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Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere"

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> Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. . . . And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.
> Terry v. Ohio, 392 U.S. 1, 15 (1968).

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INTRODUCTION

Quality-of-life policing, responsive to the concerns of urban communities, presents a profound paradox. On the one hand, the collateral effects of drug use, especially in public and in racially fragmented, low-income communities, result in levels of crime and fear of crime that renders the communities almost uninhabitable; on the other, the collateral effects of policing drug crime, for these same communities, destroy the community's human fabric.

Many urban, minority neighborhoods suffer the tangible reminders of disregard: decrepit buildings, littered sidewalks, and public crime. The everyday taint of public disorder—"panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, [and] the mentally disturbed"[1]—magnifies the fear of random violent acts. Public safety is of paramount concern. Yet in those same communities, huge numbers of residents have, for almost a generation, spent lengthy periods of time in prison as a result of the War on Drugs.[2] These residents are not strangers, but sons and brothers, fathers and husbands, and to a lesser extent, daughters and sisters, mothers and wives: the friends and neighbors who patronize local shops, churches, schools, and PTA meetings.

A "new" generation of legal scholars have embraced and transformed the Broken Windows model of policing urban communities.[3] The Broken Windows model, which was developed by George Kelling and Catherine Coles,[4] suggests that disorder on the streets tends to be the cause of further disorder, for it signals to criminals and law-abiding citizens alike that the street is not being monitored.

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[1] James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 30.

[2] The War on Drugs began under President Ronald Reagan when Congress dubbed drug abuse a "national security problem." *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)). The Bail Reform Act of 1984 identified certain types of drug-related crimes as so dangerous to the community as to require pretrial preventative detention. *See* 18 U.S.C. § 3142 (2000). Both the 1986 Anti-Drug Abuse Act and the 1988 Anti-Drug Abuse Act placed a premium on expressive punishment, first by targeting drug dealing, then by targeting drug users. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4231 (codified as amended at 21 U.S.C. § 801 (2000)). The War on Drugs "utterly transformed law enforcement in the USA." DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 132 (2001).

The War on Drugs disproportionately imprisoned African-American men, at a terrible cost to the Black community. *See, e.g.*, CARL T. ROWAN, THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL 193-94 (1996); Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219, 228 n.45 (1998); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 52 (1994) (charting the "foreseeable disparate impact on Blacks" of targeting cocaine usage).

[3] *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 661, 671-73 (1998) [hereinafter Lessig, *Chicago*] (describing social norms theorists as the "New Chicago School"); *see also* David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1062 (1999) [hereinafter Cole, *Discretion*] (describing those who embrace the social norms perspective as the "new discretion scholars").

[4] *See* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 12-14 (1996).

The "new" Broken Windows theorists share a "social norms" perspective:[5] they suggest that law's direct threat of imposing sanctions is not the sole means of constraining conduct.[6] Rather, a variety of other devices, including non-legal, "social" norms, may supplement the law's coercive power.[7]

The social norms view of the Broken Windows argument is that public low-level crime undermines the social structures of local communities. A healthy social structure depends upon a relatively high degree of social cohesion, where community members share values and cultures, and take responsibility for ensuring an orderly neighborhood. Cohesive communities are both "better able to engage in [the sorts of] informal social control that can . . . lower levels of crime"[8] and more responsive to official norms of conduct.[9] They can be contrasted with socially fragmented neighborhoods, where the community's lack of a set of consistent, shared values abrogates individual and collective responsibility for neighborhood problems.[10] Members of fragmented communities embrace a "hands-off" approach to criminal behavior,[11] resulting in a state of virtual chaos.[12]

The relation between cohesion, order, and crime is central to the social norms claim that inner-city blight sends a distinct message to community members.[13] Low-level norms of disorder indicate social fragmentation and publicly broadcast rejection of norms supporting law-abiding behavior and the community's failure or inability to take responsibility for disorder and crime. Social programs targeted at reducing the signals of disorder empower community members to engage in social control, increasing cohesion around law-abiding norms, and trickling up to reduce the incidents of public disorder and criminal activity.[14] Ensuring low-level order thus has a major impact on more serious criminal activity.

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[5] Social norms theories have been described variously as "norm focused scholarship," *see* Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. 179, 179 (2000); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 806 (1998) [hereinafter Meares & Kahan, *Norms*], and "legal pragmatism," *see* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 133, 173-198 (2004).

[6] Lessig, *Chicago*, *supra* note 3, at 666.

[7] *Id.* at 666-67.

[8] *Id.*

[9] *Id.* at 687-88.

[10] *Id.* at 673 (emphasizing importance of "cohesion," "common values," "[c]ollective supervision . . . and personal responsibility").

[11] *See* Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 583 (1997) [hereinafter Meares, *Question*] (discussing free riders in social communities).

[12] Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 675-77 (1998) [hereinafter Meares, *Place & Crime*].

[13] Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 395-98 (2000) [hereinafter Meares, *Legitimacy & Law*] (tbe normative structure of the community determines its ability to resist and reduce crime); *see also* Meares, *Place & Crime*, *supra* note 12, at 675 (same).

Another feature of the social norms movement is to insist that cohesion and fragmentation are not related to a community's racial composition or level of impoverishment.[15] Equally poor minority communities may experience greater or lower levels of crime or disorder dependent upon their level of social cohesion.[16] Thus, cohesion and fragmentation better explain crime and disorder than race- or poverty-based analyses, and targeting signals of disorder can have a greater impact on reducing crime than race- or poverty-based initiatives. The criminal law in general, and policing in particular, can radically affect quality of life in urban communities. Policing public order increases cohesiveness; incarcerating too many community members undermines it. Accordingly, social norms theorists advocate empowering police and local communities through a variety of traditional and newly minted public-order offenses (such as anti-loitering statutes and youth curfews) as a means of attacking high crime in urban and predominantly minority neighborhoods.[17]

In this Article, I take up the challenge of public-order policing. My claim is that the sort of preventative policing social norms theorists advocate is different from reactive "investigative" policing directed at apprehending criminals.[18] Separating preventative and investigative policing suggests that the police, as currently constituted, are the wrong people to engage in preventative policing. Instead, it is more appropriate for other groups—such as municipal officials with no power to engage in investigation—to conduct preventative policing. These groups may include a range of specially created officials, such as city wardens and community support officers; alternatively, or in addition, the role of a range of current officials, including crossing guards and meter readers, could expand, and these existing officials could operate as "eyes on the street" to reduce the signs of urban disorder.

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[14] *See* Meares, *Place & Crime*, *supra* note 12, at 675-77 (discussing the effects of social cohesion and fragmentation on law-abidingness).

[15] *See id.* at 673-75, 688-91 (the range of community-level social processes better explains community cohesion than facts of race or poverty).

[16] *See id.* at 675-78.

[17] *See, e.g.*, Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1167-69 (1998) [hereinafter Kahan & Meares, *Crisis*] (curfews, gang-loitering, laws, order-maintenance policing); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261 (1998) [hereinafter Livingston, *Caretaking*]; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997) [hereinafter Livingston, *Communities*]; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 223-24 (1998) [hereinafter Meares, *Social Organization*] (curfew; anti-loitering ordinance; reverse sting); Meares, *Place & Crime*, *supra* note 12, at 699 (curfew; anti-loitering ordinance); Meares, *Question*, *supra* note 11, at 593 (curfew; anti-loitering ordinance).

[18] I use the term "investigative" to signal a particular police role, that of seeking out criminal activity or responding to crime. It is accomplished through a range of activities, from walking the beat or patrolling in a car to setting up speed traps, responding to 911 calls, or any of the other endeavors related to "the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Livingston, *Caretaking*, *supra* note 17, at 261 (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)) (internal quotation marks omitted).

My proposal is to restructure the manner in which we think about the legitimacy of policing practices and the type of authority the police wield. The current focus on constitutional remedies for low-level police abuses has failed to reduce justified resentment against the police by individuals and local communities subject to heightened amounts of increasingly invasive policing.

The attempt to limit police authority through prospective[19] constitutional (and other) norms that control the police's ability to search, seize, and interrogate suspects is properly confined to the police's investigative role. These limits do not work well to regulate the police's authority when engaged in upholding public order and preventing crime. The police often fail to internalize the legislature's justification for constraining the means of investigation, and courts have proven reluctant to sanction the police for investigative abuses, for example by carving out a strong "reasonableness" exception to the Fourth Amendment that threatens to swallow the rule.[20] I suggest that constraints upon the scope of authority may be rule-based and role-based. Both role- and rule-based concepts of authority concern legitimate authority's proper scope—that is, the extent of the authority's jurisdiction to act in particular circumstances. Rule-based authority is limited by the substantive content of a pre-existing norm, whereas role-based authority is limited by the nature of the authoritative office. Rule-based authority is based on officials' adherence to the content of particular rules; role-based authority is based in the powers afforded to individual officials occupying particular roles. Whereas rule-based authority derives its legitimacy primarily from the government's right to promulgate norms, role-based authority gains legitimacy from the degree to which officials' roles are matched to the circumstances triggering their authority. My claim is that rule- and role-based constraints on authority have a central role to play in explaining the power to police our communities.

Rule-based authority enables the government to regulate police conduct over a broad range of situations using general rules. Interpreting the Fourth Amendment to include a warrant requirement, for example, required the police to follow general, pre-existing norms of conduct, including obtaining the prior approval of a neutral magistrate, or face exclusion of evidence illegally obtained.[21] Role-based conceptions of the scope of authority, though they limit the jurisdiction over which an official may act, delegate the power to create norms of conduct to the police. They are consistent with the Supreme Court's expansion of "reasonableness" as a post hoc standard by which to evaluate police conduct.[22] Such grants of authority are inconsistent with broad, prospective limits on the power to police.[23]

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[19] "Prospective" is here to be contrasted with "retroactive." Prospectivity is one of the virtues of the rule of law identified by Lon L. Fuller in his *Morality Of Law*. *See* LON L. FULLER, THE MORALITY OF LAW 33-38 (rev. ed. 1969). Accordingly, ad hoc standards of adjudication—for example, the more opaque versions of "reasonableness"—may be thought of as permitting retrospective evaluation of conduct, undermining prospectivity.

[20] *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (describing the conflict between the jurisprudence of prospective rules and the jurisprudence of reasonableness in the context of the Fourth Amendment).

Role-based policing works best when the police or a municipality matches a law-enforcement official's authority to the specific set of problems to be addressed through public-order policing, including vandalism, loitering, noisiness, cruising, and solicitation.[24] Where matching police authority to relevant harms is impossible or ineffective, the solution is to remove jurisdiction from the police and confer it upon some other agency. It turns out that a range of municipal officials other than the police can address many public-order issues. Such officials possess limited institutional legitimacy outside their various spheres of operation and no role-based authority to engage in the invasive, investigative policing practices that render the police unsuited to public-order policing.

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[21] *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

[22] Consider, for example, the reasonable suspicion standard, itself something less than usually required by the Fourth Amendment. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Illinois v. Gates, 462 U.S. 213 (1983); United States v. Sokolow, 490 U.S. 1 (1989). In *Sokolow*, the Court followed its ruling in *Gates* to reaffirm that "reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *Sokolow*, 490 U.S. at 7 (citing *Gates*, 462 U.S. at 232). *See also* United States v. Arvizu, 534 U.S. 266, 274 (2002) (reasonable suspicion is "somewhat abstract"; "not a finely-tuned standar[d]"; "an elusive concept") (internal citations omitted). Rather, the Court simply investigates the "totality of the circumstances—the whole picture," *id.* at 8, viewed for "evidentiary significance as seen by a trained agent," *id.* at 10. Though the reasonable suspicion standard is "objective," *Sokolow*, 490 U.S. at 7 (citing INS v. Delgado, 466 U.S. 210, 217 (1984)), nonetheless, circumstances considered include the police officer's training. The fact of training is not merely one among others; rather, it is the lens by which the other circumstances are understood when considering their significance. *See Arvizu*, 534 U.S. at 273 (the totality-of-the-circumstances inquiry "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'") (citation omitted).

[23] These offenses are particularly problematic insofar as they are indicia of drug crime and gang activity. *See, e.g.*, David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1738 (2005) ("Warrants, in fact, were the principal motif of the Warren Court's approach to the Fourth Amendment.... Again and again, the Court insisted that, with certain narrow exceptions, searches and seizures were reasonable only if the police obtained 'advance judicial approval' in the form of a warrant. The point was that judges should decide, not police officers.") (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[24] *See generally* Kahan & Meares, *Crisis*, *supra* note 17, at 1160-64; Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 163-93 (1999) [hereinafter Livingston, *Gang Loitering*]; Livingston, *Communities*, *supra* note 17, at 616-18; Meares, *Question*, *supra* note 11, at 593; Meares, *Social Organization*, *supra* note 17, at 223.

In Part I, I lay out the contemporary problem with the overpolicing of drug crime and its harmful effects on urban communities of color. In order to understand the scope of the social norms theorists' political and moral responses to these problems, it is essential to elaborate the concepts of authority that underlie the discussion. Accordingly, in Part II, I address the concepts of rule- and role-based authority. These different justifications for the scope of legitimate authority explain some of the features of Fourth Amendment doctrine and the tendency of the Court's jurisprudence to "lurch[ ]" between competing visions of the scope of justified authority.[25]

In Part III, I demonstrate that the social norms theorists attempt to legitimate increased police power by involving community members in the process of norm creation.[26] Police trained to use public-order legislation as a backdoor means of investigating and detecting drug crime inevitably go beyond public-order policing when empowered by youth curfew, anti-gang, or anti-cruising laws to control the mostly minority urban communities that are the prime targets of public-order policing.[27] The result is high-stakes policing in which low-level encounters rapidly escalate into stops, searches, and seizures that convert possession of small amounts of low-level drugs into lengthy prison sentences. The style and consequences of policing often lead to a public perception of institutional illegitimacy, where the minority, urban community internalizes the style and consequences of policing as race-based and racist.[28]

In Part IV, I conclude that it is unclear whether the police are the proper body to accomplish the point and purpose of public-order policing. If public officials with a more limited institutional role undertake public-order policing, community participation in policing and the crime-control goals touted by Broken Windows policing should work at least as effectively—and from the perspective of community participation, more effectively—as under the current model of policing.

Intriguingly, public-order offenses are only tangentially related to the various serious offenses, including drug dealing or gang violence, that social norms theorists seek to police. Where groups of young people are orderly and where low-level drugs are distributed non-violently and in private houses, we are often not concerned about policing them. Experience shows that there is widespread public tolerance for private low-end drug use so long as the community remains orderly.[29] In addition, communities generally not only tolerate but demand low sentences for public-order offenses.[30] Accordingly, the officials empowered to stop, search, and arrest should not be those engaged in public-order policing—those who are trained to use any encounter as a justification for initiating collateral, investigative policing as part of the control of low-level drug crime in urban communities. These considerations argue in favor of redeploying police away from public-order policing and into the more labor-intensive activity of investigating crimes of violence and dealing dangerous drugs.

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[25] California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("[O]ur jurisprudence [has] lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.").

[26] Meares & Kahan, *Norms*, *supra* note 5, at 827; *see also* Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1612 (2002) [hereinafter Meares, *Policing*] (discussing reverse stings and anti-gang ordinances); Meares, *Social Organization*, *supra* note 17, at 220-26 (same).

[27] *See* Livingston, *Gang Loitering*, *supra* note 24, at 170-72.

[28] *See* Meares, *Place & Crime*, *supra* note 12, at 678-80.

I

POLICING URBAN CRIME: DRUGS VERSUS PUBLIC ORDER

Current discussion of crime and criminality tends to swing between representing the criminal as normal and rational, "just like us," and as fearsome, threatening the fabric of society.[31] The central problem is community disorder—not just crime, but "fear of crime" itself.[32] The social norms claim is that disorder has two sources: (1) various types of public antisocial behavior, such as gang activity or street-walking; and (2) the overaggressive policing of one particular public order offense, low-level drug crime.

The manner in which local law-enforcement officials police drug crime has had devastating effects on urban, and particularly minority, communities. The War on Drugs is directly responsible for the massive increase in incarceration over the last twenty years, particularly in minority, urban communities. As of 1996, African Americans comprised over half those incarcerated in prison and jail. The effect on the African American community in general, and in urban centers in particular, is devastating. Almost 10% of African Americans live under the supervision of the criminal justice system. For young Black men living in our cities, the situation is much worse. In 1992, 56% of all African-American men aged eighteen to thirty-five in Baltimore were under some form of criminal justice supervision; in the District Columbia, the figure is 42%. Nationally, in 1994, one third of African-American men between the ages of twenty and twenty-nine were under some form of criminal justice supervision.[33]

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[29] *See, e.g.*, William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1813-15 (1998) (asserting that the social and economic differences in drug markets and between drug users affect the perceived social costs of drug use).

[30] Meares, *Place & Crime*, *supra* note 12, at 679-80.

[31] In discussing the new culture of crime control, David Garland identifies

> a criminology of the self, that characterizes offenders as normal, rational consumers, just like us; and there is a criminology of the other, of the threatening outcast, the fearsome stranger, the excluded and the embittered. One is invoked to routinize crime, to allay disproportionate fears and to promote preventative action. The other functions to demonize the criminal, to act out popular fears and resentments, and to promote support for state punishment.

GARLAND, *supra* note 2, at 137.

[32] *Id.* at 122.

As a result, a number of scholars have denounced the over-policing of minority and urban communities. Over-policing takes a variety of forms, and so may be distinguished in a variety of ways. One useful distinction is between the manner and substance of policing: how the police go about their job as opposed to what range of norms they are empowered to enforce. Scholars uniformly condemn the use of brutal or highly invasive styles of policing that threaten the bodily integrity of community members. Some, however, tolerate the stop-and-frisk style of policing that, though it may not physically harm criminal suspects, nonetheless affronts their dignity.[34]

Similar issues are raised by the imposition of curfews,[35] the use of anti-cruising checkpoints,[36] and prohibitions on loitering or vagrancy,[37] each of which limits free movement and association. Such techniques of policing may not impose dignitary costs on individuals; nonetheless, they place greater numbers of police in a community, in a manner that may be burdensome even for law-abiding individuals.[38]

Another concern with over-policing addresses the result of channeling offenders into the criminal justice system. There are social costs associated with removing extremely large numbers of law-breakers from the community, or incarcerating others for lengthy periods of time.[39] Here, the various decisions by law-enforcement officials at all stages of the criminal justice process are subjected to scrutiny, particularly if they reveal race or class bias. Thus, the manner of decision-making may be problematic because it shows insufficient regard for the individual or community policed.

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[33] CARL T. ROWAN, THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL 193-94 (1996).

[34] *See, e.g.*, Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 777-78 (2000) (giving a qualified endorsement to the necessity of stops-and-frisks). For a discussion of the debate surrounding the use of stops-and-frisks to curb violent crime that rejects the necessity for an automatic frisk policy, see David A. Harris, *Frisking Every Suspect: The Withering of*Terry, 28 U.C. DAVIS L. REV. 1, 1-6, 23-39 (1994).

[35] Meares & Kahan, *Norms*, *supra* note 5, at 827; *see also* Meares, *Social Organization*, *supra* note 17, at 220-26 (discussing reverse stings and anti-gang ordinances); Meares, *Policing*, *supra* note 26, at 1612 (same);.

[36] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 616 (1997).

[37] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); City of Chicago v. Morales, 527 U.S. 41 (1999) (holding void for vagueness statutes that sought to punish loitering or vagrancy).

[38] Community policing traditionally depends upon a greater presence of law-enforcement officials in local communities. "In the classic community policing model, permanent beat officers are frequently visible and easily accessible in local neighborhoods." Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1254 (2000). As Harris suggests, problems arise when the manner of policing becomes overly burdensome and destructive of the dignity of the community members—especially the innocents—who are stopped. *See* Harris, *supra* note 34, at 1-6.

[39] *See, e.g.*, Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 27, 52 (1994).

Finally, the substantive criminal law may be controversial, even if the manner of policing is not. There can be substantive disagreement over the necessity for curfews or loitering laws, so that the existence of the law itself is contested, even if the style of policing is not onerous. Where the process of arrest and sentencing is fair, the criminalization of certain acts or the length of sentence imposed can be the subject of dispute.

There may be an important difference between enforcement of laws that are controversial and enforcement of laws that are wrong. Accordingly, over-enforcement concerns two different senses of illegitimacy—one in which the police enforce norms without community consent, and the other in which the police enforce norms that are morally sub-optimal.

Responses to over-policing tend to focus on one or another of the procedural and substantive concerns. Some worry about dignitary costs;[40] others about over-incarceration;[41] yet others about the legitimacy of the underlying laws that are the subject of law enforcement.[42] Where the worry is a dignitary one, the solution may be equal enforcement of drug laws in white and suburban communities. Jury nullification for certain drug crimes addresses both over-incarceration and the legitimacy of the underlying laws.[43] Social norms scholars generally favor replacing over-enforcement of drug laws with an emphasis on public order. While the worry is perhaps over-incarceration, the effect would be to alter the substantive law surrounding drug crime by de-criminalizing drug use in private spaces.

It is worth noting that society does not fear drug users *per se*. If society did fear simple drug use, college campuses across the country would be on lockdown. Society fears the social effects of drug addiction—specifically the out-of-control addict who can no longer usefully participate in society and so turns to crime to feed her addiction. Similarly, we are not fearful of all illegal drug dealers—we tend not to worry about the pharmacist or doctor who is willing to turn a blind eye and prescribe addictive painkillers to the Rush Limbaughs[44] and Noelle Bushes[45] of this world, and we are not terribly worried about ex-hippies with arthritis selling off "surplus" marijuana grown for their personal or medicinal use. We are worried about organized, public drug dealing that openly takes over neighborhood spaces. Public dealing sends a visible and tangible message about who "owns" the neighborhood and for what purposes;[46] it also colonizes, in a ripple effect, adjacent spaces as dangerous to innocent passersby. We are concerned about streetwalkers and certain types of gangs who similarly send the message that a neighborhood is a frontier town in the War on Crime.[47]

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[40] *See, e.g.*, William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064-66 (1995) (describing stop-and-frisks as a stigmatic affront to individual dignity).

[41] MICHAEL H. TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 123 (1995).

[42] *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (proposing African Americans on juries nullify drug laws criminalizing possession).

[43] *See, e.g.*, Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 884 (1997); Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 154 (1996); Butler, *supra* note 42; Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997).

The Broken Windows movement in policing was the first to alert us to this aspect of criminality. Its proponents regard the disorderly street as "a source of distasteful, worrisome encounters."[48] Disorder engenders crime because it functions as "a signal that no one cares" and that low-level crime has no significant social repercussions.[49] The effect of distasteful encounters with disorderly people—the drunk, the insane, the addicted; aggressive panhandlers, streetwalkers, and gang members—reduces the quality of life in urban neighborhoods and drives out those who have means of escape.[50]

The flip-side of over-policing poor, minority, urban communities is "under-policing." Professor Randall Kennedy has suggested that historically "blacks have suffered more from being left unprotected or underprotected by law enforcement authorities than from being mistreated as suspects or defendants."[51] Under-enforcement provides a visceral and often immediate signal of government disinterest in a community: the police fail to respond to emergency calls or to investigate "black-on-black" crime.[52] Whole neighborhoods may be zoned out of policing: there may be areas where the police go rarely, if at all, or where they tolerate a high degree of criminal conduct.[53] Lacking police protection, law-abiding citizens in under-policed neighborhoods become fearful of retaliation if they report crime, and so the problem spirals out of hand.[54]

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[44] The prosecution sought to charge Limbaugh under FLA. STAT. § 893.13 (2005), and his plea negotiations were made public. *See* Letter from the Florida State Attorney to Roy Black, Esq., Limbaugh's Attorney (Dec. 15, 2003), http://www.thesmokinggun.com/archive/rushletters3.html; *see also* Dan Lynch, *New Request in Rush Limbaugh Drug Probe*, LAW COM. DAILY BUS. REV., Sept. 29, 2005. He appears to have entered into a pre-plea deal to undergo eighteen months of drug treatment, agree to regular drug testing, and pay $30,000. *See* Peter Francesehina, *Limbaugh Arrested on Felony Charge*, S. FLA. SUN-SENTINEL, Apr. 29, 2006, at 1A.

[45] *See* Dana Canedy, *Daughter Of Gov. Bush Is Sent to Jail in a Drug Case*, N.Y. TIMES, July 18, 2002, at A18; *see also Jeb Bush Weeps as Drug Remarks Turn Personal*, N.Y. TIMES, May 1, 2002, at A16 (reporting that Noelle Bush was to be diverted to drug court after falsifying a prescription for a painkiller).

[46] Stuntz, *supra* note 29, at 1810.

[47] Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 41 (2000-2001).

[48] Wilson & Kelling, *supra* note 1, at 31.

[49] *See id.*

[50] *Id.*; *see also* KELLING & COLES, *supra* note 4, at 21-25, 30-37, 242-43, 247-57.

[51] RANDALL KENNEDY, RACE, CRIME, AND THE LAW, x (1998). *See also id.* at 29-75, 363. Kennedy does not seek to deny the tremendous impact of racial discrimination on the part of the police. *See id.* at 4-5, 21, 113-125 (acknowledging racial bigotry within the law-enforcement establishment).

Having identified under-policing as Black communities' central concern,[55] Kennedy forcefully argues for liberal criminal theorists to empathize with the innocents in these communities, rather than to focus exclusively on the rights of criminal defendants.[56] For example, whatever the merits of crack cocaine legislation,[57] the increased policing of the African American community in the wake of the War on Drugs is a major change from under-policing. Enforcement agencies, often under the direction of a Black chief of police or mayor, are finally acting in a non-racial manner. Instead of ignoring minority communities, the police are at last treating them equally, in the same manner as white communities.[58]

Kennedy's powerful argument popularized two of the central claims adopted by the social norms approach: (1) that the racially disparate effects of the War on Drugs may have a race-neutral animus;[59] and (2) that the burden of crime in the minority community cannot be properly understood without considering minority victims of crime.[60] According to Kennedy, discussions of crime in minority communities that do not account for the law-enforcement needs of the law-abiding members of the communities are "infected with a pervasive, systemic racial bias."[61] Such discussions focus excessively on the manner of law enforcement—brutality and over-incarceration. They thus depend upon a misplaced empathetic identification with the law-breaking members of the community. They are doubly partial, first by providing an incomplete picture of the benefits of law enforcement for the minority community and second by wrongly depending on a narrow and outdated critique of governmental racism.[62]

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[52] *See id.* at 69-75. *See also* Alexandra Natapoff, Underenforcement 9-20 (Mar. 13, 2006) (unpublished manuscript, on file with author).

[53] *See* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 685-690, 694-95 (2004); Natapoff, *supra* note 52.

[54] *See* Natapoff, *supra* note 53, at 685-690, 694-95; Natapoff, *supra* note 52.

[55] I use the plural because Professor Kennedy has argued that "too little attention has been given to the complexity of black communities and to the varied, and often conflicting, ways in which government policies will affect different sectors of such communities." Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1275 (1994).

[56] Kennedy, *supra* note 55, at 1258-59.

[57] Kennedy is deeply ambivalent about its merits. *See* KENNEDY, *supra* note 51, at 386 ("I have not endorsed the current crack-powder sentencing differential.... [T]he crack-powder senteneing differential is part of a war against drugs that should be reconsidered. There is force to the argument that policing prohibition with draconian laws is inefficient, the cause of avoidable misery, and inferior to alternative models of regulation.").

[58] *See* Kennedy, *supra* note 55, at 1256-57.

[59] This claim has been most forcefully developed outside the social norms field by William Stuntz. *See* Stuntz, *supra* note 29; William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000).

[60] *See, e.g.*, Kennedy, *supra* note 55, at 1255-56.

[61] *Id.* at 1257.

Kennedy's community focus thus reorients the discussion from a worry about police conduct to a worry about the ability of crime and disorder to retard the development of individuals and communities. He wishes to engage a debate about the substantive merits of enforcing the criminal law in minority communities. As Kennedy is the first to acknowledge, the problem of over-policing remains. Whether or not crack cocaine is as debilitating as politicians have claimed, the solution of hyper-punishing first distribution and then possession of crack has impacted primarily urban, predominantly minority individuals. Accordingly, the community-policing debate must consider not only the effect of certain types of policing on minority communities but also the substantive value of the crack-powder disparity for the criminal law.

Social norms theories share this reorientation of the policing debate. They accept the profoundly negative consequences of incarcerating so many Black men[63] for so long with so little effort to educate and rehabilitate them. Releasing these forgotten souls back into society further burdens a community already stretched to the limits by their absence and ill equipped to take care of them on their return. Social norms theories thus assert that the problem is not too much policing, but policing directed at a substantively controversial set of problems—minor drug crime.[64] Social norms policing thus targets a universally accepted set of criminal norms as a means of reducing public drug crime. Focusing on street-walking, panhandling, noise pollution, and the other indicia of disorder helps increase community cohesion and drive drug crime off the streets.

A. The Legitimacy Crisis of Criminal Law

At its best, the sort of preventative policing associated with the Broken Windows approach attempts to chart the difficult course between preventing crime and further destabilizing fragile and fragmented urban communities.[65] The risk, which has been borne out in too many urban neighborhoods, is that law enforcement's preventative policing techniques can serve instead to exacerbate the difficult relationship between the local community and the police.

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[62] According to Randall Kennedy:

> [C]olleagues of the Left (of which I still consider myself a part) are taking morally dubious and politically ineffectual positions that contribute to the stymying of much-needed efforts to better our society. The evasiveness and sentimentality with which many progressives discuss the relationship between race relations and the criminal justice system is part of what I am rebelling against. The Right is driving the nation towards greater social misery. Unfortunately, with ill-conceived gestures and a palpable impatience with complexity, the Left too often aids its ideological antagonists.

Randall Kennedy, *A Response to Professor Cole's "Paradox of Race and Crime"*, 83 GEO. L.J. 2573, 2577 (1995).

[63] However, such laws punish not only African Americans and not only men.

[64] *See, e.g.*, Kahan & Meares, *Crisis*, *supra* note 17 at 1165 (members of minority, urban community share "linked fate" in which they disapprove of both drug crime and drug sentencing policy); Meares, *Place & Crime*, *supra* note 12 at 680-81, 695-98 (too great a focus on policing drug crime disrupts communities).

On the one hand, the style of policing in urban communities relies heavily on the types of procedures provisionally endorsed by the Court in *Terry v. Ohio*:[66] public, invasive investigation and enforcement mechanisms, such as youth curfews and stop-and-frisk searches.[67] These easy and cost-effective but highly invasive techniques target members of the community on the basis of characteristics that include race and location.[68] Such criteria fail to distinguish between the criminal and the innocent and serve to stigmatize and humiliate law-abiding community members.[69] The disparate impact of this treatment on different communities, and on law-abiding individuals within those communities, undermines public respect for the law.

Thanks to the punitive sentences mandated by the War on Drugs, this indiscriminate style of policing raises the stakes of encounters between citizens and the police. Over-policing and over-punishing drug crime selectively channels a large number of young African-American men into the criminal justice system while leaving suburban white communities untouched.[70] The disproportionate sentencing policy mandated for crack cocaine is particularly responsible for this outcome.[71] Policing that targets those drug crimes that disproportionately affect urban minority neighborhoods[72] devastates the communities it is supposed to protect.

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[65] Meares treats the issue as one of legitimacy. *See* Meares, *Legitimacy & Law*, *supra* note 13, at 399; Tracey L. Meares, *Signaling, Legitimacy, and Compliance: A Comment on Posner's Law and Social Norms and Criminal Law Policy*, 36 U. RICH. L. REV. 407, 410 (2002) [hereinafter Meares, *Signaling*]. William Stuntz relates the issue to the question of bias: "[T]he central question the system faces in combating the effects of bias in policing and punishment [is]: How can we reduce perceived bias without reducing the level of law enforcement in poor black communities? The question has no obvious answer." Stuntz, *supra* note 29, at 1836.

[66] 392 U.S. 1 (1968).

[67] Stuntz, *supra* note 29, at 1898 n.64.

[68] *See* Illinois v. Wardlaw, 528 U.S. 119, 124 (2000) ("[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."); United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976) (holding that there was no constitutional violation when Border Patrol officers detained motorists even if such detentions were made largely on basis of apparent Mexican ancestry); United States v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975) (holding that Border Patrol officers may consider the race of a suspect as a factor in a decision to stop the suspect).

[69] *See, e.g.*, David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 312-15 (1997); *see also* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 295-300 (1998).

[70] It turns out that the addictive quality and crimogenic effects of crack are little different from those of powder cocaine, Joseph E. Kennedy, *Drug Wars in Black and White*, 66 LAW & CONTEMP. PROBS. 153, 178-79 (2003) [hereinafter Kennedy, *Drug Wars*], and the remedy of mass incarceration is intolerable. MICHAEL H. TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 97 (1995) ("The problem with the rationale of the War on Drugs as an exercise in moral education is that it destroyed lives of young, principally minority people in order to reinforce existing norms of young, mostly majority people."). *See id.* at 123 ("The willingness of the drug war's planners to sacrifice

On the other hand, regardless of the sentence given to those involved in drug crimes, drug dealing and public drug use contribute to a range of societal factors that signal public disinterest in the well-being of the neighborhood and the people who live there. Empty lots, trash on the streets, public prostitution, gangs' illegal or intimidating activities, and public drug use blight a community and prevent its members from focusing on how to economically and socially better their lives and communities.

Urban policing now faces a legitimacy crisis resulting from justified public perceptions of a disjunction between the promise of equal treatment by the criminal justice system and the reality of certain laws and policing practices. Urban communities do demand more policing, but such demands are complex and (1) tend to focus on universally accepted norms of criminality and (2) require different styles of policing dependent upon the type of crime. There is thus a complicated relationship between the crimes policed and the manner of policing.

While the focus on over-policing tends to demonstrate the difficult relationship between the style of policing and the norms policed, an emphasis on under-policing draws attention to the necessity of providing a rapid response and comprehensive investigation of violent crime and crimes against property. Communities might tolerate a more "muscular" approach to violent crime so long as it is responsive to particular requests

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young black Americans cannot be justified."). The justifications for disparate penalties on crack cocaine users—that it is an exercise in moral education, *id.* at 97; "that crack use inevitably destroyed the lives of those using it," Kennedy, *Drug Wars*, *supra* at 178; that the use of crack "was expanding beyond the ghetto" into the white community, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1294 (1995), "that blacks as a class may be *helped* by measures reasonably thought to discourage [crack use,]" Kennedy, *supra* note 55, at 1269—no longer apply. *See* Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 735-736 (2003) (noting that the Congressional Black Caucus, the NAACP, the Urban League and the U.S. Sentencing Commission "found that there was little rationale" for the differential treatment of crack cocaine). The only reason that appears to explain the *continuation* of the drug policy is a race-based one. *See* Sklansky, *supra* at 1294.

[71] *See* Ogletree, *supra* note 2, at 229 ("The mandatory minimum sentences which were intended to rid our streets of drugs have instead stolen minority youth from their communities; they penalize blacks, who use crack cocaine, up to 100 times more harshly than their white counterparts who use powder cocaine. These sentencing guidelines send conflicting messages to young people: our supposedly fair and equal justice system treats them differently on the basis of their choice of the same drug.").

[72] *See, e.g.*, ROWAN, *supra* note 33, at 193-94 (suggesting that the war on drugs has disproportionately imprisoned African-American men at a terrible cost to the Black community); Ogletree, *supra* note 2, at 228 n.45 (comparing disparate sentencing of Blacks and Whites); Tonry, *supra* note 2, at 52 (charting the "foreseeable disparate impact on Blacks" of targeting cocaine usage); *see also* Note, *Winning the War on Drugs: A "Second Chance" for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1485-86 (2000) ("The dramatic increase in African-American incarcerations has resulted from congressional attempts to stop the devastating epidemic of crack cocaine.").

for assistance. Unjustified differential enforcement of such norms across communities adversely impacts governmental legitimacy.[73]

Communities also tend to endorse enforcement of norms supporting some degree of public order. They are, however, less indulgent of invasive practices used to police disorder, particularly those that are broadly directed at the whole community.[74] Where, however, communities contest (1) the validity of certain criminal laws or (2) the substantive effect of prosecuting the criminal law, their support for such norms is likely to be ambivalent at best and hostile at worst. For a range of crimes, there may be a disagreement between the state and the locality over the necessity and warranted degree of enforcement. Here, reform of the style of policing may not be enough to confer legitimacy on the fact of policing. Such reactions are likely to be magnified when contested laws are applied in a differential manner from community to community, and such differences appear to track such features as race and class.

Sometimes it appears that there is no such thing as "criminal law," and that the law as applied depends upon the whim of law-enforcement officials empowered to interpret, apply, and refuse to apply properly legislated norms.[75] At other times it appears that the police target some communities for heightened attention for malicious or discriminatory reasons.[76] Law-enforcement officials presented with a limited budget and faced with a diverse range of crimes and neighborhoods to police may target one location over another without much explanation. Despite similarities in the type of crime, different communities may experience different quantities and qualities of law enforcement based upon the relative expense and availability of policing strategies.[77] Even when there are race-neutral explanations for law-enforcement techniques, the perception of illegitimacy is hard to shake.[78]

B. *The Need for Policing Reform*

The War on Drugs creates a problem for law enforcement in minority communities. The manner of policing drug crime alienates community members and undermines legitimacy. Heavy sentences, as the primary solution to drug dealing and drug use, risk exacerbating the problem of social fragmentation in inner cities. Politicians, particularly at the federal level, are unwilling to reduce drug sentences for fear of being perceived as "soft on crime." Enforcement reform presents the most attractive option, and perhaps the only available one.

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[73] Meares & Kahan, *Norms*, *supra* note 5, at 181; Stuntz, *supra* note 29, at 1798.

[74] Thus, for example, David Harris briefly documents community resistance to "preventative" stop-and-frisks for weapons proposed in Chicago and Los Angeles that sought to target housing projects or large numbers of the minority population. *See* Harris, *supra* note 34, at 1-6, 23-39.

[75] *See, e.g.*, Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 263-64, 268 (2003) (overcriminalization of everyday drugs renders "use and possession of these drugs . . . often contrary to the law as written," yet selection for arrest, prosecution, and sentencing depend upon factors other than law in the statute books).

[76] Stuntz, *supra* note 29, at 1801.

[77] *Id.* at 1819-20 (discussing the costs of urban v. suburban policing).

[78] *Id.* at 1801.

The response from the left is to stop targeting minority drug users. There is, however, some disagreement about how best to do so. Traditionally, "legal liberals"[79] have sought to constrain the type of policing that takes place in minority communities through prospective scrutiny and control of police practices.[80] In contrast, the social norms solution is to loosen public scrutiny of the police; in return, the police should ignore drug crime and focus instead on policing public disorder. Social norms scholars argue that only certain types of crime engender community fragmentation and that communities would work better if the police focus on the community-destroying crimes rather than contributing to the problem. My proposal is to endorse an emphasis on low-level public-order offenses but to require a different set of officials to deal with public order while the police concentrate on responding to serious offenses.

There is thus a persistent and vital debate about the scope and style of policing in minority communities. Liberal legal and social norms theorists differ profoundly in their characterization of acceptable types of policing. My claim is that each has something to offer in attempting to develop a law-enforcement program that engenders community cohesion without targeting minor drug use.

Social norms theorists regard policing as an aspect of community building. They emphasize one half of the policing equation—the community's desire for public order, an increased police presence, removal of gangs, controls on delinquency, and a better quality of life. They claim policing enables and persuades individuals to engage in the promotion of public order, so that law enforcement can work independently of other social programs to promote community-building. The goal is to develop a law-enforcement program that participates in and is legitimated by local formal and informal social networks.[81]

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[79] Legal Liberalism is a term I have borrowed from William Simon. According to Simon,

> Legal Liberalism . . . consists of a cluster of ideas associated with the Warren Court, the ACLU, the NAACP Legal Defense Fund, Ralph Nader, and the legal aid and public defender movements . . . . [Legal liberals express] a preference for standards for decision makers who are presumed trustworthy and a preference for rules for those who are presumed untrustworthy. The most salient trusted class is the judiciary. In general, Legal Liberalism has favored broad contextual decision-making power for judges under norms like due process, reasonableness, public convenience and necessity, and just cause. The most salient distrusted class is the police. Thus, we have the Miranda rule.

William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 129, 141-42 (2004).

[80] Another solution is to declare crack laws, at least in their effect, unconstitutional due to their disparate impact. That position, which briefly gained some traction in a variety of lower courts and under some interpretations of state constitution equal-protection clauses, was uniformly rejected by federal courts of appeals. *Compare, e.g.*, State v. Russell, 477 N.W.2d 886 (Minn. 1991) (holding that the differential punishment of crack and powder cocaine provided by the Minnesota drug statute had a racially disparate effect that violated the equal-protection clauses of both federal and state constitutions) *with* United States v. Lattimore, 974 F.2d 971, 975-76 (8th Cir. 1992) (rejecting Russell's analysis as it applied to the Federal Equal Protection Clause).

Legal liberal scholars take the opposite view. Several of them denounce the "over-policing" of inner-city communities as antithetical to the communities' wellbeing.[82] They characterize current policing as relatively unconstrained by prospective legislation[83] and explain differential enforcement across communities as consciously or unconsciously racially motivated.[84]

Both liberal legal and social norms theories concern the institutional authority of the police, but each provides a different account of the source of legitimate police authority. Whereas liberal legal theorists claim that police authority is limited by the content of institutional norms or "rule-based" authority, social norms theorists claim that we should recognize that police legitimacy consists in adherence to local standards of law-abiding behavior. In contrast to these rule-based and localist justifications of police action, I emphasize the functions and circumstances justifying police action—or "role-based" authority.

II

RULES AND ROLES

In the context of policing, legitimacy depends in part upon possessing justified authority to affect another's legal status. In this Part, I suggest that there are at least two different types of justified authority: rule-based and role-based. Whereas the concept of rule-based authority is a familiar staple of legal liberalism and consists in conformity to pre-announced norms with determinate content, role-based authority seeks to explain one way in which authority may be delegated to officials based upon their skill and training to deal with a discrete range of unpredictable circumstances. I am interested in the ways rule- and role-based authority structure policing on the ground. My claim is that the (re-)emergence of role-based authority in modern policing requires us to reconceptualize the potential solutions to the problems of urban policing for low-level public-order offenses.

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[81] Meares, *Legitimacy & Law*, *supra* note 13, at 413-14 (describing the cooperation between Black church leaders and police officers); Meares, *Social Organization*, *supra* note 17, at 224-25 (explaining how community residents assisted police to implement Chicago's anti-gang loitering ordinance); *see also* Meares, *Question*, *supra* note 11, at 593; Meares, *Place & Crime*, *supra* note 12, at 699; Meares & Kahan, *Norms*, *supra* note 5, at 819.

[82] *See, e.g.*, David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2555-62 (1995) [hereinafter Cole, *Paradox*] (questioning whether increased law enforcement constitutes a public good).

[83] *See* Cole, *Discretion*, *supra* note 3, at 1062 ("Reliance on the political process . . . will simply ensure that minority interests within inner-city communities will be ignored.").

[84] TONRY, *supra* note 70, at 4-5, 123; Butler, *supra* note 42, at 693-96.

Rethinking public order must move from a debate about acceptable levels of law-enforcement discretion to one concerned with matching types of competence, as measured by an official's institutional skills and goals, to the types of low-level disorder requiring intervention.

The scope of rule-based authority is determined by the content of a norm of conduct.[85] For example, the familiar rule, "[No] vehicle[s] into the public park,"[86] limits the scope of the official's authority in the following way: only an object that counts as a vehicle may be excluded from places identifiable as a park. The official may not use that rule to enter a private dwelling. Once the official acts outside or against the content of the conduct-guiding rules, legitimacy concerns—defined as the range of actions within the scope of the official's institutional authority—arise.[87]

The scope of role-based authority is determined by the official's status in relation to the subjects of authority and the circumstances in which the official acts. In an institutional system, role-based authority is governed not by the content of conduct-guiding norms of the system but by a range of norms specifying the general circumstances in which the official is entitled to act. Further, the official's actions should conform to the legitimate goals or purposes the action is designed to achieve.

The Judgment of Solomon provides a more-or-less familiar example of role-based authority.[88] In his role as king, Solomon had authority to adjudicate disputes that his subjects brought before him. His ruling ordering the bisection of the subject of a custody dispute was not authorized by the content of any conduct-guiding norms. The desired outcome of revealing the biological mother, who was willing to give up her child to save its life, depended upon the role-based scope of Solomon's authority. Solomon had the right to settle their dispute, as manifested in the rules establishing both his office as king and the point or purpose of adjudication.

A. *Institutional Justifications of Rules and Roles*

Rule- and role-based grants of authority provide different methods by which to control official conduct. Rules constrain behavior if the official (1) accepts and internalizes the rules controlling behavior or (2) is subject to some form of effective sanction to enforce compliance. A prominent example is the exclusionary rule in criminal procedure, which precludes the use, at trial, of evidence seized in violation of the Fourth Amendment.[89] Where there is no exclusionary rule, or where it is subject to significant exceptions, the police lack an external or prudential incentive to obey the law.[90] Where the police regard the law as an inconvenient set of technicalities standing in the way of effective investigation, they lack an internal motivation to obey the law. An effective system of sanctions, however, may overcome internal resistance to the rules, though sanctions may be unnecessary if the police are independently motivated to obey the law.

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[85] For an example of rule-based jurisprudence, see H.L.A. HART, THE CONCEPT OF LAW 94 (2d ed. 1994).

[86] *See id.* at 126-27; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49, 63 (1993).

[87] Such a view fits comfortably within most modern liberal trends in legal political theory and receives some of its strongest modern expression in the thought of Herbert Wechsler. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11-16 (1959).

[88] 1 *Kings* 3:16-28. Another example is Adam Smith's "ideal spectator." *See* ADAM SMITH, THEORY OF MORAL SENTIMENTS III 4.2 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759); *see also* Eric J. Miller, *"Sympathetic Exchange": Adam Smith and Punishment*, 9 RATIO JURIS 182 (1996).

Role-based authority controls conduct by limiting the circumstances in which an official may act while delegating to the official substantial authority to generate the standards that measure the appropriateness of a given response. Roles constrain behavior by delimiting the goals of official action, the skills to be deployed in service of these goals, and the circumstances triggering official intervention. Role-based authority is effective when roles are clear, distinct, and matched to particular purposes.

Role-based authority fails to control conduct when the official's purposes are poorly matched to circumstances or officials are asked to undertake multiple roles that are poorly separated. For example, "the double-agent dilemma" in psychiatric forensic testimony presents the problem of multiple roles.[91] The forensic psychiatrist is required, in her role as physician, to develop an intimate and non-judgmental relation of trust with her subject, but in her role as agent of the court, she is required to pass judgment in a manner that has a range of serious legal and moral consequences. When faced with such a role-based conflict in the legal setting, physicians tend to ignore the constraints of the therapeutie role in order to empower the legal one.[92] Alan Stone, a professor at Harvard Law School and former president of the American Psychiatric Association, provides a role-based solution: physicians should decline to testify where so doing compromises their therapeutic role.[93] Where officials or agencies engage in conduct that outstrips their proper role or conflates incompatible ones, the role-based solution is jurisdictional; that is, it requires different sets of officials, with distinct competences and goals, to exercise authority over the different situations.

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[89] *See* Mapp v. Ohio, 367 U.S. 643 (1961).

[90] *See, e.g.*, Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 124 (2003) [hereinafter Kamisar, *Defense*] (discussing different legal standards before and after *Mapp* to demonstrate that police ignored a rule that refused to punish illegal searches, treating it as a permission to engage in the illegal conduct); Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 559-60 (1990) [hereinafter Kamisar, *"Old World" Criminal Procedure*] (same).

[91] Alan A. Stone, *Revisiting the Parable: Truth Without Consequences*, 17 INT'L J.L. & PSYCHIATRY 79, 87 (1994). Stone suggests that "the [psychiatric] expert often enters the courtroom deeply involved in a [therapeutic relationship with the patient], wearing both hats and bound by both kinds of ethics, but without any sense of the conflict between them." *Id.* at 83.

[92] Whether it is because they themselves want to be helpful witnesses or to beat the lawyers at their own game, or because they have brought their own private agenda to the courtroom, psychiatrists all too frequently [violate the principles of modesty and truthfulness in the courtroom] and claim to possess more objective certainty and subjective conviction than they could possibly justify in a clinical context. *Id.* at 89.

As a sociological, if not a philosophical, matter, rule- and role-based limits on the scope of authority each comport with certain justifications and types of institutional organization.[94] Rule-based authority promotes predictability and repeatability over a range of different situations. Logically interrelated systems of rules efficiently direct conduct over a range of disparate situations. The equal application of these rules to all persons and circumstances minimizes the number of necessary ad hoc or case-by-case judgments. The impartial administration of rules consistently and equally across the whole population serves the instrumental purpose of directing or channeling conduct.[95]

A principal justification of rule-based systems is that governance by rules is better than case-by-case decision making because the former treats people as rational individuals able to organize their lives by means of various directives. This "ethics of legalism" holds that social systems organized by means of prospective, published rules have an intrinsic value. They engender autonomy, at least for those laypeople whose conduct the rules purport to guide. First, anyone who is familiar with the rules can interpret them to determine what outcome the system requires.[96] Rules thus require an element of reciprocity between governor and governed: rules guide, even absent sanctions, so long as individuals accept the system of rules and conform their behavior to that system. Second, rule-based systems limit institutional discretion by preventing officials' external biases from having a regulatory effect. Rather than bringing their own prejudices into the process of regulation, officials enforce those values identified as important by the system.[97] In this way, lay autonomy is guaranteed by the absence of official autonomy—by the official following the rules of the system.

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[93] *See id.* at 87. *Cf.* Paul S. Appelbaum, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*, 13 INT'L J.L. & PSYCHIATRY 249 (1990).

[94] I say this matter is sociological because it is a matter of historical contingency, rather than a universal feature of this type of organization or a necessary justification of this type of authority. *See, e.g.*, Michael S. Moore, *Three Concepts of Rules*, 14 HARV. J.L. & PUB. POL'Y 771, 773-75, 777-78 (1991) (clarifying the meaning of "descriptive" and "prescriptive" rules); *see also* Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167, 193 (1999).

[95] *See* CARY BOUCOCK, IN THE GRIP OF FREEDOM: LAW AND MODERNITY IN MAX WEBER 9, 27 (2000).

[96] *See* Neil MaeCormick, *The Ethics of Legalism*, 2 RATIO JURIS 184, 184 (1989) [hereinafter MacCormick, *Ethics*] (noting that relevant sense of "legalism is . . . the stance [that] legal politics . . . ought . . . to be conducted in accordance to predetermined rules . . . in which acts of government . . . must be subordinated [to] rules and rights"); Neil MacCormick, *Reconstruction After Deconstruction: A Response To CLS*, 10 OXFORD J.L. STUD. 539, 541 (1990).

The rule-based model of authority is thus essentially identical to what, following Max Weber, sociologists call "formal legal rationality,"[98] and to what Herbert Packer famously identified as the due-process model of criminal procedure.[99] For Weber, formal rational legal authority consists in a "gapless system of rules, under which . . . all conceivable fact situations must be capable of being logically subsumed lest their order lack an effective guarantee of certainty."[100] Packer's "due-process" model of the criminal justice system seeks to achieve such control through prospective, adversarial, court-regulated constraints upon the executive discretion to investigate, detain, and search suspects.[101] In a similar vein, Anthony Amsterdam, in his discussion of the proper basis for the justification of the Fourth Amendment exclusionary rule,[102] suggested that the propriety of executive law-enforcement practice should depend on how well it conforms to express standards of conduct enacted by either state or municipal legislatures or by the police themselves as a set of administrative rules.[103] These norms would establish the content of executive procedure that control how police and prosecutors interact with the public and so limit the scope of police authority.

Role-based authority differs from rule-based authority in at least two ways. First, role-based authority allows non-institutional factors to affect the evaluation of conduct. For example, a police officer's skill and training are not subject to legal regulation under the Fourth Amendment:[104] the appropriate type and degree of skill and training is determined by the relevant law-enforcement agency. Nonetheless, the Supreme Court currently considers such factors when assessing the propriety of a law-enforcement officer's investigative acts.[105] Second, the institution considers role-based factors on a case-by-case basis. Since the scope of an official's role-based authority depends upon the range of unpredictable circumstances in which she acts, the appropriate test is *ad hoc* and backward-looking.[106] Role-based authority emphasizes that law-enforcement officials are permitted to and responsible for developing their own external, autonomous constraints on an official's acts.[107] Non-institutional considerations, appropriate to the particular purposes of the official role, guide the decision.[108]

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[97] *See* MacCormick, *Reconstruction After Deconstruction*, *supra* note 96, at 556-58; *see also* BOUCOCK, *supra* note 95, at 27 (explaining how the "hallmark of the legal authority behind the rationalism of bureaucratic organization is the performance of duty according to calculable rules and without regard for persons") (internal quotation marks omitted); ANTHONY T. KRONMAN, MAX WEBER 78, 84-84, 95 (1983). It is but a short step from the claim of intrinsic organization to the claim that the law is an "autopoietic" system of norms. *See, e.g.*, Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 137, 141-42 (1989). I do not believe this step must be taken—at least not as forcefully as the theory of autopoiesis implies.

[98] *See, e.g.*, MAX WEBER, ECONOMY AND SOCIETY 654-58 (Guenther Roth & Claus Wittich eds., 1978) (1914) (discussing formal, informal, rational, and irrational modes of legal thought). "For Weber, the significance of formal legal rationality is tied to its promotion and protection of individual autonomy." BOUCOCK, *supra* note 95, at 5. According to Anthony Kronman:

> If one places a high value on the ability of individuals to control their own lives in a deliberate and planful way, and believes that their power to do so will be significantly increased if the consequences—in particular, the legal consequences—of their actions are known to them in advance, a legal system which promotes calculability is likely to seem preferable, on moral grounds, to onc that does not.

KRONMAN, *supra* note 97, at 94. Formal, rational legal rules do so, however, at the expense of official autonomy, which is radically constricted.

[99] *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1-23 (1964) (describing the "values underlying the models").

[100] WEBER, *supra* note 98, at 656.

[101] *See id.* at 13-23.

[102] *See* Anthony G. Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349 (1973-1974).

[103] *Id.* at 416-17.

A major feature of the shift from rule- to role-based policing is the Court's rejection of determinate, prospective "technical" "tests" for the various standards of reasonableness,[109] replacing them with "practical" or commonsense standards.[110] Rather than require adherence to prescriptive legal standards,[111] the Court emphasized instead the "value of... independent police work."[112] In a variety of settings, from the evaluation of informants' tips[113] to the various exigencies justifying searches and arrests[114] and the propriety of the use of deadly force,[115] the

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[104] Law enforcement's failure to provide rules of conduct that would then form a set of legally binding standards is precisely Amsterdam's criticism of policing. *See id.*

[105] *See, e.g.*, United States v. Arvizu 534 U.S. 266, 273-74 (2002) (totality of circumstances used to evaluate reasonable suspicion includes officer's skill and training).

[106] *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (reasonableness measured by fact available to officer at time she makes relevant factual determination).

[107] Substantive justifications are transitive rather than intransitive. Transitive justifications are those in which A justifies B, B justifies C, and A justifies C. "The hallmark of substantive rationality is thus the fulfillment of ultimate values or needs derived from ethical, political, utilitarian, hedonistic, egalitarian, or whatever, scales." BOUCOCK, *supra* note 95, at 21.

[108] This may be true either because the rules are posited by another institution or because they are not of the type to be posited—for instance, morality. *See, e.g.*, John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 199-202 (2001) (suggesting that "[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits").

[109] Illinois v. Gates, 462 U.S. 213, 231 (1983).

[110] *Id.*; *see also id.* at 241. *Compare id.* at 290 (Brennan, J., dissenting) ("words such as 'practical,' 'nontechnical,' and 'common sense,' as used in the Court's opinion, are but code words for an overly-permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment.").

[111] Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("[W]e have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.").

[112] *Id.* at 241.

[113] *Id.* at 231, 241.

[114] Richards v. Wisconsin, 520 U.S. 385, 396 (1997) (in knock-and-announce case, "the Magistrate could not have anticipated in every particular the circumstances that would confront the officers when .... These actual circumstances... justified the officers' ultimate decision to enter without first announcing their presence and authority."); United States v. Banks, 540 U.S. 31, 37, 41-42 (2003) (in knock-and-announce case, focus is on "the significance of exigency revealed by

Court has rejected rule-based criteria seeking to cabin law enforcement's freedom to respond to rapidly changing circumstances. Instead, the Court has emphasized both the fluid nature of the circumstances justifying a particular exercise of authority and that the officer's knowledge and training may render particular judgments reasonable.[116] Role-based authority does not fit comfortably into Weber's categorization of authority into formal and substantive, rational and irrational.[117] Roles may be formal, generated by legal rules, or informal, generated by circumstances. A prominent example of formally generated role-based authority in the federal criminal justice system is that wielded by the prosecutor;[118] informally generated authority includes the transformation from subservient status to a leadership role thanks to dire circumstances—the stuff of countless Hollywood movies. In Weber's terms, both types of authority are irrational because they are external to the logic of a system of rules. Put differently, the prosecutor responds to the constraints placed upon her by her office rather than by the judiciary.

Role-based authority is not adequately captured by Packer's crime-control model, which is more an attitude held by the relevant legal officials than a particular technique for controlling official conduct. As we shall see, I propose a type of role-based limitation on police authority that rejects the crime-control model. I believe in role-based constraints upon police

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circumstances known to the officer"; use of technical "set of sub-rules" to "overl[ie] . . . a categorical scheme on the general reasonableness analysis [which] threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes").

[115] Graham v. Connor, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

[116] *See, e.g.*, United States v. Leon, 468 U.S. 897, 919-23 (1984). In *Leon*, the Court distinguished between the role of the magistrate and the police officer in obtaining and executing a warrant. The Court considered that, in relying upon a validly executed warrant, the Fourth Amendment does not require a showing of good faith to avoid exclusion of evidence obtained pursuant to a defective warrant. Rather, in carrying out her official duties, a "reasonably well trained officer should rely on the warrant" unless it is apparent that "the issuing magistrate wholly abandoned his judicial role." *Id.* at 923. The Court strongly endorses the prophylactic effect of "police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits. [An objective good faith exception] is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism." *Id.* at 919. In executing a facially valid warrant, "it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." *Id.* at 920.

[117] WEBER, *supra* note 98, at 85-85, 655-57; *see also* KRONMAN, *supra* note 97, at 72-78.

[118] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 727-78 (1988) (Scalia, J., dissenting) (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)). While Scalia phrases the authority of the prosecutor in terms of power and discretion, it is clear from his quotation of Jackson that he considers the prosecutor's authority to be limited by the proper purposes of the role and the circumstances animating it. *Id.* Where a prosecutor abuses her charging discretion, the solution is also a role-based one: removal of the offending prosecutor (rather than the rule-based option of sanctioning her and excluding the evidence). *Id.* at 729.

authority precisely because I am worried about law-enforcement officers' ability to switch roles from policing public order to policing drug crime.

Official action in a role-based scheme may be constrained by jurisdictional limits upon the situations that trigger the official's competence to act and by restrictions upon the aims or goals of official activity. This process delegates autonomy to the official to determine the means by which those goals are carried out. For example, role-based authorities such as teachers, doctors, and social workers hold jobs relatively unconstrained by rules determining the means to effect that role.[119]

On a case-by-case basis, it may not be possible to predict in advance what set of actions are appropriate for the role. The goal of regulating role-based authority is not primarily to guide conduct but to evaluate it;[120] such evaluation may depend on imprecise standards of reasonableness that are, given the vagaries of circumstance, incapable of anticipation. That a police officer greets me in the role of caretaker, interested in my safety, rather than that of investigator, interested in my criminality, may have significant consequences for the conduct and consequences of a traffic stop.

Of course, extrinsic standards may be more or less systematic. For example, an administrative system may generate its own "statutory rules" or "common law" to regulate its officials' conduct. Nonetheless, from an institutional point of view, these standards state goals more than they regulate conduct. The relevant institution of the legal system still reviews each decision on a case-by-case basis, applying a test that takes those extrinsic norms into account without regarding these norms as determinative.[121]

For example, the "articulable suspicion" standard has become one role-based characterization of the police officer's authority. As long as the officer's training and experience furnishes her with some reason for stopping a suspect, she may do so by virtue of her role as an officer of the peace.[122] In such circumstances, the content of some conduct-guiding rule that she enforces need not limit the scope of her authority. Rather, her general role in preventing or responding to actual or threatened disturbances, as determined through her training and departmental guidelines, offers limits on her authority.

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[119] For example, in the case of a teacher, conveying information to a specified group of students in a determinate setting does not operate within tightly constrained rules.

[120] Rule-based authority thus does not deal with "decision-norms," which are rules of conduct addressed to institutional officials guiding their reasoning. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625-30 (1984). Decision-norms are more like formal rational norms of conduct. *See* ROGER COTTERRELL, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 136 (1995); KRONMAN, *supra* note 97, at 78.

[121] *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 230-32 (1983) (applying a totality-of-circumstances test that deals with "probabilities" and "common sense").

[122] *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

The articulable suspicion standard reflects the way many commentators think about law enforcement's role-based authority. For example, Jerome Skolnick identified the stand-out feature of the police role as one in which "the policeman is required to respond to assaults against persons and property. The *raison d'être* of the policeman and the criminal law . . . arises ultimately and most clearly from the threat of violence and the possibility of danger to the community."[123] Egon Bittner, another influential early commentator on the police role, also suggests that force is central to policing: "the police are nothing else than a mechanism for the distribution of situationally justified force in society."[124] Furthermore, because of the multiplicity and relative unpredictability of the situations in which violence may be directed at the police and the difficulty of determining in advance how to respond, training and experience become more pronounced determinants of acceptable behavior.[125]

Both rule- and role-based authority may be legitimated in the same way. If both types of constraint are formal—that is, institutional—then officials obtain institutional license to act based upon the propriety of the formal process by which their office (and, in the case of rule-based authority, by which the norm to be applied) was created. In institutional systems, the source of rule-based authority derives from the formal process of norm-enactment; the source of role-based authority derives from the nature of the authoritative office. The *source* of their authority is independent of the *content* of their authority; that is, their pronouncements will still be authoritative even if wrong.[126]

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[123] JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 45 (3d ed. 1994).

[124] EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY: A REVIEW OF BACKGROUND FACTORS, CURRENT PRACTICES, AND POSSIBLE ROLE MODELS 39 (1970).

[125] Egon Bittner suggests that the delegation of general authority to the police to engage in the use of responsive force entails that "the police authorization is essentially unrestricted." *Id.* at 37. Due to the multiple responsibilities of the police in a modern state, *see id.* at 120-21, "policemen are inevitably involved in activities that cannot be fully brought under the rule of law. Only a limited set of legal restrictions can be conditionally imposed on the police which, however, still do not make it impossible for the police to proceed as they see fit." *Id.* at 34. The use of force, if it is to be legitimate rather than "crude," "gross," or destructive of dignity, *id.* at 120-21, must be exercised with "civility and humaneness" as well as by an "informed, deliberating, and technically efficient professional who knows that he must operate within the limits set by moral and legal trust." *Id.* at 121.

[126] H.L.A. Hart suggests that reasons for action are content independent if they are "intended to function as a reason independently of the nature or character of the actions to be done." H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 254 (1982). Differently put, content-independent justifications are intransitive. Intransitive justifications are those in which A justifies B, and B justifies C, but A does not justify C. For various discussions of intransitivity, see ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 67-68 (1993) and JOSEPH RAZ, MORALITY OF FREEDOM, 325-326 (1986). *See also* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2148-51 (1990).

B. The Transition from Rule-Based to Role-Based Conceptions of Policing

Since its procedure became an object of criminal justice reform in the 1960s, a central concern of the criminal justice system has been the appropriate exercise of police authority. The Warren Court revolution in criminal procedure primarily sought to delimit the proper scope of police authority, in large part because policing formed such a central feature of the state-sponsored systems of racial inequality.[127]

The Court adopted a strongly rule-based attitude to police control. Recall that rules work well when they are accepted by the rule's subjects or enforced by means of effective sanctions. The Warren Court conceived of the police as a "discrete and unified group" possessing a "distinctive mentality"[128] antagonistic to the Court's equal-protection values. Recognizing that law enforcement had failed to internalize the limits imposed upon policing by state and federal law, the Court applied the sanction of the federal exclusionary rule to the states.[129] In so doing, the Court "boldly and confidentially inserted itself as the guardian of the Fourth Amendment,"[130] willing to punish police misconduct and expressing solicitude for the rights of minority defendants.[131]

In recent times, however, the federal courts' signature move is role-based deference to police expertise, particularly when confronted with cases involving drug crime. For example, by the early 1990s, the Second Circuit had adopted what amounts to an exigent-circumstances exception to the warrant requirement in drug cases.[132] The Supreme Court rejected a bright-line rule permitting the police automatically to avoid the warrant clause in drug cases.[133] Rather than endorse an approach based upon the class of crime at issue, the Court embraced a case-by-case analysis of the circumstances surrounding law enforcement's authority to act characteristic of the rule-based approach.[134]

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[127] Traccy L. Meares, *Everything Old is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 107 (2005) [hereinafter Meares, *Fundamental Fairness*] (emphasizing the racial dimension of Warren Court criminal justice cases). Meares acknowledges that the Court's attention to race in criminal justice was largely implicit. *Id.* David Sklansky has called it the "gingerly, subtextual manner in which the Warren Court pursued racial equality in criminal justice." Sklansky, *supra* note 23, at 1805.

[128] Sklansky, *supra* note 23, at 1735.

[129] Mapp v. Ohio, 367 U.S. 643, 656 (1961).

[130] Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1277 (1998).

[131] *Id.* at 1276.

[132] *See, e.g.*, United States v. MacDonald, 916 F.2d 766 (2d Cir. 1990) (en banc). It is worth noting that the Bail Reform Act of 1984 devoted special attention to drug crimes, and federal courts have found that drug charges raise special concerns for community safety requiring the denial of bail. *See, e.g.*, United States v. Rueben, 974 F.2d 580 (5th Cir. 1992) (establishing a rebuttable presumption that no conditions of release exist to ensure the safety of the community where probable cause as to a serious drug crime exists); United States v. Jessup, 757 F.2d 378 (1st Cir. 1985) (sustaining the presumption in the Bail Reform Act of 1984 that a defendant charged with serious drug offenses poses a serious risk of flight).

[133] *See* Richards v. Wisconsin, 520 U.S. 385 (1997).

1. Rule-Based Policing

The Warren Court's chief concern was with the domination of state police forces by race-based and class-based biases. The problem with law enforcement, in this view, is the familiar one of unelected officials (such as the police) displacing or replacing legislative will by interpreting and enforcing the law according to personal values or preferences.[135] The institutional and individual autonomy of the police, combined with a pervasive discriminatory and anti-democratic attitude, generated a widespread distrust of the police among liberal commentators and the Court.[136] As such, liberal reformers sought to replace the degenerate values of the self-regulated criminal justice system with "a fair and dignified legal process"[137] that "treats all criminal suspects with dignity and respect."[138] The remedy required the police to adhere to a rule-based system of values antecedently established by the legislature or the Constitution and monitored by the courts.

Thus, during the Warren Court era, the content of the conduct-guiding rules of criminal procedure developed from the Fourth, Fifth, and Sixth Amendment—as well as other rules of appropriate conduct promulgated by legislatures and courts—constrained the power of the police. Accordingly, legal liberals emphasized formal judicial oversight beginning at the pretrial process[139] so as to control, in part, illegitimate class- and race-based police discretion and to remedy substantive class- and race-based differences among defendants.[140] This process bears all the hallmarks of rule-based constraints upon police authority: the official's personal autonomy is rejected in favor of authority extending only as far as the content of the properly enacted norms will permit.[141]

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[134] *See id.* at 393-96.

[135] *See* Wechsler, *supra* note 87, at 15-17.

[136] Sklansky, *supra* note 23, at 1735-36.

[137] H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1138 (1987); *see also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 219 ("A public trial, if fairly conducted, sends its own message about dignity, fairness, and justice that contributes to the moral force of the criminal sanction.").

[138] Arenella, *supra* note 137, at 190; *see also* Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.").

[139] *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (footnote omitted).

[140] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.").

2. *Role-Based Policing*

Relatively soon after the Warren Court's reforms, policing (and attitudes toward policing) experienced an overhaul. Changes in officer selection and training transformed the Court's perception of the police and resulted in a more diverse and professional force.[142] Currently, the Court believes that the police are the solution to problems of public disorder and high crime, rather than its cause.[143] Under the present regime, so long as police enforcement activities are "reasonable" in light of the officer's understanding at the time she acts, her activity will generally survive Fourth Amendment scrutiny.[144] This change in emphasis from rules to reasonableness transforms the basis for the scope of police authority from rule-based to role-based. Today, it is by virtue of an official's status as police officer that she has the power to act under various specified circumstances.[145]

The Court characterizes law enforcement in terms of training and professional know-how. The police are skilled experts in investigating and controlling law-breaking conduct. They are required to make—and capable of making—context-dependent and pressured decisions in rapidly evolving and potentially dangerous situations to ensure public safety, restore order, and apprehend criminals.[146] The problem is no longer replacing a set of informal and illegitimate values with ones that are express, prospective, formal, and legitimate.[147] The interposition of autonomous police values in the process of law enforcement poses no challenge to democracy because police and mainstream people, or at least courts, now share the same set of understandings.

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[141] As Tracey Meares has recently discussed, the Warren Court's criminal justice can be understood as a "code . . . list[ing] sharp-edged prophylactic prohibitions and requirements [in order to] bring on reform of [police] practices." Meares, *Fundamental Fairness*, *supra* note 127, at 113. In support she cites *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Miranda v. Arizona*, 384 U.S. 436 (1966), cases that emphasize checks upon the power of law enforcement to convict or interrogate criminal defendants. *Duncan* is perhaps formalist and prophylactic in its insistence that an essential feature of the adversary system, trial by jury, be made available to a defendant as a bulwark against government action. *Duncan*, 391 U.S. at 155-56. *Miranda* is more obviously prophylactic in nature, providing a code of conduct for police through its list of warnings essential to preserve the defendant's Fifth- and Sixth-Amendment rights to silence and to the assistance of counsel. *Miranda*, 384 U.S. at 444. Another significant case is *Katz v. United States*, 389 U.S. 347 (1967), which required the formalistic and prophylactic process of obtaining a warrant precedent to placing a wire-tap on a telephone. *Id.* at 356 (warrant would "compel[ ] [officer] . . . to observe precise limits established in advance by a specific court order [and] . . . to notify the authorizing magistrate in detail of all that had been seized"). Emphasizing the formal and prophylactic aspects of the Warren Court's criminal code buttresses my claim that it undertook a rule-based reform of the criminal justice system.

[142] *See* Sklansky, *supra* note 69, at 302 ("Fourth Amendment cases may have become easier for the Court because the justices now share a set of underlying understandings that are markedly more favorable to law enforcement than to criminal suspects.").

[143] *See* Livingston, *Communities*, *supra* note 17, at 565-66.

[144] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21 (1968).

[145] *See generally* Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004) (considering in depth a role-based account of the police); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999) (same).

The development of *Terry v. Ohio*'s "reasonable suspicion" standard[148] presents the most striking example of this transformation from the rule-based and autonomy-constricting response to police bias to a role-based and autonomy-promoting approach.[149] *Terry*, which purportedly marks the end of the Warren Court's "revolution in criminal procedure,"[150] was among the first cases after *Mapp* to question the warrant requirement and to spark a battle over the meaning of the Fourth Amendment. As its legacy, it transformed a unitary understanding of seizure as arrest and the singular probable-cause evidentiary requirement into standards that are multiple and particularized. Each seizure can now be distinguished by different amounts of police coercion and justified by different evidentiary requirements; may be of greater or lesser duration; and may permit various types of collateral searches or the removal of a suspect from the scene.[151]

David Sklansky argues that we should regard *Terry* not as a grant of discretion but as a limitation upon it.[152] After all, *Terry* constrained the police power to stop and frisk by requiring some "articulable suspicion" sufficient to withstand (admittedly subsequent) court scrutiny rather than simply the individual officer's hunches or vague suspicions.[153] This moderately rule-based approach to *Terry* did not survive.[154] Now, almost any evidence that a police officer can proffer will suffice to provide reasonable suspicion.[155] In the reasonable suspicion totality-of-the-circumstances calculus, the officer's training is not just one fact among many, but one that operates as a lens through which to view the other facts. The officer's ability to explain how otherwise-innocent conduct is, under the circumstances and properly understood, suspicious,[156] characterizes the police as well-trained, experienced experts responding to "imponderable evidence" of criminality.[157] An officer's articulation of justifications displays her role-based qualifications and legitimates her role-based expertise.

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[146] *See* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 460 (2000) (explaining how race-based police stops are justified in "case law as the sound exercise of 'professional judgment' by police officers").

[147] According to David Sklansky, the courts have a set of pro-police "shared understandings" about the values underlying policing, understandings that are no less powerful for being premised upon a legal fiction. *See* Sklansky, *supra* note 69, at 302, 319-23.

[148] *Terry*, 392 U.S. at 20-22.

[149] The autonomy at issue here is that of the institutional official. To the extent that institutional autonomy is constrained, lay autonomy may be promoted, and vice versa. This, at least, is the legalism justification for formal-rational, rule-based systems of governance.

[150] *See* Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 4-5 (1995).

[151] *See, e.g.*, Wayne R. LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REFORM 417, 417-18 (1984) (explaining the transition from a formerly one-dimensional approach to seizure to a multi-dimensional one).

[152] *See* Sklansky, *supra* note 69, at 315-16.

[153] *See Terry*, 392 U.S. at 21-22, 27; Sklansky, *supra* note 23, at 1735-36.

[154] It is noteworthy that, one year after the Court decided *Terry*, Jerome Skolnick published his highly influential study of the police officer as defensive and socially isolated. In this work, Skolnick describes the working personality of police as defined by fear of assault and social isolation. *See* SKOLNICK, *supra* note 123, at 41-68.

As Carol Steiker notes, by converting *Terry*'s reasonableness standard into various ad-hoc exceptions to the warrant requirement, the Burger and Rehnquist courts managed, in a bloodless coup, to overturn the rule-based due-process approach of the Warren Court.[158] The Court's change in approach was predominantly a matter of "style"[159] and procedure,[160] a move from "prophylactic"[161] rule-based constraints to a more fluid, role-based series of considerations. The Court accomplished the reasonableness counter-revolution without overruling Warren Court precedents.[162] Whereas the Warren Court expressed a special distrust of the police, the Burger and Rehnquist Courts generally have expressed empathy with law enforcement, reinterpreting Warren Court constraints consistently with the policing role rather than simply overruling them.[163]

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[155] *See, e.g.*, United States v. Arvizu, 534 U.S. 266 (2002) (finding reasonable suspicion where a car slowed dramatically, from about 50-55 to 25-30 miles per hour; the officer saw five occupants inside and an adult man driving a minivan with adult woman and three children; the driver appeared stiff and posture rigid, did not look at police officer, or give officer "a friendly wave"); Florida v. Rodriguez, 469 U.S. 1 (1984) (finding reasonable suspicion where an airline passenger behaved in unusual manner while leaving the National Airlines ticket counter in airport); Florida v. Royer, 460 U.S. 491 (1983) (plurality opinion) (finding reasonable suspicion where an airline passenger was nervous, young, male, paid cash for an airline ticket from Miami to New York, used an assumed name, and carried heavy bags).

[156] *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 8-10 (1989).

[157] *See, e.g.*, LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 228 (Robert L. Arrington & Hans-Johann Glock eds., 1991). The Austrian-English philosopher Ludwig Wittgenstein suggested that it is just such imponderable evidence that forms the basis upon which "experts" exercise their judgment. *See id.*; RAY MONK, HOW TO READ WITTGENSTEIN 99-106 (2005). The notion of imponderable evidence has its correlate in the emphasis on "experience" or "training." *See Arvizu*, 534 U.S. at 273 ("[R]eviewing courts should . . . look at the 'totality of the circumstances' of each case . . . . This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"); Ornelas v. United States, 517 U.S. 690, 699 (1996) (suggesting that "a police officer views the facts through the lens of his police experience and expertise" and discussing a range of otherwise innocuous facts that will justify suspicion by a well-trained officer); *Rodriguez*, 469 U.S. at 6 (discussing the contribution of police training to the establishment of articulable suspicion); *Royer*, 460 U.S. at 525 (Rehnquist, J., dissenting) ("Any one of these factors relied upon by the Miami police may have been as consistent with innocence as with guilt; but the combination of several of these factors is the essence of both 'articulable suspicion' and 'probable cause.'"); United States v. Mendenhall, 446 U.S. 544, 563-64 (1980) ("[I]t is important to recall that a trained law enforcement agent may be 'able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.'") (quoting Brown v. Texas, 443 U.S. 47, 52 n.2 (1979)).

[158] *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring) (suggesting that there are at least twenty-two exceptions to the warrant requirement and that "[o]ur intricate body of law regarding 'reasonable expectation of privacy' has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment 'search' and therefore not subject to the general warrant requirement").

[159] *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2492-93 (1996).

[160] *See id.*

This procedural "counter-revolution" has resulted in a Fourth Amendment often characterized as "inconsistent and incoherent,"[164] "an embarrassment,"[165] and "filled with apparent contradictions."[166] I believe, however, that the current state of Fourth Amendment law might profitably be reconsidered as expressing a conflict over rule-based versus role-based constraints. On my reading, *Terry* has evolved from a rule-based limitation upon police power controlled through the requirement of express justification into a role-based grant of authority. For example, Phyllis Bookspan argues that "the reasonableness approach focuses on the acts of the police instead of the rights of the people."[167] Whereas a rights focus invites a rule-based approach, the Court's reasonableness analysis has generally "eschewed bright-line rules . . . [o]r 'litmus-paper test[s]' or single 'sentence or . . . paragraph . . . rule[s]' . . . or *per se* rule[s]."[168] Rather, the touchstones of the reasonableness analysis are role-based considerations of context,[169] status, and purpose[170]—the "endless variations in the facts and circumstances" translated through "experience" or "training" into the police decision to search or seize.[171]

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[161] *See id.*

[162] *Id.*

[163] Nowhere is this more apparent than in the area of consent searches. In *Schneckloth v. Bustamonte*, both Justices Douglas and Marshall adopted a suspect-focused and rule-based model of authority in adopting the Ninth Circuit's worry that "a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law." 412 U.S. 218, 289 (1973) (Douglas, J., dissenting); *id. at* 289 (Marshall, J., dissenting). The majority's officer-focused and role-based model of authority exhibited no such concern. In fact, a focus on the investigative role of the police, dependent as it is upon an ethics of autonomy, has, in the view of the Court, created a mirror image of the reasonable officer in the reasonable and robust citizen, sufficiently self-reliant to resist police imprecations. *See* INS v. Delgado, 466 U.S. 210, 216 (1984). As Sklansky notes, this view is merely a legal fiction. Sklansky, *supra* note 69, at 320-23. It operates upon a judicial "understanding" favorable to law-enforcement officials and their judgments. *Id.* at 302-03. Or, as Steiker would say, it operates at the level of a decision rule (whether the decision is to trust the police and require a certain fortitude on the part of the public in police-public interactions), which is at the root of the justifications behind much investigation "outside" the Fourth Amendment's purview. Steiker, *supra* note 159, at 2492.

[164] Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 474 (1991).

[165] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

[166] William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991).

[167] Bookspan, *supra* note 164, at 477.

[168] Ohio v. Robinette, 519 U.S. 33, 39-40 (1996) (citing Florida v. Bostick, 501 U.S. 429 (1991); Michigan v. Chesternut, 486 U.S. 567 (1988); Florida v. Royer, 460 U.S. 491 (1983)).

[169] *See* Florida v. Royer, 460 U.S. 491, 506-07 (1983); *see also Robinette*, 519 U.S. at 40; Illinois v. Gates, 462 U.S. 213, 230-32 (1983).

Role-based understandings of the scope of authority derive from the range of activities suited to an official's institutional or social status, which, in the case of the police, is criminal investigation. Role-based justifications thus extend beyond the regime of institutional rules and account for non-institutional, administrative, or customary understandings of an official's role.[172] This change in attitude has important consequences for the manner in which courts decide to scrutinize conduct and hold the police accountable. A court or other decision maker asks how an official, such as a police officer, would act in circumstances that trigger her role. Put simply, role-based authority concerns the circumstances and purposes that empower an official to act rather than conduct-guiding norms, the content of which define the scope of legitimate authority.[173]

Role-based authority thus focuses on institutional agents in the context of action—performing the jobs with which they have been entrusted, given the circumstances and appropriate level of competence. It concerns issues of professional identity and ethics rather than a morality of rights and duties. The Court evaluates the decision to act based upon "whether the[ ] historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause."[174] Under the reasonableness standard, the Court focuses on contextual triggers, changing circumstances, and pragmatic responses to the problems presented by the investigative process. In doing so, the Court has removed a variety of impediments to the officer's performance of her job, sometimes on the basis of inconvenience or danger,[175] sometimes as essential to the very possibility of following up on investigative hunches,[176]

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170. *See, e.g.*, *Royer*, 460 U.S. at 520 (Rehnquist, J., dissenting) ("The opinion nonetheless, in my view, betrays a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent.").

171. United States v. Arvizu, 534 U.S. 273, 273 (2003); Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Mendenhall, 446 U.S. 544, 563-64 (1980); *see also* Florida v. Rodriguez, 469 U.S. 1, 6 (1984); *Royer*, 460 U.S. at 524-25 (Rehnquist, J., dissenting).

172. Non-institutional, of course, from the legal perspective.

173. *See* Steiker, *supra* note 159, at 2470-71, 2533-3540 (describing the manner in which the Burger and Rehnquist Courts indirectly eviscerated protections of the Warren Court's criminal procedure by transforming "conduct" norms into "decision" norms).

174. *Ornelas*, 517 U.S. at 696.

175. *See* New York v. Belton, 453 U.S. 454, 460 (1981) (holding that in order to protect the safety of police officers, they may search the passenger compartment of an automobile as a contemporaneous incident of an arrest); Pennsylvania v Mimms, 434 U.S. 106, 110-11 (1977) (explaining that the danger of deliberate or accidental hazard associated with traffic stops justifies a bright-line rule permitting police officers to order a suspect from his or her vehicle).

176. I take this to be one of the underlying rationales for the standards the Court adopted to evaluate the constitutionality of consent searches. *See* Ohio v. Robinette, 519 U.S. 33, 39-40 (1996).

sometimes because to do otherwise would lead investigating officers to disregard the law.[177]

Furthermore, the police role is, it turns out, somewhat amorphous and described in a manner that obscures as much as it illuminates.[178] It remains transparent to cultural and political values rather than clearly determined by the courts or the police. One influential claim is that, at its core, the police role is to "mak[e] use of the capacity and authority to overpower resistance."[179] "Accordingly, the question, 'What are policemen supposed to do?' is almost completely identical to the question, 'What kinds of situations require remedies that are non-negotiably coercible?'"[180] The result is that "the parameters of the police officer's role have not been set exclusively by the legal rules, and perhaps not even principally."[181] Instead, the Court leaves the various police roles largely implicit and under-defined, resting upon public perceptions and expectations. It treats the values underlying policing as aligned with institutional goals, and it grounds those values, often without much explanation, in the fiction of public trust of the police and deference to the police descriptions of their thought processes as mediated by the circumstances and their training.[182]

One of the more egregious examples of this refusal to define police roles is the Court's endorsement of pretextual traffic stops in *Whren v. United States*.[183] *Whren* permits mixed-motive police stops so long as evidence of potential wrongdoing, as viewed by an experienced officer, rises to the requisite level.[184] So long as an officer can legitimate the initial stop by pointing to some infraction, the Fourth Amendment does not inquire into the officer's "subjective"[185] or "real" purpose. The Court's decision exemplifies the role-based method of regulation: so long as circumstances triggering police authority are present, the Court confers incredible leeway upon law-enforcement officers to choose the means by which to investigate crime.

In *Whren*, the Court expressly refused to consider the content of "usual," "general," or "standard" police practices,[186] as ascertained from police manuals and standard procedures, as a means of regulating police conduct.[187] This refusal emphasizes the role-based nature of the Court's analysis: as far as the Court is concerned, the Fourth Amendment is not concerned with regulating police conduct by reference to published policies or customary norms of law-enforcement defining what police officers "generally" do.[188] Instead, the Court defers to what the police actually do given the circumstances.

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[177] *See* Illinois v. Gates, 462 U.S. 213, 236 (1983) ("If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search.").

[178] *See* BITTNER, *supra* note 124, at 2-3.

[179] *Id.* at 40.

[180] *Id.* at 41.

[181] Sklansky, *supra* note 145, at 1227.

[182] *See* Ornelas v. United States, 517 U.S. 690, 699 (1996) ("a police officer views the facts through the lens of his police experience and expertise").

[183] 517 U.S. 806, 814 (1996).

[184] Whren v. United States, 517 U.S. 806, 817 (1996).

[185] *Id.* at 813.

[186] *Whren*, 517 U.S. at 814, 815.

The problem, however, is that *Whren* is a racial profiling case: petitioners essentially claimed the police used minor traffic violations as a pretext to stop them for driving while Black.[189] The Court's role-based Fourth Amendment analysis, however, cannot engage with such a claim:[190] so long as the circumstances confer authority and the purpose is to investigate crime, the means chosen are, within broad limits, irrelevant.[191] Even racially discriminatory criteria evade constitutional scrutiny under the Fourth Amendment analysis: discrimination claims must be brought under the Fourteenth Amendment's Equal Protection Clause. As David Sklansky suggests, the result is "[i]nsensitivity to the racial aspects of policing,"[192] and "the Court's relative disregard of the ways in which searches and seizures can cause grievances . . . disproportionately suffered by blacks and members of other racial minorities."[193] Given the difficulty of raising an equal-protection claim,[194] race remains a viable, though contested, criterion for identifying suspects.[195]

III

LOCAL CONSTRAINTS: THE SOCIAL NORMS SOLUTION TO PUBLIC ORDER POLICING

The traditional Fourth Amendment debate revolves around constraining governmental intrusions upon individual privacy. The social norms embrace of Broken Windows has transformed that debate, however. Now, the central issue is the creation of a slew of low-level crimes that extend the grounds for stopping and searching pedestrians for reasons only collaterally related to the envisaged social harm.[196] The social norms thesis is essentially that constraints on law-enforcement work only if they are sufficiently local, specific, and contextualized.[197] These local limits on executive discretion are supposed to minimize the intrusive styles of policing that lead to arrest and incarceration.[198]

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[187] *Id.* at 815.

[188] *See* Amsterdam, *supra* note 102, at 416-17. Amsterdam's approach is rule-based, I have suggested, because he would require police departments to produce rules of conduct that would form a set of legally binding standards.

[189] *Whren*, 517 U.S. at 818.

[190] *Id.* at 814 ("[T]hat the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option.").

[191] *Id.* at 817.

[192] Sklansky, *supra* note 69, at 318.

[193] *Id.*

[194] *See, e.g.*, Chavez v. Illinois State Police, 251 F.3d 612, 634-48 (7th Cir. 2001) (emphasizing difficulty of establishing Equal Protection claim in the context of asserting discriminatory police stops).

[195] *Compare* United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975) (ethnic appearance can be factor in reasonable suspicion calculus) *with* United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000) (en banc) (distinguishing *Brignoni-Ponce* to hold that race is constitutionally impermissible factor in reasonable suspicion calculus).

Social norms theorists thus propose a partnership between local communities and the police, such that the police reduce policing high-stakes drug crime and transfer their resources to preventative policing of public order. Their central thesis is that the collateral effects of policing public order are less damaging to the community than those of policing drug crime. Their goal is to empower policing through a legislative program of low-level, substantive criminal laws that undermine the antisocial activities constitutive of disorder,[199] such as curfews, loitering ordinances, and the like—and thus ultimately to expand rather than constrain police power. At the same time, they seek to remove or reduce the formal and prophylactic norms of police conduct characteristic of Warren Court criminal procedure.[200] In so doing, they facilitate a new, preventative role for the police who are constrained mostly by localized interpretations of enforcement norms established through local guidelines and local community-police partnerships. Such new crimes also demand positive creation of a range of new, low-level powers to police otherwise innocent conduct, and these powers are justified by participatory community self-regulation.

What social norms scholars propose is not the absence of rules regulating and constraining behavior but the presence of social and institutional guidelines, regulations, and norms positively defining the role of the police. Their aim is to relocate the power to generate norms of police conduct from inside to outside the law, from legal to social norms. They envisage the police and community collaborating to develop effective law-enforcement strategies as independent, self-directed entities, each with respect for the dignity and identity of the other.[201]

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[196] William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2153-54, 2154 n.53 (2002) ("The key exception to the warrant requirement is the one for searches incident to arrest. That doctrine allows the police to search the person and belongings of anyone who the police have probable cause to believe has committed a crime. Since crimes can include such things as traffic offenses, this power gives the police the ability to search, without a warrant, almost anyone in a vehicle, plus (depending on the stringency of local curfews and quality-of-life ordinances) a large portion of the pedestrian population to boot.") (internal citations omitted).

[197] *See* Kahan & Meares, *Crisis*, *supra* note 17, at 1177-78.

[198] The broken windows philosophy regards policing as responding to a patchwork quilt of local norms that provide the content of police conduct. It is thus the epitome of formal irrational regulation—these local norms may be stoked by bias or prejudice against strangers or outsiders. Wilson & Kelling, *supra* note 1, at 30, 36; *see also* KELLING & COLES, *supra* note 4, at 21-25, 30-37, 242-43, 247-57; Harcourt, *supra* note 69, at 304-05, 342.

[199] *See* Meares, *Social Organization*, *supra* note 17, at 223-24.

[200] *See, e.g.*, Meares, *Fundamental Fairness*, *supra* note 127, at 107.

Social norms theorists would limit police authority using specific, local constraints upon permissible action, developed in partnership with or responsive to the local community and its standards.[202] This partnership posture promotes institutional autonomy because the police are required to negotiate with local communities as allies, experts, and advisors, and on occasion to act so as to overcome local self-interest or bias.[203] The goal is to develop institutional self-conceptions and understandings of the relationship between law enforcement and community that reorient policing towards a new, preventative role.[204]

Legitimacy thus depends upon police willingness to self-regulate the performance of a limited, preventative, and community-oriented role, eschewing the temptation to escalate low-level encounters into a punitive form of drug enforcement.[205] Citizen review helps to develop appropriate guidelines or identify places and people in need of increased police care early in the process, and it continues as a means of evaluating and redirecting police performance and police-community goals, not as an after-the-fact sanction to punish police misconduct.[206] The operating principles are "persuasion"[207] and "'[t]rust [of] the individual's belief that the authority will act . . . fairly and predictably in the future."[208] Thus, the police are to be treated with the same respect and autonomy with which they are expected to treat the public.

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[201] KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 267-72 (2005) (exploring the value of discourse in recognizing and sharing one's identity). Guidance by rules results in what might be called a locally rule-based approach and undermines the claim of social norms theorists that they approve thoroughgoing police discretion. Both Meares and Livingston in fact support constraint of police conduct through local guidelines of the sort recommended by Amsterdam and other legal liberals. *See* Livingston, *Communities*, *supra* note 17, at 658-663 ("Placing reasonable restraints on the individual officer's discretion might be further facilitated through the use of departmental guidelines: broad policy statements developed within the police department that seek to instruct the officer in how to employ his discretion in addressing specific public order problems."); *id.* at 659-60 (comparing legal liberal emphasis on guidelines with social norms approach); Tracy L. Meares, Terry *and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343, 1348-49 (1998) [hereinafter Meares, *Terry*].

[202] *See* Meares, *Place & Crime*, *supra* note 12, at 676, 694-95.

[203] *See* ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 1-18 (2005) [hereinafter FUNG, EMPOWERED PARTICIPATION]; Livingston, *Communities*, *supra* note 17, at 655-56.

[204] *See, e.g.*, Livingston, *Gang Loitering*, *supra* note 24, at 198-99; Livingston, *Communities*, *supra* note 17, at 640, 650.

[205] Livingston, *Gang Loitering*, *supra* note 24, at 173 (noting that police "pursue their own predilections in targeting people for enforcement").

[206] Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 665-66 (2004).

[207] Meares, *Legitimacy & Law*, *supra* note 13, at 404. Additionally,

> [a] legitimacy-based law enforcement policy, then, should include both those who abide by the law and those who break the law. The focus of such a policy is persuasion, more so than punishment. To implement such a policy, the authority must first establish trust among the governed, which the group value model suggests cannot be achieved by focusing on punishment. Compliance created by threats of punishment is fundamentally inconsistent with a relationship of trust and results in a rift, rather than a bond, between the authority and the governed.

Meares, *Signaling*, *supra* note 65, at 413.

B. *Enforcement and Internalization of Legal Norms*

There are a variety of possible critiques of a program that replaces broad city, county, or national standards with a patchwork quilt of crime zones, each enforcing different standards of behavior and some prohibiting the exercise of innocent or constitutionally protected conduct. One, I wish to suggest, depends upon a central problem with rule-based authority. As Part II.A indicated, where the executive official resists internalizing the legislature's values expressed through a system of rules and is unafraid of being punished for such resistance, she has no motivation to obey the rules as enacted. The goals and values of the executive, and in particular her particular agency, will animate her conduct. Role-based concerns will trump rule-based ones.[209]

Rule-based constraints upon authority can fail miserably in their goal of restraining official conduct where they are poorly enforced or, like the Fourth Amendment's Warrant Clause, riddled with exceptions. In addition, rules can generate discretion. For example, there may be too many norms controlling conduct. Where different institutions or branches of government seek to regulate official behavior, more and clearer legislative norms may do nothing to alter the administrative discretion of law-enforcement agencies. Thus, where a series of administrative norms, arising from executive custom or executive agency enactment, structure rule-based grants of authority, the administrative official often responds to the executive agency's interpretation of the rules, rather than the legislative or public regulations. In part, this may be due to what Jamison Colburn termed the "cascading" effect of administrative regulations:[210] the executive interprets laws and determines the manner of their enforcement so as to generate a range of practices and procedures that are more consistent with the administrative imperatives of the regulatory agency than with the purposes of the original legislation.[211]

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[208] Meares, *Signaling*, *supra* note 65, at 412-13.

[209] Yale Kamisar's description of the New York City Police Commissioner's reaction to the different legal standards before and after *Mapp* offers a striking demonstration of the manner in which the police ignored a rule that refused to punish illegal searches, treating it as a permission to engage in the illegal conduct. *See* Kamisar, *Defense*, *supra* note 90, at 124; Kamisar, *"Old World" Criminal Procedure*, *supra* note 90, at 559-60. *People v. Defore*, 150 N.E. 585 (1926), established the New York State law on the admissibility of illegally seized evidence that applied before *Mapp*.

[210] *See* Jamison E. Colburn, *"Democratic Experimentalism": A Separation of Powers for Our Time?*, 37 SUFFOLK U. L. REV. 287, 335-42, 383-92 (2004).

[211] *Id.* The extant customs and traditions of the administrative institution, along with the agency's interests in preserving its jurisdictional authority and internal hierarchy, render the impact of legislation less predictable and direct than might be imagined or desired. All this is predictable given

For example, a police force may control its officers' conduct through a set of operating procedures, training manuals, and directives from senior to junior officials, as well as customary practices learned "on the job" and handed down from officer to officer.[212] Some of these police norms may directly enforce legislative norms; others may channel the resources and energies of the enforcement branch in ways that could bolster but also undermine legislative initiatives. Other practices may be unsystematic and *ad hoc*, dependent upon the discretion of individual officials—police officers or prosecutors.[213] These law-enforcement norms help the individual officer and the institution to determine its role, thereby identifying the scope of its authority.

This administrative refusal to internalize and apply legislative norms damages legitimacy by undermining the relationship between state and citizen.[214] Transforming prohibition into license harms the participatory legislative process and replaces it with a set of non-public police tactics designed to frustrate the law.[215]

Two recent Supreme Court cases, *Chavez v. Martinez*[216] and *Missouri v. Seibert*,[217] demonstrate that the purposive, outcome-oriented attitude to norms characteristic of role-based justifications of official action is of current importance and that it has a national impact. Both cases arose from police violations of suspects' Fifth Amendment *Miranda* rights; in both cases, the police were trained or instructed to violate the suspects' rights.[218]

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the concepts of social meaning and social influence integral to the social norms explanation of regulated intentional conduct.

[212] For some such body of norms, see SKOLNICK, *supra* note 123, at 41-68 (discussing institutional mentality of police); Waldeck, *supra* note 38, at 1263-71 (discussing norms of police subculture). *Compare* Kamisar, *"Old World" Criminal Procedure*, *supra* note 90, at 559-60. Kamisar discusses the manner in which the New York police ignored a rule prohibiting as illegal certain types of searches and seizures. Instead, the police interpreted the absence of a sanction excluding illegally seized evidence as a permission to engage in the prohibited and illegal searches and seizures. *See id.* at 559-60.

[213] *See* Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1561 (2004) (discussing discretion and procedure in drug courts); *see also* Colburn, *supra* note 210, at 335-42, 383-92.

[214] *See, e.g.*, Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 658, 667 (1972) (discussing the importance of the correspondence of police rules of conduct with community sentiment).

[215] These illegitimate administrative procedures may even be ratified by legislative action or inaction where the legislature has the power to repeal the norms justifying the procedure. The Fourth Amendment's exclusionary rule, Kamisar has argued, attempts to restore that relationship through the "principled basis" of refusing to "[ratify] the unconstitutional police conduct that produced the proffered evidence, to keep the judicial process from being contaminated by partnership in police misconduct, and to assure the police and the public alike that the Court took the fourth amendment seriously." Kamisar, *"Old World" Criminal Procedure*, *supra* note 90, at 560.

[216] 538 U.S. 760 (2003).

[217] 542 U.S. 600 (2004).

[218] In *Chavez*, the police shot petitioner Martinez following an altercation, "causing severe injuries that left Martinez permanently blinded and paralyzed from the waist down." After arresting Martinez:

This executive, purposive, role-based interest that encouraged violation of a Constitutional right in order to obtain information stemmed from an improper understanding of *Miranda v. Arizona*[219] as presenting a rule-based prohibition on nonconsensual interrogations.[220] Instead, a variety of state and federal law-enforcement training programs[221] "disfigure[d]"[222] the Court's reasoning in *Oregon v. Elstad*[223] and treated its tort-style causation analysis as a mere suggestion of how to avoid the exclusion of un-*Mirandized* confessions.[224] Indeed, one of the major worries identified by

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> officer Chavez accompanied Martinez to the hospital and then questioned Martinez there while he was receiving treatment from medical personnel. The interview lasted a total of about 10 minutes, over a 45-minute period, with Chavez leaving the emergency room for periods of time to permit medical personnel to attend to Martinez. . . . At no point during the interview was Martinez given warnings under *Miranda v. Arizona*.

Chavez, 538 U.S. at 764. In *Seibert*, the police awakened the defendant at 3:00 a.m. and took her to the police station where she was questioned without being given any *Miranda* warnings. After confessing, she was given "a 20-minute coffee and cigarette break. [The police officer then] returned to give her *Miranda* warnings, and obtained a signed waiver. He resumed questioning . . . [by] confront[ing] [her] with her prewarning statements." 542 U.S. at 600. The policy of withholding the *Miranda* warnings until a first confession had been obtained, then re-interrogating the witness, was a policy "promoted not only by [the Missouri police] department, but by a national police training organization and other departments in which he had worked." *Id.* at 609.

[219] 384 U.S. 436 (1966).

[220] This occurred despite the Court's reiteration of the constitutional foundation of the warnings in *Dickerson v. United States*, 530 U.S. 427 (2000). *See* Brief for Former Prosecutors, Judges and Law Enforcement Officials as Amici Curiae Supporting Respondent, Missouri v. Seibert, 542 U.S. 600 (2004) (No. 02-1371). Former prosecutors, including Charles D. Weisselberg, Professor of Law at the U.C. Berkeley School of Law (Boalt Hall) and Stephen J. Schulhofer of NYU Law School's Brennan Center for Justice, filed the brief. In that brief, they pointed out that "[f]rom the outset, law enforcement officials have understood that *Miranda*'s warning requirement applies directly to them . . . . No reasonable interpretation of th[e Court's] language leaves any room to contend that the warnings are optional, not mandatory, or that they are anything other than binding upon police." *Id.* at 6. Furthermore, in his opinion respecting denial of a *sua sponte* call for en banc rehearing in *United States v. Orso*, 275 F.3d 1190, 1197 (9th Cir. 2001), Judge Stephen Trott, himself a former state and federal prosecutor, suggested that a refusal to exclude outside-*Miranda* interrogations would send a clear message to police trainers: "Don't advise, interrogate the suspect, violate the Constitution, use subtle and deceptive pressure, take advantage of the inherently coercive setting, and then, after the damage has been done, after the beachhead has been gained, gently advise the suspect of her rights." *Id.*

[221] *See Seibert*, 542 U.S. at 610-11 n.2 (discussing training materials, including D. ZULAWSKI & D. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 50-51 (2d ed. 2002); Police Law Institute, Illinois Police Law Manual; Videotape: Video Training Programs for California Law Enforcement, Miranda: Post-Invocation Questioning (California Commission on Peace Officer Standards and Training, broadcast July 11, 1996)); *see also* Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 110, 132-39 (1998).

[222] *Seibert*, 542 U.S. at 613.

[223] 470 U.S. 298 (1985).

[224] *Seibert*, 542 U.S. at 600; *see also* Oregon v. Elstad, 470 U.S. 298, 313 (1985). Charles Weisselberg's study of questioning "outside *Miranda*" provides an apt demonstration of the problem: a bulletin prepared by the Orange County, California District Attorney's office following *Peevy* described the state high court's characterization of "outside Miranda" questioning as illegal as "unfortunate dictum" that would "be open to serious dispute if [it] should ever form the basis of a ruling." The bulletin continued: "Meanwhile, like they say down home, 'If you've caught the fish, don't fret about losing the bait.'" Weisselberg, *supra* note 221, at 1143-44. *See also* Cal. Att'ys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999) (discussing police officers who regularly

critics of the police procedures used in *Seibert* was the manner in which state and national training programs undermined local police guidelines or standards.[225]

Whether one regards the *Elstad* rule as a prohibition or permission upon un-*Mirandized* interrogations depends upon factors internal to the police investigative role. Whereas some may regard such an executive transformation of legislative norms as a perversion of the law, others may believe it to be justified given the exigencies of crime fighting.[226] The collateral consequences of such interrogations support the Court's finding of substantive illegitimacy: the "outside *Miranda*" practices that some police follow and some prosecutors endorse had the obvious effect of keeping defendants from testifying in their own defense for fear of impeachment.[227]

A major problem with social norms theories is that local control of law-enforcement initiatives deals only with the problem of generalized norms, not with the problem of competing administrative norms that purport to interpret and apply legal standards. Both community and law-enforcement norms are local compared to the legislature. And community and law-enforcement norms can themselves conflict. This again raises the problem of under- and over-policing: where the legislature, police, and community agree on the norms to be policed, the need for policing, and the manner of policing, law-enforcement intervention is appropriate. Over- and under-policing both arise from disagreements between community and law

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subvert *Miranda* pursuant to official policy set forth in training programs and materials); Brief as Amici Curiae Supporting Respondent at 21, Chavez v. Martinez, 583 U.S. 760 (2003) (No. 01-1444) ("California Supreme Court's disapproval of such conduct had little effect on police training.").

[225] Police training has been a problem for decades. *See, e.g.*, Stephen L. Wasby, *Police Training About Criminal Procedure: Infrequent and Inadequate*, 7 POL'Y STUD. J. 461, 461-68 (1978).

[226] For example, police training videos emphasized that the interrogation is often their "one shot" at solving serious crime. Weisselberg provides an example of police training procedures in a video encouraging officers to interrogate "outside *Miranda*":

> What if you've got a guy [in custody] that you've only got one shot at? This is it, it's now or never because you're gonna lose him—he's gonna bail out or a lawyer's on the way down there, or you're gonna have to take him over and give him over to some other officials—you're never gonna have another chance at this guy, this is it. And you Mirandize him and he invokes. What you can do—legally do—in that instance is go outside *Miranda* and continue to talk to him because you've got other legitimate purposes in talking to him other than obtaining an admission of guilt that can be used in his trial. . . . [Y]ou may want to go outside Miranda and get information to help you clear cases . . . . Or maybe it will help you recover a dead body or missing person . . . . You may be able to recover stolen property . . . . Maybe his statement will identify other criminals that are capering in your community . . . . Or, his statements might reveal the existence and location of physical evidence. You've got him, but you'd kinda like to have the gun that he used or the knife that he used . . . . [Y]ou go "outside Miranda" and take a statement and then he tells you where the stuff is, we can go and get all that evidence.

Weisselberg, *supra* note 221, at 110, 135-36.

[227] *See id.* at 110, 135-36 (police training video stated that questioning "outside *Miranda*" "forces the defendant to commit to a statement that will prevent him from pulling out some defense and using it at trial—that he's cooked up with some defense lawyer—that wasn't true. So if you get a statement 'outside Miranda' and he tells you that he did it and how he did it or if he gives you a denial of some sort, he's tied to that, he is married to that").

enforcement over the substantive norms to be policed or the need for policing. Over-policing also results from conflicts over the manner of policing.

All communities appear to want law enforcement to police violent crime and crimes against property. There also seems to be general agreement upon the necessity for policing certain public-order offenses. Conflict arises from a range of offenses, including low-end drug crime, that may be tolerated by the community so long as they do not contribute to public disorder. Here, the only thing guaranteeing the influence of community norms on law enforcement is law enforcement itself. Given the institutional and political pressures on law-enforcement agencies to police easy targets of crime, there is good reason to believe that the police are likely to promote their own goals and values at the expense of both the legislature and the community unless they either internalize the communities' values or are effectively sanctioned for failing to do so.

C. *Encounter and Escalation: Role Confusion as a Police Tactic*

It is worth remembering that roles are constructed through assigning importance to certain skills and goals that are triggered by more or less specific circumstances. It is clear from police training that low-level criminal offences have a different "social meaning"[228] for officers than for the local community. For the police, low-level crimes serve as a gateway to investigating higher-level crimes; policing tends to operate through escalation techniques. In fact, the whole direction of policing under the Fourth Amendment is to use low-level encounters to engage the public, and then to progress through the stages of reasonable suspicion and probable cause to high-stakes interactions resulting in arrest.[229] For social norms theorists, by contrast, the point is to reorient policing, not to solve crime.[230] Such theorists therefore assume that the police will be willing to tolerate private crime so long as there is public order.

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[228] Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2184 (1995-1996).

[229] For an excellent example of the way this routine works in the context of traffic stops, see Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

[230] That is certainly Tracey Meares's orientation, *see* Meares, *Social Organization*, *supra* note 17, at 224; Meares, *Terry*, *supra* note 201, at 1347; at one point it appears to be Debra Livingston's. *See* Livingston, *Communities*, *supra* note 17, at 558-60. Livingston, however, seems most interested in investigative policing when discussing community caretaking. *See* Livingston, *Caretaking*, *supra* note 17, at 271-77. Livingston could be making an argument about the standard by which to evaluate the reasonableness of intrusions upon privacy to engage in the caretaking role. Such a discussion would properly implicate not criminal cases but civil cases for damages consequent to some tort of constitutional magnitude committed by the police when executing their caretaking function. The shocks-the-conscience standard for such a suit is high, and the police enjoy a certain degree of immunity, so such cases are infrequent. But civil infractions consequent to the severely negligent or intentionally maleficent performance of the caretaking function is not Livingston's target. Instead, she wants criminal investigation consequent to caretaking to be free from the warrant requirement. *Id.*

Debra Livingston points out, however, that the police traditionally perform a variety of "caretaking functions"[231] that include the classic Broken Windows public order issues: noise abatement; finding shelter for the drunk, homeless, and mentally ill on the streets; removing abandoned property; and a myriad of other activities designed "to create and maintain a feeling of security in the community."[232] It is hard to draw a bright line between investigation and caretaking because many caretaking activities intrude upon privacy rights protected by the Fourth Amendment. In fact, Livingston claims, the caretaking role cannot and should not be regulated in the manner of the investigative role. Rather, such police intrusions that the community generally supports ought to be promoted so long as they are reasonable and so long as they are not motivated by an investigatory interest.[233] Livingston thus contends that the rule-based "warrant preference"[234] is inapposite when measuring caretaking intrusion.[235]

Whereas social norms theorists often seek to draw bright lines between the police's investigative role on the one hand and its preventative or caretaking role on the other, both the police and the Court tend to muddy the issue. Most worryingly for social norms theorists law enforcement and the Court have chosen to understand the type of low-level encounters central to public-order policing as non-coercive and central to the investigatory process. In a series of cases concerned with traffic stops,[236] the Court has removed a series of low-level encounters from the purview of the Fourth Amendment and has permitted the police to search and interrogate motorists and passengers in a manner that quickly escalates, via the legal fiction of consent, into high-stakes drug policing.[237] In effect, such cases translate the rationale of *Terry* into the motor-vehicle context and permit the vast range of low-level offenses—sufficient to render almost any use of a motor vehicle subject to police regulation[238]—to operate as grounds for a variety of more or less invasive high-stakes encounters with the police as part of the War on Drugs. The whole point of public-order policing is to enact a similar set of low-level offenses so as to expand the role of the police in community affairs.

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[231] Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

[232] Livingston, *Caretaking*, *supra* note 17, at 272.

[233] *Id.* at 265, 271.

[234] Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 203-04 (1993).

[235] Livingston, *Caretaking*, *supra* note 17, at 265-71.

[236] *See* Ohio v. Robinette, 519 U.S. 33, 35-36 (1996) (police who stopped defendant for speeding on Interstate 70 asked a defendant to consent to police search of car); Ornelas v. United States, 517 U.S. 690, 691-93 (1996) (as part of drug interdiction effort, and after establishing driver and passenger were drug dealers, police officer asked driver of car parked in motel parking lot for consent to search car); Florida v. Bostick, 501 U.S. 429, 437-38 (1991) (two officers entered bus as part of drug interdiction effort and asked defendant for consent to search his luggage); Pennsylvania v. Mimms, 434 U.S. 106, 107-08 (1977) (officers stopped defendant for driving with expired license plate, ordered him out of the car, noticed a bulge under his arm, frisked him, and discovered a concealed gun); Schneckloth v. Bustamonte, 412 U.S. 218, 220-21 (1973) (officer stopped car with faulty lights and asked defendant for consent to search, which was freely given).

[237] Sklansky, *supra* note 69, at 320-23; *see also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 27-34 (1999) (discussing consent searches); Cole, *Discretion*, *supra* note 3, at 1071-73.

Vehicle stops provide an important analogy because vehicles are precisely at the vanguard of drug policing. The police depend upon the use of low-level encounters for their effectiveness in policing drug crime.[239] The techniques used in traffic stops are transferable to pedestrians, and indeed many pedestrians become the drivers of automobiles, or passengers in cars, buses, and trains. Furthermore, it is in just these encounters at the side of the road, on the bus, and in the airport that autonomy from police pressure may be at its weakest. It is here that the sort of polite police "May I . . ." that is an essential part of the social norms program to legitimize police conduct is most likely to obtain grudging consent.[240]

A common explanation of consent to searches is that it derives from lack of information coupled with intimidation. The failure to alert citizens that they need not consent and are free to leave,[241] combined with their generalized feelings of coercion during a police encounter, preclude citizens from asserting their rights.[242] A complementary explanation suggests that the use of public-order policing has increased the range of inherently adversarial encounters, reducing the instances where the police interact with citizens "outside" the Fourth Amendment.

For example, the New York Attorney General has explained that "[o]rder maintenance theory encourages officers to intervene in instances of low-level disorder, whether observed or suspected, with approaches which fall short of arrest. A 'stop' intervention provides an occasion for the police to have contact with persons presumably involved in low-level criminality."[243] The temptation becomes to expand the definition of disorder to increase the likelihood of such police-citizen contacts.[244] The police then initiate interactions with citizens in an adversarial posture, one that brings with it the coercive authority associated with the law enforcement role, rather than the service posture associated with the "caretaking" role.

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[238] In the car-stop situation, it does not matter whether the initial infraction is civil or criminal, so long as the police have the power to detain the driver. *Compare* Whren v. United States, 517 U.S. 806 (1996) (the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is consistent with the Fourth Amendment) *with* Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (a warrantless arrest for a misdemeanor traffic offense is permissible under the Fourth Amendment).

[239] Sklansky, *supra* note 69, at 299.

[240] *Schneckloth*, 412 U.S. at 276 (Douglas, J., dissenting); *id.* at 289 (Marshall, J., dissenting).

[241] *See, e.g.*, Sklansky, *supra* note 69, at 320.

[242] *See id.*; COLE, *supra* note 237, at 1-55.

[243] Waldeck, *supra* note 38, at 1282-83 (citing Office of New York State Attorney General Eliot Spitzer, The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General (Dec. 1, 1999), at 57).

[244] *See id.* at 1268.

Emphasizing politeness in police conduct, as do both the Court and social norms theorists, sidesteps the coercive ramifications of the encounter. Divergent social meanings of police politeness present significant problems for social norms descriptions of formally legitimate police conduct. Politeness is a social-norms criterion of successful community policing.[245] But if the polite police "May I" is in fact experienced by the public as intimidating—if, as Sklansky suggests, the idea of non-coercion is a fiction[246]—then consent operates as no more than an "externalist" formal mark to help the police move from low-level to more invasive styles of policing, and from caretaking norms to contested substantive norms of criminality.[247]

If the goal of policing is not the prosecution of low-level crimes but rather escalation to high-stakes policing as part of the War on Drugs, then low-level policing engages in a double fiction. Not only is public consent illusory, but the police are not primarily motivated by an interest in tackling low-level crime. Rather, the police use low-level crime as means of engaging suspects in the hopes of escalating an encounter initially structured by caretaking concerns into one where the police can engage in investigation. The inevitable result is that minorities translate experiences of being stopped on the street or pulled over for "driving while black" as something other than "caretaking" or the policing of low-level crime. The police deliberately confuse their different roles as one of the major techniques for policing drug crime. The policy of escalation make even the most casual encounter between the police and the mostly minority members of inner cities (or targets of traffic stops) fraught with high-stakes consequences.[248] At the very least is the fear and inconvenience associated with a *Terry*-stop while the process of escalation takes its course. At the worst, a casual encounter escalates from a minor incident to a brutal one.[249]

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[245] *See* Meares, *Legitimacy & Law*, *supra* note 13, at 403; Tracy L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1195 (2003). [hereinafter Meares et al., *Punishment*]

[246] Sklansky, *supra* note 69, at 318-323.

[247] Justice Stevens's partial concurrence in *Wardlaw v. Illinois*, 528 U.S. 119 (2000), reflects the ambiguous nature of consensual encounters for members of racial or ethnic minority groups.

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.

Id. at 132 (Stevens, J., concurring in part and dissenting in part). If Stevens is correct, then the shift is experienced by minority citizens as one that ratchets up the levels of coercion, rather than a move from shared norms of civility to contested norms of criminality.

[248] Sarah Waldeck, citing William Stuntz, lists five:

> [1] harm to the individual's privacy . . . [2] "targeting harm," the injury suffered by one who is singled out by the police and publicly treated like a criminal suspect . . . [3] Police violence . . . [4] discrimination . . . [5] an individual who is repeatedly stopped and formally arrested will eventually have a long record of such incidents. This record may lead to the impression that he is a troublemaker and set him up for additional encounters with law enforcement, when in fact he is merely a victim of forces beyond his control.

Tom Tyler, a prominent social psychologist whose work has influenced much social norms scholarship, suggests that this escalation may be a feature of the "command and control" model adopted by law enforcement in police-citizen encounters.[250] Tyler proposes that

> the effort to exert control over citizens that is central to the command and control styles of legal authority can itself increase danger for and risk to the police . . . as well as to community residents. In the case of the police, by approaching people from a dominance perspective, police officers encourage resistance and defiance, create hostility, and increase the likelihood that struggles will escalate into struggles over dominance that are based on force. The police may begin a spiral of conflict that increases the risks of harm for both the police and for the public.[251]

My discussion of escalation indicates that this command-and-control model reaps significant benefits when policing drugs through low-level offenses. The police will win these struggles over dominance, and they will do so in a manner that permits them to engage in a more thorough search of the individual than might otherwise occur. The struggle may be one that seeks to obtain consent to search, or it may be one that seeks to coerce the non-consenting target. Either way, the goal of escalation is to raise the stakes of the low-level encounter to justify the ultimate search or seizure.

Encounters with the police thus reveal a different set of stakes for individuals in those urban communities targeted for drug policing and undercut minority perceptions of the government's right to legislate criminal norms at the local level.[252] So long as the mostly minority urban neighborhoods are a primary site of the high-stakes policing associated with the War on Drugs, the disparate treatment of a minority community will continue to "undermine commitment to the law by minority law abiders by

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Waldeck, *supra* note 38, at 1284-85 (quoting William J. Stuntz, Terry*'s Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1218 (1998)).

[249] *See, e.g.*, Katheryn K. Russell, *"What Did I Do to Be So Black and Blue?": Police Violence and the Black Community*, *in* POLICE BRUTALITY 135, 135-48 (Jill Nelson ed., 2000) (minor incidents "set the tone for the more egregious acts of police brutality"); *see also* Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 646 (2003) (police selectively pick on poor and minority suspects as targets for brutality).

[250] Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 363-64 (2001).

[251] *Id.* at 369.

[252] Meares, *Social Organization*, *supra* note 17, at 214 (manner of policing drug crime in minority neighborhoods, as well as effect of prosecution and sentencing in removing African Americans from community, reduces local perceptions of police legitimacy).

fostering a perception of illegitimacy of government among members of the stigmatized minority group."[253]

The liberal legal rule-based approach had a certain merit: even if it did not deter police conduct, it certainly precluded the legal effect of some conduct. From *Mapp* to *Seibert*, that has been the role of the exclusionary, rule-based approach to police action in excess of or contrary to their legitimate authority. This approach provides the hard separation of investigative from preventative policing. It is precisely the function of the warrant requirement to require the police, in certain circumstances, to take additional steps to move from one role to the other and so prohibit investigative windfalls from the caretaking role.[254]

The Court, however, has devalued significantly the exclusionary rule as a tool for regulating police conduct, effectively eviscerating this barrier to role-confusion. Even if the rule were strictly enforced, it is likely that the police would not internalize the necessity for legal searches but would seek ways around the Fourth Amendment, much as they seek ways around *Miranda*. Social norms theorists exacerbate this feature of role-confusion by failing to appreciate how the policy of escalation operates to transform low-level crime into high-stakes busts. They seek to multiply the opportunities for low-level intervention by recommending a slew of new, substantive but low-level criminal offenses. This tactic does not redirect the police's interest from drug crime to the various noise abatement or anti-cruising campaigns. Rather, it provides another set of opportunities for police to stop urban dwellers and start looking for drugs.

The liberal legal attempt to enlist the Court or the Constitution to regulate the police has failed. The social norms proposal to use local pressure to redirect the police to enforce a different and less onerous type of substantive criminal law is unlikely to fare any better. We require an alternative means to reform law enforcement in urban communities. I suggest addressing the source of the problem directly, by developing a role-based solution to what is inherently a role-based problem.

IV

ROLE-BASED COMMUNITY POLICING

Role-based constraints provide a method of reconceiving the project of enforcement reform begun by social norms theorists. Urban crime undermines the quality of life of urban residents and the social cohesion of urban communities. Preventative policing promotes cohesion and improves the quality of life, while lowering the stakes of encounters through policing low-level public-order offenses with sanctions set at the level of a misdemeanor.[255] The central problem is that the police attempt to switch or conflate roles, from preventative policing of public order to investigative policing drug crime.

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[253] Meares, *Place & Crime*, *supra* note 12, at 678; *see also* COLE, *supra* note 237, at 169-78 (adopting a very "social norms" sounding rejection of police practices as undermining local perceptions of legitimacy).

[254] Furthermore, current law permits such windfalls where there is an investigative justification for invading privacy—either some independent source, Murray v. United States, 487 U.S. 533 (1988), or a showing that the evidence would inevitably have been discovered, Nix v. Williams, 467 U.S. 431 (1984).

The solution is for separate officials to perform the distinct preventative and investigative roles. Where the police wear two hats, they should be required to remove the one that undermines community cohesion. My suggestion is simply to remove the police from preventative enforcement of low-level public-order offenses and to find someone else to do it. This does not entail that the "real" police do less policing, but that they do policing of a particular kind, one that avoids escalation and the minority perceptions of illegitimacy that accompany it.

If the central concerns of urban, minority communities are over- and under-policing, then any solution must address both (1) the manner in which the police engage in under-policing of violent crime or crimes against property by failing to respond to calls for help or to investigate[256] and (2) the manner in which they over-police public-order offenses, both in the style or manner of policing such offenses and in the substantive escalation from policing order to policing drugs. In particular, police culture has proved recalcitrant to the sort of change necessary for the public-order policing favored by social norms theorists.[257] Absent a change in the institutional culture, role-based policing suggests that police should do what they currently do best, or most want to do: make arrests. The power to investigate and arrest can then be concentrated on the sort of violent crimes or crimes against property that the community most wants the police to address. And to the extent that change in the law-enforcement culture is required, it can begin with issues raised by under-policing these sorts of crime.[258]

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[255] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 47 (1999) (gang loitering "ordinance creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service").

[256] According to Robert Sampson:

> [W]hat citizens appear to want are not fewer police, but *police of a different kind*. The evidence has long shown that more than nine in ten police-citizen encounters derive from citizen calls. This is a fact with deep implications, for it exposes the centrality of citizens as the engine of crime control. That citizens are behind the demand for police services is especially true in low-income, minority neighbourhoods where crime rates are high. Yet residents of the inner city do not want racist police, or a hierarchical form of policing from the top down that treats residents merely as passive recipients of a crackdown. The implications of collective efficacy theory for policing turn on the need to proffer innovative strategies that bear on legitimate and procedurally just partnerships.

Robert J. Sampson, *Neighborhood and Community: Collective Efficacy and Community Safety*, 11 NEW ECON. 106, 110 (2004).

[257] *See, e.g.*, Livingston, *Communities*, *supra* note 17, at 653-67 (discussing need for police reform as part of community policing, and suggesting that community policing orientation can bring about such a change); *cf.* Waldeck, *supra* note 38, at 1277-82 (suggesting that policing subcultures can transform community orientation to serve traditional police goals of increasing arrests).

I suggest that the police should retain the power to respond to crime when called upon. The call to respond to crimes of violence or against property is one of the primary circumstances triggering the police role. Such calls do not trigger the preventative social norms role.[259] Similarly, low-level crime should not trigger the police's regulatory response. The police are not, in the first instance, to engage in the Broken Windows policing of noise abatement, finding shelter for the drunk, homeless, and mentally ill, moving along panhandlers or loiterers, or removing abandoned property.[260]

The point is to acknowledge the potential of preventative policing while avoiding its major pitfalls. By differentiating the individuals and institutions responsible for public order and investigative policing, the police retain their primary role—responding to crime, acting on local calls for high-stakes offenses. Recall that a central feature of Kennedy's critique of policing minority communities was that the police traditionally ignore black-on-black crime. It turns out urban residents want the police to respond in a muscular manner when crimes are committed.[261] But the use of force must be carefully directed rather than generally employed. Freeing police manpower to engage in more responsive policing can be part of a policy of ensuring that more inner-city calls receive a rapid and meaningful response.

A different group of municipal officials, one without the personal or institutional motivation to conflate preventative with institutional roles, would take over the caretaking and preventative roles. Their goal is to remove the indicia of social fragmentation in a manner consistent with local norms, thereby promoting community cohesion. To avoid the perception of under-policing, the group with public-order responsibilities must be visible and associated with municipal or state governments; to engender trust and avoid the perception of over-policing, the group must possess no role-based investigative authority, but instead seek primarily to use a range of alternatives to arrest as a means of securing public order.[262] While there is no perfect solution to "the central question [of how to] reduce perceived bias without lessening the level of law enforcement in poor black communities,"[263] there are some candidates available to engage in the sort of precisely targeted policing of subjects and situations that social norms theorists demand.

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[258] Role-based policing may thus be characterized as a gloomy response to problems in the institutional culture of law enforcement. It accepts that "crime control and the apprehension of criminals remain the core police functions." Waldeck, *supra* note 38, at 1299. To the extent that we might wish to change such a culture, I am unsure that community policing, on its own, can effect this sort of institutional change. I recognize that some people might believe that separating the police from the community only cxacerbates the problem. *See id. See also* WILLIAM KER MUIR, POLICE: STREETCORNER POLITICIANS 280-82 (1977) (arguing that sociability and empathy prevent corruption of police authority). That is why I believe role-definition is only the beginning, and not the end, of a solution to problems of policing urban communities.

[259] A different type of call may trigger the caretaking role. Generally, the municipal official's role in that situation is to call the appropriate emergency authority for help.

[260] *See* Waldcck, *supra* note 38, at 1273-74 (listing New York's range of public order offenses).

[261] *See* Sampson, *supra* note 256, at 110.

In what follows, I consider a range of public-municipal interactions to identify the type of municipal official equipped to engage in public-order policing. Some local communities already successfully negotiate the limits of policing, requiring the police to direct their activities to investigation, and partner with local school, housing, and transportation authorities to remove the sources of public disorder. Municipalities could do more by reconstructing the activities of some local officials to engage in promoting public order.

A. Municipal-Community Partnerships

A major goal of partnerships between local governments and neighborhood communities is to identify and scrutinize the roles effectively performed by the police. Those that are nonessential or inefficient may be delegated to other municipal agents. The current success of municipal-community partnerships suggests that the police often play a peripheral role in the kinds of effective community-sponsored interventions that remove crime hotspots and reduce the crimogenic influence of local people or places.

The social norms literature is replete with discussions of partnerships between local communities, the police, municipal authorities, and private entities. It is worth briefly recounting a few of these discussions to give an overview of the subjects and workings of such partnerships. Public-order offenses are truly low-level offenses, such as aggressive panhandling and the like. The point of regulating them is that they send a significant message that impacts community cohesion. In solving such problems, it turns out that police activity is a relatively minor part of the order-restoring activity. Most public-order policing ultimately requires reclaiming and reconfiguring public spaces and avoiding the type of incident that would give rise to investigation by managing municipally controlled movements of people through public facilities or by public transportation.[264]

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[262] Sarah Waldeck argues that:

> Community policing and the original broken windows theory contemplated that officers would address neighborhood problems through alternatives to the criminal justice system, such as mediation, citizen education and, most significantly for this Article, partnerships between the police and a variety of public and private entities. While arrest would remain an essential tool in an officer's arsenal, it would be resorted to infrequently and only in particularly difficult cases.

Waldeck, *supra* note 38, at 1260. In fact, the police quickly came to re-interpret social norms policing in a manner that reinforced the arrest power. *See id.* at 1275-77.

[263] Stuntz, *supra* note 29, at 1836.

The Chicago Bus Transfer Station, on the corner of 100th and Pullman Streets in Chicago, Illinois, was a crime hotspot suffering from a gang problem exacerbated by the presence of students from a local high school.[265] Disorder was particularly pronounced on days when there had been fights at school. While the police provided a car to monitor the station, the real solution to the problem involved a partnership between parents, the Chicago Transport Authority, and the principal of the high school. The principal staggered class times to reduce pupil traffic, and the Transport Authority provided buses to bypass the Transfer Station and transport students directly to and from the high school.[266]

In the Lake View neighborhood of Chicago, drug dealers used a sunken concrete pit in a local park to sell crack and engage in prostitution at night.[267] The residents initially encouraged more policing after dark—but over the longer term they remodeled the park by trimming the trees to make the interior more visible from the street, installing night lights, redesigning the park to remove the pit, and creating a series of amenities more attractive to legitimate users.[268] To effect the cleanup and redesign of the park, residents enlisted the help of the "streets and sanitation department, the parks department, a friendly architect, private foundations, and local businesses."[269] Their efforts were overwhelmingly successful in reducing the illegal activity within the park.[270]

Both of these examples occurred in a city that has made great strides in reforming its police departments to promote local accountability at the neighborhood level.[271] In other words, Chicago appears to have engaged in some of the reform that Livingston suggests is essential to constraining the police role. The Mayor's Office and the Chicago Police Department reorganized the police officers into "neighborhood-sized 'beat teams,'" provided training for officers as part of a "striking" series of reforms directed at increasing partnerships with the local community, and required officers to engage in monthly meetings with local residents.[272] As described by Archon Fung, a professor of public policy at Harvard, the City had to engage in educating or re-educating not only the police but also the local community; they did this by hiring organizers "to knock on doors, post posters, contact community leaders, and call and facilitate meetings."[273] Yet, as the two Chicago examples above make clear, better public-police relations are only part of the solution.

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[264] Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 B.C. ENVTL. AFF. L. REV. 615, 618-23 (2001) [hereinafter Fung, *Beyond & Below*].

[265] *Id.* at 625-27.

[266] *Id.* at 627.

[267] *Id.* at 627-29. Fung describes an identical example in the "Lakeville" community in Chicago. *See* FUNG, EMPOWERED PARTICIPATION, *supra* note 203, at 2. For present purposes, I shall treat the two as interchangeable.

[268] Fung, *Beyond & Below*, *supra* note 264, at 628-29.

[269] FUNG, EMPOWERED PARTICIPATION, *supra* note 203, at 7.

[270] *See* Fung, *Beyond & Below*, *supra* note 264, at 628-29.

[271] FUNG, EMPOWERED PARTICIPATION, *supra* note 203, at 53-61, 63-68, 73-75, 79-86; *see also* Fung, *Beyond & Below*, *supra* note 264, at 618-21; Archon Fung, *Deliberative Democracy, Chicago-Style: Grass-roots Governance in Policing and Public Education*, *in* DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 111, 111-44 (Archon Fung & Erik Olin Wright eds., 2003) [hereinafter Fung, *Deliberative Democracy*].

Of particular importance to community-order maintenance efforts are problems resulting from "land use patterns and the ecological distributions of daily routine activities.... The location of schools, the mix of residential with commercial land use (e.g., strip malls, bars), public transportation nodes, and large flows of nighttime visitors."[274] Recent studies of community disorder suggest both that links between crime and disorder are not so direct as some would suppose and that partnerships between police and communities, without other interventions, are not the solution.[275] If the police are not to unilaterally transform public order policing to comport with their own priorities, then citizens must assume the dominant role in the partnering process.

Another example of successful partnering between police and public is the New York City Transit Authority's Clean Car Program. In the 1970s and early 1980s, the New York subway system was a scary place, filled with indicia of blight. To deal with the problem, the Transit Authority decided to remove graffiti, one of the major signals of disorder, from all its subway cars.[276] The Transit Authority adopted an approach that dealt with the graffiti problem by de-emphasizing arrest as the primary response and instead removing disfigured trains from the transportation system.[277] "All new and clean trains were placed in the program; if graffitists tagged a... train, the train was taken out of service until the graffiti was removed."[278] By de-emphasizing the police's investigative role and identifying other agencies to engage with the graffiti problem, the Transportation Authority was able to use alternative stratcgies as a first resort, while being able to call upon the arrest power for some recalcitrant or egregious offenders.[279] As these examples suggest, the police's role in enforcement of low-level disorder provisions can and should be solely reactive. A clearly differentiated body of individuals empowered to operate as the eyes and ears of the community, and with limited powers to enforce public order,[280] should perform the role of preventative policing. Many of the local responses to crime and disorder emphasize social relationships that require the police to act, if at all, in their traditional investigative role and engage in partnerships with other agencies as part of the process of prevention. These include graffiti watch teams, public action to withdraw licenses from bars in high-drug neighborhoods, and the demolition of abandoned houses used for drug sales.[281]

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[272] *See* Fung, *Deliberative Democracy*, *supra* note 271, at 112-17.

[273] Fung, *Beyond & Below*, *supra* note 264, at 619; *see also* FUNG, EMPOWERED PARTICIPATION, *supra* note 203, at 70-73.

[274] Robert J. Sampson et al., *Assessing "Neighborhood Effects": Social Processes and New Directions in Research*, 28 ANN. REV. SOC. 443, 458 (2002). Sampson et al. identify these issues of place and routing as one of the most important influences on order maintenance. *Id.* at 458.

[275] FUNG, EMPOWERED PARTICIPATION, *supra* note 203, at 1-18; Fung, *Beyond & Below*, *supra* note 264, at 618-23; Sampson, *supra* note 256, at 110.

[276] Waldeck, *supra* note 38, at 1271.

[277] *Id.* at 1271-72.

[278] *Id.* at 1272.

Quite aside from restructuring the administrative bureaucracy of the police in terms of public accountability, examples such as these indicate that there is an opportunity to emphasize municipal-public relationships other than those involving the police. A range of municipal agencies are responsible for public order: education, transportation, and housing to name but three. And they are involved in public-order policing both by engaging in local, preventative partnerships to respond to those situational factors that locate crime at various points in the neighborhood and by transmitting norms of law-abidingness across the community by responding to the low-level disturbances of public order within their jurisdiction. The police should only become involved in public-order policing after disorderly individuals have been identified, have been warned, and persist in unruly behavior. In such non-emergency situations, the police can respond to those infractions and *only* those infractions identified by caretakers or agents policing low-level crime, without the opportunity to change roles midstream as part of the process of escalation. Simply put, the police still have a role to play in punishing people who commit crimes, including repeated acts of public disorder. The point is that if the police are limited to serving subpoenas or warrants for disorder offenses, there is some control over the appropriate role in which they engage with low-level crime in order to prevent automatic escalation and the community harms that accompany such high-level public encounters with the police.

It is worth emphasizing that the opportunity to generate new relationships outside of those between the police and the community is only half the story. The other half is that the police must refocus their interactions with the community as well. It might seem that role-based policing maintains a system of "centralized dispatch of patrol cars [that] ha[s] removed essential neighborhood links between patrol officers and neighborhood residents, contributing to the mutual alienation of police and communities, and also reducing the level of citizen cooperation."[282] My claim is that the problem of community-police alienation is not centralized dispatch alone, but a variety of features stemming from institutional culture, conflicts over the appropriate substantive criminal law norms, and concerns about the manner of policing. Emblematic of these problems is the policy of escalation, which is best understood as a specific technique of policing drug crimes and imposing police authority.

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[279] *Id.*

[280] The Community Support Officers have been given the authority to impose spot fines under Police Reform Act, 2002, c. 1, § 1, sched. 4 (Eng.).

[281] Robert J. Sampson & Stephen W. Raudenbush, *Systemic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 612 (1999).

Escalation permits the police to adopt an attitude of policing in the community's interest that fits within, rather than challenges, police cultural norms. On the one hand, the caretaking posture essential to the initiation of some forms of escalation permits the police to maintain the fiction of uncoerced consent to police-citizen encounters. On the other hand, increasing the number and triviality of public order offenses transforms everyone into a source of disorder. The police then engage with a suspect in a posture of defending law-abiders from disorderly excess. Each of these modes of escalation has arrest as its goal.

If, however, the police really want to engage with local communities, then the solution is not the aggressive policing of low-level crime, but as Fung suggests, an aggressive process of consultation designed to persuade urban residents that they are actively responding to crimes of violence or property crimes: the traditional offenses targeted by responsive policing.

Role based policing emphasizes the need to generate positive partnerships between communities and a variety of government and private organizations. For example, Sarah Waldeck describes the spaces targeted for public-order policing as controlled by "the transit authority, the sanitation department, and public housing authorities . . . public health and social welfare agencies . . . local school boards and boards of education . . . [B]usinesses and other organizations have vested interests in maintaining the quality of life in their areas of operation."[283] The role-based technique of selecting officials who lack command and control authority highlights the necessity of community support and challenges neighborhoods to determine what processes can generate it.

A second feature of the role-based emphasis on non-police municipal officers is to highlight the goal of de-escalation. Community policing, as Waldeck reminds us, traditionally has sought to engender a range of mediatory responses to public disorder.[284] The point is to avoid or de-escalate circumstances leading to adversarial or command-and-control encounters.

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[282] Livingston, *Communities*, *supra* note 17, at 572.

[283] Waldeck, *supra* note 38, at 1301.

[284] *Id.* at 1260, 1270.

A third feature of role-based policing is to suggest that role-differentiation is not a complete answer to the problems of under- and over-policing, but that it provides the beginning of a solution. Role differentiation forces a community and municipality together to decide which substantive norms to police, and the initial severity or intrusiveness of the response. Public and private organizations can then determine which among their available resources are best suited to provide the appropriate type of policing.

The necessity of identifying alternatives to law enforcement as an essential aspect of role-based policing suggests that under-enforcement of the criminal law is a part, but only a part, of the problem of government disinterest. Public and private institutions can signal disinterest and disorder as profoundly as can private citizens; where they are part of the problem in generating social fragmentation, they must be part of the solution.[285] Partnerships are thus necessary to ameliorate the perceptions, not only of under policing, but also of larger social disinterest in urban communities, where such partnerships seek mediatory, prophylactic solutions to problems that stretch beyond crime alone.

Accordingly, it is worth first considering a non-governmental but fairly traditional solution to policing disorder: private police forces. Looking to private policing provides a means of identifying some of the advantages and disadvantages of turning outside government to engage in public order policing. I shall then consider two different state sponsored solutions, before suggesting that role-based policing provides a major part of the solution to public order policing.

1. Private Policing

The separation of low-level from high-stakes policing has been accomplished in a variety of private spaces open to the public. In shopping malls and bus terminals, the goal is not to police drug crime but to ensure that shoppers and travelers enjoy their visits free from the indicia of crime. The point is to create the signals of cohesion and safety prized by Broken Windows' advocates. In such locations, the building's owner hires private police to perform a role radically different from traditional policing. Private police demonstrate that, in these limited environments at least, role separation can work to maintain public order.

Of course, private police do not solve all the problems associated with police-community interactions. The classic experience of

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[285] Recognizing the influence of broader institutional disinterest in urban communities may suggest that disorder does not generate crime, but that it stem from a shared underlying cause. *See, e.g.*, Sampson & Raudenbush, *supra* note 281, at 638 (arguing broken windows and visible disorder do not create crime but rather flow from the same underlying sources). Role-based policing can be agnostic on this point, while at the same time insisting that signals of disinterest extend beyond graffiti on a wall or a train.

African-American shoppers being followed around shops by security guards who profile them as shoplifters suggests that role separation cannot solve every problem presented by police-community relations. What the private police example demonstrates, I will suggest, is that there can be policing without escalation when policy-makers curb the power to arrest and remove or reduce the motivation for doing so.

A useful point of comparison is the type of private policing used for patrol in "wealthier neighborhoods... quasi-public spaces, such as shopping centers, all kinds of parking lots, and other private property open to the public."[286] These private guards participate in limited policing because they are invited in by the relevant community to do the community's bidding. These police "possess no greater legal capabilities than do ordinary citizens to forcibly detain persons who are suspected of or have in fact committed a crime."[287] Rather than engaging in arrests and detentions, the private police tend to "treat matters privately—banning, firing, and fining—instead of pursuing prosecution."[288] Finally, even in the realm of drug crime, so long as they perform the primary goals of preventing commercial losses through theft and maintaining social order, they often tolerate other "kinds and amounts of deviance."[289]

Remember, the central insight of social norms theorists is that drug crime itself is not the problem; it is the disorder that accompanies public drug use or drug dealing that diminishes social cohesion. Private policing can account for that fact. Elizabeth Joh provides, as an example of private policing, a Greyhound Bus Lines terminal in Tennessee, where the guards "routinely release persons who have been found with small amounts of drugs on their persons."[290] Per Joh's account, "The public police were notified, according to the Greyhound guards, only when the quantity of drugs found warranted a felony charge."[291] Thus, precisely in the arena of drug policing, private police concerned with order-maintenance rather than investigation and escalation ignored low-level illegal drug possession in favor of controlling public order in their assigned locality.

Private policing is to an extent a model of role-based limits on the promotion of public order. Although private police-enforcement practices may not be completely transparent, they are certainly subject to social and economic pressures to discipline guards who do not treat the community respectfully.[292] Such police have a significant impact on norms of social conduct.[293] "Private police keep people from drinking from bottles, arguing loudly, running around recklessly, or playing loud music."[294] They police precisely the sorts of disruptions of daily life[295] and public locations, such as malls, schools, and transportation hubs, that are of particular concern to public-order maintenance.

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[286] Lawrence W. Sherman, *Policing Communities: What Works?*, *in* COMMUNITIES AND CRIME, 8 CRIME & JUSTICE: A REVIEW OF RESEARCH 343, 372 (Albert J. Reiss, Jr. & Michael Tonry eds. 1986).

[287] Meares, Katyal & Kahan, *supra* notc 245, at 63.

[288] *Id.* at 62-63.

[289] *Id.*

[290] *Id.* at 63 n.73.

[291] *Id.*

Due to problems of cost and logistics, private policing may not be a solution for urban neighborhoods. Furthermore, private police may send the wrong signal that the neighborhood does not deserve or require public policing, thus perpetuating historical perceptions of race- and class-based bias. Simply replacing the public police with rent-a-cops fails to engage with some of the major projects of role-based community policing: ensuring that police respond to violent crime or crime against property, and developing partnerships between local government, private organizations, and the community to empower local control of some governmental functions. The task for municipalities, then, is to narrow the role of the police and promote police-community relations while at the same time identifying a range of municipal officials who can engage in the same type of policing as private security forces, focused on disorder rather than theft and violence,[296] using bans and fines rather than arrests. To the extent that we are worried about traditional policing functions, such policing does not remove the police from the community, but does emphasize the role of the public and the municipal official in calling upon the police, as well as redirecting policing resources to the dominant ones of response and investigation of crime.

2. *Community Support Officers*

Preventative policing attempts to identify crime hotspots and to remove the physical factors contributing to crime. The policy requires "eyes on the streets" to quickly identify the routine disturbances that promote disorder and damage—public drinking, noise, panhandling, and other disturbances of everyday life, as well as the tangible signals of public neglect and crime in specific neighborhoods or locations such as broken windows or abandoned cars.

The government of the United Kingdom initially adopted an approach to community policing influenced by this model, seeking to create a cadre of civilian officers working in partnership with the police, as members of the police's "extended family."[297] The government conceived of these civilian officers, known as Community Support Officers (CSOs), as the eyes and ears of the police[298] while at the same time mediating between police and community, relaying local concerns to regular law enforcement as they allay fear of crime.[299]

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[292] *See id.* at 90.

[293] Sherman, *supra* note 286, at 372.

[294] *Id.*

[295] Meares et al., *Punishment*, *supra* note 245, at 62.

[296] *Id.*

These goals have had mixed success in practice. Although crime rates appear to be steady or falling where CSOs are used,[300] the general public's diffident reviews indicate that CSOs fail in the role of intermediary. What the public wants is real police to deal with real problems; recent legislation beefing up the CSOs' powers to search and detain wrongdoers indicates government acknowledgement of that fact.[301]

CSOs function in the manner of private police but are municipal employees patrolling public spaces.[302] They are a civilian staff employed by and under the control of the local Chief of Police and are empowered to carry out basic police functions.[303] CSOs take on the community-friendly patrolling functions that police engaged in the responsive investigatory role generally abdicate.[304] They receive only about three weeks' worth of training,[305] wear a uniform,[306] and are differentiated from regular police by their limited powers. For example, like private police, they have no special power to arrest, although they may detain individuals for thirty minutes for designated offenses.[307]

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[297] SEC'Y OF STATE FOR THE HOME DEP'T, POLICING A NEW CENTURY: A BLUEPRINT FOR REFORM, 2001, at 85-86 [hereinafter POLICING A NEW CENTURY] (describing Community Support Officers as part of the "extended police family").

[298] *See* ASSOC. OF CHIEF POLICE OFFICERS OF ENG., WALES & N. IR., GUIDANCE ON POLICE COMMUNITY SUPPORT OFFICERS (PCSOs), 2002, at 6 (as amended 2005) [hereinafter GUIDANCE] ("[CSOs] will be additional eyes and ears, with a brief to observe and report."); POLICING A NEW CENTURY, *supra* note 297, at 85-86 (describing CSOs' surveillance functions); Stephen Moss, *Softly, Softly*, GUARDIAN, Nov. 16, 2004, at G2.

[299] GUIDANCE, *supra* note 298, at 6 ("The fundamental role of the PCSO is to contribute to the policing of neighbourhoods, primarily through highly visible patrol with the purpose of reassuring the public, increasing orderliness in public places and being accessible to communities and partner agencies working at local level.").

[300] *See* HOME OFFICE, NATIONAL EVALUATION OF COMMUNITY SUPPORT OFFICERS: INTERIM REPORT—DECEMBER 2004, 2004, at 4-5 [hereinafter HOME OFFICE, INTERIM REPORT].

[301] The government created CSOs and designated their powers in the Police Reform Act, 2002, c. 1, §§ 38-39, sched. 4 (Eng.); it added new powers to the Serious Organised Crime and Police Act, 2005, part 6, sched. 8, para. 2-4, 6, 8-10, 12, part 6, sched. 9, para 2-4 (Eng.), and the Clean Neighbourhoods and Environment Act, 2005, c. 16, § 1 (Eng.). These powers were first proposed in the government consultation paper, POLICE LEADERSHIP & POWERS UNIT, HOME OFFICE, POLICING: MODERNISING POLICE POWERS TO MEET COMMUNITY NEEDS, Aug. 2004, at 10-14 [hereinafter HOME OFFICE, POLICING].

[302] *See* POLICING A NEW CENTURY, *supra* note 297, at 3, 6, 83-86. Private security firms could be accredited in certain situations. *Id.* at 87. A different official is the "neighborhood warden," who has none of the powers of the CSO. Instead, neighborhood wardens "provide a uniformed, semi-official presence in residential areas with the primary aim of helping to maintain the built environment." Susan Doran, *Eyes and Ears: The Role of Neighborhood Wardens*, COMMUNITY SAFETY PRAC. BRIEFING (NACRO, Crime & Soc. Policy Section, London, U.K.), July 2003, at 4.

[303] Police Reform Act, 2002, c. 1, §§ 38-39, sched. 4 (Eng.).

[304] *See* POLICING A NEW CENTURY, *supra* note 297, at 87.

[305] *See* Rosie Cowan, *Warning Over Search Powers for Part-Time Police*, GUARDIAN, Nov. 25, 2004, at 2; *Policing, Like Teaching And Nursing, Is a Job for Well-Trained (and Well-Paid) Professionals*, INDEPENDENT, Nov. 26, 2004, at 38 [hereinafter *Professionals*]; *see also Police*

Originally the CSOs were supposed to comprise a highly visible, patrolling presence on the streets, interacting with citizens, providing reassurance to local communities, and engaging in surveillance to determine the location of crime and the signs of crime.[308] The government created CSOs to "focus[ ] predominantly on lower level crime, disorder and anti-social behavior."[309] Whereas different police forces can determine which of the range of powers their local CSOs will wield, four are common throughout the UK: confiscating alcohol from those under eighteen; confiscating tobacco from those under sixteen; demanding the name and address of people stopped for minor infractions, and "enter[ing] buildings to save life and limb [and] prevent serious damage to property."[310]

The British experience with CSOs identifies what can go wrong when roles become blurred and municipal officials are given responsibilities in excess of policing public order or various caretaking functions. In particular, public-order officials are not crime-fighters but are engaged in deterring disorder. The government's failure to separate these roles created a significant problem—the community perception that CSOs are not "real" but rather "plastic policemen,"[311] lacking sufficient power to prevent real crime. There is some anecdotal evidence that their limited powers have led the very youths they were supposed to control to disregard their authority.[312] Recent proposals therefore have attempted to greatly expand the CSOs' role by increasing their power to search detainees, providing the batons and handcuffs currently reserved for the traditional police, and

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Community Support Officer (PCSO) Training, http://police.homeoffice.gov.uk/news-and-publications/publication/police-reform/centrex_cso_training.pdf (last visited May 1, 2006).

[306] The uniform does not greatly distinguish the CSOs from regular police. *See* Philip Johnston, *Our Policemen Should Look the Part*, DAILY TELEGRAPH, May 31, 2004, at 21.

[307] Police Reform Act, 2002, para. 2, sched. 4 (Eng.); Serious Organised Crime and Policc Act, 2005, para. 3(2), sched. 8 (Eng.).

[308] *See* POLICING A NEW CENTURY, *supra* note 297, at 3, 83-86 (emphasizing role in combating anti-social behavior); GUIDANCE, *supra* note 298, at 6; *see also* Police Reform Act, 2002, c. 1, §§ 38-40, sched. 4 (Eng.). The UK government has targeted anti-social behavior by creating low-level crimes designated as "anti-social behavior orders," or "ASBOs" in the Crime and Disorder Act of 1998 that apply to any "person [who] has acted, sincc the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself." Crime and Disorder Act, 1998, c. 1, §§ 1 & 4 (Eng.).

[309] HOME OFFICE, INTERIM REPORT, *supra* note 300, at 1.

[310] *Id.* at 6.

[311] Cowan, *supra* note 305, at 2; Moss, *supra* note 298, at G2; *Professionals*, *supra* note 305, at 38.

[312] *See Professionals*, *supra* note 305, at 38. *See also* David Harrison, *Community Wardens are "The Future of Crime Fighting,"* SUNDAY TELEGRAPH, Nov. 14, 2004, at 10 (discussing a similar reaction to community wardens).

granting them authority to deal with begging, traffic, and licensing offenses.[313]

Beefing up CSOs' investigative powers, rather than more aggressively pursuing community outreach or partnering, is precisely the wrong response, and it is one that has served to antagonize communities and the "real" police alike. These new powers narrow the distinctions between CSOs and the regular police and encroach on the police's "traditional role."[314] Regular police believe that the original role differentiation emphasizing "engagement as opposed to enforcement"[315] enabled the CSO to be closer to the communities that they serve, acting as mediators between police and neighborhood residents.[316] But the real problem appears to be that the public does not understand the limited role of the CSOs and therefore has false expectations for them. The powerlessness of these second-class "Blunkett's Bobbies" to effectuate "proper" arrests and detentions of vandals and disorderly youths frustrates the citizens.[317] Public disappointment results from the expectation that CSOs, like police, will respond to citizen calls with the use of force in a manner designed to resolve conflict.[318] Ideally, however, the CSO's role is not triggered by such calls; rather, that sets off the police's responsive role.

These problems with the use of CSOs in the United Kingdom illustrate three issues that arise when preventative municipal officials are asked to engage in "real" policing. The first is under-policing—the community perception that they are still disvalued, receiving rent-a-cops rather than real police. Especially in areas forsaken by regular police, whether due to station closures or other factors, communities regard CSOs as a poor substitute for "real" police. There is reason to fear a similar reaction to community order control by non-police in the United States, given the history of law enforcement's neglect of minority communities. Promising a police force and providing instead a glorified hall monitor is likely to promote a vigorous backlash. The second is that the "real" police become resentful of infringements upon their authority to arrest: the United Kingdom experience is that where the CSOs operate in the community-support role, police officers are much more supportive of their deployment. The point of social norms theories was to orient the police away from the investigative policing of certain offenses, rather than add another, relatively poorly trained layer of policing.

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[313] HOME OFFICE, POLICING, *supra* note 301, at 10-14.

[314] Nigel Morris, *Police Angry at Plan to Give Batons to Community Officers*, INDEPENDENT, Nov. 25, 2004, at 7; *see also* Cowan, *supra* note 305, at 2; Philip Johnston, *Civilian Police Aides May Get Greater Powers*, DAILY TELEGRAPH, Aug. 13, 2004, at 8.

[315] GUIDANCE, *supra* note 298, at 6.

[316] *See* GUIDANCE, *supra* note 298, at 6-7 (stating that "for the sake of clarity, distinction should be made between the role of a PCSO and that of a sworn police officer" and discussing police role); POLICING A NEW CENTURY, *supra* note 297, at 83-86; Morris, *supra* note 314, at 7 (quoting Jan Berry, chairman of the Police Federation).

[317] Blunkett's Bobbies are named after the Home Secretary who developed the CSO project. *See Professionals*, *supra* note 305, at 38.

[318] *See* BITTNER, *supra* note 124, at 97 (suggesting that when the police are called, "there is a complainant with a real grievance who in calling the police hopes, openly or secretly, to invite doom upon his adversary"); Sampson, *supra* note 256, at 110 (noting that "more than nine in ten police-citizen encounters derive from citizen calls").

Third is that increasing CSOs' law-enforcement authority raises the likelihood of under- and over-policing. The CSOs core role transforms from caretaking and supervising minors to law enforcement. The substantive norms they are asked to police are no longer the universally accepted caretaking norms but potentially contested policing norms. To the extent that CSOs are asked to police crimes of violence or crimes against property, they have neither the power nor the training to do so. Accordingly, the risk of implementing CSO-like officers in U.S. communities is that they would provide "second-class" policing while retaining the right to stop and search for suspected drug crime, which are the two major current complaints about urban policing. In the American context, the training provided is an especially problematic issue. The prospect of civilians, deputized by the police, wielding mace, batons, and handcuffs, empowered to stop and search for designated offenses, with or without the arrest powers of the police, is a civil-rights lawsuit waiting to happen—or worse.[319]

CSOs are thus a suboptimal response to the ills addressed by role-based policing: (1) perceptions of governmental disinterest; (2) invasive policing styles; and (3) contested substantive norms. Furthermore, the CSOs' policing style depends upon the type of authority delegated to them. As their role changes and expectations rise, the wrong type of authority—that is, authority to engage in law-enforcement—paradoxically undermines community satisfaction.

The British experience with CSOs demonstrates why investigative and preventative roles must be clearly differentiated. To promote public approval, the government must make sure that the public understands the limited role of CSOs and recognizes that the CSOs are not intended as a substitute for regular policing of crimes of violence or crimes against property. CSOs should not wear police-style uniforms and should not carry the cuffs and batons of the regular police. Furthermore, role confusion risks creating institutional allegiances that transform the ideology of police-trained laypersons who are not clearly confined to a preventative role into one similar to that of the police; they may come to think the same way and target the same crimes. That may be perfectly fine where there are serious problems with violence or property damage; it is problematic where the major issue is low-level disorder, including drug crime, in public places.

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[319] *See, e.g.*, Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 473-74 (2004) (arguing that failure-to-train cases are difficult to win); *see also* Bd. of the County Comm'rs v. Brown, 520 U.S. 397 (1997) (sheriff's isolated failure to perform adequate screening did not constitute deliberate indifference to high risk that deputy would use excessive force); City of Canton v. Harris, 489 U.S. 378 (1989) (inadequacy of police training may serve as basis for 42 U.S.C. § 1983 municipal liability only where failure to train amounts to deliberate indifference to rights of persons with whom police come into contact); Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (single shooting incident insufficient to establish municipal "policy" of "inadequate training" for purposes of 42 U.S.C. § 1983 liability); Praprotnik v. St. Louis, 798 F.2d 1168 (8th Cir. 1988); *cf.* Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 187-191 (2005) (arguing that three weeks of training for the powers currently wielded by CSOs would present few of the problems identified by Armacost).

The theoretical advantage of employing some CSO-like community force is to signal a governmental interest in policing the streets while drawing civilian law enforcement from the very communities to be policed. CSOs signal social investment in an urban community. But CSOs, on their own, are not the answer. The regular police must redirect their efforts to supporting the community, divesting some of their functions to the CSO in return for more aggressively engaging in the hard work of community relations. The municipality must aggressively explain the role of CSOs as part of a wider program of community consultation, and seek out community participation in defining the scope of the CSOs' functions. The problem of community investment is magnified if, in practice, CSOs and similar "mediators" are not themselves community residents. Some live a considerable distance from the community they police "'to protect [their] famil[ies]' from reprisals."[320]

B. *An Alternative Solution: Municipal Institutions, Public Officials*

So far, I have considered a variety of officials, both public and private, for whom public order policing would be the major function of their role. A different and perhaps preferable alternative is to identify those public officials whose role already requires them to exercise authority over the variety of locations implicating public order. These officials have control over various public terminals, such as bus, train, or subway terminals; work on various modes of public transportation; have responsibility for pedestrian traffic at street corners; enforce low-level traffic laws; and are otherwise already a regular presence in the community. They often already possess the authority to engage in the sort of low-level interactions and observations that constitute community policing. My suggestion is that municipal governments make an effort to identify these individuals and encourage them to undertake public-order policing with community support.

The prospects for success of such a program should not depend upon municipal officials' relying upon the same kind of command-and-control authority as the police. The point of public-order policing, as social norms theorists insist, is that generating low-level norms of public order can have significant indirect effects through building community cohesion and signaling law-abidingness. Again, the goal of social norms public-order policing is an indirect engagement with crime through norms of order and law-abidingness, rather than an attempt to use public order as a gateway through which to enforce high-stakes criminal laws directed at crimes of violence, crimes against property, and drug crimes. Utilizing municipal officials with responsibilities distinct from law enforcement reinforces this point and also helps avoid the perception of rent-a-cop policing.

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[320] Harrison, *supra* note 312, at 10.

At this point, it might be worth remembering that the range of issues that comes under the heading of public order is, despite the New York experience,[321] somewhat limited in a properly participatory model. Most street order offenses can be resolved without placing municipal officials in dangerous situations, even in neighborhoods that suffer serious social problems. Where offenders are intransigent, the police can and should be called. But for the rest of these low-level crimes, what is required is to call upon public services to tow cars, repeal bar licenses, pick up trash, install lighting, landscape parks, and the like.

1. Public Officials and Public Order

Municipal officials often undertake the role of public policing within the mandate of their job titles. A variety of municipal officials have engaged in activities that have a policing component, most recently as part of the War on Terror.[322] Many of these officials work on buses and trains, in transportation terminals, or on the streets enforcing parking or littering ordinances. In contrast to the police or private security officers, many of these public officials are residents of the communities in which they work, or travel so frequently through the community that they are identified with the particular neighborhoods in which they work.

Delegating increased responsibilities for policing public order charges such officials with signaling norms of public order to their peers within the community. Furthermore, such municipal officials are able to communicate the powerful message that quality-of-life issues matter and the government is taking it seriously, while simultaneously modeling appropriate norms of behavior in normatively fragmented communities. The community is thus encouraged to participate in the process of policing: members of the local community are encouraged to pick up their trash, scoop up after their dogs, not congregate in a threatening manner on street corners, keep the noise down, and obey other consistent norms.

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[321] Sarah Waldeck notes that the invasive and escalatory use of public order policing was so attractive to the police that public order offenses rapidly expanded from various "linchpin" crimes "to combat sex shops, jaywalking, violations of leash laws, and horn-honking. Indeed, the Mayor went so far as to declare speeding a quality-of-life offense that was undermining the 'quest for civility.'" Waldeck, *supra* note 38, at 1273-74.

[322] *See, e.g.*, Daryl Khan & Joshua Robin, *Cops Say NY's Eyes Wide Open*, NEWSDAY, July 14, 2005, at A3; Deborah Fineblum Raub, *With Loudspeaker Warnings, The MBTA Puts Citizens on Alert and Wary Passengers Report an Outbreak of the Heebie-Jeebies*, BOSTON GLOBE, July 11, 2004, at 1; *see also* Michael Dresser, *Light Rail Puts Inspectors on Trains to Combat Problem of Free Riders; Passengers Will Be Asked to Prove They Paid Fare*, BALTIMORE SUN, July 21, 2004, at 2B.

Some recent empirical evidence supports this type of community self-reliance policing.[323] Local norms of cooperation, especially directed at controlling the behavior and misbehavior of children, has a significant impact on public order.[324] In addition to control of children in public places such as at street corners with crossing guards or by bus drivers on public buses, these public officials can identify and address the familiar causes of urban blight—the abandoned cars, dumped trash, and broken windows that undermine the quality of life in fragmented urban communities. While not a solution for every problem, such policing strikes the balance between ignoring the problem of public order and the worrisome effects of the War on Drugs.

Public-order policing does not require intervention in violent crimes against the person or against property. Municipal officials will not chase down and detain fleeing criminals caught in the act. This type of activity is outside their role. Put differently, these conditions do not trigger the public-order role. Instead, the examples from Chicago and New York described above give a sense of the different circumstances triggering public-order policing.

Typical problem areas generating public disorder are bars, with the familiar problems of noisy, drunken behavior; transportation hubs, schools, and parks, which may be the site of anti-social gang activity[325] or illegal activity such as drug dealing; and houses or businesses that provide sites contributing to public disorder.[326] Problem activities include drug dealing, staking out "turf" through "loitering" on street corners or "cruising" up and down neighborhood streets, intimidating local residents through public displays of gang activity, or disrupting the peace in residential communities. Some of these activities may be solved by redesigning the location of disorder, others by municipal employees enforcing norms of order in schools, bus and train terminals, and parks. While not a solution to every problem, certainly municipal authorities can organize areas and target infrastructure without engaging in dangerous interactions and can alert police to locations of dangerous or violent disorder.

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[323] *See, e.g.*, Robert J. Sampson, Stephen Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 817, 918-24.

[324] *See id.*

[325] It is worth remembering that not every gang is a problem. Only gangs that undermine public order pose a problem for community policing.

[326] As a counterpoint, consider Fung's description of a laundry business that was used for drug dealing because it had payphones on the premises. When the owner chased the dealers out, they congregated on a nearby street corner which had pay phones. As a consequence, private crime soon became public disorder. Fung, *Beyond & Below*, *supra* note 264, at 623-25.

The point is that these signals of disorder rarely require immediate detention of criminal suspects. Rather, they indicate a recurring set of circumstances that requires not a repressive and sanctioning response but rather (1) "eyes and ears on the street" to identify crimogenic locations and (2) some form of creative effort to marshal responses from the different municipal and private actors with the ability to diffuse the situation.

A different set of signals do permit some form of one-off intervention, such as moving along panhandlers and identifying the appropriate services for the mentally ill, chronically alcoholic, or homeless. It may be that a small number of innovative interventions to manage people on the street may make a large difference.[327] These interventions, however, are not to detain but are properly styled as caretaking—seeking help for vulnerable people who have chronic problems.

2. *City Wardens and Public Order*

Role-based public-order policing requires municipalities to identify public officials whose current job entails authority over the predictable locations of public disorder. Where no such officials are readily identifiable, some municipalities use "city wardens," who bear superficial similarity to the CSO model but who are not agents of the police, to control low-level crime. For example, in Baltimore, Maryland, Public Safety Guides operate as "goodwill ambassadors, giving directions [and] responding to medical emergencies."[328] To address Baltimore's "high levels of vacant office space in the downtown areas," Guides not only act as a "visible deterrent," but "offer an escort service on dark evenings to walk late-workers to public transport stops."[329]

Wardens share some of the features of the original CSO role: they operate as the "eyes and ears" of the police and function as mediators between police and community.[330] Unlike CSOs, Guides distinguish themselves from police by their distinctive uniform, and they do not make arrests but are expected to know how and when to contact other agencies. In this manner, they function much less as part of the police family and much more as "agents of the community."[331] Providing a cadre of identifiable individuals responsible for providing a human presence where "eyes on the street" are likely to deter crime alongside a program of enhancing lighting and removing graffiti addresses some of the issues central to the community-policing initiative.

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[327] Malcolm Gladwell, *Million-Dollar Murray: Why Problems Like Homelessness May be Easier to Solve Than to Manage*, NEW YORKER, Feb. 13, 2006, at 96.

[328] DEP'T OF THE ENV'T, TRANSP. & THE REGIONS: LONDON, CONFERENCE REPORT: NEIGHBORHOOD WARDENS' PERSPECTIVES FROM EUROPE AND AMERICA—NOVEMBER 17, 2000, Feb. 2001, at 28. Baltimore's City Guides are similar to the Dutch Stadswacht, or City Guards, "who have uniforms but no powers." *See* Jason Bennetto, *Security Men Could Be Second Police Force*, INDEPENDENT, July 17, 1998, at 9; *see also* INDEPENDENT COMM. OF INQUIRY, POLICE FOUNDATION & THE POLICY STUDIES INSTITUTE, THE ROLE AND RESPONSIBILITIES OF THE POLICE 30 (1996); Albert Hauber et al., *Some New Forms of Functional Social Control in the Netherlands and Their Effects*, 36 BRIT. J. CRIMINOLOGY 199, 200 (1996). City Guards are drawn from the long-term unemployed. *See* B. Donovan, *Unemployed Can Reduce Crime*, HERALD SUN, Mar. 11, 1992.

[329] DEP'T OF THE ENV'T, TRANSP. & THE REGIONS: LONDON, *supra* note 328, at 28.

[330] *Id.*

Where the issue is to identify crime hotspots and render them less attractive to criminals, municipal officials can target the physical signals of disinterest without criminalizing the local population. As the situation in Baltimore suggests, they can and should do this with police as backup to call upon in an emergency or if the situation warrants it. But the primary task is to represent the orderly community and deter crime through the physical alterations to the neighborhood in terms of better-kept and busier public spaces.

3. Role-Based Alternatives to City Wardens

City wardens are an attractive solution to public-order policing because they provide a group dedicated to identifying disorder on the public street. Nonetheless, there are three distinct advantages to selecting current municipal officials when seeking people to police public order. First, the officials are unlikely to engage in role confusion between public-order policing and responsive, investigative policing. Second, these individuals already have authority over the spaces they are asked to observe and are already recognized as agents of government authority in the community. Third, emphasizing or extending their authority may be less expensive than creating a dedicated force of city wardens.

Certainly, officials responsible for public transportation hubs and channels, for keeping the streets clean and orderly, and for ensuring the maintenance of public buildings have an interest in the smooth running of their workplace. Many already ensure that norms of order and cleanliness are maintained within their buildings or vehicles. They quiet loud noises, exclude alcohol, remove rowdy individuals, and require cigarettes to be extinguished. These resources are currently used in an atomistic fashion. The solution is for the community and municipality to identify a more holistic use of its resources, and to structure public spaces so as to reduce crimogenic factors as people move from place to place.

Furthermore, tasking these officials with public-order responsibilities promises to be a cheaper alternative than creating new city wardens or having the police engage in prevention. For much of the day, a range of municipal officials, from bus drivers and crossing guards to meter readers and street sweepers, provide a visible presence and the ability to engage in surveillance that can deter public disorder. As these municipal officials are already employed to perform functions such as removing abandoned cars, cleaning streets and buildings, ensuring the smooth movement of pedestrian traffic at busy corners, and controlling the behavior of individuals on public transportation, they could perform many of the preventative functions necessary to control low-level crime and prevent the escalation of consequences.

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[331] *Id.*

Finally, these employees have order, not crime control, as one of their job requirements. There is thus a much reduced risk of role conflation. The goal of municipal government is thus to ensure that these officials extend or emphasize only those functions that could directly impact order without presenting the thorny issues of deciding what other behavior may count as unlawful. The likelihood of success is heightened by the diminished risk of role confusion.

For example, public transportation officials already help ensure the safety of passengers by working in tandem with the police, who are called in only when some high-stakes crime is threatened.[332] Generally, and during busy times especially, officials can curtail disorderly behavior by mobilizing peer pressure through threats to delay the journey until the individual desists or exits the bus or train.[333]

That municipal officials often finish their shifts around midnight does not pose a problem. Municipal officials are primarily concerned with public acts of disorder, and those acts accomplished late at night in isolation are properly handled by the police. Areas to which no one ventures may prove less worrisome from the perspective of policing disorder, even though they may constitute a locus of criminal activity. Other areas that are more centrally located, though deserted, may sufficiently impair the functioning of necessary thoroughfares or public transportation as to require the presence of some form of warden to ensure such channels remain sufficiently busy to deter crime. Yet other locales, such as those surrounding bars, which are busy though disorderly, may require the intervention of licensing or fire department officials to enforce orderly conduct inside and outside these establishments.

Again, it bears emphasizing that role-based separation of the policing functions is only the beginning, not the end, of the analysis. The goal of role differentiation is to match the scope of authority to the type and level of crime or disorder as a means of empowering local control of law enforcement. Policing by municipal officials does not address many communities' legitimate complaints that police fail to respond to urban crime; that can be done only if the police do respond. The tasks of knocking on doors, raising awareness, and discussing with the community what crimes occur remains to be done. These tasks have a salutary effect, not only upon the citizens who are included in the discussion of better securing their community, but also upon the police who are socialized by this contact with the people they police. William Ker Muir has emphasized the values of "sociability," "empathy," "social awareness," "stability," and "continuity" in limiting the excesses of authoritarian police power;[334] similarly, Egon Bittner has suggested that the essential qualities possessed by every officer must include "civility and humaneness" as well as being "informed [and] deliberating."[335] Contact with the citizens who need policing in a non-adversarial context promotes these values, which in turn are an essential feature of the empowered democracy that modern theories of community governance promote.[336] Police outreach into the community must, however, take an investigative perspective, looking to combat serious crime, and leave other municipal officials to assume the primary role for combating disorder and the symbols of disorder.

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[332] JEROME A. NEEDLE & RENÉE M. COBB, IMPROVING TRANSIT SECURITY: A SYNTHESIS OF TRANSIT PRACTICE 12 (1997); *see also* Anastasia Loukaitou-Sideris, *Hot Spots of Bus Stop Crime: The Importance of Environmental Attributes* 65.4 AM. J. PLANNING ASS'N 395 (1999) (two-thirds of bus transit crime occurs at bus stops; majority of bus-stop crime is concentrated geographically and temporally; and most serious crime occurs on Friday and Saturday nights between 10:00 p.m. and 12:00 a.m., although most non-serious crime occurs from 12:00 pm to 5:00 p.m.).

[333] Who counts as orderly and disorderly, and thus a legitimate object of peer pressure, may itself be contested. *See generally* Harcourt, *supra* note 69, at 297-300 (suggesting categories of "the orderly" and "the disorderly" created by policing).

Preventative policing does not, therefore, absolve the regular police of responsibility for community policing; instead, it refines and sharpens their role, concentrating their work in areas where their training and expertise differentially situate them with the ability to meaningfully intervene. The police must engage in the process of discussion of crime with the community, for in some communities, the regular police have been largely and traditionally absent. In these cases, the police must overcome the deep-seated specters of race and class by treating the residents as citizens of equal worth—as entitled to the type of investigative response afforded more affluent or white citizens.

Investigative policing requires a police presence within the community, but one not concerned with the lazy and degrading process of escalation from low-level to high-stakes policing, a switch that inherently undermines the idea that the police are empathetic caretakers engaged in the community they are supposed to serve and protect. We should not expect the police to ignore crime, but we rather must direct the police to tackle our most pressing crimes—the ones identified by the community as damaging to its very fabric. In return, the police must become responsive to the community's call by listening to the bus drivers, crossing guards, wardens, and citizens who have determined that there is actual crime occurring, rather than disorder to be dispersed.

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[334] WILLIAM KER MUIR, JR., POLICE: STREETCORNER POLITICIANS 274, 280-82 (1977).

[335] BITTNER, *supra* note 124, at 121.

[336] This is an involved, active, process. Remember Fung's description of Chicago's efforts to promote police-community partnerships. Fung, *Beyond & Below*, *supra* note 264, at 619; *see also* FUNG, EMPOWERED PARTICIPATION, *supra* note 203, at 70-73.

This discussion of alternatives to the standard model of policing suggests that policing, insofar as it depends upon public expectations and normative control, must extend beyond a limited focus on the regular police as the solution to urban disorder. At bottom, the community must assume responsibility for itself. Nonetheless, many of the signals of disorder are conveyed not by police neglect but by the larger municipal neglect evident in graffiti, broken windows, uncollected trash, potholes in the road, and abandoned cars by the roadside.

In conjunction with the communities they serve, municipalities must identify priorities for their neighborhoods: What types of crime are significant and cannot be tolerated? What types of disorder are troublesome and must be curtailed? Which locations attract crime or disorder, and how should they be remodeled? And what human resources apart from the police are available to exercise some form of control on the street?

The British experience indicates that the regular police are willing to have some of their public-order and caretaking functions devolved to municipal officials, so long as these officials do not exercise the traditional police power to arrest or investigate. Such savings in time on the beat enables police resources to be redirected to responding to the sort of community calls for help that trigger the responsive, investigatory role, as well as the sort of community relations that are necessary to assure the public that the police are taking care of crime.

In addition, municipalities should determine how best to spend public funds. For some communities, the municipality's currently-available resources may be sufficient; certainly, this may be the cheapest model in terms of money, although it may require an investment in time by higher-level officials to engage in the sort of active community consultation envisaged by Fung. For others, non-police guides or wardens may provide the eyes on the street that forms one component of crime (or fear of crime) reduction. If municipalities can embrace their distinct, non-investigative role, the limited competence to engage in policing is a resource rather than a limitation upon effectiveness.

CONCLUSION

Policing urban communities blighted by social, cultural, and economic disinvestment and disinterest is difficult and often dangerous. There is no quick and easy fix for the multiple causes of social fragmentation; any response requires the coordinated effort of different public and private resources simply to restore order and reduce fear of crime. And to the extent that policing public order is part of the answer, it is also part of the problem.

The main problem facing the police is their social and institutional distance from the most troubled communities that they must police and the often-hazardous settings in which they are required to interact with these communities' most dangerous members. Where communities are poor and socially fragmented, there may be few individuals to whom the police can appeal to participate in modeling standards of appropriate behavior. From the other side of the equation, thanks in part to the technique of escalation that marks much policing of drug crime, "the dwellers of the ghettos and the barrios of this land . . . view the policeman as 'an occupying soldier in a bitterly hostile country.'"[337]

Role-based policing provides an important palliative to three problems of over- and under-policing: (1) local perceptions of governmental disinterest; (2) an invasive and authoritarian policing style; and (3) resentment generated through policing contested substantive norms. Emblematic of over- and under-policing is a policy of escalation that targets low-level crime as a wedge to high-level crime, uses an invasive manner of policing to coerce individuals into public and discomforting searches, and transforms the police caretaking role into enforcement of contested norms. My solution is a simple one—to prevent escalation by requiring officials other than the police to have primary responsibility for preventative policing. That is not to deny the police a role in community policing but instead to recognize that the police's role is and should be secondary in the realm of public order. High-stakes escalation should be the last, not the first, resort in poor communities, just as it is in better-off ones. This program requires a moderate re-allocation of resources and interests that empowers municipal officials at the same time as it redirects and sharpens the police's investigative role.

The goal of role-based policing is thus to ensure that officials' authority matches their function, and that the community, municipality, and private organizations participate in decisions determining that function. These decisions may not always be correct, but they will be the community's own autonomous decisions, reached in partnership with local government; this confers substantive legitimacy upon both the manner of policing and the norms policed. Perhaps more importantly, it constitutes the community, with all its plural voices, as worthy of consultation and respect, and capable of self-regulation given the appropriate tools.

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[337] *See* Amsterdam, *supra* note 102, at 400.