

STREET STOPS AND POLICE LEGITIMACY IN NEW YORK

Jeffrey Fagan^a
Tom Tyler^b
Tracey Meares^c

I. INTRODUCTION

A. 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 stop and frisk (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 1994.² 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 caselaw³ for such encounters, known as *Terry* stops nationally,⁴ 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.⁵

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.⁶ There was a SCU in each of the five boroughs, and their deployment was supervised by Borough commanders using newly available real-time spatial information about crime trends. Still, not much was known about the units outside of the neighborhoods where they focused their patrols. There was little public discussion and

^a Professor of Law, Columbia Law School

^b University Professor, New York University

^c Walton Hale Hamilton Professor of Law, Yale Law School

¹ 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 Bratton and Knobler; Maple and Mitchell; Silverman; Smith and Purtell

³ *People v DeBour* 40 N.Y. 2d 210 (1976)

⁴ *Terry v Ohio* 392 U.S. 1 (1968)

⁵ *U.S. v. Watson* 423 U.S. 411 (1976) *Chimel v. Cal.* 395 U.S. 752 (1969). Appendix A shows the levels of suspicion and the permissible police intrusions at each level under New York law. See *People v DeBour* XXXX (1976).

⁶ The unit's motto was "We Own the Night." It was formed in 1971 and had fewer than 100 officers until 1999.

little visible reaction. While residents of the City's highest crime neighborhoods were aware of the SCU's aggressive and intrusive searches, not much was known outside those neighborhoods. In 1999, Police Commissioner Howard Safir expanded the SCU to over 300 officers.

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 shooting death 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.⁷ 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 their experiences with police. Evidently, the anger that had been simmering for nearly three years since the adoption of OMP strategies and the sharp increase in SQF.⁸

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. 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 at 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. After all, from the perspective of many New Yorkers, crime was falling fast, and it fell fastest in the City's

⁷ Allegations that the officers made inflammatory cries of "It's Giuliani time", celebrating the strong support for aggressive policing from then-Mayor Giuliani had given to police, later proved to be unfounded. The officers were subsequently convicted on criminal charges ranging from NY to obstruction of justice and making false statements. N are still in prison today.

⁸ 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 also is not unreasonable, given the revelations in the *Spitzer* report two years later, that those encounters were unpleasant.

highest crime neighborhoods.⁹ Those also were the areas with the highest concentrations of Black and Latino residents.¹⁰ 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.

B. 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 revealed 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 analyses¹¹ 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. 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.¹²

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 were unleashed toward the new policing in New York after Louima. Thirteen months after Diallo's killing, the March 2000 shooting death of Patrick Dorismond by undercover police officers in a reverse drug sting led to a third cascade of popular anger

⁹ Bratton and Knobler, *supra*.

¹⁰ Spitzer Report

¹¹ Andrew Gelman, Jeffrey Fagan and Alex Kiss (2007); Jeffrey Fagan, Amanda Geller, Garth Davies and Valerie West (2010). But see Ridgeway and MacDonald 2010

¹² Spitzer Report; Koszinewski

toward the new policing.¹³ 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 in 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 contested 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. 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.

A small number of studies have examined specific aspects of these strategies. Two studies focused on misdemeanor arrests.¹⁴ Two other studies examined the unique crime control effects of SQF.¹⁵ Others examined policing as a vector of tactics under a larger strategic initiative.¹⁶ Two studies compared New York’s crime decline to declines in other cities and failed to identify a comparative advantage.¹⁷ Zimring’s recent book¹⁸ 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.¹⁹ 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. This ambiguity in the social science evidence about street policing in New York has contributed to the ambivalence toward policing strategies, including in the communities that are most heavily policed and where crime rates have fallen most.

C. *Balancing Tests*

However important it may be to policy and perhaps in litigation, this cost-benefit

¹³ Cites on Dorismond and on Operation Condor

¹⁴ Rosenfeld et al, Corman and Mocan

¹⁵ Smith and Purtell(a), Smith and Purtell (b)

¹⁶ Jeffrey Fagan, Expert report in *Floyd et al v City of New York*, Reply Brief, December 2010.

¹⁷ Rosenfeld et al., Harcourt and Ludwig. See also, Judith Greene (1999).

¹⁸ Franklin Zimring, *The City that Became Safe*. New York: Oxford University Press (2011).

¹⁹ Crime also declined by 10% in 1992-3, a period when NYPD patrol strength expanded by nearly 5,000 officers following the passage of the Safe Streets Safe City legislation by the state legislature. See, Judith Greene, *supra*.

debate is not our concern in this chapter. The failure to persuasively 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 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 10 adult citizens over the age of 16, either on highways or in pedestrian encounters, across the U.S.²⁰ 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.²¹ 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.²²

The debate in New York joins this broader nationwide debate on 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.²³ For police officials, these debates affect how the police can manage street stops to make officers behave reasonably to and lawfully on the ground. We hope, as did the NAS panel on policing,²⁴ that police will be concerned in turn with whether their tactics produce legitimacy.

So, our concern in this chapter is the effects of SQF policing on public trust and confidence in the police, and whether SQF tactics build or undermine legitimacy. Our claim is that both the substance and procedure of how stops are conducted in New York have costs on 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 is an issue that competes 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

²⁰ Matthew Durose, Erica Smith and Patrick Langan, *Contacts between the Police and the Public, 2005* (NCJ 215243) (2007)

²¹ *Id.*

²² See, Tyler and Fagan 2008.

²³ Wesley Skogan & Kathleen Frydl (Eds.) (2004). *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE*. Washington, D.C.: National Academies Press.

²⁴ *Id.*

elsewhere in the U.S., given the general embrace of proactive policing among U.S. law enforcement agencies,²⁵ and the centrality of *Terry* stops as an essential tool of policing. For example, Kubrin et al suggest that proactive policing can reduce the incidence of robberies, a bellwether crime in the U.S. 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 longstanding racial grievances between minority citizens and police, as distrust has historically been and remains today much higher among minority group members.²⁶ Studies consistently show that African-Americans are 20-30% 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 (2007) found that African Americans were 29% less likely to express confidence that local law enforcement will enforce the law; 29% less confident that the police would not use excessive force when dealing with the public; and 30% 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.²⁷ As we show later in this essay, aggressive and proactive policing practices tend to reduce compliance and voluntary cooperation with law enforcement.²⁸ 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

²⁵ Kubrin et al (2010); Skogan and Frydl, *supra*.

²⁶ Bobo and Johnson (2004)

²⁷ c.f., Brunson and Weitzer, 2009; Gau et al., 2010

²⁸ Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. POVERTY L. & POL’Y 419, 426 (2007) (concluding that “...intensive frisks and needless arrests can often be a source of friction,” thereby “undermining the very sense of legal legitimacy they were designed to foster.”) *See also*, Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, MICHIGAN LAW REVIEW 106, 1193-1212 ((2008); Babe K. Howell, *Broken Lives from Broken Windows: the Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHG. 271 (2009).

police.²⁹ Because adult orientations toward the law are often formed during adolescence, these precursors of adult attitudes are crucial.

D. 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. In the final section, 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.

II. DIGNITY AND INDIGNITY IN ORDER MAINTENANCE POLICING

A. Cumulative Harms of SQF

The late Bill Stuntz, in a 1998 essay³⁰ 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.

²⁹ Jeffrey Fagan and Tom Tyler, *Legal Socialization of Children and Adolescents*, SOCIAL JUSTICE RESEARCH (2005); Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEG. STUD. 715 (2007).

³⁰ William J. Stuntz, *Terry’s Impossibility*, 72 ST. JOHN’S L. REV. 1216 (1998).

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 to not be stopped or searched.³¹ But privacy does matter, and it's 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 dignity of control and privacy.

Second is “targeting harm.” Targeting harm arises when a person, having been 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 out me of all people absent a valid and proper evidentiary basis? Why would s/he have a “hunch” that I am 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 falls almost always 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

³¹ 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.

targeted - of being singled out as a criminal, being stopped by the government in a public space also suggests public discounting of worth.³² 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.³³ The emotion may be compounded when the stop and frisk is conducted in public in front of peers and neighbors.³⁴

Moreover, the resulting stigma has potential consequences for mental health and behavior (Link and Phelan (2001: p. 367).³⁵ 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.) In the context of SQF policing, these components are likely to be observed through the process of identifying who will be frisked or searched. 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.

The third harm flows from the *racial bias* in the distribution of these incursions: the signaling of suspicion if not criminality on black citizens simply by virtue of being black or moving about in a black neighborhood. The racial distribution, over and above what any area difference in crime rates would predict, is a fact on the ground.³⁶ As a regulatory matter, recent data show that there are more stops per reported crime in minority neighborhoods than in White or wealthy areas.

³² David Harris, *The Stories*, MINNESOTA LAW REVIEW. Discuss the stop in *Wilkins v Maryland*.

³³ I. Bennett Capers

³⁴ Though it also could earn the person who is frisked some status as having gotten under the skin of the police.

³⁵ 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. Additionally 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. Efforts to avoid stigma can lead to coping orientations that backfire or harm. Anger at stigma's inherent downward placement might lead to a harsher police response leading to arrest, jail or physical harm.

³⁶ Gelman et al., 2007. Fagan et al., 2010; Fagan, Report in Floyd. But see Ridgeway and MacDonald, 2010.

When stops are racialized in these ways, the harm is further compounded by connecting to whatever racial grievances a person may hold based on prior experiences with discrimination. In other words, the compounding of harm derives from the sense that this is a form of state power that can be exercised principally against minorities, far more than it is against whites (and this perception holds even after Black citizens are reminded that serious crime rates are often higher in their neighborhoods).³⁷ The *Terry* court observed that body frisks are humiliating, but scholarly analyses of *Terry* over the three decades scrubbed race from its meaning.³⁸ It was not until the 1990s that the racial contours of police interdictions procedural 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 600,000 *Terry* stops in 2010, some force is routine. From 2004-10, there was physical contact in 23% of cases, and contact with restraint (beyond merely a placing of hands on the suspect) in 8% of the cases. Suspects are handcuffed in 3% of all stops, including cases where there was no suspicion by officers that a weapon might be present.³⁹ Frisks were made in 38% of stops where 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% 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.⁴⁰

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 reinforcing the predicate of suspicion that seems to have motivated an unjustified police interdiction.

B. Legitimacy and Procedural Justice

³⁷ Capers, *supra*.

³⁸ For an exception, see Anthony Thompson, *Stopping the Usual Suspects*, NYU L REV (1999).

³⁹ These were cases where the suspected crime was either a weapons offense or a violent offense. See, Expert Report, *Floyd v City of New York*, *supra*. Actions to ensure the safety of officers are fundamental to *Terry* doctrine as well as to New York caselaw. However, the circumstances where restraint is used, which amounts to “seizure” in most Fourth Amendment caselaw, 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, XXX (DeBour) and Appendix A.

⁴⁰ City Council testimony

Stuntz's discussion raises an important dimension to 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 in terms of the evidence on 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."⁴¹

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.)⁴² A robust body of social-science evidence from around the world shows that people are more likely to voluntarily obey the law when they believe that authorities have the moral authority as well as the legal basis to tell them what to do.⁴³ 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.⁴⁴

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

⁴¹ Skogan & Frydl (eds.) 297 (2004). David Beetham, *Legitimation of Power* (1991)

⁴² 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* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW*, 3-5 (1997).

⁴³ *See generally*, *Legitimacy, Criminal Justice and the State in Comparative Perspective* (Russell Sage, 2007 Braga, A., Fagan, J., Meares, T., Sampson, R., Tyler, T., & Winship, C., eds.) (exploring the impact of perceptions of legitimacy in criminal justice systems across the globe).

⁴⁴ Tom R. Tyler, *Why People Obey the Law*

fairness, or effectiveness, of the outcomes.⁴⁵ 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 a 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 officer's personal opinions and biases. Even if an officer is acting without bias, they may be perceived as making decisions unfairly by those they are dealing with and it is important for them 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 it reveals 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.

⁴⁵ See Tom R. Tyler, *Enhancing Police Legitimacy*, 593 THE ANNALS 84, 91 (2004) (making this point and collecting various studies.)

C. How Much Do Legitimacy and Procedural Justice Matter?

Research on legitimacy and procedural justice provides a set of consistent results on 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 include Blader and Tyler (2003), Tyler and Huo (2002), Tyler and Wakslak (2004), Bradford, Jackson & Stanko (2008), 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.*⁴⁶ 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 5 to 6 times as strong as the influence of outcomes.⁴⁷

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

⁴⁶ Tyler, T. R., & Huo, Y. J. (2002). *Trust in the law: Encouraging public cooperation with the police and courts*. New York: Russell Sage.

⁴⁷ Tom R. Tyler and Yuen J. Huo (2002). *Trust in the law*. NY: Russell-Sage.

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 to voluntarily obey the law when they believe that authorities have the right to tell them what to do.⁴⁸ 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.⁴⁹

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.⁵⁰ 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. And, 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

⁴⁸ See generally, *Legitimacy, Criminal Justice and the State in Comparative Perspective* (Russell Sage, 2007 Braga, A., Fagan, J., Meares, T., Sampson, R., Tyler, T., & Winship, C., eds.) (exploring the impact of perceptions of legitimacy in criminal justice systems across the globe).

⁴⁹ Tom R. Tyler, *Why People Obey the Law*

⁵⁰ Tom R. Tyler, *WHY PEOPLE COOPERATE* (2011); Tom R. Tyler and Jeffrey Fagan, *supra*.

judgments of the fairness of actions than to evaluations of fairness, or effectiveness, of the outcomes.⁵¹

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 – corrosive on 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 at the hands of when no wrongdoing is detected can grow into fundamental problems of social exclusion, where a profound sense of loss of recognition, respect and worthlessness follow. In Charles Taylor's work on the self and the importance of recognition, he argues that our identities are deeply moral, that we understand ourselves as moral entities.⁵² Denial of basic and essential recognition – or respect – means denial of the recognition of others of that moral status. In Taylor's view, indignities confer a harsh status: those who suffer indignities have weaker moral claims to recognition and respect.

Finally, 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. Tyler and Lind (1992) explain that people care about procedural justice because it provides them with important informational signals that they view as relevant to their identities.⁵³ 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 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

⁵¹ See Tom R. Tyler, *Enhancing Police Legitimacy*, 593 THE ANNALS 84, 91 (2004) (making this point and collecting various studies.)

⁵² Charles Taylor, *Sources of the Self: The Making of Modern Identity* (1989)

⁵³ See LIND & TYLER cited in note ____, *supra*.

likely than those who do not to believe that profiling has occurred.⁵⁴ 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 the officers listen to people, explain the basis of their actions, treat them respectfully and acknowledge people's concerns in the situation, they are trusted and viewed as acting professionally. If not, they are viewed as acting based upon animus toward whatever potentially stigmatizable group the person is from (i.e. young, minority, male).

D. 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, it may still have a strong impact upon the views that the person has about the police. When police make a mistake, they unlawfully deprive a citizen of her physical liberty as well as their dignity, risking a wrongful conviction if the mistake is neither detected nor corrected.⁵⁵ The mistake can also proceed to further harms as the situational dynamics unfold through a series of both social and symbolic interactions where the ends often are contingent of decisions made at intermediate transactions that take place throughout an encounter.⁵⁶ In other words, someone can get hurt, if not threatened, when the encounter accelerates through a sequence of 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.⁵⁷ These issues apply to police officers, not just citizens.⁵⁸ These indignities of the police workplace are as corrosive for police officers as they are in any other workplace.⁵⁹

The other side of the coin is 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

⁵⁴ *See id.*

⁵⁵ Wayne Logan, *Police Mistakes of Law*, Emory L. J. (2012)

⁵⁶ Ogletree, *Presumption of Guilt*

⁵⁷ *Id.* See also Harcourt, *Criminology and Public Policy* (2004).

⁵⁸ Akiva Liberman et al. (2007), *Routine Occupational Stress And Psychological Distress In Police*, *POLICING: AN INTERNATIONAL JOURNAL*. Research on 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.

⁵⁹ See, for example, Philip Atiba Goff, Liana Epstein and K. Reddy (2012), *Safe Because We Are Fair: How Cross-Deputization Jeopardizes Law Enforcement's Perceptions of Safety*. *PSYCHOLOGY, PUBLIC POLICY, AND LAW* (in press).

her or his authority – the citizen. This builds both trust in the police, and also identification with the police. In our work, trust and identification are important contributors to legitimacy.

III. 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 to 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.

A. 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. What it does imply is that there is a tradeoff 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.”) 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 crimes acts is intrinsically lower, and places *Terry*’s fundamental rules at risk.

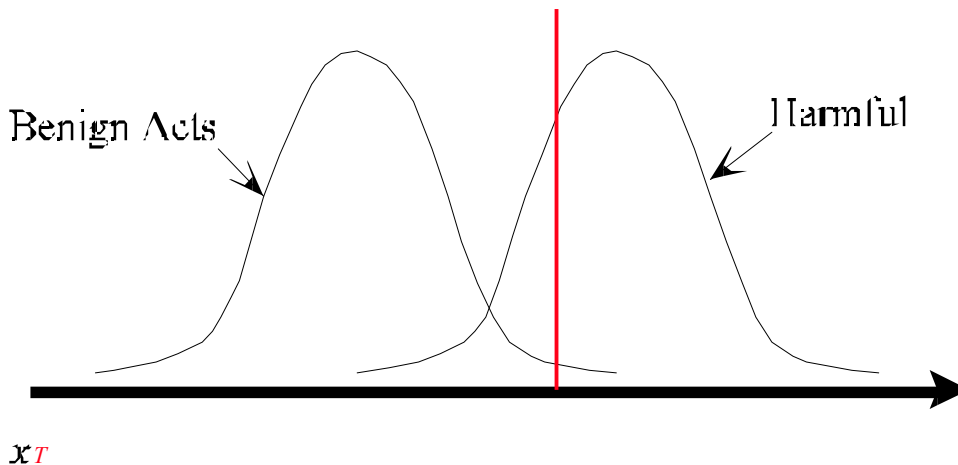
Imagine that we have two types of acts – a benign act, and a harmful one. Intervening in the relatively benign act, such as a violation of an administrative code, seems to benefit almost no one – there are few public benefits to crime control, since the range of harm is private. We may stop someone from smoking in public, or drinking from an open container, playing loud music in a residential area, or fare evasion 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.⁶⁰ This may seem like an efficient use of a scarce public good – policing – because “hit rates” may 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 there is intrinsically low.⁶¹ Intervening in the benign act then, distracts from intervening in the more harmful one. The social harms from undetected harmful acts will outweigh any private or small scale benefits from intervening in the benign acts. This is simple regulatory algebra.

Intervening in the harmful one, 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 compromise the standard of evidence that we require before we ask police officers to act. If we raise the evidence bar, we go after more harmful acts, make fewer mistakes, and are more likely to “chill” these acts. What we must tradeoff is a greater tolerance for the minor ones.

Probability Distributions for Strength of Evidence



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

⁶⁰ CITES.

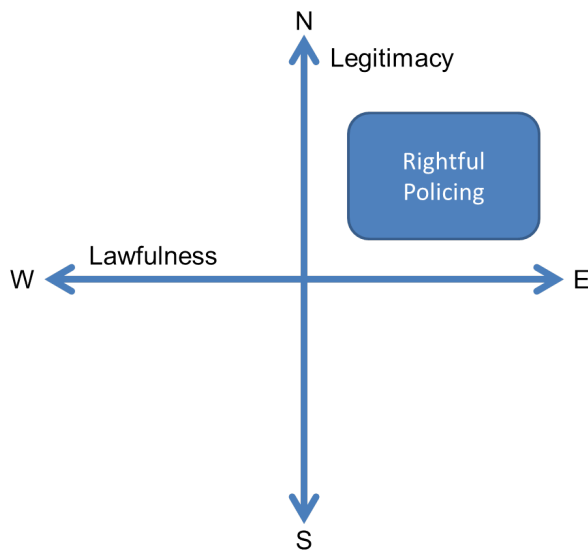
⁶¹ Kaplow, Burden of Proof, Yale Law Journal (in press)

mistakes, 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 do 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) doing 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 that 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.

B. 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 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.

Figure 2. Lawful and Legitimate Policing



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 include high quality interpersonal treatment;⁶² offering citizens an opportunity to tell their side of the story during an encounter;⁶³ 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.⁶⁴ 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 potential primary problem with street policing in urban cities such as New York and Philadelphia is that they are examples of southeastern behavior: police conduct that is very likely lawful, but also 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.⁶⁵ If this is right, then it means that any attempted strategy to both

⁶² Tyler & Wakslak, Tyler & Fagan

⁶³ Need cites for VOICE, probably Tyler & Huo

⁶⁴ Cite here

⁶⁵ Both Fagan and Rudovsky 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.

describe and remedy a problem that exists in multiple dimensions will fail if the proposed strategy is unidimensional.

This, we submit, 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.⁶⁶ 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.

⁶⁶ SHEBANI's information on training here.

**Appendix A. Permissible Actions by Police Officers during Stops
under *People v DeBour***

Predicate	Permissible Response
Level 1	<p>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> <p>PO can:</p> <ul style="list-style-type: none">• say “STOP” (If not “forceful”)• approach a stopped car• touch holster. <p>PO cannot:</p> <ul style="list-style-type: none">• 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>PO 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> <p>PO can:</p> <ul style="list-style-type: none">• request permission to search <p>PO cannot:</p> <ul style="list-style-type: none">• pursue• forcibly detain
Level 3	<p>PO can:</p> <ul style="list-style-type: none">• 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>PO can arrest and search suspect</p>