Police Discretion in the
21st Century Surveillance State

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I. INTRODUCTION

This analysis discusses changes in policing that could help build popular legitimacy, i.e. public trust and confidence in the police. The low level of public trust, especially in minority communities, has been the focus of recent national attention in the wake of a series of deaths during public contact with the police. This analysis will focus on three potential areas of change: the style of policing, the scope of policing, and the organization of policing. The style of policing refers to how the police deal with the public; the scope of policing focuses on who the police deal with in the streets and in cars; and the organization of policing is concerned with the internal dynamics of police departments.

The premise underlying these arguments is that we are at a pivotal moment in policing—a time when police leaders, federal law enforcement officials, and the general public are focused on legitimacy as an important issue in policing. I accept the premise of the report, *President's Task Force on 21st Century Policing*, that building public trust and confidence is a desirable goal, and focus on finding ways to achieve it.[1]

What is legitimacy? The focus of this paper is upon popular legitimacy; the public view that police officers are entitled to direct people's actions because they exercise authority on behalf of the community. It is appropriate for them to make decisions about how to resolve conflicts and enforce rules, and people have an obligation to defer to them and comply with their directives. From this perspective,

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legitimacy involves people's evaluations and judgments about the police. In studies of the public, legitimacy is typically measured using one or more of three interrelated public evaluations: having trust and confidence in the police; feeling obligated to accept and follow police directives; and believing that the police and the public share values concerning the boundaries of appropriate public behavior within the community.

However, my concern is with the types of changes in policing that can enshrine legitimacy within the overall framework through which policing is understood in the twenty-first century. My own role is as an empirical scientist, so I will focus on changes that are supported by research findings as part of a broader effort to promote evidence-based law and legal policy.[2] I will particularly emphasize the findings of my own research, since a broader overview of findings in the field is already available.[3] In addition to talking about immediate policy recommendations for changing policing today, I use the current discussion about policing to highlight how recent discussions about proactive policing highlight a more general move in the United States toward a surveillance society in which the behavior of citizens is widely scrutinized and examined by law enforcement officials.

In earlier eras, law enforcement authorities viewed their primary responsibility as involving investigating already committed crimes and prosecuting people apprehended and viewed as the likely involved criminals. This model of policing is nicely captured in the popular homicide bureau slogan "our day begins when your day ends." Similarly, most crime dramas begin with at least one body in their first five minutes, followed by efforts to solve the crime by arresting and convicting the perpetrators. In contrast to this traditional and fictionalized world of criminal justice, the police in America have pioneered the idea of proactive policing to prevent crimes. This includes general preventive interventions directed toward those the police suspect of being current or likely future lawbreakers, as well as focusing particular attention on people or places suspected of being likely sources of criminal activity. I suggest that these policing efforts to control violent crime have gradually expanded to a general "surveillance state" in which government authorities, motivated by the laudable mission of preventing violent crimes and terrorist acts, have increasingly disregarded the idea that people are entitled to be free of government interference in their activities absent specific evidence that

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    [2] *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

    [3] *See generally* Tom R. Tyler et al., *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement,* 16 PSYCHOL. SCI. PUB. INT. 75 (2015).

they are or about to be engaged in criminal activity (i.e. "reasonable" grounds for suspicion).

Such proactive approaches are increasingly married with predictive technologies. These technologies allow criminal justice authorities to predict the future behavior of people based upon criterion ranging from their past actions to their demographic characteristics.[4] The consequences of this development has been the minimization of the centrality of another important legal concept: that people are presumed innocent until they have and have been shown in an appropriate legal forum to have committed illegal acts.

My general argument is that, while the more extreme examples of proactive policing such as the policy of stopping large groups of the general population for questioning and searches based upon thin or even nonexistent legal pretexts may be in retreat, the more broadly conceived surveillance state is flourishing. This flourishing raises questions about the ability of traditional legal concepts to effectively restrain modern criminal justice systems to maintain the balance of state interests and individual rights originally envisioned in our Constitution.

A.   Crime Rates, Police Professionalism, and Popular Legitimacy

It is striking that improvements in police professionalism and declines in crime rates have not raised the level of police legitimacy within American communities.[5] As a consequence, there is a need to a focus on better understanding how to create and sustain legitimacy. The *President's Task Force on 21st Policing* refers to police legitimacy as the "First Pillar" of effective policing.[6] This legitimacy frame, once initially articulated, shapes discussion of all the other Pillars of policing outlined in the report.[7]

In contrast to this recent focus on legitimacy, prior discussions of policing have been concerned with two issues: crime control and police professionalism. Crime control is a core issue in policing. During the 1970s and 1980s, when violent drug related crime was widespread, it became a central preoccupation of police leaders.[8] This was so much the

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[4]   *See* Jack Smith IV, *'Minority Report' is Real—And it's Really Reporting Minorities*, MIC.COM (NOV. 9, 2015), https://mic.com/articles/127739/minority-reports-predictive-policing-technology-is-really-reporting-minorities#.mec1pnvjy [https://perma.cc/A8QD-7CL2].

[5]   *See* Tyler et al., *supra* note 3, at 96.

[6]   PRESIDENT'S TASK FORCE, *supra* note 1, at 9.

[7]   *Id.* (stating that trust and legitimacy are foundational to the whole inquiry of the taskforce).

[8]   *See* John N. Mitchell, Attorney General of the United States, *The War on Crime: The End of the Beginning, Address Before the Attorney Generals Conference on Crime Reduction*, ATTORNEY GENERAL'S CONFERENCE ON CRIME REDUCTION (Sept. 9, 1971), https://www.justice.gov/sites/

case that many policing policies have been evaluated solely in terms of their ability to deter crime without any consideration of whether they have a broader impact on the community. For many departments, crime reduction has become an end in itself in terms of justifying police actions. At the same time, issues of corruption and unprofessional conduct have been important concerns in the move toward professionalization in policing.[9] These preoccupations have been productive because there is evidence that the police have made substantial progress in recent decades on both of these fronts.[10]

The reductions in crime and increases in police professionalism stand in contrast to unchanging levels of popular legitimacy. In 1993, fifty-two percent of adult Americans expressed "a great deal" or "quite a lot" of confidence in the police in their community and in 2014 the percentage was fifty-three percent.[11] Further, there has been a large race-based gap in trust, and that gap continues to this day. In 2014, sixty percent of White Americans expressed confidence in their local police, while forty percent of African Americans expressed such confidence (in 1993 the numbers were forty-seven percent and thirty-three percent).[12] This racial gap has been an important factor in disputes about issues such as racial profiling.[13] It has recently been starkly revealed in different reactions to police shootings of civilians among African Americans and whites. Minority group members are less likely to trust the police to explain events honestly, to investigate wrongdoing transparently and impartially, or to be motivated to help people in their communities.[14]

While there has been considerable public attention to issues of public trust and confidence in the police in the last year,[15] the

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default/files/ag/legacy/2011/08/23/09-09-1971.pdf [https://perma.cc/AJ9G-VJFH].

[9] *See* SAM WALKER, WHAT A GOOD POLICE DEPARTMENT LOOKS LIKE: PROFESSIONAL, ACCOUNTABLE, TRANSPARENT, SELF-MONITORING 2 (2014) (self-published guide) (on file with *The University of Chicago Legal Forum*).

[10] COMMITTEE TO REVIEW RESEARCH ON POLICE POLICY AND PRACTICES, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 1–11 (Wesley Skogan & Kathleen Frydl eds., 2004).

[11] Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP: POLITICS (June 19, 2015), http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx [https://perma.cc/994R-VGAK].

[12] Justin McCarthy, *Nonwhites Less Likely to Feel Police Protect and Serve Them*, GALLUP: POLITICS (November 17, 2014), http://www.gallup.com/poll/179468/nonwhites-less-likely-feel-police-protect-serve.aspx [https://perma.cc/GT7H-9YGU].

[13] Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 276–77 (2004).

[14] Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 236–37 (2015) (stating that minorities fill out the most complaints against police and only nineteen percent of African Americans trust police to investigate police-involved incidents).

[15] Cheryl K. Chumley, *Public Trust in Police Low, Criticism of Militarization Rises: Poll*, WASH.   TIMES   (Aug.   26,   2014),   http://www.washingtontimes.com/news/

importance of legitimacy is not a new idea. The value of legitimacy emerged from research conducted over the last several decades.[16] Studies have shown that legitimacy is related to deference to decisions made by legal authorities.[17] Many of the police-citizen encounters that have led to high visibility police shootings began in resistance and anger toward the police in everyday encounters.[18] If people in the community have greater trust in the police, these conflicts are less likely to begin and escalate into resistance and physical violence.[19] However justified the police use of force might be in a given situation, it is better if the encounter never becomes one in which questions of force arise.

Legitimacy is also linked to the broad acceptance of police authority.[20] The goal of having a police force is for people to refer issues involving conflict with others or rule enforcement to government authorities rather than engaging in interpersonal conflict with others in the community. To most effectively maintain order, the police need serious grievances and conflicts to be brought to their attention rather than being handled privately by people in the community. While it may be better for everyday conflicts with coworkers or neighbors to be handled informally, conflicts that are serious enough to be long-term in scope or to lead to spirals of private retaliatory violence benefit from police intervention. For the police to do this effectively, people need to feel that they can bring problems to the attention of the police.

2014/aug/26/public-trust-police-low-poll-finds/ [https://perma.cc/65RB-N2B7]; Emily Brown, *Timeline: Michael Brown Shooting in Ferguson, Mo.*, USA TODAY (Aug. 10, 2015), http://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827/ [https://perma.cc/KE5Z-ASBV].

[16] *See generally* Tyler et al., *supra* note 3, for a review.

[17] TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 58–75 (Karen S. Cook, Russell Hardin, Margaret Levi eds., 2002); Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 753 (2014).

[18] *See* POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 2–4 (Apr. 2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf [https://perma.cc/4SLF-MV4K].

[19] Tyler et al., *supra* note 3, at 84 (stating that police legitimacy decreases the willingness of the public to engage in riots or rebellions); Kurtis Alexander, *Police Often Provoke Protest Violence, UC Researchers Find*, SFGATE (Aug. 22, 2014), https://perma.cc/HR8T-WT68.

[20] JONATHAN JACKSON ET AL., JUST AUTHORITY? TRUST IN THE POLICE IN ENGLAND AND WALES 213–14 (2013); Jonathan Jackson et al., *Monopolizing Force? Police Legitimacy and Public Attitudes Toward the Acceptability of Violence*, 19 PSYCHOL., PUB. POL'Y, AND L. 479, 479 (2013); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513, 529 (2003); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL., PUB. POL'Y AND L. 78, 89 (2014).

Legitimacy is further linked to everyday compliance with the law[21] and to cooperation with the police.[22] It has been increasingly recognized that the relationship between the police and the community influences the general climate of engagement with neighbors, jobs, and government.[23] These various studies demonstrate that the police have a lot to gain from building popular legitimacy. Many of the problems that the police identify as making policing more difficult——such as widespread disregard of police authority and a broad unwillingness to work with the police, are linked to a lack of trust and confidence in the police——so building legitimacy is a desirable strategy for addressing those problems.

Now is the time for addressing the problem of police legitimacy. There are currently low rates of violent crime in major cities, and crime rates have been declining for the last several decades.[24] Despite some comments by political leaders, evidence continues to suggest that crime rates are low, and suggestions of crime increases are not supported statistically.[25] Further, irrespective of contemporary fluctuations in crime rates, it is impossible to compare current crime issues to the 1980–90s, since current rates are so much lower.[26]

In addition, legitimacy is an issue because recent public events have highlighted the question of trust for both local police leaders and in federal authorities. As an example, recently a group of American police chiefs came together to advocate for change in policing.[27] Their statement outlining needed reforms in criminal justice echoes the themes of the *President's Task Force on 21st Century Policing*, which

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[21] Jonathan Jackson et al., *Why do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051, 1062 (2012); Sunshine & Tyler, *supra* note 20, at 529; TYLER, *supra* note 2, at 170; Tom R. Tyler et al., *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact*, 12 J. EMPIRICAL LEGAL STUD. 602, 613 (2015).

[22] 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, 262 (2008); Tyler & Jackson, *supra* note 20, at 89.

[23] Tom R. Tyler, *Trust and Legitimacy: Policing in the USA and Europe*, 8 EUR. J. CRIMINOLOGY 254, 262 (2011); Tyler & Jackson, *supra* note 20, at 89.

[24] *See* Jennifer L. Truman & Lynn Langton, *Criminal Victimization, 2014*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Aug. 2015), http://www.bjs.gov/content/pub/pdf/cv14.pdf [https://perma.cc/34XN-SMKE].

[25] Matthew Friedman et al., *Crime in 2015: A Preliminary Analysis*, 2015 BRENNAN CTR. FOR JUST. 12.

[26] Ian Simpson, *FBI: Violent Crime Drops, Reaches 1970s Level*, CHI. TRIB. (Nov. 10, 2014 2:25   PM),   http://www.chicagotribune.com/news/nationworld/chi-violent-crime-1970s-level-20141110-story.html [https://perma.cc/8NPX-PBCS].

[27] *130 Top Police Chiefs and Prosecutors Urge End to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 21, 2015), https://www.brennancenter.org/press-release/130-top-police-chiefs-and-prosecutors-urge-end-mass-incarceration   [https://perma.cc/T9P8-PH XU].

argued that "[t]rust between law enforcement agencies and the people . . . is essential[.]"[28]

II. STYLE OF POLICING

Discussions of policing emphasize the broad discretion that police officers have to manage their interactions with the public.[29] While past discussions focus on police discretion concerning whether to cite or arrest people, officers have equally broad discretion concerning how they treat the members of the public with whom they deal, i.e. whether they are respectful, whether they explain their decisions, etc. While it is important for the police to be lawful and to be effective, this article presents reasons why it is also important that they treat members of the community in ways that those people regard as being fair.

There is no constitutional right to be treated with courtesy, respect or dignity by government officials, just as people are not entitled to receive particular outcomes. Constitutional models focus on the appropriate level of evidence that justifies each stage of contact with the police, i.e. stops, frisks, arrests, and the use of various levels of force all the way up to deadly force.[30] The police frame their actions in terms of the Constitution and ask if they are entitled to legally engage in particular actions. They frequently do so instead of asking if their actions promote desirable goals, such as trust in the community.[31] Actions can be legal but still undesirable when viewed against the goal of building community trust.

A. Evaluating the police

During the 1970s the police developed the view, now widely shared both by political leaders and by many in the public, that they should be held accountable not just for solving past crimes but also for preventing future crimes.[32] This belief is influenced by law enforcement's expectation that people view the police instrumentally and thus people will respond to favorable outcomes, such as reductions in the crime

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[28] PRESIDENT'S TASK FORCE, *supra* note 1, at 1.

[29] *See, e.g.*, Brett G. Stoudt, Michelle Fine & Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331, 1334 (2011).

[30] *See* Tyler et al., *supra* note 17, at 752–55.

[31] *See, e.g.*, Amy Lavalley, *Porter Officials: County Complies With DUI Warrants*, CHI. TRIB. (June 22, 2016 4:41 PM), http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-supreme-blood-warrant-st-0625-20160624-story.html [https://perma.cc/8G2G-BNGL] (reporting that county police officials continued to frame their breathalyzer tests as constitutional after recent Supreme Court ruling).

[32] Mitchell, *supra* note 8, at 3, 10–11; Tyler et al., *supra* note 3, at 77.

rate.[33] In particular, the police generally believe that their evaluations by the public are linked largely or even completely to their ability to deliver services or control the nature and frequency of crime.[34]

A consequence of this focus on crime and crime control is that the police have developed strategies designed to best combat crime. To do this, they adopted a managerial style in which they concentrate resources within internal police hierarchies which are organized in a command and control, or quasi-military, framework and which determine policies and practices for policing within communities.[35] Those policies and practices have then been deployed into communities through displays of threat, the use of force, and other sanctions. The core characteristic of policing thinking is the assumption that the professional knowledge of the police makes police officers best able to decide how and when to deploy police resources so as to most effectively control crime. To prevent crime, the police have moved proactively to search widely for guns and drugs, and to generally communicate fear of rule breaking through the salience of risk of identification, citation/arrest, and potential punishment.

A large body of social science research has accumulated which shows that irrespective of whether this model of management is effective in reducing crime, it is misaligned with the basis of police legitimacy.[36] When people evaluate the police either in personal encounters with officers or when considering the general policies and practices of the police in their neighborhood, their central focus is not on the crime rate or the lawfulness of the police,[37] but on whether or not the police exercise their authority in just ways. The public focuses on this issue both when policies are being developed[38] and when they are being implemented.[39] This is the issue of procedural justice.

Studies further demonstrate that judgments of procedural justice include assessments of the fairness of decision-making and the fairness

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[33] Joel B. Plant & Michael S. Scott, *Effective Policing and Crime Prevention: A Problem-Oriented Guide for Mayors, City Managers, and County Executives*, 2009 U.S. DEP'T JUST. OFF. COMMUNITY ORIENTED POLICING SERVICES 18–19.

[34] Malcolm K. Sparrow, *Measuring Performance in a Modern Police Organization*, 2015 U.S. DEP'T OF JUST., NAT'L INST. OF JUST., NEW PERSP. IN POLICING BULL., 5.

[35] David Alan Sklansky, *The Persistent Pull of Police Professionalism*, 2011 U.S. DEP'T OF JUST., NAT'L INST. OF JUST., NEW PERSP. IN POLICING BULL., 3–4.

[36] Tyler, *supra* note 23, at 170; Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 318 (2009); *see generally* TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS (2011); Tyler et al., *supra* note 3, at 77.

[37] Tracey L. Meares et al., *Lawful or Fair? How Cops and Laypeople View Good Policing*, J. CRIM. L. & CRIMINOLOGY (forthcoming 2016).

[38] Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 L. & SOC'Y REV. 365, 386 (2010).

[39] Tyler et al., *supra* note 17, at 775.

of the treatment that people receive from the police.[40] Decision-making involves allowing opportunities for participation and voice, and providing evidence that decision-making is neutral, impartial, and unbiased by using transparent procedures to make decisions. Quality of treatment focuses on issues of courtesy and respect in interpersonal treatment and evidence of trustworthiness through signs of benevolent and caring motivations. Recognition and acknowledgement of people's needs and concerns is a primary mechanism for communicating trustworthy motives.[41]

While all of these aspects of policing matter, the degree to which people believe they experience respect frequently emerges as the central issue when people deal with the police. Studies of the police, for example, have found that citizen complaints are dominated by concerns about disrespect, discourtesy, and demeaning or harassing treatment by police officers.[42]

Studies not only point to the central role that procedural justice in decision-making and treatment plays in shaping judgments of police legitimacy, but they also indicate that the degree to which people feel that they receive fairness from the police shapes whether people respond to the police deferentially, as opposed to with hostility and defiance.[43] And, when people generalize from a personal experience to overall legitimacy judgments, procedural justice is the key issue they consider.[44] On this general level, legitimacy judgments shape important public behaviors, including compliance and cooperation with the police.[45]

Given the centrality of civilian concerns about fairness—and especially about fair treatment—the widespread reports about harassment, disrespect, and demeaning and prejudiced behavior on the part of the police[46] suggest that officers do not understand the impact of their behavior on trust and confidence in the police. It suggests that the police do not view trust and confidence as an issue that they should be

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[40]   *See id.*; Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY AND SOC. PSYCHOL. BULL. 747, 756 (2003).

[41]   Tyler, *supra* note 23, at 255–56.

[42]   Katz, *supra* note 14, at 236 (stating that in 2013, fifty-three percent of all police complaints were for physical force misconduct).

[43]   Tyler & Fagan, *supra* note 22, at 263; Tyler & Huo, *supra* note 17, at 59–75.

[44]   TYLER & HUO, *supra* note 17, at 90–91; Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 L. & SOC'Y REV. 553, 572 (2007).

[45]   *See generally* Tyler et al., *supra* note 17.

[46]   Jennifer Fratello et al., *Coming of Age with Stop and Frisk: Experiences, Self-Perceptions, and Public Safety Implications*, 2013 VERA INST. OF JUST. 89–90; Stoudt et al., *supra* note 29, at 1361; Tyler et al., *supra* note 17, at 775.

concerned about when they do their jobs. However, research suggests that the impact of such experiences upon members of the public is significant. Jeffery Fagan, Amanda Geller, and I demonstrate an impact of police unfairness upon young men in New York City.[47] We find that unfairness lowers legitimacy, promotes criminal behavior, and lowers the willingness to cooperate with the police.[48] Amanda Geller, Jeffery Fagan, Bruce G. Link, and I extend these findings and demonstrate that unfair treatment is associated with the development of mental health symptoms such as post-traumatic stress disorder (PTSD).[49]

Why does unfairness undermine legitimacy? Unfairness undermines the relational bonds between people and authorities.[50] Studies demonstrate this influence of shared social bonds by directly measuring the social bond the public feels with the police and showing that it mediates the influence of judgments about procedural justice upon perceptions of police legitimacy.[51] They consider whether people trust police motives, whether they are proud of the police (e.g. think they are honest, etc.), and whether they believe that the police respect them, their values, and their lifestyle. These studies find that when people feel that the police communicate suspicion of wrongdoing and treat them like "criminals," this undermines their connection with the police. Proactive police stops, particularly of those who are not involved in criminal activity, communicate mistrust and suspicion on the part of the police; harassment and disrespect directly express marginality and suspect character.[52]

It should be further noted that the *repeated* stopping of people who are not engaged in illegal behavior, however fairly the police treat those people, communicates the same sense of marginality and suspect character. For example, studies of police interactions with young men find that the number of stops is itself a predictor of assessments of legality and procedural justice, with more frequently stopped civilians rating their stops as less legal and more unfair.[53] In other words, after repeated experience, people evaluate their stops not in their own terms but as part of a larger policy and practice that is itself unfair.[54]

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[47]   *See generally* Tyler et al., *supra* note 17.

[48]   *Id.* at 775.

[49]   Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2324 (2014).

[50]   Tom R. Tyler & E. Allen Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115, 133–37 (1992).

[51]   Tyler et al., *supra* note 21, at 602.

[52]   *Id.* at 631.

[53]   *See* Tyler et al., *supra* note 17, at 775–76.

[54]   CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP

These results suggest that one important source of improvement for the police can come through reframing their goals to include evaluating their actions in terms of their impact on popular legitimacy. For example, departments can interview people who have had experiences with particular officers to determine their views about the police and/or through interviews with random samples of people in the community with the same goal. When formulating and implementing policies, the police need to focus on how their actions are understood by civilians. This approach has been used in police departments such as the Chicago Police Department, which developed a model of RespectStat to parallel CompStat[55], which has focused primarily on crime rates.[56] The idea is to track changes in police legitimacy, reward officers who build legitimacy, and provide an alternative to an exclusive focus on crime rates.

B. Policing as Social Control

This argument is important, even if the goals of the police are broader than crime control. Bradford and Loader suggest that the police also serve the function of maintaining order in an unequal and biased social and economic system by intimidating and dominating marginal populations.[57] This would explain the widespread reports of harassment and similar approaches designed to generate fear of the police. It is difficult to understand the pattern of disrespect and humiliation reported by minority group members at the hands of the police through a rational theory of crime control. For example, the police almost never find guns or drugs when they search people, so broad searching is difficult to regard as an effective tool of crime suppression.[58]

To the extent that the police are, in reality, agents of social control for an unjust society, this places limits on the degree to which the arguments made in this article are a blueprint for change. To achieve popular legitimacy, the police need to act fairly. While some of this can

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134–51 (John M. Conley & Lynn Mather eds., 2014).

[55] Compstat is an accountability program initially developed by the New York Police Department (NYPD).

[56] Garry F. McCarthy & Dennis P. Rosenbaum, *From CompStat to RespectStat: Accountability for Respectful Policing*, POLICE CHIEF at 76–78 (Aug. 2015).

[57] Ben Bradford & Ian Loader, *Police, Crime and Order: The Case of Stop and Search*, *in* THE SAGE HANDBOOK OF GLOBAL POLICING (Ben Bradford, Beatrice Jauregui, Ian Loader & Jonny Steinberg eds., forthcoming 2016) (manuscript at 27).

[58] *See, e.g., Stop and Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, http://www.nyclu.org/content/stop-and-frisk-data [https://perma.cc/PKC6-3WVG] (noting that "[n]early nine out of 10 stopped-and-frisked New Yorkers have been completely innocent, according to the NYPD's own reports").

involve more superficial issues such as politeness and courtesy, it also involves allowing people to actively participate in making decisions about what the policies and practices of the police will be. Consequently, it is hard to build a system of legitimate policing on top of an unjust social system. Even allowing for the possibility of false consciousness with people accepting fair process in place of objective fairness, an attractive feature of a procedural justice model is the focus on what the public thinks about how the police behave, not the manner in which the police evaluate their own conduct or define their own preferred priorities. One argument for fear and intimidation is that it is the only strategy available to police officers who are acting in the role of enforcing oppression. A key question for the future is whether the police can, in fact, utilize procedural justice-based strategies, and recognize community participation and acceptance as a necessary part of and "cost" of pursing such a strategy.

The police of Ferguson, Missouri provide a recent and salient example of this problem. Investigation of that police force reveals that it depends heavily upon the model of indenturing the population through warrants and fines.[59] If the population of that community had a real voice in determining the policies and practices of their local police department, they likely would not assent to a model of policing through which their community financed its budget using a system of widespread pretextual arrests, whose goal was to generate revenue through fines and the long-term use of failures to pay fines to generate further financial resources. Hence, this is an example of a system that is likely to only be possible through a model of coercion and intimidation. The more general question is how widespread conditions of this type are throughout the United States. Of course, this line of argument assumes that people are fully aware of how the system operates and would not voluntarily assent to the current system. In reality, many people may not be aware of the system-level dynamics underlying policing and the operation of the courts in their community. Further, studies make clear that people are motivated to justify the status quo, even when it disadvantages them.[60]

To the extent that widespread searches are designed to be a tool of crime control because they communicate the risk of being caught when

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[59] Michael Martinez et al., *Policing for Profit: How Ferguson's Fines Violated Rights of African-Americans*, CNN (Mar. 6, 2015), http://www.cnn.com/2015/03/06/us/ferguson-missouri-racism-tickets-fines/ [https://perma.cc/3SV4-PLJD].

[60] *See generally* John T. Jost, *Resistance to Change: A Social Psychological Perspective*, 82 SOC. RES.: AN INT'L Q., 607 (2015); *see generally* John J. Jost et al., *"The World Isn't Fair": A System Justification Perspective on Social Stratification and Inequality in* APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY: VOL. 2. GROUP PROCESSES (J. F. Dovidio & J.A. Simpson eds., 2015).

engaged in wrongdoing, they are not effective since research suggests that stops do not lead to higher estimates of the risk of being caught when involved in ongoing criminal activity.[61] In addition, stops do not lower the rate of criminal participation.[62] These actions are not achieving crime control objectives because they are, at best, weakly raising the perceived risk of criminal activity. If these actions are a general intimidation strategy, it is not clear what metric would reflect the success of that strategy if it is not increasing risk estimates or lowering the rate of crime.

The first important point is that the police need to change their style of policing if they are to build legitimacy. They need to focus on building a consensual relationship with people in the communities they police. Consequently, they need to think of each experience that people have with the police as a learning moment during which people gain information about the law and the nature of legal authority. The people in the community might experience trust and reassurance or they might experience fear. The police need to focus on the image of the police as public guardians to be trusted and supported, and the police need to treat the public in ways that support that model of policing.

Emphasizing legitimacy-based policing facilitates a broad vision of the future role of the police. Local governments are generally retrenching with diminished budgets and declining services.[63] But the future of American communities depends upon social cohesion and economic development. The police can serve a crucial role in this effort at economic and social development, if the police project reassurance and not fear. As will be noted below, the type of reassurance that is especially related to trust is demonstrating concern for community priorities and communicating that when people deal with the police they will receive fair and respectful treatment. This reassurance promotes social and economic development.[64] People are more willing to work in the community, shop, take in entertainment, or otherwise do the types of things that in the long run promote community well-being and lead to the availability of jobs. If we have a police force, that force can develop a style of policing that is not directed only at controlling crime. It can focus more directly upon policing strategies that lead people to feel reassurance, because they believe they will be treated fairly and helped by the police when they call upon them for aid or

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[61]   Tyler et al., *supra* note 21, at 628–29.

[62]   Tyler et al., *supra* note 17, at 774.

[63]   Thomas P. DiNapoli, *New Fiscal Realities Challenge Local Governments*, OFF. OF THE N.Y. STATE COMPTROLLER, DIV. OF LOCAL GOV'T AND SCH. ACCOUNTABILITY 5 (Aug. 2012).

[64]   Tyler & Jackson, *supra* note 20, at 80, 89.

when they are stopped by the police in their cars or on the street and consequently create the conditions for economic development.

From a policy perspective, a question to ask is how to spend money. If we have a dollar should we hire a police officer, build a prison, or do something else? The recent review of deterrence literature by Chalfin and McCrary finds strong evidence that crime declines when potential criminals have "attractive legitimate labor market opportunities."[65] Money invested in economic and social development in a community pays a higher dividend than money invested in police or prison (although both can have an impact on the rate of crime).[66] While this may be true, my impression is that the political pressure to keep or maintain levels of police is considerable. In spite of the striking declines in the crime rate, police departments are not reducing their forces.[67] It may not be realistic to expect resources to be redirected away from the police and the legal system toward community development. Hence, it is desirable for the police to become an organization that supports community development.

III. THE SCOPE OF POLICING

Recent changes in police strategies have led to two types of changes in the connection between people and the police. The police have increasingly sought to prevent crimes. To do so they have proactively intervened into the lives of ever larger groups of the population, seeking evidence of ongoing criminal activity. If the police stop and search one hundred people on the street and find one gun, they have viewed this as a success because they have gotten one gun off the street. However, they have also intervened into the lives of ninety-nine innocent people, communicating suspicion and a presumption of criminality to those people. In this section I consider how this expansion has occurred; and how it has influenced the communities involved.

A.   Mechanisms for Expansion

The second important development in policing since the 1960–70s has been a change in the perceived mission of the police among the police, the public and political leaders. An important change in

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[65]   Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature* 26–30 (May 9, 2014) (working paper) (available from University of California at Berkeley) (on file with *The University of Chicago Legal Forum*).

[66]   *Id.*

[67]   Brian A. Reaves, *Census of State and Local Law Enforcement Agencies 2008*, 2011 U.S. DEP'T. OF JUST. BUREAU OF JUST. STATISTICS 3 (explaining the increase of police forces due to the increase in population).

philosophy that has expanded the scope of police contact with the public has been to move away from a reactive stance in which the police view their job as being to deal with ongoing crimes and/or to investigate already committed crimes, and instead move towards trying to prevent crime from occurring. Historically, police departments were tasked with ensuring that criminals were held to account for their actions and received punishment, thus ensuring post-event justice for victims. In response to widespread public concerns about crime, the police became increasingly involved in proactive policing. This effort to prevent future crime fundamentally changed the goals and practices of the police.[68]

1. Broken windows.[69]

The consequence of this change is that the police have been motivated to act in advance of crime. An early framework for understanding this transformation in policing is contained within the highly influential article *Broken Windows*[70] and several other similar pieces with the same theme.[71] These articles made a number of key arguments regarding crime. First, public fears about crime were driven by evidence of low level crimes, which can be called community "disorder."[72] As the authors summarize: "to judge from their behavior and their remarks to interviewers, [people] apparently assign a high value to public order, and feel relieved and reassured when the police help them maintain that order."[73] Public fear is driven by widespread minor lifestyle crimes, rather than more serious but less frequent violent crimes.[74] Thus responding to the public desire for order means addressing lifestyle crimes and community deviants (e.g. prostitutes, drunks, etc.).

Second, the broken windows model suggests that such low level disorder motivates later more serious crimes. The theory posits that signs of decline and disorder—whether piles of trash, graffiti, or beggars on the street—encourage more serious crimes in the future, since disorder and crime are usually inextricably linked in a kind of

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[68]   Sklansky, *supra* note 35.

[69]   This section relies heavily on work Jonathan Jackson, Avital Mentovich, and I published. *See* Tom R. Tyler et al., supra *note* 21, at 606–07.

[70]   *See* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, March 1982, at 29.

[71]   *See* James Q. Wilson & Barbara Boland, *The Effect of the Police on Crime*, 12 L. & SOC'Y REV. 367 (1978).

[72]   Wilson & Kelling, *supra* note 70, at 31.

[73]   *Id.*

[74]   *Id.*

developmental sequence.[75] A fundamental goal of law enforcement must be creating perceptions that the authorities care about public order and engage in efforts to control it by dealing with the petty crimes which are central to community concerns.

These arguments led to a strategy for proactive crime control, where the police targeted minor lifestyle crimes before those conditions could lead people to engage in more serious crimes. The broken windows model was supported by research conducted at that time on the gains resulting from proactive policing,[76] as well as by the results of psychological experiments.[77] The broken windows theory has shaped policing models for the last thirty years. For example, in 2014, Commissioner Bill Bratton "endorsed this model and stated it still shapes his policies for the [New York Police Department]."[78]

The broken windows model brings the police into more frequent non-voluntary contact with the public. In those contacts, the police are rule enforcers who bring the possibility of arrest or other sanctions as an implied context for their interactions with people on the street or in cars. It is not just more frequent contact that matters. When people are committing minor crimes, a further issue is whether the police use their discretion and just warn or admonish them as opposed to citing, arresting or incarcerating those individuals. The key argument of broken windows is that the police should draw these people into the formal criminal justice system rather than treating their minor crimes informally.

2. Zero tolerance policing.[79]

An early extension of the broken windows model in New York City was the idea of zero tolerance policing.[80] The police engaged in more widespread arrests for minor crimes—for example, vandalism, public intoxication, marijuana possession, public urination, or even drinking beer on one's front steps. This policy has been described by police leaders as based upon the "broken windows" theory because the people

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[75]   Wilson & Kelling, *supra* note 70, at 32–33.

[76]   Lawrence W. Sherman & Dennis P. Rogan, *Effects of Gun Seizures on Gun Violence: "Hot Spots" Patrol in Kansas City*, 12 JUST. Q. 673, 684 (1995).

[77]   Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 280–81 (2006) (explaining Zimbardo's 1969 car experiment); Kees Keizer et al., *The Spreading of Disorder*, 332 SCIENCE 1681, 1684 (2008).

[78]   Tyler et al., *supra* note 21, at 607.

[79]   This section relies heavily on work Jonathan Jackson, Avital Mentovich, and I published. *See* Tom R. Tyler et al., supra *note* 21, at 607–08.

[80]   ANDREA MCARDLE & TANYA ERZEN, ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 4, 19–24 (2001).

targeted were committing crimes that typically had been ignored by many traditional police officers or responded to with an informal warning.[81] The underlying model was that widespread arrests for such minor crimes would deter later major crimes. For most such arrests, people would spend a brief time in jail, sometimes pay a fine, and often end up with a criminal record.[82]

While based upon the premises of the broken windows theory, "zero-tolerance practices expanded beyond one of the important underlying ideas of the original broken windows model. In the original model the police were directed to focus on those individuals whose behavior was viewed by the community as outside of the widely agreed upon rules of everyday social order (i.e. outside the communities' shared normative consensus about appropriate behavior). In other words, the original model "reflected the norms of the general community," which included disapproval of "disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, and the mentally disturbed."[83]

The expansion of zero-tolerance policing increasingly led the police to draw an ever bigger segment of the people in the community into the criminal justice system for minor lifestyle crimes, rather than primarily dealing with a small group of outsiders or "marginal" people.[84] Drawing people into the system involves arrest, which is a ceremony of degradation that changes a free person into a criminal defendant, with all the attendant social meanings, physical discomforts, and civil burdens.[85] Instead of feeling that they are within the law-abiding community and condemning some smaller groups of socially marginal "deviants," a larger group of residents found themselves being excluded from the category of "decent people" and socially marginalized by the police.[86] Because the original goal of the broken windows model was to show police responsiveness the targets of police action were a small group of people that most others in the community would view as acting inappropriately. However, the goal was to build support from the larger community rather than causing people in the community to more broadly feel that the police suspect them of misconduct and are targeting them for criminal sanctioning.

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[81]   *Id.*

[82]   Issa Kohler-Hausmann, *Misdemeanor Justice: Control without Conviction*, 119 AM. J. SOC. 351, 386 (2013).

[83]   *Id.*

[84]   Plant & Scott, *supra* note 33, at 35.

[85]   Kohler-Hausmann, *supra* note 82, at 374.

[86]   *Id.* at 388; Charis E. Kubrin et al., *Proactive Policing and Robbery Rates Across U.S. Cities*, 48 CRIMINOLOGY 57 (2010).

3. Stop, question, and frisk.

Most recently, the police in some major cities have dropped any pretext that the people they stop are engaged in illegal behavior; the New York Police Department (NYPD) practice of stopping, questioning and frisking large numbers of citizens in search of drugs and guns is an example. The police have widely screened people on the streets, particularly young people and minority group members. These stops have not been predicated upon any reasonable suspicion of ongoing criminal activity and are often referred to as pretextual stops, because the reasons given are merely pretexts for stops motivated by the goal of widespread searches of innocent people.[87] Almost everyone stopped is not involved in any criminal activity (for example carrying a gun or drugs).[88] For hundreds of thousands of residents and visitors in New York City being questioned by the police has been a common occurrence in New York City and other major cities. This has been particularly true for young men of color.[89] This policy expanded the scope of proactive policing by including people who were not committing any crimes or even engaged in overtly suspicious behavior.

The scope of these aggressive and proactive street stop programs was large. In New York, these policies have produced more than 4.4 million involuntary contacts between the police and members of the public between 2004 and 2012,[90] most with the members of minority groups, almost none of whom were carrying weapons or serious drugs. Of these contacts, about one in nine resulted in an arrest or a citation, and about one in five appear to fall short of constitutional grounds of legal sufficiency.[91] This policy of widespread stops is a clear example of the police dealing with large groups of the general public from a posture that communicates suspicion and leads people to feel that the police mistrust them and think they may be engaged in criminal activity; stopping, questioning, and frisking people who are simply on the street.

As a consequence of these changes in the scope of the police stops in the community, the police have communicated to a broader group of people and in increasingly clear terms that they are individuals of suspect character and presumed criminal tendencies. Not surprisingly,

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[87]   *Stop and Frisk in Chicago*, 2015 ACLU OF CHI. 7 (Mar. 2015) http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf [https://perma.cc/2YY7-TFJB].

[88]   *Stop-and-Frisk*, NEW YORK CIVIL LIBERTIES UNION, http://www.nyclu.org/content/stop-and-frisk-data [https://perma.cc/UPN2-XPXK]; Delores Jones-Brown, *Stop, Question & Frisk Policing Practices in New York City: A Primer*, 2010 CENTER ON RACE, CRIME AND JUST. 10.

[89]   Fratello et al., *supra* note 46, at 30.

[90]   Tyler et al., *supra* note 17, at 752.

[91]   *Id.*

this has undermined trust in the police, even among those people who gave the police the benefit of the doubt when initially stopped. This change in the scope of policing has exacerbated the problems with policing style that have already been outlined.

B. Reasons for the Expansion

Why has this inexorable expansion of policing occurred? While deterrence can be effective and studies do link the level of police presence to the rate of crime, the effects of deterrence are often weak and frequently limited by the availability of surveillance capacity. Hence, when the police embark on a style of policing that relies on perceived risk, the impact of police is limited. This is particularly true when the police engage in broad—rather than focused—strategies for policing. This reflects the cascade effects of coercive strategies. These strategies reliably produce immediate compliance when officers are present, so they seem desirable. However, they are difficult to sustain, especially because they undermine other motivations for compliance, such as legitimacy.[92] Since the police feel responsible for controlling crime, they slowly move toward broader and less justified stops as a long-term consequence of managing crime through fear of sanctions. They expand the range and lower the justification needed for street stops.

The slippery slope of investigatory stops has been highlighted by several recent studies of policing. Research shows that people distinguish investigatory stops from traffic stops and react to the perceived illegality and injustice of repeated investigatory stops.[93] In contrast, members of the public believe that they can control traffic stops, because they can obey the law. Obeying the law is not a bar against investigatory stops, which people view as outside their control since being law abiding does not prevent being stopped by the police. Similarly, research on contacts in New York City found that repeated street stops undermined the likelihood that a young person would view a subsequent stop as legal and procedurally fair.[94] Hence, a practice of widespread and repeated stops undermines the good faith that many police initially enjoy, i.e. the presumption that they have good faith motives when dealing with the community.

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[92]	Tyler, *Legitimacy and Criminal Justice, supra* note 36, at 309–11.

[93]	EPP ET AL., *supra* note 54, at 93–113.

[94]	Tyler et al., *supra* note 17, at 775–76.

C.   Fruits of the Expansion

Ironically, at the same time as the police have increased the range of the people that they stop, the justification for doing so has become less tenable. Studies show that even in high crime communities, most people do not commit crimes.[95] Hot spots policing research shows that even in high crime neighborhoods, most geographical areas are not high violence areas.[96] Further, there are tactics for identifying high-risk offenders (network analysis)[97] and high-risk areas (hot spots policing).[98] This leads to an argument for focused deterrence.[99] That approach focuses upon high-risk people and high-risk places. These research findings suggest the desirability of focused deterrence.[100]

The police can identify the small set of places and people responsible for the majority of violent crime, and they can direct their attention to those places. Rather than treating all the people in a neighborhood, even in a high crime neighborhood, as potential criminals the police should seek to differentiate. This will allow them to pursue cooperative legitimacy based self-regulatory approaches toward almost everyone in any community.

A still unresolved issue is how to address the smaller group of violent offenders. Some models suggest a sanction-based approach.[101] While a directed sanction-based approach toward this small group is preferable to broad deterrence-based models, it is important not to ignore evidence that even people with a history of violent crime are still responsive to procedural justice and still act based upon legitimacy.[102]

The second important change in policing is to focus investigatory stops on a small but identifiable set of people and locations. This change in general policing is consistent with the focus on hot spots that is already occurring within some police departments. The police should

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[95]   *See generally* Andrew V. Papachristos et al., *Tragic, but not Random: The Social Contagion of Nonfatal Gunshot Injuries*, 125 SOC. SCI. & MED. 139 (2015).

[96]   *See generally* Lawrence W. Sherman & David Weisburd, *General Deterrent Effects of Police Patrol in Crime "Hot Spots": A Randomized, Controlled Trial*, 12 JUST. Q. 625 (1995).

[97]   *See generally id.*

[98]   *See generally* David Weisburd & Lorraine Green, *Policing Drug Hot Spots: The Jersey City Drug Market Analysis Experiment*, 12 JUST. Q. 711 (1995) (arguing that law enforcement is more effective reducing crime when focused on specific hot spots, instead of larger areas).

[99]   Anthony A. Braga & David L. Weisburd, *Focused Deterrence and the Prevention of Violent Gun Injuries: Practice, Theoretical Principles, and Scientific Evidence*, 36 ANN. REV. PUB. HEALTH 36, 56–58 (2015).

[100]   *Id.* at 65.

[101]   DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 207–31 (2011).

[102]   Andrew V. Papachristos, Danielle Wallace, Tracey Meares & Jeffrey Fagan, *Desistance and Legitimacy: The Impact of Offender Notification Meetings on Recidivism among High Risk Offenders*, JUST. Q., 21 Sep 2015, at 1, 27–28.

minimize investigatory contact with the general population and focus on responding to calls for service. In all stops the police should emphasize providing justifications, explaining their policies, listening to people, and being respectful and courteous. This could be described as a return to *Terry*, i.e. to a high threshold for intervening in people's lives that is related more directly to suspicion of ongoing crime. It is more like the older view that the police should generally wait until crime has occurred or is in the process of occurring to act upon suspicions.

As noted, this sounds like an appeal for a return to the *Terry v. Ohio*[103] standard for police intrusion into people's lives. That standard requires that there be specific and articulable factors suggesting that "criminal activity may be afoot."[104] However, the discussion suggests that even if these criteria are met, the police should consider avoiding arrests when people's conduct is marginally illegal. Warnings about lifestyle crimes and other ways of diverting people away from the criminal justice system are generally desirable, especially when dealing with young people. This does not mean ignoring crime. It means emphasizing informal mechanisms for admonishing wrongdoers whenever possible.

The argument is that the police should limit investigatory contact with the public and in particular should avoid making minor arrests for lifestyle crimes. This argument is the opposite of the broken windows argument, where the police target lifestyle crimes. But broken windows itself was originally conceived as focusing police efforts on a small group of community deviants. The suggestion is particularly relevant to police contacts with juveniles, which are a large proportion of police contacts with the public. If the police recognize that ninety percent of people, even in high crime communities, are unlikely to be involved in violent crime, they can try to avoid drawing that group into the criminal justice system.

The diversion argument is especially important for adolescents. Many adolescents commit minor crimes. If left alone, they mature out of crime.[105] However, if the police intervene and draw them into the criminal justice system, their likelihood of maturing out of crime

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[103]   392 U.S. 1 (1968).

[104]   *Id.* at 21.

[105]   *See* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993) (explaining that most adolescent criminal behavior can be grouped into either life style persistent or adolescent limited and that adolescent limited offenders are only engaging in criminality for social reasons, to fit in, and will generally stop criminality when they are mature enough to see the long-term consequences of their criminality).

decreases.[106] Why? Because adolescents lack the adult capacities needed to support law-abiding behavior. They pay too little attention to long-term consequences, are too influenced by immediate rewards, and find it hard to resist peers.[107] These are cognitive and neurological limits—not character defects—so as their capacities develop, almost all children mature into law-abiding adults.

In fact, adolescent mistakes have been recognized as a necessary part of the growth process. Children are not born with an understanding of what constitutes a reasonable risk and must acquire it through experience. Taking risks that push (perhaps beyond) their ability to reasonably control events is an inevitable and desirable part of the process by which adolescents become adults.[108] Mistakes are learning experiences and shape later actions. When the police intervene, they have the general effect of decreasing the likelihood that this normal evolution of effective risk calibration will occur as adolescents move into adulthood because adolescents are drawn into the world of criminality.

IV. THE ORGANIZATION OF POLICING

Finally, the police should focus authority dynamics within the department. In particular, they should be concerned with whether departments have procedural justice. Studies suggest that officers are more willing to treat people with respect and courtesy, discuss issues with them, explain their decisions, etc., if they experience the same types of procedural justice from their superiors within the police department.[109] Hence, what began as an effort to change how field

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[106] Anthony Petrosino, Carolyn Turpin-Petrosino & Sarah Guckenburg, *Formal System Processing of Juveniles: Effects on Delinquency*, 2010 THE CAMPBELL COLLABORATION 36 ("[M]ost analyses showed that [juvenile justice] processing increased delinquency.").

[107] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 68–69, 92–100 (2014).

[108] *See* Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 TRENDS COGNITIVE SCIENCES 63, 64 (2014); B. J. Casey, *Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior*, 66 ANN. REV. PSYCHOL. 295, 302–04 (2015).

[109] Ben Bradford et al., *Why do 'the Law' Comply? Procedural Justice, Group Identification and Officer Motivation in Police Organizations*, 11 EURO. J. CRIMINOLOGY 110, 126 (2014); Joseph De Angelis & Aaron Kupchik, *Ethnicity, Trust, and Acceptance of Authority Among Police Officers*, 37 J. CRIM. JUST. 273, 279 (2009).; Tom R. Tyler et al., *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 L. & SOC'Y REV. 457, 479–81 (2007); Suzanne J. Farmer et al., *Becoming an Undercover Police Officer: A Note on Fairness Perceptions, Behavior, and Attitudes*, 24 J. ORGANIZATIONAL BEHAV. 373, 383–84 (2003); Christopher J. Harris & Robert E. Worden, *The Effects of Sanctions on Police Misconduct*, 60 CRIME AND DELINQ. 1258, 1280–81 (2014); Faye S. Taxman & Jill A. Gordon, *Do Fairness and Equity Matter? An Examination of Organizational Justice Among Correctional Officers in Adult Prisons*, 36 CRIM. JUST. AND BEHAV. 695, 705–07 (2009); Scott E. Wolfe & Alex R. Piquero, *Organizational Justice and Police Misconduct*, 38 CRIM. JUST. AND BEHAV. 332, 346–49 (2011).

officers behave when dealing with the public has become a discussion about how police leaders treat their own officers. Studies show that when police officers feel fairly treated, they are more likely to regard their department, its policies, and its leaders, as legitimate and to follow with organizational rules and policies; to feel a commitment to the goals of their department; to want to stay within the department; and to be motivated to work cooperatively with their supervisors.[110]

Typical of studies of police departments is a recent study of the Chicago Police Department.[111] In that study, 786 patrol officers and sergeants in a large urban police force completed surveys assessing their perceptions of their department, the communities they police, their views on different policing styles, and their well-being. The findings of this examination of the internal dynamics of the Chicago Police Department indicate that when officers were in a department in which they rate the policies and practices of their superiors as being procedurally fair, they were more likely to trust and feel obligated to obey their supervisors; less likely to be psychologically and emotionally distressed; less likely to be cynical and mistrustful about the world in general and the communities they police in particular.[112] From the perspective of this analysis it is especially important that these effects were associated with a stronger endorsement of democratic forms of policing, with less reported use of force, with increased organizational efficiency, and with officer well-being.[113] These findings reinforce the value of building procedural justice into the internal working climate of police departments as a means to improve police officer job performance, their well-being, and their relationship with the communities they police.[114]

The final suggestion is that police departments need to focus on fundamental changes in their own organization. They need to move away from being quasi-military organizations and move toward becoming more democratic in their internal processes. There are several reasons for departments to do so. First, those democratic practices shape interactions with the public and lead to greater police legitimacy. Second, officers are more likely to themselves view the policies and practices of their organization as legitimate and engage with their superiors, resulting in desirable discretionary behavior.

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[110] Tom R. Tyler et al., *supra* note 3, at 97.

[111] Rick Trinkner et al., *Justice from Within: The Relations Between a Procedurally Just Organizational Climate and Police Organizational Efficiency, Endorsement of Democratic Policing, and Officer Well-Being*, 22 PSYCHOL., PUB. POL'Y AND L. 158–72 (2016).

[112] *Id.* at 2.

[113] *Id.*

[114] *Id.*

Finally, officers themselves have a less stressful work environment and have better physical and mental health.

V. TAKE-AWAY: CHANGING POLICING

A. The Police and Crime Control

The current focus on the popular legitimacy of the police provides an opportunity to shift American policing toward a model of consent-based policing in which people take on a stronger self-regulatory role based upon their belief that the police are legitimate authorities who ought to be supported and accepted in the community as the primary agents of social control. To make that shift work, the police need to adopt a new style of policing based upon the principles of procedural justice. This would lead them to evaluate all of their dealings with the community in terms of the impact of those contacts upon public trust and confidence in the police. Further, the police should design their policies and practices in similar terms. They should implement and promote policies, such as community engagement, in designing policing policies that lead to heightened trust.

The research reviewed demonstrates that the police have a lot to gain by adopting this model of policing.[115] First, their actions will be more widely accepted by people in the community and resistance and anger over police interventions into people's lives will diminish. Second, people will be less likely to engage in criminal activity and more likely to help the police in their efforts to combat crime and disorder. This more cooperative stance on the part of the public will facilitate effective policing efforts.

This review suggests that a general effort to change the style of policing from a "warrior" model to a "guardian" model as advocated by the *President's Task Force on 21st Century Policing* does not undermine evidence about what works in fighting crime.[116] General strategies of widespread stops undermine trust; they are also not the most effective approaches to fighting violent crime. Focused models better utilize police resources by targeting places and people.

Their use minimizes the investigatory contact that police have with the general public. Research findings support focused stops because: (1) in high crime areas most of the people in the community are not

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[115] *See* Part III.

[116] PRESIDENT'S TASK FORCE, *supra* note 1 at 11–12.

engaged in criminal conduct,[117] and (2) virtually all adolescents mature out of crime if they are not drawn into the criminal justice system.[118]

Finally, research makes clear that police reform must also involve efforts to change the nature of police departments.[119] Ironically, field officers are found to be very similar to members of the community. Their cooperation is based upon experiencing fair treatment from authorities. In this case the authorities are their superiors. Legitimacy functions in similar ways in both settings: the authority changes. To build consent-based policing within communities, it is necessary to build legitimacy within police departments.

B.   Refocusing Police Efforts: The Police and Community Development

Beyond combating crime, can police play a role in individual and community development and flourishing? While a proactive suspicion-based model seeking to prevent crime is bad, a proactive conception of the police based upon the forward-looking ability to anticipate community problems and act in advance to prevent them is desirable. The police can be part of an effort to build communities that develop socially, economically and politically. The key to doing so is to create conditions that facilitate people's engagement in their own communities. There is no question that law, one of government's primary mechanisms for shaping society, has increasingly been called upon to adopt a more proactive and intrusive role in modern society. But that role has been defined in terms of crime control. Can that role be defined instead in terms of supporting the empowerment and engagement of people in the community, and through that process, facilitating economic and social development?

How should we evaluate the potential impact of proactive policing? The model that argues that the police can proactively build legitimacy through efforts to promote safety by lowering crime suggests that police actions are justified to the community if they manage societal threats like crime. This model further argues that widespread proactive police contact with a broad swath of people in the community both identifies ongoing crime and broadly communicates the risk of wrongdoing, thereby lowering current and future crime. Yet, as has been noted, studies of the results of police stops suggest that proactive police contact seldom identify active "ongoing" crime, so the focus must be on the communication of risk, which might deter future crimes. However, as has been noted, stops do not increase risk perceptions.

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[117]   *See* Papachristos et al., supra note 95 at 142.

[118]   *See* Moffitt, *supra* note 105, at 685–89.

[119]   *See* Part IV.

In contrast to the model outlined, research does support the suggestion that building public trust in the police promotes compliance with the law and cooperation with the police.[120] However, unlike arguments linking support to the ability of the police to manage fear and disorder, recent studies suggest that the key to legitimacy is fair treatment.[121] Hence, policies and practices for obtaining this long-term goal need to be rethought in the light of research on what the public considers when evaluating the police.

These arguments are something that has already been noted within the field of policing. Ever since the early discussions of policing by Sir Robert Peel in London, it has been suggested that the police can best do their jobs through gaining the support and cooperation of the public.[122] The results of recent research support the value of popular legitimacy and link it cooperation. These findings speak to a larger legal debate over the psychological consequences of being singled out and questioned by the police. In discussing the impact of such a stop, Supreme Court justices have taken different views, as shown in *United States v. Martinez-Fuerte*.[123] This case involves people being "briefly" detained for secondary screening during the course of a border stop conducted on highways in the area of the U.S.-Mexican border. Justice Powell speculated that such a minor inconvenience is not likely to be "stigmatizing."[124] In contrast, Justice Brennan's dissent argued that it would be an "affront to the dignity," especially among the members of minority groups who have a history of discrimination in dealing with law enforcement.[125] Furthermore, he contended that "for the arbitrarily selected motorist who must suffer the delay and humiliation of detention and interrogation, the experience can obviously be upsetting."[126] Finally, "that deep resentment will be stirred by a sense of unfair discrimination is not difficult to see."[127]

This growth in predictive actions is not restricted to the police. Rather, it reflects a general growth in the use of risk assessment in criminal justice. For example, people are held in custody based upon estimates of likely future dangerousness, and decisions such as punishment and parole involve the use of risk estimates. This set of

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[120]   *See* Jackson et al., *supra* note 20, at 480.

[121]   *Id.* at 490.

[122]   Clive Emsley, *Peel's Principles, Police Principles, in* THE FUTURE OF POLICING   11–20 (Jennifer M. Brown ed., 2014).

[123]   428 U.S. 543 (1976).

[124]   *Id.* at 560.

[125]   *Id.* at 573 n.4 (Brennan, J., dissenting).

[126]   *Id.* at 573.

[127]   *Id.*

practices has been labeled "actuarial justice" and widely applied to pretrial detention, prison sentences, sentence severity, and post-release supervision.[128]

Both through stops themselves and any subsequent processing, the police are communicating a message on the risk of being caught. Through these mechanisms, the police believe they are potentially deterring wrongdoing. The risk is first of being stopped and searched anytime when on the street or in a car. Secondarily, there is a fear of suffering the costs of arrest and subsequent efforts to avoid adjudication and a criminal record by demonstrating the ability to repeatedly appear at the courthouse and otherwise not break laws. As has been noted, research does not support the assumption that being involved in these types of contacts leads people to increase their estimates of the likelihood that they will be caught and punished for future wrongdoing.[129] At best, policies involving street stops have a modest effect in deterring crime, and that occurs primarily when they are concentrated in high crime areas.[130]

In contrast to any possible gains in terms of reducing crime is the cost of communicating to a large group of the public that state authorities are suspicious of their character and behavior. In these stops, most people are innocent of any wrongdoing but must still account for their actions to suspicious police officers. Even drawing people into the system based upon the fact that they are engaging in minor forms of criminal conduct communicates doubts about their character that they are required to disprove by engaging in a protracted series of interactions with the courts.

These feelings are dramatically illustrated by people's reactions to tickets based on speed cameras.[131] Wells's interviews suggest that people work to create and maintain a "respectable identity" through which they view themselves as law-abiding members of the community.[132] They assume that they will be "free from censure and criminalisation" as they attempt to "carry out good-faith social cooperation."[133] These are the good citizens whose concerns with social order shape broken windows policing. The "law abiding" majority supports the application of police sanctions to deviant and marginal

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[128]   Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. AND SOC. SCI. 397, 406–14 (2005).

[129]   *See* Kohler-Hausmann, *supra* note 82.

[130]   David Weisburd et al., *Do Stop, Question, and Frisk Practices Deter Crime? Evidence at Microunits of Space and Time*, 15 CRIMINOLOGY & PUB. POL'Y, 31, 46–47 (2015).

[131]   HELEN WELLS, THE FAST AND THE FURIOUS DRIVERS, SPEED CAMERAS AND CONTROL IN A RISK SOCIETY (2011).

[132]   *Id.* at 106.

[133]   *Id.*

groups. Traffic offenses provide a context in which good people can receive a camera-based ticket for speeding. Such a ticket was found in interviews to be viewed as communicating a stigmatizing symbolic meaning provoking a number of defensive efforts to distinguish oneself from the class of "real criminals" that ought to be the focus of police attention.[134]

VI. BROADER IMPLICATIONS

What relevance do these arguments have for the future? The argument here is that the findings outlined provide a cautionary tale for evaluating the policies and practices of a rapidly emerging surveillance state. That is a society in which legal authorities broadly monitor the ongoing activity of people in the community. While the specific tactic of stop, question and frisk may be diminishing, the surveillance state is rapidly growing in many other forms. Surveillance cameras are ubiquitous in public spaces and people have grown accustomed to feeling that their behavior on the internet and on the phone is monitored by the government. While particular police tactics may be changing, the idea of proactive policing is more powerful than ever.[135] People see many signs indicating that they are "suspects" in the eyes of legal authorities. Ultimately, people in our democratic society must decide how much discretion they want to give legal authorities to engage in such suspicion-driven activities.

Of course, there are many forms of suspicion. One form is being personally questioned by legal authorities under circumstances in which you are doing nothing wrong. However, surveillance raises several further issues. One is whether people have a choice, i.e. whether they can control whether they are under surveillance. If you go to an airport, you voluntarily accept the choice to be screened, and you can avoid that screening by deciding not to fly. Studies indicate that on the street, people do not feel free to decline to answer police questions or to allow themselves or their car to be searched, so street stops are an arena in which people lack perceived choice. Research suggests that this is a central distinction between traffic and investigatory stops.[136] People believe they can prevent traffic stops by obeying the law, but they feel that investigatory stops are beyond their control. Obeying the law does not prevent street stops. Much of being suspected in street stops is beyond personal control because it is linked to where a person lives or their demographic characteristics.

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[134]   *Id.* at 106–07.

[135]   Tyler et al., *supra* note 21, at 631.

[136]   EPP ET AL., *supra* note 54, at 2.

A second related dimension is active versus passive surveillance. A particularly disturbing aspect of street stops is feeling that an ascribed category membership (race, age, gender) leads the police to view you with suspicion.[137] In contrast, street surveillance via cameras is passive and nondiscretionary. It is because of this distinction that random roadblocks are often advocated. Similarly, the fact that everyone goes through a metal detector makes Transportation Security Administration (TSA) screening more acceptable. No one stopped at a random roadblock or who goes through a metal detector at an airport is, at least in theory, stopped because of who they are or what they are doing.[138] Hence, random stops do not communicate suspicion, while targeted stops can. It is for this reason that there have been strong objections to the secondary screening, which occurs at airport stops based upon TSA profiles, but do not apply to overall screening of all passengers.

The people who are subjected to secondary screening may feel picked out of a crowd and may wonder why they are the subjects of suspicion. It is that same sense of being treated as suspect by the police and wondering why that figures in the Supreme Court discussion of border stops which are conducted using "apparent ethnicity" as one reason for choosing people for further screening.[139] As Wakslak and I note in our discussion of racial profiling, when people are stopped by the police they engage in an effort to identify the reasons for that stop.[140] Those can include that they were breaking law and/or that they are African American, female, or young. The reasons that they decide are the causes for the stop shape how they interpret and react to police behavior.[141] In the case of inferences about racial profiling the police seldom give race as a reason for a stop when they deal with a person, so believing that one is singled out due to race is an inference that people may make based upon their past experience with the police, their knowledge of what others experience in their neighborhood and/or how the officers behave towards them.

Is a brief stop for unknown reasons stigmatizing and undermining of the feelings of respect and inclusion that are central to legitimacy? While legal guidelines typically require some objective criterion for police action such as secondary screening, those subjected to such

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[137] Tyler & Wakslak, *supra* note 13, at 254.

[138] *See generally* Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809 (2011).

[139] *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[140] *See generally* Tyler & Wakslak, *supra* note 13.

[141] *See id.* at 273.

action are seldom told what those reasons are.[142] Often, those subjected to additional police action consider the possibility that prejudice and racism are involved when they are young, male or members of a minority group. No police officer, border agent or TSA agent would ever say to a person that they stopped, searched or questioned them because they are Black, "terrorist appearing" or "apparently Mexican in appearance." Such encounters are inherently ambiguous and in that ambiguity lies the petri dish for incubating perceived bias and racism.

Finally, surveillance can be public or private. Much of the discussion of surveillance over Muslim groups has involved secret surveillance.[143] Monitoring of communications loses its intelligence value when people know that their phone lines or e-mail accounts are being monitored, so surveillance must be secret. On the other hand, street stops and other practices such as airport screening or bag checks in subways are public.

Separate from the proactive tactics of the police is their general manner of behaving when dealing with the public. Recent policing has taken on the trappings of an instrumental model based upon threats and intimidation, in which the police project control and dominance in situations and are perceived by the public as harassing and demeaning the people they deal with. Hence, separately from the value of broadened surveillance is the manner in which the community experiences the police. Are the police reassuring or are they threatening? Threats communicate mistrust, social marginality, and exclusion. A person who feels that the police are to be feared and avoided has internalized a view of themselves as a marginal member of society who is unsure whether its rules and protections in reality apply to him or her.

Further, compliance with the law or even cooperation in maintaining social order is not the only concern. Although the dominant focus of recent discussions about police stops has been on their legality and effectiveness in suppressing crime, the post-*Terry* decision literature on police stops also raises a distinct but important concern about the impact of stops on people's well-being.[144]

A.   Legal Rights and Proactive Policing

The Constitution is structured to protect the freedom of citizens from the intrusion of government into their lives. The primary form of such protection is the principle that any intrusion of legal authorities

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[142]   *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 8–10 (1968).

[143]   Tyler et al., *supra* note 38, at 393.

[144]   Geller et al., *supra* note 49, at 2323–25.

into people's lives must have a legal justification. Traditionally, such justifications begin in one of two ways. The first is that there is evidence of ongoing illegal behavior. In the case of the police, an independent judicial agent, such as a judge, issues a warrant for a search or seizure and typically evaluates such behavior. This principle is modified when the police see suspicious activity suggesting that crime is in the process of occurring—circumstances under which the law allows for a brief stop, questioning and search activities (a *"Terry* stop").[145]

Police also deal with the public when there is some evidence of prior illegal conduct, i.e. a crime has occurred and the police are seeking to identify the criminal(s). In this case, any involvement in the police investigation or imposition of sanctions must flow through the due process of law, reflecting again independent judicial judgments to justify investigatory intrusions, and an adjudicatory process concerning innocence or guilt prior to the further intrusions associated with punishment.

The traditional legal framework fits a zero-tolerance model that reacts to minor crimes. While the use of police resources to arrest minor level offenders may or may not be a wise use of resources, it is legal since those involved are in fact violating the law. However, it is also striking that such cases infrequently receive any form of adjudication. Most frequently, the cases are dropped, often after those charged have some period of involvement in the court system.[146] As Kohler-Hausmann has documented, most of the current action involving misdemeanor cases occurs during a pre-adjudicatory phase, which lacks even the legal safeguards associated with plea-bargaining.[147]

Furthermore, many people who experience brief inconvenience when stopped and questioned by the police have little or no clear remedy if they object to being treated as a suspicious person while engaged in no illegal behavior in a public place. No mechanism exists for questioning whether the police had any reasonable grounds for reasonable suspicion unless someone is arrested. As noted above, even then most cases never come before a judicial authority or in reality have even the type of second-rate justice typically derided in plea bargaining. The message communicated to people is that the system is arbitrary, nontransparent, and basically indifferent to their side of the story. This provides good reasons to become cynical about the law.

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[145]   *Terry*, 392 U.S. at 8–10.

[146]   Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 615 (2014).

[147]   Kohler-Hausmann, *supra* note 82, at 364–81; *see also id.* at 689.

Because of these changes in police practices due to changing policing goals and the growth of the proactive model of policing, the constitutional model is increasingly ill-suited for the contemporary world of policing. Police policies and practices, as well as those of the courts, are not designed with the goal of allowing people to clear their names and establish their good character and innocence. On the contrary, their suspect character is assumed from the beginning and they have neither the opportunity to clarify that they are good citizens or the procedural justice based feeling that at least they received some fair adjudication of their responsibility for criminal conduct. In most cases, a person's fate is linked to discretionary judgments by police officers and prosecutors based upon vague and never clearly articulated criterion. This is troubling in general and in particular because of evidence that such vaguely made judgments are the most likely to be governed by implicit biases.[148]

The key point is that the law and the actions of government authorities carry a great deal of social meaning and being suspected of or even arrested for minor crimes carries social and identity related messages of great weight.[149] As a result "[t]he consequences for one's moral, as well as social and economic, identity seen to result from the enforcement of the criminal law against a mass activity, have been shown to result in a reassertion . . . [by the individual of their] essential law-abidingness and respectability."[150] From this perspective, people feel that traffic cameras are unfair because fines based upon them "formalises the authorities' lack of interest in the context of the offence and the offender."[151] In other words, such a ticket does not give people the chance to negotiate their identity issues with a police officer or a judge by telling those authorities that they are a good person and thereby treats citizens with disrespect. Research findings suggest that these feelings are not generally mitigated by the possibility of having a day in court rather than paying a ticket, because most of the people "speed ticketed" are guilty of the speeding offense and those people would have no case in court.[152] Those who are guilty still object to their impersonal treatment.

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[148] Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2634–40 (2013).

[149] JOSEPH R. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS: DRINKING-DRIVING AND THE SYMBOLIC ORDER 122–26 (1981); HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 19–39 (1963).

[150] WELLS, *supra* note 131, at 132.

[151] *Id.* at 147.

[152] *See id.* at 106–09.

In general, the growth of police technology has not been accompanied by efforts to understand how it is changing police-community relations. As a consequence, at this time,

> [l]ittle is also known about how technology undermines, preserves, or enhances the nature of people's interactions with police. Policing is a human service industry, and technology has the capacity to dehumanize policing, to make it more actuarial and impersonal.[153]

Traffic stops are a good example of the general point that most people in any community are invested in the image of themselves as "decent people" and typically identify a small deviant group as being criminals. As it turns out, research supports this argument by showing that even in high crime areas, the overwhelming proportion of the population is generally not involved in crime, particularly violent or drug related crime. People resist the application of the label of suspect or law breaker when the police apply it and seek to negotiate their connection to a more favorable identity. Repeated police investigatory stops undermine this premise, and when they are of people who are not committing crimes, the police undermine feelings of self-worth and good character. The stops also undermine the legitimacy of the law and the connection between people and the police.

In the situations outlined, traditional jurisprudence is inadequate to manage the behavior of the police and the courts. Although the police still frame their actions in a *Terry*-stop framework, in reality their low hit rates make it hard to imagine that they are actually making stops based upon "reasonable suspicion" of ongoing criminal conduct. For example, in *Floyd v. City of New York*,[154] Judge Scheindlin noted very low hit rates for gun seizures for NYPD street stops.[155] The *Floyd* decision illustrates the ability of the legal system to address at least the racial disparity aspect of police behavior. But it does not address the overall constitutionality of stopping, questioning and frisking people who are not engaged in criminal conduct. Current police practices have rendered the legal idea of "reasonable" suspicion irrelevant, since the police are stopping people with little or no justification for their conduct.

What is left as a basis for evaluating police conduct? This paper argues that the focus should be upon the impact of police practices on

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[153] Edward R. Maguire, *Police Organizations and the Iron Cage of Rationality, in* THE OXFORD HANDBOOK OF POLICE AND POLICING 68, 85 (Michael D. Reisig & Robert J. Kane eds., 2014).

[154] 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

[155] *Id.* at 559 (seizures for other contraband occurred in only 1.8% of stops).

the public's views about the legitimacy of the police. The broken windows model of proactive policing argued that policing should seek to build relationships with the community by being responsive to community concerns and showing concern with addressing community problems. However, at least in terms of legitimacy, the efforts that have been made under the general rubric of "broken windows" to address fear of crime and community disorder have not built a positive relationship with the community nor increased popular legitimacy. Crime has declined, but popular police legitimacy has not increased.[156]

B.   Terrorism as the Frontier of the Surveillance State

While street stops may be in decline, the arguments made here and the findings outlined have broad implications for the increase of the anti-terror surveillance state. Following the September 11, 2001 terrorist attacks on New York City and Washington, D.C., officials recognized a fear of terrorism similar to the fear of crime in the 1970s and responded with similar proactive policies. Government officials have explicitly adopted the proactive goal of preventing another terrorist attack and are actively engaged in a variety of policies and practices to achieve that objective.[157] This is an example of aggressive proactive policing broadly conceived. Unfortunately, its impact on later terrorist acts is hard to assess. It is tempting to attribute the lack of further serious terrorism on the success of this policy, but that would be unjustified since such success could have many causes.

The larger issue is how such tactics shape the legitimacy of the law. These tactics have involved interactions with many members of the Muslim American community. As with street stops, this has led to stories of humiliating experiences communicating social marginality and disrespect.[158] This widespread pattern is revealed in research on policing the Muslim community.[159] Such research further indicates that the willingness of Muslim Americans to cooperate with the police in reporting terror threats is heavily influenced by whether the members of that community experience the police as responsive to their concerns,

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[156]   *See* Jones, *supra* note 11.

[157]   David Cole, *Preserving Privacy in a Digital Age: Lessons of Comparative Constitutionalism*, *in* SURVEILLANCE, COUNTER-TERRORISM AND COMP. CONSTITUTIONALISM 95–116 (Fergal Davis, Nicola McGarrity & George Williams eds., 2014).

[158]   MOUSTAFA BAYOUMI, HOW DOES IT FEEL TO BE A PROBLEM? BEING YOUNG AND ARAB IN AMERICA 1–12 (2008).

[159]   Aziz Z. Huq et al., *Mechanisms for Eliciting Cooperation in Counter-Terrorism Policing: Evidence from the United Kingdom*, 8 J. EMPIRICAL LEGAL STUD. 728, 749–52 (2011); Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement: The Influence of the Purposes and Targets of Policing?*, 17 PSYCHOL., PUB. POL'Y, AND L. 419, 436–38 (2011); Tyler et al., *supra* note 38, at 385–88.

respectful of them and their community, and sincerely concerned with their own and their communities' well-being. Broadly framed, these are issues of fair treatment, and they are central to legitimacy and cooperation. Hence, the same dynamics are involved as those identified in discussions of policing against crime.

The war on terror has led to the further militarization of the police. "[T]he most serious consequence of the rapid militarization of American police forces . . . is the subtle evolution in the mentality of the 'men in blue' from 'peace officer' to soldier."[160] "A primary imperative for soldiers is to kill the enemy; but police have a very different mission than the military."[161] This "war" mentality is reflected in the range and variety of forms of surveillance, public and private, that have developed in the police focus on the Muslim minority community.

C.   The Future Surveillance State

Local and federal level police forces, as well as related agencies, seem to have ushered in a new general era of broad surveillance associated with the idea of proactive prediction involving risk assessments concerning future actions.[162] In the case of the police, the law enforcement community is engaged in widespread geographical locations using cameras and, in the near future, drones. Telephone calls and internet communication are monitored. And, the police continue with some unknown variety of public and covert efforts to engage in proactive screening of the public as it goes about its everyday behavior.

Certainly, it must be acknowledged that there are threats in society and proactive police efforts seek to address those threats. The argument being made here is that there are also costs of such approaches, and those costs are often understated or even totally ignored. As suggested by the findings outlined, by enacting these policies and practices, law enforcement communicates a general attitude of suspicion and mistrust, which ultimately erodes the relationship that the public has with the police at a time when the police are increasingly being looked upon as agencies that should build solidarity[163] and motivate identification with and engagement in communities.[164]

From this perspective, a particularly disturbing development is that risk prediction is becoming broader in scope with risk predictions

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[160]   Maguire, *supra* note 153, at 87 (quoting Arthur Rizer & Joseph Hartman, *How the War on Terror has Militarized the Police*, ATLANTIC, 2011).

[161]   *Id.*

[162]   *See* Smith, *supra* note 4.

[163]   *See* Tyler & Jackson, *supra* note 20, at 79–88.

[164]   *Id.* at 89.

used to set sentences, make parole decisions, determine post-prison release supervisory conditions and even whether people will be executed.[165] In particular, it has involved the imposition of sanctions based upon anticipated actions, while traditional policing has focused upon using risk prediction to shape who is stopped and questioned.

Whatever the benefits and problems of risk prediction are as a guide to investigation, being punished based upon a model that does not involve individual conduct further undermines the relationship between people and the state. People do not feel listened to and evaluated as individuals who have a chance to explain and justify their actions prior to punishment, because they are not being punished for something they have done. They are being sanctioned for something they are predicted to do in the future.

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[165]   Simon, *supra* note 128, at 414–17.