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Article 1

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## Policing, Protestors, and Discretion

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## POLICING, PROTESTORS, AND DISCRETION

*Alafair Burke\**

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### INTRODUCTION

On September 17, 2011, protestors descended upon New York City’s Financial District, announcing that they were occupying Wall Street to call attention to the country’s growing income disparities and other injustices.<sup>1</sup> The first three reported arrests were of protestors who were accused of wearing masks in public.<sup>2</sup> Another woman was arrested on graffiti charges after drawing on the sidewalk with chalk.<sup>3</sup> As participants marched north toward Union Square one week after the Occupy Wall Street (“Occupy”) protests began, tension between police and protestors escalated with approximately

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1. Colin Moynihan, *Protesters Find Wall Street Off Limits*, N.Y. TIMES, Sept. 18, 2011, at A22.

2. Colin Moynihan, *Wall Street Protests Continue, With at Least 6 Arrested*, N.Y. TIMES CITY ROOM (Sept. 19, 2011, 12:28 PM), <http://cityroom.blogs.nytimes.com/2011/09/19/wall-street-protests-continue-with-at-least-5-arrested/>.

3. *Id.*

eighty arrests and the use of pepper spray by police officers.<sup>4</sup> Protestors posted video footage of the arrests on Facebook, Twitter, and other social networking sites, calling attention to a growing movement.<sup>5</sup> By winter of 2012, Occupy had spread to more than one hundred cities across the country, and clashes between protestors and police clad in riot gear became familiar.<sup>6</sup>

At a party the following spring, a friend of mine who is a New York Police Department (NYPD) detective told me that the media were speculating that the NYPD had acted unlawfully by checking whether participants in the Occupy Wall Street movement were subject to any outstanding arrest warrants. Because I teach Criminal Procedure, I immediately thought through the Fourth Amendment analysis. Neither inquiring about a person's identity nor checking a database for warrants is itself a restraint on liberty or invasion of privacy, and therefore such investigations need not be justified.<sup>7</sup> Even if the warrant check occurred after a seizure, the seizure would be lawful as long as an objective justification existed; an individual officer's subjective desire to use the seizure as a pretext to determine the person's identity and the presence of any outstanding warrants would not affect the lawfulness of the seizure.<sup>8</sup> However, I then considered the question through the lens of the First Amendment and Equal Protection. Critics, I explained, would argue that a check for warrants, if based solely on a person's participation in a protest, discriminates on the basis of the exercise of a fundamental right.<sup>9</sup>

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4. Colin Moynihan, *80 Arrested as Financial District Protest Moves North*, N.Y. TIMES CITY ROOM (Sept. 24, 2011, 8:31 PM), <http://cityroom.blogs.nytimes.com/2011/09/24/80-arrested-as-financial-district-protest-moves-north/>.

5. Jillian Dunham, *Protests Stir Up Voices on the Web*, N.Y. TIMES CITY ROOM (Sept. 30, 2011, 10:35 PM), <http://cityroom.blogs.nytimes.com/2011/09/30/protests-stir-up-voices-on-the-web/>.

6. According to Occupy Wall Street supporters, in the year following the movement's formation with the first New York City protest, police made 7,623 arrests in 120 different cities. See OCCUPYARRESTS.COM, <http://occupyarrests.moonfruit.com/> (last updated May 13, 2013) (tallying a running total of the number of arrests made in the United States since September 17, 2011).

7. See *Hibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 185 (2004); *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 216 (1984). See generally *Katz v. United States*, 389 U.S. 347 (1967) (holding that police activity constitutes a search only if it implicates reasonable expectations of privacy).

8. *Whren v. United States*, 517 U.S. 806, 816–19 (1996).

9. Alisa Chang, *Using NYPD Warrant Squads to Monitor Protesters May Violate Constitution: Experts*, WNYC NEWS (May 4, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/may/04/using-police-warrant-squads-monitor-occupy-wall-street-protestors-may-be-unconstitutional-legal-experts-say/> (“Executing old

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I might have forgotten about the brief conversation with my friend if I hadn't watched three days earlier as uniformed officers descended upon my neighborhood in anticipation of an Occupy march to Union Square Park. Marked patrol vehicles lined both sides of Fourteenth Street. Officers stood side to side, legs spread in a triangle stance. From their body language, I gathered that they were showing their power, preparing for confrontation, although no protest crowds had yet arrived. I assumed at the time that if I construed the image in that light, protestors would as well. That protest, which Occupy supporters later called the "May Day Siege by NYPD,"<sup>10</sup> ended with the arrests of at least thirty demonstrators and "occasionally bloody clashes" between police and protestors.<sup>11</sup>

On further reflection, I realized that I had missed an opportunity to answer my detective-friend's question with another question: *Why?* Even if the law permits warrant checks, why use an Occupy protest as an opportunity for mass warrant checks any more than the NYPD would take the same action at an afternoon street fair or outdoor concert?

Fast forward two months. I was in Portland, Oregon, where I used to be a prosecutor. As I drove past City Hall, I noticed what appeared to be an extensive makeshift campsite outside. But in addition to the sleeping bags and blankets, I saw handmade signs. When I saw some of my local friends later in the week, I asked them about the scene. Their frustration was clear. The protest of the city's anti-camping laws had been going on for more than a month, but the police so far had been leaving the protestors alone, even though at least some of the protestors' activities were in violation of the law.<sup>12</sup> It was time to start making arrests, my friends suggested.<sup>13</sup> I

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warrants—no matter how minor—is legal. But legal experts say the tactic becomes illegal if it is done solely to investigate political activity.”).

10. See OCCUPYARRESTS.COM, <http://occupyarrests.moonfruit.com> (last updated May 13, 2013) (arrest data for May 1, 2012).

11. Andy Newman & Colin Moynihan, *At May Day Demonstrations, Traffic Jams and Arrests*, N.Y. TIMES, May 2, 2012, at A20. Supporters of OWS claim that the protest resulted in 97 arrests. OCCUPYARRESTS.COM, <http://occupyarrests.moonfruit.com/> (last updated May 13, 2013) (arrest data for May 1, 2012).

12. See Chase G. Hall, *Portland Hunger Striker, Supporters Camp Outside City Hall*, OREGONLIVE.COM (July 3, 2012, 7:31 PM), [http://www.oregonlive.com/portland/index.ssf/2012/07/protesters\\_camped\\_in\\_front\\_of.html](http://www.oregonlive.com/portland/index.ssf/2012/07/protesters_camped_in_front_of.html).

13. Others have suggested that cities have not been sufficiently aggressive in enforcement against protestors. See Chip Johnson, *Oakland Blames Police, Not Occupy Mobs*, S.F. CHRON., Oct. 15, 2012, at C1.

remembered my conversation with the NYPD detective. I thought about all those officers lining the street outside my apartment. I remembered hearing neighborhood residents wonder aloud why police didn't just leave the protestors alone.

This Essay explores the policing of protestors, but it does so in a very limited way. It does not attempt to explore the many disturbing claims that have arisen from the Occupy movement about the legality of individual police responses. Rather, it looks solely to the issue of police discretion in enforcing criminal law against protestors, assuming that criminal law has been violated<sup>14</sup> and that a police response would be lawful, both substantively and procedurally. Specifically, the Essay looks beyond formal law to the literatures on procedural fairness and community policing to discern neutral principles to govern the exercise of police discretion in this context.

Part I of the Essay provides an overview of the role that discretion plays in the policing of protests, presenting the potential for both overenforcement and underenforcement of criminal law. Part II looks to the principles of community policing and procedural justice to guide the exercise of police discretion. In Part III, an application of those general principles to the policing of protestors exposes tensions that exist between community policing and procedural justice philosophies, but also indicates the importance of ex ante, transparent, and neutral decision making by law enforcement.

### I. DISCRETION IN ENFORCEMENT

Policing the conduct of contemporary social movements raises several issues of formal law. Protestors and their supporters argue that police have used excessive force in attempting to restrain and arrest protestors,<sup>15</sup> that police have fabricated the facts used to justify

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14. To be clear, "the Occupy Wall Street movement expressly embraces nonviolence (and for the most part has been nonviolent)." Bernard E. Harcourt, *The Politics of Incivility*, 54 ARIZ. L. REV. 345, 356 (2012).

15. A report from the Protest and Assembly Rights Project alleges a broad pattern of aggressive policing against the Occupy movement. SARAH KNUCKEY ET AL., THE GLOBAL JUSTICE CLINIC & THE WALTER LEITNER INT'L HUMAN RIGHTS CLINIC, SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET (2012), available at <http://chrgj.org/wp-content/uploads/2012/10/suppressingprotest.pdf> (alleging a pattern of aggressive policing against the Occupy movement). Multiple lawsuits have been filed alleging excessive force against protestors by the New York Police Department. See Margaret Hartmann, *NYPD's Occupy Pepper Spraying Sparks More Lawsuits, Calls for Police Oversight*, N.Y. MAG. (July 31, 2012), <http://nymag.com/daily/intelligencer/2012/07/nypds-occupy-pepper-spraying-sparks-new-lawsuit.html>.

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police responses,<sup>16</sup> that law enforcement has resorted to intrusive and unlawful domestic surveillance in monitoring the activities of protestors,<sup>17</sup> and that laws restricting the use of public spaces violate the First Amendment.<sup>18</sup> But even assuming that police conduct is supported by formal law, questions of police discretion remain. When should police enforce criminal law against protestors, and when should they opt for non-enforcement? And, if police are going to intervene, how aggressive should their actions be? Should they warn the protestors? Issue a citation? Arrest?

Policing of protestors can raise problems of both over- and under-enforcement. Traditionally, criminal justice scholars have focused on the problem of overenforcement of criminal law, arguing that overenforcement unleashes undeserved punishment, disproportionately targets minority groups, and reduces individual incentives to comply with criminal law.<sup>19</sup> Applied in the protest context, concerns about overenforcement could include concerns about over-criminalization of conduct perceived to be harmless or minor,<sup>20</sup> such as public camping or wearing masks in public.<sup>21</sup>

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16. In New York, for example, protestors who were charged with disorderly conduct claimed that police intentionally led protestors onto an area of the Brooklyn Bridge where pedestrians were not permitted. See Andrew Keshner, *'Public' Tweets Are Subject to D.A.'s Subpoena, Judge Says*, N.Y. L.J. (July 3, 2012), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202561602402>.

Prosecutors subpoenaed protestors' Twitter posts to demonstrate that protestors knew the area was off-limits. Ross Buettner, *A Brooklyn Protester Pleads Guilty After His Twitter Posts Sink His Case*, N.Y. TIMES, Dec. 12, 2012, at A31.

17. See KNUCKEY ET AL., *supra* note 15 (alleging surveillance by the NYPD); Linda Lye, *Spying on Occupy?*, ACLU N. CAL. (July 17, 2012), [https://www.aclunc.org/issues/freedom\\_of\\_press\\_and\\_speech/spying\\_on\\_occupy.shtml](https://www.aclunc.org/issues/freedom_of_press_and_speech/spying_on_occupy.shtml) (alleging surveillance by the Federal Bureau of Investigation).

18. See generally Sarah Kunstler, *The Right to Occupy—Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989 (2012) (arguing that sleeping and camping outdoors constitutes speech that should be protected); Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L.J. 1155 (2012).

19. See generally David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999); Tracy Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005 (2001); William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

20. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 710 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (arguing that broad codes overcriminalize behavior and expand law enforcement power).

Overenforcement can also raise separate concerns about selective enforcement,<sup>22</sup> if protestors believe that the law is being enforced against them disproportionately because of their involvement in a protest movement.<sup>23</sup> And it can raise concerns about the degree of law enforcement's response, such as complaints that police used excessive force or resorted to custodial arrests when lesser interventions would have sufficed.<sup>24</sup>

More recently, scholars have called attention to the potential harms of underenforcement of criminal law.<sup>25</sup> The failure of police to enforce criminal law can embolden criminals, undermine public safety, and deteriorate expectations about law enforcement's willingness to protect members of society equally. Complaints about underenforcement in the protest context could come from neighborhood residents and other private citizens who believe that the protests infringe on their property rights.<sup>26</sup> Neighborhood

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21. One much-discussed arrest in New York was of a 56-year-old woman who was knitting in a folding chair, because chairs in the park were prohibited. Colin Moynihan, *At Least 4 Arrested at Zuccotti Park After Occupy March*, N.Y. TIMES CITY ROOM (July 12, 2012, 11:14 AM), <http://cityroom.blogs.nytimes.com/2012/07/12/at-least-3-arrested-at-zuccotti-park-after-occupy-march>.

22. See Roberts, *supra* note 19, at 1007–09.

23. See Gina Barton, *March to Protest Death in Police Custody Ends in 4 Arrests*, MILWAUKEE-WIS. J. SENTINEL ONLINE, Nov. 12, 2012, <http://www.jsonline.com/news/milwaukee/march-to-protest-death-in-police-custody-ends-in-four-arrests-c87k34k-179026431.html> (quoting protestors who claimed that police arrested them as punishment for having participated in an Occupy protest); Barry Grey, *Occupy Protests Targeted by FBI Counterterrorism Units*, WORLD SOCIALIST WEB SITE (Dec. 27, 2012), <http://www.wsws.org/en/articles/2012/12/27/poli-d27.html> (alleging that municipal police and the FBI are engaged in a systematic campaign to undermine the Occupy Protests).

24. KNUCKEY ET AL., *supra* note 15; Hartmann, *supra* note 15.

25. See generally RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1998); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere"*, 94 CAL. L. REV. 617, 627–28 (2006); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1721 (2006) (delineating when underenforcement of criminal law is normatively troublesome); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) (identifying "anomalous zones" in which "certain legal rules, otherwise regarded as embodying policies of the larger legal system, are locally suspended"); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998).

26. In New York City, for example, the initial site of Occupy's activities was Zuccotti Park, a privately owned but publicly accessible park in lower Manhattan. See Janos D. Marton, *Representing an Idea: How Occupy Wall Street's Attorneys Overcame the Challenges of Representing Non-Hierarchical Movements*, 39 FORDHAM URB. L.J. 1107, 1140 (2012).

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residents might also complain that the disorder resulting from public camping and other minor offenses contributes to a deterioration of the neighborhood and could contribute to a general sense of lawlessness.<sup>27</sup> Underenforcement of criminal law against protestors can also lead to concerns about equity if police appear to be tolerating conduct from one group of individuals that it would not tolerate from others.<sup>28</sup>

## II. LOOKING BEYOND FORMAL LAW: PROCESS AND COMMUNITY

Formal law does little to prevent either overenforcement or underenforcement. The law gives police broad discretion to act in the face of unlawful conduct. Temporary restrictions on liberty are permitted as long as reasonable suspicion of criminal activity is present.<sup>29</sup> A custodial arrest is permissible as long as probable cause exists to believe the arrestee has committed a crime,<sup>30</sup> no matter how minor the offense.<sup>31</sup> An officer who is justified in stopping or arresting an individual may also use reasonable force to effectuate the seizure,<sup>32</sup> and courts are generally deferential to officers in determining whether the level of force used was reasonable.<sup>33</sup>

Formal law is even more deferential to police discretion when they choose *not* to enforce the law.<sup>34</sup> Absent discriminatory motivations

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27. James Wilson and George Kelling's influential "broken windows" theory posits that low-level disorder contributes to more serious crime if left uncorrected. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29–38.

28. See Lenese C. Herbert, *O.P.P.: How "Occupy's" Race-Based Privilege May Improve Fourth Amendment Jurisprudence for All*, 35 SEATTLE U. L. REV. 727, 731–35 (2012) (noting that Occupy protestors are primarily white and appear to expect better treatment from police than minority communities have experienced).

29. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

30. *United States v. Watson*, 423 U.S. 411, 415 (1976).

31. See *Virginia v. Moore*, 553 U.S. 164, 177–78 (2008) (holding that a custodial arrest for a misdemeanor was valid even when the state legislature had designated the crime a non-arrestable crime); *Atwater v. City of Lago Vista*, 532 U.S. 318, 320–21 (2001) (holding that a custodial arrest for a seatbelt offense was lawful, even though the maximum penalty was a fine, because the offense was designated a crime by the legislature).

32. See *Muehler v. Mena*, 544 U.S. 93, 98–99 (2005); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it").

33. *E.g.*, *Scott v. Harris*, 550 U.S. 372, 383–86 (2007).

34. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989) (noting that because the Constitution does not obligate the



against a protected class, police have unfettered discretion not to arrest a person, despite the strength of the evidence, just as prosecutors can choose to decline charging.<sup>35</sup> As Alexandra Natapoff has observed, “Jurisprudentially speaking, underenforcement is a non-issue.”<sup>36</sup> Principles of both procedural justice and community policing demonstrate, however, that the desirability of police conduct generally, and exercises of discretion in particular, should not be determined solely through a jurisprudential lens.

### A. Procedural Justice

Although an exhaustive discussion of the lessons of procedural justice would go beyond the scope of this Essay, the truncated version of the central thesis of procedural justice is this: When people perceive a decision-making process to be fair, they are more likely to accept the outcome of that process, even if the decision itself is adverse.<sup>37</sup> Thanks to the influential work of social psychologist Tom Tyler and other scholars, we know that public perceptions about fairness are derived from four distinguishable factors. First, people are more likely to be satisfied with a process when they have been given an opportunity to participate by expressing their side of the story.<sup>38</sup> Second, perceptions of fairness are higher when people perceive the decision maker to be neutral.<sup>39</sup> Third, people are more satisfied when authority figures are perceived as having acted out of a

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government to enforce the law, “random underenforcement is not constitutionally objectionable”).

35. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

36. Natapoff, *supra* note 25, at 1756.

37. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003); Tom Tyler, Peter Degoey & Heather Smith, *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. OF PERSONALITY & SOC. PSYCHOL. 913 (1996); see also TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 196 (2002) (“[P]eople’s main consideration when evaluating the police and the courts is the treatment that they feel people receive from those authorities.”). See generally JOHN RAWLS, A THEORY OF JUSTICE § 14 (1971).

38. Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS 84 (2004); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 379–80 (2003).

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

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sense of care and benevolence for them.<sup>40</sup> Fourth, people care about how they are treated. When authorities treat them politely and with dignity and respect, they are more likely to perceive the process as fair.<sup>41</sup>

Procedural justice research has important implications for policing. Psychological research demonstrates that perceptions about the fairness of law enforcement's conduct drive the public's acceptance of law enforcement's legitimacy, separate from the lawfulness of police action. For example, in a recent study, Tracy Meares, Tom Tyler, and Jacob Gardener measured the relationship between people's assessment of police conduct and both the legality of the officer's conduct and the perception of the officer's procedural fairness.<sup>42</sup> They did this by showing subjects videos in which police were depicted as wielding some level of authority, ranging from verbal commands to the use of force, over a stopped person.<sup>43</sup> Prior to watching a video, subjects were told whether there was a lawful basis for the police conduct.<sup>44</sup> After watching the video, subjects were asked to evaluate the police along the various dimensions of procedural fairness.<sup>45</sup> Subjects were then asked to rate their desire to punish the officers.<sup>46</sup> This design permitted the researchers to divide the resulting data (how much to punish) into four groups of police encounters: 1) lawful encounter with high procedural justice; 2) lawful encounter with low procedural justice; 3) unlawful encounter with high procedural justice; and 4) unlawful encounter with high procedural justice.<sup>47</sup>

Meares et al. found that the lawfulness of the police conduct had only a small, if any, effect on subjects' desire to punish the officers.<sup>48</sup> For example, among groups who perceived there to be a high level of

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40. *Id.*

41. *Id.*; Tyler & Thorisdottir, *supra* note 38, at 380; *see also* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 420–24 (2008) (summarizing procedural justice theory).

42. Tracey L. Meares et al., *The Two Different Worlds We Live In: Lawfulness and Perceived Police Misconduct* (Yale Law Sch., Public Working Paper No. 255, 2012).

43. *Id.* app. B at 2.

44. *Id.* at 16. For example, some were told that police stopped a suspect for driving "erratically," while others were told that the stopped person was driving lawfully. *Id.*

45. *Id.* app. B at 2–3.

46. *Id.* app. B at 3.

47. *Id.* at 17.

48. *Id.* at 18 fig.2.

procedural justice, subjects who witnessed an unlawful encounter reported, on average, a desire to punish of 1.39,<sup>49</sup> while subjects who witnessed a lawful encounter reported a desire to punish of 1.36.<sup>50</sup> When procedural justice was low, subjects who witnessed an unlawful encounter reported a desire to punish of 2.25, compared to 2.10 for subjects who witnessed a lawful encounter.<sup>51</sup> Those same data tell a different story about the effect of procedural justice. Subjects who perceived high procedural justice had low inclinations to punish (either 1.36 for lawful encounters or 1.39 for unlawful), while subjects who perceived low procedural justice were much more desirous of punishment (2.10 for lawful encounters, 2.25 for unlawful).<sup>52</sup>

Perceptions of law enforcement's legitimacy affect not only public sentiment toward authority, but also actual conduct. By demonstrating that people are more likely to comply with rules when they are viewed as legitimate,<sup>53</sup> the procedural justice literature adds an important dimension to the usual deterrence-based crime-control model of punishment.<sup>54</sup> While traditional deterrence theory posits that people comply with the law to avoid sanction, social scientists have found a direct relationship between compliance with the law and perceptions about the legitimacy of the authority underlying the law.<sup>55</sup> People are also more likely to cooperate with law enforcement when they perceive law enforcement's authority to be legitimate.<sup>56</sup> Not surprisingly, perceptions of law enforcement's legitimacy can be driven by individual experiences:

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49. *Id.* Subjects were asked to number the intensity of their desire to punish, on a scale from 1 to 5, with higher numbers indicating a greater desire to punish. *Id.* at 18 n.56.

50. *Id.* at 18 fig.2.

51. *Id.*

52. *Id.*

53. *See generally* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

54. *See* Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 *LAW & SOC. INQUIRY* 983, 984–85 (2000) (“Research findings demonstrate that both specific decisions and more general laws and public policies are difficult to enforce using threats of punishment.”).

55. Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 *OR. L. REV.* 391, 400 (2000) (summarizing research); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 *HOFSTRA L. REV.* 707, 716–17 (2000).

56. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 *OHIO ST. J. CRIM. L.* 231, 267 (2008) (“Cooperation increases not only when the public views the police as effective . . . but also when citizens see the police as legitimate authorities who are entitled to be obeyed.”).

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Personal experience does have political impact. The judgments of adults about their obligation to follow legal authorities respond to their experiences with particular police officers and judges. Because experience influences legitimacy, legal authorities cannot take citizens' allegiance for granted. It can be eroded by unsatisfactory experiences with police officers or judges. And legitimacy will be eroded if the legal system consistently fails to meet citizens' standards. On the other hand, the existing reserve of legitimacy can be increased over time by positive personal experiences with police officers and judges.<sup>57</sup>

The procedural justice literature teaches us, then, to look beyond the lawfulness of police conduct to other normative factors. Law enforcement's willingness to listen, neutrality, respect, and caring affect perceptions of law enforcement's legitimacy, which in turn affect compliance with substantive criminal law and cooperation with police. Accordingly, procedural justice factors should help shape law enforcement's exercise of discretion.

### B. Community Policing

Another model of policing that offers lessons for the exercise of police discretion comes from the community justice movement. Although the term "community policing" can be elusive, it is perhaps best understood in contrast to the rapid-response model of policing that was dominant through most of the twentieth century. In rapid-response policing, law enforcement reacts to crimes as they occur.<sup>58</sup> Its goal is to identify a suspect, gather sufficient evidence to arrest and charge the suspect, and then to prosecute and punish the offender for the offenses charged.<sup>59</sup> In this form of law enforcement, each actor serves a limited purpose. Police become involved only after a crime has occurred, prosecutors step in once evidence has been gathered against a suspect, and citizens are relevant only to the extent they serve as suspects, complainants, witnesses, or jurors.<sup>60</sup> When law enforcement takes action—a stop, an arrest, the filing of criminal charges—the rapid-response model looks to formal law to determine

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57. TYLER, *WHY PEOPLE OBEY THE LAW*, *supra* note 53, at 106.

58. Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 *WAKE FOREST L. REV.* 285, 286–87 (2012).

59. *Id.* at 287.

60. Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 *WASH. L. REV.* 985, 992 (2003); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 *NOTRE DAME L. REV.* 321, 339 (2002).

the lawfulness of governmental conduct.<sup>61</sup> When a shortage of resources forces law enforcement to opt for underenforcement or non-enforcement, the rapid-response model looks to the criminal code for guidance, prioritizing serious offenses over petty ones.<sup>62</sup>

The community justice movement, in contrast, calls for greater involvement of and cooperation with communities at every stage of the justice system.<sup>63</sup> A model of community cooperation can affect exercises of discretion in multiple ways that contrast with rapid-response policing. First, in community policing, law enforcement must look to community members not merely as complainants and witnesses, but as “stakeholders” who not only help police identify community concerns, but also help develop and even implement responsive strategies.<sup>64</sup>

Community policing also affects law enforcement’s discretion in prioritizing resources. In identifying the most important community concerns, participating stakeholders will look more to their everyday, real-world problems rather than to the ranking of criminal offenses as defined by the formal criminal code. Accordingly, in community policing, police often exercise their discretion by addressing low-level crimes that might not warrant attention in comparison to more serious crimes, but which the community views as detrimental to their

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61. Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 415–16 (2000) (noting that police are limited by statute and exceeding that statute is “generally a violation of local and federal law”).

62. Green & Burke, *supra* note 58, at 288; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEF. FUNCTION § 3-3.9(b)(ii)–(iii) (1993) (listing “the extent of the harm caused by the offense” and “the disproportion of the authorized punishment in relation to the particular offense or the offender” among factors relevant to the decision to prosecute).

63. See Heymann, *supra* note 61, at 420 (2000); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 575 (1997); Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1600 (2002).

64. Of the jargon that emerges from community justice programs, one of the most frequent terms is “stakeholder.” See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 502 (2000) (discussing the role of “stakeholders” in shaping norms under new policing approaches); Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 720 (2000) (noting the importance of “stakeholder” agreement in restorative justice programs); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 410 (2000) (noting that participation of community “stakeholders” legitimizes government action).

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quality of life.<sup>65</sup> The enforcement of desirable social norms, rather than the criminal code itself, is often the focus of community policing. For example, while formal law prohibits the enactment of vague criminal prohibitions, scholars who support community policing have advocated for giving law enforcement discretion to enforce community norms that are often ambiguous.<sup>66</sup> Similarly, in the name of community, cities have enacted or increased the enforcement of substantive criminal laws that are focused more on social compliance than traditional criminal punishment, such as prohibitions against public camping,<sup>67</sup> panhandling,<sup>68</sup> and loitering.<sup>69</sup>

Moreover, because police look to affected stakeholders in identifying, prioritizing, and responding to community problems, community policing tends to be extremely localized.<sup>70</sup> One neighborhood's biggest problem could be a red-light district with a proliferation of sex shops and visible prostitution activities. In another neighborhood, domination of public spaces by gang members or drug dealers could be the driving concern. To residents and business owners in another district, graffiti and loud skateboarding could be of paramount importance.

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65. Eric W. Nicastro, *Confronting the Neighbors: Community Impact Panels in the Realm of Restorative Justice and Punishment Theory*, 9 ROGER WILLIAMS U. L. REV. 261, 261 (2003). Advocates of devoting resources to minor, quality of life offenses often invoke the broken windows theory in support. See Kelling & Wilson, *supra* note 27.

66. For more thorough discussions of the role of enforcement of social norms in community policing efforts, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367–77 (1997); Livingston, *supra* note 63, at 578–84; Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 377 (2001); 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, 1256–58 (2000).

67. See, e.g., *Roulette v. City of Seattle*, 97 F.3d 300, 302–06 (9th Cir. 1996); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562–84 (S.D. Fla. 1992).

68. See *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 701–06 (2d Cir. 1993) (striking down an ordinance prohibiting loitering for the purpose of panhandling); Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 896 n.5 (1991) (summarizing laws regulating panhandling).

69. See Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 143; Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 129 (2000) (arguing that gang influence on “community mores” undermines the inner cities’ chances for revitalization).

70. Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 B.C. ENVTL. AFF. L. REV. 615, 629 (2001); Heymann, *supra* note 61, at 421 (“[P]olice are accountable to neighborhoods as well as to cities . . .”).

Finally, community policing affects police discretion in devising responsive strategies to community crime concerns. Rapid-response policing treats arrest, prosecution, and punishment as paramount objectives, necessary to achieve incapacitation and deterrence.<sup>71</sup> Perhaps because it often prioritizes low-level quality of life offenses rather than serious crimes with immediate, identifiable harms, community policing treats arrest, prosecution, and punishment as a means to the end of improving community satisfaction.<sup>72</sup> If enforcement of criminal law against individual offenders on a reactive basis is necessary to solving community concerns, it can be part of community policing. However, community policing tends to emphasize long-term, proactive crime-prevention strategies over short term, reactive ones.<sup>73</sup>

### III. DISCRETION, POLICE, AND PROTESTERS

A superficial comparison of community policing and procedural justice might suggest that the two theories would carry similar implications for the exercise of police discretion. Both procedural justice and community policing theories look beyond formal law to other normative values, and both look specifically to the voices of citizens who are affected by police decision making to effectuate these values. Community policing does so by emphasizing police cooperation with the public and the prioritization of long-term problem solving over criminal punishment for its own sake. Procedural justice does so by encouraging police to give suspects a voice and by treating them without bias, with respect and dignity, and with a sense of caring and benevolence. Although the two theories have different emphases, they both tend broadly to evoke images of a more democratic, transparent, and accountable form of policing. But a deeper attempt to apply these shared principles in the context of policing protestors reveals potential tensions between the two policing theories.

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71. See Green & Burke, *supra* note 58, at 287, 291.

72. This model of “problem solving” policing is often attributed to Herman Goldstein. See generally HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING (1990); Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236 (1979).

73. Heymann, *supra* note 61, at 420 (“[O]ur policing strategies in the last decade have turned heavily towards prevention of crimes . . . rather than individual events.”).

### A. Rules of Engagement: Communication and Transparency

Both procedural justice and community policing principles suggest that guidelines for police discretion in the protest context should be both *ex ante* and transparent. Ad hoc decisions by individual officers, especially in the chaotic environment of mass protest activity, will inevitably lead to variations in treatment, which undermine the perception of neutrality.<sup>74</sup> Moreover, by its very definition, ad hoc discretion also undermines community policing's goal of preventing problems before they occur through *ex ante* problem solving rather than reacting to them.<sup>75</sup> Instead, police should adopt guidelines about what type of conduct will trigger what level of police response, and should make these guidelines available to protestors and the public.

Moreover, police should develop these guidelines not unilaterally, but in cooperation with the affected community. Permitting community input to shape the rules of engagement advances both community policing's emphasis on public participation and procedural justice's emphasis on giving voice to those affected by police decision making.<sup>76</sup> There is, however, a potential difference between procedural justice and community policing principles on the question of which constituencies' opinions are relevant.

In community policing, police are encouraged to partner with "stakeholders," a population that can include neighborhood residents, local businesses, schools, healthcare and social service agencies—"practically everyone," as one scholar noted.<sup>77</sup> The limited research seeking to describe the constituencies involved in

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74. In other contexts, the contributory role of broad police discretion to unequal treatment is well explored. *See, e.g.,* *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (striking down a city ordinance aimed at gang-affiliated loitering in part because it was too vague to prevent arbitrary and discriminatory enforcement); *Delaware v. Prouse*, 440 U.S. 648, 656 (1979) (striking down wholly discretionary spot checks of vehicles in part because unfettered discretion could lead to "indiscriminate official interference" (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975))).

75. *Cf. Morales*, 527 U.S. at 59 (reasoning that because an anti-gang loitering ordinance gave police discretion to issue an order to disperse "only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse").

76. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. REV.* 453, 476 (1997) ("Criminal law rules can contribute to normative forces; they can shape, alter, and guide those forces, but only if the community accepts the law as a legitimate source of moral authority.").

77. David Thacher, *Conflicting Values in Community Policing*, 35 *LAW & SOC'Y REV.* 765, 765 (2001) (noting that community policing attempts to incorporate "practically everyone").



community policing reports that residential involvement is often dominated by older, whiter, and wealthier neighborhood residents.<sup>78</sup> Business owners, whose values may differ from those of residents, may have the ability to garner disproportionate attention by providing funding to some of the public-private partnerships involved in community policing programs.<sup>79</sup> Because the rhetoric of “community” is simultaneously popular and elusive, scholars have warned that it can be co-opted by unrepresentative or majoritarian populations.<sup>80</sup> For example, one could imagine the NYPD justifying aggressive police tactics against Occupy Wall Street through the lens of community policing. Zuccotti Park, the original location for the movement’s “occupation,” is privately owned.<sup>81</sup> It is surrounded by the country’s financial center, still raw from the largest mass murder on American soil. Nearby is Tribeca, a neighborhood favored by families with young children.<sup>82</sup> Consulting only with “stakeholders” seeking enforcement against the collateral effects of speech activities would lead to very different police strategies than if demonstrators and their supporters dominated the conception of “community.” For this reason, several scholars have noted the importance of including diverse and representative voices in the community policing process.<sup>83</sup> While community is intended to shape the exercise of police

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78. See Michael E. Buerger, *A Tale of Two Targets: Limitations of Community Anticrime Actions*, in COMMUNITY JUSTICE: AN EMERGING FIELD 137, 137–38 (David R. Karp ed., 1998); Wesley G. Skogan, *Community Organizations and Crime*, in 10 CRIME AND JUSTICE: A REVIEW OF RESEARCH 39, 68 (Michael Tonry & Norval Morris eds., 1988); Bernard E. Harcourt, *Punishment and Crime: Policing L.A.’s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles (an Experiment In Real Time)*, 2005 U. CHI. LEGAL F. 325, 329.

79. Green & Burke, *supra* note 58, at 305 (noting the role that private actors and funding can play in community justice programs).

80. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 77 (2009) (noting that “one of the unexplored drawbacks of community policing” is that “police receive their cues from society”); Green & Burke, *supra* note 58, at 304–09; Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 381 (2005).

81. Kunstler, *supra* note 18, at 1017.

82. *Tribeca*, STREET ADVISOR, <http://www.streetadvisor.com/tribeca-manhattan-new-york-city-new-york> (last visited Mar. 24, 2013); *Tribeca Demographics*, ZILLOW, [http://www.zillow.com/local-info/NY-New-York/Tribeca-people/r\\_270951/](http://www.zillow.com/local-info/NY-New-York/Tribeca-people/r_270951/) (last visited Mar. 24, 2013).

83. See, e.g., Green & Burke, *supra* note 58, at 305; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 215–17 (1998) (discussing the concept of “linked fate,” both generally as with people who care about how government policies affect loved ones, and specifically in African Americans, who feel connected to Black strangers because of shared historical circumstances).

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discretion, the very determination about which community members to communicate and work with is itself discretionary.

In contrast, the theory of procedural justice makes clear that police should listen not only to those who complain to police about underenforcement, but also to the populations who will potentially be policed. Procedural justice scholars emphasize this point directly by teaching us that people are more likely to view police action as fair, and will therefore be less likely to break the law and more likely to comply with police, when they are given a chance to have their voices heard.<sup>84</sup> Applied to Occupy Wall Street, the lesson of procedural justice is that police should meet not only with segments of the population who believe they are inconvenienced or harmed by protest activities, but also the protestors themselves, including those most likely to violate the law.

When I was a community-based prosecutor,<sup>85</sup> we would meet in advance with protest organizers and agree to the rules of engagement. Protestors knew what activities were lawful (or would be tolerated through underenforcement), what would be treated with a citation, and what would trigger custodial arrest. Demonstrators who wanted to be arrested for civil disobedience reasons were given “easy” ways to break the law. These arrestees would be taken away with plastic zipties on their wrists. Protestors who went beyond the agreed upon norms were subjected to the usual custodial process.

Opponents of including protestors in the conversation that shapes the exercise of police discretion might argue that a group like Occupy Wall Street is impossible to negotiate with because of its unique nature. Occupy is largely non-hierarchical, with no named leaders or organizers.<sup>86</sup> However, as it continues, it has become more organized, though still driven by individuals.<sup>87</sup> Moreover, the level and means of

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84. See Tom Tyler, *Enhancing Police Legitimacy*, 593 *THE ANNALS* 84 (2004); Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 *DEPAUL L. REV.* 355, 380 (2003).

85. See Burke, *supra* note 60 (drawing on my experience as part of Portland, Oregon’s “Neighborhood District Attorney” program).

86. See Sandra D. Jordan, *Victimization on Main Street: Occupy Wall Street and the Mortgage Fraud Crisis*, 39 *FORDHAM URB. L.J.* 485, 491 (2011); Marton, *supra* note 26, at 1109.

87. For example, the New York City General Assembly represents itself as “dozens of groups working together to organize and set the vision for the #occupywallstreet movement.” *About*, #OCCUPY WALL STREET N.Y.C. GEN. ASSEMBLY, <http://www.nycga.net/about/> (last visited Mar. 24, 2013). The resulting “Internet working group” has been described by one its creators as the movement’s

communication used by protestors to communicate gathering times and locations with one another, and to publicize its confrontations with police, should be sufficient for police to communicate as well. Occupy has been especially successful at publicizing its activities via websites, message boards, Facebook, and Twitter.<sup>88</sup> Law enforcement could use these same online tools to communicate guidelines and decisions with transparency and to encourage increased cooperation between police and protestors.

Another potential conflict between community policing and procedural justice theories is in the ultimate goals that should guide police discretion. Community policing emphasizes long-term problem solving, but, just like the meaning of community, the terms “problem” and “solving” are ambiguous. Consider, for example, the possible problems reported to the police by mass demonstrations in lower Manhattan as protestors move from the Financial District up to Union Square Park. Concerns from residents could be as varied as litter, noise, blocked traffic, trespassing, or fears of violence. Concerns by protestors, if permitted to participate in the shaping of police guidelines as part of “community,” might be about fears of harassment or violence by opponents or police, or uncertainty about the scope of their constitutional rights (e.g., hours of park closure, street permit requirements, or noise restrictions against drums or amplification).

How should the success of a community policing project be measured? By an actual decrease in overall crime? The prevention of serious crime? A decrease in complaints? An increase in overall satisfaction?

In this context, again, procedural justice provides more specific guidance. Thanks to procedural justice research, we know that *perceptions* of police fairness, specifically the perception of fairness demonstrated *toward* the policed, has instrumental value.<sup>89</sup> People subject to police conduct not only report more satisfaction, but are also more likely to comply with law enforcement, when they perceive that they have received a fair process.<sup>90</sup> Moreover, people who are

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“general assembly.” Adam Martin, *Occupy Wall Street Is Building Its Own Social Network*, ATLANTIC WIRE (Oct. 13, 2011), <http://www.theatlanticwire.com/national/2011/10/occupy-wall-street-building-its-own-social-network/43637/>.

88. See Jennifer Preston, *Protesters Look for Ways to Feed the Web*, N.Y. TIMES, Nov. 25, 2011, at A28.

89. See discussion *infra* Part II.A.

90. See *supra* notes 53–56 and accompanying text.

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outsiders to the encounter are also likely to feel better about police discretion when they perceive that police have given procedural fairness to the people they are policing.<sup>91</sup> Here, the implications of the research are again clear: Police should not only listen to demonstrators; they should also treat them fairly. Doing so not only will increase satisfaction in both protestors and those outsiders who are viewing the protests, but also increase the perception of police legitimacy, which in turn makes it less likely that protestors will violate the law or disregard police commands.

### B. Neutrality

Although media reports about the policing of the Occupy movement have often focused on claims of excessive force, supporters of the movement have noted a separate concern about selective enforcement. The New York Civil Liberties Union, for example, collates “Free Speech Threat Alerts” that highlight “under-the-radar” police activities that chill or punish the exercise of speech rights, including targeted surveillance and the selective enforcement of criminal law.<sup>92</sup> Similarly, the Protest and Assembly Rights Project also focuses on selective enforcement in alleging a broad pattern of aggressive policing against the Occupy movement.<sup>93</sup>

Both community policing and procedural justice principles would advise police to act neutrally toward protest movements. This principle of neutrality means at the very least that law enforcement should police a Tea Party protest in the same way it polices an Occupy Wall Street protest.<sup>94</sup> Preferential treatment based on the viewpoint of the speaker undermines the perceived legitimacy of law enforcement and serves no community justice values. Police also should not enforce criminal law any more aggressively when it arises from protest activity than when it arises within any other group gathering in a public area. Crimes like trespass, jaywalking, and blocking traffic are no more harmful when committed by a protestor than by a marathon observer or concertgoer.

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91. See *supra* notes 38–52 and accompanying text.

92. See *NYC Free Speech Threat Assessment*, N.Y. C.L. UNION, <http://www.nyclu.org/protest> (last visited Mar. 24, 2013).

93. See KNUCKEY ET AL., *supra* note 15.

94. Tea Party supporters have argued that big city mayors, whom they claim are more likely to be liberal, have shown favoritism toward the Occupy Wall Street movement by tolerating lawlessness by Occupy protestors. Alan Farnham, *OWS Getting Under Tea Party's Skin*, ABC NEWS (Nov. 21, 2011), <http://abcnews.go.com/Business/tea-party-response-occupy-wall-st/story?id=14985439>.

There are two distinctions that police might, however, legitimately draw in their policing of protestors without necessarily violating principles of neutrality. First, neighborhood differences might warrant more aggressive or different policing in one geographic area than another. Here, community policing and procedural justice potentially carry different implications regarding geographic variations in the enforcement of criminal law. Because community policing tends to define “community” geographically and then permits the defined community to help identify and prioritize quality of life concerns, geographic variations in police responses is not only tolerated but expected. In the protest context, for example, one could imagine that the congested, business-focused Financial District would report more dissatisfaction with the potential collateral crimes associated with a protest movement than would constituencies on the Lower East Side of Manhattan. Accordingly, police might be less likely to intervene with protest activity, even when in violation of formal law, if conducted in an acceptable, geographic zone.<sup>95</sup> Community policing’s emphasis on problem solving could lead to similar geographic disparities. For example, thousands of protestors in the financial district or midtown Manhattan would be more disruptive to traffic than the same protest activities in a residential district. Although the city could zone protest activity directly through the permitting process,<sup>96</sup> police could also zone informally by using discretion to enforce a “zero tolerance” approach in congested areas, and taking a more lenient approach in less congested areas.

From the perspective of procedural fairness, however, variations in enforcement based on geography could potentially undermine the perception of police neutrality. If, for example, protestors are arrested in the Financial District for wearing masks when such conduct is tolerated on the Lower East Side, protestors could construe the disparity as creating a zone of privilege for the geographic area that symbolizes the economic policies that the Occupy movement is protesting. Discrepancies in enforcement by

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95. For further discussion of treating the enforcement of criminal law differently according to geographic distinctions, see Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1219–46 (1996) and Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1166–82 (1999).

96. See Mary M. Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, 8 U. D.C. L. REV. 53 (2004) (describing the use of “free speech zones” to limit the geographic location of speech activity).

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geography, if perceived as a sign of hostility toward the protestors in favor of the protested, would also undermine the perception that police are acting out of a sense of caring and benevolence toward protestors. The risk of such perceptions could potentially be alleviated by giving careful regard to the other dimensions of procedural fairness.

A second distinction police should consider is to underenforce criminal law in protest settings compared to other group settings. As Alexandra Natapoff has noted, “[s]ome underenforcement practices are unfair, undemocratic, and harmful; others may be empowering, responsive, and helpful.”<sup>97</sup> Specifically, she identifies underenforcement of minor offenses committed in the protest context as a place when underenforcement can serve desirable values:

Although protesters often violate trespass, loitering, and other criminal laws, police routinely do not fully enforce these laws, opting for symbolic or partial enforcement in the spirit of the expressive nature of the protest. We take it as a sign of social maturity that police do not fully enforce criminal laws against protesters, and we fear for our democracy when protesting lawbreakers are treated like traditional criminals without regard for the expressive or First Amendment values at stake. In this context, underenforcement is a sign of truly responsive government, one that recognizes that not all laws deserve to be enforced all of the time and that principles of democratic accountability sometimes require law enforcement to make room for public deviance.<sup>98</sup>

Randall Kennedy’s analogy of policing to a form of tax proves helpful here.<sup>99</sup> In its original context, Kennedy’s argument identified the “racial tax” paid by African American communities to pay for aggressive police tactics.<sup>100</sup> Kennedy and others have argued that the tax of policing should be paid equally.<sup>101</sup> As noted above, at the very least, the policing tax imposed on Occupy protestors should be no higher than the tax paid by Tea Party protestors or marathon

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97. Natapoff, *supra* note 25, at 1744.

98. *Id.* at 1743.

99. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1997).

100. Randall Kennedy, *Suspect Policy*, *NEW REPUBLIC*, Sept. 13, 1999, at 30, 34 (identifying “a special kind of tax for the war against illegal immigration, drugs, and other forms of criminality”).

101. *Id.* (arguing that the cessation of racial profiling would repeal the “racial character” of the “tax” for law enforcement); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 54 (1999) (arguing that “well-to-do white people” would be more concerned about police tactics if they were routinely subjected to them).

observers or concertgoers. Arguably, though, people who gather in large groups for the purpose of exercising speech rights should pay a lower tax than other groups that present similar order-maintenance challenges, because they are engaged in speech activities, whether the positions are favored or not, that are valued in a democracy.

### C. Culture

Regardless of the content of the guidelines developed to govern police discretion in enforcing criminal law against protestors, police departments should emphasize to individual officers that the quality of their decision making is determined not solely by outcomes but by *process*. This conclusion of course flows from procedural justice directly: Research demonstrates that people are more accepting of police decision making, independent of outcome, when they perceive it to be procedurally just.<sup>102</sup> An emphasis on fair process is also consistent with community policing's emphasis on long-term solutions. Thanks to the work of Tom Tyler and others, we know that fair process in the long term drives outcomes because people are more likely to comply with law if they are treated fairly.<sup>103</sup>

An emphasis on process has implications for police culture. Police should be trained to treat protestors (and everyone else) with respect. Even if they opt for intervention or enforcement or both, they can do so with respect. Here, I return to the anecdotal observations that gave rise to my interest in this Essay. Although police in Portland have certainly clashed with protestors generally and with the Occupy movement in particular, I watched as officers approached protestors camping outside of City Hall. They approached casually, coffee cups in hand. They were there to "chat," prepared to escalate the confrontation level if necessary.<sup>104</sup> In contrast, the NYPD showed up for what became the May Day Siege with their fight faces on.

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102. TYLER, *supra* note 53, at 5 ("Justice concerns are seen as acting independently of the influence of an outcome's favorability."); Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 214 (2012) ("Critically, perceptions of procedural fairness are outcome independent.").

103. See *supra* notes 53–56 and accompanying text.

104. I confirmed my observations by meeting with a Portland Police Bureau Captain and Commander to discuss the Bureau's policing of protestors. As they described their philosophy, police have "nowhere to go" if they start with a "zero-tolerance" attitude in "riot gear." They cannot "de-escalate." Moreover, they have been cautioned to avoid developing an "us versus them" culture. Notes from meeting at Portland Police Cent. Precinct (Aug. 1, 2012) (on file with author).

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Specifically in the protest context, showing respect is not simply a matter of being polite, but about respecting the exercise of constitutional rights. Police should not arrive to a protest with the perception that the demonstrators are the enemy. In fact, they should not even view a protest as just another crowd control job. The police are there not only to prevent protestors from causing trouble, but to protect them against those who would silence, harass, or harm them. The police, in short, are there not to police the protestors, but to be protectors and peacekeepers for everyone present.

#### CONCLUSION

The dangers of overenforcement and underenforcement apply equally to the policing of protestors as in other contexts. Looking beyond formal law to community policing and procedural justice principles offers some guidance as to best practices for the exercise of police discretion in enforcing criminal law against protestors. At the same time, however, examination of the community policing and procedural justice principles in this context reveals potential tensions between the two theories.