The Limits of Procedural Justice

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Police are society's last resort: We grant them broad authority to force solutions on urgent problems when less coercive tactics have failed (Bittner 1990: 125). The paradox of policing is that the whole reason to create such an institution is a desire to exile the use of force from society as far as possible (*Ibid.* 130-1). By concentrating responsibility for the legitimate use of force in a single institution, we hope to professionalize it—to ensure that it will be used less intensively and more responsibly than it otherwise would be by organizing, monitoring, regulating, and refining expertise for resolving problems that may require coercive solutions. In that respect, police work represents one of the highest aspirations of a free society. Nevertheless, even when police are able to resolve an emergency without resorting to overt coercion, the covert threat of doing so if "voluntary" compliance fails always lies in the background; and of course police cannot entirely avoid overt coercion in every case. In these respects, the everyday realities of police work seem destined to make a free society uneasy (Goldstein 1977), and it can be tempting to downplay, ignore, or deny the foundational role that coercive authority plays in police work. "How," Egon Bittner asked, "can we arrive at a favorable or even accepting judgment about an activity which is, in its very conception, opposed to the ethos of the polity that authorizes it? Is it not well nigh inevitable that this mandate be concealed in circumlocution?" (1990: 131). Reform programs that succumb to this temptation end up reforming only the least significant aspects of policing, and they may obscure more urgent questions about when police should use their unique authority (Klockars 1988).

The procedural justice agenda sits uneasily with these concerns. The guiding motivation for Tom Tyler's remarkable work over more than three decades has been to develop a robust alternative to the coercive model of law—to show that legal authorities can usually secure compliance more easily by treating people fairly than by threatening them with force (Schauer

2015: ch. 5; Tyler 2016; Schulhofer, Tyler, and Huq 2011: 350 ff). That agenda has real potential to advance the mission of policing by reducing the need to resort to coercion (Tyler and Huo 2003: 1-5), but we should not lose sight of how much lies outside its scope.

First, by design it excludes questions about when police should use the coercive authority that makes them unique. To decide when police can justifiably use that authority, we must rely not only on principles of procedural justice but also on principles of substantive justice, including those embodied in the diverse bodies of law that regulate police work (Harmon 2012), in administrative guidelines about the proper use of police authority (Davis 1975; Goldstein 1967; Friedman 2017), in project-specific decisions about the appropriate use of police discretion (Thacher 2016), and in professional expertise within policing (Klockars 1996).

Second, contemporary scholarship about procedural justice probably overstates the extent to which fair treatment can serve as a viable alternative to coercion. That work aims to study the meaning and value of fair treatment empirically: Researchers make the case that the practices they define as "procedurally fair" are important because they affect public cooperation and compliance. This argument faces two challenges. First, although the complex causal relationships that this kind of research investigates are intellectually interesting, they are often too weak, unreliable, and elusive to provide a firm basis for public policy (Rein and Winship 1999). Three decades of research has amassed convincing evidence that perceptions of procedural fairness are associated with the perceived legitimacy of legal authorities, but so far it has provided little evidence for the stronger causal claim that motivates reform efforts—that deliberate efforts to encourage procedurally fair policing will substantially improve public cooperation with the police, and that procedural fairness matters more than fair outcomes in this regard. Second, the social scientific perspective on procedural fairness has obscured important

moral questions (Thacher 2015b). To the extent that procedural justice research *does* identify tactics that help police gain compliance, those tactics need moral and legal scrutiny, not just empirical analysis; otherwise there is no way to distinguish illicit manipulation from voluntary and appropriate deference to authority (Miller 2016). "Voluntary" compliance may be less benign and more coercive than it appears, so police still need clear substantive standards about when it is appropriate to request it.

This essay develops these concerns in three steps. Section 1 clarifies the meaning of procedural justice and distinguishes it from other frameworks for reform, particularly those focused on various forms of substantive justice. The rest of the essay turns to the main normative claim that procedural justice scholars seem to be making—that the pursuit of procedural justice should be a central priority for police reform because it generates public trust, cooperation, and deference to police authority. Section 2 considers the empirical case for this claim, and section 3 considers its moral logic.

1. Procedural Justice and Its Alternatives

Procedural justice did not begin as a fully developed policing strategy but as a theoretical perspective in academic psychology. Most models of human psychology across the social sciences have emphasized the role of self-interest in explaining all kinds of human action, but Tyler and others have argued that moral concerns have more influence on our relationships with social organizations. People do not mainly cooperate with groups and institutions because they think that is the best way to advance their material self-interest; they care more about whether they are being treated fairly, since fair treatment signals their value and status within the community (Lind and Tyler 1988).

From this perspective, legal authorities can gain public cooperation more easily by exercising their authority in a procedurally fair manner than by using the threat of force and sanctions (Tyler and Sunshine 2003; Tyler and Huo 2002). Consider the President's Task Force on 21st century policing, which describes procedural justice as "the guiding principle" for police reform (President's Task Force 2015: 12). The Task Force's final report advises police leaders to reform "the ways officers and other legal authorities interact with the public" in order to increase public trust in police. Police should aim to treat people in a dignified and respectful manner, give them an opportunity to tell their side of the story, make decisions in a neutral and transparent way, and convey "trustworthy motives" (President's Task Force 2015: 10).

These ideas have implications for many different organizational practices, including management's relationship with the agency's own workforce (President's Task Force 2015: 14), public input into police strategy (Kunard and Moe 2015: 8), and the agency's response to citizen complaints (Fischer 2014). So far, however, documented procedural justice initiatives have mostly focused on the character of street-level interactions between patrol officers and the public. Leading training programs have encouraged officers to treat members of the public "fairly and with respect as human beings"—for example, by explaining the reason why an officer conducted a stop, listening empathetically to the citizen's side of the story, avoiding rude and insensitive comments, and showing concern for the welfare of the people they interact with (Skogan, van Craen, and Hennesy 2015: 321-3; Gilbert, Wakeling, and Crandall 2015). A leading field study of procedural justice operationalized the strategy in a similar way, instructing officers to explain why they were conducting a sobriety checkpoint, to tell drivers that they had been stopped at random, to solicit the drivers' ideas about police priorities, and to thank them for their time and cooperation (Mazerolle *et. al.* 2013).

Former Chicago Police Superintendent Garry McCarthy has been perhaps the most visible police leader to embrace procedural justice, and his approach illustrates its practical application more concretely. McCarthy summarized his own understanding of the idea with an aphorism: "It's not what you do, it's how you do it" (Wildeboer 2013). That view guided the stop and frisk strategy he developed in Chicago, which was a centerpiece of the department's approach to crime prevention; recorded street stops roughly tripled during the first two years of his tenure (Skogan 2017). Shortly after taking office in 2011, McCarthy wrote a white paper outlining that strategy. That document acknowledged the need to ensure that officers only conduct stops when they are lawful, but it mostly focused on "how we train our officers to interact with the public during stop-and-search situations":

> It is imperative that police officers explain the logic behind the street stop and take the individual through the process step by step. This includes greeting the pedestrian respectfully, explaining the reason for the stop, explaining the stop within the context of the department's overall crime reduction strategy, and then taking the pedestrian through each step of the stop as it proceeds. Explaining the logic behind the stop, or "selling" it to the pedestrian, encourages the officer to treat the pedestrian with respect and explain departmental policy and strategy. Even if a stop results in an arrest, that pedestrian and his or her fellow community members can distinguish between an encounter in which the pedestrian was treated with procedural fairness and one in which he or she was not. The law enforcement officer's demeanor and interaction with the pedestrian (the selling of the stop) is the most important determinant in whether the pedestrian and bystanders will believe the stop was legitimate (McCarthy 2012: 39).

To that end, Chicago soon embarked on a major effort to train thousands of patrol officers in the procedural justice philosophy (Skogan, van Craen, and Hennesey 2015). The goal, as McCarthy explained it to a reporter, was to maintain community support for the heavy use of street stops as a crime prevention strategy: "So you can stop somebody but . . . you explain to them why you stopped them" (Wildeboer 2013).[1] Academic literature on procedural justice echoes this

[1] McCarthy brought this approach (and the language of "selling the stop") from Newark, where he had developed a stop and frisk strategy based on procedural justice ideas (Lachman, LaVigne, and Matthews 2012: 8; Baker 2010).

perspective, suggesting that "if stops are carefully initiated, police would not have to reduce their frequency" (Schulhofer, Tyler, and Huq 2011: 352), that "it is not stops per se that undermine legitimacy, but the behavior of the police during those stops" (Tyler, Fagan, and Geller 2014: 760), and that fair treatment will raise the odds that the public will grant police the authority "to decide whom to stop, question, and ticket" (Sunshine and Tyler 2003: 518).

What does this perspective leave out? In McCarthy's language, it leaves out questions about "what" police do as opposed to "how" they do it—about how often and in what circumstances police invoke their authority to stop, search, cite, arrest, physically restrain, and otherwise coerce people. Those questions implicate substantive justice as well as procedural justice; they are questions about fair outcomes, not just fair process.[2]

Most simply, procedural justice leaves out lawfulness. Advocates for procedural justice draw this contrast repeatedly, and one of their main claims is that procedural justice defines a dimension of policing quality that is distinct from the traditional concern for lawfulness (*e.g.* Meares 2015). A police strategy focused entirely on procedural justice sets questions about lawfulness aside. For example, when McCarthy encouraged Chicago's officers to conduct more pedestrian stops, he briefly acknowledged that stops should be lawful (McCarthy 2012: 41), but his action plan overwhelmingly emphasized procedural fairness: It aimed to reform how officers conducted their stops rather than when they conducted them (except to say that they should do so more often). By contrast, civil rights organizations like the American Civil Liberties Union and

[2] They may also be questions about effectiveness and raw politics, but I focus here on the moral evaluation of police work to which procedural justice scholars have rightly tried to redirect attention.

As I will discuss shortly, the distinction that procedural justice scholars draw between substance and procedure is not always clear, and their treatment of "substantive" (or "distributive" or "outcome") justice has been particularly uneven. Given the central role this distinction plays in procedural justice literature and the notorious difficulties involved in distinguishing "procedures" and "substance" in other contexts, it is surprising that procedural justice scholars have said so little about it. Eric Miller usefully formulates a slightly different distinction between endogenous features of a police-citizen interaction and factors exogenous to it—between the experienced character of the interaction itself (which is shaped by the officer's actions during the encounter) and external determinants and consequences of the interaction. That distinction, too, sometimes breaks down (Miller 2016: 354).

the Civil Rights Division of the U.S. Department of Justice have repeatedly called on police departments to strengthen legal controls over investigative stops—mainly by providing more thorough training about what the law requires and better monitoring of how well officers comply with it. For example, the class action settlement for a lawsuit that challenged stop and frisk practices in New York public housing required the NYPD to revise its patrol guide and training to provide detailed guidance about the specific factors that do and do not provide "reasonable suspicion" to justify a pedestrian stop (*Davis v. New York*). The previous patrol guide had said little about that topic, and critics alleged that lack of training and oversight gave police free reign to question almost anyone in public housing. As a result, they believed, police were detaining and frisking people who should have been left alone. The main goal of this reform was to regulate what police do (who they stop in what circumstances), not how they do it.

As important and challenging as the ideal of lawfulness is, it does not exhaust the meaning of substantive justice. Students of procedural justice have rightly observed that lawfulness is a weak constraint. As Tracey Meares succinctly observes: "People do not automatically approve of a stop just because an officer is legally entitled to make one" (2015: 5). On her view, procedural fairness is the additional consideration that people use to distinguish lawful but unacceptable stops from fully acceptable stops. There are other possibilities. During the last major crisis of police legitimacy in the 1960s, scholars also concluded that lawful policing was not enough: The criminal law had become so broad that it justified police intervention in an alarmingly wide range of circumstances (Thacher 2016: 540-1). Instead of procedural fairness, however, they called for further substantive guidance about when police should actually invoke the authority that was legally available to them (Goldstein 1967; Davis 1975). The legacy of their agenda survives today in administrative guidelines for the use of police discretion (Kelling 1999;

Friedman 2017: 63 ff.), in agency policies governing the use of force (Walker and Archbold 2014: ch. 3), and in tailored strategies for resolving community problems at particular times and places (Thacher 2016). From this perspective, substantive fairness is not just a matter of whether people get "what they deserve under the law" (Sunshine and Tyler 2003: 541). It is also a matter of whether moral and practical considerations beyond the law itself support the decision to intervene under the circumstances.

The Milwaukee police department under chief Edward Flynn illustrates one kind of substantive guidance that goes beyond both lawfulness and procedural justice. Like McCarthy, Flynn sought to dramatically increase police-citizen contacts in Milwaukee, particularly through heightened attention to traffic violations. He recognized, however, that these stops could aggravate enforcement burdens on the residents of high-crime neighborhoods—the very people his strategy aimed to protect. Citizen satisfaction surveys had found that even among city residents who had been stopped by police, support for the department varied substantially depending on the outcome of the stop (for example, whether the driver got a ticket) and other burdens associated with it (for example, whether the car was searched or whether a pedestrian was patted down). Recognizing all this, the department deemphasized the use of formal sanctions and searches, encouraging officers to use warnings rather than citations and arrests whenever possible and to minimize intrusive searches. The goal was to keep coercive intervention to a minimum, not just to carry it out in a procedurally fair manner. Police should stop drivers breaking relatively minor traffic rules and question pedestrians acting suspiciously, but they should usually let the driver off with a warning rather than a ticket, and even if they discovered minor contraband they did not necessarily need to make an arrest. Departmental policy and training also encouraged officers to treat people with dignity and respect and convey their

neutrality and benevolent motives, but the agency's main goal was to minimize unfavorable outcomes even when the law authorized them (Milwaukee Police 2017; Cera and Coleman n.d.).[3]

Milwaukee's strategy sought to minimize enforcement burdens—to reduce the volume of arrests and citations that a high rate of stops might generate—but stops themselves are a form of coercive intervention even when they do not lead to sanctions. In principle, administrative guidelines could also try to minimize and otherwise restrict the burdens of stops themselves, specifying the circumstances in which police should and should not invoke their broad legal authority to conduct them. I am not aware of any police department that has refined its stop and frisk strategy in that way, but the approach is common in other contexts. For example, use of force policies often prohibit the use of force in situations where the law permits it (Walker and Archbold 2014), and order maintenance guidelines often define the behavior that warrants police attention more narrowly than the law itself (for example, that jaywalking usually is not worth police attention or that discrete public drinking should be ignored in some locations); guidelines also typically instruct police to use "the least forceful means possible" to gain compliance (Kelling 1999).

These strategies aim to refine and enforce substantive standards that specify when coercive intervention is and is not justified. Procedural justice sets that contentious task aside in order to focus on *how* police exercise their authority once they have decided to invoke it. As Tyler put it in one provocative essay, the goal is to find a way to build community support for legal authority "even though their decisions are possibly contrary to peoples' feelings about what is right", so that legal authorities "can gain acceptance from both the winners and the losers in a policy

[3] In 2017 the ACLU filed a class action lawsuit alleging that Milwaukee police had done too little to ensure that investigative stops are lawful. I take no position on that allegation, for my claim is not that Milwaukee's strategy is appropriate all things considered. I claim only that it illustrates an often-ignored dimension of policing practice distinct from both lawfulness and procedural justice.

debate" (Tyler 2000: 988; cf. Tyler 2006: 66). As Tyler emphasizes, pluralistic societies that lack a shared moral framework sometimes cannot avoid that approach. It is not, however, the only way to cope with moral disagreement about the circumstances in which coercive intervention is justified. It may sometimes be possible to refine the law and its applications to identify principles that a wider range of moral views can endorse (Rawls 1993, Sunstein 1995), decentralize decision-making to adapt broad legal standards to the varying expectations of diverse communities (Dorf and Sabel 1998; Cohen and Sabel 1997), or narrow the scope of state authority over individual and community life (Mill 1859/1978; Larmore 1987). If the mismatch between law and personal morality cannot be eliminated entirely, at least it can be minimized; and when law must override personal views about right and wrong, it should intervene as parsimoniously as possible (Thacher 2015a). When legal authorities refine and enforce the law according to these principles, the people subject to it have no legitimate objection to their fate (even though *right now* they might decide to break a law they know their society needs). Where procedural justice tries to build support for the law and law enforcement *in spite of* some peoples' reasonable belief that legal authorities are making the wrong decisions, substantive justice aims to reshape legal intervention so that it is less likely to offend those beliefs in the first place. The substantive strategies I have described return our attention to the hard but unavoidable question at the heart of policing: Under what conditions is the use of coercive authority actually justified?

I have tried not to define procedural justice too narrowly. Critics sometimes suggest that it demands nothing more than polite and respectful treatment during street-level interactions, but its defenders rightly point out that procedural justice also requires high quality decision-making—including careful consideration of relevant facts, a sincere concern for community

well-being, and a determined effort to keep the officer's personal biases at bay (Meares 2017: 1898). But even this broader understanding of procedural justice does not encompass the substantive considerations I have been discussing, such as those contained in the post-*Davis* patrol guides (which define more clearly when pedestrian stops and trespassing arrests are warranted in public housing) and the Milwaukee traffic patrol guidelines (which instruct officers to avoid citations and arrests in most circumstances). Those considerations involve outcomes, not process. If procedural justice *did* encompass them, the distinction at the heart of one of the literature's core claims—that "people typically care much more about how law enforcement agents treat them than about the outcome of the contact" (Meares 2015: 5)—would unravel. If we believe it is wrong for police to arrest or cite a man for public drinking when he walks down to the sidewalk to greet a neighbor while still holding the beer he was sipping on his porch, we are objecting to the injustice of the outcome of this police intervention: We are insisting that someone behaving like *that* should not end up arrested or fined, no matter how fairly the officer treats him in the process. The law, administrative guidelines, and other standards that specify when police should use their coercive authority all focus on outcomes in that sense.

2. The Empirical Case for Procedural Justice

The argument that procedural justice deserves a central place in police reform rests mainly on an empirical claim: That procedurally fair policing is the most effective strategy for producing community trust and support for the police. Despite dramatic reductions in crime since the early 1990s, public confidence in the police remains strained in many communities—to the point that police sometimes have a hard time getting cooperation and deference when they need it to do their jobs (Tyler and Huo 2002: 5). Procedural justice researchers aim to diagnose the reasons for these tensions. By identifying what the public expects from police beyond successful

crime reduction, these researchers aim to identify the elements that need to be part of an effective strategy for building community trust (Tyler 2014: 16; Sunshine and Tyler 2003 515-6). Their conclusions are by now well known. People view legal authorities as legitimate when they think they behave in a procedurally fair manner, and perceptions of legitimacy lead to cooperation, deference, and obedience the law. Procedural fairness seems to matter more than the threat of sanctions does, and more than judgments about distributive justice, fair outcomes, or lawfulness.[4]

While the vast body of research that supports many of these conclusions is impressive, it has repeatedly encountered several challenges. The most widely discussed challenge involves the familiar problem of distinguishing correlation from causation. Most procedural justice research documents the "antecedents" of legitimacy and compliance without demonstrating that those antecedents cause the relevant outcomes. Research shows that people who think police act fairly tend to trust them and comply with their authority, but that may not mean that their perceptions have a causal effect on legitimacy and compliance. For example, people who trust the police may have developed a strong commitment to the social order early in life, and perhaps such people tend both to view police behavior through rose-colored glasses and to defer to legal authority. Perceptions of fair treatment may track deference to the law not because the former causes the latter but because both result from personality (cf. Worden and McLean 2017: 51). Daniel Nagin and Cody Telep (2017) argue that this kind of problem is pervasive in procedural justice research, and it affects both attitudinal studies based on survey research (e.g. Tyler 2006) and observational studies in the field (e.g. Mastrofski *et. al.* 1996). A few recent studies have tried to address this concern by conducting experiments, both in the field and in the lab—for example, by asking respondents to watch randomly selected videos of police-citizen encounters or by

[4] Researchers sometimes concede that substantive considerations like lawfulness and fair outcomes remain important, but they suggest that those considerations already get more than their share of attention (e.g. Schulhofer, Tyler, and Huq 2011: 356).

conducting sobriety checkpoints guided by randomly assigned protocols. Some of these studies have found modest effects of procedurally fair policing on perceptions of procedural justice and self-reported compliance (*e.g.*, Mazerolle *et. al.* 2013), but others have not (*e.g.*, MacQueen and Bradford 2015).[5]

Second, the complex attitudes that procedural justice research aims to study are difficult to define and measure, so it is not always clear what the conclusion that people care more about process than outcomes actually means. One of the most influential studies measured distributive justice partly by asking respondents whether minority residents "receive a lower quality of service than do whites", but it used similar-sounding questions to measure procedural justice, such as whether the police "treat everyone in your community equally". The same study measured outcome justice by asking respondents whether people get "what they deserve under the law", and it measured procedural justice by asking whether police "accurately understand and apply the law" (Sunshine and Tyler 2003). Do survey respondents distinguish carefully among these questions? Do they interpret their meaning the same way that researchers do? Is it appropriate to describe their answers as statements about the "process" and "outcomes" of police intervention? Unless the answer to all of these questions is "yes", the study's conclusion that people care more about procedural justice than distributive justice is hard to interpret.

Several important statistical, observational, ethnographic, and philosophical analyses give reasons to question the interpretive claims procedural justice literature makes and the conclusions that many practitioners have drawn from them. The most prominent study of

[5] Tyler (2017) argues that psychology experiments in other fields lend indirect support to the procedural justice hypothesis in policing, and to some extent they do (though police authority is clearly different from—and typically more momentous than—authority in other contexts; moreover, police-citizen interactions tend not to be repeat interactions to the same degree as, say, employee-employer interactions). Nagin and Telep's point, which Tyler does not dispute, is simply that there is little or no direct evidence that unequivocally demonstrates that procedurally fair policing has a causal effect on perceptions of legitimacy, compliance, and cooperation.

construct validity in procedural justice research found that the attitudes tapped by commonly used survey questions do not seem to be entirely distinct—that questions used to measure distributive justice seemed to belong in the procedural justice scale and vice versa (Reisig, Bratton, and Gertz 2007); it is not possible to conclude that "procedural justice" matters more than "distributive justice" from research that relies on those questions.[6] A major observational study that reviewed video footage of police-citizen encounters found that survey responses cannot be taken as a reasonable interpretation of actual police behavior, and observed procedural justice had much less influence on trust in the police than the outcome of the encounter did (Worden and McLean 2017: tk); even if *perceptions* of procedurally fair treatment affect legitimacy and cooperation, improvements in *actual* procedural fairness may have no effect. Ethnographic work that probes people's attitudes towards the police in more depth than standardized survey questions can has repeatedly found that people's views about police legitimacy and related concepts embrace many considerations other than procedural justice (Futterman, Hunt, and Kalven 2016; Bell 2017; Epp, Maynard-Moony, and Haider-Markel 2014); when we listen closely to what people say about police in their own words (rather than their responses to standardized survey questions), they seem care quite a bit about what police do, not just how they do it. The most careful conceptual analysis of procedural justice research has concluded that the concept of legitimacy it employs represents a fairly narrow motivation for legal compliance, and most empirical studies in the field have not successfully isolated it; to act

[6] By dropping these questions from the survey, the authors produced new composite measures of procedural and distributive justice that seemed to make better psychometric sense, and an analysis using these revised measures of procedural and distributive justice replicated some (but not all) of the literature's main findings. But what does the new, stripped-down measure of each variable mean? The fact remains that widely used survey questions that directly ask survey respondents about central elements of procedural justice as researchers have long articulated them—whether officers "make decisions based on their own personal feelings" (neutrality) and whether they "listen to all citizens involved before deciding what to do" (voice)—yielded answers that appeared much more closely related to distributive justice. The decision to drop these questions rather than repurpose them as additional measures of distributive justice was not dictated by factor analysis alone but by the observation that "these items were originally designed to measure different factors" (Reisig, Bratton, and Gertz 2007).

in a way that is *consistent* with the law is not the same as *obeying* the law, and people who act that way may simply be doing what they think is right regardless of legal orders (Schauer 2015). In short, a diverse range of careful analyses of what it means to say that procedures have more impact than outcomes on police legitimacy and cooperation have raised significant doubts about whether the evidence cited in support of that proposition has adequately tapped into the relevant concepts.

Third, the claim that procedural fairness matters more than lawfulness or fair outcomes lacks empirical support because existing research has not thoroughly investigated the full range of variation in those dimensions. Police often fail to understand and follow the law (Gould and Mastrofki 2004), but procedural justice research has rarely studied both lawful and unlawful policing directly. For example, the field experiments discussed earlier do not vary the lawfulness of police behavior, so even if they convincingly demonstrated that procedural justice matters, they would not have demonstrated that it matters more than lawfulness.[7] One sophisticated recent study comes closer. Researchers showed video recordings of police encounters and provided a narrative description of how the encounter came about, and they attempted to vary the procedural justice of the encounter (for example, whether the officer listened to the citizen) and "the actual legality of police behavior" (Meares, Tyler, and Gardener 2015: 138). On closer examination, however, it is not clear whether the study varied the second factor successfully. The researchers intentionally did not tell respondents that police had behaved unlawfully; instead they provided contextual information designed to signal that fact—for example, a statement that "the individual in the video was stopped after the police officer observed him walking down the street late at

[7] Survey-based studies potentially tap into natural variation in police lawfulness, but when they operationalize "lawfulness" using survey questions they suffer from the kind of problems discussed in the previous paragraph (as well as the problems discussed in section 3). Here I focus mainly on lab and field experiments about procedural justice.

night" or that the man driving the car was stopped "while he was driving appropriately and within the speed limit" (Meares, Tyler, and Gardener 2015: tk). Did the respondents assume that the absence of a clearly stated legal reason for these stops meant that the police had stopped the driver or pedestrian illegally, as the researchers intended? Or did they assume that some unstated reason justified the stop—that the pedestrian matched the description of a suspect, for example, or that the driver had expired tags or a broken taillight (which would not be covered by the statement that he was "driving appropriately and within the speed limit")?

Moreover, for the reasons discussed in section 1, fair outcomes are not just a matter of lawfulness. Milwaukee's approach to traffic stops and street stops differs from Chicago's mainly because Milwaukee's command staff discouraged arrests and citations in favor of warnings. Assuming that both departments were equally lawful, Milwaukee's strategy arguably led to fairer outcomes because it imposed a lighter enforcement burden on residents of high-crime neighborhoods. It is not clear that procedural justice research has really shown that an approach like Milwaukee's has less impact on community confidence than an approach like Chicago's. (and as noted earlier, Milwaukee's own data about public perceptions of the police indicated that outcomes mattered considerably). In practice, efforts to use police authority in more restrained and strategic ways have sometimes proven revolutionary for police-community relations. When police in High Point, North Carolina decided not to arrest most of the drug dealers who sustained the city's worst overt drug market but to "bank" the cases against them and give them an ultimatum, the officers' forbearance profoundly affected many community members. One NAACP leader told the audience at a community meeting about the project: "I never would have believed that the police would hold our young men in their hands, able to put them in prison, and

not do it" (Kennedy 2008: 154-5). This aspect of police strategy is not just about procedural fairness but about outcomes—avoiding arrest.

Fourth, although procedural justice researchers often make general claims that people care more about procedures than outcomes (e.g. Meares 2015: 5; Tyler 2014: 35), the preferences they study may be more contingent than this sweeping language suggests. Some research in social psychology does seem to tap into stable features of human cognition—for example, our tendency to overestimate the probability that vivid, frightening events will occur and underestimate the probability of hard-to-visualize threats, or our tendency to give too much weight to the final moments of an experience and ignore its duration when we remember how well we liked it (Kahneman 2011: chs. 12, 35). It is not clear whether procedural justice researchers intend to uncover invariant features of the mind like these; their conclusions often sound more like empirical reports of the preferences that particular people in particular places currently have. Tyler has defended the value of observational research in the real word (as opposed to the psychology lab) on this basis. Stressing "the futility of trying to draw an overall conclusion about how important one factor is, alone or relative to others", he observes that "surveys of natural settings are important because they tap into the strength of each factor within a particular setting" (Tyler 2016: 517). He and others have noted how the meaning and importance of procedural justice vary across cultures (tk). What general claims are left to make? Whether someone cares more about procedural justice than fair outcomes presumably depends on many things—not just on that person's cultural and demographic identity but also on the actual state of policing in her community. In a city where police have recently been accused of theft, smuggling, and even kidnapping (Pheppen 2016), a predominant focus on procedural justice rather than reasserting the rule of law would be insulting. When we need to decide

whether our local police department should focus scarce energy on procedural justice, lawfulness, or sensitive use of discretion, what can we learn by consulting general social science findings that we cannot learn by conducting a community dialogue?

Finally, procedural justice research has never, to my knowledge, shown that a broad-based effort to strengthen an agency's legitimacy has succeeded by focusing on fair procedures. The literature's methodological and conceptual approach comes from social psychology and criminology, where researchers aim to explain variation in perceptions of police across individuals. Reformers then craft a strategy for action by assembling the set of front-line practices that seem to improve individual perceptions. This approach faces at least two problems. First, even if researchers can identify front-line practices that increase public confidence, there is no guarantee that police managers can get their officers to adopt those practices on a broad scale. Based on a detailed study of two mid-sized New York agencies, Robert Worden and Sarah McLean conclude that procedurally just policing is ambiguous and difficult to monitor, and they express skepticism about the ability of police departments to successfully encourage officers to carry it out as intended (2017: 5). Second, the practices that explain variation in trust across individuals within a single community may not explain variation in overall levels of trust across communities or variation over time within a single community. Practices that "work" to build trust on an individual level may have very different effects once they have been aggregated up into a deliberate program of action at a broader community level (e.g. Cartwright and Hardie 2012: 30-2). For example, the public may catch on quickly when police begin to deliberately design procedures that *appear* fair. They may begin to see canned explanations, comment cards, and empty opportunities for voice as cynical ploys to mask the injustice of a substantively inappropriate practice (Tyler tk).

These complex dynamics call for a different kind of research, particularly historical and case study research that investigates comprehensive efforts to shore up an agency's legitimacy over a long stretch of time. Procedural justice has not been studied systematically from that perspective, but relevant historical work casts some doubt on the claim that police agencies can successfully overcome severe legitimacy deficits by focusing mainly on procedural fairness. Wilbur Miller's research is particularly relevant because he has studied police legitimacy more directly than most historians, and he has worked within the same Weberian tradition as Tyler (Miller 1977: 222). In a study of the Bureau of Internal Revenue agents who enforced federal liquor tax laws in the late 19th century, Miller found that Bureau officials initially faced a severe legitimacy crisis that made it very difficult to do their jobs: Neighbors warned moonshiners when tax collectors were on their way, and few of them would willingly serve as informants, witnesses, or jurors. The Bureau eventually gained the cooperation and deference it needed by accepting significant restraints on the scope of its authority, including a tacit agreement to restrict enforcement to deliberate scofflaws who knew that their moonshining was illegal, extensive provisions for clemency, and limits on asset forfeiture (Miller 1991: 52-9). The key to agency legitimacy involved what officers did, not how they did it. In a study of the early New York City police, Miller similarly found that police tried to gain legitimacy (and to a halting and uneven degree succeeded) by using their discretion to tailor general legal rules to local expectations. Police work in this environment "called for flexibility in the administration of justice—taking individual circumstances into account when making decisions and rendering substantive rather than merely formal justice" (Miller 1977: 21). I know of no historical evidence that procedural fairness has had a comparably large influence on public support for police.

Researchers have sometimes suggested that Robert Peel's vision for the early London police reflects key principles of procedural justice and that the success of that force illustrates the value of his approach. Peel stressed the need for officers to demonstrate "impartial service to law", "courtesy", and other key elements of procedural justice, and under Richard Mayne's long and influential leadership the force sought to reassure a skeptical British public with strict discipline and an impersonal demeanor that aimed to make London bobbies "models of restraint and politeness" (Miller 1977: 38-42). All of this does seem to resonate with core ideas of procedural justice. On closer examination, however, the long-run success of even London's police also required close attention to what the police did, not just how they did it (*e.g.* Miller 1977: 48, 55, 62-3, 132-8). In Michael Ignatieff's words:

> To win this cooperation, the police manipulated their powers of discretion. They often chose not to take their authority to the letter of the law, preferring not to 'press their luck' in return for tacit compliance from the community. In each neighbourhood, and sometimes street by street, the police negotiated a complex, shifting, largely unspoken 'contract'. They defined the activities they would turn a blind eye to, and those which they would suppress, harass, or control. . . This was the microscopic basis of police legitimacy (1979: 445).

As Peel's "Blue Locusts" spread throughout the rest of the country, resistance arose not from a failure to achieve Peel and Mayne's ideal of neutrality and politeness but from the substantive restrictions on individual freedom they imposed. Riots erupted in response to police involvement in strike-breaking, crackdowns on popular recreation, interference in political activity, and the arrest and pursuit of well-loved members of the community (Storch 1975: 72). Once again, community support (or at least tolerance) came only when police tailored the scope of their substantive authority more closely to local expectations.

3. The Moral Limits of Procedural Justice

Whether or not the process-based elements of Peel and Mayne's strategy played a significant role in building legitimacy for the London police, what may be most notable about them was the degree to which they were an adaptation to an undemocratic legal system. The London police represented a vigorous effort to assert the legal framework of an aristocratic society on the inhabitants of its largest city, and later to the rest of the country. Compared with the forces that soon took shape in America, London's police were more numerous, more powerful, more centralized, and more insulated from popular influence—accountable not to municipal officials but to the Home Office, and organized around precincts that had been deliberately mismatched to existing political divisions (Miller 1977: 12; Walker 1977: 15; Reith 1943: 51). Peel had first thought about the police function in an even less democratic context as Chief Secretary for Ireland during the early years of its vexed union with Britain; his problem, in effect, was to develop a system of policing that could successfully impose British authority on the United Kingdom's new and reluctant Catholic subjects (Vitale 2017; Palmer 1988: 193-236; Reith 1943: 35). In both contexts his task was to build support and deference for an agency enforcing laws that he knew lacked broad public support.

Advocates for procedural justice do not, of course, describe their own goals that way, but the agenda they have pursued is uncomfortably well-suited to it. Procedural justice aims to provide legitimacy to legal institutions regardless of the content of the laws they enforce. As Tyler recently put it: "If people think they ought to obey the law, they obey it irrespective of what it says they should or should not do" (2016: 511). Tyler is speaking here about legitimacy in general, but the sentiment applies more clearly to legitimacy based on procedural fairness than legitimacy based on substantive fairness (*i.e.,* on a belief that the law represents a reasonable

accommodation of the moral convictions and interests of a diverse society). Civil disobedients who believe they have a duty to obey the law *unless* it is morally outrageous do not think legitimacy is content independent in this sense (*e.g.* King 1964). People who refuse to cooperate as witnesses, jurors, or the compliant subjects of consent searches because they think the laws they are being asked to help enforce are unjust are not indifferent to the outcomes the law pursues; they do not cooperate irrespective of what legal authorities say they and their neighbors should or should not do (*e.g.* Butler 2010). They believe cooperation is appropriate only when legal authorities exercise their authority in circumstances where it is justified.[8]

Procedural justice research has no place for these considerations because it studies the antecedents of a form of legal authority that has no substantive boundaries. The most widely cited study of procedural justice in policing measured the consequences of legitimacy partly by asking respondents whether they agree that "the police should have the right to stop and question people on the street" (the question does not mention a need for reasonable suspicion), that "the police should have the power to do whatever they think is needed to fight crime," and that "the police should be able to search peoples' homes without having to get permission from a judge if they think stolen property or drugs are inside" (Sunshine and Tyler 2003: 542, 546). A study like this investigates the style of policing that will lead people to accept police intervention regardless of whether that intervention is legally or morally appropriate.

If we take the main claim of procedural justice theory at face value, this is as it should be: Whether or not police intervention is legitimate depends on process, not outcomes. Procedural

[8] Tyler seems to suggest that legal authorities cannot rely on this kind of consideration as a basis for compliance—for example, when he asserts that "authorities cannot plan based on the assumption that personal morality will support compliance with their actions" (Tyler 2006: 65). But the lesson of the historical examples I have just given is that officials can and do try to adapt the law and its enforcement to prevailing moral sentiment.

justice advocates recognize how implausible this view is as a general proposition (e.g. Tyler 2006: 111; Schulhofer, Tyler, and Huq 2011: 356). Procedural fairness may be a necessary condition for the legitimate use of state authority (Waldron 2011), but it is not sufficient (West 2011). The concern deepens when we consider what counts as a "fair process" for research purposes. Police must provide people with an opportunity to tell their side of the story, but they satisfy that demand when they "show an honest interest in what people have to say, even if it is not going to change anything" (Skogan, van Craen, and Hennesey 2015: 325) or when the topic the officer asks about is irrelevant to the decision she is making (Mazerrole *et. al*. 2013: 41). These studies eliminate all moral content from the concepts of fair treatment and deference. The words used to describe those concepts ("procedural justice", "legitimate", "defer") make them sound like they refer to morally attractive things, but the researchers who use them disclaim responsibility for moral evaluation. They study procedural justice and legitimacy in a manner that is "thoroughgoing in its empiricism" (Tyler, Meares, and Gardener 2015: 305), aiming to document how the people they study actually understand these ideas regardless of whether their understanding is coherent or defensible. "It is beyond the scope of this book to evaluate whether those studied 'ought' to be more or less satisfied than they are with legal authorities", Tyler explained in *Why People Obey the Law* (2006: 148).[9] People who defer to "legitimate" authority in this morally agnostic sense may not be impressed by a well-founded sense of moral rightness so much as they are confused, deceived, or weary. Those who stubbornly defy the authorities may expect officers to pander to their whims. The finding that people view police as legitimate and defer to their authority when they have been treated in a particular way does not imply that

[9] Tyler adopts this value-neutral approach to legitimacy from Weber. For critiques and alternatives, see Selznick (1992: 268-273), Pitkin (1973: 280ff.), Beetham (1991).

this style of policing is appropriate, since their perceptions may be skewed and their deference may be unjustified (Miller 2016).

When social scientists strip the moral connotations out of the concepts they use, we cannot responsibly apply their findings to practice until we put those moral considerations back in (Thacher 2015b). Businesses sometimes use psychological research to sell us things we don't need, and politicians sometimes use it to get us to support causes and vote for candidates who won't serve our interests. More benevolent authorities hope to nudge us in whatever direction *they* judge to be best for ourselves or for society. All of these officials exploit predictable quirks in human cognition to manipulate the choices people will make, and in doing so they raise concerns about manipulation, transparency, and freedom (Sunstein 2016; Hausman and Welch 2009).

The same concerns apply to procedural justice research, which generates psychological knowledge about how human beings tend to respond to various cues in their environment. It tells us what people respond to, not necessarily what they truly value. According to Tyler's "group value theory", procedurally fair treatment does have intrinsic value: It expresses a person's status in the group and her dignity as an individual (e.g. Tyler and Blader 2000). Tyler's sometime-coauthor Allen Lind provides a different interpretation. People do not value fair treatment for its own sake but instead use it as a decision heuristic. People ultimately care about fair outcomes, but when they don't have enough information to evaluate whether an outcome is fair they rely on procedural cues to guess (*e.g.*, van den Bos, Lind, and Wilke 2001). When a person gets stopped by the police, she often has no idea whether the officer really had a good, lawful reason for a stop, but if the officer treats her with dignity and respect she may give the officer the benefit of the doubt (Meares, Tyler, and Gardener 2015: 331; Tyler 2014: 12). She does not defer because

she believes that all stops conducted respectfully are legitimate. She defers because she thinks stops made for good, lawful reasons are legitimate, and she assumes that respectful officers probably have such reasons. The ethical concern arises when the officers' Police Commissioner has encouraged them through aggressive performance management to push and perhaps exceed the limits of reasonable suspicion (Skogan 2017: tk) while simultaneously arming them with interpersonal skills they can use to persuade citizens to give them the benefit of the doubt (Skogan, van Craen, and Hennesey 2015). Like marketers and political campaigners trying to sell a product or a candidate, their police commissioner is strategically using a known decision-making heuristic to "sell" the stops his officers make. If the stops themselves are unjustified, that effort may be at best a distraction from more important priorities.[10]

These are not new concerns for policing. Eric Miller observes that police have used tactics "identical or akin to procedural justice" for years: For decades modern interrogation techniques have used empathy and a non-confrontational, respectful tone to get suspects to cooperate (Miller 2016: 354-66), and since at least the 1980s patrol officers have used psychological insights to gain consent for voluntary searches (Epp, Maynard-Moody, and Haider-Markel 2014: 39). Both strategies represent progress from a brutal past—the Reid method is better than the third degree, and consent searches are better than lawless raids and shakedowns—but both remain controversial (Friedman 2017: 8; Hager 2017). Critics argue that they replace physical coercion with psychological manipulation, and that the people who "voluntarily" comply with police requests often believe they have no choice. This subtle form of coercion may be harder to regulate than more blatant forms, since it is harder even to perceive (Miller 2016: 360).

[10] Shortly after McCarthy left Newark, Department of Justice investigators concluded that agency managers lacked any evidence that three-quarters of the department's pedestrian stops complied with the constitution. Records of *Terry* stops in Chicago were too haphazard to assess easily, but an ACLU analysis suggested that nearly half did not record reasonable suspicion (Ramos 2013), and officers apparently received no post-academy training on how to lawfully conduct a stop and frisk (ACLU 2015: 8).

Procedural justice may reduce the need for police to use overtly coercive tactics, but the "consent" associated with it cannot single-handedly justify police intervention. Policing is always potentially coercive, and police should intervene only when coercion is justified. The use of procedurally fair tactics does not alter that basic reality (though it may conceal it). We should not want a strategy of policing that convinces citizens to acquiesce to unreasonable requests for compliance. We should want a strategy that refuses to make such requests in the first place. The most important goal of police reform is to develop and enforce appropriate substantive guidelines about when police should even try to exert their authority.

The police force that Robert Peel set in motion famously strove for "impartial service to Law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws". Its officers' impartial neutrality, their "ready offering of individual service and friendship to all members of the public", and their "courtesy and friendly good humour" would build legitimacy even when the London police enforced laws that much of the population found unjust (Reith 1943: 3-4). The early American police pursued a different strategy. Deeply enmeshed in local politics, they had no choice but to take account of public views about the justice or injustice of individual laws. As Wilbur Miller observed, a neighborhood officer in New York "would not win much respect if he consistently contradicted local standards and expectations in favor of impersonal bureaucratic ideals" (Miller 1977: 23). A precinct captain would not survive if he ignored the elected ward leader's priorities. And since everyone realized that the party in power could shift after the next election, the authority granted to the New York police was more restricted than that granted to their counterparts in London (Miller 1977: 48).

In short, the early American police did not usually try to build legitimacy with a strategy that deliberately ignored substantive disagreement about the proper use of police authority. Instead they were more likely to pursue a strategy built out of the elements I outlined earlier—the self-conscious effort to accommodate conflicting interests, decentralization of authority to make that difficult task more feasible, and restriction of the scope of state authority in contexts where it would be intractably controversial. This ideal has probably been more honored in the breach than the observance, and changes in American policing since the late 19th century have made it harder to adapt law enforcement to local expectations over time (Steinberg 1989; Fogelson 1977). Then and now, American policing has historically been especially unresponsive—even hostile—to the interests of young people of color (Forman 2004). Nevertheless, the ideal itself can provide an attractive and viable guidepost for police reform in America that points in a different direction than procedural justice does. The United States has by far the most decentralized system of law enforcement in the world, and its natural genius remains its potential accountability to local priorities (Stuntz 2011). Strategies that harness that potential most effectively aim to make the use of police authority more responsive to community norms and local problems, within the constraints defined by individual rights and a genuine concern to minimize the burdens of coercive intervention (e.g. Goldstein 1967, 1977; Sparrow, Moore, and Kennedy 1992; Kelling 1999; Friedman 2017).

Conclusion

It is better for police officers to treat the people they encounter with dignity and respect than to treat them badly, and it is better for them to enforce the law in a neutral and trustworthy manner than to do the opposite. Procedural justice research has usefully called attention to these vital dimensions of police work. Those dimensions are most important in agencies that already

follow the law, minimize and properly regulate the use of force and arrest, and seek community input about how they should use their discretionary authority, but where something about the manner in which officers interact with the public makes many people believe otherwise. Advocates of procedural justice rightly observe that even when police exercise their authority responsibly, officers may still need to persuade the public of their integrity; they may also be right that a visible display of procedural fairness can sometimes help with that task (Meares, Tyler, and Gardener 2015: 319). What I question is whether the need for such displays can really serve as "the guiding principle" of police reform.

The case for procedural justice rests on an empirical claim: That procedurally fair policing can strengthen police legitimacy, and in turn improve public cooperation, deference, and law-abiding behavior. As in many other areas of criminal justice, the evidence for this complex causal claim is more equivocal than the most enthusiastic accounts suggest. It turns out to be difficult to justify policy ideas on the basis of their long-run consequences (Rein and Winship 1999). In the meantime, we should not lose sight of the important moral considerations that this empirical claim sets aside even if it turns out to be true. Police intervention is always potentially coercive, and the decision about when coercive intervention is justified is one of the most difficult decisions any society must make. A reform agenda that mostly sets that decision aside to focus on how police behave once the decision to intervene has already been made is at best incomplete.

On what basis should police make such momentous decisions? The law provides one source of guidance, and we cannot assume that police already make the best possible use of it—not because most police deliberately break the law but because legal standards are complex and infinitely demanding, and because new developments in police strategy always have to be

carefully adjusted to evolving legal constraints. Moreover, the law is not the only source of guidance for the police. American criminal law gives police remarkably broad authority to arrest, detain, and use force, and it is simply not true that all possible uses of this expansive authority are equally appropriate as long as police use it in a procedurally fair manner. The most important task for police reform may be to provide better guidance about when, not just how, police should actually invoke the profound authority the law has granted them.

If we view procedural justice as a supplement to this more substantive agenda for police reform, it can make an important contribution to American policing. The advocates of procedural justice are undoubtedly right to stress that fair procedures are valuable. But when they insist on the stronger claim that fair procedures matter *more* than outcomes, and *more* than lawfulness, they may give the impression that procedural justice is a substitute rather than a supplement for the alternative agenda I have described. In the process, they risk blinding police leaders to the difficult but centrally important questions that demand their attention—questions about when it is appropriate to use the coercive authority entrusted to the police at all.

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