

ROLE-BASED POLICING: RESTRAINING POLICE CONDUCT “OUTSIDE THE LEGITIMATE INVESTIGATIVE SPHERE”

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ABSTRACT

The last quarter of a century has produced a growing legitimacy crisis in the criminal justice system arising from profound and familiar differences in race and class. The same tactics used to win the War on Crime also harassed and intimidated the very people policing was supposed to protect, sending disproportionate numbers of young minority men and women to prison as part of War On Drugs.

In this article, I take up challenge of social norms theorists who advocate empowering police and local communities through a variety of traditional and newly minted public order offenses. My claim is that the sort of preventative policing they advocate, singling out quality of life issues, can and should be separated from reactive investigative policing directed at apprehending criminals. The police, as currently constituted, are simply the wrong people to engage in preventative policing. My proposal is to radically restructure the manner in which we think about the legitimacy of various policing practices and the type of authority wielded by the police. The rule-based attempt to limit police authority through prospective constitutional (and other) norms limiting their ability to search, seize, and interrogate suspects does not work to constrain their ability to police public order and engage in crime prevention. Instead, I propose a series of role-based constraints of the scope of police authority.

Much like the separation-of-powers limitation upon the various branches of government, role-based constraints suggest that municipalities should match the authority conferred upon particular government officials to the specific problems to be addressed through public order policing. The appropriate local authorities include bus drivers and crossing guards: municipal officials with no power to engage in investigation but who have the authority to enforce norms of public order. Such officials possess limited institutional legitimacy outside of their various spheres of operation and no role-based authority to engage in the invasive, investigative policing practices currently utilized in predominantly urban areas.

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ROLE-BASED POLICING

I. INTRODUCTION

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)

Despite the many strides made in sharply reducing the rate of violent crime, the last quarter of a century has produced a growing legitimacy crisis in the criminal justice system.¹ That the crisis is not experienced in a uniform manner across all segments of our society is not a cause for complacency, but an additional source of concern. Put simply, whether or not you regard the techniques and targets of policing as well chosen depends in part upon profound and familiar differences of race, political affiliation, and place of residence.² Most intriguingly, a lack of uniformity among racial, political, and geographical groups only adds to the confusion.³

A central paradox of the War on Crime is that the means by which it triumphed alienated those it was intended to liberate. Increased policing of urban communities has, by at least one measure, resoundingly succeeded: serious crime is down everywhere.⁴ Nonetheless, many of those concerned

¹ See MICHAEL TONRY, *MALIGN NEGLECT — RACE, CRIME AND PUNISHMENT IN AMERICA* 4-5 (1995); compare Dan M. Kahan & Tracey L. Meares, *Twenty-Seventh Annual Review of Criminal Procedure—Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1160-66 (1998) (hereinafter Kahan & Meares, *Crisis*).

² See TONRY, *supra* note 1, at 4-5; compare William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1875-76 (2000) (hereinafter Stuntz, *Self-Defeating Crimes*); William J. Stuntz, *Race, Class, And Drugs*, 98 COLUM. L. REV. 1795, 1801-3, 1813-15 (1998) (hereinafter Stuntz, *Race, Class & Drugs*).

³ See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998) (hereinafter KENNEDY, *RACE & CRIME*); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1270-76 (1994) (hereinafter Kennedy, *State & Criminal Law*).

⁴ See, e.g. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing*

with racial disparities in policing have pointed out that the same tactics used to win the War on Crime have also served to harass and intimidate the very people such policing was supposed to protect.⁵ Policing may be working, but at what cost?

The debate over the appropriate manner of policing urban, minority communities has riven the liberal criminal law community.⁶ In particular, liberal legal theorists⁷ have clashed with the relatively liberal proponents of economic or administrative approaches to law — who I shall broadly call social norms theorists⁸ — over policing public order. The heart of that debate

New York Style, 97 MICH. L. REV. 291, 329-331 (1998) (citing Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY (1998); Richard Curtis, *The Improbable Transformation of Inner City Neighborhoods: Crime, Violence, Drugs and Use in the 1990's*, 88 J. CRIM. L. & CRIMINOLOGY (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 369 (1997) (hereinafter Kahan, *Social Meaning*).

⁵ See TONRY, *supra* note 1; Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 154 (1996); David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547 (1995) (hereinafter Cole, *Paradox of Race and Crime*); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN AMERICAN CRIMINAL JUSTICE SYSTEM 1-55 (1999) (hereinafter COLE, NO EQUAL JUSTICE). See also Tracey L. Meares, *Place And Crime*, 73 CHI.-KENT L. REV. 669, 680 (1998) (hereinafter Meares, *Place And Crime*).

⁶ Meares, *Place & Crime*, *supra* note 5, at 684-94 (critiquing the race-based analyses of Paul Butler and of Angela Davis) (citing Butler, *supra* note 5, at 154; Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 884 (1997) (hereinafter Butler, *Affirmative Action*); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (hereinafter Butler, *Jury Nullification*); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Angela Jordan Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998)). Compare KENNEDY, RACE & CRIME, *supra* note 3 with Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998); compare Kennedy, *State & Criminal Law*, *supra* note 3, at 1270-76 with Cole, *Paradox of Race and Crime*, *supra* note 5.

⁷ When discussing legal liberalism I mean to follow William H. Simon's use of the term. See William H. Simon, *Solving Problems v. Claiming Rights: The Pragmatist Challenge to Liberal Legalism* (August 1, 2003 version), unpublished manuscript at 7-10 (describing liberal legal theorists as subscribing to a "victim perspective... fundamentally concerned with the needs of the wounded and vulnerable" and a "commitment to formulating certain fundamental norms as...analytical, individualistic, categorical, judicially enforceable, and corrective...[r]ights...derived analytically by the application of legal reasoning to authoritative sources").

⁸ These social norms theories have been variously described as "legal pragmatism," see Simon, *supra* note 7, at 48-74; "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 L. & 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*); the "New Chicago School," see Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998); and the "new discretion scholars," David Cole, *Foreword: Discretion and Discrimination Reconsidered: A*

concerns the best means by which to ensure quality of life in urban minority communities while avoiding sending young Black and Latino men and (increasingly) women to prison as part of War On Drugs.⁹

In this article, I take up challenge of social norms theorists who advocate empowering police and local communities through a variety of traditional and newly minted public order offenses as means of attacking high crime in urban and predominantly minority neighborhoods.¹⁰ My claim is that the sort of preventative policing they advocate, singling out public order or quality of life issues, can and should be separated from reactive investigative policing directed at apprehending criminals. Given such a separation of prevention and investigation, the police, as currently constituted, are the wrong people to engage in preventative policing. Instead, the appropriate people include meter readers, bus drivers, and crossing guards: municipal officials with no power to engage in investigation but who have the authority to enforce norms of public order.

My proposal is to radically restructure the manner in which we think about the legitimacy of various policing practices and the type of authority wielded by the police. Our current focus on constitutional remedies for low-level police abuses has failed to ameliorate the legitimacy crisis faced by the police and the justified resentment expressed by individuals and local communities subject to heightened amounts of policing that is taking increasingly invasive forms.

The attempt to limit police authority through prospective constitutional (and other) norms limiting their ability to search, seize, and interrogate suspects is properly confined to the police's investigative role. It does not work to constrain their ability to police public order and engage in crime prevention. Yet even at the investigative stage, the Court has already replaced the rule-based due-process model of authority¹¹ with a series of role-based exceptions to the Fourth, Fifth and Sixth Amendments' constitutional requirements.

Response to the New Criminal Justice Scholarship, 87 GEO. L.J. 1059, 1062 (1999) (hereinafter Cole, *Discretion*).

⁹ See Stuntz, *Race, Class & Drugs*, *supra* note 2 at 1836.

¹⁰ See, e.g., 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 5, at 699 (curfew; anti-loitering ordinance); Tracey L. Meares, *It's a Question Of Connections*, 31 VAL. U. L. REV. 579, 593 (1997) (hereinafter Meares, *Connections*) (curfew; anti-loitering ordinance); Kahan & Meares, *Crisis*, *supra* note 1 (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*).

¹¹ Exemplified by the warrant requirement and a strong reading of the Fourth, Fifth, and Sixth Amendments.

Role-based conceptions of the scope of authority do not fit with an emphasis on due process, the warrant requirement, and prospective limits on the power to police.¹² Much like the separation-of-powers limitation upon the various branches of government, they work to suggest that municipalities should match the scope of authority conferred upon particular government officials to the specific set of problems to be addressed through public order policing. These include vandalism, loitering, noisiness, “cruising,” and solicitation, and are particularly problematic insofar as they are indicia of drug crime and gang activity.¹³ A range of municipal officials other than the police can address many of these activities. Such officials possess limited institutional legitimacy outside of their various spheres of operation and no role-based authority to engage in the invasive, investigative policing practices currently utilized in predominantly urban areas.

The distinction between rule- and role-based policing helps illuminate some troubling features of the public-order policing debate. Currently that discussion revolves around the propriety of endorsing an increase in the “discretion” devolved upon law-enforcement officers. I suggest that focus on “discretion” alone — from both sides of the debate — is mistaken, not because police (should) have or lack discretion, but because social norms scholars, properly understood, do not wish to give police “discretion.” Rather, they propose a different source of constraint — local supervision and “social norms” — premised upon conceptions of police authority, professionalism, and legitimacy that diverge markedly from the legal liberal model. Once the normative (as opposed to sociological)¹⁴ basis for police authority and legitimacy is laid bare, it turns out that the debate is over different conceptions of (constrained) police autonomy, and the solution to problems of policing is not police discretion but the police role.

¹² 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.”).

¹³ See Meares, *Social Organization*, supra note 10, at 223; Kahan & Meares, *Crisis*, supra note 1; Meares, *Connections*, supra note 10, at 593; Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 Sup. Ct. Rev. 141 (1999); Livingston, *Communities*, supra note 10.

¹⁴ See Michael S. Moore, *Three Concepts of Rules*, 14 HARV. J. L. & PUB. POL’Y 772, 773-75, 777-78 (1991). See also Brian Bix, H.L.A. Hart and the Hermeneutic Turn in Legal Theory, 52 SMU L. Rev. 167, 193 (1999) (discussing “sociological or psychological exploration on why people treat legal rules as giving them reasons for actions.”) (citing TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990)).

In Section II, I place the social norms theorists descriptive (empirical or sociological) account of community perceptions of legal legitimacy into a normative framework.¹⁵ The ability of legal officials to govern depends upon the assimilation of legal directives into the local social norms structuring an agent's choices.¹⁶ In the criminal law, social perceptions of legal legitimacy depend upon the manner in which rational agents understand and internalize criminal sanctions as part of their general attitude towards other, legal and non-legal, norms of conduct.¹⁷ At the very least, that people endorse a set of norms tells us an interesting fact — what system of norms is in force in a given community and so how to tailor new or existing norms to make them more efficient.¹⁸ That sociological fact does not, however, tell us whether those norms ought to form the basis of a moral, political, or legal theory.¹⁹

Descriptive elaboration of local norms does not encompass the full scope of the social norms theorists' ambitions: despite the empirical, rational-choice the nature of much of their argument, they want to discuss not just the appearance of legitimacy, but *actual* legitimacy. Their normative claim is that social norms provide justified, substantively legitimate reasons upon which we ought to rely independent of the claim made by either the authority or the norm-subjects²⁰ — a set of “politically feasible and morally attractive” policies.²¹ The disagreement between social norms and liberal legal theories rests upon the attractiveness of the normative claim.

In order to understand the scope of the social norms theorists political and moral program, it is essential to elaborate the concepts of legitimacy and authority that underlie the discussion. Accordingly, in Section III I provide a definition of these concepts, as well as introducing the concepts of rule- and role-based authority. Each concerns the proper scope of legitimate authority: rule-based authority has its basis in adherence to the content of particular

¹⁵ Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1616 (2002) (hereinafter Meares, *Pollicing*). See also Meares, *Social Organization*, *supra* note 10, at 214 (compliance with norms based on agent's internal perception of government legitimacy).

¹⁶ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

¹⁷ See *id.* at 1006.

¹⁸ See Moore, *supra* note 14, at 773-75, 777-78. See also Bix, *supra* note 14, at 193 (discussing “sociological or psychological exploration on why people treat legal rules as giving them reasons for actions.”) (citing TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990)).

¹⁹ Lawrence B. Solum, *Procedural Justice*, 78 S. Cal. L. Rev. 181, 265-67 (2004); Moore, *supra* note 14, at 773-75, 777-78.

²⁰ The concepts of legitimacy and justification are normative; they entail a particular, internal attitude on the part of the law's subjects. See, e.g., Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 864-65 (2002) (hereinafter Meares, *Empiricism*); Meares, *Place & Crime*, *supra* note 5, at 670-80.

²¹ Harcourt, *supra* note 7, at 179.

rules; role-based in the powers afforded individuals occupying a particular status in specified circumstances or jurisdictions. 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.²²

My central concern is with the legitimacy crisis in policing urban, minority communities and the social norms response to that crisis. Section IV contains a statement of the problem and a discussion of the legal liberal and social norms responses to it. Minority communities face the paradox of under- and over-policing.²³ Differential rates of arrest, prosecution, conviction, and length of sentencing has resulted in a vastly disproportionate number of minority drug users sent to prison, with a devastating effect upon the human resources in their communities.²⁴ Drug dealing and gang activity, however, impose significant burdens on the community, often resulting in a break-down of public order and a rise in violent crime and property damage that curtails the quality of life in afflicted neighborhoods. The legal liberal emphasis on the rights of criminal defendants and constitutionally mandated controls upon the police does little to ameliorate the plummeting quality of life experience by urban residents; the legal liberal emphasis on race, poverty and crime fails to account for differences in criminality experienced by communities with similar racial and economic profiles.²⁵ Social norms theorists' claim they can explain local differences and raise the quality of life through neighborhood attitudes to government legitimacy.

In Section V, I demonstrate that the social norms project of delegating power to the police ironically requires more, not less, legislation and the creation of new, government-generated, rather than local, standards of criminality. Social norms theorists attempt to legitimate these increased police powers by involving community members in the process of norm creation.²⁶ This solution stems from a failure clearly to understand the nature of police authority and the consequences of removing the few due-process restraints upon the operation of that authority in the community setting. What is required is not more police discretion, but a preventative, public order policing authority limited to that role and precluded by inclination and institutional

²² *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("our jurisprudence [has] lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.").

²³ See Kennedy, *State & Criminal Law*, *supra* note 3, at 1255-56.

²⁴ See Michael Tonry, *Toward a Rational Drug Policy: Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 52 (1994).

²⁵ See Meares, *Place & Crime*, *supra* note 5, at 675-81.

²⁶ Meares & Kahan, *Norms*, *supra* note 8, at 827; see also Meares, *Social Organization*, *supra* note 10, at 220-26 (discussing reverse stings and anti-gang ordinances); Meares, *Policing*, *supra* note 15, at 1612 (same).

competence from engaging in the type of policing that generates alienation and resentment from the very groups that are supposed to benefit from an increase in order.

Police trained to use public order legislation as collateral means of engaging in investigation 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 a form of high-stakes policing in which low-level encounters rapidly escalate into stops, searches, and seizures and in which possession of small amounts of low-level drugs result in lengthy prison sentences. The style and consequences of policing often results in 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 Section VI, I conclude that, given the point and purpose of public order policing, it is not clear that the police are the proper body to accomplish them. Community participation in policing — and the crime-control goals touted by “broken windows” policing — should work at least as effectively (from the perspective of community participation, more effectively) if public officials with a more limited institutional role undertake public order policing.

Intriguingly, such targeting does not involve statutes directed against youth, gangs, or drug dealers: public order offenses are only tangentially related to these activities. 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 to police them. Experience shows that there is widespread public tolerance for low-end drug use so long as that use is private and the community remains orderly. In addition, generally communities not only tolerate but demand low sentences for public order offenses. Accordingly, the officials empowered to stop, search, and arrest should not be those engaged in public order policing, and who are trained to use any encounter as a justification for initiating collateral, investigative policing as part of the investigation 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.

²⁷ See Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 Sup. Ct. Rev. 141, 173 (1999).

²⁸ See Meares, *Place & Crime*, *supra* note 5, at 680; Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 413-14 (2000) (hereinafter, Meares, *Legitimacy & Law*).

II. SANCTION- AND NORM-BASED THEORIES OF CRIMINAL LAW

Social norms theories share a distinctive approach to legal analysis, one that is empirical and contextual,²⁹ concerned to examine non-legal, informal systems of social regulation. The *empirical* ambition of the theory is to discover what government rules and standards people endorse and discern public perceptions of legitimacy as measured by observable reactions to social and legal norms.³⁰ The *social* emphasis of the theory is to insist that lay-persons' conduct is motivated by *non-legal* standards even when the law purports to control their behavior.³¹ The *normative* aspect regards social agents as rational beings capable of *directing their conduct* by reference to norms.³² So while social norms theorists consider that the law is an institution able to create obligations that are internalized by subjects, they attempt to determine the manner in which a rational agent will understand and internalize the sanction as part of their general attitude towards other, legal and non-legal, norms of conduct.³³ The concept of "internalization" helps explain the relation between empirical and normative theories and the distinctive, sanction-minimizing character of the "new" policing.

A. Internal and External Norms

Social norms theories attempt to determine the manner in which a rational agent will understand and internalize criminal sanctions as part of his or her general attitude towards other, legal and non-legal, norms of conduct.³⁴ The social-norms perspective gives weight to the meaning that agents and social groups place upon legal norms³⁵ and, so the social-norms theorists claim, mediates individual assessments of value.³⁶ Accordingly, such theories seek to identify the effect of both the direct threat to impose sanctions and the indirect

²⁹ See, e.g., Meares, *Empiricism*, *supra* note 20..

³⁰ See Meares, *Legitimacy & Law*, *supra* note 28, at 413-14.

³¹ See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 351 (1997). The law guides conduct by providing "general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose." H.L.A. HART, *THE CONCEPT OF LAW* at 121 (1st ed.).

³² See, e.g., Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 747 (1989); Neil MacCormick, *Norms, Institutions, and Institutional Fact*, 17 L. & PHIL. 301, 322-24 (1990).

³³ See Lessig, *supra* note 16, at 1006.

³⁴ See *id.*

³⁵ See, e.g., HART, *supra* note 31, at 55-6 (1st ed. 1990); NEIL MACCORMICK, H. L. A. HART 30-34 (1981). For a sociological perspective on the internal attitude to rules (phrased in terms of "context" and "contingency") see Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2181-83 (1996).

³⁶ See, e.g., Kahan, *Social Meaning*, *supra* note 4, at 359-60.

assimilation of such legal directives into the social norms structuring and agent's choices.³⁷

A distinctive feature of the "social meaning" of norms is (in normative terms) the agent's "internal" point of view.³⁸ The internal point of view explains the agent's particular orientation towards the rule, her "critical reflective attitude" towards behavior described or justified with regard to that rule.³⁹ From the internal point of view, norms operate as criteria for the agent's judgments governing her decisions about what to do. From the internal point of view, the norm motivates and justifies conforming behavior.⁴⁰ Agents manifest the internal point of view by pointing to the various reasons for following norms to explain, critique, or justify conduct *and would do so even in the absence of a sanction*.⁴¹

What is essential to this critical attitude is that the agent accept the norms structuring the practice as providing a standard of judgment against which such statements can be compared, critiqued, and justified using such concepts as "'ought,' 'must,' and 'should,' 'right' and 'wrong.'"⁴² Without the internal attitude to the rule (or norm or authority) the concepts of obligation, justification, and legitimacy are absent from any explanation of our behavior in conformity with the rule, and the particular type of obligation imposed remains opaque.⁴³ The normative account, therefore, can explain why people obey the law and demand conformity from others even when they do not believe the sanction will be imposed. The contribution of social norm theorists to the analysis of the criminal law may be represented as a move from external to internal understandings of the structure of such choices, from an emphasis on outcomes to social meanings.⁴⁴

The distinction between internal and external points of view, long familiar to philosophers of law, is a central plank of the social norms critique of the "old-

³⁷ See Lessig, *supra* note 16.

³⁸ See, e.g., HART, *supra* note 31, at 55-6; MACCOMICK, *supra* note 35 AT 30-35.

³⁹ MACCOMICK, *supra* note 35 at 30-35. HART, *supra* note 31, at 54-56.

⁴⁰ For motivational accounts of the law, see Scott J. Shapiro, *The Difference that Rules Make* in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 33, 37 (Brian Bix, ed., 1998) (hereinafter Shapiro, *Rules*); Scott J. Shapiro, *On Hart's Way Out*, in ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 149, 173 (Jules Coleman, ed. 2001) (hereinafter Shapiro, *Hart*); See, e.g., Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 99, 122 (Jules Coleman, ed. 2001).

⁴¹ H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982).

⁴² HART, *supra* note 31, at 56. Hart refers to these terms as part of our "general normative terminology."

⁴³ *Id.*

⁴⁴ See Lessig, *supra* note 16, at 1006. See also Meares & Kahan, *Norms*, *supra* note 8, at 809-815.

style” economic analysis of law.⁴⁵ Consider, as an example of the external perspective, Richard Posner’s economic analysis of the criminal law. Posner’s theory is expressly sanction-based. He claims that the criminal law seeks to enforce market interactions by making extra-market transactions so costly that they are unaffordable.⁴⁶ For a range of criminals, especially the poor, monetary sanctions may insufficiently deter market-avoiding transactions.⁴⁷ Accordingly, the state is justified in turning to incarceration given the cost of deterring, detecting, and punishing crime.⁴⁸

For Posner, the criminal law provides the public with “prudential” reasons for compliance with its dictates — a wish to avoid the sanction. The potential criminal need not agree with the rule or regard it as justified or formally or substantively legitimate in order to obey it. Rather, the rule provides information that enables the rational potential criminal to modify her behavior based upon the likelihood and quantity of punishment.⁴⁹ But Posner’s theory fails to provide a means of distinguishing between a punishment for engaging in prohibited behavior and a tax levying funds for engaging in permitted behavior.⁵⁰ As Posner notes, the fine is a penalty consequent to a finding of legal accountability in either criminal or tort law.⁵¹ The difference between the two, however, resides not so much in the relative ability to pay but in the “social meaning” of the penalty: how the penalty is understood by participants in the practice.

In the criminal law, the fine is a *sanction* or *punishment* imposed upon a finding of legal *culpability* and is generally regarded to justify strong moral disapproval of the act engaged upon. In the civil law, the fine constitutes *damages* imposed upon a finding of *liability* and may entail no moral significance whatsoever.⁵² Where Posner does discuss the stigmatic effect of

⁴⁵ Kahan, *Social Meaning*, *supra* note 4, at 350; Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 610 (1998).

⁴⁶ See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195-1204 (1985); see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2003).

⁴⁷ See Posner, *supra* note 46, at 1204-05.

⁴⁸ See *id.* at 1205-14.

⁴⁹ Such reasons are “epistemic”: they provide information that may help the process of practical reasoning by stating the consequences of certain options. See Shapiro, *Hart*, *supra* note 40, at 173.

⁵⁰ See H.L.A. Hart has emphasized the normative significance of the distinction between “an act which is legally obligatory and punishable, from conduct which is subjected to a tax or other painful or disagreeable administrative measures.” HART, *supra* note 41, at 133-34.

⁵¹ See Posner, *supra* note 46, at 1205-14.

⁵² See, e.g., Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 205-06 (1996) (same); Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 693-95 (1993) (same).

the criminal law he presupposes moral condemnation as an additional cost to be factored into the rational agent's decision process without suggesting why doing so would be appropriate or justified.⁵³ To do so would require a theory that takes into consideration the social meaning of culpability and punishment. Such a theory would have to take a more or less⁵⁴ internal attitude to the practice, and include the fact that in the criminal law the forbidden conduct is ruled out altogether as wrong rather than tolerated or regulated (though discouraged) so long as adequate compensation is made.

From the perspective of social norms scholars, authority internalized as part of the agent's personal morality is a "powerful normative reason for compliance."⁵⁵ "[T]he individual who complies for normative reasons does so because she feels an internal obligation to do so," rather than on the basis of some external stimulus.⁵⁶ As an empirical matter, in the legal context internalized, "legitimate" authority is particularly associated with government behavior and consists in "an amalgamation of perceptions that individuals hold of the law and authorities that enforce it."⁵⁷ The greater the popular perception of governmental legitimacy, the greater the likelihood of popular compliance with the law.⁵⁸ The likelihood of compliance with a particular government authority is a measure of that authority's "social influence."

The concept of "social influence" is an important one in social norms scholarship: I suggest it has a normative dimension. From a normative perspective, an authority has "social influence" when, consciously or not, it possesses the power to alter an agent's normative situation by declaring the agent's actions legitimate or illegitimate, justified or not.⁵⁹ Social influence is thus the normative power exerted by a community authority upon community norms. Social norms theorists give the concept an empiricist twist; it "is the term that social psychologists use to describe the propensity of individuals to conform to the behavior and expectations of others."⁶⁰ Clearly, not just any set of expectations exerts an influence over an individual, so the notion of authority is intrinsic to the sociological concept. School-teachers, celebrities,

⁵³ See Posner, *supra* note 46, at 1205-07, 1216, 1223-24.

⁵⁴ See, e.g., Bix, *supra* note 14, at 174; MACCOMICK, *supra* note 35 at 30-35.

⁵⁵ Meares, *Legitimacy & Law*, *supra* note 28, 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).

⁵⁶ Meares, *Policing*, *supra* note 15, at 1616. See also Meares, *Social Organization*, *supra* note 10, at 214 (compliance with norms based on agent's internal perception of government legitimacy).

⁵⁷ Meares, *Legitimacy & Law*, *supra* note 28, at 399.

⁵⁸ See Meares, *Place & Crime*, *supra* note 5, at 679.

⁵⁹ Meares & Kahan, *Norms*, *supra* note 8, at 813.

⁶⁰ *Id.* at 813; see also Kahan, *Social Meaning*, *supra* note 4, at 353.

and mentors may constitute such an authority, but so may a barber or beautician if their opinions carry weight in the community.⁶¹

Because social influence concerns the number of individuals whose behavior an authority influences and with what strength, if we are to understand the force and reach of particular norms, we must have some understanding of the manner in which individuals guide or govern their behavior by authorities. Here again, the attitudes of subjects are important. An agent might internalize and endorse a norm as intrinsically valuable or instrumentally legitimate and be motivated to act accordingly.⁶² The agent may act for instrumental and prudential or self-interested reasons, for altruistic reasons, or for no reason.⁶³ Perhaps the agent is governed by fear of criticism to identify as a member of a group;⁶⁴ perhaps she does not whole-heartedly endorse the norm, or even think much about it.

Police behavior is one influence upon the attitudes of citizens to the law. Law enforcement is one “important indicator[] to individuals about how the authority in question views the group to which the evaluator perceives herself belonging.”⁶⁵ So long as the processes are perceived as fair,⁶⁶ particular outcomes will not undermine citizen assessments of justified law

⁶¹ Social influence is likely to be greater the more easily that influence can be disseminated across the community. In social norms literature, “norm-highways,” systems for the communication of norms to different members of the community represent the “connections, or social networks, among adults in a community,” the “multiple, overlapping relationships among a community’s residents,” across which “obligations and expectations . . . are transfer[red].” Meares, *Connections*, *supra* note 10, at 583, 858. These relationships include “friendship networks, community-wide supervision of teen peer groups, and . . . participation in formal organizations,” *id.* at 585, including churches and parent-teacher associations. This network of overlapping relationships constitutes a “social infrastructure,” Meares, *Policing*, *supra* note 15, at 1064; Meares, *Place & Crime*, *supra* note 5, at 676, the stability and robustness of which “will either facilitate or hinder the transmission of community values that can support law-abiding behavior.” *Id.* The existence and relative health of such a social infrastructure does not, however, indicate that the norms it transmits are ones that promote law-abidingness; the norms transmitted “may facilitate crime as well as prevent it.” Meares, *Policing*, *supra* note 15, at 1064.

⁶² See Shapiro, *Rules*, *supra* note 40, at 36. Authorities may have different degrees of social influence dependant upon the range of attitudes entertained by the authorities’ subjects. An individual may regard an authority as intrinsically or instrumentally valuable. Intrinsic value entails that the authority is valuable in itself — it is good, just, etc.; instrumental value entails that it is valuable as a means to some other end — for example, it is able to coordinate behavior by setting rules that others will follow. Individuals may entertain prudential or motivational attitudes to following instrumental authorities. Prudential attitudes regard the authority as providing information about the manner in which others will react to conduct; motivational ones regard it as providing an independent reason for acting in a particular way.

⁶³ See HART, *supra* note 41, at 266-67.

⁶⁴ See McAdams, *supra* note 31, at 351.

⁶⁵ Meares, *Legitimacy & Law*, *supra* note 28, at 402-03.

⁶⁶ See Meares, *Social Organization*, *supra* note 10, at 214.

enforcement.⁶⁷ Police practices may thus feasibly exert a great deal of positive or negative social influence in urban communities. One goal of social norms scholarship is to analyze and develop ways of creating the conditions by which to increase the local police's positive social influence and support norms of law-abidingness.

B. Social Norms Justifications of Disparate Policing of Urban Communities

Some theorists, most notably Bernard Harcourt and Robert Weisberg, have (correctly) chosen to critique the concept of social meaning as underdeveloped in the social norms literature.⁶⁸ I would suggest that the theory of social meaning in fact does double duty: it not only accounts for certain normative concepts (such as obligation, authority, and legitimacy), but also generates a sociological description of the shared beliefs of certain groups or communities to explain their response to legal and non-legal norms as justified or unjustified.

Social norms theories can be read as a double-barreled critique of accepted understandings of criminal law scholarship.⁶⁹ Such scholarship rejects the classic, Henry Hart-style description of the criminal law "method":⁷⁰ the belief that criminal law is an enterprise in governance through general "directions,"⁷¹ addressed to norm subjects who are liable to sanction for disobedience.⁷² Internal attitudes to norms explain how the criminal law can operate in the absence of a sanction, and helps redirect the focus of criminal law scholars on low-level as well as high-stakes crimes. The new scholarship also dismisses

⁶⁷ Meares, *Legitimacy & Law*, supra note 28, at 402-03.

⁶⁸ Harcourt, supra note 7. Harcourt criticizes the superficial construction of social meaning. *Id.* at 180-84. For a more nuanced and in-depth investigation of social meaning among gun-using youths and gang members, see Jeffrey Fagan, Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity in Inner Cities*, 24 CRIME & JUST. 105 (1998). Another possible criticism of the social norms concept of social meaning is that it has ignored the tradition of continental phenomenology and hermeneutics which could supply some much-needed depth. See Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 476-77 (2003) ("[social meaning] is the most elusive and troublesome term in this new [normative criminal law] enterprise." See also Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out that Baby*, 87 CORNELL L. REV. 309, 328-40 (2002). Anthony Honoré is the principal legal theorist in the analytic tradition explaining norms in terms of group membership. See TONY HONORÉ, *MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL* (1987).

⁶⁹ See, e.g., Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261 (2003).

⁷⁰ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 402, 403-06 (1958).

⁷¹ *Id.* at 403.

⁷² *Id.* at 404.

traditional rule of law constraints on enforcement practices as improperly focused on law-breakers and insufficiently attentive law-abiding citizens in failing, high-crime communities who demand more and different policing to secure a decent quality of life.⁷³

Social norms scholars seek to shift our assessment of the criminal law's impact away from criminals and onto communities generally described by some relatively small locality, for example "the neighborhood."⁷⁴ Social norms scholars focus on insiders rather than outsiders;⁷⁵ law-abiders rather than law breakers;⁷⁶ public order issues rather than major crimes;⁷⁷ and local experimentation rather than centralized standards.⁷⁸ They tend to emphasize discretion rather than legalism and rule-of-law issues.⁷⁹ A central claim is that the inclusion of certain shared, local norms in the policing calculus is sufficient to justify enforcement practices. Police sensitivity to social norms justifies the rejection of broad checks on their discretion and empowers urban communities able to participate in criminal legislation and enforcement.⁸⁰

Social norms theories are especially powerful in explaining urban crime. The norms they are interested in are social (shared by groups of people) and local (shared by geographically discrete communities). Social studies reveal that differences in crime rates among urban communities are not explained by poverty or race, but by the disparate degree of social or normative cohesion

⁷³ See, e.g. Simon, *supra* note 7, at 7-10; 48-74; see also Kennedy, *State & Criminal Law*, *supra* note 3, at 1255-56.

⁷⁴ See, e.g. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Meares & Kahan, *Norms*, *supra* note 8; Meares, *Place & Crime*, *supra* note 5.

⁷⁵ Harcourt, *supra* note 7.

⁷⁶ Meares, *Connections*, *supra* note 10, at 593 (describing the use of curfews and anti-loitering ordinances to isolate lawbreakers from law-abiders).

⁷⁷ Tracey L. Meares, *Terry and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343, 1347 (1998); Meares, *Social Organization*, *supra* note 10, at 224.

⁷⁸ Meares, *supra* note 77, at 1348-49; Meares, *Social Organization*, *supra* note 10, at 224; Meares, *Place & Crime*, *supra* note 5.

⁷⁹ For a general discussion of social norms theories, see Simon, *supra* note 7, at 21-26; 47-71; For a bibliography of these theories, see *id.* at 6 n.4.

⁸⁰ See, e.g. Livingston, *supra* note 74; Meares & Kahan, *Norms*, *supra* note 8; Kahan & Meares, *Crisis*, *supra* note 1. Empowered participation as feature of "democratic experimentalism" more generally; see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Michael C. Dorf & Charles F. Sabel, *DRUG TREATMENT COURTS AND EMERGENT EXPERIMENTALIST GOVERNMENT*, 53 VAND. L. REV. 831 (2000); Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 ENVIRONMENTAL AFFAIRS 615, 618-623 (2001) (hereinafter Fung, *Beyond & Below*); Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POLITICS & SOC. 75-103 (2001).

existing in the disparate communities.⁸¹ Where community members share social norms that promote law-abiding behavior and are transmitted through local institutions, perceptions of government legitimacy are high and crime rates are low.⁸² Where the community shares few norms or local institutions for transmitting them, social cohesion and perceptions of government legitimacy breaks down and crime rises.⁸³ The distinctive claim of social norms theorists, then, is that the manner in which crime rates vary from locality to locality depends upon the degree of normative cohesion within the community rather than on the traditional indicia of wealth, class, or race.⁸⁴ Even in poor, urban, predominantly lower class and minority neighborhoods, norms theorists identify the most significant predictor of community criminality as the normative dissonance or cohesion of the various communities.⁸⁵

There are a variety of potential sources for normative dissonance, but three in particular stand out in the criminal law literature: the fragmentation of norms; apathy towards or the outright rejection of the government as a source of legality; and the government's active signaling of an anti-community stance.⁸⁶ The problem is not normatively cohesive communities, whether antagonistic or not. Because "[l]egitimacy... is rather uniquely in government control,"⁸⁷ the government can evaluate and control public perception of its behavior by the way in which "the legal process, in both its formal and informal aspects, signals to members of a social group how their group is perceived by

⁸¹ See Robert J. Sampson, Stephen W. Raudenbush, & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997) (hereinafter, Sampson, Raudenbush, & Earls, *Neighborhoods*); Robert J. Sampson, & W. Byron Groves, *Community Structure and Crime: Testing Social Disorganization Theory*, 94 AMERICAN J. OF SOCIOLOGY 774-802 (1989); Robert J. Sampson, & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: Neighborhood Context of Racial Differences*, 32 LAW & SOCIETY REV. 777-804 (1998); Robert J. Sampson, & Janet Lauritsen, *Violent Victimization and Offending: Individual-, Situational-, and Community-Level Risk Factors*, in A. REISS & J. A. ROTH, EDS., UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES (1994); Robert J. Sampson, & William Julius Wilson *Toward a Theory of Race, Crime, and Urban Inequality*, in J. HAGAN & R. PETERSON, ED., CRIME AND INEQUALITY (1995). These articles are cited in Meares & Kahan, *Norms*, *supra* note 8; Kahan & Meares, *Crisis*, *supra* note 1.

⁸² Meares, *Policing*, *supra* note 15, at 1606; Meares, *Social Organization*, *supra* note 10, at 224; Meares, *Connections*, *supra* note 10, at 591-92.

⁸³ Meares, *Place & Crime*, *supra* note 5, at 675; Meares, *Connections*, *supra* note 10, at 581.

⁸⁴ Meares, *Place & Crime*, *supra* note 5, at 675-81.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Meares, *Legitimacy & Law*, *supra* note 28, at 399. See also Lessig, *supra* note 8, at 665 (noting that new Chicago school rejects idea that law is of marginal significance to social control).

governmental authorities.”⁸⁸ For social norms scholars, the task in cohesive communities is to align local norms with enforcement norms so as to promote law-abidingness.

The problem, both empirically and normatively, is community fragmentation: the lack of any “common values”⁸⁹ sufficient to establish “cohesive” standards of conduct transmitted across shared “social networks.”⁹⁰ Fragmented communities are distinguished by a lack of “[c]ollective supervision over and personal responsibility for neighborhood problems”;⁹¹ members of the community embrace a “hands-off” approach to criminal behavior,⁹² resulting in a state of virtual chaos in which any and all conduct, social or anti-social, may be regarded as justified.⁹³ By contrast, “[c]ohesive communities are better able to engage in informal social control that can lead to lower levels of crime than communities that are not cohesive.”

A community experiences normative fragmentation when the system for transmitting and enforcing norms breaks down. Two types of entity are implicated here: the “social infrastructure”⁹⁴ comprised of intersecting associations between persons or organizations that enable communication of norms to different members of the community;⁹⁵ and authoritative institutions with the “social influence”⁹⁶ to alter or enforce social norms. Fragmented communities lack the “connections, or social networks, among adults in a

⁸⁸ Meares, *supra* note 55. Perceptions of governmental legitimacy, according to the sociological theory, are engendered through a variety of interactions between citizen and state, ranging from low-level stops or searches by the police up to participation in the legislative process. *See, also* Meares, *Place & Crime*, *supra* note 5, at 680; Meares, *Legitimacy & Law*, *supra* note 28, at 413-14. Across this spectrum, the manner in which the government treats the citizen is extremely important for the social meaning of that encounter — the way in which the encounter is translated “against a background of social norms that define how persons who value particular goods — whether the welfare of other persons [or] their own honor or dignity . . . — should behave.” Meares & Kahan, *Norms*, *supra* note 8, at 816.

⁸⁹ Meares, *Place & Crime*, *supra* note 5, at 673.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See* Meares, *Connections*, *supra* note 10, at 583 (discussing free-riders in social communities).

⁹³ Meares, *Place & Crime*, *supra* note 5, at 675.

⁹⁴ Meares, *Policing*, *supra* note 15, at 1064; Meares, *Place & Crime*, *supra* note 5, at 676.

⁹⁵ This network of overlapping relationships constitutes a the stability and robustness of which “will either facilitate or hinder the transmission of community values that can support law-abiding behavior.” Meares, *Place & Crime*, *supra* note 5, at 676.

⁹⁶ Kahan, *Social Meaning*, *supra* note 4, at 353 (“The concept of social influence refers to a pervasive and familiar phenomenon in our economic and social life: namely, that individuals tend to conform their conduct to that of other individuals.”); *see also* Meares & Kahan, *Norms*, *supra* note 8, at 813.

community,”⁹⁷ the “multiple, overlapping relationships among a community's residents,” across which “obligations and expectations . . . are transfer[red].”⁹⁸

The solution to localized differences in crime rates, according to social norms theories, is increased and differential policing in communities that were traditionally ignored and undervalued by the police.⁹⁹ The goal is to replace signals indicating government disinterest with those expressing government interest,¹⁰⁰ and to empower law-abiders and disempower law-breakers. Among social norms scholars there is a degree of disagreement over appropriate styles of policing. They all generally approve the sort of flexible, “broken windows” public order policing that comports with the community’s tolerance for street-level disorder — pan-handling, loitering, etc. — through targeting “known” disruptive individuals and places, to undermine the ability of anti-social influences to organize and associate.¹⁰¹ Debra Livingston, however, favors a range of civil injunctions and criminal ordinances targeted very precisely upon specific individuals and behaviors.¹⁰² Tracey Meares and Dan Kahan favor increased civility on the part of the police combined with a series of local laws, such as youth curfews, and police practices, such as reverse stings, that are inherently general and expressive of neutrality over a broad range of individuals. In effect social norms scholars propose a form of police zoning based on normative cohesiveness or dissonance, such that communities comparable as to race, class, and location receive highly disparate quantities and qualities of police attention.

III. AUTHORITY AND LEGITIMACY, RULES AND ROLES

Social norms theories are part of the liberal reaction to the effect of the War on Drugs on minority communities. The War on Drugs is directly responsible for the massive increase in incarceration over the last twenty years.¹⁰³ Both the

⁹⁷ Meares, *Connections*, *supra* note 10, at 583.

⁹⁸ *Id.* at 585. These relationships include “friendship networks, community-wide supervision of teen peer groups, and . . . participation in formal organizations,” including churches and parent-teacher associations. *Id.*

⁹⁹ See, e.g., KENNEDY, RACE & CRIME, *supra* note 3.

¹⁰⁰ See Livingston, *supra* note 74, at 586.

¹⁰¹ See Meares, *Social Organization*, *supra* note 10, at 223; Kahan & Meares, *Crisis*, *supra* note 1; Meares, *Connections*, *supra* note 10, at 593.

¹⁰² Livingston, *Gang Loitering*, *supra* note 13; Livingston, *Communities*, *supra* note 10.

¹⁰³ See, e.g., Charles J. Ogletree, Jr., *The Burdens And Benefits Of Race In America*, 25 HASTINGS CONST. L.Q. 219, 228 n.45 (1998) (comparing disparate sentencing of blacks and whites for possession of same weight of cocaine); CARL T. ROWAN, THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL 193-94 (1996) (suggesting that The war on drugs has disproportionately imprisoned African American men, at a terrible cost to the black community); Tonry, *supra* note 24, at 52 (charting the “foreseeable disparate impact on Blacks” of targeting cocaine usage). See also Note, *Winning the War on Drugs: A “Second*

1986 Anti-Drug Abuse Act and the 1988 Anti-Drug Abuse Act¹⁰⁴ “increased the tendency toward punishment,”¹⁰⁵ first by targeting drug dealing, then by targeting drug users.¹⁰⁶ The rates of arrest and incarceration have had a striking effect on the prison population: “In the federal prisons...drug offenders constituted 22 percent of admissions in 1980, 39 percent in 1988, and 42 percent in 1990.”¹⁰⁷

The burden of arrest, prosecution, and conviction has disproportionately impacted African American men, at a terrible cost to the black community.¹⁰⁸ Most notorious among the provisions were the draconian punishments for possession of crack cocaine.¹⁰⁹ Its disparate impact is felt both in the style of policing and in the rates of arrest, prosecution, and sentencing.¹¹⁰ It is primarily responsible for the increased rates of arrest, conviction, and incarceration of African and Latino Americans in the last twenty years.¹¹¹

Liberal legal and social norms theorists differ profoundly, however, in their characterization of acceptable policing standards. This difference, I will suggest, turns on two ways of creating and limiting the scope of police authority: through rule-based or role-based justifications. I shall first discuss two different types of authority: institutional and social. Institutions, in the relevant sense, are internally related systems of norms; institutional authorities are those empowered by the norms of an institution to engage in (institutionally) specified conduct. Social authority is simply any exercise of

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.”).

¹⁰⁴ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4231 (codified as amended at 21 U.S.C. §801 (1988)).

¹⁰⁵ William D. Mccoll, *Comment: Baltimore City's Drug Treatment Court: Theory And Practice In An Emerging Field*, 55 MD. L. REV. 467, 475 (1996). *See also* DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 118, 132 (2001) (describing the War on Drugs as an event that “utterly transformed law enforcement in the USA”).

¹⁰⁶ Mccoll, *supra*, note 105, at 475.

¹⁰⁷ Tonry, *supra* note 24, at 27.

¹⁰⁸ *See, e.g.*, Ogletree, *supra* note 103, at 228 n.45; ROWAN, SUPRA NOTE 103, AT 193-94.

¹⁰⁹ ROWAN, SUPRA NOTE 103, AT 193-94; *see also* Ogletree, *supra* note 103, at 229 (comparing disparate sentencing of blacks and whites for possession of same weight of cocaine); Tonry, *supra* note 24, at 52 (charting the “foreseeable disparate impact on Blacks” of targeting cocaine usage).

¹¹⁰ *See* Tonry, *supra* note 24, at 52.

¹¹¹ *See* MICHAEL TONRY, *MALIGN NEGLECT* ch. 3 (1995); Tonry, *supra* note 24; ROWAN, SUPRA NOTE 103, AT 193-94. *See also* Note: *Winning the War on Drugs*, *supra* note 103, at 1485 (The United States Public Health Service has estimated that in 1992 76% of illicit drug users were white, 14% were black, and 8% were Hispanic—figures that approximate the racial and ethnic composition of the United States. Yet African- Americans account for 35% of all drug arrests, 55% of all drug convictions, and 74% of all drug sentences.”).

authority not endorsed by an institution. Exercises of authority that are institutional from one perspective may be social from another: thus, the chairman of a golf club is an institutional authority from the perspective of the club, and social from the perspective of the legal system.

Both liberal legal and social norms theories concern the institutional authority of the police; each provides a different account of the source and scope of legitimate police authority. Where liberal legal theories' claim that police authority is legitimate derives from institutional norms and is limited by the content of those norms — which I shall call “rule-based” authority — social norms theorist claim that we should recognize certain social norms as conferring legitimacy upon police. Instead of rule-based justifications of police action, social norms theorists emphasize the functions and circumstance justifying police action — what I shall call “role-based” authority.

A. *Authority and Legitimacy*

Authority and legitimacy are normative concepts.¹¹² An authority is an entity that possesses a normative power over another; that is, the ability to change an agent's reasons for action, either by creating protected reasons or overriding conflicting protected reasons.¹¹³ The authority does so by replacing an agent's own reasons for action with authoritative reasons. The authority claims the power to govern an agent's actions and to exclude the agent's own reasons for action or for action on the balance of reasons.¹¹⁴

Legitimacy consists in the valid exercise of authority¹¹⁵ and may have a formal and a substantive component. Substantive legitimacy entails that an authority is fully justified, by some evaluative standard, in the exercise of authority.¹¹⁶ Thus, a norm is substantively legitimate when the authority correctly assesses the facts and values motivating the act of norm-creation as having positive worth. Formal legitimacy requires that the process by which an authority creates, changes, or extinguishes norms is accepted as valid by those entities empowered to execute or enforce the norms.¹¹⁷ Formal legitimacy — which might be thought of the due-process model of legitimacy — requires only the partial justification of authority: it is primarily a feature of institutional

¹¹² Joseph Raz, *Legitimate Authority*, in JOSEPH RAZ, *AUTHORITY OF LAW* 3, 10 (1979) (“Authority is a practical concept. This means that questions of who has authority over whom are practical questions; they bear on what one ought to do.”).

¹¹³ See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* at 101 (1990).

¹¹⁴ See *id.*.

¹¹⁵ Raz, *supra* note 112 at 12-18.

¹¹⁶ See, e.g., Joseph Raz, *Authority, Law and Morality*, in JOSEPH RAZ, *ETHICS AND THE PUBLIC DOMAIN* 212-14 (1994).

¹¹⁷ See, e.g., HART, *supra* note 41, at 266-67; see also JOSEPH RAZ, *AUTHORITY OF LAW* 155 & 155 n.13 (1979)

systems such as the law.¹¹⁸ As is by now familiar in legal theory, formal legitimacy does not entail substantive legitimacy: an authority may create norms in a formally legitimate manner, yet those norms may not be fully justified by the relevant (moral, political) evaluative standard.¹¹⁹

Institutional systems share two features: first, they are *systematic* because the norms of the system are “internally related”;¹²⁰ and second, they are *institutional*, because select officials or bodies are responsible for enforcing the system’s norms. H.L.A. Hart’s discussion of law as a system of rules,¹²¹ famously elaborates the systematic quality of institutional systems. He distinguishes between primary and secondary rules, where primary rules are duty imposing, specifying what conduct is permitted or prohibited, and secondary rules regulate the recognition and change of, and adjudication using, primary rules.¹²² For rules to form a system the primary rules must be supplemented by secondary rules.¹²³ Secondary rules identify what the rules of the legal system are, how they can be changed, and how any disputes arising from them can be settled. That is, they specify what sort of internal relations the rules of a legal system can take.

Joseph Raz elaborates upon Hart’s description of legal systems by emphasizing the role of legal institutions. Raz, who is primarily concerned to develop an account of institutional authority, suggests that a definitive feature of institutional systems is the presence of some official or body that derives its authority from its role in applying the norms of the system.¹²⁴ Applicative officials are both bound to apply the norms of the system and empowered to do so in a manner that is, from the point of view of the organization, authoritative and final upon the subjects of the norms.¹²⁵ That power is

¹¹⁸ Formal legitimacy requires only that the norm-creating act of an institutional authority be justified according to the evaluative criteria employed by the institutional system. These criteria may not be fully justified, that is, substantively legitimate.

¹¹⁹ See David Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 178 (1984)

¹²⁰ Raz, *supra*, note 113 at 111-3.

¹²¹ See, e.g., HART, *supra* note 31, at, 2-3.

¹²² Rolf Sartorius rightly notes that Hart’s discussion of primary and secondary rules in fact makes two kinds of distinction between primary and secondary rules, see Rolf Sartorius, *Hart’s Concept of Law*, in MORE ESSAYS IN LEGAL PHILOSOPHY, 131, 131-41 (Summers, ed., 1971); however, the duty-imposing and recognition-change-adjudication distinction is the one appropriate to Hart’s discussion of the systemic character of law.

¹²³ Secondary rules “may all be said to be on a different level from the primary rules, for they are *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves.” HART, *supra* note 31, at 92.

¹²⁴ Unless the norm-applying institution has the power to change the rules of the system.

¹²⁵ For more on law as an institutional system of norms, see RAZ, *supra* note 113, ch. 4; JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM chs. 6 and 7 (1990); NEIL MACCORMICK AND OTA WEINBERGER, AN INSTITUTIONAL THEORY OF LAW (1986); Neil MacCormick, *Law As Institutional Fact*, 90 L.Q. REV. 102 (1974); Neil MacCormick, *Legal Reasoning and the*

formally legitimate so long as it follows institutional constraints upon official decision-making; it is substantively legitimate if the decision is “the right thing to do.”¹²⁶ Police officers are, according to Raz, one such type of applicative body; courts are another.¹²⁷

1. *Two Types of Authority*

Limitations on the institutional authority of various bodies or officials — courts, judges, police, etc. — go beyond the justification of the *source* of authority as formally or substantively legitimate. Authority may also be limited by *scope*: the extent of the authority’s jurisdiction to act. Constraints upon the scope of authority may be rule-based and role-based. I shall call the scope of authority “rule-based” if it is constrained by the substantive content of a pre-existing norm. I shall call the scope of authority “role-based” if it is constrained by the nature of the authoritative office.

The scope of rule-based authority is determined by the content of a primary norm.¹²⁸ For example, the familiar rule, “No vehicles in the park,” 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, e.g., enter a private dwelling. Once the official acts outside or against the content of the primary rules the issue of legitimacy — the range of actions within the scope of the official’s institutional authority — arises.¹²⁹

The scope of role-based authority is determined by the authority’s status in relation to the subjects of authority and the circumstances in which the authority acts. In an institutional system, role-based authority is governed, not by the content of primary norms of the system, but by secondary norms specifying the types of action or decision the official is entitled to undertake in specified circumstances. The Judgment of Solomon provides a familiar example.¹³⁰ In his role as king, Solomon had authority to adjudicate those disputes his subjects brought before him. In this particular case, his ruling —

Institutional Theory of Law, 9 RECHTSTHEORIE, Beiheft 14, 117 (1992). But see Simpson arguing that no such thing as legal system

¹²⁶ In terms of justification: a substantively legitimate decision is fully justified “all things considered”; a formally legitimate decision is partially justified because some reasons are excluded from consideration.

¹²⁷ RAZ, *supra* note 113, at 136.

¹²⁸ See HART, *supra* note 31, at 94. Primary norms are those designed to control conduct.

¹²⁹ Such a view fits comfortably within most modern liberal trends in legal political theory, and receives its strongest modern expression in the thought of Wechsler. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)

¹³⁰ Another is Adam Smith’s “ideal spectator.” See ADAM SMITH, *THEORY OF MORAL SENTIMENTS* III.4.2 (1759) (1976); see also Eric J. Miller, “Sympathetic Exchange:” *Adam Smith and Punishment*, 9 Ratio Juris 182 (1996).

to bisect the subject of a custody dispute — was not authorized by the content of any primary norms. The outcome — 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: he had the right to settle their dispute, as manifested in the biological mother’s acceptance of his decision.

One might consider that role-based authority entails the presence of discretion: it consists, after all, in the absence of primary rules of conduct.¹³¹ Rules can, however, contain such a grant of discretion — for example, to determine what is “reasonable” conduct. Nonetheless, a reasonableness standard can, as we shall see, be applied in a more or less role-related manner: more, where the standard of reasonableness depends upon features intrinsic to the individuals status or role or defined by extra-institutional norms (e.g., rules of ethics, administrative guidelines) fleshing out the content and purpose of the role; less, where there is reasonableness depends on features possessed by everyone, no matter what their status. Role-based authority thus depends upon more than the mere indeterminacy of rules requiring further elaboration: it depends upon the nature of the individual or office and the circumstances in which that individual or office is required to operate. In an institutional system, this would be to argue that something about the nature of the office and its relation to the system legitimates substantial discretion over a range of circumstances.

For example, the “articulable suspicion” standard has become one role-based characterization of the police officer’s authority: so 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.¹³² In such circumstances, the scope of her authority need not be limited by the content of some primary rule that she enforces, but by her general role in preventing or responding to actual or threatened disturbances as determined through her training and departmental guidelines.

Both rule- and role-based authority may be legitimated in the same way. If both are institutional authorities, they 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 primary 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

¹³¹ Role-based authority thus entails the absence of both “conduct” and “decision” rules, where decision rules are content-based norms specifying what considerations an authority ought to weigh in determining how to decide a case or course of action. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625-31 (1984).

¹³² See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).

independent of the *content* of their authority: that is, their pronouncements will still be authoritative even if wrong.¹³³

2. Rule- and Role-Based Conceptions of Policing

One of the established ways of understanding the scope of police authority to interfere with private conduct is Herbert Packer's famous contrast of two conflicting models of police practice: the crime-control and due-process models of criminal procedure.¹³⁴ Both legal liberal and social norms theories may be understood, as I have suggested elsewhere,¹³⁵ as a modern embodiment of the due-process and crime-control models.¹³⁶

What I call legal liberal and Packer calls "due process" critiques of the criminal justice system emphasize role-based principles of proportionality and individual dignity. The individual's rights are respected and expressed through prospective, adversarial, court-regulated constraints upon the executive discretion to investigate, detain, and search suspects.¹³⁷ Criminal defendants are afforded significant rights and protections, including rights against self-incrimination and the right to counsel. The presumption of innocence and the burden of proof establish core limits on governmental power.¹³⁸

Social norms theories comport more closely with the crime-control model, organized around the principle of repression of antisocial conduct. Crime control affords the executive branch wide discretion in pursuing and

¹³³ 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." Hart, *supra* note 41, at 254. Differently put, content-independent justifications are intransitive. Transitive justifications are those in which A justifies B, and B justifies C, and A justifies C. 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 JOSEPH RAZ, *MORALITY OF FREEDOM*, 325-326 (1988); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* at 67-8 (1995). And see Richard H. Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy; Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2148-51 (1990).

¹³⁴ See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1-23 (1964).

¹³⁵ See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO STATE L.J. 1479, 1504-1512 (2004).

¹³⁶ See Packer, *supra* note 134, at 1-23.

¹³⁷ See *id.*

¹³⁸ See Charles J. Ogletree, Jr., *The Rehnquist Revolution in Criminal Procedure*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (H. Schwartz, ed., 2002); Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping Gideon's Promise through Public Defender Offices: The American and the Israeli Experiences* (unpublished manuscript) (on file with the author). See also *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

prosecuting criminals; accordingly, it places great trust in the police's capacity to determine which suspects are guilty or innocent.¹³⁹ Norms scholars reject court-enforced legalism and rule-of-law constraints upon law enforcement in favor of highly discretionary forms of policing designed to reflect a sensitivity to social norms.¹⁴⁰ This style of policing is facilitated by a legislative agenda creating series of highly interventionist regime for enforcing public order, designed in part to enable the police to isolate degenerate social influences from the rest of the community.¹⁴¹

a. Rule-based Policing

One source for the liberal legal concern with executive enforcement of the criminal law was the growing perception, through the 1950s and 1960s, of the then-current practice of law enforcement as akin to “set-thief-to-catch-a-thief.”¹⁴² Until *Mapp v. Ohio*,¹⁴³ police investigation had been dominated by a “crime control model” that afforded the executive branch almost unlimited discretion in pursuing and prosecuting criminals.¹⁴⁴ The crime-control model limited or delayed the use of formal procedural checks on the government's use of that discretion;¹⁴⁵ minimized substantive distinctions between defendants on the basis of race or economic or social status; “and exhibit[ed] a large degree of confidence in the government's identification of suspects as guilty of the crime with which they [we]re charged.”¹⁴⁶ Investigative procedures tended to concentrate upon the person of the accused as “the most likely and accurate source of that information.”¹⁴⁷ Confessions were the prime source of evidence and the evidentiary barriers to obtaining such confessions

¹³⁹ See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO STATE L.J. 1479, 1505 (2004).

¹⁴⁰ See, e.g., Livingston, *supra* note 74, at 640-45; Meares & Kahan, *Norms*, *supra* note 8; Kahan & Meares, *Crisis*, *supra* note 1.

¹⁴¹ On social norms and interventionism, see, for example, Meares, *Connections*, *supra* note 10, at 593 (promoting curfews, gang-loitering laws, and order-maintenance strategies). See also Meares, *Place And Crime*, *supra* note 5, at 695 (same); Meares & Kahan, *Norms*, *supra* note 8; Kahan & Meares, *Crisis*, *supra* note 1, at 1160-66. Isolation from degenerate social influences is a major feature of the social norms movement. See, e.g., Livingston, *supra* note 74, at 640-45 (discussing curfews and civil injunctions to exclude gangs from law-abiding neighborhoods); Meares, *Connections*, *supra* note 10, at 593.

¹⁴² See, e.g. Sklansky, *supra* note 12, at 1735.

¹⁴³ 367 U.S. 643 (1961).

¹⁴⁴ See Packer, *supra* note 134, at 1-23.

¹⁴⁵ Packer calls such checks “ceremonious rituals.” *Id.* at 159.

¹⁴⁶ Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 224 (1983) (“crime control ideology suggests that criminal procedure should function exclusively to punish the guilty. It values fair process norms primarily for their instrumental tendency to promote good ‘results’”).

¹⁴⁷ Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMP. L. REV., 63, 70 (1996).

were few if any.¹⁴⁸ In particular, the police use of the “third degree” — beating prisoners — to obtain confessions posed a significant worry.¹⁴⁹

The administrative discretion afforded the police went hand-in-hand with the racial and social segregation of local forces. Often, the police served as instruments of state repression, enforcing express and implicit norms of segregation.¹⁵⁰

It is almost commonplace by now that much of the Court's criminal procedure jurisprudence during the middle part of this century was a form of race jurisprudence, prompted largely by the treatment of black suspects and black defendants in the South. The Court's concern with race relations served as the unspoken subtext of many of its significant criminal procedure decisions.¹⁵¹

Prior to *Mapp*, then, most policing could be characterized as lacking much state and any federal regulation.¹⁵² The police were the recipients of a massive grant of discretion through the absence of any express rules specifying appropriate conduct or establishing appropriate values. Where there was some form of regulatory scheme placing limits on conduct such schemes were transformed, through the lack of effective sanction, into a license.¹⁵³ What

¹⁴⁸ *Id.*

¹⁴⁹ “From their inception, modern police forces have been plagued by the twin problems of corruption and brutality... The sort of ‘excesses’ to which the police have regularly resorted both on the street and in the stationhouse — beatings, torture, false arrests, the third-degree, and the like — are well-documented.” Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 834, 836 (1994) (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 152-53 (1993); DAVID R. PAPKE, FRAMING THE CRIMINAL: CRIME, CULTURAL WORK, AND THE LOSS OF CRITICAL PERSPECTIVE, 1830-1900, 122 (1987); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 63 (1980); ERNEST J. HOPKINS, OUR LAWLESS POLICE: A STUDY OF THE UNLAWFUL ENFORCEMENT OF THE LAW (1931)). See also Livingston, *supra* note 74, at 565-66 (discussing police corruption as a significant problem for the police as traditionally constituted).

¹⁵⁰ See Livingston, *supra* note 74, at 593 (“police practices that were imbued with persistent hostility to the poor, to dissidents, and especially to racial minorities.”).

¹⁵¹ David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 316 (1997) (citing Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305-06 (1982); Steiker, *supra* note 149, at 841-44); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968)).

¹⁵² Before incorporation of the Fourth Amendment, the federal Constitution would of course apply only to the federal government, and so the primary target of fourth-amendment regulation was the F.B.I.

¹⁵³ See Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 124 (2003) (hereinafter Kamisar, *Defense*); Yale Kamisar, *Remembering the “Old World” of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537, 559 (1990) (hereinafter Kamisar, “Old World” *Criminal Procedure*). Kamisar notes that *People v. Defore*, 150 N.E. 585 (NY App. Ct. 1926), which established the New York State

changed was the discovery or re-conceptualization of the police as possessing a “distinctive mentality” and forming a “discrete and unified group”¹⁵⁴ with its own set of race- and class-biases. This understanding of the police as an administrative agency that had supplanted the values of democratic government, expressed through the Equal Protection Clause, with its own discriminatory and anti-democratic animus, formed the bedrock of the Warren Court’s “revolution in criminal procedure.”¹⁵⁵

The problem with law enforcement, on this picture, is the familiar one of unelected officials — in this case the police — displacing or replacing legislative will by interpreting and enforcing the law according to their own personal values or preferences.¹⁵⁶ The institutional and individual autonomy of the police, combined with a shared and pervasive discriminatory and anti-democratic attitude, generated a widespread distrust in liberal commentators and the Court.¹⁵⁷ The legal liberal solution should be understood as an executive correlate to the “neutral principles” doctrine developed to constrain judicial discretion.¹⁵⁸ Liberals sought to replace the degenerate values of the self-regulated criminal justice system with “a fair and dignified legal process,”¹⁵⁹ one that “treats all criminal suspects with dignity and respect.”¹⁶⁰ Where the police institutionally or individually interjected their own

law on the admissibility of illegally seized evidence applicable prior to *Mapp*, was ignored by executive officials unaffected by the exclusion of tainted evidence.

¹⁵⁴ Sklansky, *supra* note 12, at 1735.

¹⁵⁵ See, e.g., Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 4 (1995) (dating the revolution as lasting from 1961-1967 at the latest); see also COLE, NO EQUAL JUSTICE, *supra* note 5.

¹⁵⁶ See Weschler, *supra* note 129.

¹⁵⁷ Sklansky, *supra* note 12, at 1735-6.

¹⁵⁸ See Weschler, *supra* note 129. According to Wechsler, neutral principles are “criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will.” *Id.* at 11. The avoidance of willfulness is ensured by a reliance upon pre-existing, legislated (and in the context of constitutional interpretation, *constitutional*) values. See *id.* at 16; see also Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200 (1984); Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 90-91, 94-96 (1935); Brian Bix, Book Review: *Positively Positivism* (Review of Legal Positivism in American Jurisprudence by Anthony J. Sebok), 85 VA. L. REV. 889, 898-99 (1999).

¹⁵⁹ H. Richard Ulliver, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1138 (1987). Arenella asserts that “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.” Arenella, *supra* note at 146, at 203, 219.

¹⁶⁰ Arenella, *supra* note at 146, at 190. See also *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“the 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.”).

conceptions of proper social relations into the process of policing,¹⁶¹ the remedy was to remove this source of bias and require the police to adhere to a rule-based system of values antecedently established by the legislature (or founders of the Constitution), as monitored by the courts.

Henceforth, the power of the police was to be constrained by the content of the primary rules of criminal procedure stated in and developed out of the Fourth, Fifth, and Sixth Amendment as well as other rules of appropriate conduct promulgated by legislatures and courts. Accordingly, legal liberals emphasized formal judicial oversight beginning at the pre-trial process¹⁶² so as to control, in part, illegitimate class- and race-based police discretion and remedy substantive class- and race-based differences between defendants.¹⁶³ This process bears all the hallmarks of rule-based constraints upon police authority: the rejection of individual autonomy in favor of authority extending only so far as the content of the primary norms would permit. The fact that these primary norms were addressed to the police is precisely to the point.

Many of the major liberal reform proposals exemplify the rule-based approach to constraints on police authority. For example, Anthony Amsterdam, in his discussion of the proper basis for the justification of Fourth Amendment exclusionary rule,¹⁶⁴ suggested that the propriety of executive law enforcement practice should be measured by conformity to express standards of conduct enacted by legislatures (either state or municipal) or by the police themselves (as a set of administrative rules).¹⁶⁵ These norms would set the content of executive procedure — how police and prosecutors are to interact with the public — and so limit the scope of police authority. Such rules have the advantage of increased transparency, such that the community is aware of the norms of conduct governing their interactions with the executive.¹⁶⁶ “Police rulemaking would bring [such norms] to visibility not merely for the police command but also for the community. Departmental rules would be subject to a kind of scrutiny by the community and by local police organs.”¹⁶⁷

¹⁶¹ Sklansky, *supra* note 12, at 1734-6.

¹⁶² See *Katz v. United States*, 389 U.S. 347 (1967) (“searches 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.”).

¹⁶³ 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 to the rich, is the great mucilage that holds society together.”).

¹⁶⁴ See Anthony G. Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349 (1973-74).

¹⁶⁵ *Id.* at 416-25.

¹⁶⁶ See Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 667, 681 (1972) (stating that “visibility of rulemaking process is its greatest virtue”).

¹⁶⁷ Amsterdam, *supra* note 164, at 422. “The individual police officer . . . would be inclined to view his responsibilities more gravely and in broader perspective and to evaluate more

Amsterdam stresses that legislation is “a deliberative process [of] community consultation and . . . community scrutiny.”¹⁶⁸ An open consultative process preceding legislation followed by public promulgation of the posited rules broadcasts “the fact, the agent and the content of decision-making [and] tends to ensure that the decisions which are made will conform to the community’s standards of justice.”¹⁶⁹ Such a process, though not required by the Fourth Amendment, exhibits the rule-based virtues of legislative supremacy and deference to government.¹⁷⁰ Absent a participative legislative process and clear rules, legal liberals claim, differential policing and prosecution practice is — while not determinative of executive animus — indicative of executive disregard for the targets of policing.¹⁷¹

b. Role-Based Policing

Relatively quickly, however, policing and with it the attitudes to policing, experienced an overhaul. Changes in selection and training, resulting in a force that is both more diverse and more professional, transformed the Court’s perception of the police.¹⁷² Rather than a source of disorder, the police have become the solution to problems of public order and high crime.¹⁷³ Under the current regime, so long as police enforcement activities are “reasonable” given the officer’s understanding at the time she acts, her activity will generally survive fourth-amendment scrutiny.¹⁷⁴ This change in emphasis from rules to reasonableness, I shall argue, transforms the basis for the scope of police

thoughtfully the impact and propriety of various courses of action open to him. He would be both more accessible and more receptive to community input . . . and he would stand to be judged and questioned by the department and the community upon irrefutable evidence of the content of the decision he had made.” *Id.* at 424.

¹⁶⁸ *Id.* at 425.

¹⁶⁹ *Id.* at 427.

¹⁷⁰ See Laurence H. Tribe, *Erog .v Hsub And Its Disguises: Freeing Bush v. Gore From Its Hall Of Mirrors*, 115 Harv. L. Rev. 170, 231, 231 n.243 (2001) (discussing virtues of accountability and transparency); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 17-3 at 1684 (2d ed. 1988) (stating that mode of interaction sets appropriate limits on executive direction of social organization).

¹⁷¹ See, e.g., WAYNE R. LAFAYE, *ARREST* 513 (1965); Kenneth Culp Davis, *Police Discretion* 137-38 (1975); Amsterdam *supra* note 164, at 423.

¹⁷² See Sklansky, *supra* note 151, at 303 (“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”). On this “shared understanding,” see *id.* at 299-308.

¹⁷³ Livingston, *supra* note 74, at 565-66.

¹⁷⁴ See, e.g. Terry, 392 U.S. at 21.

authority from rule-based to a role-based: it is by virtue of the official's status as police officer that she has the power to act in the specified circumstances.¹⁷⁵

One major feature of the shift in attitudes to the police is the advent of an administrative approach emphasizing the liberal-bureaucratic values of rationality and efficiency in law enforcement.¹⁷⁶ The police now, for the most part, share the same values as the citizens they protect and are not characterized, by the Courts at least, as a race-biased and anti-democratic institution. The exercise of police power is not an act of race-based thuggery but is rather directed by training and professional know-how. The police are skilled experts in investigating and controlling law-breaking conduct: they are required to make context-dependent and pressured decisions in rapidly evolving and potentially dangerous situations to ensure public safety, restore order, and apprehend criminals.¹⁷⁷ The problem is no longer replacing a set of informal and illegitimate values with ones that are express, prospective, formal, and legitimate.¹⁷⁸ The interposition of autonomous police values in the process of law enforcement poses no challenge to democracy because police and people (or at least courts) share the same set of understandings.

Nowhere is this transformation — from the rule-based and autonomy-constricting response to police bias to a role-based and autonomy-promoting approach — more striking than the development of *Terry v. Ohio*'s "reasonable suspicion" standard.¹⁷⁹ *Terry*, which purportedly marks the end of the Warren Court's "revolution in criminal procedure,"¹⁸⁰ was among the first cases after *Mapp* to question the warrant requirement and to spark a battle over the meaning of the Fourth Amendment. Its legacy was to transform a unitary understanding of seizure — the arrest — and the singular probable-cause evidentiary requirement into one that is multiple and particularized. Each seizure can now be distinguished by different amounts of police coercion and justified by discrete evidentiary requirements, may be of greater or lesser

¹⁷⁵ Two of the few other articles considering in depth a role-based account of the police are David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1228-29 (1999); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004).

¹⁷⁶ See, e.g., Livingston, *supra* note 74, at 565-66; Sklansky, *supra* note 12, at 1735-6.

¹⁷⁷ See Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder In New York*, 28 FORDHAM URB. L.J. 457 (2000) (race-based police stops justified in "case law as the sound exercise of 'professional judgment' by police officers.")

¹⁷⁸ According to David Sklansky, the courts have a set of pro-police "shared understandings" around the values underlying policing, understandings that are no less powerful for being premised upon a legal fiction. See Sklansky, *supra* note 151, at 303, 320-23.

¹⁷⁹ *Terry*, 392 U.S. at 21.

¹⁸⁰ See Kamisar, *supra* note 155, at 4.

duration, and may permit various types of collateral searches or removal the suspect's person from the scene.¹⁸¹

David Sklansky argues that we should regard *Terry*, not a grant of discretion, but as limitation upon it.¹⁸² *Terry* in fact constrains 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.¹⁸³ This moderately rule-based approach to *Terry* did not survive. Now, almost any non-prohibited justification that can be articulated will suffice to provide reasonable suspicion,¹⁸⁴ and does so because such reasons operate precisely to characterize the police as well-trained, experienced experts responding to “imponderable evidence” of criminality.¹⁸⁵ The articulation of reasons displays the officer’s role-based qualifications and legitimates the officer’s role-based expertise.

As Carol Steiker notes, by exporting *Terry*’s reasonableness requirement 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.¹⁸⁶ The Court’s change in approach was

¹⁸¹ See, e.g., Wayne R. LaFare, “Seizures” *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REFORM 417, 417-18 (1984) (formerly one-dimensional approach to seizure now multi-dimensional).

¹⁸² See Sklansky, *supra* note 151, at 315-16.

¹⁸³ See *Terry*, 392 U.S. at 22, 27; Sklansky, *supra* note 12, at 1735-6.

¹⁸⁴ See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *United States v. Arvizu*, 534 U.S. 266 (2002).

¹⁸⁵ See, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (2001). 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 (“reviewing 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 range of otherwise innocuous facts that will justify the suspicion of a well-trained officer); *Rodriguez*, 469 U.S. at 6 (discussing contribution of training to establishing 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) (“it 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.’”).

¹⁸⁶ See, e.g., *Acevedo*, 500 U.S. at 582-83 (1991) (Scalia, J., concurring) (suggesting 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

predominantly a matter of “style”¹⁸⁷ and procedure,¹⁸⁸ a move from “prophylactic”¹⁸⁹ rule-based constraints to a more fluid role-based series of considerations. The Court accomplished the reasonableness counter-revolution without overruling Warren Court precedents.¹⁹⁰ Where the Warren Court expressed a special distrust of the police, the Burger and Rehnquist Courts have generally expressed empathy.¹⁹¹

The result of this procedural “counter revolution” is a Fourth Amendment often characterized as “inconsistent and incoherent,”¹⁹² “an embarrassment,”¹⁹³ and “filled with apparent contradictions.”¹⁹⁴ 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 been transformed 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.”¹⁹⁵ Where a rights focus invites a rule-based approach, the Court’s reasonableness

creating these exceptions, enabling a search to be denominated not a Fourth Amendment ‘search’ and therefore not subject to the general warrant requirement.”).

¹⁸⁷ Carol S. Steiker, *Counter- Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2492-93 (1996).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Nowhere is this more apparent than in the area of consent searches: while, in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), 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,” *id.* at 276 (Douglas, J., dissenting); *id.* at 289 (Marshall, J., dissenting) (citing 448 F.2d 699, 701 (9th Cir. 1973), the majority’s officer-focused and role-based model of authority exhibits no such concern. In fact, a focus on the investigative role of the police — dependant as it is upon an ethics of autonomy — has 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 (1984). This is, as Sklansky notes, a legal fiction, Sklansky, *supra* note 151, at 320-23; it operates as an “understanding,” *id.* at 303, or, as Steiker would say, 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); and is at the root of much investigation “outside” the Fourth Amendment’s purview.

¹⁹² Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 474 (1991).

¹⁹³ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994)

¹⁹⁴ William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 881-910 (1991).

¹⁹⁵ Bookspan, *supra* note 192, at 477.

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].”¹⁹⁶ The touchstones of the reasonableness analysis are role-based considerations of context,¹⁹⁷ status, and purpose:¹⁹⁸ the “endless variations in the facts and circumstances” translated through “experience” or “training,” into the police decision to search or seize.¹⁹⁹

Role-based understandings of the scope of authority are concerned to identify the range of activities suited to the official’s institutional or social status — in the case of the police, criminal investigation. Role-based justifications thus extend beyond the regime of institutional rules (if there is any) creating the office to encompass non-institutional, administrative or customary understandings of the role.²⁰⁰ This change in attitude is profoundly important for the manner in which courts will agree to scrutinize conduct and hold the police accountable. A court (or other decision-maker) asks how that sort of agent would act in circumstances that trigger her role. Put simply, role-based authority concerns the circumstances and purposes that empower an official to act (the secondary rules of a legal system) rather than (primary) norms, the content of which define the scope of legitimate authority.²⁰¹

¹⁹⁶ *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (citing *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Royer*, 460 U.S. 491; *Florida v. Bostick*, 501 U.S. 429 (1991); *Schneekloth*, 412 U.S. 218).

¹⁹⁷ *See Royer*, 460 U.S. at 506; *see also Robinette*, 519 U.S. at 40; *Illinois v. Gates*, 462 U.S. 213 (1983).

¹⁹⁸ *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.”).

¹⁹⁹ *Arvizu*, 534 U.S. at 273; *Ornelas*, 517 U.S. at 699; *Rodriguez*, 469 U.S. at 6; *Royer*, 460 U.S. at 525 (Rehnquist, J., dissenting); *Mendenhall*, 446 U.S. at 563-64.

²⁰⁰ Non-institutional, of course, from the legal perspective. The Court rejected holding law enforcement to account through their administrative and role-defining procedures in *United States v. Robinson*, 94 S. Ct. 467, 470, 470-71 n.2 (1973). On *Robinson* and police procedure, *see Amsterdam*, *supra* note 164, at 414-5.

²⁰¹ Carol Steiker relies upon Meir Dan-Cohen’s distinction between decision and conduct norms to explain the manner in which the Burger and Rehnquist Courts eviscerated many of the protections of the Warren Court. *See Steiker*, *supra* note , 2470-71, 2533-3540 (1996); *see also Meir Dan-Cohen*, *supra* note 131, at 626. I believe that Dan-Cohen’s distinction between decision and conduct norms is somewhat confusing: at some points he appears to rest the distinction upon the norm’s addressees; at other points it appears to be a distinction between mandatory norms and power-conferring norms. *Id.* at 626-635. Furthermore, he suggests that there can be “acoustic separation” between decision and conduct norms, such that the Court’s power to apportion responsibility can be totally separated, as a conceptual matter, from the legislature’s power to pre- or proscribe conduct. *Id.* at 626. For a variety of reasons, I reject the notion of acoustic separation between decision and conduct norms as either possible or desirable, I believe decision norms send a message about — or in social norms terms, send a signal about the social meaning of — acceptable conduct.

Role-based authority is thus focused on the (institutional) agent in the context of action — performing the job with which they have been entrusted, given the circumstances and appropriate level 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.”²⁰² Under the reasonableness standard, the Court focuses on contextual triggers, changing circumstances, and pragmatic responses to the problems presented by the investigative process. The Court has removed a variety of impediments to the officer’s performance of her job, sometimes on the basis of inconvenience or danger,²⁰³ sometimes as essential to the very possibility of following up on investigative hunches,²⁰⁴ sometimes because to do otherwise would lead investigating officers to disregard the law.²⁰⁵

B. Social Norms and Role-Based Policing

Social norms theorists embrace role-based police autonomy and agency, and propose to empower policing through a legislative program using low-level, substantive criminal laws to undermine those antisocial activities constitutive of disorder.²⁰⁶ If the police are to be constrained, it is through their self-regulated sensitivity to neighborhood mores that help them to determine what type and levels of order different communities prize.²⁰⁷ Accordingly, social norms scholars are, to a considerable extent, concerned with the impact of policing on neighborhoods and communities evaluated through local, social norms.

As a substitute for the punishment-oriented War on Drugs, social norms theorists suggest a variety of policing practices designed to promote order and

²⁰² Ornelas, 517 U.S. 690.

²⁰³ See *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1971) (danger of deliberate or accidental hazard on stopping automobile justifies bright-line rule permitting officer to order suspect from vehicle); *New York v. Belton*, 453 U.S. 454, 460 (1981) (“workable rule” permitting search of passenger compartment of automobile).

²⁰⁴ I take this to be one of the underlying rationales for consent searches. See *Robinette*, 519 U.S. at 39-40 (citing *Chesternut*, 486 U.S. 567; *Royer*, 460 U.S. 491; *Bostick*, 501 U.S. 429; *Schneekloth*, 412 U.S. 218).

²⁰⁵ See *Gates*, 462 U.S. at 236 (“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.”)

²⁰⁶ See Meares, *Social Organization*, *supra* note 10, at 223-24.

²⁰⁷ Livingston, *Communities*, *supra* note 10.

enable adult supervision of local youths.²⁰⁸ Reverse stings, youth curfews, anti-loitering ordinances,²⁰⁹ and laws addressing automobile cruising and aggressive panhandling,²¹⁰ civil injunctions and civil sanctions,²¹¹ are enforced across diverse communities, in part to spot and punish outsiders, often from more socially affluent communities.²¹² Adult authority is enforced by the variety of measures designed to remove youths from the streets and prevent them accumulating in intimidating numbers or public spaces; particular individuals — gang members and other crime-seeking outsiders — may be identified and prevented from entering the community.²¹³ This municipal-government emphasis on local, neighborhood organic solidarity²¹⁴ expressed through policing demonstrates the virtues of neutrality, absence of bias, and respect for law-abiders necessary to encourage local perceptions of police legitimacy.²¹⁵

For social norms theorists, the emphasis is not on criminal procedure and norms of police conduct, but on substantive criminal laws directed at the public. From this role-based perspective, primary rules — curfews, loitering ordinances, and the like — operate not to *constrain* police power but to *expand* it. Social norms scholars want to create new, low-level crimes (or targets of policing) and in so doing facilitate a new, preventative role for the police that requires not only freedom from geographically or jurisdictionally broad constraints upon localized interpretations of the manner in which the norms are to be enforced (through local guidelines and local community-police partnerships) but also a positive creation of a range of new (low-level) powers to police otherwise innocent conduct, justified by participative community self-regulation. The real debate is not about discretion but 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

²⁰⁸ Meares, *Policing*, *supra* note 15, at 1606; Meares, *Place & Crime*, *supra* note 5, at 699 (1998); Meares, *Social Organization*, *supra* note 10, at 223-24; Meares, *Connections*, *supra* note 10, at 591-92; Kahan & Meares, *Crisis*, *supra* note 1.

²⁰⁹ Meares & Kahan, *Norms*, *supra* note 8, at 827; *see also* Meares, *Social Organization*, *supra* note 10, at 220-26 (discussing reverse stings and anti-gang ordinances); Meares, *Policing*, *supra* note 15, at 1612 (same).

²¹⁰ Livingston, *Communities*, *supra* note 10, at 636.

²¹¹ *Id.* at 638-45.

²¹² Meares & Kahan, *Norms*, *supra* note 8, at 818-819 (“reverse-sting arrestees are likely to be more racially and economically diverse than the drug offenders arrested under a buy-bust procedure”).

²¹³ *See, e.g.*, ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 1-18 (2004); Fung, *Beyond & Below*, *supra* note 80, at 618-23.

²¹⁴ *See* Livingston, *Communities*, *supra* note 10.

²¹⁵ *See* Tracey L. Meares, Neal Katyal, & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1195 (2004); Meares, *supra* note 55, at 412-13; Meares, *Legitimacy & Law*, *supra* note 28, at 403-04.

harm.²¹⁶ That concerns, not rule-based limits upon the scope of police authority to search and seize citizens, but the criminalization of everyday life: not criminal procedure, but substantive criminal law.

Refocusing the debate on autonomy rather than discretion explains a puzzling feature of the social norms posture — the oddity of demanding discretion when the police already have it in spades.²¹⁷ As David Cole notes:

In fact, the courts are quite hospitable to police discretion, as a result of a host of decisions by the Burger and Rehnquist Courts that have substantially undermined the constitutional protections of the Warren Court era. Thus, although the [social norms] scholars ... sometimes talk as if they are calling for radical change, in fact their arguments are more aptly described as an apology for a sea-change that has already taken place in constitutional criminal procedure.²¹⁸

These rules vest individual officers or departments with considerable discretion to determine to select as a target of investigation.²¹⁹ They permit the police to engage in a variety of encounters, including “mere...questioning,”²²⁰ or examining the individual's identification,²²¹ and others deemed “consensual,” including requesting to search luggage,²²² without requiring the police to warn suspects of their right to refuse consent, all of which avoid Fourth Amendment scrutiny.²²³

²¹⁶ 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. [Citation omitted]. 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, [citation omitted], 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.”).

²¹⁷ Cole, *Discretion*, *supra* note 8, at 1060.

²¹⁸ *Id.* at 1062.

²¹⁹ “These rules allow the police to approach and investigate people for any reason or none at all; the officer's discretion is wholly unregulated. In other settings, the officer's discretion is subject only to the most deferential oversight, as in ‘stop and frisk’ encounters, which may be predicated on ‘reasonable suspicion,’ a standard that itself defers substantially to the officer's on-the-scene judgment and experience.” *Id.* at 1072.

²²⁰ *Bostick*, 501 U.S. at 434. *See also* *Delgado*, 466 U.S. at 216; *Rodriguez*, 469 U.S. at 5-6.

²²¹ *See* *Delgado*, 466 U.S. at 216 (1984); *Mendenhall*, 446 U.S. 544.

²²² *Royer*, 460 U.S. at 501.

²²³ *See id.* at 497 (“law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”).

That oddity stems, I would suggest, from a confusion between discretion (which I have suggested consists in the absence of rule-based constraint) and role-based authority (which consists in a power to act). The Fourth Amendment debate revolves around the presence or absence of constraints upon intrusions upon individual privacy. What social norms scholars seek, however, is something more than the absence of constraint; they are, in fact, happy with certain forms of local limits on executive discretion and generally seek to minimize the intrusive styles of policing that lead to arrest and incarceration. Rather, they propose a separation of investigative and preventative roles to empower the police to take on preventative policing.

IV. IDENTIFYING THE LEGITIMACY CRISIS

Many inner-city communities suffer from what might be called a crisis of legitimacy; norms that support law-abiding behavior are rejected or ignored in favor of norms supporting law breaking. Government institutions are regarded with suspicion or disdain and community members regard state-sponsored efforts to enforce the criminal law as motivated by malign racial and class stereotypes. Crime rates are high.²²⁴

Other inner-city communities, though equally poor or with similarly large minority populations do not experience this type of crisis. Although sharing a variety of social and economic problems in common with other impoverished, urban, predominantly minority communities, these neighborhoods do not have runaway crime rates and are much more self-regulating than the law-breaking ones.²²⁵ They accept the government's right to posit new norms and tend to endorse the norms independent of their content.²²⁶

I claim that the legitimacy crisis in the criminal law depends upon justified public perceptions of a disjunction between the formal and substantive legitimacy of certain laws and policing practices. In this section, I begin by distinguishing legal liberal accounts emphasizing rule-based formal legitimacy from social norms accounts that highlight role-based substantive legitimacy.²²⁷ My claim is that rule-based legitimacy cannot provide an adequate response to recent discussions of the race- and class-neutral animus behind formally

²²⁴ Meares, *Place & Crime*, *supra* note 5.

²²⁵ *Id.* at, 676 (suggesting that “both structural organization and cultural organization in neighborhoods help to explain the crime that occurs in them.”).

²²⁶ Reasons are content-independent if they are “intended to function as a reason independently of the nature or character of the actions to be done.” Hart, *supra* note 41, at 254; *see also* RAZ, *supra* note 133 at 35.

²²⁷ Simon, *supra* note 7, at 7-10; 48-74 (contrasting liberal legal emphasis on “analytical, individualistic, categorical, judicially enforceable, and corrective...[r]ights...derived analytically by the application of legal reasoning to authoritative sources” with legal pragmatism of social norms theorists).

legitimate norms endorsed by social norms theorists. Neither, however, can participative local empowered democracy justify substantively illegitimate laws. Accordingly, the limits of democratic governance engender problems of accountability and control at both legislative and executive levels that neither theory can properly accommodate.

A. Differential Enforcement, Policing, and Legitimacy

It is common ground between social norms and legal liberal theorists that unjustified differential enforcement of the law across communities adversely impacts both the fact and perceptions of governmental legitimacy.²²⁸ 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 — police and prosecutors — empowered to interpret, apply, and refuse to apply properly legislated norms.²²⁹ At other times it appears that the police target some communities for heightened attention for malicious or discriminatory reasons.²³⁰

Within such “target” communities, moreover, the police may use public, invasive investigation and enforcement mechanisms, such as youth curfews and stop-and-frisk searches.²³¹ This style of policing frequently fails to distinguish adequately between criminal and non-criminal, such that law-breakers and law-abiders alike are stigmatized as criminal by the law.²³² This disparate impact on different communities, and on law-abiding individuals in those communities, undermines public respect for the law.

As a result, a number of legal liberal scholars have denounced the “over-policing” of inner-city communities as antithetical to their wellbeing.²³³ A central link between traditional and modern liberal legal critiques is to characterize current policing as relatively unconstrained by prospective legislation²³⁴ and to explain differential enforcement across communities as consciously or unconsciously racially motivated and so formally illegitimate.²³⁵ Many liberal legal scholars have gone further to equate the differential legislative impact of the War on Drugs on poor and rich, minority

²²⁸ Stuntz, *Race, Class & Drugs*, *supra* note 2; Meares & Kahan, *Norms*, *supra* note 8.

²²⁹ See, e.g., Husak, *supra* note 61.

²³⁰ Stuntz, *Race, Class & Drugs*, *supra* note 2.

²³¹ See, e.g. David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997).

²³² Stuntz, *Race, Class & Drugs*, *supra* note 2. Executive activity may be structured directly, by norms telling the enforcement agents what to do, or indirectly, by social or legislative norms that suggest the community’s priorities for law enforcement.

²³³ See, e.g., Cole, *Paradox of Race and Crime*, *supra* note 5.

²³⁴ See Cole, *Discretion*, *supra* note 8, at 1062.

²³⁵ TONRY, *supra* note 1, at 4-5, 123; Butler, *Jury Nullification*, *supra* note 6.

and majority, with some form of class- or race-based animus.²³⁶ Proponents of a race-based analysis claim that even if the government is not consciously motivated by race in developing legislative or executive norms,²³⁷ it is careless of the foreseeable consequences of its legislation and in particular its impact on the African American community.²³⁸ The argument is then that such legislation, given its disparate effect on people of color, is an illegitimate expression of “unconscious racism”²³⁹ and “malign neglect.”²⁴⁰ To demonstrate animus, this:

antidisubordination approach to equality would not require Black defendants to prove that the prosecutions are motivated by racial bias. Rather than requiring victims to prove distinct instances of discriminating behavior in the administrative process, the anti-subordination approach considers the concrete effects of government policy on the substantive condition of the disadvantaged.²⁴¹

The anti-subordination principle would therefore require only a showing of disparate impact to render a statute illegitimate.

Substantively onerous impacts, however, need not derive from conscious or un-conscious race-based motives. Rule-based theories depend upon controlling police conduct by excluding illegitimate bias agent autonomy through deference to the legislated norms. If the problem does not reside in executive bias then the legal liberal worry about illegitimate race- or class-based animus does not exist, and the rule-based solution — replace caprice through legislation and remove autonomy through closely scrutinized prospective formal rules — will not help.

1. Race-Neutral Legislation with Race-Specific Outcomes

²³⁶ See, e.g., TONRY, *supra* note 1; COLE, NO EQUAL JUSTICE, *supra* note 5.

²³⁷ See, e.g. Angela Jordan Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18-19 (1998).

²³⁸ See, e.g., TONRY, *supra* note 1, at 4-5, 123.

²³⁹ Generally, the anti-subordination principle gains much of its traction from the notion of “unconscious racism,” “the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.” Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987). Unconscious racism may result either from a conflict between our attitudes and our feelings of guilt towards those attitudes or from those beliefs, preferences and other social norms that structure a person’s “rational ordering of her perceptions of the world.” *Id.* at 323.

²⁴⁰ See, e.g., TONRY, *supra* note 1, at 4-5, 123.

²⁴¹ Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1434-35 (1991).

Randall Kennedy has provided a forceful critique of the claim that “unconscious racism” explains the real motivation of such legislation. That critique is, I claim, consistent with the concept of formal legitimacy. He conditions a finding of illegitimacy upon some showing of governmental racial animus. That a distinct group bears the burden of a particular piece of legislation need not, he suggests, be explained by racism. Race-neutral reasons may equally well explain the legislation.²⁴²

The charge of racial animus, Kennedy has argued, is a weighty one that plays a particular role in discussions of legislative legitimacy.²⁴³ Demonstrating the racial animus of legislation requires more than a disparate effect on people of color, even against a (historical) background of discriminatory social norms. What more is required is a means of linking these background norms to the foreground of legislation and enforcement. Race-neutral legislative or executive norms may result in race-specific disparate impacts. Such an impact may be legitimate and justified — it may stem from the legislator’s belief that crack cocaine impacts minority communities in a manner that is different in kind to powder cocaine, and that the remedy of mass incarceration is necessary and tolerable to remedy the situation.²⁴⁴ Where some communities are more at risk during a drug epidemic, extreme measures may in fact be justified as to control the situation, despite our ability to foresee the detrimental collateral effects of such a policy.²⁴⁵ Kennedy points out that many African American lawmakers supported the drug laws.²⁴⁶

Put simply, Kennedy notes that racial animus operates, under our constitutional structure, to render the legislative process illegitimate.²⁴⁷ So understood, racial animus is a “canceling condition”²⁴⁸ that negates the formal legitimacy of the legislative process; absent racial animus, however, the

²⁴² See, Kennedy, *State & Criminal Law*, *supra* note 3, at 1278; Stuntz, *Race, Class & Drugs*, *supra* note 2 at 1798.

²⁴³ See Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1418-19 (1988).

²⁴⁴ See, Kennedy, *State & Criminal Law*, *supra* note 3, at 1278; Stuntz, *Race, Class & Drugs*, *supra* note 2 at 1798.

²⁴⁵ On foreseeability as an argument against the crack laws, *see, e.g.*, TONRY, *supra* note 1, at 4-5, 123.

²⁴⁶ See, Kennedy, *State & Criminal Law*, *supra* note 3, at 1278; Stuntz, *Race, Class & Drugs*, *supra* note 2 at 1798.

²⁴⁷ Kennedy, *State & Criminal Law*, *supra* note 3, at 1255-56. This procedural account of the Equal Protection Clause comports with Paul Brest’s description of the “anti-discrimination principle” he takes to underlie its operation. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976) “The antidiscrimination principle fills a special need because — as even a glance at history indicates — race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference.” *Id.*

²⁴⁸ See RAZ, *supra* note 113.

process, so long as otherwise proper, is legitimate. Kennedy further notes that legitimacy and justification are independent.²⁴⁹ Many of the individuals who supported the crack cocaine legislation believed disparate sentencing laws were substantively justified given the effect on the urban, minority communities they represented.²⁵⁰ That they no longer feel this way is indicative that the law's underlying justification no longer applies.²⁵¹ It does not, however, mean that such laws are formally illegitimate. As Kennedy himself notes, "being wrong is different from being racist, and the difference is one that matters greatly."²⁵² Because courts are primarily empowered to pronounce only upon formal legitimacy, they are obliged to uphold the sentencing disparity between crack and powder cocaine absent a showing of racial animus during the legislative process. The issue of justification is, according to Kennedy, for the legislature to determine.²⁵³

But where formal legitimacy in the process of enactment is accompanied by *subsequent* substantive illegitimacy, due-process critiques lack a proper target. Where the focus is on the propriety of a piece of legislation, a race-based legitimacy crisis arises only if there is some race-based procedural impropriety during the enactment process manifested on the face of the statute or through some showing of animus.²⁵⁴ Absent such a showing, neither the content of the law nor its disparate effect is properly discussed in terms of legitimacy.²⁵⁵

Indeed, Kennedy suggests, historically, it is the *lack* of enforcement that indicates racial animus: the police have, for race-based reasons, ignored the African American community to the latter's detriment.²⁵⁶ The increased policing of the African American community in the wake of the War on Drugs, and particularly the emphasis on crack cocaine, suggests that enforcement agencies 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.²⁵⁷

²⁴⁹ Kennedy, *State & Criminal Law*, *supra* note 3, at 1276-78.

²⁵⁰ *Id.* at 1260-61; Randall Kennedy, *A Response to Professor Cole's "Paradox of Race and Crime,"* 83 GEO. L.J. 2573, 2575 (1995); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1295 (1995).

²⁵¹ Kennedy, *State & Criminal Law*, *supra* note 3, at 1277-78.

²⁵² *Id.* at 1278.

²⁵³ *Id.*

²⁵⁴ A variety of commentators have expressed frustration with the ability of the Equal Protection Clause to solve problems of the racially disproportionate effects of the criminal law. See, e.g., Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2025-28 (1998); Sklansky, *supra* note 250, at 1308-13.

²⁵⁵ Kennedy, *State & Criminal Law*, *supra* note 3, at 1278.

²⁵⁶ See KENNEDY, RACE & CRIME, *supra* note 3.

²⁵⁷ See *id.*; Kennedy, *State & Criminal Law*, *supra* note 3, at 1256-57.

The absence of conscious or unconscious animus when enacting the legislation removes the rule-based claim that the legislative branch was illegitimately motivated by improper considerations. During the legislative process, the government and the community are animated by a shared set of values. That consensus subsequently disappears; nonetheless, given that the rule-based account of the scope of authority precisely demands adjudicative and executive deference to formally legitimate norms, the law enforcement apparatus is denied authority to ignore the law. The only solution to a substantive mistake or change in circumstances is to re-legislate the law.

Given that a formally legitimate statute may turn out to be substantively unjustified, the problem is what to do then. The solution recommended through the anti-subordination principle — that the statute be deemed formally illegitimate once disparate impact on the basis of race is proved — cannot be justified as a claim of discrimination, whether conscious or unconscious. If a race-neutral mistake in calculating the impact of the statute is to have the effect of a procedural flaw in its enactment, that claim properly must be understood as demanding a thoroughgoing program of redistributive justice based upon the effect of neutral laws on minority communities.²⁵⁸ I am not opposed to such a program: like Professor Kennedy, however, I believe we should be clear that the justification for such a program does not stem from deliberate racial animus.

2. *Race-Neutral Policing with Race-Specific Outcomes*

Kennedy's race-neutral theory of motivation also applies in the realm of executive enforcement. Liberal legal rule-based control depends, remember, upon legislative and adjudicative distrust of the police force's capricious substitution of malign enforcement norms for formally legitimate ones. William Stuntz, Kennedy's Harvard colleague, has, however, provided a race-neutral justification for the disparate impact of precisely those policing practices that worry liberal legalists. If successful, such a justification would appear to similarly undermine the potency of the rule-based critique.

Stuntz's analysis depends in part upon distinguishing communities by the *type* of crime committed in "upscale" and "downscale" communities. Two features in particular distinguish rich from poor crime; the crimes themselves and the level of "institutional" organization required to support the crimes. The poor engage in burglary and auto theft; the rich embezzle and engage in insider

²⁵⁸ See, e.g., *Griggs v. Duke Power Co.* 401 U.S. 424 (1971). Such redistribution may be justified by the need to affirmatively undo historical discrimination. Accordingly, I have a great deal of sympathy with Paul Butler's identification of substantive injustice and suggestion that individuals may have a moral duty to disregard the law in certain circumstances. See, e.g., Butler, *Jury Nullification*, *supra* note 6. I have some problem with some aspects of his proposed solution that need not detain us here.

trading.²⁵⁹ Poor crime requires networks to receive, launder, and distribute stolen goods; rich crime does not. Poor crime thus requires a criminal community and a criminal market in order to work efficiently; rich crime does not. Poor crimes are relatively institutionalized, with different people holding a variety of normatively structured positions in the criminal enterprise; rich crimes are much more atomistic.²⁶⁰

Where crime is socially structured (by social networks or markets), destructive of the fabric of community cohesiveness, and conducted in the open, practices that involve prominent invasions into everyday behavior may be appropriate.²⁶¹ Where crime is atomistic, less harmful to the community's fabric, and conducted behind closed doors in the criminal's office or home, more discreet practices are required. Class bias does not render such difference formally or substantively illegitimate so long as the different types of crimes, rich and poor, are qualitatively distinct. If rich and poor crime is properly incomparable across social and geographic communities, then different enforcement practices are substantively justified given the community-specific and location-driven availability of more or less private spaces for crime.²⁶²

It is worth emphasizing that, for Stuntz, differential enforcement need not be a product of racism (and therefore formal or substantively illegitimate) but of class differences that produce or exacerbate substantively legitimate differences in policing rich and poor communities.²⁶³ This is as true for drug crime as for other socially and economically stratified crimes. Sociological features of the disparate drug-using communities,²⁶⁴ however, engender divergences in the organization of drug markets in upscale and downscale communities.²⁶⁵ Differences in the quality and price of different drugs stratify the market by class; thanks to social features of urban poverty, class stratification entails racial stratification.²⁶⁶ Accordingly, the difference in policing public, socially structured and private, atomistic communities has a racially disparate impact.

²⁵⁹ Stuntz, *Race, Class & Drugs*, *supra* note 2 at 1803.

²⁶⁰ *Id.* at 1802.

²⁶¹ *Id.* at 1813-15; Stuntz, *Self-Defeating Crimes*, *supra* note 2 at 1875-76.

²⁶² See, e.g., Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691, 694-96 (1998) (discussing social meaning of different crimes and criminal sanctions in terms of incommensurability); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 620-21 (1996) (discussing qualitative expressive differences between crimes).

²⁶³ Stuntz, *Race, Class & Drugs*, *supra* note 2 at 1803; Stuntz, *Self-Defeating Crimes*, *supra* note 2 at 1877.

²⁶⁴ Stuntz, *Self-Defeating Crimes*, *supra* note 2 at 1877.

²⁶⁵ See KENNEDY, RACE & CRIME, *supra* note 3.

²⁶⁶ Stuntz, *Race, Class & Drugs*, *supra* note 2 at 1805-06; Stuntz, *Self-Defeating Crimes*, *supra* note 2 at 1874-79.

Thus, despite similarities in the type of crime, the different communities experience different quantities and qualities of law enforcement based upon the relative expense and availability of policing strategies. Where the drug market remains indoors and atomistic, investigation proceeds by means of electronic surveillance and targeted busts; where it is public and social, investigation relies on stop-and-frisks.²⁶⁷ Furthermore, upscale users tend — through necessity or choice — to find their drugs through social networks of suppliers, dealers, and buyers in downscale communities.²⁶⁸

This again is to insist upon the shared values of the police and the communities they police. Both wish the neighborhood to be rid of drug dealers and free of violence. Accordingly, the police choose the most effective means to police public spaces, and that choice is determined by considerations derived from their professional expertise and expressive of tactical efficiency rather than malign race- or class-based values. In other words, the rule-based charge of bias and caprice will not stick. Instead, role-based considerations justify the tactics chosen.

Nonetheless, because there is some overlap between markets,²⁶⁹ race-neutral motivations in the style of policing and minority populations are internalized by minority target groups as intentional; such perceptions are reinforced by different enforcement techniques that, in the poor, urban communities in which many minority targets live, interfere with the daily life of the law-abiding as well as law-breakers.²⁷⁰ These non-normative discrepancies thus obtain, by virtue of their translation through internalization, a negative normative impact that undermines the legitimacy of the drug laws and the government that enforces those laws.²⁷¹ The charge that race-based differences in enforcement are the product of racial animus is thus wrong as a matter of fact, but understandable: thanks to the social stratification of many communities by class *and* race, that perception of illegitimacy is exacerbated.

3. Social Norms, Local Participation, and Public Order Policing

Social norms theorists agree with the legal liberal contention that, prior to the Warren Court revolution in criminal justice, the police were often animated by institutional or individual racist caprice.²⁷² Law enforcement officials used a variety of vaguely drafted public order laws to discriminate against minorities

²⁶⁷ Stuntz, *Race, Class & Drugs*, *supra* note 2 at 1821.

²⁶⁸ *Id.* at 1809.

²⁶⁹ *Id.* at 1812-13.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² See Livingston, *Communities*, *supra* note 10, at 596-97; Kahan & Meares, *Crisis*, *supra* note 1, at 1156-57; Meares, *supra* note 77, at 1344-47.

and answered to a political bureaucracy that was itself segregated and segregationist.²⁷³ Social norms theorists accept that the Warren Court was correct to be skeptical of police discretion operating as a cover for discrimination and to engage in a rule-based limitation upon the scope of police (and lower court) authority.²⁷⁴

Times change, however. Nowadays both the police and the municipal administrations to which they answer are integrated and often run by minorities.²⁷⁵ The problem is no longer racially motivated executive discretion but, first, the lengthy sentences imposed for drug crimes and, second, drug policing targeted upon poor, urban, minority communities already struggling to cope with a variety of other social issues.²⁷⁶ The solution is to curtail a policing style aimed at arrest and incarceration, and in its place develop a style designed to control the sort of open-air, low-level anti-social behavior common across racially diverse communities.²⁷⁷ The goal is to facilitate direct engagement between local government and the neighborhood community, so as to strengthen community bonds to enable neighborhoods to police themselves. Public order policing encourages “law-abiders to engage in behavior — from patrolling the streets, to cooperating with police, to transmitting law-abiding values to youths — that themselves suppress crime. The same effects can likely be achieved by cooperative alliances between the police and community associations.”²⁷⁸

²⁷³ See Livingston, *Communities*, *supra* note 10, at 596-97; Meares, *supra* note 77, at 1344-47.

²⁷⁴ See Meares, *supra* note 77, at 1344-47.

²⁷⁵ See, e.g., Kennedy, *State & Criminal Law*, *supra* note 3, 1258 (discussing “African-Americans’ . . . efforts to reform and participate in the creation and implementation of government policy . . . [undertaken by] black mayors, chiefs of police, and legislators.”). Kennedy’s argument on the race-neutral animus of and minority participation in legislation substantially anticipates the major points of the social norms theorists. See Kahan & Meares, *Crisis*, *supra* note 1, at 1162 “(African-Americans today make up a significant percentage of all urban police departments. New York, Washington, and Los Angeles have all had black police chiefs accountable to black mayors. Indeed, the election of black mayors in several major cities has led directly to racial diversity in the hiring of police officers.”).

²⁷⁶ Meares, Katyal & Kahan, *supra* note 215, at 1190-91; Meares, *Legitimacy & Law*, *supra* note 28, at 398; Meares & Kahan, *Norms*, *supra* note 8, at 818-819; Meares, *Social Organization*, *supra* note 10, at 226.

²⁷⁷ See Meares, *Social Organization*, *supra* note 10, at 224; Meares, *supra* note 77, at 1345-49.

²⁷⁸ Meares & Kahan, *Norms*, *supra* note 8, at 827; see also Meares, *Social Organization*, *supra* note 10, at 220-26 (discussing reverse stings and anti-gang ordinances); Meares, *Policing*, *supra* note 15, at 1612 (same).

From the social norms perspective, legitimacy inheres in local endorsement of police practices rather than formal adherence to the letter of the law.²⁷⁹ The desires of the community — for public order, for an increased police presence, to remove gangs and control delinquency, and generally improve quality of life — are fundamental. The goal is to empower adults through formal and informal regular interactions — styled as “friendship networks”²⁸⁰ — supporting public displays of law-abidingness and emphasizing acceptable limits on public conduct,²⁸¹ and bolstered in this effort by the police.²⁸² Broad anti-discrimination principles are matched by strong discretion at the local level to enable enforcement to target particular individuals, places, or practices.²⁸³ Local participation by minority residents in endorsing such strategies enforces the presumption of anti-discrimination and includes local communities in the creation and enforcement of the law,²⁸⁴ “enhanc[ing] the cultural organization of a community around law-abiding behavior.”²⁸⁵

²⁷⁹ Meares, *Policing*, *supra* note 15, at 1606-07.

²⁸⁰ *Id.*; Meares, *Social Organization*, *supra* note 10, at 218, 225; Meares, *Connections*, *supra* note 10, at 593; Kahan & Meares, *Crisis*, *supra* note 1, at 1164 (1998); Meares & Kahan, *Norms*, *supra* note 8, at 811-12.

²⁸¹ The type of program contemplated by social norms theorist can be quite ambitious: we might imagine government programs that are more directly in the business of creating linkages among individuals in a neighborhood, or involving individuals in community institutions. We might even imagine programs involving individuals in organizations and bringing together community organizations and institutions that typically have little to do with one another for the purpose of helping children and addressing crime. Such programs involve rethinking relatively traditional approaches to law enforcement in terms of social-organization improvement.

Meares, *Policing*, *supra* note 15, at 1612. In fact, Meares and Kahan have provided an example of one such successful organizational partnership; the prayer vigil organized by the commander of Chicago's Eleventh Police District which mobilized about 7,000 African American church goers to stand on street corners usually used by drug dealers. *See* Meares & Kahan, *Norms*, *supra* note 8, at 828; *see also* Meares, *Place & Crime*, *supra* note 5, at 702-03. “The role of social organization in nourishing community's own self-policing capacity suggests that the Eleventh District's prayer vigil has the potential to be an important ‘law enforcement’ tool.” Meares & Kahan, *Norms*, *supra* note 8, at 830; *see also* Meares, *Policing*, *supra* note 15, at 1620-22 (discussing positive police responses to vigil).

²⁸² Meares, *Policing*, *supra* note 15, at 1606; Meares, *Place & Crime*, *supra* note 5, at 699; Meares, *Social Organization*, *supra* note 10, at 223-24; Meares, *Connections*, *supra* note 10, at 591-92; Kahan & Meares, *Crisis*, *supra* note 1.

²⁸³ *See* Livingston, *Gang Loitering*, *supra* note 13; Debra Livingston, *Police Patrol, Judicial Integrity, and the Limits of Judicial Control*, 72 ST. JOHN'S L. REV. 1353 (1998); Livingston, *Communities*, *supra* note 10. *See also* FUNG, *supra* note 213, at 1-18; Fung, *Beyond & Below*, *supra* note 80, at 618-23.

²⁸⁴ Meares, *Place & Crime*, *supra* note 5, at 699-700; Meares, *Social Organization*, *supra* note 10, at 224; Meares, *supra* note 77, at 1436-37; Kahan & Meares, *Crisis*, *supra* note 1, at 1153-54 (1998).

²⁸⁵ Meares, *Place & Crime*, *supra* note 5, at 701.

In this form of “empowered democracy,”²⁸⁶ policing operates to enable and persuade individuals to engage in the promotion of public order, and in turn participates in and is legitimated by local formal and informal social networks.²⁸⁷ Central to this enterprise are public attitudes of trust in the police and belief that they are enforcing the law in a neutral and respectful manner.²⁸⁸ Social norms theorists are thus concerned with police legitimacy as demonstrating impartiality and engendering public confidence in law-enforcement. The emphasis is on persuasion rather than punishment.²⁸⁹ Sanction-based regimes are antithetical to creation of trust and destroy the fabric of already fragile at-risk communities.

This vision of law-enforcement legitimacy has formal and substantive elements. It is formal where the creation or maintenance of legitimacy is process-oriented, dependent upon local participation in developing law-enforcement norms and a reciprocal attitude of respect from the police. It is substantive because what is proposed is a “new politics” of local “empowered” or “deliberative” democracy justifying the various measures designed to enhance law enforcement.²⁹⁰

²⁸⁶ FUNG, *supra* note 213; *see also* Archon Fung, *Deliberative Democracy, Chicago-Style: Grass-roots Governance in Policing and Public Education*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung and Erik Olin Wright, eds. 2003) (hereinafter Fung, *Deliberative Democracy*).

²⁸⁷ Meares, *Legitimacy & Law*, *supra* note 28, at 413-14; Meares, *Social Organization*, *supra* note 10, at 224-25; Meares, *Place & Crime*, *supra* note 5, at 699; Meares, *Connections*, *supra* note 10, at 593; Meares & Kahan, *Norms*, *supra* note 8, at 819.

²⁸⁸ *See* Meares, Katyal & Kahan, *supra* note 215, at 1195 (“individuals focus on three factors: standing, neutrality, and trust”); Meares, *supra* note 55, at 412-13 (“individuals may gauge how they are perceived and treated by their government by three factors: standing, neutrality, and trust.”); Meares, *Legitimacy & Law*, *supra* note 28, at 403-04 (“individuals focus on three factors: standing, neutrality, and trust”). “By standing, researchers are referring to indications that the authority recognizes an individual’s status and membership in a valued group, such as polite treatment and treatment that accords dignity and respect, such as concern for rights. Neutrality refers to indications that decisions in which the perceiver is not made to feel as if she is less worthy than others because of bias, discrimination, and incompetence. And trust refers to the extent to which a perceiver believes that the authority in question will act fairly and benevolently in the future.” Meares, *Legitimacy & Law*, *supra* note 28, at 403-04. This passage is repeated verbatim in Meares, Katyal & Kahan, *supra* note 215, at 1195, and with minor changes in Meares, *supra* note 55, at 412-13 (“‘Standing’ refers to an individual’s membership in a social group. If the group is treated with dignity and respect, the individuals are likely to conclude that the authority recognizes their membership and status within the group. ‘Neutrality’ refers to the absence of bias or discrimination against the group and suggests that different groups will be treated alike. ‘Trust’ is the individual’s belief that the authority will act not only fairly but also predictably in the future.”).

²⁸⁹ *See* Meares, *supra* note 55, at 413.

²⁹⁰ FUNG, *supra* note 213; *see also* Fung, *supra* note 286.

The goal is to create “*preventative partnerships*”²⁹¹ in which police enlist community help in responding to crime rates and adapting to the new realities of crime. So long as the police partner with the community to create substantive criminal law or identify the targets of policing, then discretion is appropriately constrained. As NYU Law School criminologist David Garland describes, in his magisterial discussion of changes in policing and punishment over the past thirty-five years, the buzz words for this form of organization are: “‘partnership,’ ‘public/private alliance,’ ‘inter-agency cooperation,’ ‘the multi-agency approach,’ ‘activating communities’...and the ‘co-production of security’”:²⁹² all of these emphasize that crime control requires a joint effort, whether between criminal justice agencies themselves, or those agencies and the public. Hand in hand with this emphasis on pooling of resources is a focus on responsiveness and reflexivity, both at the institutional and community levels.²⁹³ Throughout this changed approach to crime control, state organizations retain a certain primacy, but operate to steer, rather than carry out, the functions of crime control: “[t]he state’s new strategy is not to command and control, but rather to persuade and align, to organize, to ensure that other actors play their part.”²⁹⁴

Local community participation at the point of legislation — creating the various local ordinances and other “laws on the books” used to establish youth curfews or enjoin pan-handling — that the police then enforce, is formally legitimate in that participation in the legislative process is insufficient to ensure that the norms as legislated are substantively justified.²⁹⁵ Police reciprocation and respect at the point of enforcement also provides a formally legitimate justification: it is independent of the substantive outcome²⁹⁶ and depends upon the manner in which the government interacts with its citizens or the larger groups to which they belong or with which they identify.²⁹⁷

²⁹¹ GARLAND, *supra* note 105, at 16.

²⁹² *Id.* at 124.

²⁹³ *See, e.g., id.* at 117 (“bureaucracies of the criminal justice system have had to become more responsive, more attuned to the interests of individual consumers and stakeholders, and less assured in their definition of what constitutes the public interest.”).

²⁹⁴ *Id.* at 126.

²⁹⁵ *See* Solum, *supra* note 19, at 265-67. Participation may, however, ensure a substantively justified *institution*, as democratic participation ensures that certain legislative processes are substantively justified as deliberative bodies. The substantive legitimacy of a deliberative, legislative body does not guarantee that it will enact substantively legitimate — that is, fully justified — laws.

²⁹⁶ Meares, *Legitimacy & Law*, *supra* note 28, at 402.

²⁹⁷ *See* Meares, Katyal & Kahan, *supra* note 215, at 1195; Meares, *supra* note 55, at 412-13; Meares, *Legitimacy & Law*, *supra* note 28, at 403-04

Social norms theorists often provide what appears to be an aesthetic goal for executive encounters with the public: the police embark on a “charm offensive” in which they are more “polite” to arrestees,²⁹⁸ in order to replace signals indicating government disinterest with those expressing government interest²⁹⁹ and to persuade communities that they are being policed for their own benefit.³⁰⁰ Substantively legitimate programs of community policing, however, require more than polite interactions between police and public during their various encounters on the street. Rather, preventative partnering requires some more thoroughgoing effort to generate community interest and facilitate police-public interactions. This is more than a matter of mere politeness: it requires a revolution in police civic engagement.³⁰¹

B. Reframing the Issues

The problem facing liberal legal theories depending upon a due-process critique is that the lack of animus at the input-end of both legislation and enforcement renders the process of legislating and policing formally legitimate. From a rule-based point of view, the police and the courts are required to follow the law. So long as there was no procedural impropriety in the law-creating process, the substantive moral, political, economic, etc., effect of the law is immaterial. Any challenge to the law must usually rest upon the procedure by which it was enacted, not the value of the norm as enforced. The absence of animus operates to undermine the rule-based, legal liberal claim of illegitimacy.

The problem facing Kennedy and Stuntz, as well as social norms theorists, is, however, twofold: first, as a sociological matter, the communities perceive differences in enforcement as unjust; and second, as a normative matter, these differences are in fact substantively unjust: the assumptions underlying both legislation and enforcement have changed to such a degree as no longer to provide a full justification for the laws.

It turns out that the addictive quality and crimogenic effect of crack is little different from powder,³⁰² and the remedy of mass incarceration is intolerable.³⁰³ The justifications for disparate penalties on crack cocaine users

²⁹⁸ Meares, Katyal & Kahan, *supra* note 215, at 1195, 1197; Meares, *Legitimacy & Law*, *supra* note 28, at 403.

²⁹⁹ Livingston, *supra* note 74, at 586.

³⁰⁰ See Meares, *supra* note 55; Meares, *Legitimacy & Law*, *supra* note 28, at 402-03; Meares, *Social Organization*, *supra* note 10, at 214.

³⁰¹ FUNG, *supra* note 213.

³⁰² Joseph E. Kennedy, *Drug Wars in Black and White*, 66-SUM LAW & CONTEMP. PROBS. 153, 178-79 (2003).

³⁰³ TONRY, *supra* note 1, at 97 (“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

— an exercise in moral education;³⁰⁴ “that crack use inevitably destroyed the lives of those using it”;³⁰⁵ that the use of crack “was expanding beyond the ghetto” into the white community;³⁰⁶ “that blacks as a class may be helped by measures reasonably thought to discourage [crack use]”³⁰⁷ — no longer apply.³⁰⁸ The only reason that appears to explain the *continued* attitude to the drug policy is a race-based one.³⁰⁹

The liberal emphasis on disparate outcomes identifies a real problem; the different interests and priorities of the legislative and target communities. The latter does not experience the brunt of the enforcement practices, negative or positive, and so remains free to ignore them. Accordingly, the formal illegitimacy inheres, not in some race-based animus *motivating* legislation and enforcement, but in the discovered substantive illegitimacy of that legislation combined with a formal inability to *cure* the substantive problem. If the process is illegitimate, that is not due to motivational animus but “democratic domination” of the target community by some other group — a group that does not care what happens to the target community and refuses or neglects to re-legislate the malign, illegitimate norms.³¹⁰

This malign neglect presents a serious legitimacy problem: if the law is in fact, illegitimate, why should anyone follow it? It would be morally wrong to do so, unless the weight of some (moral) obligation to obey the law trumps the public’s obligation to avoid committing a moral wrong.³¹¹ Although the police and courts are required to enforce formally legitimate norms, the public’s obligation to obey the law is dependant upon the substantive legitimacy of the laws that are enacted.³¹² If the government does not repeal a law it knows is substantively illegitimate, that suggests — as a sociological and evaluative matter — that the government is willing to act immorally. And if the law is

order to reinforce existing norms of young, mostly majority people.”). *See id.* at 123 (“The willingness of the drug war’s planners to sacrifice young black Americans cannot be justified.”)

³⁰⁴ TONRY, *supra* note 1, at 97.

³⁰⁵ Kennedy, *supra* note 302, at 178.

³⁰⁶ Sklansky, *supra* note 250, at 1294.

³⁰⁷ Kennedy, *State & Criminal Law*, *supra* note 3, 1268.

³⁰⁸ *See* Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 745-736 (2003) (noting that Congressional Black Caucus, NAACP, Urban League and U.S. Sentencing Commission “found that there was little rationale” for the differential treatment of crack cocaine). Justice Stephens, in remarks to the American Bar Association, has made a similar point about mandatory minimum sentences.

³⁰⁹ *See* Sklansky, *supra* note 250, at 1294.

³¹⁰ *See* Butler, *Jury Nullification*, *supra* note 6 at 711 (citing DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 177 (3d ed. 1992))

³¹¹ Hence, the classic maxim of natural law theory coined by Thomas Aquinas and most recently elaborated by John Finnis, *lex iniusta non est lex*. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

³¹² *See, e.g.,* RAZ, *supra* note 113.

targeted only at particular citizens, the government acts in a doubly illegitimate manner by enforcing substantively unjust norms in a formally discriminatory manner.³¹³

The existence of a legitimacy crisis thus hinges on the trumping of formal legitimacy by substantive illegitimacy sufficient to undermine some general public respect for the legal system. For a discrete patchwork of communities throughout the nation, the government has, through disparate police practices tied to a history of racial discrimination, already forfeited that respect and is now (paradoxically) trying to regain it through the disparate enforcement of unjustified and substantively illegitimate laws.³¹⁴

Both Stuntz and Kennedy acknowledge the difficulty of finding some effective solution to the legitimacy crisis. They adopt the approach recommended by President Grant on the occasion of his First Inaugural Address: “Laws are to govern all alike — those opposed as well as those who favor them. I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”³¹⁵ Stuntz expressly and Kennedy more qualifiedly endorse a leveling up of crime enforcement so that rich, suburban whites are policed in the same manner as poor urban African Americans. I, however, believe as a practical matter that such an approach is politically unlikely and normatively unnecessary.

Social norms theories face a slightly different objection. They rely upon indicia of increased local minority participation to justify the process that produces youth curfew and anti-gang ordinances. There is, however, a somewhat complex relation between legislation, law enforcement, and legitimacy. Even at the local level, the crime-ridden neighborhood may be separated from the body politic in a variety of ways, including flight of the more affluent members of the community, school zoning, and incarceration — all of which reduces the crime-ridden community’s social and legislative capital (and places in question the motives of the fleeing, zoning, affluent community).

As Kennedy³¹⁶ Mears,³¹⁷ and others have noted, the African American community is not a monolith: “the stereotyping of African Americans generally, and African American men in particular, as criminals leads to distrust within communities — Reverend Jesse Jackson is not unique among

³¹³ See Butler, *Jury Nullification*, *supra* note 6.

³¹⁴ Or only partially justified, and then only from the point of view of a legal system that has historically forfeited its claim to treat minorities in an equal and so formally legitimate manner.

³¹⁵ Ulysses S. Grant, First Inaugural Address (March 4, 1869).

³¹⁶ Kennedy, *State & Criminal Law*, *supra* note 3.

³¹⁷ Meares, *Place & Crime*, *supra* note 5, at 689-90.

African Americans in fearing victimization by young African American men.”³¹⁸ Social and class differences may separate geographically proximate and racially comparable communities.³¹⁹ Those who bear the brunt of crime may not be those who bear the brunt of policing, and vice versa. Rather, it may be more affluent communities on the fringes of disorderly ones — the “next-door” neighborhoods —that are able to legislate laws targeted at the neighborhood level.³²⁰

Youth curfews and anti-gang ordinances are, on this explanation, popular because they reflect adjoining, relatively affluent beliefs about their next-door neighborhoods. The perception of poor urban youth as inherently dangerous then justifies the targeting of such individuals by the criminal justice system, although better, more effective policies may be available. Fear of next-door neighborhoods may militate against social welfare policies because the target community is characterized part of the undeserving poor.³²¹ That judgment in turn depends upon the social norms used to categorize and evaluate such communities as using the crime-centered assessments of risk, deviancy, and desert.³²²

Both the legislative and executive formal elements of legitimacy, however, depend upon substantive considerations of reciprocity between government and citizen. Under the notion of empowered democracy,³²³ the law, if it is to be substantively legitimate, depends upon a reciprocal attitude of respect from the government combined with group participation in a neutral legal process.³²⁴ Reciprocity indicates that the government takes seriously the citizen’s participation in the process. At the level of legislation, the process is substantively legitimate if it does in fact maximize public participation in the

³¹⁸ Meares & Kahan, *Norms*, *supra* note 8, at 818; *see also* Meares, *Social Organization*, *supra* note 10, at 218 (“Reverend Jesse Jackson is not unique among African Americans in fearing victimization by young African-American men. Neighborly distrust leads to greater atomization of African Americans in poor communities.”).

³¹⁹ *See* Meares, *Social Organization*, *supra* note 10, at 218.

³²⁰ *Id.*

³²¹ *See, e.g.* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688 (1988); Dorothy Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994).

³²² Jonathan Simon suggests that the criminal law now has a central role in the political creation and organization of communities. The process of legislating criminal laws encourages a form of political participation premised upon the idealization of criminal and victim, *see* Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035, 1042 (2002); Jonathan Simon, *Megan's Law: Crime And Democracy In Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1125-30 (2000).

³²³ FUNG, *supra* note 213.

³²⁴ *See, e.g.* Meares, *Legitimacy & Law*, *supra* note 28, at 402-03; Meares, *supra* note 55, at 412-13; Meares & Kahan, *Norms*, *supra* note 8, at 832.

creation and enforcement of criminal-law norms through a fair and inclusive process. The goal of the process is to increase formal legitimacy through more and devolved participation in the regulatory process, and so increase the underlying substantive legitimacy of the institution. But, it bears repeating, a formally legitimate process of legislation by a substantively justified institution may still produce substantively unjust outcomes, whether deliberately or through neglect.

Paul Butler makes precisely this demand for the substantive legitimacy of the democratic process. For Butler, formal legitimacy is unimportant if it is no more than propaganda operating to induce compliance to substantively unjust drug laws in a discriminated-against community. In such circumstances, he suggests, African American are substantively justified in engaging in direct action to replace or reject substantively unjust laws,³²⁵ and has famously (or notoriously) argued for jury nullification of non-violent drug crimes because of the race-based effect of the War on Drugs.³²⁶ Butler frames this type of disregard for unjust laws as a sort of “affirmative action” or, in my terms, substantive justice for poor, African American drug users.³²⁷

Thus, even where the politically active residents of the target neighborhood endorse measures including curfews and loitering ordinances, it is not clear that they do so on the self-understanding that these are the best solutions to their problems. Local residents may generally agree that the solution to gang activity or juvenile drug dealing is to increase child-care facilities and after-school programs and engage in mentoring activities with at-risk youth. Due to a lack of social capital such options, and others like them, are unavailable.³²⁸ Extreme measures may appear inviting, especially when it is clear that these are ones the executive will, in fact, enforce.³²⁹ Such measures may appear especially attractive when the more socially engaged members of the target neighborhood increase their “social capital”³³⁰ across communities through their sponsorship of such measures.³³¹ Participation alone, however, neither

³²⁵ See Butler, *supra* note 308, at 737 (“Minority participation in pluralist politics can, of course, take the form of voting, running for office, or making campaign contributions, but it is not limited to those forms of involvement. Minority participation can also take the form of demonstrations, boycotts, and riots.”) (quoting Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1992- 93 (1990)).

³²⁶ See Butler, *Jury Nullification*, *supra* note 6; Butler, *supra* note 5; Paul Butler, *Race-Based Jury Nullification: Surrebuttal*, 30 J. MARSHALL L. REV. 933 (1997).

³²⁷ Butler, *Affirmative Action*, *supra* note 6.

³²⁸ Butler, *supra* note 5, at 156.

³²⁹ Fung would suggest that part of empowering local communities is alerting them to the availability of these other options. Fung, *supra* note 213; see also Fung, *supra* note 286. As I make clear in the next section, the police may have a vested interest in not so doing.

³³⁰ See, e.g. Meares, *Legitimacy & Law*, *supra* note 28, at 402-03.

³³¹ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

justifies such laws nor suggests that they are optimal solutions to the problem at hand.³³² Instead, the solution lies in the concept of role-based authority.

V. DISCRETION, AUTONOMY, AND HIGH-STAKES ESCALATION

The real issues in the debate between social norms theorists and legal liberals are the extent to which the criminal law is substantively legitimate and the manner in which police power is responsive to local demands to reject enforcement of substantively illegitimate laws. Social norms theorists claims that locally rather than remotely generated and enforced standards provide the solution to the community control of law-enforcement. There are, however, inherent difficulties in that form of regulation, ones that can be explained, ironically enough, using the basic concepts of social norms theory. Even at the local level, so long as police are motivated by their own internal and local values different from those entertained by the community, they are likely to respond to general standards in a manner different from the community. The likelihood that the police will then willingly separate investigative and preventative roles is reduced, and the goal of empowering the police to engage in low-level interactions serve only to increase the arsenal available for the police to wage the high-stakes policing that is part of the War on Drugs.

The social norms approach to legitimacy — empowered democracy — relies heavily upon an interest in local governance and neighborhood social organization; not all social norms theories take a similar interest in police self-governance and police organization.³³³ There are a range of true believers and fellow travelers, variously described as legal pragmatism,³³⁴ norm focused scholarship”; the “New Chicago School”;³³⁵ and the “new discretion scholars,”³³⁶ each using the concept of social norms for different purposes.

³³² In the long run, it may serve to undercut the authority of the enacting social authorities among the target group now feeling the brunt of the policy. Participation is not, in itself, a guarantor of substantive legitimacy. See, e.g., Solum, *supra* note 19, at 265-67; see also Harcourt, *supra* note 7, at 179 (discussing need for more research into which of the social norms programs do in fact work).

³³³ Debra Livingston is an exception in this regard. See Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653 (2004); Livingston, *Caretaking*, *supra* note 10.

³³⁴ Simon, *supra* note 7, at 48-74 (describing social norms theorists as legal pragmatists).

³³⁵ Harcourt, *supra* note 7.

³³⁶ Cole, *Discretion*, *supra* note 8, at 1062. Cole emphasizes discretion both because it is a common response by the various scholars under discussion, though particularly the Chicago and Columbia schools. His response is to control discretion through clear, mandatory norms. He thus participates in a tradition of what might be called “legalism scholars” that would include LaFave, Amsterdam, and Davis. Because I suggest that the “newness” of the new discretion is its focus on community standards of behavior — social norms — and am sympathetic to, but dubious of, the efficacy of legalistic responses as the only solution to the issues he identifies, I prefer to emphasize the social and normative aspects of the scholarship.

The distinction I wish to draw in this section is between those scholars predominantly associated with the New Chicago School, particularly Tracey Meares and Dan Kahan, who believe low-level policing is a panacea for negative impact of the War on Drugs and those others, predominantly Debra Livingston but also William Stuntz,³³⁷ who have reservations about that solution.

New Chicago theorists appear interested in the internal workings of the police, if at all, primarily to show that departments or officers are not motivated by racial animus. Their real interest, however, is in community social organization. Policing is to be at the service of local communities free to bargain for neighborhood standards and targets of policing without county, state, or national interference. Livingston is far more interested in the variety of roles allotted to the police, the tendency of those roles to blur, and the different constraints — both institutional and constitutional — upon those roles. In their different ways, these social norms theorists demand, not for freedom from rule-based constraints, so much as a recalibration of control through the separation of distinct police roles: investigation and prevention.

A. Discretion and Autonomy: Empowering Local Democracy

No matter the source or sweep of legislative norms (whether at the neighborhood, city, county, state, or national level) for rules to guide executive behavior they must be both comprehensible without further instruction³³⁸ and the executive must enforce them in a “transparent” manner — that is, without adding its own values into the mix. The social norms promotion of “discretion” and rejection of broad rules should thus be recast as a distrust of, not rules generally, but rules with a certain source and scope.

The social norms thesis is essentially that rule-based constraints on law-enforcement only work if they are sufficiently local, specific, and contextualized.³³⁹ General norms of constraint — those with constitutional force and national sweep — ought to be used only to exclude impermissible values such as racial bias in the legislation and enforcement of laws.³⁴⁰ Where the police are concerned, rather than operating to constrain the scope of authority, general norms are better used to carve out a range of positive powers

³³⁷ Who might best be characterized as a fellow traveler.

³³⁸ According to H.L.A. Hart, an essential feature of systems of law is their ability to guide conduct by providing “general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose.” HART, *supra* note 31, at 121. Lon Fuller’s concept of “social ordering” makes substantially the same point. See LON L. FULLER, *THE MORALITY OF LAW* (1964); Lon L. Fuller, *The Forms And Limits Of Adjudication*, 92 HARV. L. REV. 353, 357 (1978).

³³⁹ Meares, *Place & Crime*, *supra* note 5, at 690.

³⁴⁰ Livingston, *Communities*, *supra* note 10, at 608-27; Meares, *supra* note 77, at 1344-47.

for the police. What social norms scholars propose is not so much discretion as autonomy: not the absence of rules regulating and constraining behavior, but the presence of social and institutional guidelines, regulations, and norms defining (positively) the role of the police. Their point is to relocate of the power to generate those rules from inside to outside the law — from legal to social norms — and down from national, state, or county authorities and into the local community. Empowered autonomy envisages the police and community in partnership negotiating law-enforcement strategies as independent, self-directed entities each with respect for the dignity and identity of the other.³⁴¹

This feature of guidance by rules results in what might be called a locally rule-based approach on the part of social norms theorists and undermines the claim that they approve thoroughgoing police discretion. Both Meares³⁴² and Livingston³⁴³ in fact support constraint of police conduct through local guidelines of the sort recommended by Amsterdam and other legal liberals.³⁴⁴ While law enforcement officials can always choose to interpret the local law enforcement initiatives in idiosyncratic ways,³⁴⁵ transparent guidelines can provide some limit on police power, and can increase legitimacy through ready availability and good-faith enforcement.³⁴⁶

National, state, or even county control³⁴⁷ rule-based constraint pertain only to certain general participation-promoting (and so anti-discrimination) values.³⁴⁸ Police authority is rather to be more precisely limited by specific, local constraints upon permissible action, developed in partnership with or responsive to the local community and its standards.³⁴⁹ That partnership posture promotes institutional autonomy. The police are required to negotiate with local communities as allies, experts, and advisors, and on occasion act so

³⁴¹ KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005).

³⁴² Meares, *supra* note 77, at 1348-39.

³⁴³ See Livingston, *Communities*, *supra* note 10, at 658-663 (“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”).

³⁴⁴ See *id.* at 659-660 (comparing legal liberal emphasis on guidelines with social norms approach) (citing LAFAVE, *supra* note 171; Davis, *supra* note 171, at 137-38; Amsterdam, *supra* note 164, at 423; Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500, 500-01 (1971); Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. MERCY L. REV. 361, 365366 & n.33 (1986).

³⁴⁵ See, e.g., Livingston, *supra* note 27, at 173; Livingston, *supra* note 74. The worry here is that neutral laws cannot constrain police discretion, and that the police can always “interpret” laws instead of simply following them.

³⁴⁶ See Livingston, *supra* note 74.

³⁴⁷ See Meares, *Place & Crime*, *supra* note 5.

³⁴⁸ Meares, *supra* note 77.

³⁴⁹ See Meares, *Place & Crime*, *supra* note 5.

as to overcome local self-interest or bias.³⁵⁰ The goal is to develop institutional self-conceptions (and understandings of the relationship between law-enforcement and community) that reorient policing towards a new, more preventative role.³⁵¹

The foundations of this process of community-police regulation — dignity, respect, and trust — are captured by the concept of autonomy. Autonomy has both a social and a normative strand: it accepts that individuals, institutions, and communities are socially situated within a history and locality, but recognizes that these entities can take a range of evaluative attitudes to their social situation that have normative consequences. Accordingly, autonomous or autonomy-respecting relationships consist in dialogue rather than demand, appreciative that the other has certain goals and identifications that must be respected even if they are ultimately to be rejected.³⁵²

This concept of two autonomous entities engaged in mutually beneficial dialogue fits the community-creating form of policing premised on reciprocal relationships of trust and respect.³⁵³ Recently Dan Kahan has suggested that, “individuals in collective action settings behave not like rational wealth maximizers but rather like moral and emotional reciprocators. When they perceive that other individuals are voluntarily contributing to public goods, most individuals are moved by honor, generosity, and like dispositions to do the same.”³⁵⁴ In an atmosphere of distrust, individuals will engage in non-cooperation, even at some cost to themselves.³⁵⁵ In the context of public-order policing, the issue is whether “community residents and police [will] contribute to the collective good of cooperation and respect or instead ... approach one another with suspicion and animosity.”³⁵⁶ Order-maintenance policing thus directly and indirectly benefits communities through creating trust between police and residents and promoting guardianship and friendship networks that better enable the public to police

³⁵⁰ See Livingston, *supra* note 74; FUNG, *supra* note 213.

³⁵¹ See, e.g., Livingston, *supra* note 27; Livingston, *supra* note 74.

³⁵² See APPIAH, *supra* note 341.

³⁵³ Meares, Katyal & Kahan, *supra* note 215.

³⁵⁴ Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 368-69 (2002). See also Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71-72 (2003) (hereinafter Kahan, *Logic of Reciprocity*); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513 (2002) (hereinafter Kahan, *Collective Action*).

³⁵⁵ Kahan, *Logic of Reciprocity*, *supra* note 354, at 71-2; Kahan, *Collective Action*, *supra* note 354, at 1514-15.

³⁵⁶ Kahan, *Collective Action*, *supra* note 354, at 1514-15. Kahan continues, “As in other collective-action settings, individuals within these environments behave like moral and emotional reciprocators, contributing or not contributing to the collective good depending on whether they perceive others to be contributing.” *Id.*

themselves without incarcerating large numbers of minority drug users as part of the War on Drugs.³⁵⁷

In their preventative role, police on the beat are expected to engage in a large degree of self-regulation, eschewing the temptation to escalate low-level encounters into a punitive style of drug enforcement.³⁵⁸ Legitimacy thus depends not upon rule-based constraint but upon police willingness to adopt a limited, preventative, and community oriented role. Citizen review operates at the beginning of the process, to develop appropriate guidelines or identify places and people in need of increased police care, and continues not as a post-hoc sanction to punish police misconduct, but as a means of evaluating and redirecting police performance and police-community goals.³⁵⁹ The operating principles are “persuasion”³⁶⁰ and “[t]rust”...the individual's belief that the authority will act not only fairly but also predictably in the future.”³⁶¹ The police are therefore to be treated with the same respect and autonomy with which they are expected to treat the public.

B. Police Enforcement Practices 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 is that divergence between general and local norms may be replicated at the local level by divergence between local and institutional norms. In fact, the concepts of social meaning and social influence provide a ready account of such variances, and experience suggests the profound consequences even when policing “only” low-level crime.

To elaborate the manner in which local police and community interests may diverge despite local partnerships, it is worth reminding ourselves of some of

³⁵⁷ See *id.* at 1529; Meares, *Policing*, *supra* note 15, at 1606; Meares, *Social Organization*, *supra* note 10, at 223-24; Meares, *Place & Crime*, *supra* note 5, at 699; Meares, *Connections*, *supra* note 10, at 591-92.

³⁵⁸ Livingston, *supra* note 27, at 173 (noting that police “pursue their own predilections in targeting people for enforcement”).

³⁵⁹ Livingston, *supra* note 333.

³⁶⁰ Meares, *Legitimacy & Law*, *supra* note 28, at 404; Meares, *supra* note 55, at 413 (“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.”)

³⁶¹ Meares, *supra* note 55, at 412-13.

the ways in which social norms theorists believe norms are internalized, and to place them in the context of theories of norms more generally. While that account provides further ammunition against rule-based constraints upon policing, it also suggests that the police are likely to take advantage of their ability to shift roles when engaging in public order policing to suit their own administrative agenda. Such considerations do not undermine the concept of role-based restraints but suggest a radical re-thinking of the how, if not the why, of community policing.

1. Social Meaning, Social Influence, and Institutional Conduct

The concept of social meaning suggests that, generally, we understand a norm against the background set and structure of norms that we have variously internalized.³⁶² The manner in which the norm is placed within an agent's set of values, goals, and beliefs — its social meaning — may be different from its legislated meaning — the values, goals, and beliefs entertained by the law-maker. The intermediary of social meaning can break link between legislated norms and social norms and render opaque the manner in which the legislated norm will be adopted by the prosecutor or the police. The relative social influence of the norm determines how forceful and widespread such a rupture will be.

The problem is that the social meaning of a norm — its value for a particular subject — generates different degrees of social influence. Legal liberal solutions to executive law enforcement, though all too aware of administrative discretion in law enforcement, have tended to rely upon rules to constrain discretion and have ignored the ability of rules alone to create it. As we have seen, rule-based constraints on the scope of authority operate through transparent, prospective rules to limit a decision-maker's discretion. Rules

³⁶² The role that the “internalization” of norms plays in the theory may be illustrated by Tracey Meares's distinction between justified and legitimate authority: legitimacy concerns the authority's right to posit norms; justification concerns the agent's personal morality. Meares, *Legitimacy & Law*, *supra* note 28, at 399; *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-4 (1990). Justified authority is a “more powerful normative reason for compliance” than legitimate authority, Meares, *Legitimacy & Law*, *supra* note 28, at 399; Meares, *supra* note 55, at 410, presumably because justified authority is “internalized” as part of the agent's personal morality whereas legitimate authority need not be. “[T]he individual who complies for normative reasons does so because she feels an internal obligation to do so,” rather than on the basis of some external stimulus. Meares, *Policing*, *supra* note 15, at 1616. *See also* Meares, *Social Organization*, *supra* note 10, at 214 (compliance with norms based on agent's internal perception of government legitimacy). The manner in which Meares distinguishes legitimate from justified authority is substantially identical to the analytic description. The concepts of legitimacy and justification are normative; they entail a particular, internal attitude on the part of the law's subjects. *See, e.g.*, Meares, *supra* note 20, at 864-65; Meares, *Place & Crime*, *supra* note 5, at 670-80.

can, however, generate discretion in a variety of ways: more general norms tend to flatten nuances between different subjects or situations, including greater numbers of people within the scope of the norm;³⁶³ competing intra-institutional norms may conflict, causing ambiguities in the scope of authority; social or other institutions norms may define the point and practice of an institutions norms in ways not contemplated by or in conflict with the institutional norms.

As recognized in recent discussions of administrative systems: the administration of norms often departs significantly from the purposes contemplated during the legislative process not because there are too few norms controlling conduct, but too many.³⁶⁴ Where rule-based grants of authority are structured by a series of administrative norms that arise from executive custom or are enacted by the executive agency itself, the administrative official responds to executive rather than legislative or public regulations (if, indeed there are any available). These may include the operating procedures regulating the day-to-day practice of the executive body, training manuals, and directives from senior to junior officials.³⁶⁵ Some may directly enforce legislative norms; others may have a less direct impact, channeling the resources and energies of the enforcement branch in ways that bolster or undermine legislative initiatives. Other practices may be unsystematic and *ad hoc*, dependent upon the discretion of individual officials — police officers or prosecutors.³⁶⁶ In general, they will help to determine the official's and the institution's sense of its role and so determine the self-conception of the scope of its authority: a self-conception that the public and courts may come to credit.

As Debra Livingston argues, more and clearer legislative norms do nothing to alter the administrative discretion of law enforcement agencies.³⁶⁷ In part, this may be due to what Jamison Colburn has called the “cascading” effect of administrative regulations.³⁶⁸ The executive authority to interpret laws and

³⁶³ From an anti-discrimination perspective, this may be a good thing; Meares certainly thinks that greater generality across groups has important consequences for signaling race-neutrality. See Meares, *supra* note 77, at 1344-49.

³⁶⁴ See also Jamison E. Colburn, “Democratic Experimentalism”: *A Separation of Powers for Our Time?*, 37 SUFFOLK U. L. REV. 287, 335-42, 383-92 (2004).

³⁶⁵ For some such body of rules, see Yale Kamisar, *Remembering the “Old World” of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537 (1990) (discussing absence of rules of this type in pre-1960s New York State).

³⁶⁶ See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO STATE L.J. 1479, 1561 (2004). See also Colburn, *supra* note 364 at 335-42, 383-92.

³⁶⁷ See, e.g., Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001) (discussing the manner in which police training led officers to violate suspects *Miranda* rights).

³⁶⁸ Colburn, *supra* note 364 at 335-42, 383-92.

determine the manner of their enforcement generates a range of practices and procedures that may owe nothing to the purposes of the original legislation and everything to the administrative imperatives of the regulatory agency.³⁶⁹ 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 the concepts of social meaning and social influence integral to the social norms explanation of regulated intentional conduct.

2. Policing Enforcement Practices and Externalization of Legal Norms

Indeed, the executive branch may even adopt an “external” or “prudential” attitude to legislation as a means of increasing its discretion. Rather than internalizing legislative norms as intrinsically or instrumentally worthwhile, the executive may be interested only in the range of sanctions consequent to violating the norms. One interesting example of this is the New York City police force's attitude to Supreme Court's decision in *Mapp v. Ohio*,³⁷⁰ which applied the Fourth Amendment to the states. As Yale Kamisar has explained, New York City Police Commissioner Michael Murphy's reaction to the different legal standards pre- and post-*Mapp* offers a striking demonstration of the manner in which a rule determining the culpability and sanction for non-conforming conduct may be regarded, from the external perspective, as a behavior-guiding rule.³⁷¹

Prior to *Mapp*, New York State had adopted a rule that prohibited illegal searches and seizures as a violation of civil and criminal law³⁷² but permitted the prosecutor to use illegally seized evidence.³⁷³ The police commissioner considered that the pre-*Mapp* rule — which determined the *consequences* of unlawful conduct — could be used as a rule *guiding* that conduct. This administrative refusal to internalize and apply legislative norms has a legitimacy cost: it undermines the relationship between state and citizen.³⁷⁴

³⁶⁹ *Id.*

³⁷⁰ 367 U.S. 643 (1961).

³⁷¹ See Kamisar, *Defense*, *supra* note 124; Kamisar, “*Old World*” *Criminal Procedure*, *supra* note 153 at 559. *Defore*, 150 N.E. 585, established the New York State law on the admissibility of illegally seized evidence applicable prior to *Mapp*.

³⁷² See *Defore*, 150 N.E. at 586-87 (“The officer might have been resisted, or sued for damages, or even prosecuted for oppression. [Citation omitted] He was subject to removal or other discipline at the hands of his superiors. These consequences are undisputed.”).

³⁷³ See *Defore*, 150 N.E. at 589.

³⁷⁴ See, e.g., McGowan, *supra* note 166, at 667 (discussing importance of correspondence of police rules of conduct with community sentiment) (citing O.W. HOLMES, *THE COMMON LAW* 41 (1938) “The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, right or wrong.”).

The law as published precluded various forms of police conduct; the law as enforced applied a much different standard (the rule operated as a license rather than a prohibition).³⁷⁵ The transformation of prohibition into license is not part of the participative legislative process — in fact, it undermines it and replaces it with a set of non-public police tactics designed to frustrate the law. 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.³⁷⁶

Two recent Supreme Court cases, *Chavez v. Martinez*,³⁷⁷ and *Missouri v. Seibert*,³⁷⁸ demonstrate that the prudential attitude to norms is of current vintage and 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. The executive, role-based, crime-control interest in obtaining the information trumped a proper understanding of *Miranda v. Arizona*³⁷⁹ as presenting a rule-based prohibition on non-consensual interrogations.³⁸⁰ Instead, a variety of state and federal law-enforcement training programs³⁸¹ "disfigure[d]"³⁸² the Court's reasoning

³⁷⁵ Note that the Fourth Amendment's discussion of searches and seizures is framed as an express prohibition: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." U.S. Const. 4th Adt.

³⁷⁶ 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, *supra* note 153, at 560.

³⁷⁷ 123 S. Ct. 1994 (2003).

³⁷⁸ 124 S. Ct. 2601 (2004).

³⁷⁹ 384 U.S. 436 (1965).

³⁸⁰ Despite the Court's reiteration of the constitutional foundation of the warnings in *Dickerson v. United States*, 530 U.S. 428 (2000). See *Missouri v. Seibert*, Brief Amici Curiae of Former Prosecutors, Judges and Law Enforcement Officials, Supporting Respondent (filed October 8, 2003). That brief was filed by former prosecutors, including Charles D. Weisselberg, Professor of Law at the University of California School of Law (Boalt Hall) Berkeley, and Stephen J. Schulhofer of NYU Law School's Brennan Center for Justice. 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 5. Furthermore, in his opinion respecting denial of sua sponte call for full court 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 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.*

³⁸¹ See *Seibert*, 124 S. Ct. at 2608-09, 2609 n.2 (discussing training materials including Police Law Institute, Illinois Police Law Manual; California Commission on Peace Officer

in *Oregon v. Elstad*,³⁸³ treating that Court's tort-style causation analysis instead as a prescription for how to avoid exclusion of un-Mirandized confessions.³⁸⁴ Indeed, one of the major worries identified by critics of the police procedures used in *Seibert* was the manner in which state and national training programs undermined local police guidelines or standards.

Whether one regards the *Elstad* rule as a prohibition or permission upon un-Mirandized interrogations depends upon factors internal to the police investigative role. While such an executive transformation of legislative norms may be regarded by some as a perversion of the law, it may be regarded by others as justified given the exigencies of crime fighting. For example, police training videos emphasized that the interrogation is often their "one shot" at solving serious crime.³⁸⁵ The Court's finding of substantive

Standards and Training, Video Training Programs for California Law Enforcement, *Miranda*: Post-Invocation Questioning (broadcast July 11, 1996); D. Zulawski & D. Wicklander, *Practical Aspects of Interview and Interrogation* 50-51 (2d ed.2002)). See also Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 110, 132-139 (1998).

³⁸² *Seibert*, 124 S. Ct. at 2611.

³⁸³ 470 U.S. 298 (1985).

³⁸⁴ *Seibert*, 124 S. Ct. at 2612; 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 367, at 1143-44. See also *Cal. Att'ys for Crim. Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (police officers regularly subverting *Miranda* pursuant to official policy set forth in training programs and materials); *Chavez v. Martinez*, No. 01-1444. Brief Amici Curiae in Support of Respondent 21 (filed October 25, 2002) ("California Supreme Court's disapproval of such conduct had little effect on police training").

³⁸⁵ 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

illegitimacy is supported by the collateral consequences of such interrogations: the “outside *Miranda*” practices followed by police and endorsed by some prosecutors had the effect — of which the police were apparently aware — of keeping defendants from testifying in their own defense for fear of impeachment.³⁸⁶

C. Encounter and Escalation

A consequence of institutional deviation from general norms is that low-level criminal offences have a different “social meaning” for officers and for the local community. Low-level crimes serve as a gateway to investigating higher-level crimes and policing tends to operate through technique of escalation. In fact, the whole direction of policing under the Fourth Amendment is to use low-level encounters to engage the public, then progress through the stages of reasonable suspicion and probable cause to high-stakes interactions resulting in arrest.³⁸⁷ For New Chicago theorists, generally the point is to reorient policing, not solve crime.³⁸⁸ They therefore assume that the police will be willing to tolerate private crime so long as there is public order.

Now, if public order policing works to reduce crime, it does so for one of two reasons: either because the same amount of crime now occurs in an orderly way in a private space; or because the people who would engage in public crime are caught or driven elsewhere. If it is the latter, public order policing

statement and then he tells you where the stuff is, we can go and get all that evidence.

Weisselberg, *supra* note 381, at 110, 135-136.

³⁸⁶ See *id.* at 110, 135-136 (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.”)

³⁸⁷ For an excellent example of the way this “routine” works in the context of traffic stops, see Wayne R. LaFare, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843 (2003-2004).

³⁸⁸ That is certainly Tracey Meares’s orientation, see Meares, *supra* note 77, at 1347; Meares, *Social Organization*, *supra* note 10, at 224; at one point it appears to be Debra Livingston’s. See Livingston, *Communities*, *supra* note 10. Livingston, however, seems most interested in investigative policing when discussing community caretaking. See Livingston, *Caretaking*, *supra* note 10 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 standard for such a suit is high (shocks the conscience) 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.*

works *precisely because of* the escalation effect: policing low-order crime enables high-stakes busts. If it is the former, then what is required is that the police (who recognized through their preventative, public order encounters, that high-stakes crime is occurring) turn a blind eye to crime so long as it is private and orderly. Debra Livingston suggests that the police tend to endorse the latter expectations.

The importance of role-based constraints should now be obvious. It is the conjunction of the War on Drugs' punishment-oriented law enforcement with the police's investigative role that is problematic, not discretion per se. Social norms theories endorse a form of leveling down, not in the rates of policing but in the rates of arrest, prosecution, and incarceration, and believe the police and the public can be bought off by the gains in public order and perceptions of legitimacy. So long as the police can separate their investigative from their preventative or caretaking roles, community policing will help create the trust relations upon which public order policing depends.

Most worryingly for social norms theorists, not only law enforcement but also the court has chosen to understand the type of low-level encounters central to public-order policing as non-coercive and central to the investigatory process. Where social norms theorists 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 police and Court seek to fudge the issue. In a series of cases concerned with traffic stops,³⁸⁹ the Court has removed a series of low-level encounters from the purview of the Fourth Amendment, and permitted the police to search and interrogate motorists and passengers in a manner that quickly escalates, via the "fiction" of consent, into high-stakes drug policing.³⁹⁰ In effect, such cases translated the rationale of *Terry* into the motor-vehicle context and permitted the vast range of low-level offenses, sufficient to render almost any use of a motor vehicle subject to police regulation,³⁹¹ 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.

³⁸⁹ See *Schneekloth*, 412 U.S. 218; *Mimms*, 434 US 106; *Bostick*, 501 U.S. at 457-38; *Ornelas*, 517 U.S. 690; *Robinette*, 519 U.S. at 39-40.

³⁹⁰ Sklansky, *supra* note 151, 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 8, at 1071-73.

³⁹¹ 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) (temporary detention of motorist who the police have probable cause to believe has committed civil traffic violation is consistent with Fourth Amendment) with *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (warrantless arrest for misdemeanor traffic offence is permissible under Fourth Amendment).

1. Role-Confusion and Escalation

The police already perform a vast range of preventative functions in the community. For example, Debra Livingston points out the difference between the police's caretaking and investigative roles.³⁹² The "caretaking functions"³⁹³ include:

a wide range of everyday police activities undertaken to aid those in danger of physical harm, to preserve property, or "to create and maintain a feeling of security in the community." It includes things like the mediation of noise disputes, the response to complaints about stray and injured animals, and the provision of assistance to the ill or injured. Police must frequently "care for those who cannot care for themselves: the destitute, the inebriated, the addicted . . . and the very young." They are often charged with taking lost property into their possession; they not infrequently see to the removal of abandoned property. In those places where social disorganization is at its highest, police are even called upon "to serve as surrogate parent or other relative, and to fill in for social workers, housing inspectors, attorneys, physicians, and psychiatrists." Community caretaking, then, is an essential part of the functioning of local police.³⁹⁴

The caretaking role, she claims, cannot and should not be regulated in the manner of the investigative role: rather, it concerns police intrusions that are generally supported by the community and which ought to be promoted so long as reasonable. Although many of these activities intrude upon privacy rights protected by the Fourth Amendment, they are not motivated by an investigatory interest, and so should be measured by a substantially different set of assumptions.³⁹⁵ Livingston thus contends that the (rule-based) "warrant preference"³⁹⁶ is inapposite when measuring caretaking intrusion.³⁹⁷

Livingston is, however, more ambivalent than Meares and Kahan about the separation of investigative and preventative roles. Clearly, it is hard to draw a bright line between investigation and caretaking: nonetheless, so long as caretaking is properly motivated, Livingston argues, any investigative fruits are fair game for the police.³⁹⁸ In part, Livingston's approach explains her rejection of broad based substantive laws, such as curfews, and demand for

³⁹² See Livingston, *Caretaking*, *supra* note 10.

³⁹³ *Cady v Dombrowski*, 413 US 433, 441 (1973).

³⁹⁴ Livingston, *Caretaking*, *supra* note 10, at 272.

³⁹⁵ *Id.* at 265, 271.

³⁹⁶ Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 203-04 (1993)

³⁹⁷ Livingston, *Caretaking*, *supra* note 10, at, 265-271.

³⁹⁸ Livingston, *Caretaking*, *supra* note 10.

more targeted norms. Livingston supports anti-gang loitering ordinances precisely because they narrowly target, not only the individuals to be policed, but also the officers who do the policing.³⁹⁹ In part, her approach demands a much greater transformation of police administration than that contemplated by Meares or Kahan, accompanied by a variety of mechanisms for oversight and reform.⁴⁰⁰

Nonetheless, Livingston's analysis of the caretaking role paradoxically demonstrates one of the strengths of the liberal legal rule-based approach: while it may not deter police conduct, it certainly operates to preclude some conduct from having legal effect. 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 rule-based approach serves to provide the hard separation of investigative from preventative policing required by the "trust and respect" perspective. 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.⁴⁰¹

2. "No Neighborhood is an Island"⁴⁰²

A further problem for the separation-of-roles requirement is that localities are not hermetically sealed. As the traffic enforcement context makes apparent, low-level policing is not geographically specific in the manner demanded by social norms theorists. Meares critique of legal liberal "county level" solutions to local criminal justice problems⁴⁰³ is totally misplaced in the context of vehicle stops — and vehicles are precisely at the vanguard of drug policing and depend upon the use of low-level encounters.⁴⁰⁴ Just as the techniques used in traffic stops are transferable to pedestrians, so 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, in the airport — that public self-reliance or autonomy from police pressure may be at its weakest. It is here that the polite police "May I" is most likely to obtain grudging consent.⁴⁰⁵

³⁹⁹ Livingston, *Gang Loitering*, supra note 13; Debra Livingston, *Police Patrol, Judicial Integrity, and the Limits of Judicial Control*, 72 ST. JOHN'S L. REV. 1353 (1998).

⁴⁰⁰ See, e.g., Livingston, supra note 27; Livingston, supra note 74.

⁴⁰¹ 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).

⁴⁰² Fung, *Beyond & Below*, supra note 80, at 632.

⁴⁰³ Meares, *Place & Crime*, supra note 5, at 688.

⁴⁰⁴ David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997).

⁴⁰⁵ *Bustamonte*, 412 U.S. at 276 (Douglas, J., dissenting); *id.* at 289 (Marshall, J., dissenting).

The consent doctrine demonstrates the manner in which rule-based constraints upon authority can generate role-based social influence. The police have a narrowly circumscribed authority to search individuals without a sufficient quantum of evidence to suspect criminal conduct. But, by virtue of the generally compliant attitude of the general public, they wield a social influence in excess of their legal influence and so may induce consent against the suspect's interest.

A common explanation of consent to searches is in terms of lack of information backed by intimidation: the failure to alert citizens that they need not consent and are free to leave,⁴⁰⁶ combined with their generalized feelings of coercion during a police encounter, preclude citizens from asserting their rights.⁴⁰⁷ A complimentary explanation based on social influence would suggest that the public afford the officer a social authority that outstrips any granted by the law. Court emphasis on the legal contours of the police role fudges the issue of the legitimate scope of authority in these low-level encounters. A focus on the acts of the police ignores the significance of the encounter for the civilian. The Court's emphasis on politeness in police conduct 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.⁴⁰⁸ 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" — then low-level policing is formally illegitimate. If the targets of policing are not low-level crimes, but rather escalation to engage in high-stakes policing as part of the War on Drugs, then low-level policing is substantively illegitimate as well.

The inevitable result is that minorities translate experiences of being pulled over for "driving while black" to local encounters with police. In other words, disparate policing practices *outside* the neighborhood at the county, state, and national level can undercut minority perceptions of the government's right to legislate criminal norms at the local level.⁴⁰⁹ So long as the channels of transportation are used to engage in 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

⁴⁰⁶ See, e.g., Sklansky, *supra* note 151.

⁴⁰⁷ See, *id.*; COLE, *supra* note 390.

⁴⁰⁸ See Meares, Katyal & Kahan, *supra* note 215, at 1195, 1197; Meares, *Legitimacy & Law*, *supra* note 28, at 403.

⁴⁰⁹ Meares, *Policing*, *supra* note 15, at 1616. See also Meares, *Social Organization*, *supra* note 10, at 214.

ROLE-BASED POLICING

fostering a perception of illegitimacy of government among members of the stigmatized minority group.”⁴¹⁰

Where the police conflate investigative and preventative roles, legal liberals tend to support cutting off the investigative role by rule-based constraints where possible, but mostly by diminishing the amount of policing received by minority communities. This is, however, to leave local communities under-policed. The social norms attempt to separate roles depends upon notions of local autonomy and transparent partnerships and “trust relationships” between the police and the community. Experience and their own concepts of social meaning and social influence suggest, however, that national programs and institutional imperatives urging role-conflation and “escalating up” will trump local community norms.

A different solution is to separate roles by differentiating the individuals and institutions responsible for public order and investigative policing. Let the police engage in investigation and find another group without the personal or institutional motivation to conflate preventative with institutional roles. To avoid the perception of under-policing, that group would have to be visible and associated with municipal or state governments; to engender trust and avoid the perception of over-policing, the group would have to have no role-based investigative authority. While there is no perfect solution to “the central question...: How can we reduce perceived bias without reducing the level of law enforcement in poor black communities?”,⁴¹¹ there are some candidates available to engage in the sort of precisely targeted policing of subjects and situations demanded by social norms theorists.

VI. ROLE-BASED COMMUNITY POLICING

My proposal is to separate preventative policing focused on public order or quality of life issues from reactive investigative policing focused on apprehending criminals. In contrast with liberal legal theories, I believe that police adherence to national or self-generated guides is no solution given the police tendency to translate norms from prohibitions to licenses, and to escalate low-level encounters into high-stakes interventions. One of the Social Norm school’s fundamental insights is the transformative effect of our critical reflective attitude towards promulgated norms or regularly repeating phenomena. The range of institutional imperatives structuring the law-enforcement role decisively influences the attitude of the prosecutor or the police to social and legal norms.

⁴¹⁰ Meares, *Place & Crime*, *supra* note 5, at 678. See also COLE, *supra* note 390 at 169-78 (adopting a very “social norms” sounding rejection of police practices as undermining local perceptions of legitimacy).

⁴¹¹ Stuntz, *Race, Class & Drugs*, *supra* note 2 at, 1836.

In contrast to social norms theories, however, I suggest that encouraging “polite” interactions between police and public, and concentrating on low-level substantive crimes is no alternative to the War on Drugs. The police use precisely these encounters to engage in high-stakes policing, blurring the line between, on the one hand, preventative and caretaking roles and, on the other, investigative policing. The courts are right to separate roles through the Fourth Amendment and deny the fruits of investigation to policing motivated by caretaking.⁴¹² That type of role-based separation cannot, however, be accomplished by rule-based limits on the scope of authority, as the police routinely engage in a range of encounters through which they utilize their social influence to avoid Fourth, and sometimes Fifth Amendment scrutiny.

The solution to problems of urban policing is not — or not only — to equalize police tactics by policing upscale communities in the same manner as downscale ones.⁴¹³ Nor is it simply to remove the police from urban communities. To properly address the quality of life problems undermining community cohesion, municipalities must separate public order policing from investigative policing. The police should continue to have authority to engage in investigation and detection of serious crime; however public order policing should be delegated to agents with limited authority to arrest or investigate and who have public order as his or her primary institutional goal. Such individuals have neither the authority to use or interest in using criminal norms as a means of engaging in collateral policing of drug crimes.

In what follows, I consider a range of public-municipal interactions to identify the type of municipal official able 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 partnering with local school, housing, and transportation authorities to remove the sources of public disorder. Municipalities could, however, do more: reconstructing the activities of some local officials to engage in promoting public order.

A. *Municipal-Community Partnerships*

The social norms literature is replete with discussions of partnerships between local communities, the police, municipal authorities, and private entities. It is

⁴¹² Livingston cites a number of Supreme Court and lower court opinions that take this position. *See* Livingston, *Caretaking*, *supra* note 10, at 301-03 (citing *Skinner v Railway Labor Executives' Assn*, 489 US 602, 619 (1989); *O'Connor v Ortega* 480 US 709, 721-725 (1987); *New Jersey v T.L.O.*, 469 US 325, 340 (1984); *United States v Rohrig*, 98 F3d 1506 (6th Cir 1996); *United States v Miller*, 589 F2d 1117, 1125 (1st Cir 1978); *Bies v State*, 251 NW2d 461, 468 (Wis 1977); *Griffin v Wisconsin*, 483 US 868, 873 (1987).

⁴¹³ Stuntz, *Race, Class, And Drugs*, *supra* note 2 at 1836, 1840-41.

worth briefly recounting a couple to give an overview of the subjects and workings of such partnerships, if only to demonstrate that police activity is a relatively minor part of the order-restoring activity. Most of public order policing turns out to require reclaiming and reconfiguring public spaces and avoiding the type of incident that would give rise to investigation through managing municipally controlled movements of people through public facilities or by public transportation.⁴¹⁴

The Chicago Bus Transfer Station, on the corner of 100th and Pullman Streets in Chicago, Illinois, was a crime hot-spot suffering from a gang problem exacerbated by the presence of students from a local high school.⁴¹⁵ Disorder was particularly pronounced on days in which 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.⁴¹⁶

In the Lake View neighborhood of Chicago, drug dealers used a sunken concrete pit in a local park at night to sell crack and engage in prostitution.⁴¹⁷ The residents initially encouraged more policing after dark — but over the longer term they remodeled the park, trimming the trees to make the interior more visible from the street, installing night lights, and redesigning the park to remove the pit and create a series of amenities more attractive to legitimate users.⁴¹⁸ To effect the clean up 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.”⁴¹⁹ Their efforts were overwhelmingly successful in reducing the illegal activity within the park.⁴²⁰

Both these examples occurred in a city that has made great strides in reforming its police departments to promote local accountability at the neighborhood level.⁴²¹ In other words, Chicago appears to have engaged in some of the reform that Livingston suggests is essential to constraining the police role.

⁴¹⁴ Fung, *Beyond & Below*, *supra* note 80, at 618-23.

⁴¹⁵ *Id.* at 625-27.

⁴¹⁶ *Id.* at 627.

⁴¹⁷ *Id.* at 627-29. Fung describes an identical example in the “Lakeville” community in Chicago. See Fung, *supra* note 213, at 2. I shall treat the two as, for present purposes, interchangeable.

⁴¹⁸ *Id.* at 628-9.

⁴¹⁹ Fung, *supra* note 213, at 7.

⁴²⁰ See Fung, *Beyond & Below*, *supra* note 80, at 628-9.

⁴²¹ *Id.* at 53-61, 63-68, 73-75, 79-86; see also See Fung, *Beyond & Below*, *supra* note 80, at 618-21; Fung, *Deepening Democracy*, *supra* note 286 at 112-13.

The Mayor's Office and 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.⁴²² As described by Archon Fung, a Harvard professor of public policy, the City had to engage in educating or re-educating, not only the police, but also the local community, hiring organizers "to knock on doors, post posters, contact community leaders, and call and facilitate meetings."⁴²³ Yet, as the two Chicago examples, above, make clear, better public-police relations are only part of the solution.

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."⁴²⁴ Recent studies of community disorder suggest both that links between crime and disorder are not so direct as some would suppose, and partnerships between police and communities, without more, are not the solution.⁴²⁵ If the police are not to transform public order policing to comport with their own priorities, then citizens must assume the dominant role in partnering process. 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 patrols' ...; agitating for voting referendums to delicense bars where drug sales and disorder loom large [and t]he razing of a vacant 'drug house' by housing authorities."⁴²⁶

Quite aside from restructuring the administrative bureaucracy of the police in terms of public accountability, then, there exists 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 on two distinct levels: engaging in local, preventative

⁴²² See Fung, *Deepening Democracy*, *supra* note 286 at 112-17.

⁴²³ Fung, *Beyond & Below*, *supra* note 80, at 619. See also Fung, *supra* note 213, at 70-73.

⁴²⁴ Robert J. Sampson, Jeffrey D. Morenoff, and Thomas Gannon-Rowley, *Assessing "Neighborhood Effects": Social Processes and New Directions in Research*, 28 ANN. REV. SOCIOLOGY 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.

⁴²⁵ Robert J. Sampson, *Neighborhood and Community: Collective Efficacy and Community Safety*, 11 NEW ECONOMY 106, 110 (2004); Fung, *supra* note 213, at 1-18; Fung, *Beyond & Below*, *supra* note 80, at 618-23.

⁴²⁶ Robert J. Sampson and Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOCIOLOGY 603, 612 (1999).

partnerships to respond to those situational factors that locate crime at various points in the neighborhood; and transmitting norms of law-abidingness across the community by responding to the low-level disturbances of public order within their jurisdiction.

1. *Private Policing: A Comparison*

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.”⁴²⁷ These private guards participate in limited policing — they are invited in by the relevant community to do their bidding, and they “possess no greater legal capabilities than do ordinary citizens to forcibly detain persons who are suspected of or have in fact committed a crime.”⁴²⁸ Rather than engaging in arrests and detentions the private police tend to “treat matters privately — banning, firing, and fining — instead of pursuing prosecution.”⁴²⁹ Finally, even in the realm of drug crime, so long as they perform the primary goals of preventing “loss” (the theft of commercial goods) or maintaining social order, other “kinds and amounts of deviance” may be tolerable.⁴³⁰

For example, 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.”⁴³¹ According to Joh, “The public police were notified, according to the Greyhound guards, only when the quantity of drugs found warranted a felony charge.”⁴³² 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 thus, to an extent, a model of role-based limits on the promotion of public order. Although private police enforcement practices may be completely transparent, they are certainly subject to social and economic pressures to engage in discipline of guards who do not treat the community

⁴²⁷ Lawrence W. Sherman, *Policing Communities: What Works?*, in ALBERT J. REISS, JR. & MICHAEL TONRY, EDS., *COMMUNITY AND CRIME*, 8 *CRIME & JUSTICE: A REVIEW OF RESEARCH* 343, 372 (1986).

⁴²⁸ Joh, *supra* note 175, at 63.

⁴²⁹ *Id.* at 62-63.

⁴³⁰ *Id.* at 62, 63.

⁴³¹ *Id.* at 63 n.73.

⁴³² *Id.* (citing Christian Bottorff, *After Incident Here, Greyhound Changes Policy on Illegal Items*, THE TENNESSEAN, June 16, 2004, at 1; *Greyhound Guards Sometimes Let Drug Offenders Go*, ASSOC. PRESS NEWSWIREs, June 12, 2004).

with some form of respect.⁴³³ Such police have a “demonstrably substantial” impact on norms of social conduct.⁴³⁴ “Private police keep people from drinking from bottles, arguing loudly, running around recklessly, or playing loud music.”⁴³⁵ They police precisely the sorts of disruptions of “routine activity”⁴³⁶ and specific locations — malls, schools, and transportation nodes — that are of particular concern to public order maintenance.

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 — so perpetuating historical perceptions of race and class based bias. The task for municipalities, then, is to identify a range of municipal officials who can engage in the same type of policing as private security forces, focused on loss rather than harm,⁴³⁷ and bans and fines rather than arrests. Such policing does not remove the police from the community, but does emphasize the public (and municipal official’s) role in calling upon the police, as well as redirecting policing resources to the dominant ones of response and investigation of crime.

B. Municipal Institutions, Public Officials

A variety of municipal officials have engaged in activities that have a policing component, most recently as part of the “War on Terror.”⁴³⁸ 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 reconstitutes such officials as norm entrepreneurs charged with signaling norms of public order to their peers within the community. Furthermore, such municipal officials are able to communicate a powerful message — that quality-of-life issues matter and the government is taking it seriously — while simultaneously modeling appropriate norms of behavior in normatively

⁴³³ See *id.* at 90.

⁴³⁴ Sherman, *supra* note 428 at 372.

⁴³⁵ *Id.*

⁴³⁶ Joh, *supra* note 175, at 62.

⁴³⁷ *Id.*

⁴³⁸ See, e.g., Daryl Khan & Joshua Robin, *Cops Say NY's Eyes Wide Open*, NEWSDAY, July 14, 2005, Section A at 3; 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, Section 2.

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 consistent norms.

Some recent empirical evidence supports this type of community self-reliance policing.⁴³⁹ Local norms of cooperation, especially directed at controlling the behavior and misbehavior of children, has a significant impact on public order.⁴⁴⁰ In addition to control of children in public places — at street corners with crossing guards, 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.

Thus, to consider the two examples of order-maintenance policing from Chicago, above: typical problem areas are bars, with the familiar problems of noisy, drunken behavior; transportation nodes, schools, and parks, which may be the site of anti-social gang activity⁴⁴¹ or illegal activity such as drug dealing; and houses or business that provide a site contributing to public disorder.⁴⁴² Problem activities include drug dealing, and 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 redesign of the location of disorder, others by municipal employees enforcing of 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 where dangerous or violent disorder occurs.

VII. CONCLUSION

The structural considerations that operate at the executive level require that, in executing the laws, the police and prosecutors treat not just individual agents but whole communities with respect. The problem facing the police is their

⁴³⁹ See, e.g. Sampson, Raudenbush, & Earls, *Neighborhoods*, *supra* note 81 at 918-924.

⁴⁴⁰ See *id.*

⁴⁴¹ It is worth remembering that not every gang is a problem. Only gangs that undermine public order pose a problem for community policing.

⁴⁴² 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 80, at 623-25.

social and institutional distance from a particular community and the often-hazardous settings in which they are required to interact with its most dangerous members. Where social fragmentation is pronounced, there may be few individuals in authority and with social influence to whom they can appeal to participate in the norm-creating process. From the other side of the equation, “the dwellers of the ghettos and the barrios of this land . . . view the policeman as ‘an occupying soldier in a bitterly hostile country.’”⁴⁴³

“Normative” policing thus counsels at least moderation in the adversarial stance between police and community: adversarialism smacks of an attitude that is the antithesis of respect. Especially so when the individuals at the sharp end of police practices — including those with social authority — may themselves engage in criminal and quasi-criminal activities and have a complex attitude to law-abidingness.⁴⁴⁴ Such problems are complex, and may require the use of the police and prosecutorial enforcement discretion.

Escalation suggests that the problem of policing in minority communities is not too many police but too harsh policing. Those who reject the legal liberal claim of “over-policing” may be right that more policing is required to restore or maintain order, but are wrong to suggest that police officers are best placed to engage in this preventative role. “Over-policing,” in other words, has quantitative and qualitative dimensions, and each side in the debate shifts from number of police to type of policing depending upon which best supports their argument.

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 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, and not the first resort, in poor communities 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 redirecting and sharpening the police investigative role.

⁴⁴³ See Amsterdam, *supra* note 164 at 400.

⁴⁴⁴ See Kahan & Meares, *Crisis*, *supra* note 1.