THE GOOD COP: KNOWING THE DIFFERENCE BETWEEN LAWFUL OR EFFECTIVE POLICING AND RIGHTFUL POLICING—AND WHY IT MATTERS

TRACEY L. MEARES*

INTRODUCTION

There are two dominant ways to evaluate the police. The first is whether their conduct comports with the law. The second approach assesses whether they are effective crime fighters.[1] The legal domain is the province of lawyers and law professors. Their briefs and scholarly writings depend usually on interpretations of constitutional law and assessments of police conduct with reference to that law. Sometimes other bodies of law, such as police agency administrative regulations, civil lawsuits, or the very law that authorizes police to act in the first place—substantive criminal law—are the subject. But the assumption no matter the body of law is that more lawfulness is the ideal goal. Effectiveness at crime fighting has become the other police evaluation metric. This yardstick is of newer vintage than lawfulness, and those who wield it are primarily social scientists—criminologists and economists —who attempt to find causal connections between various police practices and crime statistics. The theoretical model these social

* Walton Hale Hamilton Professor of Law, Yale University. Thanks go to Ben Grunwald for helpful research assistance and to Ben Justice and Tom Tyler for comments on an earlier draft of the lecture that became this Essay. I am also appreciative of comments and questions from students and audience members at the George Wythe Lecture at William & Mary Law School, who help me sharpen and deepen the discussion here.

1. *See, e.g.*, Michael D. Reisig, *Community and Problem-Oriented Policing*, 39 CRIME & JUST. 1, 1-4, 23-40 (2010); Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 483 (2009); Heather Mac Donald, Op-Ed., Fighting Crime Where the Criminals Are, N.Y. TIMES, June 26, 2010, at A19 (describing the New York City Police Department's use of the CompStat System as a strategy to achieve effective policing).

scientists employ typically assumes that offenders are rational actors who are persuaded to desist from criminal behavior when the prospect of formal punishment outweighs the benefits of criminal behavior.

This Essay will present a third view called "rightful policing." Rightful policing attempts to account for what people say that they care about when assessing police agent behavior specifically and police agencies in general. It is different from lawful policing and efficient policing in at least two ways. First, rightful policing does not depend on the actual lawfulness of police conduct. Instead, rightful policing depends primarily on the procedural justice or fairness of police conduct. Second, rightful policing does not depend on an assessment of police as ever more effective crime fighters, although it turns out that rightful policing often leads to more compliance with the law and therefore lower crime rates. Additionally, and critically, it is likely this third way helps us move toward police governance that is substantially, as opposed to rhetorically, democratic.

My Essay will proceed in four parts. First, I will lay out the two often-used metrics of police evaluation, lawfulness and crime-fighting effectiveness. Next, I will explain the theoretical foundation underlying the third way, which is what I am calling rightful policing. In the third Section, I will present an overview of empirical work that I have done in collaboration with my colleague, Tom Tyler, and others. This work demonstrates that ordinary people care a great deal about the theoretical precepts underlying rightful policing. In the Essay's last Section, I will conclude with some implications of both the theory and the empirical results for governing police in a way that is meaningfully democratic. In short, I will sketch out what it could mean to produce the *Good Cop*.

I. TWO VIEWS: MORE LAW OR LESS CRIME? NEVER THE TWAIN SHALL MEET

I begin with Weber, who famously said the state is the entity that "upholds a claim to the monopoly of the legitimate use of physical

force in the enforcement of its order."[2] Law, then, is what legitimizes Weberian policing. That law authorizes, circumscribes, and shapes police activity is what distinguishes police from vigilantes. According to this view, evaluating policing with reference to its lawfulness is one of the most important aspects of democratic society.[3]

Law suffuses policing. As Rachel Harmon of the University of Virginia has pointed out recently, the laws that regulate police conduct vary from international treaties to federal statutory and constitutional law to state constitutions, statutes, and regulations.[4] There are local ordinances and internal department administrative regulations, too. And these bodies of law do not even encompass those rules providing for police qualification and training, those pertaining to police management and organization, and laws regarding access to information about the police. There has been very little scholarship about the vast majority of these laws. The reason is that when many people think about lawful police behavior, they are referring primarily to contemporary criminal procedure, a muscular body of interconnected doctrines that tell police when they can interact with suspects on the street, what procedures they must follow before searching or seizing someone, how interrogations must be conducted, and what kind of authority they have to maintain public order.[5] Much of this law specifies remedies for rule transgression. It is, in other words, primarily about redressing the illegitimate exercise of power.

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2. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 154 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1964) (emphasis omitted). I refer to Weber's notion that police serve to effect the state's legitimate monopoly on physical force. For an engaging explication of this idea and how it relates to the development of the modern police officer, see Rubén G. Rumbaut & Egon Bittner, *Changing Conceptions of the Police Role: A Sociological Review*, 1 CRIME & JUST. 239, 269-70 (1979).

3. For this reason, legality is such a central concept in criminal law. For one of the best discussions of the role of legality, see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205-19 (1985) (discussing the justifications for the legality principle including separation of powers concerns, notice arguments, and discretion control).

4. *See generally* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 785, 795-808 (2012) (discussing the often-ignored bodies of law beyond constitutional amendments that regulate police activity).

5. *See id.* at 765-68 (explaining what Harmon calls the "conventional paradigm" of police regulation).

This last point is crucial. The dominant approach to thinking about police lawfulness is to assess it in terms of a trade-off between the risk of arbitrary or oppressive enforcement and individual rights.[6] The dominant approach does not usually focus on police effectiveness at reducing crime—a point to which I will return in a moment. Rather, the assessment of police in lawfulness terms almost always casts police as a necessary evil as opposed to a welcome utility or potentially critical mechanism for empowering communities in democratic terms.[7] In this world the ideal is always less policing.

What are the implications of lawfulness as a yardstick? When lawyers, legal scholars, and criminal justice practitioners observe what they consider to be the overexercise of state power in the form of stops and arrests, they move quickly to describe the problem as a legal one. New York City[8] and Philadelphia[9] provide ready examples. Members of the lawfulness tribe typically frame their observations with respect to constitutional law to describe police transgressions.[10] Arrests and stops become problematic because

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6. For one example criticizing the police lawfulness trade-off, consider the discussion by Meares and Kahan of the legal struggle regarding searches for guns in Chicago public housing. *See* Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong: The Paradox of Unwanted Rights*, *in* URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 3, 3-5, 20-21, 28-29 (Joshua Cohen & Joel Rogers eds., 1999).

7. *Compare* Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH L. REV. 299, 300 (2010) (discussing the decision in *Terry v. Ohio*, which characterized police as necessary despite their possible intrusion on individuals' rights), *with* Meares & Kahan, *supra* note 6, at 18-20 (describing a regime in which communities could democratically choose to allow what otherwise might be a limitation of individuals' constitutional rights in order to achieve safety in that particular community).

8. New York City cops performed well over 500,000 street stops in 2009, up from 313,000 in 2004. *See* DELORES JONES-BROWN ET AL., CTR. ON RACE, CRIME & JUSTICE OF JOHN JAY COLL. OF CRIMINAL JUSTICE, STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY 4, 19 (2010), *available at* http://www.scribd.com/doc/33806018/ Stop-Question-and-Frisk-Policing-Practices-in-NYC-a-Primer.

9. In Philadelphia, data for 2009 indicate that the Philadelphia Police Department made 253,000 pedestrian stops and 250,000 car stops. Given Philadelphia's population, these numbers yield an even higher per capita encounter rate than New York City's. *See* E-mail from Professor David Rudovsky, Senior Fellow, Univ. of Pa. Law Sch., to author (July 25, 2011) (on file with author).

10. Legal scholars and lawyers commonly reference the Fourth Amendment of the United States Constitution when looking to legal provisions to explain the wrongfulness of racial profiling. *See, e.g.*, Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278-87 (1998) (arguing that more stringent

they do not conform to the Fourth or sometimes Fifth Amendment principles that restrict and circumscribe these actions. If the constitutional violation is the problem, then the remedy, seemingly, is apparent. The architecture of law and rights both describes and solves problematic urban street policing.

The realities of street policing, however, tend to defy description in legal terms—especially when the relevant legal rubric is heavily dependent on constitutional law. Although it is true that various bodies of law, constitutional law among them, shape policing authority, it is also true that the exercise of police power takes place largely at the discretion of individual police officers. This is a point Kenneth Culp Davis made famous decades ago, but scholars still are much too quick to ignore it.[11] Consider that most police officers work alone and not under the direct gaze of a supervisor.[12] Supervisors rarely have the opportunity to learn about an individual officer's eight-hour shift (during which the officer is heavily armed) except through the formal reports an officer fills out if he or she happens to make an arrest. And arrests themselves are relatively rare events.[13] Police deal more with criminal suspects, homeless individuals, drunks, and prostitutes in potentially troublesome situations than they do with "ordinary citizens," so neither the police nor those they encounter have particularly strong incentives to reveal very much about their encounters. This means opportunities for corruption are higher than they might otherwise

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Fourth Amendment standards would address problems related to racial profiling of African American men on the street).

11. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4-5 (1969). The gist of Davis's argument was that statutory and judge-made law is overdeveloped in comparison to regulatory law with respect to policing and similar agencies. *See id.* at 18. Davis also argued, controversially, that the most serious police problem was getting police to do *anything*, as opposed to keeping them from doing bad things. *See id.* at 88-89.

12. *See, e.g.*, PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT 111-20 (2008) (discussing the realities of police discretion in an urban environment). *See generally* JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME 14-15, 21-22 (2002) (discussing everyday police tasks in the context of the policing of hate crime).

13. *See* Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 821-29 (2011) (reviewing studies of urban police workload and showing that patrol-and-stop activities are much more common than the execution of search and arrest warrants).

be.[14] On top of all of this, it is difficult to punish police officers who violate because agencies in many municipalities are subject to strong union rules that tie the hands of those who manage street cops.[15] Broad discretion allows police to shape, redescribe, and recategorize situations and contexts in ways that defy strictly defined codes, so that attempts to specify strict rule compliance seem somewhat misfitting.

Recently, the manner in which police manage their discretion has become a flashpoint in policing as departments have developed strategies based on the widespread use of stop-and-frisk approaches that bring officers into frequent contact with people on the street.[16] Increased police discretion has led to a series of public controversies over racial profiling,[17] zero-tolerance policing,[18] aggressive police

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14. *See, e.g.*, Darius Charney et al., Panel Discussion, *Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 CUNY L. REV. 57, 66-67 (2010).

15. *See* DARREL W. STEPHENS, HARVARD KENNEDY SCH. & NAT'L INST. OF JUSTICE OF THE U.S. DEP'T OF JUSTICE, POLICE DISCIPLINE: A CASE FOR CHANGE (2011) (exploring the implications of union power in police management); *see also* Alan Suderman, *Montgomery Attorney: Police Officers Get Light Punishments Thanks to Union*, WASH. EXAMINER (Mar. 19, 2012, 11:25 AM), http://washingtonexaminer.com/montgomery-attorney-police-officers-get-light-punishments-thanks-to-union/article/106625.

16. Many municipalities argue that stop-and-frisk policies reduce crime. *See* John Coté & Heather Knight, *Stop-and-Frisk Policy Might Cut Violence, Ed Lee Says*, S.F. CHRON. (June 27, 2012, 11:27 PM), http://www.sfgate.com/default/article/Stop-and-frisk-policy-might-cut-violence-Ed-Lee-3668653.php; Raymond W. Kelly, *Stop-and-Frisk Bill Imperils N.Y.: Ray Kelly Says Database Helps NYPD Protect Young Black Men*, N.Y. DAILY NEWS (July 13, 2010, 4:00 AM), http://www.nydailynews.com/opinion/stop-and-frisk-bill-imperils-n.y.-Ray-Kelly-database-helps-nypd-protect-young-black-men-article-1.468308; Mac Donald, *supra* note 1, at A19; Heather Mac Donald, *Stop & Frisk Facts*, N.Y. POST (May 21, 2012, 10:15 PM), http://www.nypost.com/p/news/opinion/opedcolumnists/stop_frisk_facts_rVuSm8oy OMhFdNe0PzGKsO; Ray Rivera & Al Baker, *Police Cite Help From Stop-and-Frisk Data in 170 Cases*, N.Y. TIMES, July 17, 2010, at A15; Michael Howard Saul & Sean Gardiner, *Kelly Shifts Policy on Stop and Frisk*, WALL ST. J., May 18, 2012, at A15; Kate Taylor, *Police Street Stops Hit a Record, Rising 14%*, N.Y. TIMES, Feb. 15, 2012, at A21.

17. *See, e.g.*, Al Baker, *City Minorities More Likely to Be Frisked*, N.Y. TIMES, May 13, 2010, at A1, A27; Al Baker & Ray Rivera, *Thousands of Street Stops by New York Police Were Legally Unjustified, a Study Finds*, N.Y. TIMES, Oct. 27, 2010, at A22; Chris Dolmetsch, *New York Police Lose Second Stop-and-Frisk Case on Appeal*, BLOOMBERG (July 4, 2012, 12:10 AM), http://www.bloomberg.com/news/2012-07-03/n-y-court-tosses-second-stop-and-frisk-arrest.html; Tamer El-Ghobashy et al., *Judge Clears Stop-Frisk Class Action*, WALL ST. J., May 17, 2012, at A19; Editorial, *Stop-and-Frisk Needs Reform*, PHILA. TRIB., June 24, 2011, at 10A; Kate Taylor, *Gay Rights Groups Are Joining Oppostion to Police Stops*, N.Y. TIMES, June 5, 2012, at A17. Critics have been trenchant, and some victims have filed suit alleging civil rights violations. *See, e.g*, Dolmetsch, *supra*; El-Ghobashy et al., *supra*; Editorial, *supra*.

18. *See* John Eterno, *Policing by the Numbers*, N.Y. TIMES, June 18, 2012, at A23; Sean

stops,[19] and covert surveillance.[20] Police and political leaders have defended their actions as necessary to reduce violent crime in cities,[21] and their arguments bring me to the second oft-used approach to evaluating police: whether or not they are effective at reducing crime.

Many readers might today take for granted the idea that police make a difference in crime rates, but this was not always so. The conventional wisdom, at least from the 1960s until the mid-1990s, was that police had very little impact on crime rates. David Bayley, in his 1994 book, *Police for the Future*, sums up this view nicely:

> The police do not prevent crime. This is one of the best kept secrets of modern life. Experts know it, the police know it, but the public does not know it. Yet the police pretend that they are society's best defense against crime and continually argue that if they are given more resources, especially personnel, they will be able to protect communities against crime. This is a myth.[22]

The idea that police can do little to impact crime became entrenched among scholars following the 1967 groundbreaking report of the President's Commission on Law Enforcement and Administration of Justice: *The Challenge of Crime in a Free Society*. That report detailed the relationship between so-called root causes and crime.[23] If crime was rooted in poverty and deprivation, then

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Gardiner, *Police Officer Sues, Alleging Quota System*, WALL ST. J., Feb. 24, 2012, at A17 (discussing how quotas may lead police officers to stop and frisk individuals when they otherwise might not); Thomas Kaplan, *Cuomo Seeks Cut in Frisk Arrests*, N.Y. TIMES, June 3, 2012, at A1.

19. *See, e.g.*, Baker, *supra* note 17; Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1, A17.

20. *See, e.g.*, Erica Goode, *Philadelphia Defends Policy on Frisking, with Limits*, N.Y. TIMES, July 12, 2012, at A11, A14; Rivera et al., *supra* note 19.

21. *See, e.g.*, Chris Francescani et al., *NYC Mayor Defends "Stop and Frisk" at Black Church*, REUTERS (June 10, 2012, 2:46 PM), http://www.reuters.com/article/2012/06/10/us-usa-newyork-stopandfrisk-idUSBRE8590CE20120610; Goode, *supra* note 20 (describing Philadelphia Police Commissioner Charles Ramsey's defense of the stop-and-frisk policy due to decreased gun violence). *But see* Joseph Goldstein, *Resistance to Prosecuting Stop-and-Frisk Arrests*, N.Y. TIMES, Sept. 26, 2012, at A21.

22. DAVID H. BAYLEY, POLICE FOR THE FUTURE 3 (1994).

23. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 17-18 (1967), *available at* http://ncjrs.gov/pdffiles1/nij/42.pdf.

what could police do to stop it? Of course, police could and should be responders for justice reasons. Offenders should be called to account for their behavior. But police fulfillment of that role did not necessarily lead to lower crime rates.[24] The view espoused in the Commission's report percolated for decades.[25] Scholars pursuing research into "police science,"[26] then nascent, often wrote of the police role in preventing crime; however, much of this research emphasized identifying and addressing the needs of troubled youth more than it promoted the notion that the patrolman on the street could make a substantial difference in the crime rate.[27]

The political economy of criminal justice likely also fueled Bayley's pessimism. The governmental units with resources, both political and financial, to address crime are state and federal rather than municipal. Governance and funding of policing are, of course, located at the local level.[28] Thus, until President Clinton put

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24. *See id.* at 25 (presenting the ironic paradigm that more formal police methods may actually lead to an apparent rise in crime rates).

25. The following quote is indicative:

> [T]he fact that the police deal daily with crime does not mean that they have unlimited power to prevent it, or reduce it, or deter it. The police did not create and cannot resolve the social conditions that stimulate crime. They did not start and cannot stop the convulsive social changes that are taking place in America. They do not enact the laws that they are required to enforce, nor do they dispose of the criminals they arrest. The police are only one part of the criminal justice system ... and the government is only one part of society. Insofar as crime is a social phenomenon, crime prevention is the responsibility of every part of society. The criminal process is limited to case by case operations, one criminal or one crime at a time.

Id. at 92.

26. *Id.* at 116.

27. *See* Walter A. Lunden, *The Theory of Crime Prevention*, 2 BRIT. J. CRIMINOLOGY 213, 226-27 (1961) (discussing a strategy relying again upon identifying troubled youth and "drafting" them into correctional corps—an approach in which potentially relevant police activities are notable due to their absence); August Vollmer, *The Prevention and Detection of Crime as Viewed by a Police Officer*, 125 ANNALS AM. ACAD. POL. & SOC. SCI. 148, 152-53 (1926) (suggesting that crime reduction for police was a relatively new and emerging idea practiced by a small number of departments); John E. Winters, *The Role of the Police in the Prevention and Control of Delinquency*, 21 FED. PROBATION 3, 3-4 (1957) (suggesting that police would more effectively prevent crime by getting involved in the identification and service of kids who showed signs of delinquency).

28. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 64-66 (2011) (pointing to the bifurcation between state and federal governments on the one hand and municipal ones on the other and explaining how this dynamic leads to poor funding and support of necessary police forces).

policing on the map in 1994 with his crime bill, there had been no natural opportunity to interrupt a crime control agenda dominated by criminal legislation and imprisonment.[29] The establishment during the Clinton administration of the Community Oriented Policing, or COPS, Office, with its mandate to distribute 100,000 police officers among local jurisdictions, as well as innovations in econometrics and in evaluating policing strategies, have upended David Bayley's conventional wisdom.[30] The question is no longer whether police can make a difference. We ask instead, "How much of a difference in crime rates can police make?"

The relationship between New York City's recent and dramatic reduction in the crime rate and the city's policing methods is today a very hot topic among scholars and others.[31] Crime in New York City has dropped as much as 90 percent over the last twenty years. Is the drop a function of innovative policing in the form of CompStat and aggressive stop and frisk, as some claim, or does it have more to do with changes in drug markets, economic changes, or changes in demography and the like? The new literature is voluminous, but it is worth reviewing a few highlights. One problem that historically plagued social scientists attempting to show that the increases in the number of police on the street could actually impact crime is the fact that governments usually deploy more police to areas with high crime rates. My former colleague, economist Steven Levitt of *Freakonomics* fame, seemingly broke this endogeneity problem in a well-known 1997 paper by using mayoral and gubernatorial elections as instruments, and he showed that increases in the size of police forces actually do result in lower crime rates.[32] Other crim

29. *See* Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 578 (1996).

30. *See* JEFFREY A. ROTH & JOSEPH F. RYAN, NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF: THE COPS PROGRAM AFTER 4 YEARS—NATIONAL EVALUATION 4 (Aug. 2000).

31. For a notable recent example, see FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 3-5, 100 (2012).

32. Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270, 286 (1997). I say seemingly because another economist, Justin McCrary, found that Levitt's results were caused by a programming error. *See* Justin McCrary, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime: Comment*, 92 AM. ECON. REV. 1236, 1236-37 (2002). However, later studies seem to confirm the causal effect Levitt originally attempted to establish. *See* Rafael Di Tella & Ernesto Schargrodsky, *Do Police Reduce Crime? Estimates Using the Allocation of Police Forces After a Terrorist Attack*, 94 AM. ECON. REV. 115, 130-31 (2004); Jonathan Klick &

inological research over the last couple of decades has shown that deploying police forces in geographically focused ways, such as hot spot policing, can have a significant impact on crime without resulting in displacement to other areas.[33] Indeed, sociologist David Weisburd has shown that this kind of policing can result in diffusion of benefits of crime reduction beyond the area of focused policing as opposed to displacement of crime.[34] Other scholars have demonstrated that strategies such as problem-oriented policing and community policing can be useful to address crime and the fear of crime.[35]

But there is one notable gap in the police effectiveness discussion: lawfulness is largely irrelevant to it. On occasion the rare social scientist might point to police law breaking as a potential "cost" to balance against the benefit of policing that effectively reduces crime.[36] But this happens only rarely. It is almost as if social scientists *presume* that policing takes place lawfully.

Correlatively, the lawfulness discussion proceeds as if police effectiveness is not only irrelevant but almost an anathema when it comes time to evaluate police. The party line here is that police adherence to strict dictates that constrain their discretion always results in more liberty for individuals, and the higher levels of crime that we might experience as a result of less policing is simply a price we pay for more freedom in society.[37] What this view ignores is that crime and predation among individuals can and does result in significantly less freedom for residents of high crime communities. Residents of high crime communities, for example, could and

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Alexander Tabarrock, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J.L. & ECON. 267, 277 (2005).

33. *See* ANTHONY A. BRAGA & DAVID L. WEISBURD, POLICING PROBLEM PLACES: CRIME HOT SPOTS AND EFFECTIVE PREVENTION 15-17 (2010).

34. *See* David Weisburd et al., *Does Crime Just Move Around the Corner? A Controlled Study of Spatial Displacement and Diffusion of Crime Control Benefits*, 44 CRIMINOLOGY 549, 584 (2006).

35. *See* COMM. ON LAW & JUSTICE, NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 84-85 (Wesley Skogan & Kathleen Frydl eds., 2004).

36. *See* David H. Bayley, Commentary, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 CRIMINOLOGY & PUB. POL'Y 133, 133-35, 145 (2002) (exploring this problem).

37. *See* Meares & Kahan, *supra* note 6, at 18-22.

often do see higher levels of policing as a way to achieve freedom as opposed to a way to limit it.[38]

II. THE THIRD WAY: RIGHTFUL POLICING

A third way to evaluate police is attentive to both lawfulness and effectiveness and captures important dimensions that neither of the prevailing modes of evaluation do. I call this approach "rightful policing." Rightful policing is grounded in the social psychological concept of legitimacy. Legitimacy in this context is positive rather than normative. My colleague and coauthor Tom Tyler has defined legitimacy in this way: 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 decisions and rules accepted and followed by others."[39] Note that in defining legitimacy in this way I am not offering a philosophical justification of why people *ought* to defer to authorities. My claim is descriptive in that I will explore the extent to which people *do* defer—or, at least say that they do.[40]

People systematically focus on a few dimensions when evaluating police (and judges and teachers, and so on). First, participation is an important element. People report higher levels of satisfaction in encounters with authorities when they have an opportunity to explain their situation and perspective on that situation.[41] Second, people care a great deal about the fairness of decision making by authorities.[42] That is, they look to indicia of decision-maker neutrality, objectivity and factuality of decision making, consistency in

38. *See* Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 830-32 (1998) (discussing community empowerment through law enforcement).

39. Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, OHIO ST. J. CRIM. L. 307, 313 (2009).

40. Additionally, we mean to emphasize the public feeling of obligation as opposed to personal morality. 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 (1990).

41. *See* Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 94 (2004).

42. *Id.*

decision making, and transparency.[43] Third, people care a great deal about how organization leaders treat them. Specifically, people desire to be treated with dignity, with respect for their rights, and with politeness.[44] Fourth, in their interactions with authorities, people want to believe that authorities are acting out of a sense of benevolence toward them. That is, people attempt to discern why authorities are acting the way they do by assessing *how* they are acting. They want to trust that the motivations of the authorities are sincere, benevolent, and well intentioned.[45] Together these indicia comprise a model of *procedural justice*,[46] which is the basis of legitimacy. 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 right to tell them what to do.[47]

The legitimacy account's dynamic is inherently social. Rather than being primarily concerned with outcomes and individual maximization of utility, legitimacy-based compliance is centered on individual identity and is relational.[48] People tend to seek a favorable social identity within the groups to which they belong. People also seek a favorable social status for their group vis-à-vis other groups. Psychologists Allan Lind and Tom Tyler explain that people

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43. *Id.*; *see* Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 255 (2004).

44. Tyler, *supra* note 41, at 94-95.

45. *See id.* at 95.

46. *See* Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 755-56 (2003) (finding support for a hypothesized four-component model of procedural justice wherein people are influenced by two aspects of formal procedures of the group—those that indicate quality of decision making and those that relate to quality of treatment—and additionally people are separately influenced by two aspects of authorities with whom they deal—the quality of the decisions authorities make and the quality of treatment they receive from authorities); *see also* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 131-32 (1988) (exploring Gerald Leventhal's six procedural justice rules, which are similar to those mentioned above); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115, 122 (1992).

47. *See generally* Tom R. Tyler et al., *Legitimacy and Criminal Justice: International Perspectives*, *in* LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 9 (Tom R. Tyler ed., 2007) (exploring the impact of perceptions of legitimacy in criminal justice systems across the globe).

48. *See* Tyler & Lind, *supra* note 46, at 140-43.

care about procedural justice because it provides them with important informational signals that they view as relevant to their identities.[49] 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 undoubtedly will be a negative one. Pride and respect, then, are much more important motivators of behavior than is formal punishment, for loss of status can occur without punishment.[50] Indeed, punishment can operate to enhance status.[51] Tyler and Fagan demonstrate that the police can give a person a ticket or even arrest her while simultaneously enhancing police legitimacy if they are respectful and fair to the person they are dealing with.[52] By affirming and enhancing a person's status within society, the police are giving that person something valuable—a positive sense of self and identity—that is more important to them than the valence of their outcome.

One implication of this is that when police generate good feelings in their everyday contacts, it turns out people are also motivated to help them fight crime.[53] We can expect all of this to lead to lower crime rates in communities. Importantly, safer communities are not the only important result of law enforcement authorities and other government representatives treating people with dignity and fairness. Another result is healthy and democratic communities. Amy Gutmann trenchantly observes, "We earn each other's respect as equal citizens in some very basic ways. We show ourselves capable of abiding by the results of fair procedures, honoring the rights of others, and supporting the passage of laws and public policies that we can justify to one another."[54] Policing in ways that the public

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49. *See* LIND & TYLER, *supra* note 46, at 230-37.

50. *See id.* at 158-59.

51. *See* Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445, 448 (1993).

52. *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 262 (2008).

53. *See* TOM R. TYLER, WHY PEOPLE COOPERATE 66-67, 73, 76-80 (2011) (explaining that procedural justice is the basis of cooperation that leads to more compliance); Tyler & Fagan, *supra* note 52, at 262-65 (same).

54. *See* Amy Gutmann, *Why Should Schools Care About Civic Education?*, *in* REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION 73, 74 (Lorraine M. McDonnell et al. eds., 2000) ("Fair procedures are essential to a healthy democracy.").

recognizes as legitimate is one of the many ways that legal authorities build and replicate strong government.

Rightful policing is also relevant to lawfulness as an evaluation mechanism, although the two dimensions are importantly not coincident. One way to see the connection is to imagine four points on a compass, as in Figure 1. 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 that person, 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 meet 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 or administrative rule relevant to the specific context, and so on.

Now imagine procedural justice or legitimacy as running north and south on our compass. When police comport themselves in ways that confer dignity on those with whom they interact and otherwise treat people with respect, we will say they are "headed north." Examples here include providing high-quality interpersonal treatment;[55] offering citizens an opportunity to tell their side of the story during an encounter;[56] and being transparent about the reasons for the encounter and explaining in advance what will happen during the encounter. The last of these examples, moreover, raises the probability that a citizen will conclude that the officer's decisions are fact based and neutral rather than arbitrary.[57] 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 cops to be is the northeast.[58] That is

55. *See* Tyler, *supra* note 41, at 91-93 (synthesizing and summarizing a wide range of research in this area).

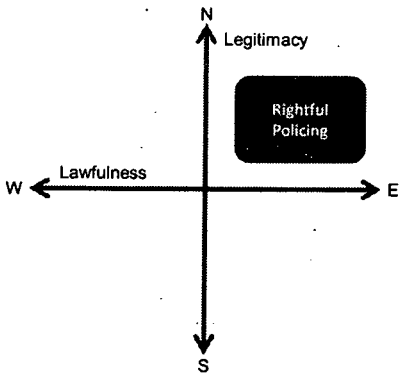
56. *Id.* at 94.

57. *See id.*

58. It should be obvious that these two dimensions are not completely orthogonal to one another. Consider that one of the procedural justice dimensions, concern for dignity and rights, clearly implicates notions of lawfulness. Thus, there is likely some interaction among characteristics. The important point is to see that law, as it stands today and possibly into the future, cannot capture all aspects of procedural justice. One suspects that legislated politeness, for example, ceases to be such. And, to the extent that the dimensions capture

where one will find *rightful policing*, which is policing that is both lawful and procedurally just.

Figure 1



The fundamental problem with evaluating police conduct solely with respect to lawfulness is that the law has no capacity, or very little 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.[59] More than this, police rarely are trained in norms that would support this disposition. Instead, rookie police officers spend literally hours and hours reading law to learn when they are legally allowed to stop, arrest, and search.[60] They are not correspondingly trained about how to conduct themselves so as to create and maintain their legitimacy in the community. The consequence is plain: any attempted strategy to both describe and remedy a problem that exists in multiple dimensions will fail if the proposed strategy is unidimensional.

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different aspects of what people care about, the disjuncture that we describe here will continue to exist.

59. *See* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141 (2002).

60. We canvassed several policing agencies across the country including the departments in Boston, Chicago, New Haven, and San Francisco. The number of hours rookies spend learning the law ranges from a high of 258 hours out of 1040 hours of total training in Boston, representing approximately 25 percent of the total training hours, to 98 hours out of a total 1184 hours of total training in San Francisco, representing just over 8 percent of the total training hours.

Along with Tom Tyler,[61] I have conducted an experimental survey designed to explore citizen assessment of police conduct and engagement with other citizens with reference to the dimensions captured in the figure above.

III. A LITTLE DATA[62]

In March 2008, we conducted a nationwide study of the influence of lawfulness and procedural justice in policing on public judgments about the appropriateness of police conduct and the need to discipline police officers, with the goal of improving our ability to identify key factors influencing public views about when police conduct is appropriate or inappropriate. Through the unraveling of interconnected individual, contextual, and situational factors, we sought to enhance our understanding of the salient pathways through which citizens make judgments about the appropriateness of police actions.

This study included two connected components to assess the influence of demographic, experiential, situational, and contextual factors on citizens' perceptions and evaluations of police actions. One component was a questionnaire that measured factors we hypothesized to influence how citizens perceive and evaluate police-citizen encounters. The second component was a factorial experiment that tested how citizens perceived and evaluated these types of encounters in manipulated vignettes that incorporated actual police video.

The study's two-part design allowed us to analyze people's perceptions of police authority on several levels. First, we were able to compare the effects of the past experiences of individuals, their social contexts, and personal histories with the influence of the specific context of an event and a description of its participants on how people understand and evaluate police-citizen interactions.

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61. Tyler and I worked on a subpart of the project. The coprincipal investigators on the entire project, *Legitimacy and Policing*, funded by the American Bar Foundation and Yale Law School's Ruebhausen Fund, are Anthony Braga, Jeffrey Fagan, Christopher Winship, Tom Tyler, and myself.

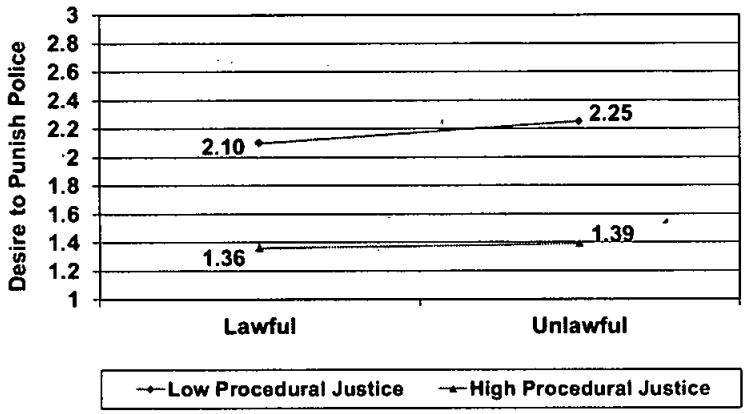
62. The following Section is a summary of research presented in Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *The Two Different Worlds We Live In: Lawfulness and Perceived Police Misconduct* (Yale Law Sch., Pub. Law Working Paper No. 255, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116645.

Second, we were able to compare how people in varying social positions—defined by characteristics such as age, race, gender, income, and occupation—evaluate the same incident when it is framed identically, and then whether their evaluations change when we provide alternate framing information in terms of past police-community relations, legality of the stop, and individuals involved. And third, we could ascertain whether the effects of group membership, past experience with the police and crime, and general perceptions of the police remain constant under all experimental conditions.[63]

In a subpart of the larger study, Tyler and I sought to determine how actual lawfulness of police behavior and perceptions of procedural justice influenced people's desire to punish the police officers for the conduct observed in the videos. We asked respondents to view three videos in random order. In each video the police exercised some level of authority over the person stopped, ranging from verbal commands to the use of physical force. Before viewing the clips, respondents read factual scenarios regarding the lawfulness of police actions in the video. For example, respondents were told prior to viewing a video that the officers stopped someone because they were driving "erratically" as opposed to "while they were driving appropriately and within the speed limit." Finally, after viewing the videotape respondents evaluated the procedural justice of the actions of the police, assessing, for example, whether the police listened to the person stopped; whether they acted neutrally; whether they were respectful; and so forth. Respondents also evaluated whether the police had engaged in wrongdoing and whether they should be punished.

63. A critical feature of the study was to vary the order in which respondents completed these components. That is, one half of the respondents completed the questionnaire first, and the other half completed the experimental component first. Given the large sample (1361 participants), this allowed us to assess whether respondents who completed the questionnaire first were primed by exposure to questions that might have influenced their evaluations of the vignettes in the experimental component.

Figure 2. The influence of lawfulness and the perceived procedural justice of police conduct on the desire to punish police officers. All videos.



To analyze the responses, we divided the subjects into two groups —one high procedural justice and the other low. Given that we provided to our respondents scenarios that were either lawful or not, we could assess the relative extent to which fairness, or lack of it, and lawfulness, or lack of it, affected the extent to which respondents believed police deserved to be punished. The average level of punishment suggested for the police could then be assessed within each group. Figure 2 shows such an analysis that combines results across the three videos.[64]

In this graph, the rating moves closer to 3 as the respondent's preference for punishment increases. The graph demonstrates clearly that procedural justice is a major factor in that determination. When procedural justice is high, punishment preferences are almost one full point lower than they are when procedural justice is low. In contrast, the distinction between the lawfulness conditions barely registers. Note that in both the low and high procedural justice conditions, moving from lawful to unlawful has almost

64. The numbers shown combine all three videos. The videos contained three lawful conditions (lawful, unlawful, and no information), but only the lawful and unlawful means are shown. The perceived procedural justice scale was divided at the mean to form two categories. The scale runs from 1 to 5. High scores indicate a strong desire to punish the officers involved. The entries are the mean for each group.

no impact on punishment preferences. The lines basically are flat. These basic findings confirm the intuitions presented in the rightful policing compass laid out above in Figure 1:

> 1. People's ordinary intuitions about rightful police behavior do not comport with lawfulness, at least as captured by constitutional law.
> 2. A two-dimensional view that accounts for lawfulness *and* fairness is necessary to bridge long-standing gaps between policing agencies and communities.

The second point in particular has implications for police governance—especially governance through law.

IV. LOOKING FOR THE GOOD COP

Police are creatures of law and are trained in it. Police are not everyday lawyers.[65] They strive to conform their behavior to a set of norms and scripts heavily influenced by formal law. The bifurcation we see on the spectrum of evaluations that ordinary people make regarding police behavior represents a social psychological disjuncture in police-citizen engagement that is damaging to citizens, counterproductive for policing agencies, and ultimately inconsistent with the crime reduction project that is critical to so many cities today. As the research on procedural justice I outlined above suggests, police and ordinary citizens live in two different worlds with respect to the law that governs the former, and this is a situation that is likely to result in ordinary citizens being alienated from the very agents of the state that the same citizens expect to be available 24 hours a day, 7 days a week, and 365 days per year. The state of affairs is not tolerable because democratic legitimacy requires police and citizens to come together.

It is true that police and ordinary citizens could come together through formal law. We could imagine educating the public so that

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65. *See* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998) (offering an analysis of the ways ordinary Americans deploy law every day); LAURA BETH NIELSEN, LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH (2004) (exploring the legal consciousness of ordinary citizens in the context of free speech).

their everyday lawyering better comports with articulated constitutional law. Going back to my schematic in Figure 1, we could imagine rotating the north-south axis toward the horizontal. I believe such a task is likely a fool's errand, however. The resources involved would be enormous, and the project also seems to bump up against the natural inclination that people have to choose evaluative methods that are consistent with and affirm their social identity. Constitutional law, as it is currently composed, does not emphasize the importance of quality of police treatment but rather places a premium on the police officer's intention when she decides to exercise her discretion to engage someone.[66] Nothing about constitutional law prohibits a cop from being rude, and very little of constitutional criminal procedure promotes the kinds of dignity concerns that people tend to care about. Indeed, much of the law is even at odds with these concerns.[67]

A different reform strategy, then, is to advocate change in the legal rules that shape police conduct. Presumably we ought to think about rotating the east-west axis up. The late William Stuntz offered a characteristically crystalline assessment pertinent to this idea:

> Fourth Amendment law devotes an enormous amount of attention to the *fact* of searches and seizures, but almost none to how those searches and seizures are carried out. That ought to be reversed; sharp legal lines between "searches" and "seizures" and everything else ought to be replaced with hazier boundaries between decent police behavior and the indecent kind.[68]

Stuntz may be right. Perhaps we could imagine constitutional law operating in the way that he suggests. Indeed, I have argued that something along these lines existed in the early days of criminal procedure before the Warren Court revolution, when the Court was committed to pursuing fundamental fairness through due process

66. *See* Tracey L. Meares, *The Distribution of Dignity and the Fourth Amendment*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 123, 127 (Michael Klarman et al. eds., 2012); Stuntz, *supra* note 59, at 2141.

67. *See* Harcourt & Meares, *supra* note 13, at 811-14 (discussing the problems with using suspicion as a method to control police discretion); Meares, *supra* note 66, at 130.

68. Stuntz, *supra* note 59, at 2141.

as opposed to attempting to work out a code of criminal procedure through incorporation of the Bill of Rights.[69]

Although I have not yet completely worked out the following idea, I think we may be better served by keeping the rightful policing axes separate and tending toward orthogonal to one another. If this is right, then the legitimacy axis is pursued through norms and training as opposed to legislation and codification. We should educate police officers about procedural justice. We need to emphasize that police should comport their behavior with constitutional rules. And we ought to encourage them to treat people with dignity and respect regardless of whether the rules require it. One way to emphasize the importance of this last requirement is to truly understand that, paraphrasing British legal scholar Neil Walker, "[t]he police ... are both minders and *re*minders of community ... —a producer of significant messages about the kind of place that community is or aspires to be."[70]

Truly good policing, then, is enjoyed by all people in common whether or not they experience as individuals a positive outcome. Generation of the individual good is "wholly, directly and reciprocally dependent upon its simultaneous generation for and enjoyment by certain others."[71] I want to go further and say that my argument implies not only a demand for policing that is assertedly social, as Waldron suggests, but constitutive, too, in the way that Ian Loader and Neil Walker additionally claim. It is not enough for policing to simply solve collective action problems associated with the project of crime reduction. Policing should also play a role in the production of self-identity that helps to "construct and sustain our 'we-feeling'—our very felt sense of 'common publicness.'"[72] Legitimacy, then, can be a key driver of a healthy and properly functioning democratic government.

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69. Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 111-13 (2005).

70. Ian Loader, *Policing, Recognition, and Belonging*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 211 (2006) (citation omitted) (citing Neil Walker, *Policing and the Supernatural*, 12 POLICING & SOC'Y 307, 315 (2002)); *see also* Tracey L. Meares, *The Progressive Past*, *in* THE CONSTITUTION IN 2020, at 209, 209-12 (Jack M. Balkin & Reva B. Siegel eds., 2009).

71. IAN LOADER & NEIL WALKER, CIVILIZING SECURITY 154 (2007) (citing JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 358-59 (1993)).

72. *Id.* at 164.

No doubt I make some uncomfortable by promoting the notion that police should be involved in this work—especially those who believe that having less police is always better. What we know, however, is that police are involved in the business of constructing community identity. The empirical distinctions we demonstrate between lawfulness assessments of police conduct on the one hand and fairness assessments on the other powerfully suggest that people understand police treatment of citizens in the constitutive manner that Loader and Walker describe. Moreover, we know that there are potentially negative consequences of this kind of psychological processing. Too often, identifiable groups—typically minority—receive the short end of the stick in this constitutive process. At the very least, we should take what steps we can to address the consequences of this reality on the ground and aspire to promote the Good Cop.

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