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Street Stops and Police Legitimacy in New York

Jeffrey Fagan
Columbia Law School, jfagan@law.columbia.edu

Tom Tyler
tom.tyler@nyu.edu

Tracey L. Meares
t-meares@uchicago.edu

8. Street stops and police legitimacy in New York

Jeffrey Fagan, Tom R. Tyler and Tracey L. Meares

1. INTRODUCTION

1.1 Revisiting the Abner Louima Incident

Most discussions of the consequences, both positive and negative, of New York City's modern policing tactics begin with an analysis of its stop and frisk activity (hereafter, SQF).[1] SQF was an essential feature, perhaps the most important and active ingredient, in the regime of Order Maintenance Policing (OMP) that began in New York City in 1994 (Bratton and Knobler 1998; Silverman 1999; Maple and Mitchell 2000). The basic tactic under SQF is an encounter between an officer and a citizen, usually initiated by the officer. Under constitutional rules and New York case law (*People v. DeBour*, 40 N.Y. 2d 210 (1976)), for such encounters, known as *Terry* stops nationally (*Terry v. Ohio*, 392 U.S. 1 (1968)), police can stop a citizen based on *founded* suspicion that crime may be 'afoot'. The encounter would proceed to increasing levels of intrusion if suspicion was determined to be *credible* or *reasonable*. Reasonable suspicion would permit pointed questioning and frisk or pat down to look for weapons, drugs or other contraband.[2]

Details about how often, to whom, and where these encounters took place were scarce during the early years of this practice. Although most officers conducted these stops, an elite NYPD detail known as the Street Crime Unit (SCU) was the vanguard of this practice during its few years.[3] In 1997, Police Commissioner Howard Safir expanded the SCU to over 300 officers, with SCU's deployed in each of the five boroughs. The units were supervised by Borough commanders using real-time spatial information about crime trends. Still, not much was known about SCU's outside of the neighborhoods where they focused their patrols. There was little public discussion and little visible reaction. While residents of the City's

203

highest crime neighborhoods were aware of the SCU's aggressive and intrusive searches, not much was known outside those neighborhoods (Kocieniewski 1999).

But it was a very different type of police-citizen encounter that brought SQF to public attention, and that unleashed a great wave of anger. The Abner Louima incident in September 1997 happened two years before the 1999 fatal shooting of Amadou Diallo in a stop and frisk incident in the courtyard of a Bronx apartment building, and 27 months before the publication of the *Spitzer* Report in December 1999 that focused political and policy attention, both in New York and across the country, on the practice of SQF. The Louima incident had nothing to do with SQF. Louima, a Haitian immigrant, was arrested following an early morning fracas outside a nightclub in a largely immigrant enclave in East Flatbush in Brooklyn. He was taken to the 72nd precinct, where he was sodomized with the handle of a bathroom plunger by police officers while in custody.[4] Even though this was a routine incident (until the assault), the publicity surrounding the incident created a political and social space in which the City's minority communities expressed a great deal of bitterness and anger about the totality of their experiences with police. Evidently, this anger had been simmering for nearly three years since the adoption of OMP strategies and the sharp increase in SQF.[5]

Why the anger? Certainly, the act was disgusting, and reactions included both visceral disgust at the thought of the act, and moral disgust both at the act itself and the thought that police might have done it, and political disgust at the attempts by the officers to conceal the act. Louima's injuries, which were revealed over a period of several days following the incident, were severe and required multiple surgeries. He was hospitalized for three weeks. Throughout this time, coverage of the incident, including the arrests of the officers, ensured that it survived multiple news cycles.

But this still didn't explain the sustained anger that arose from the Louima incident and spread through the City's minority neighborhoods (Kocieniewski 1999). After all, from the perspective of many New Yorkers, crime was falling fast, and it fell fastest in the City's highest crime neighborhoods (Bratton and Knobler 1998; Zimring 2011). Those also were the areas with the highest concentrations of Black and Latino residents (Spitzer 1999). But the experience of policing in those areas up to that moment led to a more ambivalent and complex reaction by residents. These residents were the beneficiaries of the crime decline, even as they also were the targets of tough police tactics.

1.2 The Liabilities of the New Policing

Instead, the Louima incident created a political and social space for the expression of the anger and frustration of the City's non-White (and some White) residents from their increasing exposure to the new OMP policing in New York. The liabilities and difficulties of the new regime of street stops were revealed, as were the new norms for optimal or reasonable or fair police behavior on the street.

The Louima incident exposed at least four sources of anger. First, as portrayed in the *Spitzer* report two years later, minority citizens, especially Black New Yorkers, had routinely experienced frequent unwanted contact with the police. Although precise numbers before 1998 (and perhaps after) were difficult to come by, the data reported by Spitzer showed that stops were extensive and spatially concentrated. Second was the racial skew. The *Spitzer* report and subsequent analyses (Gelman et al. 2007; Fagan 2010; Fagan et al. 2010) demonstrated that there was a racial skew in these encounters: stop rates for Black and Latino citizens were significantly higher relative to their known rates of crime participation than were comparable rates for Whites. Third, the *Spitzer* report showed that more than one in three SQF stops lacked the founded or reasonable suspicion that would satisfy constitutional predicates for police interdiction of citizens. Fourth, the nature of the interactions was another source of anger. In these encounters, suspicion was strongly signaled and often explicitly communicated with tough language and rough treatment (Tyler et al. 2014). Patdowns or searches of suspects' belongings or their persons were common, even as arrests or other actions that might justify the intrusions were rare. Harsh language and threats were routine (Spitzer 1999).

The Diallo shooting less than two years later in February 1999 created a second cascade of anger and perhaps confirmed the initial outburst of anger and disgust that was unleashed toward the new policing in New York after Louima. Thirteen months after Diallo's killing, the March 2000 fatal shooting of Patrick Dorismond by undercover police officers in a reverse drug sting led to a third cascade of popular anger toward the new policing (Rosen 2000). All three victims were of African descent, further racializing the discourse over the new policing in New York.

These three events opened a window for questioning the algebra of risk and return behind these practices. The three incidents were joined in the political and popular imaginations of many in the City and raised questions about the costs, potential harms, and the consequences of the new policing that are still debated today. Proponents of the new policing in New York argued that the crime control returns were significant and uniquely attributable to SQF or to other policing strategies that were

implemented simultaneously. These included aggressive enforcement of a variety of low-level misdemeanor laws and non-Penal Law sections of the administrative code, arrests for possession of small amounts of marijuana, and other 'disorder' offenses (Maple and Mitchell 2000). Others simply saw a more efficient and better managed police force that maximized its ample patrol strength and other resources through technological innovation and accountability reforms (see, e.g., Zimring 2011).

A small number of studies have examined specific aspects of these strategies. Two studies focused on misdemeanor arrests (Corman and Mocan 2005; Rosenfeld et al., 2007). Several studies examined the unique crime control effects of SQF (Smith and Purtell 2007; Rosenfeld and Fornango 2014; MacDonald et al. 2015; Fagan 2016; Weisburd et al. 2016). Others examined policing as a vector of tactics under a larger strategic initiative (Fagan 2010). Two studies compared New York's crime decline to declines in other cities and failed to identify a comparative advantage (Rosenfeld et al. 2005; Harcourt and Ludwig 2007). Zimring's recent book (2011) reaches the opposite conclusion, and suggests that sustained crime decline from 1994 to the present is in fact attributable to the vector of initiatives that together formed the new policing in New York.[6]

Overall, this body of evidence generally disagrees about the strength and direction of any returns to crime control from these practices, either individually or collectively (Meares 2014). This ambiguity in the social science evidence about street policing in New York offered little guidance to inform policy and practice throughout the two decades of SQF. And contentious litigation over SQF that spanned more than a decade has sustained the conflict over SQF (*Daniels et al. v City of New York* 2004; *Floyd et al. v City of New York* 2013). The intersection of tragic events, court battles and conflicting evidence contributed to the ambivalence and cynicism toward policing strategies, including in the communities that are most heavily policed and where crime rates have fallen most (Tyler et al. 2014).

1.3   Balancing Tests

However important this cost-benefit debate may be to policy and perhaps in litigation, it is not our concern in this chapter. The failure persuasively to identify unique effects of the new policing in New York has created a space, still quite open, where questions are vigorously debated about the costs and secondary consequences of the OMP strategy and the new policing in New York generally.

New Yorkers were not alone in raising these concerns. The sheer scope of high discretion, involuntary police-initiated contact lends some urgency

to their concerns. In 2005, police stopped – involuntarily – more than one in ten adult citizens over the age of 16, either on highways or in pedestrian encounters, across the US (Durose et al. 2007). Once stopped, citizens were subject to a search of their person, their belongings, their vehicle, or all three. Many of the searches are harsh, and in the national data, about 10 percent of those stopped thought the officer acted improperly, including the use of force or restraints that respondents thought unnecessary (Durose et al. 2007). The cumulative effect of these developments is the widespread use of coercive police authority to conduct 'field interrogations' without a regulatory or normative system to justify or balance crime control returns. One of our core concerns in this essay is that the harm that accrues from these stops has the potential to corrode ties between citizens and law, ultimately compromising public safety as well as the safety of police officers (Tyler and Fagan 2008; Epp et al. 2014).

The debate in New York joins this broader nationwide debate about how policing shapes the attitudes of citizens, what types of policing enhances the legitimacy of policing and criminal legal institutions more generally, and whether legitimacy matters – beyond its civic virtues – as an engine of public safety (Skogan and Frydl 2004). For police officials, these debates affect how the police can manage street stops to make officers behave reasonably and lawfully on the ground. We hope, as did a National Academy of Sciences report on policing (Skogan and Frydl 2004), that police will be concerned in turn with whether their tactics produce legitimacy.

So, our concern in this chapter is with the effects of SQF policing on public trust and confidence in the police, and whether SQF tactics build or undermine legitimacy. These issues have become a central feature of contemporary theory, policy and practice in policing (President's Task Force on 21st Century Policing 2015). Our claim is that both the substance and procedure of how stops are conducted in New York have costs for legitimacy, and that the legitimacy deficits that ensue have negative effects on public safety. Our focus recognizes that public trust and confidence in the police compete with legality, equity, efficiency and crime control efficacy as dimensions on which to evaluate policing. The legitimacy of OMP and other forms of proactive policing is an important question at this juncture, both in New York and elsewhere in the US, given the general embrace of proactive policing among US law enforcement agencies (Sampson and Cohen 1988; Skogan and Frydl 2004; Kubrin et al. 2010), and the centrality of *Terry* stops as an essential tool of policing (Heymann 2000; Fagan 2016). For example, Kubrin et al. suggest that proactive policing can reduce the incidence of robberies, a bellwether crime in the US. Proactive strategies (and even predictive strategies) generally are now viewed favorably by law enforcement, even if there is disagreement on what 'dosages'

are appropriate. The diffusion of these strategies can replicate the patterns of citizen–police interactions that gave rise to the tensions in New York.

The breach in trust between citizens and police dovetails with long-standing racial grievances between minority citizens and police, as distrust has historically been and remains today much higher among minority group members (Bobo and Johnson 2004; Lerman and Weaver 2014). Studies consistently show that African-Americans are 20–30 percent less likely to express confidence in the police and that this difference has not disappeared in recent years. A recent study by the Pew Research Center (Kohut et al. 2007) found that African Americans were 29 percent less likely to express confidence that local law enforcement will enforce the law; 29 percent less confident that the police would not use excessive force when dealing with the public; and 30 percent less confident that the police treat all races equally.

Recent studies also show that specific policing practices contribute to poor ratings by citizens of the legitimacy of law enforcement. Interviews with young urban residents show that stop and search practices, coupled with frequent arrests for low-level public-order offenses, are widely viewed as unjust because they are insensitive, harsh or racially selective and potentially based upon prejudice (Brunson 2007; Brunson and Weitzer 2009; Gau and Brunson 2010). As we show later in this essay, aggressive and proactive policing practices tend to reduce compliance and voluntary cooperation with law enforcement (Collins 2007; Delgado 2008; Howell 2009). The damage can be especially great when street sweeps or arrests for 'loitering' bear down on minority youths. The views of children and adolescents about law and the courts are shaped by many factors, including parents, teachers, gangs and the media. But one key issue is personal interactions with the police (Fagan and Tyler 2005; Fagan and Piquero 2007). Because adult orientations toward the law are often formed during adolescence, these precursors of adult attitudes are crucial.

1.4   This Chapter

These concerns are the focus of this chapter. We begin with a review of the range of potentially adverse reactions or harms that SQF or 'street' policing may produce. We next link those harms to a broader set of normative concerns that connect dignity, harm and legitimacy. In the third section we review the evidence that connects citizen views of police – as well as their experience with police – to their perceptions of the legitimacy of the police and criminal legal institutions generally. In that same section, we review the evidence that links those perceptions to how citizens behave with respect to law, and identify the consequences of adverse reactions of

citizens to harsh forms of street policing. Finally, we discuss alternative frameworks for thinking about the regulation and control of the new policing, a discussion that has longstanding roots in a broader dialogue about the management of police discretion.

2. DIGNITY AND INDIGNITY IN ORDER MAINTENANCE POLICING

2.1 Cumulative Harms of SQF

The late Bill Stuntz, in an essay commenting on SQF tactics as a form of *Terry* stops, pointed out that 'street policing' has large, complicated and misunderstood social and psychological effects on the persons subject to that particular form of police authority. He wrote this piece in early 1998 shortly after the Louima incident but nearly a year before the Diallo shooting. He made it clear that he was talking about the aggressive police tactics that characterized the new policing in New York, though he also said that his claims were generalizable to the 'new policing' that had emerged in the decade. Like the architects of the OMP and SQF regimes, Bill acknowledged that such tactics would signal to would-be offenders that police are in control of the streets and those streets would be safe for ordinary citizens. But he also acknowledged that these tactics could signal broad-based and automatic suspicion based on status (gender, race, neighborhood), and that the police could therefore be seen as a hostile presence in these neighborhoods.

He also had a cogent and coherent answer to the question of why there was there so much anger in the Black and Latino communities (and, without saying so, why there was so little anger in the City's wealthiest and whitest neighborhoods where stops were less common for their residents). He identified a range of potential harms that might arise from widespread and routine stops of citizens at very low levels of suspicion of both serious and minor crimes, and even suspicion of non-criminal violations such as open containers of alcohol.

The first harm is the invasion of a person's privacy. Privacy is a much-debated question in Fourth Amendment law, especially in the electronic and digital era, and it often is subject to various balancing tests that weigh an individual's privacy interest against the context in which the interests of criminal justice might trump a person's right not to be stopped or searched.[7] But privacy does matter, and is an essential part of one's sense of personal dignity. Losing some or all of one's dignity arouses emotions – anger, humiliation, perhaps rage. So, since much of what we are concerned

with is the immediate if not residual emotional aftermath of experiencing involuntary and coercive police contact, the effects of aggressive policing on dignity are a salient and animating feature in the discourse on SQF. So, the coercive incursion on one's person or property or even identity robs the citizen of the twin dignities of autonomy and privacy (Colb 1998).

Second is 'targeting harm'. Targeting harm arises when a person is stopped by the police for some indicia of suspicion that may not be obvious to that citizen, or that is vague even to the police officer making the stop (see our data in NYC, for example). A person who is stopped often *feels* (and I emphasize *feel*) singled out in public by the police and treated like a criminal suspect. The fact that so few stops are accurate ensures the spread of the denial of the dignity of innocence, and especially among citizens in the more powerless communities.

The first two types of harm are often joined. This type of compound injury is best understood by asking *why me?* Why would an official use her discretion to single one out from others absent a valid and proper evidentiary basis? Why would s/he have a 'hunch' that one is a criminal? Targeting harm, then, encompasses both an *innocence harm* plus the *procedural indignity* of being targeted as criminal with what appears to the person stopped to be more of a hunch or an assumption than a reasonable basis. Since accuracy is so bad (most people are let go without a formal legal sanction), this cost almost always falls on the innocent.

Interviews with persons stopped show that these interactions arouse emotions, including subjective feelings of humiliation and rage that result from the feeling of being targeted – of being singled out as a criminal. Being stopped by the government in a public space also suggests public discounting of worth (Harris 1999; Epp et al. 2014). It appears to the person stopped to be a form of public shaming that derives from the feeling that the state has no problem displaying its power and control over the citizen on a public stage (Capers 2009). The emotion may be compounded when the stop and frisk is conducted in public in front of peers and neighbors.[8]

Moreover, the resulting stigma has potential consequences for mental health and behavior (Geller et al. 2014). Link and Phelan define stigma through four interrelated components: (a) distinguishing and labeling human differences; (b) cultural beliefs that link labeled persons to negative stereotypes (such as 'criminal'); (c) categorization that separates labeled persons from 'us' as 'them', leading to disapproval, rejection, exclusion; and (d) status loss and discrimination that lead to unequal outcomes for labeled persons (Link and Phelan 2001).[9] In the context of SQF policing, these components are likely to be observed through the process of identifying who will be frisked or searched. If the stigmatization process is strong in its 'dosage', ongoing surveillance of people in specific areas – and the

stress of anticipating that it could happen again at any time – can elevate risks for stress and emotional instability. Moreover, anger at stigma's inherent downward placement in a power relationship might provoke harsher police responses leading to arrest and jail, as well as physical injury. The stereotypes of the persons selected for stops will likely shape both the tenor of the encounter and its outcome. The power difference between the police and the persons who are frisked is enormous, leaving little doubt whose labels, stereotypes and preferences to categorize and discriminate will hold sway.[10]

The third harm flows from the *racial bias* in the distribution of these incursions: the signaling of suspicion and assignment of criminality to Black citizens simply because they are Black or move about in a Black neighborhood. The racial distribution, over and above what any geographic difference in crime rates would predict, is a fact on the ground (Gelman et al. 2007; Fagan 2010, 2012; Fagan et al. 2010; Ridgeway and MacDonald 2010; Fagan et al. 2012). As a regulatory matter, recent data show that there are more stops per reported crime in minority neighborhoods than in White or wealthy areas.

When stops are racialized in these ways, the harm is further compounded by reinforcing the racial grievances a person may hold after prior experiences with discrimination. In other words, harm is compounded by a sense that this is a form of state power that is exercised principally against minorities, far more than against Whites (and this perception holds true even after Black citizens are reminded that serious crime rates are often higher in their neighborhoods). The *Terry* court observed that body frisks are humiliating, but scholarly analyses of *Terry* over the three decades scrubbed race from its meaning.[11] It was not until the 1990s that the racial contours of police interdictions procedures were acknowledged in *Whren*, only to be dismissed by holding that the 4th amendment is not the appropriate framework for adjudicating these claims.

Fourth is the indignity of verbal and physical force that accompanies a search, as well as the fear of injury. Stops are rarely, if ever, neutral or benign. In New York, where there were more than 680 000 *Terry* stops in 2011, some force is routine. From 2004 to 2010, there was physical contact in 23 percent of cases, and contact with restraint (beyond merely a placing of hands on the suspect) in 8 percent of cases. Suspects are handcuffed in 3 percent of all stops, including cases where there was no suspicion by officers that a weapon might be present.[12] Frisks were made in 38 percent of stops when there was no overt suspicion that the suspect was engaged in violence or in possession of a weapon. Force also is racialized: while police rarely draw weapons on suspects, police in New York were 20 percent more likely to draw a weapon on a Black suspect compared to a White

suspect, regardless of whether the suspected crime involved either weapons or violence.

These four harms are not separate either: the indignity of inaccurate police incursions on liberty is compounded by the mix of these harms within any single interaction. Harsh treatment, as we discuss below, compounds the second and third harms – the assault on the dignity of innocence – by signaling the predicate of suspicion that seems to have motivated an unjustified police interdiction.

2.2   Legitimacy and Procedural Justice

Stuntz's discussion raises an important dimension in a debate that often is stripped of its salience: these encounters have *emotional* freight, and the emotions matter well beyond the incident itself. They accumulate, and they are the moving parts in the explanation of how interactions can produce legitimacy or turn legitimacy into cynicism and withdrawal. That is, these interactions matter a great deal as evidence of legitimacy.

First, it's important to clarify what we mean by legitimacy, and then proceed to the ways in which the everyday conduct of SQF can affect legitimacy and law-related behavior. Legitimacy is a term with many meanings in different contexts. When we use the term 'legitimacy' we mean a property that a rule or an authority has when others feel obligated to voluntarily defer to that rule or authority. A legitimate authority is one that is regarded by people as entitled to have its rules and decisions accepted and followed by others (Tyler 2011: 34; see also Skogan and Frydl 2004; Beetham 1991).

So, when we refer to legitimacy, we are not aiming for a philosophical justification of when people ought to defer to authorities; rather, our claim is descriptive in that we examine here whether people do defer (or at least say that they do).[13] A robust body of social-science evidence from around the world shows that people are more likely to obey the law voluntarily when they believe that authorities have the moral authority as well as the legal basis to tell them what to do (Tyler et al. 2008). This research demonstrates that people typically are motivated to comply with the law more by the belief that the authorities with whom they are dealing are legitimate than they are by fear of punishment (Tyler 1997, 2011).

Legitimacy in turn is linked to whether the authorities treat people with dignity and fairness when exercising authority, i.e. whether they are procedurally fair. People tend to place much more weight on *how* authorities exercise power as opposed to the ends for which that power is exercised – i.e. on the procedural justice through which the police exercise their authority. This is true across a wide variety of authorities.

Researchers have studied public evaluations of police officers, judges, political leaders, managers and teachers, and the findings are consistent; conclusions regarding legitimacy are tied more closely to judgments of the fairness of actions than to evaluations of the fairness, or effectiveness, of the outcomes (Tyler 2004). Rather than being primarily concerned with outcomes and individual maximization of utility, legitimacy-based compliance is centered upon individual identity and is relational, positing that people tend to seek a favorable social identity within the groups to which they belong. People also seek a favorable social status for their group vis-à-vis other groups. In some studies, procedural justice is more important than either the valence or the fairness of the outcome of the experience. So, the police can most effectively build and maintain legitimacy by policing in ways consistent with public views about procedural justice.

Procedural justice can be understood in terms of four dimensions. First, people want to have an opportunity to explain their situation or tell their side of the story in a conflict. This opportunity to make arguments and present evidence should occur before the police make decisions about what to do. They are interested in having a forum in which they can tell their story, i.e. they want to have a voice.

Second, people react to evidence that the authorities with whom they are dealing are unbiased. This involves making decisions based upon consistently applied legal principles and the facts of the case, not on an officer's personal opinions and biases. Even if officers are acting without bias, they may be perceived as making decisions unfairly by those they are dealing with, and it is important for the police to provide evidence leading the people they are dealing with to understand the basis of their actions. For this reason, transparency or openness about how decisions are being made facilitates the belief that decision-making procedures are neutral when police conduct makes it apparent that decisions are being made in rule-based and unbiased ways. In the case of street stops, this involves explaining why people are being stopped, i.e. what police policies and goals are involved.

Third, people are sensitive to whether they are treated with dignity and politeness, and to whether their rights as citizens are respected. The issue of interpersonal treatment consistently emerges as a key factor in reactions to dealings with legal authorities. People believe that they are entitled to treatment with respect and react very negatively to dismissive or demeaning interpersonal treatment.

Finally, people focus on behavioral cues that communicate information about the intentions and character of the legal authorities with whom they are dealing ('their trustworthiness'). People react favorably to the judgment that the authorities with whom they are interacting are benevolent

and caring, and are sincerely trying to do what is best for the people with whom they are dealing. Authorities communicate this type of concern when they listen to people's accounts and explain or justify their actions in ways that show an awareness of and sensitivity to people's needs and concerns.

2.3   How Much Do Legitimacy and Procedural Justice Matter?

Research on legitimacy and procedural justice provides a set of consistent results about these relationships. The evidence includes panel studies with community samples (Tyler and Fagan 2008) and with samples of high-risk offenders during the transitional years from late adolescence to early adulthood (Fagan and Piquero 2007). Cross-sectional studies with adolescents (Fagan and Tyler 2005) and community samples of adults (Tyler and Sunshine 2003) show the same. Other evidence from criminal or juvenile justice samples includes Blader and Tyler (2003a, 2003b), Tyler and Huo (2002), Tyler and Wakslak (2004), Bradford, Jackson and Stanko (2009), Sprott and Greene (2010), Weitzer and Tuch (2004) and Engel (2005). Others have questioned either the validity of the constructs (Reisig et al. 2007) or the core principle that procedure trumps outcomes in citizen evaluations of police encounters (Skogan 2006). These studies tell the following story.

1. *Citizens in involuntary police–citizen encounters will positively rate the legitimacy of police intervention and voluntarily defer to decisions made by police officers, accepting those decisions willingly, when they perceive that the encounters are procedurally fair* (Tyler and Huo 2002). What is found to shape willingness to accept police decisions? People are more willing to accept police decisions when they received outcomes they judged to be favorable, or at least neutral. However, they are most strongly influenced by procedural fairness. This includes whether or not they evaluate police decision making to be fair and/or whether or not they evaluate the police as treating them fairly. In other words, the key issue shaping acceptance is procedural justice, i.e. the manner in which the police exercise their authority, not the favorability of the outcome. And, in particular, people paid attention to their interpersonal treatment by the police. This procedural fairness influence is five to six times as strong as the influence of outcomes (Tyler and Huo 2002).

2. *Procedural fairness is central to the reactions of people of all the ethnicities studied – Whites, African-Americans and Hispanics – to their personal experiences with the police.* Although minor differences in

the issues of concern within varying ethnic groups can be identified, the overall finding is that people of all groups want basically the same thing – procedural fairness – when dealing with the police. And, when we distinguish between quality of decision making and quality of interpersonal treatment it is the quality of interpersonal treatment that emerges as central in the personal experiences that minority group members have with legal authorities.

Procedural justice research findings make several points relevant to street stops. The first is that interactions with the police in which nothing legally important happens can have a strong influence upon the people involved. Even if a street stop does not result in an arrest or incarceration, it may still have a strong impact upon the views that the person has about the police. In particular, harassment or disrespect during the stop undermines legitimacy even if the duration of the stop is brief.

3. *The police will gain deference from the public and cooperation in their efforts to prevent and solve crimes when the public views their actions as legitimate*. People in encounters with legal authorities are more likely voluntarily to obey the law when they believe that authorities have the right to tell them what to do (Tyler et al. 2008). This research demonstrates that people typically are motivated to comply with the law more by the belief that the authorities with whom they are dealing are legitimate than they are by fear of punishment (Tyler 1997).

4. *Legitimacy promotes both compliance with both major and minor legal rules and cooperation with legal authorities, especially the police*. Accordingly, one implication is that when police generate good feelings in their everyday contacts, it turns out people also are motivated to help them fight crime (Tyler 2011; Tyler and Fagan 2008). All of this leads to lower crime rates. This also suggests that it is possible to deal with the public and even deliver negative outcomes such as a ticket or an arrest without undermining legitimacy, if the police conduct themselves in ways that people view as fair. Studies of street stops in New York City suggest that among those people who received a negative outcome but evaluated the police as acting through fair procedures, both legitimacy and willingness to cooperate increased following an interaction with the police. In fact, procedural justice is more important in building legitimacy than two other dimensions of citizen views of the police: citizens' evaluations of how effective police are in fighting crime, and the favorability for them of the outcome of a particular interaction or set of interactions.

The important lesson is that regulation and legitimacy do not have to be traded off. The police can enforce the law and build legitimacy

at the same time. The key is to frame interactions using the principles of procedural justice. People tend to place much more weight on *how* authorities exercise power as opposed to the ends for which that power is exercised – i.e. on the procedural justice through which the police exercise their authority. This is true across a wide variety of authorities. Researchers have studied public evaluations of police officers, judges, political leaders, managers and teachers, and the findings are consistent; conclusions regarding legitimacy are tied more closely to judgments of the fairness of actions than to evaluations of fairness, or effectiveness, of the outcomes (Tyler 2004).

5. *Procedural justice works through a set of distinct processes.* First is the importance of giving citizens voice in their interactions with police, or having a chance to tell their side of the story. Next is the management of targeting harm. Being singled out for reasons of bias – whether racial, or gender, or even neighborhood affiliation – corrodes legitimacy. A little transparency goes a long way. Third is being treated with respect and dignity. Dignity, apart from respect, is perhaps best observed in the breach. The persistence of indignities when no wrongdoing is detected can grow into fundamental problems of social exclusion, ushering in a profound sense of loss of recognition or respect and worthlessness. In his work on the self and the importance of recognition, Charles Taylor argues that our identities are deeply moral, that we understand ourselves as moral entities. (Taylor 1989). In Taylor's view, indignities confer a harsh status: those who suffer indignities have weaker moral claims to recognition and respect.

6. *Procedural fairness is understood by the way in which police signal their intent in a stop.* It matters whether police encounters are intended to produce a general social good (seeking justice) or to maximize punishment regardless of blameworthiness. Lind and Tyler (1992) explain that people care about procedural justice because it provides them with important informational signals that they view as relevant to their identities (Lind and Tyler 1988). For example, if a police officer treats a person rudely during an encounter, that person will process that treatment as information relevant to how legal authorities tend to view her, as well as the group to which she belongs. The conclusion will be a negative one.

In a study of the subjective experience of being profiled in any manner, Tyler and Wakslak (2004) show that the judgments that people make about police fairness affect whether the people dealing with the police believe they have been profiled in the first place. Those who believe the

police are neutral are less likely to feel profiled. Additionally, those whose encounters with police are characterized by respectful, polite treatment and acknowledgement of rights also are much less likely to believe they have been profiled. And, we hope not surprisingly at this point, those who trust the motives of police are less likely than those who do not to believe that profiling has occurred (Lind and Tyler 1988). In other words, people's inferences about why they have been stopped are based in large part on how they see the officers involved exercising their authority. If officers listen to people, explain the basis of their actions, treat them respectfully and acknowledge people's concerns in the situation, they are trusted and viewed as acting professionally. If not, they are viewed as acting based upon animus toward whatever potentially stigmatizable group the person is from (i.e. young, minority, male).

2.4   Emotion

This brings us back to the question of emotion. Even interactions with the police in which nothing legally important happens can have a strong influence upon the people involved when the interaction is conducted in a way that loads it with emotional freight. Even if a street stop does not result in an arrest or incarceration or use of force, it may still have a strong impact upon the views that the person has about the police and about the laws they enforce. When police make a mistake, they unlawfully deprive a citizen of her physical liberty as well as her dignity, in some cases risking a wrongful conviction if the mistake is neither detected nor corrected (Logan 2012).[14] From there, the harms of a criminal conviction can spiral, including economic, social and psychological costs (Pager 2007).

The mistake can also proceed to further harms as the situational dynamics unfold through a series of both social and symbolic interactions in which the ends are often contingent on decisions made during intermediate transactions that take place throughout an encounter (Ogletree 2012). In other words, someone can get hurt, if not threatened, when the encounter accelerates through a sequence of negative interactions and exchanges. The Henry Louis Gates incident is an important case study of the spiraling of an incident from a low-level indignity to a quite serious one in which both police and citizen incurred emotional baggage and stigma costs (Harcourt 2004; Ogletree 2012).

Putting it plainly, people get angry in these incidents, and the anger shapes their perceptions of all the elements of procedural fairness in the incident. Anger and arousal can skew both perceptions and behavior, so it is not unreasonable to assume that the person who believes she or he is

unfairly stopped or treated badly once stopped will form a negative view of the interaction and of the actors that led up to it. Anger aggregates across populations and through information markets in which knowledge about one person's interaction with police quickly spreads through a community. This can work in two ways, one that spreads the emotion of the negative interaction vicariously across populations who believe that their fates are shared (Fagan and Meares 2008); or as a deterrent that will place would-be offenders on notice that they may be subject to stop and search with little provocation. Certainly, the latter is one of the hopes of the SQF regime, and its potential deterrent effects are celebrated as one reason for the City's low crime rate (MacDonald 2013).[15]

We don't know how people aggregate these emotional experiences, nor how they weigh and balance their reactions when they have had both positive and negative experiences with police. Still, one may imagine that negative or harsh interactions may weigh more heavily emotionally than do positive ones (Skogan and Frydl 2004). That certainly seems to be the case when it comes to the outcomes of encounters, so it is reasonable to assume that the same imbalance will be evident for procedural evaluations. Since anger can lead to arousal, the emotional aftermath of a police encounter and the footprints it leaves will most likely reinforce the perception of legitimacy or illegitimacy to which the encounter gives rise. In other words, procedural justice represents not just a cognitive evaluation of how people are treated during an interaction but a vector of emotions that churns those perceptions and links them to other events in their cognitive landscape.

The other side of the coin should be obvious as well: positive interactions are reinforcing. They instill a positive view of the decision maker. They signal that the interests and values – even morals – of the decision maker are aligned with the subject of her or his authority – the citizen. This builds trust in the police and identification with the police. In our work, trust and identification are important contributors to legitimacy.

Emotion matters in thinking about the views of legitimacy that police officers develop based on their experiences both as workers in a complex workplace and as enforcers of law. In one case, they are the subordinates, while in the latter, they wield power and control over subordinate citizens. The emotions behind procedural justice and legitimacy apply to police officers in both these circumstances. For example, a recent experiment showed that under conditions of ambiguous or negative referent power, police may experience emotional anxiety and fear for their physical safety (Goff et al. 2010). In other circumstances, routine indignities in the police workplace also produce stress and undermine the perceived legitimacy of the institution in which they serve.

A different example shows that police may react to arbitrary power in the same way that citizens do when they are policed: with ambivalence about the institution, and resistance or hostility toward the rules of that institution. For example, research about police stress shows that the basic indignities of the police workplace – weak support from brass, arbitrary decision making, poor working conditions, irrational disciplinary decisions – are stronger contributors to stress among police officers than are the details of the job including witnessing injuries, deaths or other potentially traumatic events (Liberman et al. 2002).

Police who attempt to violate the rigid power lines of the subordinate or the authority under the SQF regime also suffer at the hands of their superiors, and experience the same alienation and anger as do citizens who are subjected to the seeming arbitrary or punitive actions of the police. For example, four police officers were disciplined for playing football with youngsters in the Webster Houses in the Bronx at a 2010 Fourth of July celebration. In addition to the substantive punishment of docking two days of vacation, the officers were publicly reprimanded in harsh and derogatory terms by their commanding officer on the scene (Robbins 2011).[16] Rather than cultivating legitimacy and respect, the supervising officer signaled to the residents in the area that a rigid line of authority separates police and residents, and that the command hierarchy rejects efforts to foster reciprocal identification of residents and police. More importantly, an incident like this illustrates how mundane everyday indignities of the police workplace – both when police are subordinates and also when they wield power – can be corrosive both for police officers and the communities they patrol.

The structure of these emotional responses to being both powerful and powerless lies in the idea of referent power and its role in the perception and internalization of legitimacy. Much of the legitimacy and procedural justice literatures focuses on the perspective of the subordinate or the less powerful person (Beetham 1991; Smith 2007). There has been little work on the reactions of those who are asked to enforce norms or policies that they may view as illegitimate, and how this shapes referent power. Referent power is usually assessed as a basis of social power that requires deference and respect from subordinates to produce compliance (French and Raven 1953). Without referent power, those in power may doubt their perceived legitimacy and fairness as they confront lower compliance and respect from those with subordinate power. The demands on officers under SQF, like the demands of a difficult policing workplace, may lead to ambiguous formations of referent power, both from police roles as subordinates and from their roles as wielding power.

3.   THE REGULATORY CHALLENGE

When we say that people tend to evaluate the conduct of legal authorities with respect to fairness as opposed to lawfulness, we are referring to these notions of legitimacy and procedural justice and to the relational connections between people and legal authorities that underlie them. The fact that people have a relational connection to legal authorities provides those authorities with an alternative basis for creating and maintaining their legitimacy that is not linked to the nature of the sanctions that they may use to enforce the law. So far, so good. It also provides a connection that creates a difficult and tense space between lawfulness and legality. This is the challenge for regulation: creating an institutional design where the pursuit of one dimension of policing works in a complementary and reciprocal way with the other that optimizes both. We offer two different and perhaps competing visions of a regulatory design that faces these challenges.

3.1   Adjusting the Thresholds for Police Contact

Terry stops are an important policing tool to prevent crime. But as that reliance skews, errors will increase and harms will pile up. This is not to say that the police should abandon the practice of *Terry* stops. *Terry* stops, after all, are lawful, and when carefully effected and narrowly applied, can have crime control benefits (Fagan 2016). What it does imply is that there is a trade-off to using this power too broadly.

The broad use of *Terry* stop power is encouraged by OMP regimes. Substantive criminal laws forbidding relatively harmless or benign behaviors can serve the police as a substitute for the authority to carry out *Terry* stops that require a higher level of suspicion (that 'crime is afoot') (Bowers 2014). When the criminal law is broadly enforced, and when non-penal law violations are integrated with the overall mission of street policing to detect weapons and control violence, then the likelihood increases that both benign and serious crimes will be part of the umbrella of suspicion. The burden of proof in those administrative violations or low-level offenses is intrinsically lower and places *Terry*'s fundamental rules at risk.

Imagine that we have two types of acts – a benign act and a harmful one. Intervening in the relatively benign act, such as a violation of an administrative code, seems to benefit almost no one – there are few public benefits to crime control, since the range of harm is private. We may stop someone from smoking in public, or drinking from an open container, playing loud music in a residential area, or jumping turnstiles on public transit. We may signal 'order' by enforcing these laws, but their relationship to public

safety is path dependent on the questionable relationship between theories of social or physical disorder and crime (Harcourt 1998; Sampson and Raudenbush 1999). This may seem like an efficient use of a scarce public good – policing – if 'hit rates' (arrests, seizures of weapons or contraband) turn out to be high. But the yield for public safety is low if these low-level crimes are not gateways to violence or major property crimes.

More important, the standard of proof for those low-level crimes or violations is intrinsically low (Kaplow 2012). Intervening in the benign act, then, distracts from intervening in the more harmful one. It is only in the shared space between benign and harmful acts in which it makes sense to intervene in the benign act at a lower standard of proof. The size of that shared space and the appropriateness of state actions in that space is part of a contentious debate (Risse and Zeckhauser 2004; Durlauf 2006; Harcourt 2007). The risks of intervening in the shared space are Type I errors, or false positives, if in fact the space is dominated by benign acts with little chance of ripening into more harmful acts. But the other error, ignoring potentially more serious harms in that shared space, creates a different risk. That is, the social costs from undetected harmful acts will outweigh any private or small-scale benefits from intervening more broadly in the benign acts. Figure 8.1 illustrates this simple regulatory algebra.

Intervening to stop the harmful offense, which requires a higher standard of proof, has much greater benefit, and carries with it a greater likelihood of success (in terms of efficiency). In other words, if we agree that not only bad treatment but high error rates create harms, then these errors are more likely the more we lower the standard of evidence we require before we ask police officers to act. If we raise the evidentiary bar,

x^T
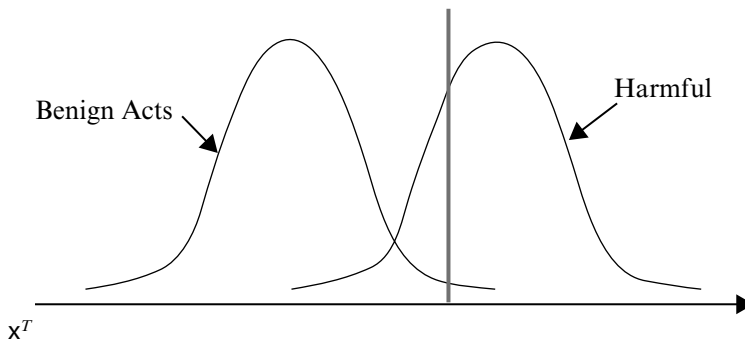
Source: Kaplow (2012).

Figure 8.1 Probability distributions for strength of evidence

we go after more harmful acts, make fewer mistakes, and are more likely to 'chill' these acts. What we must trade-off is a greater tolerance for the minor ones.

But the real return on this design is in the reduction of harms, and in turn a more effective production of legitimacy. Assume we have a low standard of proof – we make mistakes, we exact liberty and dignity costs from citizens, and harms accrue. The harms accrue for both harmful and benign acts. But if we raise the level of proof required for a stop, we will gain in the efficiency of detecting harmful acts at the cost of tolerating or missing more benign ones. But we will be more accurate and make fewer errors. The dividend here is that fewer harms accrue, using the Stuntzian framework of harm. And if we perform these stops thoughtfully and respectfully, we expand the legitimacy dividend. In economic terms, we sacrifice the largely private benefits of enforcing laws prohibiting benign acts, for the greater social benefits of (a) getting the truly bad guys, and (b) policing with legitimacy to further leverage citizen cooperation and compliance. This requires that we pay close attention to the standards of proof that we use to apply the police power of the stop, and to the manner in which we conduct that stop. Legitimacy is a benefit, a public good, just as is the security that police help create. That public benefit should be equally available to everyone as a matter of both equity and political accountability. And, in turn, legitimacy should be equitably distributed across groups and areas, as are the other benefits of policing.

3.2   Lawfulness and Legality: Toward Rightful Policing

There is another path to legitimacy, and this requires some resolution of a tense relationship between lawfulness and legality. Imagine four points on a compass, as shown in Figure 8.2. If we array lawfulness from east to west, with lawfulness to the east and unlawfulness to the west, naturally we want and expect police to be as far east as they could possibly be. In the east, police should not undertake to arrest someone (or even stop them) unless there is a statute or ordinance indicating that the conduct in question is unlawful. They should not move to arrest or engage a person unless they have gathered enough facts to constitute the constitutionally required level of suspicion that the Fourth Amendment specifies. Once an encounter has begun, the officer should endeavor to follow every general order (administrative rule) relevant to the specific context, and so on.

Now imagine procedural justice or legitimacy as running north and south on our compass. When police comport themselves in ways that confer dignity on those with whom they interact and otherwise treat people with respect, we will say they are 'headed north'. Examples here
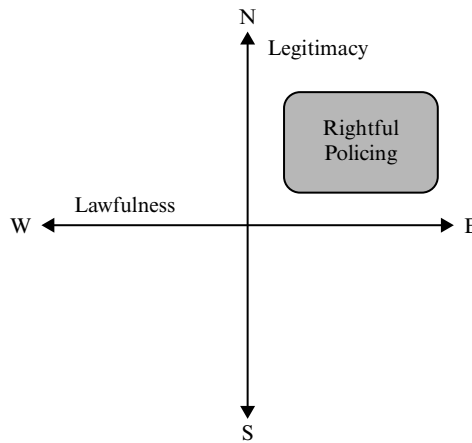
Figure 8.2   Lawful and legitimate policing

include high-quality interpersonal treatment (Tyler and Wakslak 2004; Tyler and Fagan 2008; Geller et al. 2014); offering citizens an opportunity to tell their side of the story during an encounter (Tyler and Huo 2002); and being transparent about the reasons for the encounters and explaining in advance what will happen during the encounter, raising the probability that a citizen will conclude that the officer's decisions are fact-based and neutral rather than arbitrary (Tyler et al. 2014). When an officer's conduct is inconsistent with these yardsticks, we will categorize that behavior as 'running south'.

Putting the two parts together, we see that the best place for police to be is the northeast. That is where one will find *rightful policing* – policing that is both lawful and procedurally just. We believe that a primary problem with street policing in urban cities such as New York, Chicago and Philadelphia is that they are examples of 'southeastern' behavior: police conduct that may be lawful, but also is perceived by the citizen on the other side of the encounter as deeply, deeply illegitimate, using the term the way we have defined it here.[17] If this is right, then it means that any attempted strategy to both describe and remedy a problem that exists in multiple dimensions will fail if the proposed strategy is unidimensional.

This, we claim, is the fundamental problem with a strictly law-based approach that is agnostic or indifferent with respect to procedure and the emotions that matter. The law has no capacity as it is written today to tell police *how* to arrest or stop someone in a way that will tend to support police legitimacy. More than this, police are rarely trained in norms that would support this disposition. Instead, rookie police officers

spend literally hours and hours reading law, learning *when* they are legally allowed to stop, arrest and search.[18] They are not correspondingly trained about how to conduct themselves so as to create and maintain their legitimacy in the community. How we think about police in the end is a matter not just of legality but of conduct. By optimizing both, we maximize legitimacy and, in turn, a socially and civically productive methodology for public safety. That's what's lacking right now in New York and other cities in many parts of the world.

NOTES

1. *Terry v. Ohio*, 392 U.S. 1 (1968). *People v. DeBour*, 40 N.Y. 2d 210 (1976). SQF is shorthand for stop, question and frisk, which is one of the many labels that both the City and other observers use to characterize the practice of *Terry* stops in New York.
2. The Appendix shows the levels of suspicion and the permissible police intrusions at each level under New York law. See, *People v. DeBour*, 40 N.Y. 2d 210 (1976). See, also, *U.S. v. Watson*, 423 U.S. 411 (1976); *Chimel v. Cal.*, 395 U.S. 752 (1969).
3. The unit's motto was 'We Own the Night'. It was formed in 1971 and had fewer than 100 officers until 1999.
4. Allegations that the officers made inflammatory cries of 'It's Giuliani time', celebrating the strong support for aggressive policing that then Mayor Giuliani had given to police, later proved to be unfounded.
5. In 1999, Police Commissioner Howard Safir increased the size of the SCU from 100 to over 300, and redeployed them from borough-wide commands to local commands in precincts and other smaller tactical units. Although precise and reliable data are not available for that year, it is safe to assume that the SCU spearheaded the sharp increase in the number of New Yorkers who had contact with those units. It is also not unreasonable, given the revelations in the *Spitzer* report two years later, that those encounters were unpleasant.
6. Crime also declined by 10 percent in 1992–93, a period when NYPD patrol strength expanded by nearly 5000 officers following the passage of the Safe Streets Safe City legislation by the state legislature. See, Judith Greene (1999).
7. The boundaries were set forth in *Terry* in 1968. Police were allowed to seize and detain a suspect based on their reasonable suspicion of a past or imminent future crime, and were allowed to conduct a patdown if the officer believed there was a threat to her personal safety.
8. Though it also could earn the person who is frisked some status as having gotten under the skin of the police.
9. Link and Phelan describe multiple mechanisms through which stigma can produce such consequences. Research on stigma in studies of animals and humans shows that exclusion and devaluation by one's peers can induce a stress response that wears on the body to produce pathogenesis. Efforts to avoid stigma can lead to coping orientations that backfire or harm, leading youth to reject the protection of the police or other authorities when such protection is needed.
10. There also are potential mental health consequences from stigma. If the stigmatization is strong, the individual who is stopped (especially those stopped multiple times through ongoing surveillance) is subject to the stress of anticipating that it could happen again at any time. Also, stigma can demoralize. Downward placement in a separate category can erode initiative and autonomy, making the stigmatized person feel that he/she does

not belong and is not the kind of person who can succeed in the world that the police protect. See, e.g., Link et al. (1989, 1997).

11. For an exception, see Thompson (1999).
12. These were cases where the suspected crime was either a weapons offense or a violent offense. See, Fagan (2010). Actions to ensure the safety of officers are fundamental to *Terry* doctrine as well as to New York case law. However, the circumstances where restraint is used, which amounts to 'seizure' in most Fourth Amendment case law, are narrowly defined. The use of restraints such as handcuffs when there is no indication of danger to the officer or other immediate threats to public safety, or of flight, is not sanctioned. See, for example, *People v. DeBour*, 40 N.Y. 2d 210 (1976) and the Appendix.
13. Additionally, we mean to emphasize the public feeling of obligation as opposed to personal morality. It is true that personal morality has been shown to be an important motivator of compliance. However, voluntary deference resulting from public legitimacy is also powerful –especially as compared to deference resulting from fear of the potential imposition of formal punishment. For the seminal work on this point, see Tyler (1997).
14. For example, many defendants in NYC plead out rather than enduring repeated court appearances over long periods of time to clear their names of minor misdemeanor charges such as trespass or possession of small amounts of marijuana. Those appearances often require missing work with attendant economic loss (Glaberson 2013; Levine and Small 2008).
15. 'The best thing for a person to do when being stopped is cooperate. Accept it as a fact of urban life', NYPD Commissioner Ray Kelly, March 2012.
16. The title of the website article refers to a recent incident where officers were videotaped dancing with sexual gestures during at the 2011 West Indian Day Parade on Labor Day. Those officers have yet to be disciplined. In the 2010 incident, Deputy Chief James McNamara, supervisor of the Bronx Housing Bureau, reportedly publicly and angrily chastised all four officers immediately following the incident.
17. Both Fagan (2010, 2012) and Rudovsky (*Mahari Bailey et al. v. City of Philadelphia*) have argued that many of the police stops in New York City and Philadelphia are, in fact, unlawful under our terms. We do not mean to gloss over this issue. Rather, we simply want to point out that it is likely that even if both cities are outliers compared to others regarding the lawfulness of the street encounters there, it remains true that the vast majority of the street stops in these two cities are lawful. And yet citizens are dissatisfied.
18. We canvassed several policing agencies across the country, including the departments in Boston, Chicago, New Haven and San Francisco. The number of hours rookies spend learning the law ranges from a high of 258 hours out of 1040 hours of total training in Boston (approximately 25 percent of training) to 98 hours out of a total 1184 hours of total training in San Francisco representing just over 8 percent of the total training hours.

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APPENDIX

Table 8A.1   Permissible actions by police officers during stops under
       People v. DeBour

Predicate	Permissible response
Level 1	Police Officer (P.O.) can ask non-threatening questions regarding name, address, destination and, if person carrying something unusual, police officer can ask about that. Encounter should be brief and non-threatening. There should be an absence of harassment and intimidation. P.O. can: • say 'STOP' (If not 'forceful') • approach a stopped car • touch holster P.O. cannot: • request permission to search • cause people to reasonably believe they're suspected of crime, no matter how calm and polite the tone of the questions
Level 2	P.O. can ask pointed questions that would reasonably lead one to believe that he/she is suspected of a crime. Questions can be more extended and accusatory. Focus on possible criminality. P.O. can: • request permission to search P.O. cannot: • pursue • forcibly detain
Level 3	P.O. can: • forcibly detain • frisk for weapons if in fear • pull car out of traffic flow • order defendant to lie on the ground • handcuff (for good reason) • pursue
Level 4	P.O. can arrest and search suspect