prosecution and punishment for all types of criminals"); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1169–70 (1998) (same).

[54] WESLEY G. SKOGAN, DISORDER AND DECLINE 15, 118 (1990); Brooks, *supra* note 2, at 1225.

[55] Tyler & Fagan, *supra* note 45, at 261.

[56] *See* Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 555 (2003). Some suggest that this line of argument glosses over a causal ambiguity: Citizens' perceptions of procedural fairness may be "colored by [their] views about the legitimacy of the police or courts." David J. Smith, *The Foundations of Legitimacy*, *in* LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 29, 32–33 (T. Tyler et al. eds. 2007). If so, perceived legitimacy may shape perceptions of procedural fairness, rather than the other way around. The legitimacy research has used a variety of strategies to exclude this possibility. *See, e.g.*, Tyler & Fagan, *supra* note 47, at 251 (using panel data to measure judgments of legitimacy and procedural justice before and after encounters with the police).

[57] *See* Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322, 336 (2005).

fairness and thus the willingness to comply *voluntarily*. And that effect requires yet another increase in the use of aggressive enforcement measures, a step which in turn weakens voluntary compliance even more.

Most of the research testing the legitimacy model has focused on willingness to *violate* the law. But recent research also examines the links between procedural justice, legitimacy, and police capacity to secure *cooperation* from the general public.[58]

When police are combating crime and disorder, they need the help of the community.[59] People who discover a criminal in hiding have to decide whether to report him. When a crime is occurring, they have to make a similar decision. They may also be asked to attend community meetings to discuss policing strategies or to participate in activities such as neighborhood watch. In all these cases, police success in fighting crime depends upon public cooperation. And cooperation is a more fragile commodity than compliance, because it is easy for people not to cooperate. Even when material incentives have only limited impact on behavior, they are far more likely to influence *compliance* than *cooperation*: When does a mere bystander face penalties for *not* reporting a crime or for *not* attending a community meeting? People must *want* to cooperate with the police.

Yet in many low-income African-American and Hispanic neighborhoods, anti-snitching campaigns and other signs of mistrust make clear that, even where citizens are law-abiding and desperate to have safe neighborhoods, their cooperation with the police cannot be taken for granted.[60]

The research on cooperation finds that willingness to assist the police—for example, by reporting suspicious behavior or by participating in crime prevention programs—is strongly linked to a person's belief that police authority is legitimate. And that belief is strong only when officials exercise their authority fairly. Conversely, when perceptions of procedural justice and legitimacy decline, willingness to cooperate also declines.[61] In one study, procedural fairness was more than twice as important for

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[58] *See, e.g.*, Lyons, *supra* note 39; Tyler & Fagan, *supra* note 47; Tom R. Tyler, Stephen J. Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 Law & Soc'y Rev. 365 (2010).

[59] *See* Robert J. Sampson, S. W. Raudenbush & F. Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 Science 918 (1997).

[60] *See* Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 Mich. L. Rev. 1193 (2008).

[61] *See* Lyons, *supra* note 39, at 536, 538 (profiling and other tactics resented in minority communities "make it more difficult for citizens in those communities with the information we seek to communicate [it] effectively . . . . Effective partnerships . . . only produce the desired forms of cooperation when they operate as a mechanism to increase understanding, trust and respect among the parties . . . .").

securing cooperation as judgments about police competence or the fairness of outcomes.[62]

In short, an emphasis on fairness appears to be central to police success in maintaining social order. Even though tough enforcement measures seem to increase an offender's probability of apprehension and conviction, the net effect of tough measures can be the opposite, and not only because toughness tends to chill voluntary compliance. Toughness also chills cooperation from the law-abiding community. That reduced cooperation in turn decreases the probabilities of apprehension and conviction, and those effects in turn decrease even the involuntary compliance achieved through the threat of sanctions.

IV. POLICY IMPLICATIONS OF THE PROCEDURAL JUSTICE MODEL

In this Part, we discuss the implications of the procedural justice research for concrete policy measures in two areas of conventional policing—control of ordinary crime and control of misconduct by the police themselves. We then turn to its implications for domestic counterterrorism policing.

A. CONTROLLING ORDINARY CRIME

Many zero-tolerance and order-maintenance models of policing, along with other instrumental approaches, emphasize efforts to control crime by increasing the density of police on the street and the frequency of street stops. For example, over a three-year period, a Chicago initiative aimed at containing misbehavior by unruly youth and gang members led police to order over 89,000 individuals to disperse and resulted in the arrest of over 42,000 people on charges of "gang loitering."[63] From 2003 to 2007, the number of street stops in New York City rose 500%, even though the crime rate was stable.[64] And these stops were disproportionally concentrated among minority group members.[65] Data from other jurisdictions show similar patterns.[66]

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[62] *See* Tyler, *Legitimacy*, *supra* note 49, at 379–80 (comparing influence of perceived legitimacy and police effectiveness on willingness to cooperate).

[63] City of Chicago v. Morales, 527 U.S. 41, 49–50 (1999) (plurality opinion).

[64] Jeffrey Fagan, Amanda Geller, Garth Davies & Valerie West, *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, *in* RACE, ETHNICITY, AND POLICING 309 (Stephen K. Rice & Michael D. White eds., 2010).

[65] *See* Andrew Gelman, Jeffrey Fagan & Alex Kiss, *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, 813–14 (2007) (finding that African-American and Hispanic

The procedural justice research described above suggests, however, that these efforts are likely to produce mixed or even counterproductive results. If carefully targeted crackdown measures do indeed have some crime-control payoff, as may have been the case recently in New York City,[67] and if such measures are therefore to be replicated and extended, it becomes particularly important to ensure that they are implemented wisely; the police departments that resort to them must exercise special care not to arouse resentment that offsets most of the expected benefits. Even worse, to the extent that stop-and-search practices and frequent arrests for low-level public-order offenses are seen as severe or racially selective, as they apparently are in many urban communities,[68] these practices may actually *impede* compliance and voluntary cooperation with law enforcement. "[I]ntensive frisks and needless arrests can often be a source of friction," thereby "undermining the very sense of legal legitimacy they were designed to foster."[69]

The damage can be especially great when street sweeps and arrests for "loitering" bear down on youth who are perceived as threats to a well-ordered community. The views of children and adolescents about law and the courts are shaped by many factors, including parents, teachers, gangs, the media, and interactions with the police.[70] Because adult orientations toward the law are often formed during adolescence, these precursors of adult attitudes are crucial. A considerable literature inspired by the broken windows hypothesis has posited that norms of law-abiding behavior can be nurtured by a strong law enforcement presence that exerts control over public spaces, stigmatizes gang membership, and drives disorderly youth

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pedestrians in New York City were stopped more frequently than whites, even after controlling for race-specific estimates of criminal offending).

[66] In Los Angeles, for example, in 2003–2004 there were 4,569 stops per 10,000 African-American residents, but only 1,750 stops per 10,000 white residents. *See* IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 5–7 (2008), *available at* http://www.aclu-sc.org/documents/view/47.

[67] *See* Zimring, *supra* note 40.

[68] *See supra* text at notes 65–66.

[69] Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL'Y 419, 426 (2007); *see also* Delgado, *supra* note 60, at 1202; K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 313 (2009).

[70] Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUD. 715, 718–19 (2007).

off the streets.[71] Yet the empirical research canvassed here suggests the opposite—that intensive law enforcement and a readiness to arrest for low-level offenses is far more likely to arouse resentment, weaken police legitimacy, and undermine voluntary compliance with the law.[72]

Tactics that emphasize procedural justice can be equally effective with fewer negative side effects. In the procedural justice model, officers are not oriented toward addressing situations primarily with the threat of force. Instead, officers are trained to view every citizen contact as an opportunity to build legitimacy through the tone and quality of the interaction, with force a last resort.

Although police leaders have long paid lip service to the importance of gaining community trust, concrete steps to further this goal were either nonexistent or (as in the community policing movement) centered on discussion forums largely divorced from the daily activity of the cop on the beat. More recently, police departments across the country have begun to make more tangible efforts, but only in discrete programs of limited scope. An innovative Boston initiative engaged inner-city ministers and other community leaders in an effort to convince at-risk youth to steer clear of firearms.[73] In High Point, North Carolina, police managed to shut down open-air drug markets by offering dealers a dignified opportunity to avoid arrest in return for a commitment to abandon the drug trade.[74] A Chicago program has reportedly succeeded in reducing violence and recidivism by organizing discussion forums in which gun offenders on probation or parole meet with police officers, neighborhood residents, and social workers for discussions in which their concerns are treated with respect and their needs are addressed with support instead of only threats of punishment.[75]

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[71] *See, e.g.*, MARTIN S. JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 193–202 (1991); Debra Livingston, *Police Discretion and the Quality of Life in Public Spaces*, 97 COLUM. L. REV. 551, 640–42 (1997).

[72] *See supra* text at notes 54, 56; Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217 (2005); *see also* Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651 (2009). To be sure, further research is needed to clarify the links between adolescent experience and adult attitudes toward authority.

[73] *See* Anthony A. Braga, David M. Kennedy, Elin J. Waring & Anne Morrison Piehl, *Problem-Oriented Policing, Deterrence, and Youth Violence: An Evaluation of Boston's Operation Ceasefire*, 38 J. RES. CRIME & DELINQ. 195, 198, 220 (2000).

[74] *See* Mark Schoofs, *New Intervention: Novel Police Tactic Puts Drug Markets out of Business*, WALL ST. J., Sept. 27, 2006, at A1.

[75] *See* Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223, 254 (2007).

Reportedly, as many as seventy-five cities are now implementing legitimacy-inspired initiatives of this kind.[76]

Although the value of such programs is now widely recognized, police departments have yet to fully appreciate their psychological basis and their relevance to the full range of policing activity. Perhaps more worrisome is the fact that in many departments, officers have learned to acknowledge verbally the need to build community trust even when their behavior on the beat brazenly contradicts that commitment. In a 2004 study, Gould and Mastrofski observed officers subjecting black suspects stopped on the street without justification to humiliating strip searches and rectal examination in public settings; back at the stationhouse, the same officers "expressed a desire to establish strong bonds with neighborhood residents and to treat all citizens, including suspects, with a respectful demeanor."[77] Clearly, much more must be done to communicate convincingly to police officers the substance of that objective. And equally important, officers must fully appreciate its rationale and empirical foundations, if they are to internalize the message.

Forcible street contacts will inevitably cause anxiety and discomfort for pedestrians and motorists who are stopped, and police departments must therefore remain sensitive to the need to control their frequency, especially when declining rates of success in the resulting searches and declining arrest rates (as a percentage of all stops) signal diminishing returns. But forcible stops obviously should not be withdrawn from the law enforcement arsenal. Stops based on objective indications of a serious offense are almost always warranted, and they need not trigger community mistrust if police pay attention to what happens during such stops. Indeed, the available data suggest that although African Americans resent high levels of arrest for public-order offenses, their approval of the police is "positively correlated with arrest rates for more serious offenses."[78]

Thus, if stops are carefully initiated, police would not have to reduce their frequency. But even then, the procedural justice approach emphasizes a need for change: police departments must focus on altering the dynamics of police–citizen interaction. Instead of seeking to instill fear or project power, officers would aim to treat citizens courteously, briefly explain the reason for a stop, and, absent exigent circumstances, give the citizen an opportunity to explain herself before significant decisions are made.

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[76] *See* Meares, *supra* note 72, at 665 & n.95; *see also* MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT (2009) (discussing strategies to reduce crime with less reliance on arrest and incarceration).

[77] Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 345 (2004).

[78] Brooks, *supra* note 2, at 1225–26.

Moreover, they must be trained to maintain this orientation from the beginning of an encounter. An officer who initiates a stop in an aggressive manner, assuming the worst, cannot easily pivot to a polite, diffident stance if his suspicions prove unfounded. And even if he can do so, his explanations and apologies are unlikely to go far with an innocent citizen subjected to peremptory language and rough treatment at the outset.

These elements of procedurally-fair interaction go well beyond constitutional minimums, which typically focus on limiting *what* the government can do. But many requirements of constitutional law and criminal procedure do limit *the way* that government power is exercised. Even when officers have probable cause and a search warrant, the Fourth Amendment normally requires them to knock, announce their presence, state the basis of their authority, and give the homeowner an opportunity to admit them peaceably.[79] Officers normally must give the homeowner a copy of the warrant, to provide official confirmation of their authority and the limits on the permitted scope of the search.[80] After the search, they must deliver an inventory of items seized to establish a record of their actions and a readily understood basis for challenging unauthorized conduct.[81] These requirements, so often celebrated in Fourth Amendment tradition,[82] are not about limiting the tangible burdens government may impose; indeed the traditional abhorrence of clandestine searches[83] is hard to understand from a purely material perspective. The point of these requirements is essentially the same as that which the procedural justice findings stress—the importance of government's perceived legitimacy,

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[79] *See, e.g.*, Banks v. United States, 540 U.S. 31, 41 (2003) (discussing requirement of "reasonable wait time"); Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (finding failure to knock and announce permissible only when officers have reasonable suspicion that doing so would be dangerous or futile); Wilson v. Arkansas, 514 U.S. 927, 929 (1995) (holding that common law "knock and announce" requirement forms part of the Fourth Amendment reasonableness inquiry).

[80] The obligation to provide a copy of the warrant is typically grounded in statutes or court rules but generally has not been treated as a Fourth Amendment requirement. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 3.4, at 177–78 (3d ed. 2000).

[81] City of West Covina v. Perkins, 525 U.S. 234 (1999) (basing this requirement on Fourteenth Amendment due process rather than the Fourth Amendment).

[82] *See, e.g.*, *Wilson,* 514 U.S. at 931–33 (tracing lineage of the knock-and-announce rule back to the thirteenth century and finding that it "was woven quickly into the fabric of early American law").

[83] *See, e.g.*, United States v. Villegas, 899 F.2d 1324, 1336 (2d Cir. 1990) (finding clandestine search permissible only when secrecy is "essential"); United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986) (holding that when circumstances justify clandestine search, notice to homeowner must nonetheless be given within seven days; extensions of this period permissible only on a "strong showing of necessity").

sustained by actions that build trust and treat citizens with respect. The *Miranda* warnings were designed to serve the identical purpose, communicating to the suspect that officers will treat him with dignity and acknowledge his rights.[84]

There is no reason, however, for police conceptions of fair treatment to stop with the constitutional minimum. In connection with street stops, operational guidelines within each department could formalize appropriate steps, such as the need for courteous treatment, the obligation to give the citizen a reason for the stop, and a chance to explain the circumstances. In this spirit, the review committee established to examine the Gates incident in Cambridge cautioned that "actions that police take to protect their safety and the safety of others can seem cold, insensitive, or overly authoritarian . . . . Whatever police can reasonably do to explain the reasons for the interaction and deescalate a situation is vital to the peaceful resolution of the encounter."[85] Such steps could be made a routine part of every officer's behavior on the beat. With their low cost and potential for high crime-control payoff, changes like these are a smart use of limited police resources.

As a simple way to put such priorities into practice, officers could easily carry and give to those they stop a card containing a short statement of the rules that govern police stops. The card would enumerate the rights that must be respected (including the right to have the reasons for the stop explained and the right to tell their side of the story before decisions are made) and the procedures for complaining about unfair treatment. Such efforts help communicate to the public that procedural justice principles are taken seriously.

Because trust in the police varies dramatically across racial lines,[86] policing methods must be especially attuned to racial sensibilities. Of course, that point in itself is not new. But we can illustrate the need for a new emphasis by considering the issue of "profiling" and the Gates incident in particular. Traditionally the study of racial profiling has focused upon whether reliance on racial markers actually occurs. We might ask, for example, if Officer Crowley took into account Professor Gates's African-American appearance or whether the police generally profile minorities. To do so we would collect statistics on street stops, adjust them for actual rates

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[84] Miranda v. Arizona, 384 U.S. 436, 457–60 (1966) (stating that in the absence of warnings, custodial interrogation "trades on the weaknesses of individuals" and is "destructive of human dignity"; "the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.").

[85] *See* CAMBRIDGE REVIEW COMMITTEE, *supra* note 1, at 27.

[86] *See supra* text at note 2.

of offending in the target population, and analyze the data to determine if the police stop African Americans more often than is justified by objectively based concerns about crime.

Following the argument of this Article, however, the Gates case (and other minority experiences with the police) would be approached from a different perspective. People generally view racial profiling as unfair, and when police action leads people to feel they have been profiled, it prompts hostility.[87] This response was evident when Professor Gates reacted to his perception that his treatment was explained simply by the fact that he was a "Black man in America."[88] The *belief* that the police are using unfair procedures delegitimates their authority and leads people to resist it.

This finding has two important implications. First, a person can be strongly affected by police contact even if nothing legally significant happens. Even when people are not arrested, they can still feel disrespected, and this will change their views about the police. As a consequence, experiences need to be evaluated in terms of their influence upon the person's views about the police, not just in terms of whether people were arrested and searched, or why (from the officer's perspective) he decided to act. Even trivial incivilities contribute to a climate of illegitimacy. The Supreme Court, along with countless other observers, has repeatedly missed this point.[89]

Second, people can have a *positive* experience even when the police take some potentially unwelcome enforcement action. Police can therefore act to control crime and build legitimacy at the same time. As shown in the research we have canvassed above, people who received a negative decision (such as a traffic ticket) from an officer who treated them fairly viewed the police as *more* legitimate than they did before the encounter.[90] In short, police who treat people even-handedly and with respect can reinforce their legitimacy even when they are compelled by the situation to act firmly and aggressively—force is more acceptable when it is viewed as reasonable and

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[87] Tom R. Tyler & Cheryl Wakslak, *Profiling and the Legitimacy of the Police: Procedural Justice, Attributions of Motive, and the Acceptance of Social Authority*, 42 CRIMINOLOGY 13, 13–42 (2004).

[88] *See* CAMBRIDGE REVIEW COMMITTEE, *supra* note 1, at 56.

[89] *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (upholding authority of vice-squad officers to make arrest for failure to signal a turn, whether or not their action was pretextual). *Compare* United States v. Martinez-Fuerte, 428 U.S. 543, 560, 563 (1976) (holding "objective intrusion" was "minimal" because of stops' "public and relatively routine nature," even though stops were made "on the basis of apparent Mexican ancestry"), *with id.* at 573 (Brennan, J., dissenting) (positing that the "experience [would be] particularly vexing for the motorist of Mexican ancestry who is selectively referred, knowing that the officers' target is the Mexican alien").

[90] *See supra* text at note 50.

justified and when it is delivered through just procedures. These implications are relevant to much more than just race relations. The research on legitimacy establishes that America's policing model for dealing with people in all communities and of all ethnicities needs to change.

Of course, there is a danger here. Police who successfully cultivate a courteous, self-effacing demeanor could use that façade to mask discriminatory and unnecessarily intrusive practices. We should perhaps be careful what we wish for. But police are as yet light years away from acquiring the attitudes and behavior on patrol that could make this danger a reality. The prospect of that unintended consequence simply underscores that a new emphasis on the neglected qualitative dimension of police–citizen interaction must complement but not displace the equally important quantitative dimensions. The frequency of stops, the success rates of associated searches, and the distribution of these outcomes across racial and ethnic groups are already important tools for gauging police performance. We claim that these metrics have too often monopolized attention, but an appreciation for the significance of perceived legitimacy would not by any means render these measures irrelevant or obsolete.

B. POLICE MISCONDUCT

Attention to legitimacy is important for another sort of compliance—compliance by police officers themselves.

Nearly all existing models of policing posit that an officer seeking to prevent crime and disorder *wants* to exert force (conducting stops, searches, and arrests) and that this desire is held in check by an unwelcome, externally imposed constraint—the obligation to remain within constitutional boundaries. Professor Herbert Packer captured this notion and etched it into several generations of criminal procedure scholarship with his influential paradigm contrasting a "crime control model" (one that emphasizes the goal of reducing crime as efficiently as possible) with a "due process model" (one that gives priority to maintaining respect for individual rights).[91]

In this view, police who disregard search and seizure rules may face penalties (suppression of evidence, civil damages, or administrative sanctions), and such penalties are assumed to encourage compliance through the instrumental logic of deterrence. The officer considers every stop and every search as potentially beneficial, but she must weigh those benefits against potential sanctions. When the officer can foresee that an exclusionary rule applies, the expected costs will outweigh benefits,

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[91] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

misconduct will be deterred, and compliance with constitutional norms will be achieved. Conversely, if an officer cannot foresee the prospect of an exclusionary sanction, her behavior supposedly cannot be affected. For the current Supreme Court, this logic has become an analytic obsession, as a majority of the Justices now approach nearly every issue concerning the exclusionary rule by examining the details of presumed deterrence effects under particular circumstances.[92]

From a legitimacy perspective, inquiries of this sort (whatever their conclusions) are profoundly misguided. The empirical research makes clear that fear of sanctions by itself generates only weak, poorly motivating incentives, which in turn produce at best a sullen, resentful, imperfect form of compliance. And this is exactly what we often observe in the case of police officers asked to comply with the rules of search and seizure. Indeed, the payoff from instrumental deterrence in that context is especially poor, just as we would expect, because those rules and their accompanying sanctions enjoy little legitimacy in the eyes of the police to whom they are addressed. Like the exclusionary rule and for similar reasons, damage suits and institutional reform litigation have had only mixed success in changing the culture of police organizations.[93]

The legitimacy perspective makes clear that seeking to compel change through suppression remedies, lawsuits, and consent decrees can have only limited effectiveness because the police then seek ways to avoid detection and accountability. Just as with achieving compliance by the public, so with the police: we need to change what they want to do.

The difference between Fourth and Fifth Amendment requirements is telling here. Police compliance with the rules of search and seizure is always in doubt; evasion and even outright perjury are sometimes the officer's preferred course.[94] In contrast, police interrogators for the most part follow *Miranda* and give the warnings routinely. The reason is simple:

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[92] *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 702 (2009) (exclusionary rule applies only when exclusion can "meaningfully deter" police misconduct); Hudson v. Michigan, 547 U.S. 586, 596–97 (2006) (same); United States v. Leon, 468 U.S. 897, 907 (1984) (same). *But see* Rakas v. Illinois, 439 U.S. 128 (1978) (exclusionary rule may not be invoked to suppress fruits of an illegal search that did not violate the defendant's personal rights).

[93] *See* Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 464–78 (2004) (cataloguing reasons why individual remedies are ineffective at changing police institutions); David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 480–88 (1992) (discussing lack of success in judicial efforts to change police culture).

[94] *See, e.g.*, Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 82–83 (1992) (documenting pervasive police perjury used to avoid exclusionary rule in important cases).

police have learned that they *benefit* from compliance, because the *Miranda* warnings tend to put suspects at ease by creating a (false) sense of security and thereby help officers to get confessions.[95]

The procedural justice model is promising from this perspective both for the reasons outlined above and because the changes in police practices it calls for[96] are simple to implement and relatively inexpensive. More important, they benefit the police themselves, not just outside citizens and "bad guys." By projecting sensitivity to procedural justice, officers build their legitimacy and nurture public support. They thereby gain community respect, enhance the safety of their working environment, and create conditions likely to elicit greater cooperation in fighting crime. The police are gradually transformed from an occupying force into genuine partners with all components of the community, minorities and the poor included. And, of course, such changes also benefit the community, in particular minorities and the poor, who are policed in a more professional and respectful manner.

We do not doubt the importance of penalties such as the exclusionary rule and will have more to say about them in a moment. But reform of police organizations must start from within. Articles that make a seemingly similar point—for example, urging reliance on internal police guidelines, civilian review boards, and administrative sanctions—are too numerous to count, but nearly all proposals of this sort lack an essential feature: positive motivation. The empirical findings make clear that police must *want* to follow such guidelines, because (as in the case of citizens who might contemplate other sorts of wrongdoing) the probability that a violation will be detected and punished often is too low to provide in itself a sufficiently strong reason for obedience.

Creating positive motivations for compliance is essential not only to ensure respect for citizens' rights but also to achieve adherence to a broad range of internal operational standards and norms. A working environment conducive to those motivations involves several elements. The management literature develops them in detail,[97] and we do not propose to discuss them in depth here. But the key ingredient is worth emphasizing, though it is obvious from what we have already said, because the criminal procedure and organizational-reform literature almost always assumes that ingredient to be missing and unattainable. The ingredient, of course, is the

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[95] *See* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 516–38 (1996) (reviewing evidence to this effect).

[96] *See supra* text at notes 73–90.

[97] *See, e.g.*, V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes of Obedience*, 14 RES. ORGANIZATIONAL BEHAV. 49 (1992).

legitimacy of the rules in question. And by legitimacy here, we do not mean a legal or constitutional legitimacy grounded in a duly enacted text. Rather, as we have stressed throughout, the key concept is social and psychological legitimacy, from the perspective of the target audience whose compliance is sought. Officers must come to understand that observing the tenets of procedural justice will serve their own interest, apart from the constitutional pedigree of these norms, even when (as with many of the fair-treatment dimensions of procedural justice) the norms are by no means constitutionally mandated.

1. Tone from the Top

Attaining this sort of legitimacy begins with the "tone from the top." Police leaders must emphasize the value of building public support, helping citizens to feel comfortable and safe rather than threatened by the police presence. Leaders must communicate that while force will always have a role in policing, that role should be as a last resort, one that should seldom need to be used.

2. Recognition and Reward

Police reward structures also need to be reshaped so that building legitimacy in the community is viewed as a goal of equal importance to issuing traffic tickets and making arrests. If officers believe that their advancement, compensation, and respect in the eyes of their leadership are linked to their ability to create legitimacy and motivate cooperation, they are more likely to follow the principles of procedural fairness in their behavior on the street.

When considering incentive structures, it is important to think beyond material rewards. Studies of work organizations suggest that the impact of material rewards generally flows through their role in signaling management respect for employees and their contributions. Employees want to know that their efforts are valued by their superiors.[98] Studies of police organizations indicate that one of the best ways to communicate respect is to follow the principles of procedural justice (fair decisionmaking and fair interpersonal treatment) in dealing with officers themselves. Officers in the ranks should be afforded a voice in the formulation of the rules that govern their performance (a step to which police departments have recently become more receptive), and they must feel fairly treated in connection with internal discipline and civilian review board procedures.

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[98] *See* Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143, 1153 (2005).

Officers who feel respected are more likely to accept departmental policies as legitimate and to comply with them voluntarily.[99]

Correspondingly, officers need to believe that their adherence to these policies will be recognized by their superiors. Being able to reward the police in this way requires new sorts of data. Routine efforts to follow up on police–citizen contact can verify compliance with procedural justice principles and reinforce a procedural justice culture within the police department. Police statisticians must move beyond their preoccupation with clearance rates to measure trends in public confidence in the police and in public evaluations of the fairness of police practices, both among those who have had personal experiences with the police and in the community generally. In London, for example, the Metropolitan Police now routinely surveys the public to ascertain levels of public confidence in law enforcement and willingness to cooperate.[100] Such data collection efforts nurture the legitimacy of procedural justice norms in the eyes of the cop on the beat while also signaling to the public that support for these norms is genuine within the police department itself.

A similar linkage between public perceptions and police attitudes in matters of procedural justice could profitably be examined in connection with civilian review boards or purely internal disciplinary processes. We need to pay more attention to the ways in which these review mechanisms are seen in the eyes of both citizens and the cops who are potentially subject to them. And in line with the theme of nurturing legitimacy by rewards as well as sanctions, civilian review boards could well make it part of their mission to look for successes as well as the most egregious failures, and to ensure that successes are appropriately recognized.

3. The Exclusionary Rule

If the perceived legitimacy of the rules governing police behavior is the key to compliance, and if instrumental incentives have little bite, can we dispense with sanctions like the Fourth Amendment exclusionary rule? The question is by no means merely academic. A chorus of voices has argued that changes in urban politics and in the demography and professionalism of the police have made obsolete the judicially enforced criminal procedure restraints developed by the Warren and Burger Courts in response to police

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[99] Tom R. Tyler, Patrick E. Callahan & Jeffrey Frost, *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC'Y REV. 457, 481, 483 (2007).

[100] For details on the methodology and results of the most recent survey, see Metropolitan Police Service (London), *Public Confidence in Policing London*, http://www.met.police.uk/about/performance/confidence.htm (last visited Jan. 17, 2011).

oppression of minorities.[101]   And the Supreme Court itself seems increasingly ready to gut the exclusionary rule or abandon it completely.[102] There is much to be said on the other side of this debate,[103] but here we focus solely on the research findings concerning procedural justice and legitimacy.

From its inception, the exclusionary rule has reflected two distinct, though complementary concerns. One is the desire "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[104]   But in adopting the exclusionary rule in *Mapp v. Ohio*, the Court also stressed that "there is another consideration—the imperative of judicial integrity."[105]

For both Justice Holmes and Justice Brandeis, "judicial integrity" was the decisive point. As Justice Brandeis put it, exclusion of tainted evidence is essential "to maintain respect for law . . . [and] to preserve the judicial process from contamination."[106]   The objective, he said in one of his best

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[101] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 598 (2006) (stating that "[a]nother development over the past half-century that deters civil-rights violations [thus making the exclusionary rule less necessary] is the increasing professionalism of police forces, including a new emphasis on internal police discipline"); Kahan & Meares, *supra* note 53, at 1169–70 (stating that in "today's inner city . . . the citizens who support giving more discretion to the police are the same ones who are exposed to the risk that discretion will be abused").

[102] *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 702 (2009) (rejecting the rule that suppression is presumptively mandated for all illegally seized evidence and holding that "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system"); *Hudson*, 547 U.S. at 591, 597, 599 (stating that the exclusionary rule should be applied only where deterrence benefits outweigh its "massive" social costs, and, because "much has changed" since 1961, exclusion is not necessarily justified today simply because that remedy was held necessary "in different contexts and long ago").

[103] The Fourth Amendment at its inception had nothing whatever to do with preventing racial oppression, and to the extent that this concern has greater salience today, it is not plausible to suggest that American policing tactics have rendered it obsolete. In any event, there is no evidence to support (and much evidence to contradict) the Court's assumption in *Hudson*, 547 U.S. at 597–98, that civil damage liability provides all the deterrence needed. *See id.,* at 609–11 (Breyer, J., dissenting) (arguing that any damages awarded are likely to be nominal); *Herring*, 129 S. Ct. at 709 n.6 (Ginsburg, J., dissenting) ("[P]rofessionalism is a sign of the exclusionary rule's efficacy—not of its superfluity"); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 579–82 (2008) ("Despite the genuinely vast changes in law enforcement over the past forty years, the exclusionary rule probably still does a lot of work that no other remedy stands ready to duplicate.").

[104] Mapp v. Ohio, 367 U.S. 643, 656 (1961) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)) (internal quotation marks omitted).

[105] *Id.* at 659 (quoting *Elkins*, 364 U.S. at 222) (internal quotation marks omitted).

[106] Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting); *see also id.* at 470 (Holmes, J., dissenting) ("[I]t [is] a less evil that some criminals should escape than that the Government should play an ignoble part.").

known opinions, is not to tip the balance of an individual officer's incentives but to protect the foundations of government itself: "Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for law; . . . it invites anarchy."[107] Justice Brennan urged the same view, emphasizing that suppression of tainted evidence "assur[es] the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[108]

In its latest opinions, the Court acknowledged that this perspective dominated at the outset, but declared that "we have long since rejected that approach."[109] Instead, the Court now insists that exclusion is justified solely by potential deterrence of police misconduct, and it gives that rationale a newly constrained form. Two conditions must be met: there must be "appreciable" deterrence and, in addition, "[t]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs."[110] As a result, exclusion now is "our last resort, not our first impulse."[111] And raising even further this barrier to a suppression remedy, the Court seems to have set aside the long-standing rule of exclusion for the fruits of objectively unreasonable police searches and arrests. Instead, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[112] This new approach gives the police, and is expressly designed to give the police, much greater freedom to secure convictions by using illegally seized evidence.

The present Court's assumption that suppression inflicts substantial costs, by weakening our ability to impose criminal punishment, is of course the polar opposite of the Brandeis view that it is the *failure* to suppress that will breed lawlessness. As an *a priori* matter, neither view is intrinsically implausible. But the empirical research canvassed here has direct relevance for this debate. And those studies provide compelling support for the Brandeis insight on which the exclusionary rule originally rested. Indeed,

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[107] *Id.* at 485 (Brandeis, J., dissenting).

[108] United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

[109] *Hudson*, 547 U.S. 586, 591 (2006) (acknowledging that "[e]xpansive dicta in *Mapp* . . . suggested wide scope for the exclusionary rule").

[110] Herring v. United States, 129 S. Ct. 695, 700–01 (2009) (quoting Illinois v. Krull, 480 U.S. 340, 352–53 (1987)) (internal quotation marks omitted).

[111] *Hudson*, 547 U.S. at 591.

[112] *Herring*, 129 S. Ct. at 702.

Justice Brandeis's reasoning presciently expresses the best current understanding of the connections between legitimacy, procedural justice, and the control of crime.

As we have developed in detail throughout this Article, the research regularly finds that people comply with the law not primarily because of fear of sanctions but rather because they believe that authorities that have legitimacy should be obeyed. And such legitimacy flows from people's confidence that officials are trustworthy, that they abide by the law, and that they treat citizens with respect.[113] Official disregard for the law—made evident when misconduct can be openly exploited to prosecutorial advantage in court—is the kind of behavior that, the research establishes, tends to weaken perceived legitimacy and willingness to cooperate with law enforcement.

Opponents of the exclusionary rule sometimes suggest that the notion of "judicial integrity" argues *against* suppression of illegally seized evidence. Contrary to Justice Brandeis, they insist that because suppression can allow obviously guilty defendants to go free, it *undermines* public confidence in the criminal justice system.[114] The legitimacy research has not tested this sort of claim in the specific context of the exclusionary rule. But the general question this argument poses—whether legitimacy is shaped more strongly by police effectiveness than by procedural justice— has been studied in depth across a wide variety of law enforcement situations.[115] And the findings are consistent: in virtually every context studied to date, law enforcement effectiveness has displayed at best only a weak influence on perceived legitimacy, while procedural justice concerns are strongly linked to legitimacy, voluntary compliance, and willingness to cooperate.[116]

Against this background, relaxation of the exclusionary rule represents a direct assault on the capacity of our law enforcement system to succeed in its mission of maintaining social order. To be sure, a prosecutor's ability to use illegally seized evidence increases her capacity to secure a conviction and a long sentence, an unequivocal crime control benefit if viewed strictly

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[113] *See supra* text at notes 50–55.

[114] *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2513 (1996) (describing this argument and its role in the development of the good faith exception to the exclusionary rule).

[115] *See, e.g.*, TYLER, WHY PEOPLE OBEY, *supra* note 46; Tyler & Fagan, *supra* note 47; Tyler, Schulhofer & Huq, *supra* note 58.

[116] *See, e.g.*, TYLER, WHY PEOPLE OBEY, *supra* note 46, at 59 (linking procedural justice concerns to compliance); Tyler & Fagan, *supra* note 47, at 251 tbl.3 (linking procedural justice concerns to cooperation); Tyler, Schulhofer & Huq, *supra* note 58, at 380 (linking procedural justice concerns to cooperation).

in the short term. But the strong and consistent finding of the relevant research is that the net effect of law enforcement disregard for the law is likely to be the opposite, because judicial tolerance for Fourth Amendment violations will generate disrespect for authority, chill voluntary compliance, and discourage law-abiding citizens from offering the cooperation that makes it possible to apprehend and convict other offenders in future cases.[117]

Controlling ordinary crime and controlling police misconduct thus are closely connected. And if we are to succeed at both, procedural justice concerns must be placed at the center of attention.

C. DOMESTIC COUNTERTERRORISM

Terrorism is generally considered a problem to be distinguished from ordinary wrongdoing. Like efforts to combat drug trafficking and some forms of organized crime, preventing terrorist attacks requires close attention to international linkages, and federal enforcement agencies take the lead. Yet terrorism differs significantly from other sorts of transnational criminality. Its motivations are usually political rather than financial, its potential for social harm is vastly greater, and its connections to foreign policy and armed conflict are more prominent. Partly for those reasons, the structure of law enforcement is distinctive. Local policing is sometimes relegated to an afterthought; the federal government is expected to play, and does play, an overwhelmingly dominant role.[118]

In light of these contrasts, the applicability of the procedural justice approach to counterterrorism can hardly be taken for granted. Yet criminal justice theory and the dynamics of terrorism both suggest that this model has powerful relevance. And as we discuss below, the empirical research specific to this context, though less comprehensive than that in the area of ordinary crime, confirms its importance at all levels, from grand strategy in the federal agencies to the daily behavior of the cop on the beat.

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[117] *See*, *e.g.*, Lyons, *supra* note 39, at 538 (finding that desired cooperation occurs only when police build community "understanding, trust and respect"); Tyler, *Legitimacy*, *supra* note 49, at 379–80 (police effectiveness is much less important than perceived legitimacy in predicting willingness to cooperate); Tyler, Schulhofer & Huq, *supra* note 58, at 380 tbl.1 (finding perceived effectiveness of police has no significant correlation with willingness to cooperate, but that procedural justice concerns are strongly correlated with willingness to cooperate).

[118] *See, e.g.*, David Thacher, *The Local Role in Homeland Security*, 39 LAW & SOC'Y REV. 635, 669 (2005) (describing factors that prompt federal institutions to take lead); Dafna Linzer, *In New York, a Turf War in the Battle Against Terrorism*, WASH. POST, Mar. 24, 2008, at A1 (describing FBI reluctance to cede responsibilities to New York City Police Department). *But see* Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715 (2010) (arguing that local police must play significant role).

Start at the place that usually gets the least attention—local policing. Despite the widespread assumption of federal primacy, law enforcement officials increasingly recognize that local police must play a significant role. Collaboration has even been channeled through formal institutions such as Joint Terrorism Task Forces and "fusion centers."[119]

In part, the growing involvement of local police flows from perceived changes to the nature of the terrorist challenge. In the aftermath of the September 2001 attacks, the threat was perceived as a largely foreign-source affair. The July 2007 National Intelligence Estimate played down terrorist threats of domestic origin and identified the growing strength of al Qaeda in western Pakistan as the principal danger to the United States.[120] In late 2009, this perception began to change with a series of allegations concerning terrorism conspiracies developed within the United States.[121] The 2010 National Security Strategy warned that "recent incidences of violent extremists in the United States" demonstrate "the threat to the United States and our interests posed by individuals radicalized at home."[122] Of 202 people charged with serious terrorist crimes since September 11, 2001, more than half have been U.S. citizens, and over one-third of those have been American-born.[123]

These new threats give local law enforcement increased prominence, but its importance is now acknowledged even in connection with dangers emanating abroad. A recent RAND Corporation report, drawing from global counterterrorism experiences, notes that terrorism is largely a policing problem, not a military matter, because local police are best able to

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[119] *See* JOHN ROLLINS, CONGRESSIONAL RES. SERV., NO. RL34070, FUSION CENTERS: ISSUES AND OPTIONS FOR CONGRESS 1–2 (updated Jan. 18, 2008), *available at* http://fas.org/sgp/crs/intel/RL34070.pdf.

[120] NAT'L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: THE TERRORIST THREAT TO THE US HOMELAND 5 (2007). The National Intelligence Estimate summarizes "the Intelligence Community's (IC) most authoritative written judgments on national security issues . . . ." *Id*. at 2.

[121] These conspiracies included the decision of a Somali-American to travel to Somalia and become the first American suicide bomber, the July 2009 arrest of seven North Carolina Muslims on allegations they intended to commit suicide attacks, the September 2009 arrest of Afghan-born Najibullah Zazi based on allegations that he intended to attack the New York subway system, the October 2009 arrest of Pakistani-American David Headley in connection with the 2008 Mumbai attacks, and the May 2010 attempt by Pakistani-born American citizen Faisal Shahzad to explode a car bomb in New York's Times Square. *See* JEROME P. BJELOPERA & MARK A. RANDOL, CONGRESSIONAL RES. SERV., AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 74–76, 79, 81–82, 86–91 (2010), *available at* http://www.fas.org/sgp/crs/terror/R41416.pdf; Karen J. Greenberg, *Homegrown: The Rise of American Jihad*, NEW REPUBLIC, June 10, 2010, at 6, 7.

[122] PRESIDENT OF THE U.S., NATIONAL SECURITY STRATEGY 19 (May 2010).

[123] Greenberg, *supra* note 121, at 6–7.

build relationships with the communities in which terrorists try to hide and recruit members. The report urges police to "actively encourage and cultivate cooperation by building stronger ties with community leaders . . . ."[124] Another RAND report observes that "state and local law enforcement agencies . . . may be uniquely positioned to augment federal intelligence capabilities by virtue of their presence in nearly every American community [and] their knowledge of local individuals and groups . . . ."[125] These conclusions are consonant with a broader stream of thought that understands global terrorism as a form of "insurgency" most easily defeated by winning the loyalty of the communities in which terrorists may be found.[126] Even in foreign theaters of military operation, heavy firepower, though still favored by some,[127] is increasingly de-emphasized in favor of at least partial reliance upon measures akin to domestic policing.[128]

Local police thus play a crucial role by virtue of their familiarity with neighborhoods and their ability to elicit information held within domestic communities. And with counterterrorism as with policing against conventional crime, community cooperation is essential if the police are to perform this role successfully. Moreover, as with traditional policing, cooperation cannot be taken for granted. Indeed, cooperation may be even more fragile in the context of counterterrorism than in ordinary law enforcement: Law-abiding members of the relevant community, though unswervingly loyal to the United States, know that cooperation could mean exposing people with whom they share close ethnic and religious ties to unusually harsh procedures and sanctions. Shaping sound policy to navigate these sensibilities is thus vitally important but exceptionally delicate.

Law enforcement agencies, however, do not follow a unified approach. The decision to opt for policing rather than a military model leaves open

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[124] SETH G. JONES & MARTIN C. LIBICKI, HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA 27 (2008).

[125] K. JACK RILEY ET AL., STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM ix (2005); *accord* Gary LaFree & James Hendrickson, *Build a Criminal Justice Policy for Terrorism*, 6 CRIMINOLOGY & PUB. POL'Y 781, 783 (2007) ("In many ways the community-oriented approach favored by successful police departments is the same kind of approach that is most likely to uncover terrorist operations.").

[126] *See, e.g.*, DAVID KILCULLEN, COUNTERINSURGENCY 3–5 (2010).

[127] *See supra* text at notes 28–29 (discussing commentators who urge the U.S. to make greater use of air power against the Taliban, even at the risk of extensive civilian casualties).

[128] *See, e.g.*, U.S. DEP'T OF THE ARMY, U.S. ARMY FIELD MANUAL NO. 3-24, MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5, COUNTERINSURGENCY FIELD MANUAL xxv (2007) (noting that "the civilian population [is] . . . the deciding factor in the struggle," with the key issue being the ability to secure their support).

important choices. One is whether to focus on intrusive enforcement and intelligence-gathering methods that promise instrumental gains (at possible cost to perceived legitimacy), or whether instead to emphasize long-term efforts to build community trust. Second, where priority is given to the objectives of trust and cooperation, should those goals be pursued primarily by a "top down" approach (building ties to community leaders, as recommended in the RAND report[129]), or should officials emphasize a "bottom up" policy stressing the quality of interaction with individuals in ordinary street-level encounters?

In Dearborn, Michigan, which has an Arab-American community of 200,000, law enforcement has made the maintenance of good police–community relations a "major concern."[130] In other cities, relations between Muslim-American communities and local police departments are strained.[131] At the federal level, community outreach has not been ignored,[132] but policy has been dominated by measures that relax procedural restraints on investigation and detention while expanding substantive criminal offenses to reach behavior with only tenuous connections to acts of violence.[133] From the general public to many of our highest officials, it is often considered self-evident that tougher measures will pay greater dividends.[134] In Britain, in contrast, those who lead the counterterrorism effort often stress that success depends on building community trust by adhering to traditional conceptions of due process.[135] In short, no unified

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[129] *See* JONES & LIBICKI, *supra* note 124, at 27.

[130] Thacher, *supra* note 118, at 649.

[131] *See, e.g.*, Richard Winton & Teresa Watanabe, *LAPD's Muslim Mapping Plan Killed*, L.A. TIMES, Nov, 15, 2007, at A1 (describing controversy over a police department effort to address "radicalization" with aid of a "community mapping" plan to identify geographic locations of Muslim populations).

[132] *See* Andrea Elliott, *White House Quietly Courts Muslims in the U.S.*, N.Y. TIMES, Apr. 18, 2010, at A1.

[133] Prominent examples include expansion of search and surveillance powers, military detention of alleged "enemy combatants," aggressive use of immigration detention and deportation, and enactment of broader definitions of prohibited "material support" for terrorism. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding the constitutionality of a prohibition on giving "material support" by acts intended to support humanitarian and political activities). *See generally* STEPHEN J. SCHULHOFER, THE ENEMY WITHIN (2002) (cataloguing post-9/11 measures that expand intelligence gathering and law enforcement powers).

[134] *See, e.g.*, Harris, Allen & VandeHei, *supra* note 31 (quoting former Vice President Dick Cheney, stating that counterterrorism is "a tough, mean, dirty, nasty business . . . . [W]e're not going to win this fight by turning the other cheek . . . . The United States needs to be not so much loved as it needs to be respected. Sometimes, that requires us to take actions that generate controversy").

[135] *See, e.g.*, Peter Clarke, The Courts and Terrorism: Transatlantic Observations, Lecture at NYU Law School 2–3 (Apr. 15, 2009) (on file with the authors) (stating, as former chief

approach to counterterrorism policing has emerged. Instead, officials commonly emphasize intrusive or coercive tactics without examining their collateral costs, or focus on generating cooperative relationships with Muslim community leaders while neglecting the character of daily interactions at the grassroots. A central concern is the need to determine which approaches yield the best results in terms of security.

The available empirical evidence offers stark warnings about the potentially counterproductive effects of harsh measures. A study of British counterterrorism policies in Northern Ireland found that of six high-visibility crackdown initiatives, only one had an observable deterrent effect.[136] Two others had no statistically significant impact, while two intrusive policies were associated with significant *increases* in violence.[137] The researchers hypothesized that erroneous arrests and the adoption of internment without trial contributed to this backlash by undermining the legitimacy of anti-terrorism efforts.[138] Similarly, studies have found that

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of counterterrorism in London's Metropolitan Police, that "[for] deeply pragmatic reasons, . . . it is absolutely essential to adhere to due process . . . . People . . . must have confidence and trust in the authorities . . . . They must believe . . . that information . . . will not be used . . . to stigmatize their communities or to justify extrajudicial action"). For an assessment suggesting mixed results from British efforts to build community trust through its "Prevent" program, see HOUSE OF COMMONS, CMTYS. & LOCAL GOVERNMENT COMMITTEE, PREVENTING VIOLENT EXTREMISM 3–4 (Mar. 30, 2010), *available at* http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomloc/65/65.pdf; Vikram Dodd, *Communities Fear Project Is Not What It Seems*, GUARDIAN (U.K.), Oct 17, 2010, *available at* http://www.guardian.co.uk/society/2009/oct/16/prevent-counter-islamic -extremism-intelligence.

Responding to such concerns (among others), the British government has proposed to roll back many powers granted since September 11, 2001; the authority to detain terrorism suspects for up to twenty-eight days prior to charge would be reduced to fourteen days. Protection of Freedoms Bill, 2011, H.C. Bill [146] cl. 57, *available at* http://www.publications.parliament.uk/pa/bills/cbill/2010-2011/0146/2011146.pdf. The proposal regarding pre-charge detention reflects concerns that the extended power is unnecessary and "has a negative impact on Muslim communities." HM GOVERNMENT, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: REVIEW FINDINGS AND RECOMMENDATIONS 7 (2011), *available at* http://www.homeoffice.gov.uk/publications/ counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary.

[136] Gary LaFree, Laura Dugan & Raven Korte, *The Impact of British Counterterrorist Strategies on Political Violence in Northern Ireland: Comparing Deterrence and Backlash Models*, 47 CRIMINOLOGY 17, 25–27, 34 (2009).

[137] *Id*. at 32–34. The sixth intervention studied by LaFree, et al. involved a shift from military methods to locally administered criminal justice procedures, treating captured terrorists as ordinary criminal suspects in an effort to delegitimate their cause. The detainees responded with a hunger strike to obtain a return to "prisoner-of-war" status. Further anti-British animosity resulted, and violence subsequently increased. *Id.* at 36. That finding underscores the point that both deterrence and backlash effects can be highly sensitive to context.

[138] *Id.* at 33–34.

perceived injustice on the part of U.S. forces in Iraq is a strong predictor of support for resistance there.[139]

Turning to counterterrorism tactics in the American domestic context, many thoughtful scholars have suggested that the heightened threat environment post-9/11 may justify wider use of ethnic profiling[140] and other enhanced police powers, such as greater ability to establish roadblocks and checkpoints.[141] Yet we have already noted the potential negative impact of such policing activities; in the context of ordinary law enforcement, zero-tolerance measures have often backfired, encouraging crime and discouraging cooperation by creating resentment in minority communities.[142] A similar problem could well defeat efforts to augment counterterrorism powers. Indeed, because terrorism is a relatively dispersed and infrequent phenomenon, posing a threat to a near-infinite range of symbolic targets and typically using operatives with no prior record of terrorist activity, accurate and timely information to separate genuine threats from background noise has enormous value. Community cooperation therefore assumes even greater than usual importance. To the extent that terrorist groups seek either to recruit or hide within co-religionist communities, cooperation can provide information at lower cost and with fewer negative side effects than coercive or intrusive forms of intelligence gathering.

That said, we cannot assume that findings from ordinary law enforcement will apply in a straightforward way to counterterrorism policing. Because terrorism is motivated by ideology rather than desire for material gain, co-religionists or members of the same ethnic community may share some ideological perspectives with those who plan acts of terror. As a result, law-abiding individuals may be reluctant to put politically radical members of their communities at risk, even when they themselves oppose violence. In addition, because al Qaeda invokes religious justifications for its goals and methods, the religiosity of law-abiding Muslims could conceivably alter the importance of procedural justice for securing their cooperation. Finally, because links between procedural justice and willingness to comply or cooperate have not been found in all

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[139] *See, e.g.*, Ronald Fischer, et al., *Support for Resistance Among Iraqi Students*, 30 BASIC & APPLIED SOC. PSYCHOL. 167, 173 (2008).

[140] *See, e.g.*, Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1436–38 (2002) (approving such measures in some circumstances, though urging cautious implementation).

[141] *See, e.g.*, William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141–42 (2002).

[142] *See supra* text at notes 54, 61–62.

societies,[143] recent Muslim immigrants who have lived under repressive governments could conceivably have different notions of legitimacy or its importance for cooperation.

To test the links between legitimacy, procedural fairness, and cooperation in communities impacted by counterterrorism enforcement, we conducted extensive interviews and random polling of Muslim-American residents of New York City.[144] We found little evidence that religiosity, cultural differences, or political background play a significant role in determining willingness to cooperate. The same is true for strength of identification with the Muslim community; disagreement with American government policies on Iraq, Afghanistan, and Israel; and instrumental concerns such as a belief that the police are effective.[145] In contrast, as in the case of conventional law enforcement, we found a strong association between willingness to cooperate with anti-terrorism policing and perceptions of procedural justice.[146]

One way to test the force of these relationships is to look separately at groups that have particular views about law enforcement or terrorism. For example, people who consider the terror threat very serious presumably will be much more willing to cooperate and their willingness might not be affected so much by whether they think police actions are intrusive or procedurally irregular. Likewise, people who consider the police effective and people who are inclined to defer to authority presumably will be willing to cooperate and again their willingness might not be affected so much by whether they think police practices are fair.

To look at those possibilities, we divided our sample into people who think that the terror threat is serious (or not), people who think the police are effective (or not), and likewise for the other pairs of attitudes. Table 1 below, drawn from the New York City data, shows these relationships.

Part of what Table 1 shows is not surprising. Among people who think the terror threat is not serious, willingness to cooperate is reduced substantially by perceptions that the police use intrusive tactics, target minorities, or act unfairly. We see roughly the same effect for the negative alternative in the case of each of the other prior attitudes as well. In other words, among people who can be considered law enforcement skeptics

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[143] *See, e.g.*, Joel Brockner et al., *Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 300, 314 (2001) (finding that, in China, people do not react as strongly as in other cultures to procedural unfairness).

[144] *See* Tyler, Schulhofer & Huq, *supra* note 58.

[145] *Id.*

[146] *Id.*

Table 1

Relationships Within Prior-Attitude Subgroups:
Police Behavior and Perceived Procedural Justice as
Correlated to Muslim-American Willingness to Cooperate

Prior Attitudes	Public/Clandestine Police Action	Police Targeting of Minorities	Procedural Justice of the Police
Terror Is Serious			
No	-.26*	-.21*	.37***
Yes	-.08	-.23*	.40***
Police Are Effective			
No	-.18*	-.12	.41***
Yes	-.02	-.11	.26**
Police Help You Feel Safe			
No	-.19*	-.13*	.36***
Yes	-.07	-.10	.49***
Preference for Law Enforcement Authority			
No	-.20*	-.20*	.41***
Yes	-.09	-.10	.29***
Respect for Hierarchy			
Low	-.27***	-.20*	.40***
High	-.13	-.11	.33***

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

(Entries are subgroup correlations with a combined
measure of legitimacy and cooperation.)

(people who prefer liberty to order, reject hierarchies, and think the police are not effective), cooperation drops substantially when police are perceived as intrusive or unfair. These are largely the results we would expect, but they underscore the importance of fairness for cooperation among a substantial segment of the population.

When we look at the lower row of each pair, those who think terrorism *is* a serious problem and generally favor law enforcement authority, we see in column 1 that cooperation *is not* affected by the use of intrusive tactics. These people seem more focused on instrumental payoffs than on legitimacy. They are generally willing to accept intrusive tactics when they accept hierarchical authority and consider the police effective.

But two relationships are less predictable. First, even when these respondents consider the terror threat very serious, cooperation drops substantially if they believe the police are targeting people in their community. And second, in the lower row of *all* of these pairs (i.e., among those who broadly support law enforcement), column 3 shows that cooperation drops substantially, with very high statistical significance, when police use unfair procedures, such as stopping people without explanation, denying them any opportunity to be heard, and failing to treat them with courtesy. In other words, for all of these subgroups, regardless of prior attitudes about the police, civil liberties, and so on, perceptions of procedural justice have a major impact on willingness to cooperate.

We can illustrate the concrete impact of these relationships by separating the respondents into quartiles based on the extent to which they saw the police as respecting (or not respecting) the requirements of procedural justice. We can then focus on willingness to cooperate within each group. By highlighting the differences between the groups, Tables 2 and 3 illustrate the consequences of failing to nurture perceptions of procedural fairness.

These tables show in more tangible terms the impact of procedural justice on cooperation. Table 2 focuses on perceived fairness in establishing counterterrorism policies. When people believe that overall policies are established fairly, willingness to work with the police rises by 11%, and even more strikingly, willingness to report suspicious activity rises by 61%. That 61% figure is an increase of enormous significance for successful intelligence gathering: Fairness in establishing policies makes it 61% more likely that people in this community will be willing to report suspicious behavior.

Table 3 shifts the focus to perceived fairness in enforcement. When people believe that policies are fairly implemented, willingness to report suspicious activity increases by 41% and willingness to work with the police increases by 62%.

Table 2

Willingness to Cooperate Among Muslim-Americans

Belief That Policy is Created Fairly		Percent of Each Quartile Willing to:	
	n	*Work With Police*	*Alert Police*
Very Low	71	82%	49%
Medium Low	69	78%	66%
Medium High	83	88%	67%
Very High	68	91%	79%
Difference		+9 pts (+ 11%)	+30 pts (+61%)

(Respondents grouped by perceptions of fairness in policy creation.)

Table 3

Willingness to Cooperate Among Muslim-Americans

Belief That Policy is Enforced Fairly		Percent of Each Quartile Willing to:	
	n	*Work With Police*	*Alert Police*
Very Low	71	39%	41%
Medium Low	69	43%	43%
Medium High	83	51%	57%
Very High	68	63%	58%
Difference		+24 pts (+ 62%)	+17 pts (+41%)

(Respondents grouped by perceptions of fairness in enforcement.)

One somewhat unexpected finding is that willingness to *work with* police in anti-terror initiatives is only modestly affected by fairness in the formation of policy but is extremely sensitive to fairness in enforcement. In contrast, willingness to *alert the police* decreases in response to both sorts of unfairness, but in the reverse order: it is much more sensitive to whether overall policies are established fairly. We suspect that because working with the police is local and personal, willingness to do so is more strongly driven by the trustworthiness of officials nearby than by large questions of

policy, such as the decision whether to maintain a detention camp at Guantánamo Bay. Conversely, willingness to report suspicious activity seems more likely to be affected by respondents' perceptions of overall systemic fairness: how such information will be processed by higher officials and how fairly suspects will be treated once they come to law enforcement attention. If so, it makes sense that willingness to report would be very sensitive to perceived fairness of the system as a whole but less affected by respondents' trust in officials with whom they and their neighbors interact in the neighborhood.

Dynamics of this sort can of course be explored in considerably greater detail. But the existing research is already ample to establish our two central points. First, apart from any civil liberties considerations, tough measures that skirt traditional conceptions of due process take a substantial toll on law enforcement effectiveness. And second, procedural justice concerns accordingly should be allotted a central place in all efforts to design and implement counterterrorism policy. As in other contexts, sensitivity to procedural justice serves to promote rather than impair the security effort.

V. CONCLUSION

This is an ideal moment to reconsider the principles that guide American policing. If we can adopt policing styles that communicate respect and nurture public trust, we can address the central concerns of both minority and majority populations.

Research consistently shows that whites and minorities want the same thing from the police: fair treatment. Minorities are, however, more apt to say that historically they have been treated unfairly and that they do not receive fair treatment even now. This perceived unfairness leads to lower legitimacy ratings, less deference to the law among minorities, and lower levels of cooperation with the police.

Addressing these concerns involves reframing the way we think about the goals of policing, in the context of both counterterrorism and ordinary law enforcement. At all levels, government agencies must pay attention to public judgments about how they exercise their authority because such judgments shape the behaviors that are of primary importance to the police, in particular the willingness of individuals to obey the law and their willingness to cooperate in efforts to enforce the law against others.