8-2021

Reimagining American Policing

Tom Tyler

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Current efforts at police reform focus on heightening the legal accountability of police officers when they engage in questionable behavior. While valuable, such reforms do not address the underlying problems in police organizations that lead to problems with the use of force. This paper highlights the desirability of shifting from a warrior culture, one built around gaining compliance through the threat or use of force, to a guardian- or service-oriented culture, one focused on gaining acceptance by building trust and confidence among people in the community. Beyond changing the dynamics of authority in police-civilian encounters, this new model of policing promotes a climate of reassurance within communities that promotes their social, economic, and political vitality. Instead of focusing on harm reduction via crime control, the police can have a positive role in helping communities develop their way out of crime. Taking up that role requires the police to move from a harm reduction model to a model based upon creating and sustaining public trust.

INTRODUCTION

On May 25, 2020, shortly after 8:00 p.m., Minneapolis police officers responded to a store clerk's allegations that a man had purchased cigarettes with a counterfeit bill. Officers approached George Floyd, a forty-six-year-old African-American, and demanded that he step away from his vehicle. After officers handcuffed Mr. Floyd, Derek Chauvin, a former Minneapolis Police Department officer, pinned Floyd to the ground for more than nine minutes. Despite Mr. Floyd's constant pleas, Derek Chauvin continued to press his knee into Mr. Floyd's head and neck. Floyd was pronounced dead shortly thereafter at Hennepin County Medical Center in Minneapolis.[1]

The next day, communities around the United States erupted once news of Floyd's death reached media outlets and videos of the altercation were spread online. Protests and demonstrations took place in cities throughout the nation as citizens expressed their outrage with the events in Minneapolis. While these protests were sparked by a single event, the sentiments that underscored the demonstrations had been brewing long before. The distrust of police felt by communities around the country, particularly communities of color, fueled the protests. As Spencer Grant, a young Black boy, recounted in a quote to the New York Times,

> I'm angry and I'm scared for myself, for my little brother, for my mother who works for the government, for my father who served in the military who is younger than George Floyd, I'm scared for my whole family. I'm not scared because I'm wearing black, I'm scared cuz [sic] they're wearing blue.[2]

Sentiments like those of Spencer Grant have inflamed calls for criminal justice reform. Systemic changes, such as changing legal standards, regulating the

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1. The N.Y. Times, *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Jan. 12, 2021, 10:57 AM), http://www.nytimes.com/article/george-floyd.html [https://web.archive.org/web/20210112170156/http://www.nytimes.com/article/george-floyd.html].

2. The Learning Network, *What Students Are Saying About the George Floyd Protests*, N.Y. TIMES (Apr. 14, 2021), https://www.nytimes.com/2020/06/04/learning/what-students-are-saying-about-the-george-floyd-protests.html [https://perma.cc/S3XG-ER3L].

use of force, making officers accountable (changing qualified immunity), and keeping a national database of fired officers have been demanded and are all valuable reforms for beginning to address the challenge of these problem officers.[3] However, the goal of this paper is to suggest that it is important to think beyond these immediate reforms, however useful, and talk about how to make basic cultural changes in police departments.[4] The forthcoming analysis will argue that it is important to think beyond these obvious fixes to consider more enduring reform.

The ramping up of police officer numbers and the focusing of policing strategies toward crime control occurred during an earlier era when America was in the midst of a wave of violent crime. During the period 1970–1990, America experienced high levels of criminal activity.[5] This included both violent and property crimes, such as burglary, leading to both widespread fear of crime victimization and to concerns about the damaging impact of crime and disorder on American cities.[6]

During these decades of crime waves, a focus on controlling crime by command-and-control models dominated the entirety of the of the criminal justice system. These models concentrate resources in the police and push authority out across communities through a projection of force and by heightening the perceived risk of being caught and punished for wrongdoing. In particular, the police monitored "suspect" communities in an effort to stop violent crimes and

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3.   *See, e.g.*, PHILLIP ATIBA GOFF, ELIZABETH HINTON, TRACEY L. MEARES, CAROLINE NOBO SARNOFF & TOM R. TYLER, THE JUST. COLLABORATORY, YALE LAW SCH. & CTR. FOR POLICING EQUITY, RE-IMAGINING PUBLIC SAFETY: PREVENT HARM AND LEAD WITH THE TRUTH: A FIVE-STEP POLICY PLAN FOR POLICING IN AMERICA (2020) (outlining an agenda for police reform); Seth Stoughton, *Evidentiary Rulings as Police Reform*, 69 U. MIAMI L. REV. 429 (2015) (proposing changing evidentiary rules to advance police reform); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (examining how qualified immunity undermines police accountability); Stanley A. Goldman, *Running from Rampart*, 34 LOY. L.A. L. REV. 777 (2001) (discussing the need for holding police officers accountable); David Ingram, *Politicians Have Expressed Interest in a National Police Database. One Already Exists.*, NBC NEWS: TECH NEWS (Oct. 9, 2020, 6:58 AM), https://www.nbcnews.com/tech/tech-news/politicians-have-expressed-interest-national-police-database-one-already-exists-n1242696 [https://perma.cc/B4ZV-BZVL] (outlining issues about which there is broad agreement regarding reform).

4.   *See* Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 338 (2011) (arguing for the need for a change in policing style).

5.   Lauren-Brooke Eisen & Oliver Roeder, *America's Faulty Perception of Crime Rates*, BRENNAN CTR. FOR JUST. Violent Crime In The U.S. (1960–2013) (Mar. 16, 2015), https://www.brennancenter.org/our-work/analysis-opinion/americas-faulty-perception-crime-rates [https://perma.cc/YQ2S-CGXS] (showing that the rate of violent crime increased from 1960 to 1990).

6.   PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE (2018).

arrest and punish criminals.[7] Thus, the latter twentieth century was a period of crime suppression via deterrence.

An important change in policing occurred at this time in response to rising crime levels. The police developed an increasingly proactive orientation toward crime, trying to prevent it rather than primarily solving crimes that had already occurred.[8] This change was supported by the use of metrics, such as information about where crime was occurring, which allowed the police to rapidly deploy officers in ways that addressed real-time crime issues.[9] Adopting the mission of preventing crime led to a multitude of preemptive policing models—variably labelled "proactive policing," "zero tolerance policing," "broken windows," "problem-solving policing,"[10] "focused deterrence," and increasingly, "predictive policing"[11] or "hot-spot policing."[12] The common feature of all of these approaches is that, rather than waiting for a crime to occur, the police establish a presence in the community and try to anticipate and intercept criminal activity.

An important aspect of proactive policing is the argument attributed to the influential broken windows model.[13] According to that model, there is a trajectory from minor crime to serious crime. On an individual level, people who commit minor crimes move on to commit serious crime, so intervening to address minor crimes is a preventative strategy. On the community level, if minor crimes are left unaddressed, then there is a general deterioration in the quality of neighborhoods, which also promotes serious crime. Hence, a key assumption shaping policing has been that by addressing minor crimes, the police have been preventing major crimes in the future. An example is the widespread practice of making arrests for marijuana possession. While minor drug possession is a crime, the justification for a police focus in this area is that such possession, if unaddressed, is a prelude to more serious criminal activity.

The focus on each jurisdiction's crime rate has also fueled the current policies and practices of the police. Today, police chiefs are held to account for

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7. MITCHEL P. ROTH, A HISTORY OF CRIME AND THE AMERICAN CRIMINAL JUSTICE SYSTEM 383–477 (Routledge 3d ed. 2019) (2005) (discussing the period between the 1960s and the end of the twentieth century).

8. Tom Tyler & Tracey Meares, *Revisiting Broken Windows: The Role of the Community and the Police in Promoting Community Engagement*, ___ N.Y.U. ANN. SURV. AM. L. (forthcoming ___) (describing the evolution of proactive models of policing).

9. Tom Tyler, *Police Discretion in the 21st Century Surveillance State*, 2016 U. CHI. LEGAL F. 579, 581 (2016) (outlining the evolution of police policies from broken windows to stop, question and frisk, including a discussion of police technology).

10. *Id.* at 593–96.

11. Tim Lau, *Predictive Policing Explained*, BRENNAN CTR. FOR JUST. (April 1, 2020), https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained [https://perma.cc/N6SC-RT72].

12. Tyler, *supra* note 9, at 598.

13. For more information on the broken windows model see George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/8LA2-E827].

the crime rate in their jurisdictions, irrespective of whether they catch and punish those who commit crimes.[14] Strikingly, today, success is not measured by crimes solved but rather by the number of crimes that occur. It is the crime rate, not the police clearance rate, that is politically important. As a result, in an effort to keep the crime rate low, the police recognize the need to enhance the policies through which they intervene proactively, something which has led to a series of ever-broader policies for police-initiated engagement with people in the community.

New York City is a good example.[15] The "broken windows" performance-based model encouraged the police to proactively target community "deviants" to show responsiveness to community residents' concerns about crime.[16] This was transformed into a "zero tolerance" model of policing, in which the police broadened their target to those in the community committing minor lifestyle crimes.[17] And finally, the police embarked on a general crime-suppression model in which they stopped broad segments of the community in search of criminal activity, such as the possession of weapons or drugs ("stop, question and frisk").[18] At each stage, a greater proportion of those in the community had involuntary contact with the police. As this proportion grew, the percentage of the people stopped who were committing no crimes when stopped also increased. In New York City, the vast majority of the people stopped by the police were not detained for any criminal violations, and among those who were, the major reasons of arrest were low-level crimes like marijuana possession.[19] The desire to keep crime rates low resulted in a broader police presence and increased non-voluntary interactions between officers and the community members they serve.[20]

This increased presence is not felt equally across all communities. Since ethnicity and poverty are correlated in our society and poverty leads to criminal behavior, implementing proactive approaches has meant that the police have had a particularly intensified presence in many urban communities of color.[21] This

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14.   Tom R. Tyler, Phillip Atiba Goff & Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 Psych. Sci. Pub. Int. 75, 96 (2015); Eisen & Roeder, *supra* note 5.

15.   For a discussion of these evolving police models, see Tyler, *supra* note 9, at 592–97.

16.   *Id.* at 593.

17.   *Id.* at 594–95.

18.   *Id.* at 596.

19.   *Id.*

20.   The suggestion that these practices controlled crime is undermined by the finding that when the police discontinued them the crime rate declined. *See* Amina Kahn, *In New York, Major Crime Complaints Fell When Cops Took a Break from 'Proactive Policing'*, L.A. TIMES (Sep. 26, 2017, 3:00 AM), https://www.latimes.com/science/sciencenow/la-sci-sn-proactive-policing-crime-20170925-story.html [https://perma.cc/S7JW-MGE3].

21.   *See* ANTHONY A. BRAGA & DAVID L. WEISBURD, POLICING PROBLEM PLACES: CRIME HOT SPOTS AND EFFECTIVE PREVENTION 191–98 (2010); Jeffrey A. Fagan, Amanda Geller, Garth Davies & Valerie West, *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, *in* RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 309, 312–14

proactive presence communicates the message that members of these communities are suspected of being criminals and need to be monitored and controlled. It is not surprising, then, that Black Americans have lower trust and confidence in the police than their White counterparts.

I. PROBLEMS WITH THE CURRENT MODEL OF AMERICAN POLICING

Today, there are widespread large-scale protests about the current style of American policing.[22] Unfortunately, such unrest has been part of a recurring cycle that begins with an instance of questionable police conduct often involving lethal force, followed by public outrage, and eventually promises of reform that do little to change daily police behavior. The lack of reform eventually leads to further questionable uses of force and more public outrage. This cycle has recurred for decades.

In light of this history, it is easy to see the desirability of any type of police reform. Certainly, trying to hold "bad apple" police officers more effectively accountable for their actions is one way forward. Some of the other reforms currently being pushed to address police accountability—a national database for bad officers, changing the qualified immunity standard, and requiring body worn cameras—are probably good ideas, and their widespread adoption would be a valuable reform. If these changes are adopted, is the policing problem in America addressed? A cultural view would argue no.

Consider the immediate issue of the police use of force. Studies show that most complaints are centered around a few officers who are repeat offenders.[23] That being said, the problem of the police use of force is not simply the issue of a few rotten apples among police officers.[24] As a first step it is, of course, important

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(Stephen K. Rice & Michael D. White eds., 2010) (discussing race and police stops); Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 345–46 (2014) (discussing the minority experience of recent policing).

22. Larry Buchanan, Quoctrung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/6LP4-5NXY] (discussing the large protests about policing); *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/ [https://perma.cc/9PYS-V3A4] [hereinafter PEW RSCH. CTR., *Majority*] (showing national shifts in public views about the police).

23. KENNETH ADAMS, GEOFFREY P. ALPERT, ROGER G. DUNHAM, JOEL H. GARNER, LAWRENCE A. GREENFELD, MARK A. HENRIQUEZ, PATRICK A. LANGAN, CHRISTOPHER D. MAXWELL & STEVEN K. SMITH, U.S. DEP'T JUST., USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 8 (1999) (estimating the rate of the use of force among the police); David Rudovsky, Opinion, *The Troubling Issues Regarding Police Use of Force*, REGUL. REV. (Feb. 27, 2017), https://www.theregreview.org/2017/02/27/rudovsky-troubling-issues-police-use-force/ [https://perma.cc/M2WP-76GL].

24. *See* Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017, 1024–27 (2020) (outlining the centrality of the use of force to the warrior culture underlying current policing). *See also* Kyle McLean, Scott E. Wolfe, Jeff Rojek, Geoffrey

to have effective mechanisms for responding to instances of the police use of force, and officers who behave with excessive force should be sanctioned and, when appropriate, fired or even jailed. Nevertheless, it is also important to recognize that the problems in American policing are deeper. While the lethal use of force under questionable circumstances catches the attention of the public, these events are the most extreme examples of problems that flow from the organization of policing in America, including its goals, strategies, policies, and practices.[25]

The deeper underlying issues in American policing need to be recognized and addressed. To do so, it is necessary to change the way the police define their jobs. In other words, society needs to alter what police officers view as being their mission. The few bad actors that are the focus of public outrage are outliers, but they are extreme examples of a style of policing that involves most police officers, shapes most interactions, and impacts most Americans. We need to change that style. Our focus should be on organizational and cultural changes that influence all officers. We need to think about altering the everyday practices of American policing.

The issue in American policing today is that all officers are trained in one skill set. They learn how to deploy force to compel compliance. The police are trained to be warriors.[26]

This skill set is a mismatch to most of the problems that officers deal with in the everyday course of their activities. Most of the problems they deal with do not involve violent crimes or dangerous criminals and do not call for a warrior approach.[27] However, officers are not trained in other skills that are more appropriate to such problems, like techniques for de-escalating conflict, creating empathy, and managing special populations such as the mentally ill and the homeless.

Additionally, urban neglect has become an increasing issue in recent years, with the federal government and many local governments lowering their support for social services in many American communities.[28] By default, the police have

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P. Alpert & Michael R. Smith, *Police Officers as Warriors or Guardians: Empirical Reality or Intriguing Rhetoric?* 37 JUST. Q. 1096, 1099 (2020).

25.   *See generally* Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847 (2014) (reporting on a survey of what the police do during the day).

26.   *Id.* at 867–68 (illustrating the tasks that police normally perform while on duty). Classes on the warrior model are discussed in The New Yorker, *The Police Trainer Who Teaches Cops to Kill*, YOUTUBE (Jun. 29, 2017), https://www.youtube.com/watch?v=ETf7NJOMS6Y&ab_channel =TheNewYorker [https://perma.cc/KRF8-6TFH].

27.   Quattlebaum & Tyler, *supra* note 24, at 1024–27 (outlining the tasks that the police perform).

28.   *See generally* PETER EDELMAN, SEARCHING FOR AMERICA'S HEART: RFK AND THE RENEWAL OF HOPE (Georgetown Univ. Press 2003) (2001) (outlining declining support for the disadvantaged); Rebecca M. Blank & Brian K. Kovak, *The Growing Problem of Disconnected Single Mothers*, *in* MAKING THE WORK-BASED SAFETY NET WORK BETTER: FORWARD-LOOKING POLICIES TO HELP LOW-INCOME FAMILIES 227 (Carolyn J. Heinrich & John Karl Scholz eds., 2009)

become the go-to agency for a variety of problems that could be better addressed through different skill sets. This has increased the number of situations in which the police are asked to address issues for which their crime-control mission does not train or equip them. At the same time that the crime rate has declined, the demand for social services has grown.[29]

Beyond not giving officers the skills they need to address many of the problems they encounter, the warrior style of policing makes everyday encounters worse because it introduces tensions into many situations where de-escalation is the most desirable course of action.[30] Officers define situations as involving command and control, and the police seek to establish dominance through the control of people and settings. Feeling dominated provokes anger and resistance, especially among those with low trust in the police.[31] Much of the recent discussion about policing has centered around minority communities where trust is low, and people in such communities are particularly likely to react negatively to feeling controlled. It is also broadly true of policing interactions with all members of the community. There are many situations that do not result in the police use of lethal force but which nonetheless are not managed as well as they might have been had the police had a broader set of skills for the issues and people involved. The warrior culture that pervades American policing is the root of many of its problems.

II. WHY NOW IS A GOOD TIME FOR REFORM

Today, crime in America is at record low levels.[32] Since the 1980s, the violent crime rate has consistently declined. If we consider the rate of two representative crimes—murder and burglary—we see that there was a peak in crimes around

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(detailing the lowering of government resources available to single mothers); LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA (1992) (outlining the decline in support for social services in American urban centers).

29. Occupational Outlook Handbook: Social Workers, U.S. BUREAU LAB. STAT., https://www.bls.gov/ooh/community-and-social-service/social-workers.htm [https://perma.cc/2SNE-LZAC] (last modified Apr. 9, 2021).

30. John A. Webster, *Police Task and Time Study*, 61 J. CRIM. L. & CRIMINOLOGY 94, 100 (1970); John Liederbach, *Addressing the "Elephant in the Living Room": An Observational Study of the Work of Suburban Police*, 28 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 415, 417 (2005) (observing the police to describe what they do during the day).

31. KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 153 (2009); *see also* VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 20 (2011) (explaining how policing is experienced by marginal populations).

32. Based upon survey responses collected by the Bureau of Justice Statistics, the violent crime rate declined seventy-four percent between 1993 and 2019. *See* John Gramlich, *What the Data Says (and Doesn't Say) about Crime in the United States*, PEW RSCH. CTR.: FACT TANK (Nov. 20, 2020), https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/ [https://perma.cc/YHF9-HLQQ]. Based upon reports from police departments compiled by the FBI, the violent crime rate declined forty-nine percent between 1993 and 2019. *Id.*

1980, but the crime rate today has fallen to levels found in the 1960s.[33] This holds true across major cities. Even cities like Chicago, which continue to be in the news for violent crimes, have much lower rates than they did in the 1980s.[34]

Declines in crime are important because they mean that crime is less of an issue on the public's mind. Appeals to rally the public around crime reduction are less compelling when crime is low, although the public still overestimates the amount of crime.[35] Being tough on crime is less important as a political image. Additionally, people are more open to considering changes in the criminal justice system.[36] As an example, the American Civil Liberties Union Campaign for Smart Justice conducted a national survey in 2017 and found "near-consensus support for criminal justice reform, including reducing the prison population, reinvesting in rehabilitation and treatment, and eliminating policies like mandatory minimums."[37] Further, only one in three Americans indicated that they believed that Black people receive fair treatment from the criminal justice system.[38] In the case of the police, a Pew Research Center survey conducted in 2016 found that 60% of Americans think that fatal police shootings of Black people reflect a "bigger problem,"[39] while a 2020 *Washington Post* poll of Americans found that this proportion had grown to 69% when asked in the context of George Floyd's

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33. For trends in the murder rate, see ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T JUST., NCJ 236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 2 (2011), https://www.bjs.gov/content/pub/pdf/htus8008.pdf [https://perma.cc/35AJ-GGRX]. For trends in the burglary rate, see HOWARD N. SNYDER, U.S. DEP'T JUST., NCJ 234319, ARREST IN THE UNITED STATES, 1980–2009, at 1 (2011), https://www.bjs.gov/content/pub/pdf/aus8009.pdf [https://perma.cc/M36W-5AB8].

34. Unfortunately, this crime reduction may be being undermined by recent events, such as a crime spike in 2020. German Lopez, *The Rise in Murders in the US, Explained*, VOX (Dec. 2, 2020, 10:35 AM), https://www.vox.com/2020/8/3/21334149/murders-crime-shootings-protests-riots-trump-biden [https://perma.cc/QN5D-JDYS]. The unanswered question is whether this spike was due to economic problems linked to COVID-19 or represents a trend for the future. *Id.* This spike notwithstanding, current rates of violent crime are still low in comparison to the earlier high-crime era noted.

35. Gramlich, *supra* note 32 (showing the public's persistent overestimation of crime risks even in an era of low crime).

36. Wesley G. Skogan, *Why Reforms Fail*, 18 POLICING & SOC'Y 23, 30 (2008); Christopher Stone & Jeremy Travis, *Toward a New Professionalism in Policing*, 13 J. INST. JUST & INT'L STUD. 11, 27 (2013) (discussing the possibilities and problems involved in trying to professionalize the police).

37. Press Release, Am. C.L. Union, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds [https://perma.cc/BKB9-29GF] (indicating public support for change).

38. *Id.*

39. RICH MORIN, KIM PARKER, RENEE STEPLER & ANDREW MERCER, PEW RSCH. CTR., BEHIND THE BADGE 5 (2017). For a discussion of this issue, see also Juliana Menasce Horowitz & Gretchen Livingston, *How Americans View the Black Lives Matter Movement*, PEW RSCH. CTR. (July 8, 2016), https://www.pewresearch.org/fact-tank/2016/07/08/how-americans-view-the-black-lives-matter-movement/ [https://perma.cc/6QHJ-MXTR] (discussing the willingness of Americans to support police reform).

death.[40] Additionally, the *Washington Post* survey found that 74% of Americans favored public protests about policing.[41] The June 2020 Pew survey found that 66% of Americans believe that members of the public should be allowed to sue the police for the excessive use of force (i.e., favored changing qualified immunity).[42] Public opinion seems to have undergone a clear shift towards favoring criminal justice reform.

Surveys suggest this is a time when Americans would like to see changes in the criminal justice system. A July 2020 Pew survey found that 92% of Americans believed that the police should be trained in nonviolent techniques, 90% believed that there should be a federal database of officers accused of misconduct, 75% favored civilian oversight boards, and 74% favored banning chokeholds/strangleholds.[43] These are all valuable reforms that address the immediate issue of police misconduct that have led to the demonstrations occurring in America today.

The current crisis in policing is an opportunity. What makes this a particularly important moment for policing is the lack of a political crisis concerning American crime rates. This is not to say that conservatives have not continued to express concerns about crime but that their case is less compelling. Appeals to law and order are more effective when people feel that there is a wave of violent crime. Our current climate allows us to raise fundamental questions about the meaning of democratic policing. This is also potentially a pivotal moment in criminal justice because historically low levels of crime are leading to greater openness to reexamining American models of policing. People disagree about what is good or bad in current policing models and what changes should be made, but there is broad recognition that policing needs to be reconsidered. Because people are less afraid of crime, they are more open to addressing the need for police accountability.

III. POTENTIAL SOLUTIONS

A. Reallocation of Resources to Social Services

One potential solution to the current policing problem is to reallocate resources to social services. The police could retreat from the field of social services and restrict themselves to the smaller task of controlling serious crime. It is important to control serious crime to maintain public safety, and the police are

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40. Scott Clement & Dan Balz, *Big Majorities Support Protests Over Floyd Killing and Say Police Need to Change, Poll Finds*, WASH. POST (June 9, 2020, 3:30 AM), https://www.washingtonpost.com/politics/big-majorities-support-protests-over-floyd-killing-and-say-police-need-to-change-poll-finds/2020/06/08/6742d52c-a9b9-11ea-9063-e69bd6520940_story.html [https://perma.cc/YD2G-SZPE] (outlining the openness of the American public to changes in policing).

41. *Id.*

42. PEW RSCH. CTR., *Majority*, *supra* note 22 (illustrating public opinion data shows public openness to change).

43. *Id.*

trained and equipped for this task. Protecting communities from violence is an important role, key to reassurance, and one that fits the police's current conception of their mission. What is different today is that there is substantially less violent crime.

The problem with restricting the police to a traditional crime-fighting role is finding the money to build social services. Such services need to be widely available so that when the police retreat, there is someone to deal with the problems they leave behind. In an era of social service decline, who will pick up the slack? The difficulty is that the police are frequently the best organized and most well-funded municipal agency in a community.

As crime has steadily declined in recent decades, police department funding has not declined. It has remained constant or even increased.[44] The mismatch on the organizational level is that municipalities are using high levels of funding to address low levels of crime.

This leads to the policy suggestion of reallocating resources away from the police to social services.

Neoliberalism is facing critiques today for its focus on market solutions to problems. However, one clear advantage of markets is that companies do not stay in business by continuing to provide a product that people do not need. Policing is different.

This disparity in funding suggests the potential desirability of considering the reallocation of resources to fund alternatives to policing. The reality of government today is that there are fixed and even declining levels of municipal resources available.[45] American cities may not be in a zero-sum game, but there is clearly a tradeoff among varying priorities. In such a setting it needs to be acknowledged that a decision to fund the police is, in effect, a tradeoff against decisions to increase support to education, health care, or social service agencies.

The initial response to any problem is to suggest that status-quo funding remains the same, while those areas that are not adequately funded receive more funding. This collides with the reality of limited public support for higher taxes and greater funding for local government. Surveys that ask respondents if they

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44.   *See generally* Quattlebaum & Tyler, *supra* note 24, at 1031 (comparing crime rates over time to police funding over time and discussing the implications of declining crime rates). *See also* Emily Badger & Quoctrung Bui, *Cities Grew Safer. Police Budgets Kept Growing*, N.Y. TIMES: THE UPSHOT, (June 12, 2020), https://www.nytimes.com/interactive/2020/06/12/upshot/cities-grew-safer-police-budgets-kept-growing.html [https://perma.cc/PF6Q-Q93E].

45.   City budgets have been generally struggling in the face of declines in federal support. *See* MICHAEL A. PAGANO & CHRISTOPHER W. HOENE, BROOKINGS METRO. POL'Y PROGRAM, CITY BUDGETS IN AN ERA OF INCREASED UNCERTAINTY (2018). This situation is worsening due to the current COVID-19 crisis. *See* Press Release, Nat'l League of Cities, New Survey Data Quantifies Pandemic's Impact on Cities: Municipal Revenues Down Twenty-One Percent While Expenses Increase Seventeen Percent (Dec. 1, 2020), https://www.nlc.org/post/2020/12/01/new-survey-data-quantifies-pandemics-impact-on-cities-municipal-revenues-down-twenty-one-percent-while-expenses-increase-seventeen-percent/ [https://perma.cc/VV4P-D786] ("On average, cities have seen revenues decline by 21% since the beginning of the pandemic . . . .").

support greater services and those that ask if people would be willing to pay higher taxes to receive greater services yield different responses.[46] People often want more services and at the same time want lower taxes.

We should begin from the community perspective and ask what the problems in a community are and how municipal resources can best be allocated to address those problems. This will inevitably involve some allocation of resources towards policing, but it might result in greater relative funding for social services, services which also fight crime because they lessen the reasons for committing crimes. However it is accomplished, by increasing allocations to social services now, we would be able to take advantage of the unique opportunity we have during this era of low crime to address the underlying causes of crime, rather than focusing on strategies of short-term crime control. Current strategies of policing focus on crime suppression. Long-term community development strategies focus on ameliorating the underlying conditions that lead to criminal activity. If this is not done now, an opportunity for long-term change will be missed.

B. *Building Trust in the Police*

The question of how much money should be allocated to the police only goes so far. Beyond that issue is the question of how people would like the police to deal with social order in their community. It is sadly ironic that the United States, a nation that claims to be devoted to democratic governance, has a long tradition of policing through force, which is a coercive strategy. That style of policing is not the product of a conscious and deliberate articulation of what Americans believe the connection between the police and the community ought to look like. Instead, the police have evolved through a series of informal arrangements for managing immediate problems of disorder. The police began as informal community night watchmen, served as slave catchers in the segregated South, and as ward boss assistants in Northern cities.[47] In all of these manifestations, the police have served the interests of local political and social elites and may or may not have been responsive to all the voices in the communities they patrol.

If we begin from the community perspective, the question is what role the police can and should play in the process of enhancing long-term community

46.   Jeffrey M. Jones & Lydia Saad, *U.S. Support for More Government Inches Up, but Not for Socialism*, GALLUP (Nov. 18, 2019), https://news.gallup.com/poll/268295/support-government-inches-not-socialism.aspx [https://perma.cc/R9UJ-7URY]; *Beyond Distrust: How Americans View Their Government*, PEW RSCH. CTR. (Nov. 23, 2015), https://www.pewresearch.org/politics/2015/11/23/beyond-distrust-how-americans-view-their-government/ [https://perma.cc/R8G6-QCFC].

47.   *See* Frank Olito, *Protests Against Police Have Broken Out Across the Country. Here's How Policing Has Evolved in the US Since its Beginnings in the 1600s*. INSIDER (June 2, 2020, 1:34 PM) https://www.insider.com/history-of-police-in-the-us-photos-2020-6 [https://perma.cc/HA6Q-X3CS].

well-being. One role is the traditional one of crime control. Another is to facilitate engagement in communities by creating a climate of reassurance and safety, which promotes the community's efforts to resolve its problems.

The common misconception that has shaped much of modern policing, and criminal justice more generally, is that by controlling the level of crime, the authorities build public trust. This has led the police to focus primarily on metrics of crime control, assuming that controlling crime will in and of itself build public support for policing. If, for example, the police stop one hundred people on the street and find one gun, that is viewed as a crime control success. The fact that ninety-nine people who were not breaking the law were stopped and searched is not relevant to that performance metric. The police act upon the notion that preventing crime leads to public support and ignore the issues inherent in the methods they employ to achieve that goal.[48]

The acceptance of the performance model by police authorities makes sense psychologically from their perspective. The model concentrates power and resources in the hands of the police, reinforcing their conception that policing involves the use of professional skills to manage crime. Recent psychological research on judgment and decision-making highlights how all people exaggerate their competence and their moral superiority.[49] This leads them to overestimate their capacity for making good decisions and managing problems. A top-down command-and-control model connects well with these cognitive "illusions." And, research shows that these biases are stronger among those in positions of power.[50]

The commonsense assumption that harm reduction via crime control builds popular legitimacy is not supported by evidence. This is illustrated by the finding that, while crime has dropped dramatically, the public's trust and confidence in the police has not risen.[51] Studies show this as well, finding that people's views about police effectiveness at managing crime are not major factors shaping trust in the police.[52] Crime today is twenty to thirty percent what it was during the 1980s.[53] Crime has steadily dropped. This is due to a combined effort of the police, private security forces, and groups within communities. However, trust in the police has not risen as crime has declined. In fact, trust in the police has not changed much since 1980.[54]

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48.   Tyler, *supra* note 9. The police have been primarily focused on achieving the goal of crime control, not on the influence of their tactics on trust in the police. *Id.*

49.   *See* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375 (2006).

50.   *Id.*

51.   Tyler et al., *supra* note 14, at 80–81.

52.   Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 534–35 (2003).

53.   Gramlich, *supra* note 32. This decline is documented by both the FBI reports and the findings of the surveys conducted by the government. *Id.*

54.   Tyler et al., *supra* note 14 at 80–81.

Public opinion surveys indicate that a substantial number of Americans continue to distrust their local police department and that this distrust is much higher in minority communities.[55] The actions of the police are often found to lower police legitimacy both among those they deal with and in the community more generally. Low trust is a problem because research suggests that distrust promotes criminal activity and undermines cooperation.[56] Leaving the current model of policing in place does not address this issue.

A challenge of the current style of policing is that, because it does not build the type of trust that would lead to self-regulation, there will always need to be a police presence. People do not voluntarily follow the law and cooperate in maintaining social order when trust is low. Instead, they respond to the threat of punishment and comply with laws when that threat is high.

An extension of this argument is that the current style of policing does not promote community development. America is in a period of low crime. This is the perfect opportunity to shift toward a focus upon addressing the underlying community problems of which crime is a symptom—problems such as inadequate job opportunities, poor schools, poverty, and poor health care. Central to addressing these problems is encouraging residents to identify with and engage in their communities socially, economically, and politically.

Studies show that the police can contribute to such efforts by helping create a climate of safety and reassurance.[57] However, the current style of policing does not do that. Police leaders say that "you cannot arrest your way out of crime,"[58] recognizing that the long-term solution to crime is more viable and vital communities. Current models of policing do not effectively pivot the police towards supporting efforts at engaging people in communities, so police resources are not being deployed in ways that facilitate this long-term goal. Again, this style of policing is self-justifying in that substandard social and economic conditions are incubators for crime, leading to the need for the police to control that crime.

What is to be done? There are several possibilities. One potential strategy is to repurpose the police so that they are more effective at building trust. The other is to downsize the police and reallocate municipal resources. In making this decision, it is important to consider whether the police can influence community development by using a different style of policing. Evidence suggests that the

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55.   Megan Brenan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, GALLUP (Aug. 12, 2020), https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx [https://perma.cc/ALD2-EHGK]; PEW RSCH. CTR., *Majority*, *supra* note 22; Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 POLICE Q. 322, 323–24 (2005) (comparing evaluations of the police by White and non-White respondents).

56.   *See* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCH. PUB. POL'Y & L. 78, 85–87 (2014).

57.   Schulhofer et al., *supra* note 4, at 358.

58.   Tyler & Jackson, *supra* note 56, at 80.

police can exercise their authority in ways that build trust.[59] Trust develops when the police exercise their authority through principles of procedural justice. Procedural justice involves the experience that people have when dealing with authorities. It involves their subjective judgment about whether or not the authority, in this case a police officer, exercised their authority through fair procedures.[60] The trust that flows from experiencing procedural justice, in turn, not only promotes compliance with the law but also motivates people in the community to engage with the police cooperatively and to involve themselves in their communities.[61]

One important step in changing policing is to change the conception of policing, moving away from officers defining themselves as warriors based within a police force to officers defining themselves as guardians housed in a police service. Central to this reimagining is shifting from a force-based style to legitimacy-based policing. Legitimacy is the property of an authority that leads people to accept and follow their directives and the laws they enforce. In popular literature, people often refer to legitimacy as trust and confidence.[62] And, as noted, legitimacy develops when residents either directly experience or indirectly observe procedural justice.

As noted, there was a high crime era during which police departments were primarily concerned with issue of harm reduction via crime control.[63] The beginnings in a shift in thinking about policing are found in a 2004 report from the National Academy of Sciences.[64] That report advocated the study of popular legitimacy as a key future focus for American policing.[65] The review detailed a body of evidence suggesting that the police are increasingly professional and that police departments are generally more effective at controlling corruption and managing crime. However, the report also noted that despite these changes in

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59.   *Id.*

60.   Studies of procedural justice find that people react to two distinct issues when evaluating the procedural justice of the police. Tyler et al., *supra* note 14, at 85–86. The first is whether the authorities make decisions fairly, which includes allowing people voice and making decisions neutrally. *Id.* The second is whether people feel fairly treated by the authorities, which involves both treatment with dignity and respect and showing evidence of consideration and concern for the people being dealt with. *Id.*

61.   *Id.* at 87–88.

62.   *See* Tyler & Jackson, *supra* note 56, at 78 ("[L]egitimacy is typically operationalized as (1) people's authorization of legal authority to dictate appropriate behavior and (2) people's trust and confidence that legal authorities are honest and act in ways that have citizens' best interests at heart."); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–7 (Princeton Univ. Press 2006) (1990); Tyler, *supra* note 49.

63.   ROTH, *supra* note 7.

64.   COMM. TO REV. RSCH. ON POLICE POL'Y AND PRACS., NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (Wesley Skogan & Kathleen Frydl eds., 2004).

65.   *Id.* at 329.

policing, public distrust in the police remained high, especially in Black communities.[66]

Around the same time, the highly influential Kennedy School of Government Executive Policing Sessions held a national forum on legitimacy in policing. It issued reports advocating legitimacy-based approaches under the general rubric of community policing.[67] Community policing strategies include police focus on how the community views the police, how the public perceives police policies and practices, and how to build cooperative relationships with people in the community.[68] At the core of the philosophy of community policing is the premise that effective policing is a result of developing strong and positive relationships between officers and the people in the communities they serve.[69]

The issue of distrust in the police received national visibility around the 2009 arrest of Harvard Professor Henry Louis Gates Jr. at his home by Police Sergeant James Crowley of the Cambridge, Massachusetts Police Department. The incident drew national and international attention, in part because the entire event seemed unnecessary. This incident became very visible because Professor Gates is well known and because President Obama became involved in the incident by making comments that were taken by many to support Gates. It is illustrative of policing problems associated with race in that members of the White and Black community expressed different views about who was responsible for the conflict—Professor Gates or Officer Crowley.[70] In the face of confusing facts, studies suggested that race influenced the public's views about who was at fault.[71]

Cambridge Police Commissioner Robert Haas responded to this incident by appointing an independent outside panel of experts to identify the lessons that might be learned from the incident, including lessons for police agencies across the nation. The final report of the Cambridge Review Committee was filled with references to the concepts of procedural justice and legitimacy. One issue addressed is how to achieve this goal without threatening police officer safety or crime fighting effectiveness.[72]

The members of the Cambridge Review Committee believed that "the encounter between Sergeant Crowley and Professor Gates resonated with many

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66. *Id.* at 252–90.

67. *See generally* Stone & Travis, *supra* note 36.

68. Tyler et al., *supra* note 14, at 88.

69. *See generally* COMM. ON PROACTIVE POLICING: EFFECTS ON CRIME, CMTYS., & C.L., THE NAT'L ACADS. OF SCIS., ENG'G, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES (David Weisburd & Malay K. Majmundar eds., 2018).

70. Tyler et al., *supra* note 14, at 89.

71. For details of this incident and the ensuing public controversy, see Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES (July 20, 2009), https://www.nytimes.com/2009/07/21/us/21gates.html [https://perma.cc/PQ8N-3SJJ].

72. CAMBRIDGE REV. COMM., MISSED OPPORTUNITIES, SHARED RESPONSIBILITIES: FINAL REPORT OF THE CAMBRIDGE REVIEW COMMITTEE 22–24 (2010) (discussing the circumstances leading to the arrest of Professor Gates and proposing reforms in police practices).

law enforcement officers and members of the public because it implicated the concept of 'legitimacy' in the field of policing, criminal justice, and other institutions that . . . exert authority over people."[73] The report recognized that residents inevitably form their own opinions about "whether they view the actions of an officer as measured or excessive, as impartial or discriminatory," or as fair or unfair.[74] In short, they will ask: Did the officer exercise his or her discretion in a fair manner? And, as the evidence presented here indicates, a key factor in determining whether the public considers police enforcement legitimate is whether police make decisions and treat people fairly ("procedural justice").

The Gates incident was important because it reinforced research showing that even a simple and brief encounter can influence legitimacy. One empirical study supporting this conclusion involved police behavior at a checkpoint in Australia that made stops to detect drunken driving. That study demonstrated that if officers followed a procedural justice based protocol in which they explained their stop policies, solicited driver input about police policies in the community, expressed concern for the community (saying, for example, "We do not like to have to go to homes and tell people that members of their family have been injured in a drunk driving accident"), and found ways to communicate respect (making statements such as "Thanks for your cooperation" and "Thanks for wearing your seat belt," etc.), these brief, two-to-five-minute encounters significantly increased perceptions of police legitimacy in the community.[75]

The highly visible and influential report about the Gates incident is one of the first discussions of legitimacy in policing on the national stage. It also highlighted a key issue in implementation: the effort to balance concerns of legitimacy with tactical and safety considerations. Once officers have assured themselves that someone with whom they are dealing is not a danger (for example, by searching them for weapons) or is not an active lawbreaker, they have an opportunity to build trust by explaining the reasons for their actions, showing appreciation for the resident's cooperation, and generally trying to leave the resident with a favorable view of the police and their actions. And, the research noted indicates why the police should want to pursue that goal: to enhance their legitimacy.

The key point is that officers need to look beyond the immediate goal of making appropriate law enforcement decisions to include the more general issues of building public support as an element of being a professional police officer. As noted, officers often view the goal of managing crime as their only concern when

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73. *Id.* at 22.

74. *Id.*

75. Tyler et al., *supra* note 14, at 90. For a detailed description of the study, see Lorraine Mazerolle, Emma Antrobus, Sarah Bennett & Tom R. Tyler, *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 33 (2013) (reporting the results of a randomized field experiment in which officers treated citizens with varying degrees of procedural justice).

dealing with people or communities. If officers follow the law and if their actions focus on crime reduction, they are still not considering all of the issues that they need to take into account. They need to be more sensitive to the impact of their actions on the popular legitimacy of the police.

At the federal level, under the Obama administration, the national Community Oriented Policing Solutions (COPS) agency held a series of meetings with police leaders invited to Washington, D.C. and advocated for legitimacy-based policing. One national association of police chiefs, the Police Executive Research Forum, had a plenary session on legitimacy, while an international association, the International Association of Chiefs of Police (IACP), had similar panels on the topic.

At one meeting of the IACP, then Attorney General Eric Holder gave a keynote address in which he said:

> [W]e can start by recognizing that compliance with the law begins not with the fear of arrest or even of incarceration—but with respect for the institutions that guide our democracy.
>
> A substantial body of research tells us that—when those who come into contact with the police feel that they are treated fairly—they are more likely to accept decisions by the authorities, obey the law, and cooperate with law enforcement in the future—even if they disagree with specific outcomes . . . .
>
> . . . Across the country, countless IACP members and their colleagues are applying groundbreaking research—in procedural justice, implicit bias, and truth-telling—to the jurisdictions they serve. I'm proud to report that the Justice Department is supporting this work through our COPS Office and the Office of Justice Programs . . . .
>
> In many places, these collaborative efforts—to provide training on procedural justice, to promote reconciliation, and to improve interactions with police and young people of color—are already showing tremendous promise.[76]

As the Attorney General noted, these efforts have been supported by government-sponsored grants from the COPS agency, the Bureau of Justice Assistance, and the Office of Justice Programs to design training curricula and conduct-demonstration programs. Those training curricula now include training for line officers, sergeants, and commanders. At this point, the psychological literature on legitimacy and procedural justice was the model being used to create the newest national-level model of policing. Most recently, the Department of

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76. Eric Holder, Att'y Gen., U.S. Dep't of Just., Attorney General Eric Holder Delivers Remarks at the International Association of Chiefs of Police Annual Conference (Oct. 21, 2013) (transcript available at https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-international-association-chiefs-police [https://perma.cc/C638-5T6X]).

Justice funded a six-city national initiative to implement these new models of training.[77]

There have also been court cases that recognize the importance of creating police strategies that build public trust and critiquing police practices that might undermine police legitimacy. When a federal judge in the U.S. District Court for the Southern District of New York limited police stops in New York City, the judge argued that:

> While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he [or she] leaves his [or her] home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the city, and distrustful of the police. This alienation cannot be good for the police, the community, or its leader[s]. Fostering trust and confidence between the police and the community would be an improvement for everyone.[78]

The U.S. Department of Justice filed a statement of interest in a New York City stop-and-frisk case and argued that overly aggressive policing tactics undermine public safety by reducing public willingness to cooperate with the police. The Department of Justice statement said:

> [T]here is significant evidence that unlawfully aggressive police tactics are not only unnecessary for effective policing, but are in fact detrimental to the mission of crime reduction. Officers can only police safely and effectively if they maintain the trust and cooperation of the communities within which they work, but the public's trust and willingness to cooperate with the police are damaged when officers routinely fail to respect the rule of law . . . . As systematic violations of civil rights erode public trust, policing becomes more difficult, less safe, and less effective. Therefore, if the Court finds any constitutional deficiencies exist in NYPD's stop-and-frisk practices, the implementation of injunctive relief would promote, rather than hinder, NYPD's mission of safely and effectively fighting crime.[79]

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77.   Eric Holder, Att'y Gen., U.S. Dep't of Just., Attorney General Holder Remarks Announcing Six Pilot Cities for the National Initiative for Building Community Trust and Justice (Mar. 12, 2015) (transcript available at https://www.justice.gov/opa/speech/attorney-general-holder-remarks-announcing-six-pilot-cities-national-initiative-building [https://perma.cc/TJR2-2KK5]).

78.   Brian Resnick & Nat'l J., *Why 'Stop and Frisk' Was Ruled Unconstitutional*, ATLANTIC (Aug. 12, 2013), https://www.theatlantic.com/politics/archive/2013/08/why-stop-and-frisk-was-ruled-unconstitutional/454425/ [https://perma.cc/9QTD-MZWV] (quoting Judge Scheindlin).

79.   Statement of Interest of the United States at 10–11, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y 2013) (No. 08 Civ. 1034) (citation omitted).

The culmination of these changes in conceptions of policing is the *The President's Task Force on 21st Century Policing*.[80] That report acknowledged this change in thinking about policing and suggested that building community trust in the police (i.e., police legitimacy) must be the first task of police forces (the first pillar of policing).[81] Their report made building trust and legitimacy the "foundational principle underlying the nature of relations between law enforcement agencies and the communities they serve."[82] The Obama administration also supported a six-city effort to audit departments and help them design their policies and practices to promote popular legitimacy.[83] This effort was evaluated and found to increase support among the residents of the communities involved.[84]

The core premise of the Task Force approach is that there needs to be a community trust bank. Building trust by treating a person fairly is a payment into that bank. This focus on popular legitimacy highlights a shift away from performance-based policing and towards legitimacy-based policing.[85]

1. Building and Maintaining Legitimacy: Procedural Justice

A large body of empirical evidence exists concerning methods for building and maintaining police legitimacy.[86] As already noted, these studies show that the primary issue the public considers when evaluating the legitimacy of the police and the courts is the fairness through which police officers and judges exercise their authority (i.e., procedural justice).[87] This literature suggests strategies for police policies and practices. It also makes clear that it is possible to successfully organize policing around principles of public legitimacy.

Because so much of the rhetoric of policing is built around the idea of public safety, it is important to emphasize that when people trust legal authorities, they

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80. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015) (proposing police reform).

81. *Id.* at 1.

82. *Id.* (describing legitimacy as the first pillar of policing).

83. *See generally* MEGAN QUATTLEBAUM, TRACEY MEARES & TOM TYLER, THE JUST. COLLABORATORY AT YALE L. SCH., PRINCIPLES OF PROCEDURALLY JUST POLICING (2018) (reporting the recommendations developed through this initiative).

84. *See* NANCY LA VIGNE, JESSE JANNETTA, JOCELYN FONTAINE, DANIEL S. LAWRENCE & SINO ESTHAPPAN, URBAN INST., THE NATIONAL INITIATIVE FOR BUILDING COMMUNITY TRUST AND JUSTICE 8 (2019) ("The second wave of surveys . . . yielded similarly negative perceptions of the police, but those views were markedly more positive than at baseline . . . .").

85. This theme continues in the Biden administration. A memo from Attorney General Garland released May 26, 2021, concerning efforts to reduce crime indicated that the first principle guiding the Federal strategy involves the need to "build trust and earn legitimacy" in local communities. Press Release, Dep't of Just., Attorney General Merrick B. Garland Announces New Effort to Reduce Violent Crime (May 26, 2021), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-new-effort-reduce-violent-crime [https://perma.cc/44MZ-69DU].

86. *See generally* Tyler et al., *supra* note 14 (analyzing and aggregating the findings of multiple research studies related to the legitimacy-based model of police authority).

87. *Id.* at 85.

are less likely to commit crimes. This effect is as powerful as people's estimates of the risk of being caught and punished for committing a crime. In other words, focusing on building trust does not undermine crime control. It changes the way that crime is reduced. Instead of fear of sanctions, people are oriented toward willingly cooperating with the police because they view that cooperation as promoting more viable communities. One example of that cooperation is the greater willingness to report crimes and testify in court.[88] An additional important advantage of trust-based policing is that it also encourages people to engage in their communities and promotes community well-being.[89]

A broad literature indicates that procedural justice shapes legitimacy and, either through legitimacy or directly, impacts people's compliance, cooperation, and engagement. Several studies demonstrate this basic connection.

Sunshine and Tyler reported the results of two surveys of New Yorkers.[90] The first was a mail study conducted in 2001 consisting of 586 respondents. The study found that both police legitimacy and the perceived likelihood of being caught if you break the law shaped compliance with the law.[91] Legitimacy and evaluations of police performance in managing problems in the community influenced cooperation. Finally, the willingness to empower the police to manage responses to crime was influenced primarily by legitimacy. Instrumental variables had a secondary influence upon compliance, cooperation, and engagement. Legitimacy was somewhat more influential with compliance, much more influential with cooperation, and the primary influence upon engagement. Legitimacy was most strongly responsive to procedural justice.[92]

The second study in the Sunshine and Tyler paper was a telephone interview-based sample of 1,653 respondents.[93] The primary determinant of compliance was legitimacy, and neither risk estimates nor judgments about police performance were important. The same was true for cooperation with the police. Empowerment of the police was primarily shaped by legitimacy and secondarily by evaluations of police performance. And, the primary factor shaping legitimacy was police procedural justice.[94]

Tyler and Fagan collected data on a panel of New Yorkers.[95] The first wave of interviews was in 2002 and involved the 1,653 residents discussed in Sunshine and Tyler. A second wave of interviews was conducted one year later and created

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88. 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, 236 (2008).

89. *Id.* at 250.

90. Sunshine & Tyler, *supra* note 52, at 513 ("Findings of two surveys of New Yorkers show that, first, legitimacy has a strong influence on the public's reactions to the police, and second, the key antecedent of legitimacy is the fairness of the procedures used by the police.").

91. *Id.* at 525–27.

92. *Id.*

93. *Id.* at 528.

94. *Id.* at 530.

95. Tyler & Fagan, *supra* note 88, at 244.

a sample of panel respondents (n = 830).[96] Factor analysis distinguished compliance and cooperation.[97] An analysis of cooperation indicated that legitimacy motivated helping the police and helping the community.[98] In the case of helping the police, neither crime conditions nor risk of punishment motivated cooperation.[99] Further analysis found that procedural justice was a central antecedent of legitimacy, with both quality of decision-making and quality of interpersonal treatment showing distinct and significant influences.[100]

Tyler and Jackson reported upon the results of a 2012 national survey of Americans.[101] This study was based upon a web-based questionnaire completed by 1,603 respondents. Legitimacy was an overall measure combining police, court, and law and included measures of obligation, trust and confidence, and normative alignment. It was found that legitimacy, risk of being caught, and police performance all shaped compliance;[102] legitimacy shaped cooperation; and legitimacy shaped identification with communities (which impacted social, political, and economic engagement).[103]

Tyler and Huo studied personal experiences and considered the antecedents of decision acceptance when people were stopped by the police and decision satisfaction when people called the police for help.[104] In both cases, the procedural justice of police actions shaped the willingness to defer to police authority and satisfaction with police responses to requests for assistance.

Tyler, Fagan, and Geller conducted a similar study of the personal experiences of young men stopped by the NYPD.[105] They found that procedural justice shaped legitimacy and influenced later law-related behaviors. Tyler expanded this analysis using panel data and showed that even when you control for prior attitudes, the procedural justice of experience influences post-experience legitimacy.[106] This is true both for increases associated with procedural justice and declines following unfair experiences.

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96. *Id.* at 244–45.

97. *Id.* at 247.

98. *Id.* at 250.

99. *Id.* at 251 tbl. 3.

100. *Id.* at 253, 254 tbl. 4.

101. Tyler & Jackson, *supra* note 56.

102. *Id.* at 85.

103. *Id.* at 85–86.

104. *See generally* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002) (reporting on interviews with people about their recent experiences with police officers and judges).

105. Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 763–74 (2014) (reporting on interviews with young men in New York City about their experiences with the police).

106. Tom R. Tyler, *Can the Police Enhance Their Popular Legitimacy Through Their Conduct?: Using Empirical Research to Inform Law*, 2017 U. ILL. L. REV. 1971, 1991–2004 (2017) (using interview data to test the impact of police behavior on police legitimacy and showing that fair treatment raises legitimacy).

MacCoun notes that, by now, these findings "ha[ve] been replicated [using] a wide range of methodologies (including panel surveys, psychometric work, and experimentation)."[107] Donner, Maskaly, Fridell, and Jennings reviewed twenty-eight studies of the police and concluded that procedural justice during police interactions with the public positively influences public views of police legitimacy and trust in the police.[108]

Two recent meta-analyses examined the procedural justice literature on the police and evaluated the impact of procedural justice on compliance and cooperation.[109] The studies found 196 effect sizes from ninety-five samples for compliance.[110] These were correlational studies, some of which were longitudinal. The results suggest that procedural justice influences legitimacy, and legitimacy influences compliance.[111] They also find that the direct link between procedural justice and compliance is weak.[112] In the case of cooperation, the studies reviewed 196 effect sizes from ninety-five samples.[113] The results indicate that procedural justice influences legitimacy and cooperation, and legitimacy also directly influences cooperation.

In the case of assessing the impact of police contact on later willingness to cooperate with the police, Mazerolle and colleagues created a combined measure of self-reported behavior summarizing ongoing compliance and future willingness to cooperate.[114] They evaluated five experimental studies that provided eight outcome measures.[115] Mazerolle and colleagues concluded that the results suggest that "the interventions had a large, significant, positive effect on the combined compliance and cooperation measure."[116]

Mazerolle et al. contained an extended meta-analysis on procedural justice effects, including examining police approaches that contain elements of

107. Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 171 (2005) (reviewing the literature on procedural justice).

108. Chirstopher Donner, Jon Maskaly, Lorie Fridell & Wesley G. Jennings, *Policing and Procedural Justice: A State-of-the-Art Review*, 38 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 153, 153 (2015) (reviewing the literature on procedural justice in policing).

109. P. Colin Bolger & Glenn D. Walters, *The Relationship Between Police Procedural Justice, Police Legitimacy, and People's Willingness to Cooperate with Law Enforcement: A Meta-Analysis*, 60 J. CRIM. JUST. 93 (2019); Glenn D. Walters & P. Colin Bolger, *Procedural Justice Perceptions, Legitimacy Beliefs, and Compliance with the Law: A Meta-Analysis*, 15 J. EXPERIMENTAL CRIMINOLOGY 341 (2019) [hereinafter Walters & Bolger, *Procedural Justice Perceptions*].

110. Walters & Bolger, *Procedural Justice Perceptions, supra* note 109, at 345.

111. *Id.* at 357–58.

112. *Id.* at 354.

113. *Id.*

114. *See generally* Lorraine Mazerolle, Sarah Bennett, Jacqueline Davis, Elise Sargeant & Matthew Manning, *Legitimacy in Policing: A Systematic Review*, CAMPBELL SYSTEMATIC REVS., Jan. 2013.

115. *Id.* at 30–33.

116. Lorraine Mazerolle, Sarah Bennett, Jacqueline Davis, Elise Sargeant & Matthew Manning, *Procedural Justice and Police Legitimacy: A Systematic Review of the Research Evidence*, 9 J. EXPERIMENTAL CRIMINOLOGY 245, 261 (2013).

procedural justice. In a review of community policing efforts that contain procedural justice elements, the authors found four studies exploring influence upon compliance/cooperation and report three significant relationships in the expected direction.[117] With restorative justice conferencing, they find four studies examining influence on compliance/cooperation and four significant relationships.[118] The authors concluded that procedural justice had positive effects upon perceived legitimacy, and that these jointly shaped self-reported compliance/cooperation.

2. Pivoting the Police Mission

The prior discussion has addressed issues of crime by focusing on the influence of procedural justice on legitimacy and the subsequent impact of legitimacy on two types of behavior: compliance with the law and cooperation with the police in addressing issues of crime. This assumes that the goal of the police is to minimize harm by reducing crime. The disagreement has been about police tactics. In this Section the goals of policing will be reexamined. Studies of policing suggest that it is possible for the police to redefine their mission in a way that gives them a valuable role in communities even in an era of low crime. The current police mission of controlling crime crystalized police goals and tactics during an era of high crime. This mission is less crucial during an era of lower crime.

It is possible today to focus more heavily upon the long-term goal of addressing the issues that underlie crime.[119] The best long-term strategy builds the social, economic, and political strength of communities, which lowers the motivations for committing crimes. Instead of beginning with the goal of crime reduction, discussions should begin with the goal of creating perceived public safety in the service of motivating community development. Such perceived safety can be linked to trust in the police, so building trust in the police can be one element in promoting community well-being.

How should the goal of trusted police forces helping troubled communities be achieved?[120] One approach is to diversify the type of officer who responds to calls based upon the nature of the problem. In particular, we could make greater use of unarmed officers. This would be beneficial because it would lessen the current tendency for every situation to be framed in terms of the use of, and possible resistance to, a force-based approach.

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117. Lorraine Mazerolle, Elise Sargeant, Adrian Cherney, Sarah Bennett, Kristina Murphy, Emma Antrobus & Peter Martin, Procedural Justice and Legitimacy in Policing 28 (Cynthia Lum & Christopher Koper eds., 2014).

118.   *Id.* at 29.

119.   *See generally* Tyler & Meares, *supra* note 8 (illustrating that police leaders recognize that long-term economic development is the best approach to crime control).

120.   *See generally* Quattlebaum & Tyler, *supra* note 24 (presenting four possible models for organizing policing).

The central challenge of operating police forces with diversely trained personnel is being able to dispatch the appropriate person to respond to a particular problem.[121] Making such an approach effective requires initially correctly identifying the nature of the problem and then having appropriately trained people available across shifts to respond to the problems that are reported. One advantage of modern police departments is that many of the problems they deal with are reported to them via calls, so there is the potential to match responders to problems. However, problems identified through patrol contact are more challenging. In the field, whichever officers are at the scene must, at least initially, deal with them.

There are a variety of other potentially helpful approaches including generally reeducating officers and changing the culture of police departments to provide all officers with skills built around de-escalation, empathy building, procedural justice, and implicit bias management.[122] It is important to move away from a warrior culture and toward a culture of policing with a guardian or service mission.[123] How should this occur? To make any cultural change effective, the police need to be trained and equipped with new tools. Their skill set needs to be broadened.

A change in the culture of policing can pivot the police away from the mission of harm reduction through crime control to a broader set of goals that include facilitating long-term community vitality by helping to manage community problems and, with that, addressing the underlying reasons for crime.

Perhaps the most important reason to value police legitimacy in reimagining the policing model is that when the police are trusted, this helps the people within communities more actively engage in their communities and work to promote the social, economic, and political well-being of their neighborhoods.[124] In the long-run, neighborhood vitality is the best weapon against crime and, more broadly, the best way to promote individual and societal well-being.

Even in an era of low crime, the police can play an important role in their communities. However, to play this role, they need to be viewed as legitimate, something that occurs when people feel that both themselves, and other members of their community, are treated fairly when they deal with the police.

121.	*See* S. REBECCA NEUSTETER, MARIS MAPOLSKI, MAWIA KHOGALI & MEGAN O'TOOLE, VERA INST. OF JUST., THE 911 CALL PROCESSING SYSTEM: A REVIEW OF THE LITERATURE AS IT RELATES TO POLICING 34–35 (2019) (outlining possible changes to improve the allocation of calls to officers).

122.	*See generally* Quattlebaum & Tyler, *supra* note 24 (presenting four possible models for organizing policing).

123.	*See generally* Kyle McLean, Scott E. Wolfe, Jeff Rojek, Geoffrey P. Alpert & Michael R. Smith, *Police Officers as Warriors or Guardians: Empirical Reality or Intriguing Rhetoric?*, 37 JUST. Q. 1096, 1096 (2020) (describing a shift in policing from a "warrior mindset" to a "guardian mindset" and outlining the implications of different models of policing).

124.	Tyler & Jackson, *supra* note 56, at 86.

Kochel studied the police in Trinidad and Tobago through interviews with 2,969 people in thirteen police districts and found that the nature of police-citizen interactions had an impact on "collective efficacy," a shared belief among residents that they could collectively address issues within their community.[125] Collective efficacy was strongly linked to judgments about the quality of police services, a combined measure which included satisfaction with services and judgments about whether the police are competent, respectful, capable of maintaining order, and willing to help citizens with their problems.[126]

Several studies on American communities also demonstrate that the police can play an important role in community development. Tyler and Jackson used data from a national survey in which 1,603 respondents completed an online questionnaire to examine the role of the police in motivating engagement in people's communities.[127] Their results demonstrated that the legitimacy of the police/courts facilitated political, economic, and social engagement. Legitimacy had a direct influence on community identification and social capital and indirectly influenced political and economic activity through its impact on community identification.[128]

Another example of this relationship is found in a survey of New Yorkers conducted by the Justice Collaboratory under the sponsorship of the Mayor's Office of Criminal Justice in New York City.[129] The results of this study of New Yorkers indicate that, as would be expected, higher perceived levels of neighborhood cohesion were connected with higher levels of economic, social, and political activity by residents. And when residents felt that their neighborhood was characterized by high levels of disorder, this perception undermined cohesion. These were forces occurring within neighborhoods, among their residents, and did not directly involve government.

Together, these studies show that the legitimacy of the police is an external factor that may help or hinder neighborhood forces shaping development. The results of the New York City study show that police legitimacy is linked to neighborhood cohesion, and through it, to desirable neighborhood activity. Why would this be true? High police legitimacy is linked to residents feeling reassured and secure, which leads people to be more willing to engage in their neighborhoods and work with each other and with local officials.

A core question about policing is whether it is, in fact, reassuring and supportive of the community. The answer depends upon how the police manage their relationships with the community. To facilitate development, the police need to act in ways that not only manage crime but also build trust among the residents

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125. Tammy Rinehart Kochel, *Can Police Legitimacy Promote Collective Efficacy?*, 29 JUST. Q. 384, 384, 393 (2012).

126. *Id.* at 402.

127. Tyler & Jackson, *supra* note 56, at 79, 82.

128. *Id.* at 86.

129. Tyler & Meares, *supra* note 8.

of the communities they police. If the police are trusted by people in the community, then policing is reassuring and is linked to identification with and engagement in the community. This engagement promotes economic, social, and political activity. This reorientation also benefits the police because it provides them with an important role in achieving a key twenty-first century goal: helping to build vital communities.

Building vital communities is a cooperative effort that needs to involve the police, other municipal agencies, and community groups. The degree to which the police can be constructively involved is linked to their willingness to adopt a new guardian/service role and to build the public trust needed to effectively implement that role. What does not make sense is to fund the current policing model at current funding levels to address a problem that is not currently a top priority in our society.

CONCLUSION

Fundamental reform in policing requires the type of changes that go beyond the current legislation on the police use of force. This is a moment for fundamental change. Why? First, because crime is low and the political climate is more open to change. Second, because municipal budgets are stressed and the costs of maintaining expensive police forces is salient, especially as evidence mounts that they may not be the only or even the best way to maintain social order. Finally, because there is evidence that there are viable alternative approaches to social order. Although it might seem completely unrealistic to push for broad change in the current climate, it is important to recognize the need for fundamental changes in policing at least as an aspiration.

What does any of this have to do with public safety? It is important for people to feel secure. Reassurance is central to engagement in one's community. However, discussions about safety too often begin by assuming the traditional model of policing and asking what the police need. The argument presented here suggests that we need to be asking how the police can change so that they are an answer to the question: What does the community need? The police can help communities because they provide security in a way that benefits communities not only through harm reduction by crime control, but also by facilitating the growth of vital communities.