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## Procedural Justice and Policing: Four New Directions

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## Procedural Justice and Policing: Four New Directions

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## Procedural Justice and Policing: Four New Directions: Corrected Version

Rebecca Hollander-Blumoff\*

What really happened between Michael Brown, Darren Wilson, and Dorian Johnson that summer day in Ferguson? Not the shooting, but what came before—what happened when Officer Wilson met Mr. Johnson and Mr. Brown on the street, and what might it tell us about policing and justice reform? There are two very different stories told by the two surviving members of the encounter. And the difference in narratives has the potential to reveal a great deal about what matters to people in an encounter with the police, and provide one potential avenue for justice reform on the front-end of these interactions, before things go terribly wrong.<sup>1</sup>

In his grand jury testimony, Officer Wilson explained that as he drove in his police cruiser, he noticed two men in the street.<sup>2</sup> It appeared to him that they were blocking traffic from flowing smoothly, and that cars were veering around them. In his narrative, he calls out through his open car window to the young men, “[W]hy don’t you guys walk on the sidewalk[?]”<sup>3</sup> When they respond by pointing up the road and saying they are just going a short distance, he answers, “[W]ell, what’s wrong with the sidewalk[?]”<sup>4</sup> He offers, in his version of these events, a calm, measured, polite series of questions to the two men—

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\* Professor of Law, Washington University. Thanks to Susan Appleton, Deborah Dinner, and Matt Bodie for helpful comments and suggestions, and to participants in the National Initiative for Building Community Trust and Justice Research Roundtable at Yale Law School and to participants in the Penn State Justice Reform Conference for their thoughtful questions and insights.

1. *See Experts Weigh Police Officer’s Decisions Leading to Fatal Shooting of Teenager*, N.Y. TIMES, Nov. 27, 2014, at A1. For an examination of issues surrounding the Michael Brown shooting, see KIMBERLY JADE NORWOOD, FERGUSON’S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION (2016).

2. Transcript of Hearing Before the Grand Jury, Volume V at 207, *State of Missouri v. Darren Wilson* (2014).

3. *Id.* at 208.

4. *Id.*

respectful, asking them calmly to comply with the law and giving them an opportunity to respond and offer an explanation. In his version of this story, Mr. Brown responds to his respectful questions with, “[F]uck what you have to say.”<sup>5</sup>

In stark contrast, Mr. Johnson testified before the grand jury about an encounter markedly different in tone. He said that before Officer Wilson came on the scene, “[T]wo cars had passed us already. Nobody said anything like we are in the street or nothing like that.”<sup>6</sup> Then Officer Wilson said ‘get on the sidewalk,’ but it wasn’t in a polite manner, it was very rudely.”<sup>7</sup> The prosecutor followed up, saying “You can say whatever he said,” Mr. Johnson responded, “He said get the F on the sidewalk.”<sup>8</sup>

Those are very different accounts and they give rise to different impressions. Different individuals have different reactions to these narratives, with some crediting one account and others accepting the truth of the other.<sup>9</sup> But my purpose here, in highlighting this dramatic difference, is not to determine or opine on which story is more likely, more compelling, more believable. Rather, my point is that both Officer Wilson and Mr. Johnson use narratives that rely on norms that invoke procedural justice—a fair process that involves providing the

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5. *Id.* at 208–09. He goes on to say that this is a “very unusual and not expected response from a simple request.” *Id.*

6. Transcript of Hearing Before the Grand Jury, Volume IV at 45, State of Missouri v. Darren Wilson (2014).

7. *Id.*

8. *Id.*

9. Both anecdotal and empirical evidence support the existence of this difference in perception. For example, in a talk on this topic, in front of a diverse and mostly student-age population, I was greeted with audible laughter and snickering when describing Officer Wilson’s version of events. In conversation with one older white man, after explaining the two different narratives, I received a stern lecture on why the police would never speak to someone using profanity in the way that Mr. Johnson described. And in empirical work, scholars have demonstrated that bias affects perception of events, even when there exists a “neutral” record of such events. For example, Roseanna Sommers explored reactions to video footage of police behavior, and found that “[c]rucial judgments, such as whether the officer used force, made decisions in a fair way, or ultimately violated the law, are significantly influenced by viewers’ prior level of identification with police—even though the events are captured on tape.” Roseanna Sommers, Note, *Will Putting Cameras on Police Reduce Polarization?*, 125 YALE L.J. 1304, 1323 (2016). In any event, my purpose here is not to adjudicate the veracity of either story. What is compelling here is that both parties weave a narrative that has at its core the issue of procedural justice or its absence.

other party a voice, treating the other party with respect and courtesy, being trustworthy, and acting free from bias. Officer Wilson's narrative stresses the procedural justice provided by him to the young men in the street, and Mr. Johnson highlights the absence of procedural justice he and Mr. Brown received. Yet both parties are invoking norms around procedural justice to explain and shed light on subsequent events.

Officer Wilson's shooting of Mr. Brown riveted the nation, casting a spotlight on the troubled relationship between the police and the public, particularly African American men. The shooting galvanized protesters, produced a grand jury inquiry that did not result in criminal charges, provoked rioting, and sparked ongoing discussions, formal commissions, and reform efforts. It was an incident that received attention both for what it was—the death of one unarmed young man at the hands of a police officer—and for the tapestry of similar events that surrounded it—encounters between police officers and African Americans gone terribly, often fatally, wrong.<sup>10</sup> And accounts of the interaction between the three men on the street have at their core a narrative involving procedural justice.

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10. Tragic incidents involving the death of African American men and boys at the hands of the police in the past several years have made household names out of Michael Brown, Tamir Rice (a child killed by police for wielding a toy gun in Cleveland, Ohio), Eric Garner (father of six killed after a chokehold by police in New York City during an arrest for selling cigarettes without a permit), Freddie Gray (died in a police van while in police custody in Baltimore), Philando Castile (school cafeteria worker killed in Minneapolis by a police officer during a routine traffic stop), and Alton Sterling (killed in Baton Rouge while selling magazines outside of a convenience store), only to name a handful. See Eric Heisig, *City of Cleveland to Pay \$6 Million to Tamir Rice's Family to Settle Lawsuit*, CLEVELAND.COM (Apr. 25, 2016, 5:16 PM), [http://www.cleveland.com/court-justice/index.ssf/2016/04/city\\_of\\_cleveland\\_to\\_pay\\_6\\_mil.html](http://www.cleveland.com/court-justice/index.ssf/2016/04/city_of_cleveland_to_pay_6_mil.html) (Tamir Rice); Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), [http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?\\_r=0](http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0) (Eric Garner); Catherine Rentz & Yvonne Wenger, *Baltimore Police Officers in Freddie Gray Case Face Internal Affairs Review*, BALTIMORE SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-gray-officers-review-20160713-story.html> (Freddie Gray); Pam Louwagie, *Falcon Heights Police Shooting Reverberates Across the Nation*, MINNEAPOLIS STAR TRIB. (July 8, 2016, 3:15PM), <http://www.startribune.com/aftermath-of-fatal-officer-involved-shooting-in-falcon-heights-is-captured-on-video/385861101/> (Philando Castile); Richard Fausset, Richard Pérez-Peña & Campbell Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html> (Alton Sterling).

The many benefits of procedural justice during encounters between citizens and legal actors, including the police, have been well documented.<sup>11</sup> Procedural justice increases perceptions of legitimacy, and, in turn, individuals are more able to self-regulate and obey the law when they believe that a system is legitimate. An effective self-regulatory system is more efficient, less costly, and less likely to foster polarization between police and citizens, since an effective self-regulatory system works in part because of value congruence between those who obey the law and lawmakers.<sup>12</sup> Given current tensions between citizens and police, a focus on increasing procedural justice in police-community interactions is critical, both because procedural justice fosters compliance with the law and because it bolsters the legitimacy of law enforcement in a system that has been sorely tested and is widely mistrusted.<sup>13</sup> In addition, procedural justice effects go beyond merely affecting those involved *in* encounters with the police; perceptions of procedural justice are also the primary determinant guiding the public's judgment regarding the existence of police misconduct.<sup>14</sup> Given the current climate of widespread mistrust of police, and extreme tension between law enforcement and the public, procedural justice is a natural focus of attention.

Indeed, procedural justice and policing are having a critical

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11. See generally Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (2004); Tom R. Tyler & Cheryl Wakslak, *Profiling and the Legitimacy of the Police: Procedural Justice, Attributions of Motive, and the Acceptance of Social Authority*, 42 CRIMINOLOGY 253 (2004); Tom R. Tyler & Jeffrey Fagan, *Why Do People Cooperate with the Police?*, 6 OHIO ST. J. CRIM. L. 231 (2008); Aziz Huq, Tom R. Tyler & Steven Schulhofer, *Why Does the Public Cooperate with Law Enforcement: The Influence of the Purposes and Targets of Policing?*, 17 PSYCHOL., PUB. POL'Y & L. 419 (2011); Steven Schulhofer, Tom R. Tyler & Aziz Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011).

12. See Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307 (2009).

13. Andrew V. Papachristos, Tracy L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 435–36 (2012).

14. Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 300 (2015) (“[P]erceptions of procedural justice were the most powerful predictors of whether respondents believed that the police had done wrong and deserved some form of sanctioning.”).

“moment” of connection. In December 2014, President Barack Obama established the Task Force on 21st Century Policing, convening a diverse group that included community members, law enforcement, academics, and others and charging them with “identifying best practices and offering recommendations on how policing practices can promote effective crime reduction while building public trust.”<sup>15</sup> The first major area of reform that the Task Force identified was “Building Trust and Legitimacy,” and the Task Force Report explained succinctly the critical connection between building trust and legitimacy and procedural justice:

Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority. The public confers legitimacy only on those whom they believe are acting in procedurally just ways.<sup>16</sup>

The Task Force Report also explained, in another section, the importance of training police officers regarding procedural justice.<sup>17</sup> In the wake of the Report, efforts to train officers in the deep importance of procedural justice have been unrolled around the country.<sup>18</sup> The National Initiative for Building Community Trust and Justice, funded by the Department of Justice, has six pilot sites for law enforcement and community interventions based on key principles of procedural justice, as well as other relevant areas of psychology

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15. President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing*, Washington, DC: Office of Community Oriented Policing Services 1 (May 2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

16. *Id.*

17. *Id.* at 52.

18. See, e.g., Andrew McCurdy, *Procedural Justice: High Expectations*, 6 COPS, E-NEWSL. COPS OFF. 9 Sept. 2013, [http://cops.usdoj.gov/html/dispatch/09-2013/procedural\\_justice\\_high\\_expectations.asp](http://cops.usdoj.gov/html/dispatch/09-2013/procedural_justice_high_expectations.asp) (last visited Oct. 7, 2016) (“in 2012, the King County [Seattle area] Sheriff’s Office obtained a grant from the COPS Office to develop procedural justice training for line staff officers”); *Procedural Justice*, NAT’L INITIATIVE FOR BUILDING COMMUNITY TRUST AND JUST., <https://trustandjustice.org/resources/intervention/procedural-justice> (last visited Oct. 7, 2016) (“Chicago Police Department [has created] a one-day training for line officers and command staff that teaches them how to apply powerful procedural justice principles to their routine contacts with the public”).

including implicit bias and reconciliation.<sup>19</sup> These efforts are widespread across the country and are beginning to surface in more mainstream discussions of police behavior. For example, in the aftermath of the fatal shooting of five police officers in Dallas during a protest against police violence that had been sparked by the shooting deaths of Alton Sterling and Philando Castle, the chief of the Dallas transit police highlighted the role of procedural justice in remarks to the press.<sup>20</sup>

Procedural justice is not a panacea for societal concern over policing, police misconduct, and community mistrust—there are distributive justice issues around policing, to be sure, as well as other important avenues of reform.<sup>21</sup> The role of racial bias and power differentials, for example, cannot be overstated. But procedural justice has the potential to play an important role, along with other reforms, in fostering more positive interactions between police and the community. In November 2015, the National Initiative hosted a roundtable in order for scholars to consider what future avenues of research might “contribute to future efforts to build police legitimacy.”<sup>22</sup> There is much unexplored territory to explore in thinking about the role of procedural justice in interactions between the police and the community. Considering the relationship between

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19. These sites are Stockton, California; Minneapolis, Minnesota; Gary, Indiana; Pittsburgh, Pennsylvania; Fort Worth, Texas; and Birmingham, Alabama. See *Pilot Sites*, NAT'L INITIATIVE FOR BUILDING COMMUNITY TRUST AND JUST., <https://trustandjustice.org/pilot-sites> (last visited Oct. 7, 2016).

20. Interview by Craig Melvin with James Spiller, Chief of Police and Emergency Mgmt., Dallas Area Rapid Transit (MSNBC television broadcast July 8, 2016, 8:11am), INTERNET ARCHIVE, [https://archive.org/details/MSNBCW\\_20160708\\_150000\\_MSNBC\\_Live#start/660/end/720](https://archive.org/details/MSNBCW_20160708_150000_MSNBC_Live#start/660/end/720) (last visited Oct. 7, 2016).

21. For example, as I have already mentioned, the National Initiative focuses its efforts on implicit bias and reconciliation, as well as procedural justice. NAT'L INITIATIVE FOR BUILDING COMMUNITY TRUST AND JUST., *supra* note 19. And critics of procedural justice reform have focused on its potential to obscure critical substantive issues. See, e.g., Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 298.

22. *National Initiative for Building Community Trust and Justice: Research Roundtable*, NAT'L INITIATIVE FOR BUILDING COMMUNITY TRUST AND JUST. (2015), [https://uploads.trustandjustice.org/misc/NI\\_Round\\_Table\\_Final\\_Report.pdf](https://uploads.trustandjustice.org/misc/NI_Round_Table_Final_Report.pdf) (last visited Oct. 7, 2016). This Article grows out of comments that I made at that Research Roundtable, as well as remarks at the Penn State Justice Reform Conference in February 2016. *Who, Justice Reform Conference 2016*, PENN STATE LAW, <http://sites.psu.edu/justicereform2016/who/> (last visited Oct. 7, 2016).

research on legitimacy and procedural justice and research in other areas of psychology is an important piece of that endeavor. Thinking about these connections can continue to aid in helping reform efforts that are focused on procedural justice reach their full potential.

In this Article, I consider a handful of these potential intersections between procedural justice research and other areas of social science. I begin by providing a brief background on procedural justice and policing. I then turn to several areas of potential future development. First, I consider the interaction between the research on self-control and procedural justice: considering procedural justice as an effortful behavior that requires self-control yields important insights for training police officers to demonstrate procedural justice. Second, I explore research on the antecedents of procedural justice to offer insight into what actions are most likely to yield positive perceptions of fairness by police. Third, I discuss the implications of treating procedural justice not as something that one side “provides” while the other side “experiences,” but instead, as a dynamic interchange that can be mutually reinforcing or damaging. Finally, I briefly consider the role of reactive devaluation as it might affect reaction to procedural justice reform.

### I. PROCEDURAL JUSTICE RESEARCH AND POLICING

Procedural justice in psychology is the perception by participants in a decision-making process that the process has been fair.<sup>23</sup> Procedural justice is different than distributive justice, which is the fairness of the outcome achieved, and outcome favorability, which is how positive one side finds the outcome.<sup>24</sup> Procedural justice research has shown, in robust effects across a wide variety of settings, that individuals’ perceptions of the fairness of the process by which a decision was made influences their satisfaction with the ultimate resolution of the process separately and apart from their perceptions about distributive justice and outcome favorability.<sup>25</sup> All three factors

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23. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

24. *Id.* at 73–74.

25. *Id.* at 94.

play a significant role, but forty years of procedural justice research has shown that procedural justice carries a strong and separate effect that is independent of how “good” or how “fair” people perceive their outcome to be.<sup>26</sup> Individuals feel more satisfied with their outcomes, and are more willing to accept those outcomes, when they feel that a process was fair.<sup>27</sup> Factors that guide individuals’ perceptions of procedural justice focus on four areas: whether they had the opportunity to share their point of view (voice), whether they were treated with dignity by the authority figure (courtesy and respect), whether they believed that the intentions of the decision maker were to be fair (trust), and whether the decision maker was bias-free in making his or her decision (neutrality).<sup>28</sup>

Procedural justice perceptions are not solely important because they encourage satisfaction with and adherence to a particular outcome. Additionally, procedural justice perceptions play a critical role in determining perceptions of system legitimacy.<sup>29</sup> Especially because perceptions of legitimacy are a primary driver of people’s willingness to voluntarily comply with the law,<sup>30</sup> procedural justice represents an important principle in securing a lawful society. When people feel fairly treated by authorities, they are more likely to believe those authorities’ power is legitimate, and in turn more likely to follow the rules set by those authorities.<sup>31</sup>

Research has shown the significant effects of procedural justice in

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26. See, e.g., Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 172 (2005).

27. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 162 (1990).

28. Tom Tyler & Steven L. Blader, *Justice and Negotiation*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 295, 300 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).

29. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

30. *Id.*

31. *Id.*

courts,<sup>32</sup> mediation,<sup>33</sup> arbitration,<sup>34</sup> and negotiation,<sup>35</sup> as well as in extra-legal settings such as the workplace and the family.<sup>36</sup> In legal settings, procedural justice matters in civil and in criminal matters.<sup>37</sup> In criminal settings, procedural justice significantly influences the participants' satisfaction with their resolutions in settings including felony plea bargaining, courtrooms, and drug courts.<sup>38</sup> In a study considering gang members and other individuals who break the law, the link between obeying the law, legitimacy, and procedural justice was significant.<sup>39</sup> And robust research shows the importance of procedural justice in the public's encounters with the police.<sup>40</sup>

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32. See, e.g., J. J. Long, *Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes*, 21 CONFLICT RESOL. Q. 139 (2003).

33. Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, Gary L. Welton & Lynn M. Castrianno, *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993);

34. See, e.g., Allan Lind, Carol Kulik, Maureen Ambrose & Maria de Vera Park, *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 235–36 (1993).

35. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 478–79 (2008).

36. Robert Folger & Mary A. Konovsky, *Effects Of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACAD. MGMT. J. 115, 124–26 (1989); Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287, 1305–06 (2005); Shelly Jackson & Mark Fondacaro, *Procedural Justice in Resolving Family Conflict: Implications for Youth Violence Prevention*, 21 LAW & POL'Y 101, 118–19 (1999).

37. See, e.g., E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L. F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 976 (1990); Jonathan Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988); Robert MacCoun & Tom Tyler, *The Basis of Citizens' Preferences for Different Forms of Criminal Jury*, 12 LAW & HUM. BEHAV. 333 (1988).

38. See, e.g., Casper & Tyler, *supra* note 37; MacCoun & Tyler, *supra* note 37.

39. Tracey Meares, Andrew V. Papachristos & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397 (2012).

40. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 555 (2003); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (W. G. Skogan, Ed.) (2004); Tom R. Tyler & Cheryl Wakslak, *Profiling and the Legitimacy of the Police: Procedural Justice, Attributions of Motive, and the Acceptance of Social Authority*, 42 CRIMINOLOGY 13 (2004); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 275 (2008); Aziz Huq, Tom R. Tyler & Steven Schulhofer, *Why Does the Public Cooperate with Law Enforcement: The Influence of*

Procedural justice by police officers increases compliance with the law, typically because procedural justice increases perceptions of legitimacy. The effects of police procedural justice are felt by community members in all types of areas, from those pulled over for traffic stops to those subjected to stop and frisk to those who live in the community more generally.<sup>41</sup> Research involving criminals and laypeople alike show the positive effects of procedural justice. When people are treated fairly, they believe more strongly in the legitimacy of the authority from which they received that treatment. They believe that their values are congruent with the legal authorities, they are more likely to obey the law, and they are more likely to trust in the legitimacy of the legal system more generally. The decades of robust research on the positive effects of procedural justice in policing have led to the growing inclusion of procedural justice principles into law enforcement training and stated goals by police departments across the United States.

## II. FOUR NEW DIRECTIONS FOR PROCEDURAL JUSTICE AND POLICING

The following parts consider four areas of potential interaction between procedural justice and research from other areas of social science, including self-control, the antecedents of procedural justice, procedural justice as a mutually interactive phenomenon, and finally, reactive devaluation.

### A. *Self-Control and Procedural Justice*

In thinking about the role that self-regulation and self-control play in our criminal justice system, the focus is typically on the potential criminal actor, considering criminal behavior as a self-control failure: how can we increase potential perpetrators' self-control so that they are less likely to commit crimes?<sup>42</sup> Indeed, one scholar has suggested

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*the Purposes and Targets of Policing?*, PSYCHOLOGY, PUB. POL'Y & L. 17(3), 419–50 (2011); Steven Schulhofer, Tom R. Tyler & Aziz Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011).

41. See *infra* text accompanying notes 76–81.

42. Travis Hirschi, *Self-Control and Crime*, in HANDBOOK OF SELF-REGULATION:

that at its root all criminal behavior is a self-control problem.<sup>43</sup> One potential way to think about the connection between procedural justice and self-control is to imagine that increased procedural justice in police-community interactions will foster more self-control by potential criminal actors. Procedural justice will increase legitimacy and in turn individuals will be more likely to control their own behavior to conform to a legitimate set of laws. Recently, researchers have turned attention to this relationship between self-control and procedural justice. For example, Professor Tom Tyler has suggested that justice behaviors, writ large, are social self-control behaviors, meaning that making decisions about how to allocate benefits to oneself and others, and how authorities make those decisions, requires self-control.<sup>44</sup> At a more individual level, Professor Scott Wolfe found that people with low self-control are more likely to provide lower assessments of procedural justice by the police.<sup>45</sup> This connection needs more attention from empirical scholars, but the idea that procedural justice behavior by the police might augment self-control efforts by potential criminal actors would provide yet further support for the positive effects of procedural justice on compliance with the law.

However, a more novel approach to the intersection between procedural justice and self-control might consider the relationship between procedural justice behavior by the police and their own self-control, not the self-control of the potential criminal actor. Understanding police misconduct as a subcategory of criminal behavior<sup>46</sup> makes sense and provides a simple way to think about the importance of self-control by the police: when police have low self-

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RESEARCH, THEORY, AND APPLICATIONS 537 (Kathleen D. Vohs & Roy F. Baumeister eds., 2d ed. 2011) [hereinafter Hirschi, *Self-Control and Crime*]; MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 88 (1990).

43. Hirschi, *Self-Control and Crime*, supra note 42, at 537.

44. Tom R. Tyler, *Justice as Social Self Control*, in SELF CONTROL IN SOCIETY, MIND, AND BRAIN (Ran Hassin et al. eds., 2010).

45. Scott E. Wolfe, *The Effect of Low Self-Control on Perceived Police Legitimacy*, 39 J. CRIM. JUST. 67, 72 (2011).

46. For a further exploration of criminal behavior by police, which includes police misconduct and corruption as one category of potential criminal behavior, see Philip Matthew Stinson, *Police Crime: The Criminal Behavior of Sworn Law Enforcement Officers*, 9 SOCIOLOGY COMPASS 1 (2015).

control, they will engage in more criminal behavior. Recent work supported that connection, finding that officers with lower self-control have more incidences of misbehavior.<sup>47</sup> But the connection between low self-control by the police and the exhibition of behavior that relates to perceptions of procedural justice has gained less attention. Casting the problem of procedurally-just interactions between the police and the community as a potential self-control problem yields important insights for thinking about how to increase procedural justice behaviors by officers.

As a preliminary matter, though, it is worth addressing whether the police officer-citizen interaction is *appropriately* conceptualized as an area where self-control is needed. Typically, the self-control literature suggests that self-control is the work of effortful cognition, imposing order over some visceral or automatic behavior.<sup>48</sup> Our effortful cognition—a “cold” system based on logic—can override “hot” emotional or visceral responses to a situation.<sup>49</sup> Considering a police officer in the midst of a potentially difficult encounter with the public, one could easily imagine that the situation would bring out automatic or visceral reactions including anger, violence, or escalating behavior. Indeed, these are exactly the kinds of police behaviors, including the ratcheting up of violent behavior, that have come under increased public scrutiny recently.<sup>50</sup> The attempt to act in a manner that comports with procedural justice—for instance, engaging respectfully, acting neutrally, allowing the citizen to express herself—is likely to require some imposition of self-control on a naturally volatile situation where a police officer and a community member may perceive mutual threats from one another.

In recent high-profile police-citizen encounters that have gone

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47. Christopher Donner & Wesley Jennings, *Low Self-Control and Police Deviance: Applying Gottfredson and Hirschi's General Theory to Officer Misconduct*, 17 POLICE Q. 203 (2014).

48. See, e.g., Roy F. Baumeister & Todd F. Heatherton, *Self-Regulation Failure: An Overview*, 7 PSYCHOL. INQUIRY 1, 2 (1996); George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORGANIZATION BEHAV. & HUM. DECISION PROCESSES 272, 288–89 (1996); Janet Metcalfe & Walter Mischel, *A Hot/Cool-System Analysis of Delay of Gratification: Dynamics of Willpower*, 106 PSYCHOL. REV. 3 (1999).

49. See Metcalfe & Mischel, *supra* note 48, at 3.

50. See *supra* text accompanying notes 15–20.

awry, officers' behavior could easily be perceived as exhibiting a lack of self-control by allowing anger, emotion, or other impulses full sway. The case of Sandra Bland, who was found dead in her jail cell in Texas several days after her arrest for a traffic violation,<sup>51</sup> provides an example. When Ms. Bland was pulled over by the police officer, Brian Encinia, purportedly for failing to signal as she changed lanes, the officer told her to extinguish her cigarette, saying, "You mind putting out your cigarette, please?"<sup>52</sup> When Ms. Bland responded, "I'm in my own car. I don't have to put out my cigarette," Officer Encinia became extremely angry, apparently at the perceived lack of respect for his request.<sup>53</sup> Rather than providing an explanation for his request, or letting the issue go, the officer then ordered her out of her car. When she refused to get out, which certainly continued to fuel his own sense of perceived disrespect, he continued to demand her exit, finally stating, "I'm going to yank you out," apparently physically grabbing her, and later saying, as he pulls the taser out and directs it at her, "I will light you up."<sup>54</sup>

Clearly, Officer Encinia's response is not based on effortful cognition—he is "hot" in the moment, angry and threatening, despite the fact that Ms. Bland has not posed any danger to him. It is clear that the officer in this case became deeply angry about the perceived lack of respect that he was shown, and began to say and do things that reflected his anger rather than an effort to respond respectfully and in a procedurally just manner. It takes self-control to respond to a "hot" situation with a "cold" set of behaviors. In these cases, an effort by officers to behave in a procedural just manner would have taken significant effortful cognition—an exertion of self-control that did not occur. Although the law sometimes provides a lesser punishment for

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51. David Montgomery, *Video of Arrest Fuels Anger Over Woman's Death in Jail*, N.Y. TIMES, July 22, 2015, at A12.

52. PoliceCenter, *Sandra Bland Video Dashcam Released*, YOUTUBE (July 21, 2015), <https://www.youtube.com/watch?v=jpSEemvwOn4>.

53. In fact, Officer Encinia was indicted for perjury based on his later statements regarding the arrest of Ms. Bland; before the grand jury he stated that he removed Sandra Bland from her vehicle because "he was angry she would not put out her cigarette," rather than "to further conduct a safe traffic investigation," as he had attested in her arrest warrant. *Texas v. Encina*, No. CC16-001, Indictment (Waller County, TX Jan. 6, 2016), <https://assets.documentcloud.org/documents/2678589/Trooper-Brian-Encinia.pdf>.

54. *Id.*

“crimes of passion,” implicitly acknowledging that there are limits to our self-control,<sup>55</sup> it is less obvious that we should, or do, expect police officers—who are agents of the state, not acting in their capacity as private citizens—to allow their emotions to hold sway in this manner.

If we can conceptualize police behavior that is procedurally just as an exertion of self-control over hot visceral anger or threatened responses, the two insights noted above give rise to several implications or suggestions. First, thinking about the relationship between self-control and temporal construal—the way that events are perceived depending on when they occur in time—is helpful. Researchers in this area have found that when individuals think about near-term events, they think about them with “low-level” construal—that is, they imagine specific and concrete details about the situation.<sup>56</sup> When individuals consider more distant future events, they imagine them with “high-level” construal, thinking about the essential elements or the most meaningful themes of the events.<sup>57</sup> When individuals are able to conceptualize events using high-level construal, they are better able to exercise self-control—the triumph of long-term goals over short-term temptations.<sup>58</sup> What is interesting here is that the same event can be understood as both a near-term and a long-term event; for example, from the criminal actor perspective, one might consider an illegal act, first, from the low-level perspective of “what will I gain right now,” but also from the high-level perspective of “what might the ultimate consequences of this action be?” Encouraging conceptualization at the higher-level construal can help to promote self-control efforts. Training police to make salient a longer time frame, thereby activating higher-level construal about the goals of the criminal justice system, the rights of the public, and important justice concerns, rather than lower-level construal about how a particular interaction feels as experienced in the moment, could be an aid to

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55. See, e.g., Joshua Dressler, *Provocation: Explaining and Justifying the Defense in Partial Excuse, Loss of Self-Control Terms*, in *CRIMINAL LAW CONVERSATIONS* (Paul H. Robinson et al. eds., 2009); Reid Griffith Fontaine, *Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification*, 43 U. MICH. J.L. REFORM 27, 45–46 (2009).

56. See Kentaro Fujita et al., *Construal Levels and Self-Control*, 90 J. PERSONALITY & SOC. PSYCHOL. 351, 353–55 (2006).

57. *Id.*

58. *Id.*

bolster self-control in police interactions with the public.

When a police officer and a member of the public interact in a localized and immediate setting, they are most likely considering the most down-to-earth elements of a particular situation, rather than the more large-scale societal or moral dimensions. For a police officer and a potential suspect or other actor, this means that interactions may suffer because the parties are not focused on important principles regarding the role of police in society, principles which might help to guide all parties' behavior in a way that would ameliorate, rather than exacerbate, the conflict. Police may have a choice between responding viscerally to a situation versus thinking about long term societal, community, or even career consequences. Increasing police officers' ability to frame these interactions as involving long-term issues rather than short-term crises may help to promote behavior that is congruent with long-term societal goals.

Another important insight is that people's self-control is a finite resource that can be depleted,<sup>59</sup> but that individuals can develop better self-control over time through practice.<sup>60</sup> This means that after a certain amount of exertion associated with behaving in an effortful way, overriding automatic responses to replace them with desired (typically more socially acceptable) behavior, individuals have lower self-control. For example, after spending time at work controlling one's behavior to comport with the requirements of the workplace, a person might come home and eat a lot of cake, even though he knows it is unhealthy, because his self-control resource has been depleted. Yet individuals can "train" their self-control "muscles" to become stronger over time, so that they are better able to exert self-control than they were previously.<sup>61</sup> My own work has explored the implications of these findings for criminal behavior and the perception of such behavior in the legal system.<sup>62</sup> Shifting these findings and their

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59. See Roy F. Baumeister et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCHOL. 1252, 1252 (1998).

60. Mark Muraven, Roy F. Baumeister & Dianne M. Tice, *Longitudinal Improvement of Self-Regulation Through Practice: Building Self-Control Strength Through Repeated Exercise*, 139 J. SOC. PSYCHOL. 446 (1999).

61. *Id.*

62. Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501 (2012).

implications from the criminal actor perspective to the police officer perspective is a useful endeavor that could help us better equip law enforcement officials to provide procedural justice even as they manage the serious demands placed upon them.

In light of this research, it is beneficial to first assess what other cognitive demands are made on officers, and consider ways to reduce cognitive effort before officers enter a potentially difficult situation, so that they have sufficient reserves of self-control upon which to draw. Staffing, shifts, paperwork, and other timing decisions could be made with an eye towards maximizing cognitive self-control stores. Second, it may be useful to test and assess officers on self-control measures, select or promote officers with regard to self-control scores, and take broad steps to explicitly empower officers to boost self-control more generally. In sum, thinking about procedural justice as a police self-control problem offers insight into how police-community encounters may go wrong, and how training might be more effective.

### *B. “Objective” Antecedents of Procedural Justice*

Most research on the antecedents of procedural justice—that is, the factors individuals use to make judgments about procedural justice—takes place in a third-party setting: people evaluate the procedural justice behavior of a third-party decision maker, whether a judge, arbitrator, or mediator.<sup>63</sup> But one critical distinction between procedural justice and policing and other areas of procedural justice research is that policing does not involve a third-party neutral decision-making authority. In a court or arbitration, a third-party authority makes decisions involving two disputing parties. In a typical encounter involving police and the public, there are only two sides: law enforcement and the individual. Although some police-public encounters involve the police officer serving in a third-party role to mediate or intervene in a dispute, many other interactions are more dyadic in nature—a traffic stop, stop and frisk, an approach by an

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63. Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgments in Legal Negotiation*, GROUP DECISION & NEGOTIATION (2016) [hereinafter Hollander-Blumoff, *Formation of Procedural Justice Judgments*].

officer to an individual in public.<sup>64</sup> Thus the police-public interaction is in some ways neither fish nor fowl. Although the police officer is an agent of the legal system, charged with protecting public safety and upholding the law, the officer is not a third-party neutral in a dispute. The police officer acts in this situation more like a partisan or, sometimes, a disputing actor who is actually engaged *in* a dispute setting between the officer and a member of the community who may or may not have transgressed the law, leading to a more dyadic interaction—albeit one with a dramatic power imbalance.

And yet the police-public interaction is not a simple dyadic negotiation, either. There is a vast power differential between an officer and a member of the community, not only implicitly but explicitly through the weapon that an officer typically carries. The police officer has power to coerce that a “normal” negotiation partner does not. But the interaction is often “one-on-one,” and very personal and intimate in a manner that a judge-litigant interaction never approaches. In addition, because some settings provide clear rules and strict norms for behavior, adherence to those rules and norms can guide perceptions about fair process. When those rules are more implicit than explicit, procedural justice may be harder to assess clearly.<sup>65</sup>

In light of this more intimate and often dyadic connection between a police officer and a member of the public, what might social science research reveal about the different dimensions of fair treatment by police? In a recent study, I explored two key questions about the antecedents of our judgments about when a process is procedurally fair in the negotiation setting.<sup>66</sup> First, I considered whether the antecedent factors that have been identified in previous research involving third-party authorities (voice, courtesy/respect, trust, and neutrality) affect the parties’ perceptions of procedural justice equally. In the negotiation setting, all four factors mattered, but courtesy and respect played the

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64. This is the paradigmatic situation that forms the basis for my discussion here; my analysis does not consider interventions into an ongoing crime situation, or a call to a home for intervention in a dispute.

65. See Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 406 (2010).

66. See Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgments*, *supra* note 63.

most significant, and outsized, role.<sup>67</sup> Second, I explored whether behaviors observable by a third-party neutral bear any relationship to procedural assessments made by participants in a negotiation setting.<sup>68</sup> In these dyadic situations, factors that a neutral party can observe that relate to voice and opportunity to be heard, and treatment with courtesy and respect, bear a significant relationship to participant in the situation's assessments of voice and of courtesy and respect, and then, in turn, relate significantly to the parties' general assessments of procedural justice.<sup>69</sup> In contrast, observable behaviors that related to trust and neutrality tended to be less related to negotiators' perceptions of those factors, and to negotiators' assessments of procedural justice.<sup>70</sup>

As noted above, the police-community encounter shares several features with dyadic negotiation: it typically occurs in a small, interpersonal setting, involves the engagement of a police officer and another individual without the added presence of a neutral third-party authority, and does not take place in a highly regulated setting such as a courtroom, mediation, or other legal process. Given the similarities in these settings, it may be interesting to explore what observable factors can commonly lead to mutual or widespread perceptions of procedural justice. For example, if courtesy and respect and voice are the primary drivers of assessments of procedural justice in a negotiation setting without a third-party neutral, might they also be central to assessments of procedural justice in interactions between police and the public?

More research on the specific behaviors that will be most important and effective in shifting perceptions of procedural justice is important. Especially in light of the polarization of views about police behavior,<sup>71</sup> searching for "objective" factors that are more susceptible to commonality is critical. If, for example, parties in the police context are more likely to agree on what constitutes courtesy and respect or voice than on trust and neutrality, as my research in the negotiation

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See Sommers, supra note 9.*

context has found, this suggests that further emphasis might be placed on these factors in training. I do not presume a conclusion here; the dyadic legal negotiation between two attorneys does not carry the same power dynamic as the interaction between police and the public, and it may be that both ideals and expectations<sup>72</sup> of neutrality and trust are quite different between negotiating lawyers and between a police officer and an individual. And given the salience of trust and bias in policing, those factors may play a more important role. Especially in light of concerns about racial bias, the weight of these different factors may not mirror what is found in the negotiation setting. But this line of research suggests the usefulness of considering the antecedents of procedural justice in particular unique contexts,<sup>73</sup> so that more effort can be placed on improving behavior on the dimensions that make the most significant difference to parties' perceptions rather than assuming that procedural justice antecedents are a one-size-fits-all set of factors that influence fairness judgments equally.

In today's world, where, increasingly, police may be caught on tape in highly volatile incidents, additional research on which features of procedural justice are more likely to engender agreement among the parties is critical. Recent unrest surrounding police behavior is highly polarizing, with individuals dramatically disagreeing on the underlying events and their implications. And there is no question that racial bias plays a significant role in fueling this disagreement. But if individuals are more able to agree on some factors rather than others, strengthening those particular factors may help to shape more unified perceptions about police fairness and may help to close the gap in perception that increasingly divides the public. Indeed, that "objective" factors for assessing fair process may be acutely affected by racial bias in the policing setting suggests the tremendous need for more research in this area.

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72. Ironically, it may be that the ideals of trust and neutrality are higher in police-public interactions than in lawyer-lawyer interactions. However, it may be that the parties' *expectations*, based on experience and other factors, are lower in the police-public context than in the lawyer-lawyer context.

73. See Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgments*, *supra* note 63.

### C. *The Mutuality of Procedural Justice*

The interaction between a police officer and the public is not the same as an interaction between a litigant and a judge, arbitrator, or mediator; this is a dynamic interchange where both parties interact in a more intimate and interconnected way. As I have argued above, an interaction between an officer and a member of the public may be more intimate and dyadic than the interaction between the public and other officials in the legal system. In addition, the public setting—outside of a courtroom or other arena with clearly demarcated rules for behavior—increases the lack of clear rules for behavior.

An encounter between a police officer and a member of the public does not usually consist of a one-shot moment where an individual “receives” procedural justice, or doesn’t, from law enforcement. These encounters are dynamic, back-and-forth interactions; the behavior of the other person in the encounter also plays a role and the communication between the police officer and the individual is organic and iterative.<sup>74</sup> This is an important insight for police training in procedurally just behavior, because it suggests that any procedural justice behavior must be able to adapt in dynamic settings. Additionally, though, it suggests that efforts to encourage *community members* to also treat *police* with procedural justice may be helpful. Procedural justice need not run only in one direction, although the research addressing perceptions of procedural justice *by*, rather than *of*, the legal actor is not robust.<sup>75</sup> Much of that research focuses on perceptions of procedural justice in the police workplace—that is, how fair are the processes in police departments. Procedural justice in that context has significant effects on how police officers act and even on health and welfare outcomes for police officers, suggesting that procedural justice *received* by police in the workplace context makes a difference in police behavior out in the field.<sup>76</sup> Little research,

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74. See, for example, the interactions described above in the Michael Brown and Sandra Bland cases, *supra* text accompanying notes 1–10 and notes 52–54.

75. Justin T. Pickett & Stephanie Bontrager Ryon, *Procedurally Just Cooperation: A Theory of Support for Due Process Reforms* (unpublished manuscript) (on file with author).

76. See McCurdy, *supra* note 18 (“Particularly in the areas of use of force and citizen complaints, many patrol deputies feel as though they do not have a voice, the process is not transparent, decisions are not neutral, and the process feels disrespectful or undignified.”).

though, has addressed what some scholars have termed “procedurally just cooperation,” considering the perceptions of the police regarding the fairness *they* experience at the hands of the public.<sup>77</sup>

This perspective may be unpalatable from a political perspective, because such research can raise potent questions about the role of procedural justice and the nature of public authorities’ rights vis-à-vis ordinary citizens. Why should we care about the way that fairness is experienced by powerful actors in the legal system? For example, it seems absurd to ask whether the judge in a courtroom believes that she has been fairly treated by litigants. Our courts and law enforcement are a public good whose constituents and funders are the public; *they* work for *us*, and not vice-versa. Why, then might police be any different? In an ideal world, they would not be. Nonetheless, when an individual police officer, or a handful of officers, encounter members of the public on the street, there are no formal rules such as there are in a courtroom, and there is a far more intimate connection, as I have repeatedly stressed here. These engagements are often face-to-face and person-to-person in a way that judge-litigant interactions, and even judge-lawyer interactions, are not, even though they encapsulate a significant power differential. Holding an officer on the street to the standard of having no emotional reaction to interpersonal behavior that is directed at them, sometimes in a hostile, heated, threatening manner, is certainly desirable: it would be ideal if such an officer, trained in procedural justice behavior, could maintain this behavior in the face of interpersonal behavior that the officer perceives negatively. But such an ideal may be unattainable if we fail to recognize the reality that this standard is exceptionally difficult for an ordinary human, with human psychology, to meet.

We can see, in some high-profile cases, an escalation of behavior between an officer and a citizen that goes directly to the perception by the *police officer* of the treatment he is receiving. So, for example, as discussed above, the officer who arrested Ms. Bland became extremely angry after Ms. Bland refused to put out her cigarette.<sup>78</sup> Although Ms. Bland was not violating the law by smoking in her own car, Officer

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77. See Pickett & Bontrager Ryon, *supra* note 75.

78. See *supra* note 52.

Encinia's ability to act in a procedurally just way in the face of what he likely *perceived* as procedurally unjust behavior—a refusal to comply with his request—was compromised. As I note above, bolstering training that helps officers respond to behavior that they may perceive as hostile, angering, or threatening is critical.<sup>79</sup>

Regardless of our (rightful) expectations for high-level behavior from the police, when an individual police officer, or a handful of officers, encounter members of the public on the street, there is also a far more intimate and informal connection between the police and the public. Understanding that a police officer's own behavior may be shaped by the behavior she encounters *from* the public is an important piece of understanding how best to train officers in procedural justice techniques.

Another way of conceptualizing the interaction between the officer and the individual member of the public is as a prisoner's dilemma.<sup>80</sup> A prisoner's dilemma is a simple "game" in which parties have to choose a course of action unilaterally, without awareness of the other party's choice. The choices of the two parties form a payoff matrix that rewards a "defector" with the highest payoff if the other party has "cooperated."<sup>81</sup> The cooperating party in that match-up gets the lowest payoff.<sup>82</sup> Mutual defection yields a low, but slightly higher payoff, and mutual cooperation yields a higher—but not as high as unilateral defection—payoff.<sup>83</sup> Mutual cooperation is the best long-term strategy for players in an iterated version of the prisoner's dilemma—one with multiple rounds with the same party.<sup>84</sup>

If we imagine procedurally just behavior as "cooperation" in a prisoner's dilemma, and procedurally unjust behavior as a "defection," what implications does this have for procedural justice behavior by the police? First, the most immediate implication is that this is a dyadic (or multi-party) interaction in which the police are not acting unilaterally to bestow procedural justice on the public. The behavior of the other

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79. See *supra* text accompanying notes 52–54.

80. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 7–9 (1984).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 125.

person in the encounter also plays a role and the interaction between police and public is dynamic and iterative. As discussed above, the interaction between a police officer and the public is not the same as an interaction between a litigant and a judge, arbitrator, or mediator; this is a dynamic interchange where both parties interact in a more intimate and interconnected way.

Additionally, although mutual cooperation is the best long-term strategy for a repeated game between the same players, this cooperation is much harder to establish without an ability to communicate with<sup>85</sup> or trust the other party,<sup>86</sup> suggesting that communication and trust are critical aspects for mutual cooperation. Effective communication and trust, then, may be critical aspects for mutual procedural justice behavior. Although a tit-for-tat strategy, whereby the behavior of the other party is replicated by the receiving party, is an excellent strategy in a simple prisoner's dilemma game,<sup>87</sup> tit-for-tat in the real world of policing will lead to undesirable negative or violent outcomes. For example, some recent high-profile cases where citizens and police have interacted in unsatisfactory ways appear to be catalyzed by an escalation of disrespect; police officers in our society may be expecting a certain level of deferential or respectful treatment. When behavior towards the police does not comport with that expectation, this mismatch in norms may prompt a cycle of prisoner's dilemma-style "defection."

For example, a recent videotaped incident in South Carolina involved police violence towards a teenaged girl in a classroom setting. The situation escalated when a math teacher asked the girl to give up her cell phone.<sup>88</sup> According to one account, the girl then refused to

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85. See David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-analysis of Experiments from 1958 to 1992*, 7 RATIONALITY & SOC'Y 58, 78 (1995) (noting that communication dramatically increased cooperation in prisoner's dilemma games).

86. There is some debate amongst game theorists regarding the proper role of trust in a prisoner's dilemma situation, with arguments for the importance of trust on the one hand, see Virginia Held, *On the Meaning of Trust*, 78 ETHICS 156 (1968), and arguments that trust is irrelevant, see Gordon Tullock, *The Prisoner's Dilemma and Mutual Trust*, 77 ETHICS 229 (1967), and that far more important than trust is the durability of a relationship and the presence of other factors that will be sufficient to allow players to hit on a successful strategy, see Axelrod, *supra* note 80, at 182, on the other.

87. See Axelrod, *supra* note 80, at viii.

88. Holly Yan & Mariano Castillo, *Attorney Defends Actions of Fired School Officer as*

leave the classroom after a teacher and administrator asked her to do so.<sup>89</sup> When the school police officer was summoned, the officer apparently told the student that she was under arrest and asked her to leave and when she did not, he grabbed her around the neck and threw her and her desk to the ground and dragged her across the room.<sup>90</sup> The same situation may occur in the other direction, of course, beginning with the police officer's behavior and then prompting a responsive "defection" by a community member.<sup>91</sup> In either case, the behavior demonstrated by the officer in the video is shocking and unacceptable; my explanation here of the interactive way in which the situation devolved does not mitigate the officer's behavior in any way. Understanding police or citizen behavior as an effort to use a tit-for-tat strategy does not ameliorate or explain away police misconduct, but it may help to design interventions to ameliorate tensions or help police re-conceptualize the interaction along different lines.

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'*Justified and Lawful*,' CNN (Oct. 29, 2015, 1:08 AM), <http://www.cnn.com/2015/10/28/us/south-carolina-school-arrest-videos/>.

89. *Id.*

90. *Id.*

91. As noted above, the Ms. Bland incident seems to change dramatically in tone after Ms. Bland refuses to comply the officer's request/demand regarding the cigarette because it is beyond the scope of his authority. But as noted above, he likely believed he was being polite—using the word please, for example—and felt disrespected in return. *See supra* note 53.

*D. Trust and Reactive Devaluation: Expanding the Paradigm Beyond Police-Community Interactions*

One consequence of the events in Ferguson and other places was the “unmasking” of a clear divide in perceptions by different members of various communities. The polarizing perceptions of the same information have serious consequences that are not limited to the domain of policing, of course. For example, the Supreme Court’s divided opinion in the *Iqbal*<sup>92</sup> pleading case suggests that individuals can look at the same information and see dramatically different stories: a plausible story of unconstitutional discrimination in detention, or an implausible story of complaint in light of a rational response to a national security problem.<sup>93</sup>

Policing is no exception to this rule. While one community may express strong support for those who form the police force, and consider specific events a reasonable use of force by officers, others may decry the invidious role that the police play in oppressing or targeting certain communities and consider incidents as blatant police brutality. Consider the disagreement even when a videotape exists of the incident in question, such as in *Scott v. Harris*, where participants in an experiment viewed the incident at the heart of the case and came up with dramatically different views regarding whether the situation presented a danger to the public sufficient to justify the use of deadly force.<sup>94</sup> The broad unrest that has resulted from recent interactions between officers and the public that have gone terribly wrong suggests that the broader societal forces around perceptions of the police are important to society at large, and that our concerns ought to go well beyond merely the benefit to the involved parties of managing interactions between police and citizens. Protesters in these recent police cases have argued that racial bias underlies much of the behavior

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92. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

93. This difference in perception, is, of course, not new, but the *Iqbal* court expressly moved subjective perception—long understood as both inherently present and deeply undesirable—into the legal system’s set of norms and judgments.

94. Dan Kahan, David Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); see also Sommers, *supra* note 9.

of the police, and groups such as Black Lives Matter have expressed the problem in explicitly racial terms.<sup>95</sup>

The widening divide between groups who see each other as having deeply opposing agendas, values, and norms suggests that reactive devaluation may play an important role in thinking about how to make sure that police reform interventions are effective. As protests around policing take on increasingly polarizing dimensions, along racial (black/white) as well as political (conservative/liberal) and other (Black Lives Matter/Blue Lives Matter) lines, the delineation of different parties as groups oppositional to one another has become even more pronounced, leading to a situation ripe for the effects of reactive devaluation.<sup>96</sup> Reactive devaluation<sup>97</sup> is a psychological phenomenon that speaks not to the selective perception or bias that may fuel different conclusions based on the same information; instead, reactive devaluation refers to the bias that parties display in evaluating options by using the identity of the proposer as a proxy for the favorability of the proposal. Ross and Stillinger's groundbreaking research demonstrated that once parties believe that their interests are opposed, proposals for change or reform are perceived by others as partisan, and, more importantly, oppositional or negative to the non-proposer.<sup>98</sup> In contexts such as nuclear disarmament and apartheid, this research showed that parties' ratings of the favorability of a proposal depended not on the content of the proposal but on the identity of the proposer.<sup>99</sup> This suggests that proposals to increase the procedural justice of police-community interactions, or to change the behavior of the police generally speaking, could potentially be viewed with distrust depending on the perceptions of the proposing party.

Reactive devaluation suggests one possible roadblock for reform of

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95. See, e.g., Jelani Cobb, *The Matter of Black Lives*, NEW YORKER, Mar. 14, 2016.

96. Daniel Victor, *Why 'All Lives Matter' Is Such a Perilous Phrase*, N.Y. TIMES, July 15, 2016 ("'All Lives Matter' hasn't brought people together"); L-Mani S. Viney, *Here's Why It Hurts When People Say 'All Lives Matter.'*, VANITY FAIR, July 19, 2016; Perry Bacon, *Trump and Other Conservatives Embrace 'Blue Lives Matter' Movement*, NBC NEWS (Oct. 1, 2016, 6:45 PM), <http://www.nbcnews.com/storyline/2016-conventions/trump-other-conservatives-embrace-blue-lives-matter-movement-n615156>.

97. Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389 (1991).

98. *Id.*

99. *Id.*

police behavior along procedural justice lines. Any change in behavior by the police, or reforms instituted by police departments, may be perceived negatively simply because of the identity of the actors. This suggests that work needs to be done to bring together not just the police and their communities, but different stakeholder communities which sometimes see themselves having opposing needs or values. Understanding that merely changing behavior will not immediately change perceptions is an important step in undertaking reform. One potential solution to the reactive devaluation problem, according to Ross, “involves explicitly eliciting the potential recipients’ values and preferences before making any concessionary proposal, and then explicitly linking the content of the subsequent proposal to those expressed values and preferences.”<sup>100</sup> Another possibility is to offer a “menu” of concessions that an opposing group can choose among. Finally, another possible intervention is to find a more neutral third party who can propose reforms. The Task Force on 21st Century Policing may have been an effort both to elicit values and preferences, brainstorm a number of different options for choice by stakeholders, and create a more “neutral” third party who could offer suggestions. However, it is not yet clear how successful that effort was in tamping down potential reactive devaluation to procedural justice reforms.

Of course, I do not mean to suggest that there are not serious substantive concerns about limiting police reform to procedural justice-based interventions. However, in an increasingly polarized environment where groups distrust each other and view each other as oppositional, and where police departments grow ever more enthusiastic about procedural justice reforms, attention must be paid to the potential ramifications regarding public perception of the positive direction of these reforms.

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100. Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION, 39 (Kenneth Arrow et al. eds., 1995).

### CONCLUSION

Procedural justice holds promise for reform and offers great potential to ameliorate tensions between police and the public. However, it is critical to consider that procedural justice does not occur in a vacuum, or even in a highly controlled setting, when a situation develops between a police officer and a member of the community. These are often one-on-one intimate and sometimes volatile interactions, posing special problems for training procedural justice behavior in this context that merit additional exploration. Ultimately, the burden for behavior in interactions between police and the public, because of the dramatic power differential and the special role of law enforcement, must rest on official government actors, not private citizens. But understanding the ways in which these interactions may relate to other areas of psychology can only improve procedural justice training and other procedural justice interventions.