

FOREWORD

The Coming Crisis of Criminal Procedure

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Constitutional doctrines have life cycles. They are born of practical need, flourish in an atmosphere of general utility, and decline as changing conditions drain them of their vitality. When the contradiction between a doctrine and social necessity finally becomes too intense to be endured, the doctrine expires—sometimes peacefully, sometimes convulsively—and is superseded by another doctrine that is fated to enjoy the same career.¹

Our purpose in this article is to anticipate the imminent death of certain prominent doctrines of criminal procedure. These doctrines—in particular, the constitutional standards used to evaluate discretionary community policing—have outlived their utility. It's now time to construct a *new* criminal procedure, one uniquely fitted to the conditions that currently characterize American social and political life and that are likely to characterize it into the foreseeable future.

The need that gave birth to the existing criminal procedure regime was institutionalized racism. Law enforcement was a key instrument of racial repression, in both the North and the South, before the 1960's civil rights revolution. Modern criminal procedure reflects the Supreme Court's admirable contribution to eradicating this incidence of American apartheid. Supplanting the deferential standards of review that had until then characterized its criminal procedure jurisprudence, the Court, beginning in the 1960's and continuing well into the 1970's, erected a dense network of rules to delimit the permissible bounds of discretionary law-enforcement authority. Although rarely couched as such, the unmistakable premise of these doctrines was the assumption that communities could not be trusted to police their own police because of the distorting influence of racism.

The occasion for the current doctrine's demise, we predict, will be the political revolution that's now remaking urban law enforcement. From Los Angeles to Dallas, from Chicago to New York City, cities throughout the

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1. See generally Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

nation are rediscovering curfews, anti-loitering laws, order-maintenance policing, and related law-enforcement strategies. On the surface, these community policing techniques bear a striking resemblance to the ones that communities used to reinforce the exclusion of minorities from the Nation's political life before the 1960's. But there is a critical difference in political context. Far from being the targets of these new law-enforcement strategies, inner-city minority residents are now their primary sponsors. Flexing their newfound political muscle, these citizens are demanding effective law enforcement. They support discretionary community policing both because they believe this strategy will work—a conviction shared by leading criminologists—and because they see this form of law-enforcement as morally superior to the regime of draconian punishments that has characterized American criminal law since the 1970's.

Viewed through the lens of existing constitutional doctrine, however, the new community policing appears indistinguishable from the old. In numerous cases, courts have invalidated new community policing strategies on the ground that they involve excessive police discretion. Although the civil liberties groups that have brought these cases purport to be enforcing the rights of inner-city minorities to be free from police harassment, their suits are frequently opposed by minority residents themselves. A body of doctrine designed to assure racial equality in law enforcement has now become an impediment to minority communities' own efforts to liberate themselves from rampant crime—a condition that is itself both a vestige of racism and a continuing barrier to the integration of African-Americans into the social and economic mainstream.²

This is a contradiction too fundamental to be endured for long. Indeed, the first signs of doctrinal collapse have already appeared. At the same time that many courts have been striking down new community policing techniques, others have been upholding them notwithstanding the evident tension between their holdings and the existing doctrine. The case law is characterized by disarray and confusion.

This state of affairs will persist until a new criminal procedure emerges to take the place of the existing one. The new doctrine must recognize the legitimate function of discretionary policing techniques in combating inner-city crime, and also the competence of inner-city communities to protect themselves from abusive police behavior. At the same time, the new doctrine must recognize the distinctive threats to liberty that these new political conditions themselves pose.

This is the coming crisis of criminal procedure. Our goal in this Article is to illuminate its contours and to identify just what it will take to surmount it.

2. See generally Tracey Meares & Dan M. Kahan, *When Rights Are Wrong* (Jan. 1, 1998) (unpublished manuscript on file with the authors).

I. YESTERDAY'S DOCTRINE IN YESTERDAY'S CONTEXT

Contemporary criminal procedure comprises a muscular body of interconnected doctrines. Many of these—including those governing the right to counsel,³ to trial by jury,⁴ to confront and cross-examine witnesses,⁵ and the like—regulate the conduct of criminal adjudications. But many others govern the everyday machinery of law enforcement. They tell individual police officers when and how they can interact with criminal suspects on the street.⁶ They minutely regulate the nature of police interrogations of suspects in custody.⁷ They spell out in detail the procedures that police must follow before they conduct searches or engage in related forms of surveillance.⁸ And they constrain, both in substance and in form, the authority of police to maintain public order.⁹ We'll refer to the doctrines that regulate police conduct in this fashion as the “modern regime of criminal procedure.”

Although familiar, the doctrines of the modern regime are all of relatively recent vintage. The cases that established them—including *Mapp v. Ohio*,¹⁰ *Miranda v. Arizona*,¹¹ *Gideon v. Wainwright*,¹² and *Papachristou v. City of Jacksonville*¹³—were all decided between 1961 and 1972. Incursions into criminal procedure before 1960 were sporadic and doctrinally modest.¹⁴

Indeed, the dominant criticism of the modern regime focuses on its novelty. The “exclusionary rule,” Miranda warnings, and like components of the modern regime have little basis in the expectations of the Framers.¹⁵ Because the Court could generate these doctrines only by “twist[ing] the text” and “manhandl[ing] the historical evidence,”¹⁶ the modern regime, it is said, lacks constitutional legitimacy.

3. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding Sixth Amendment right to counsel to be incorporated into Due Process Clause of Fourteenth Amendment); *United States v. Cronin*, 466 U.S. 648 (1984) (Sixth Amendment right to effective assistance of counsel).

4. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

5. See, e.g., *Maryland v. Craig*, 497 U.S. 836 (1990).

6. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 638-39 (1991) (Stevens J., dissenting) (describing interlocking maze of doctrines governing “consensual encounters,” “investigatory stops,” and “seizures of person”).

7. See, e.g., *Davis v. United States*, 512 U.S. 452, 458-62 (1992) (describing multiple “prophylactic” rules designed to conform interrogation to right to counsel).

8. See generally 2-3 WAYNE R. LAFAVE, *CRIMINAL PROCEDURE: A TREATISE ON THE FOURTH AMENDMENT* (3d ed. 1996).

9. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Kolender v. Lawson*, 461 U.S. 352 (1983).

10. 367 U.S. 643 (1961).

11. 384 U.S. 436 (1966).

12. 372 U.S. 335 (1963).

13. 405 U.S. 156 (1972).

14. See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* §2.4 (1985) (discussing pre-selective-incorporation Due Process jurisprudence).

15. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997); Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J. L. REF. 465, 478-95 (1984).

16. AMAR, *supra* note 15, at 31.

This critique, however, misses the point. Fidelity to history wasn't the goal of the doctrinal innovations of the 1960's; adapting the law to immediate societal needs was. Like other doctrines of constitutional law, those associated with modern criminal procedure were fashioned in a particular social and political context. Before the doctrine can be understood, much less cogently criticized, the presuppositions of that context must be exposed.

The context that gave rise to modern criminal procedure was institutionalized racism. From the close of Reconstruction to the modern civil rights revolution, law-enforcement played a central role in maintaining the exclusion of African-Americans and other minorities from the Nation's political life. When suspected, however remotely, of wrongdoing, these citizens became the targets of sweeping and invasive tactics of investigation. And even when not, they remained subject to relentless official intimidation, particularly when they dared to take actions that challenged the white establishment's stranglehold over political power. That intimidation sometimes took the form of horrific state-sponsored violence, such as lynchings and the beatings and killings of civil rights activists. But even more frequently it came in the form of chronic, low-level harassment through the discriminatory enforcement of vagrancy ordinances and other "public order" laws.¹⁷

Nearly all the landmark criminal procedure cases of the 1960's and early 1970's arose from this context.¹⁸ In *Davis v. Mississippi*,¹⁹ a seminal Fourth Amendment case, the police arrested twenty-four African-Americans in a dragnet roundup after a rape victim identified her assailant as simply a "Negro."²⁰ In *Cox v. Louisiana*²¹ and *Bouie v. South Carolina*,²² officials used vaguely worded statutes to arrest civil rights demonstrators.²³ *Duncan*

17. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* ch. 3 (1997); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 839-40 (1994); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 596-600 (1997); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5, 50 (1997).

18. See Steiker, *supra* note 17, at 838, 843-44. Indeed, so did many of the landmark Due Process "fundamental fairness" cases decided earlier in the century. See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (due process right to counsel); *Brown v. Mississippi*, 297 U.S. 278 (1936) (due process right against coerced confession). See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 94-107 (1997); Bennett Boskey & John H. Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. CHI. L. REV. 266, 283-86 (1946).

19. 394 U.S. 721 (1969).

20. See Steiker, *supra* note 17, at 844 (emphasizing role of race in motivating decision; see also Tracey Maclin, *Race and the Fourth Amendment*, 52 VAND. L. REV. 333, 364-65 (1998) (examining racial context of *Terry v. Ohio*, 392 U.S. 1 (1968))).

21. 379 U.S. 536 (1965).

22. 378 U.S. 347 (1964).

23. See Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 56 (1997) (suggesting that racial context explains *Bouie*); John T. Parry, *Reasonable Reliance on Official Interpretations of Criminal Law: Entrapment by Estoppel, Mistake of Law, and the Risk Against Estopping the Government*, 25 AM. J. CRIM. L. 1, 38-39, 40 n.60 (1997). (examining racial context as motivation for *Cox*).

v. *Louisiana*,²⁴ the landmark decision applying to state trials the Sixth Amendment right to a jury, involved an African-American who had been convicted for an assault that arose from a dispute involving school desegregation. *Papachristou*, which delivered a staggering blow to anti-loitering laws, involved two interracial couples arrested in a parked automobile.²⁵

Although rarely acknowledged by the Court, the racial dimension of these cases was not lost on contemporary observers. "The Court's concern with criminal procedure," one wrote, "can be understood only in the context of the struggle for civil rights."²⁶ At a time when attacking racial discrimination in public and private institutions occupied a central place on both the Court's and Congress's agendas, "[i]t would have been . . . anomalous for [the] Court to ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity" as well.²⁷

One of the commentators who sounded this theme was Associate Justice William O. Douglas. In a famous 1960 *Yale Law Journal* article,²⁸ Douglas railed against the argument that anti-loitering laws were beyond constitutional reproach. It was naïve to trust contemporary communities to apply such laws evenhandedly, Douglas asserted, because those arrested under such laws typically came "from minority groups" with insufficient political clout "to protect themselves" and without "the prestige to prevent an easy laying-on of hands by the police."²⁹ When the Court did ultimately deem traditionally worded loitering laws unconstitutionally vague in *Papachristou*, Douglas wrote the Court's opinion.

Attention to context also explains the Court's own failure to be more forthcoming about the racial dimension of its criminal procedure cases. The Court, of course, played a conspicuous role in the movement to purge American institutions of the contaminating influence of racism in the 1950's and 1960's. Indeed, the Court's leading race-equality cases, including *Brown v. Board of Education*³⁰ and *Baker v. Carr*,³¹ provoked intense political controversy. Confronted with a sustained attack on its own legitimacy, the Court changed its tactics. Rather than meet racism head on, the Court began

24. 391 U.S. 145 (1968).

25. See 405 U.S. at 158-59; see also Livingston, *supra* note 17, at 598-600, 607-08, 646-47 (linking *Papachristou* to concern that anti-loitering laws were being used as instrument of racial oppression). *Shuttlesworth v. City of Birmingham*, 382 U.S. 1 (1965), also overturned the application of a loitering ordinance to a " 'notorious' . . . civil rights" activist at a time when that law was being used against African-Americans engaged in picketing and boycotting of racially discriminatory businesses. *Id.* at 101-102 (Fortas, J., concurring).

26. A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

27. *Id.*; see also Wayne R. LaFave, "Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond," 67 MICH. L. REV. 39, 59 (1968) (recognizing racial context of Fourth Amendment doctrine).

28. William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

29. *Id.* at 13.

30. 347 U.S. 483 (1954).

31. 369 U.S. 186 (1962).

to fight it indirectly through general constitutional standards that did not explicitly address race but that were nonetheless calculated to constrain racially motivated policies. Harry Kalven, in his classic *The Negro and the First Amendment*, documented the contribution that this strategy made to modern free speech jurisprudence.³² The Court's death penalty jurisprudence in the late 1960's and early 1970's, including its decisions in *Furman v. Georgia*³³ and *Coker v. Georgia*,³⁴ likewise reflected a (largely) unspoken concern with race.³⁵ The Court's criminal procedure jurisprudence fits this pattern.³⁶

This indirect strategy for controlling racism explains the two central features of the modern criminal procedure regime. The first is its authorization of exacting judicial scrutiny of routine policing functions. Before the 1960's, courts reviewed claims of police overreaching according to a deferential "shocks the conscience" test that placed only minimal constraints on investigatory procedures.³⁷ The intricate guidelines associated with contemporary doctrine under the Fourth and Fifth Amendments, in contrast, tightly constrain those procedures and subject them to stringent judicial monitoring.

Institutionalized racism fully justified this doctrinal shift. The deferential posture of the pre-1960's doctrines assumed that communities by and large had adequate incentives and opportunities to police their own police, and that judicial intervention was necessary only in extreme cases. But as Justice Douglas and other contemporary commentators emphasized, this equanimity rested on a naïve understanding of the prevailing politics of law-enforcement. The coercive incidence of law-enforcement, in both the North and South, was concentrated most heavily on minority citizens, who by virtue of their exclusion from the political process had no say about whether those policies were just. The result was the systematic devaluation of both the liberty of individual minority citizens and the well-being of minorities as a group. By insinuating courts deeply into the process of criminal-law enforcement, the federal constitutionalization of state police procedures was intended to correct this imbalance.³⁸

32. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965). Kalven saw the positive influence of the civil rights movement on the Court's First Amendment jurisprudence as counteracting the negative influence of McCarthyism on it. *See id.* at 6 ("we may come to see the Negro as winning back for us the freedom the Communists seemed to have lost for us.").

33. 408 U.S. 238 (1972).

34. 433 U.S. 584 (1977).

35. *See McCleskey v. Kemp*, 481 U.S. 279, 330-32 (1987) (Brennan, J., dissenting) (suggesting race played a role in *Furman* and *Coker* decisions); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades Of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 376 (1995) (same).

36. We are indebted to Dennis Hutchinson for bring this parallel to our attention.

37. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 435-38 (1995).

38. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991).

The second central feature of the modern criminal procedure regime is its hostility toward discretion. Before the 1960's, the enforcement of public order through generally worded anti-loitering laws and similar provisions was a routine policing practice.³⁹ But under the Due Process "void for vagueness" doctrine and certain elements of the Court's Fourth Amendment jurisprudence, conventional order-maintenance policing became constitutionally suspect.⁴⁰

This jurisprudential innovation, too, took aim at institutionalized racism. While discretion advances the public interest by giving law enforcers the flexibility to respond to circumstances too numerous and diverse to be addressed in detail by legislative rulemakers, discretion also threatens the public good by giving law enforcers the latitude to abuse their power for personal ends.⁴¹ The primary check against such abuse, again, is the accountability of law enforcers to the community's political representatives. In the political context of the 1960's, however, law enforcement officials were accountable only to representatives of the white majority. Indeed, for precisely this reason, the police predictably used their discretion to harass and repress minorities. Insisting that law-enforcement authority be exercised according to hyper-precise rules was a device for *impeding* the responsiveness of law enforcers to the demands of racist white political establishments. Such rules also made it much easier for courts to detect and punish racially motivated abuses of authority.⁴²

The contemporary doctrinal regime reflects the Warren and early Burger Courts' plan to cleanse law-enforcement of the stain of institutionalized racism. Those who criticize that regime today, then, must do more than tell us what the Fourth and Fifth Amendments meant to a generation of Constitution drafters who didn't feel the urgency of that objective. They must argue either that the goals that the contemporary doctrine is meant to serve are irrelevant—a morally benighted position⁴³—or that the doctrine, in today's context, no longer serves those goals. It is this latter possibility that we next explore.

II. YESTERDAY'S DOCTRINE IN TODAY'S CONTEXT

Viewed from a distance, the criminal procedure world of the late 1990's looks strikingly similar to that of the late 1960's. Municipal police departments, particularly those in the inner-cities, are once again aggressively enforcing anti-loitering laws, curfews, and even random public-housing searches. Civil liberties organizations are again bringing suit to block such

39. See Livingston, *supra* note 17, at 595.

40. See *id.* at 597-608.

41. See generally CASS R. SUNSTEIN, *POLITICAL CONFLICT AND LEGAL REASONING* 112-13, 130-35 (1995).

42. See Livingston, *supra* note 17, at 646-47.

43. Cf. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

tactics, arguing that they expose inner-city minorities to harassment. And courts throughout the nation—from Washington, D.C., to Chicago, to San Diego—are once more declaring discretionary law-enforcement techniques unconstitutional.

But examined close up, the appearance of similarity turns out to be an illusion. Both the political and the litigation dynamics surrounding discretionary policing techniques have changed dramatically. Whereas in the 1960's, such strategies were being used to reinforce the exclusion of minorities from the nation's political life, today they are being adopted at the behest of those same groups, whose political representatives see them as essential to combating inner-city crime. Although civil liberties groups purport to be representing inner-city residents generally when they challenge community policing strategies, their lawsuits are often opposed by inner-city residents themselves.⁴⁴

Should these differences in social and political context make a difference, doctrinally? We will now try to show that they should, beginning with an examination of the nature of the new community policing and the political dynamics that underlie it. We'll then show how, in the context of the 1990's, the application of the modern regime of criminal procedure in fact defeats the goals that inspired that doctrinal framework.

A. THE NEW COMMUNITY POLICING

Throughout the nation, cities are rediscovering community policing. Approximately three-quarters of the Nation's 200 largest cities now have curfew laws, many of which were enacted after 1990.⁴⁵ Anti-loitering laws are also enjoying a renaissance. Some specifically target individuals engaged in prostitution or petty drug dealing.⁴⁶ Others focus on gang members,⁴⁷ a

44. See, e.g., Barbara Clements, *Views Differ on Dallas' Curfew, Which Spawned Tacoma's Plan*, NEWS TRIBUNE, Oct. 17, 1994, at B1 (quoting African-American mother who spear-headed campaign for Dallas curfew: claim that curfew would lead to racial harassment "was an ACLU scare tactic that polarized the community"); Roger L. Conner & Rev. George Clements, *Listen to the Voice of the Projects* (Letter to the Editor), N.Y. TIMES, Apr. 15, 1994, at A30 (noting that residents of Chicago housing projects sought legal representation to oppose ACLU class action brought on residents' behalf); Sen. Ulysses Currie, *The ACLU pits the civil rights of few against the common good* (Letter to Editor), WASH. TIMES, Nov. 30, 1996, at A12 (comment of African-American legislator on ACLU opposition to Washington, D.C., and Maryland curfews: "As an African American, I have always been a staunch supporter of the ACLU. Indeed, the ACLU has been there for us when often no one else has. However, over the years there have been isolated incidents when the ACLU seemed to be marching to music only it could hear.").

45. See William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQUENCY 347 (1995).

46. See Peter Kent, *County ready to take aim at loiterers*, ATLANTA J & CONST., April 16, 1997, at 01J (Gwinnett County, Ga., ordinance); Jonnel LiCari, *Trading Liberty for Security?*, WISC. STATE J., Aug. 17, 1997, at 1A (Madison, Wisc.); Kenneth Hawkins, Jr., *Clover OK's \$3.1 million budget*, HERALD (Rock Hill, S.C.), July 16, 1997, at 5A (Clover, S.C.); Livingston, *supra* note 17, at 555 & n. 13 (various jurisdictions); Mack Reed, *Oxnard Loitering Law Left Hanging*, L.A. TIMES, Ventura County Edition, August 1, 1997, B5 (Oxnard, Calif.).

47. See, e.g., CHICAGO, ILL., MUNICIPAL CODE § 8-4-015 (1992).

strategy replicated in other jurisdictions through anti-nuisance injunctions.⁴⁸ Public housing officials have attempted to widen the authority of the police to conduct warrantless building searches in response to reports of random gun fire.⁴⁹ And police in still other communities, most famously New York City, have turned their attention to aggressive panhandling, public drunkenness, vandalism and other forms of public disorder.⁵⁰ We'll refer loosely to these discretionary policing strategies as the "new community policing."⁵¹

What explains this development? Like the old community policing of the pre-civil-rights era, the new community policing reflects political dynamics that center on race. But the relationship between community policing and racial politics is very different today from what it was then. No longer an instrument for reinforcing the exclusion of minorities from the nation's political life, today's community policing is a testament to the growing political strength of African-Americans, particularly in the inner-city.

No civil rights law has succeeded as unambiguously as the Voting Rights Act of 1965. Black voter registration and turnout rates sky-rocked almost immediately upon passage of the law,⁵² and since then the representation of African-Americans in politics has steadily risen as well.⁵³ By 1990, the number of African-Americans in Southern congressional and state legislative delegations had jumped *eightyfold*.⁵⁴ Today in the South the percentage of black city council members matches that of African-Americans in the general population.⁵⁵ Similar progress in black political representation has taken place in the North, and during the 1980s and 1990s, many of America's largest cities, including New York, Los Angeles, Chicago, and San Francisco, have been led by African-American mayors.⁵⁶

Voting is not the only measure of political participation, of course. Involvement in community organizations, contact with government officials,

48. See, e.g., *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).

49. See Guy Gugliotta, *Clinton Lets Police Raid Projects*, WASH. POST, Apr. 17, 1994 at A1 (describing Clinton Administration plan to authorize searches and describing search policies in Chicago, Philadelphia, Baltimore, and Puerto Rico).

50. See generally GEORGE KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996).

51. See Livingston, *supra* note 17, at 558 (describing "new policing").

52. See PAUL KLEPPNER, *WHO VOTED: THE DYNAMICS OF ELECTORAL TURNOUT, 1970-1980* 116 (1982).

53. See Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1360 (1995) (book review).

54. See *id.* at 1367.

55. See *id.*

56. See Joint Center for Political and Economic Studies, *Black Elected Officials: A National Roster* (1993); Joint Center for Political Studies, *Black Elected Officials: A National Roster* (1984); see also STEVEN E. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941* 170-182 (1991) (detailing the progress of Black urban political officials and noting the triumphs of candidates in Newark, Oakland, New Orleans, Atlanta, Detroit, and Gary among other cities).

and participation in community-based problem solving, among other activities, also count.⁵⁷ Since the mid 1960's, these forms of African-American political participation have also increased. The enduring participation of African Americans in an active religious life also plays a key role in promoting African American access to politics.⁵⁸ While those in higher socio-economic groups tend to engage in political activity to a greater extent than those in lower groups, the sense of group-consciousness developed by African-Americans during the civil rights era, together with their widespread involvement in religious institutions, has tended to increase black political participation well above the level their socioeconomic status would predict.⁵⁹

This political transformation has had a critical impact on the nation's police departments. Unlike in the past, African-Americans today make up a significant percentage of all urban police departments.⁶⁰ New York, Washington, and Los Angeles have all had black police chiefs accountable to black mayors. Indeed, the election of black mayors in several major cities has led directly to racial diversity in the hiring of police officers.⁶¹

More effective law enforcement is, in fact, one of the primary ends to which African-Americans are putting their newfound political strength. African-Americans devote a much larger proportion of their political activity than do other groups to issues of crime, violence, and drugs.⁶² Their concern with these matters is understandable and not especially new.⁶³ Well into the 1960's, white political establishments withheld effective law enforcement from minority communities at the same time that they used the police to oppress them.⁶⁴ Because crime, through a variety of social mechanisms,

57. See SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 30-31 (1987).

58. See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 38-88, 455-58, 519 (1995).

59. See SIDNEY VERBA & NORMAN H. NIE, *supra* note 57, at 252-259. See also SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *supra* note 58, at 230 n.4 (listing several sources that confirm this point).

60. Consider the "index of black representation," which is calculated by dividing the percent of African American police officers in a department by the percent of African Americans in the local population of several major cities. Los Angeles's index increased from .55 to 1.00 between 1983 and 1992. Detroit's index increased from .49 to .70 during the same period. Chicago, San Diego, Dallas, and Phoenix posted indexes of .64, .80, .64, .77 in 1992, respectively, each an increase from 1982 levels. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS table 1.36 at 49 (Kathleen Maguire & Ann Pastore eds. 1994).

61. Examples include Richard Hatcher in Gary, Coleman Young in Detroit, and Carl Stokes in Cleveland.

62. See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *supra* note 58, at art. 247-249 and tbl. 8.6 (demonstrating that 25% of issue-based political activity among Black respondents animated by concern about crime or drugs compared to 7% among white respondents)

63. See FIELD SURVEYS V: A NATIONAL SURVEY OF POLICE AND COMMUNITY RELATIONS. *The President's Commission on Law Enforcement and Administration of Justice*, Washington, D.C.: U.S. Government Printing Office, January 1967.

64. See KENNEDY, *supra* note 17, ch. 2.

tends to reinforce itself,⁶⁵ the high crime rates that afflict minority communities today are directly related to this historical under-enforcement of criminal law. Indeed, because crime disrupts so many social institutions, many African-American citizens see rampant crime as one of the most substantial impediments to improving their economic and social status. This sentiment translates into a demand within the African-American community for higher levels of law-enforcement.⁶⁶

The new community policing is an outgrowth of this demand. In nearly every large American city, African-Americans have supplied critical support for community policing techniques. African-American community groups, including the Urban League, were the driving force behind the adoption of curfews in cities such as Miami, Dallas, San Diego, and Washington, D.C.⁶⁷ African-American city council members, representing the city's most crime-ridden districts, were instrumental to the enactment of Chicago's gang-loitering ordinance.⁶⁸ African-American residents strongly support the anti-gang injunctions in California and the renewed attention to order-maintenance policing in New York as well.⁶⁹

Broadly speaking, inner-city minorities support the new community policing for two reasons. First, they believe that it will work. Giving the police the authority to control low-level disorder is perceived as essential to deterring more serious crimes.⁷⁰

The most sophisticated recent work in criminology confirms this perception. Obviously, the incidence of crime cannot be reduced to one simple factor. Truncated social and economic opportunities and lapses in law enforcement play important roles. But so does the effect of visible disorder on social norms.⁷¹ When individuals observe visible gang activity, prostitution, public drunkenness and other forms of disorder, they infer that authori-

65. See generally Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352-61 (1997).

66. See KENNEDY, *supra* note 17, at 11-12, 19-20, 71, 370-72.

67. See *All Things Considered: Miami Curfew Gaining Support among Many Black Groups* (National Public Radio broadcast, Feb. 24, 1994) (reporting that curfew ordinance sponsored by African-American county commissioner is supported by 70% of African-Americans in Dade County and by Greater Miami Urban League); *The Teen Curfew Works* (editorial), SAN DIEGO UNION-TRIBUNE, Aug. 7, 1994 (minority support for San Diego curfew); Barbara Clements, *Views Differ on Dallas' Curfew, Which Spawned Tacoma's Plan*, NEWS TRIBUNE (Tacoma, Wash.), Oct. 17, 1994, at B1 (same, Dallas curfew); Toni Locy, *D.C. Curfew Overturned in Federal Court*, WASH. POST, Oct. 30, 1996, at A1 (Washington, D.C., curfew sponsored by African-American council member and supported by African-American Mayor).

68. Meares & Kahan, *supra* note 2.

69. See Blaine Harden, *Letter from New York: "Ideal State of Cleanliness" Is Apple of Giuliani's Eye*, WASH. POST, Mar. 23, 1998, at A6 (reporting majority of city's African-Americans support Mayor Giuliani based on perception that his emphasis on "civility" is responsible for steep drops in crime in poor, minority neighborhoods).

70. See Kahan, *supra* note 65, at 393.

71. See generally James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29; Wesley G. Skogan, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990).

ties lack the power or the resolve to control antisocial behavior. This inference emboldens potential law-breakers, whose decision to break the law reinforces the perception that crime is likely to be tolerated, and even respected, in the community at large. Disorder also frightens committed law-abiders. In a community pervaded by disorder, law-abiding individuals are likely to avoid the streets, where their simple presence would otherwise be a deterrent to crime. They are also more likely to infer that cooperating with police is both dangerous and futile. The law-abiders' fear of crime thus facilitates even more of it.⁷²

By focusing on public order, the new community policing reverses these dynamics. When citizens obey norms of orderliness—and when authorities visibly respond to those who don't—onlookers conclude that law-enforcers are likely to respond vigorously to more serious forms of criminality as well. Potential law-breakers are therefore less likely to infer that they can get away with crime, or that others will respect them for trying. The restoration of order also reassures law-abiders, inducing them to engage in patterns of behavior that themselves discourage crime.

Moreover, the new community policing does more than transform perceptions: it also reinforces the community structures that discourage crime. Again sophisticated work in criminology shows how.⁷³ The recent work reviving Shaw and McKay's social organization theory demonstrates that the prevalence of friendship networks, community-wide supervision of teen peer groups, and greater level of participation in formal organizations create "norm highways" that facilitate the promulgation and transmission of norms of orderliness.⁷⁴ Curfews can help to promote such community infrastructure by assisting adults in the community-wide monitoring of teens.⁷⁵ Enforcement of loitering laws and the restoration of order can help to promote friendship networks by encouraging community adults to engage in collective guardianship rather than solo efforts.⁷⁶ The effect of curfews, gang-loitering, laws, order-maintenance policing in restoring norms of order in the inner-city thus deserves a critical share of the credit for the decline of crime rates in the 1990's.⁷⁷

72. See Kahan, *supra* note 65, at 370-71.

73. See, e.g., Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social Disorganization Theory*, 94 AM. J. SOC. 774 (1989); Robert J. Bursik, *Political Decisionmaking and Ecological Models of Delinquency: Conflict and Consensus*, in THEORETICAL INTEGRATION IN THE STUDY OF DEVIANCE CRIME: PROBLEMS AND PROSPECTS 105 (S. F. Messner, M. D. Krohn and A. E. Liska ed., 1989); Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in CRIME AND INEQUALITY 37-54 (J. Hagan and R. Peterson eds., 1995).

74. See Tracey L. Meares, *Place and Crime*, 73 CHICAGO-KENT L. REV. 669, 676 (1998) (DEFINING THE CONCEPT OF "NORM HIGHWAYS"); SEE ALSO TRACY L. MEARES, *SOCIAL ORGANIZATION AND DRUG LAW ENFORCEMENT*, 35 AM. CRIM. L. REV. 191 (1998).

75. See Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 591-93 (1997).

76. See Meares, *Social Organization*, *supra* note 74.

The second reason that minority residents of the inner-city support the new community policing is more subtle. It is that they view it as the *least destructive* effective form of law-enforcement.

The attitude of inner-city minorities toward the criminal law is suffused with ambivalence. They obviously resent their exposure to disproportionate criminal victimization, and expect relief. But unlike many whites who also strongly resent crime, they have *not* renounced their concern for the very individuals who are, or who are likely to become, criminal victimizers. Rather, law-abiding residents of the inner-city are likely to feel a strong sense of “linked fate” with inner-city law-breakers, with whom they are intimately bound by social and familial ties.⁷⁸ These competing pulls of interest and affection explain, for example, why African-Americans strongly favor the criminalization of drugs but resent stiff drug sentences, which are viewed as having a singularly destructive effect on both the individuals on whom they are imposed and the communities from which these individuals come.⁷⁹

The new community policing comes much closer to negotiating this ambivalence. It promises—and has delivered—effective relief from crime. And yet it does so at a much smaller cost, in terms of liberty as well as dollars, than do severe prison sentences. As coercive as the enforcement of order on the streets can be, it pales in comparison to the destructive impact of the mass incarceration of young African-American men that has been the centerpiece of American criminal-law enforcement since the 1980's.⁸⁰

But inner-city residents are not naive. They realize that the new community policing can also threaten liberty. Indeed, along with more effective law-enforcement, African-American political leaders have demanded and obtained more effective bureaucratic procedures for punishing police brutality.⁸¹ These procedures don't completely eliminate the risk of harassment

77. Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner-City* (Mar. 1, 1998) (unpublished manuscript on file with authors).

78. See Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 588-89 (1997); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 211-17 (1998); Mary Patillo, *Sweet Mothers and Gangbangers: Managing Crime in a Black Middle-Class Neighborhood*, 76 SOCIAL FORCES 747 (1998) (explaining that gang members and drug dealers are incorporated into networks of law-abiding kin); Sudhir Alladi Venkatesh, *Cleaning up Chicago's public housing: a critique of "sweeps" and enforcement-based approaches in*, EIGHT ANNUAL INTERNATIONAL CONFERENCE ON DRUG POLICY REFORM, THE CRUCIAL NEXT STAGE: HEALTH CARE & HUMAN RIGHTS (1994) (same); Sudhir Alladi Venkatesh, *The Social Organization of Street Gang Activity in an Urban Ghetto*, 103 AM. J. SOC. 82-111 (1997) (noting the complex nature of mutual reliance between street gangs and the communities in which they are located).

79. See Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997).

80. See, e.g., MARC MAUER, THE SENTENCING PROJECT, *YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* (1990) (finding one-third of African-American men between 20 and 29 years of age are either imprisoned, on parole, or on probation).

associated with the new community policing. But the willingness of inner-city residents to support this form of law-enforcement nevertheless reflects their judgment that in *today's* political and social context, the continued victimization of minorities at hands of criminals poses a much more significant threat to the well-being of minorities than does the risk of arbitrary mistreatment at the hands of the police.⁸²

B. THE NEW COMMUNITY POLICING VS. THE OLD DOCTRINE

Whether those communities should even be allowed to make that judgment for themselves, however, is an open legal question. The constitutionality of the new community policing is at the heart of contentious litigation across the nation.

Applying the doctrines of the modern criminal procedure regime, courts have already invalidated numerous important experiments in community policing. The Illinois Supreme Court struck down Chicago's gang-loitering ordinance as unconstitutionally vague,⁸³ a fate shared by numerous "loitering with intent" statutes around the country.⁸⁴ Curfews in Washington, D.C.,⁸⁵ San Diego,⁸⁶ and other cities⁸⁷ have likewise been deemed to abridge the Due Process rights of teens and their parents. The building-search policy of the Chicago Housing Authority was struck down on Fourth Amendment grounds.⁸⁸ In the view of the courts that decided these cases, the new community policing, no less than old, unreasonably subordinates individual liberty to public order and invites harassment of powerless minorities.

Not all courts agree, however. Anti-gang injunctions, which in form are nearly indistinguishable from Chicago's gang-loitering ordinance, have survived a challenge before the California Supreme Court.⁸⁹ Although not materially different from those in Washington, D.C., and San Diego, curfews in Dallas⁹⁰ and Miami⁹¹ have also survived review. The same goes for most, but not all, forms of order-maintenance policing.⁹² "The overall pattern of

81. See Pildes, *supra* note 53, at 1377.

82. See KENNEDY, *supra* note 17, at 19-20.

83. See *City of Chicago v. Morales*, 687 N.E.2d 53 (1997), *cert. granted*, 66 U.S.L.W. 3474 (U.S. Apr 20, 1998) (NO. 97-1121-CSY).

84. See Livingston, *supra* note 17, at 624-25.

85. See *Hutchins v. District of Columbia*, 942 F. Supp. 665 (D.D.C. 1996), *aff'd*, 1998 U.S. App. LEXIS 10303 (D.C. Cir. May 22, 1998).

86. See *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997).

87. See, e.g., *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992); *Ashton v. Brown*, 660 A.2d 447 (Md. 1995).

88. See *Pratt v. CHA*, 848 F. Supp. 792 (N.D. Ill. 1994).

89. See *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).

90. See *Qutb v. Strauss*, 11 F.3d 488, 495 (5th Cir. 1993).

91. See *Metropolitan Dade County v. Pred*, 665 So.2d 252 (Fla. D. Ct. App. 1995).

92. See generally Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

decisions” is no longer “resolutely arrayed against the constitutional validity of public order laws”; rather it is now “erratic, fractured, and confusing.”⁹³

Who’s got it right—the courts that have invalidated new community policing techniques or the ones that have upheld them? One way to answer that question would be to determine which courts’ decisions are most faithful to the precedents that make up the modern criminal procedure regime. But as we have argued, those precedents themselves presuppose the social and political context of the 1960’s. Another way to figure out who is right, then, is to determine whether the precedents that courts have relied on to invalidate curfews, gang-loitering laws, and other elements of the new community policing fit today’s political and social context.

They don’t. The politics behind community policing today, we’ve argued, are completely different from those behind community policing before the civil rights revolution. In this new setting, the two central features of the modern criminal procedure regime—its authorization of exacting judicial scrutiny for routine policing and its great hostility toward discretion—have been stripped of their practical grounding.

1. STRICT SCRUTINY AS SECOND GUESSING

The modern regime enables close judicial monitoring of law enforcement on the assumption that communities can’t be trusted to police their own police. This made sense in an era in which the coercive incidence of law-enforcement was concentrated on a politically powerless and despised segment of the population. But African-American citizens are no longer excluded from the political process, and in fact exercise significant power in the nation’s inner-cities. They are *using* that power to obtain more effective law enforcement. Under these circumstances, the conclusion that new community policing is a cover for racial harassment displays a complete lack of comprehension.

Ironically, the Warren Court’s doctrines are now being used to frustrate minority communities’ own efforts to remedy the effects of the one feature of institutionalized racism that the Warren Court itself was powerless to attack—namely, the discriminatory *under-enforcement* of criminal law. Consider the dramatic facts of *Pratt v. CHA*: after the court certified a class action brought by the ACLU on behalf of all Chicago Housing Authority residents challenging the CHA’s building-search policy, the elected representatives of 18 of Chicago’s 19 projects intervened in support of the CHA.⁹⁴ In Washington, D.C. and in San Diego, the primary opposition to curfews, another staple of the new community policing, has come from white suburbanites, who fear that curfews are likely to be applied to their kids when

93. Livingston, *supra* note 17, at 628.

94. See *Pratt v. CHA*, 155 F.R.D. 177 (N.D. Ill. 1994).

they go into the city for entertainment, or individual business owners, who cater to the same.⁹⁵ Neither courts nor civil libertarians pause to consider why they should be siding with these groups, who obviously have much less at stake in the conditions in the inner-city than do the inner-city's residents.

Continued strict scrutiny of community policing can't be justified by the assumption that the inner-city residents themselves systematically undervalue the impact of such policing on individual liberty. Unlike the situation in the 1960's, there is no natural antagonism between the supporters of community policing and those who bear the coercive incidence of curfews, anti-loitering laws and the like. To the contrary, these two groups are intimately linked by strong emotional, social, and even familial ties.⁹⁶ Inner city supporters of the new community policing do not seek to exclude and cast out offenders; rather they seek policing methods that will assist them in the project of restoring community life. Their support of the new policing is, in fact, an outgrowth of their *concern* for their community's youth, not of hostility toward them. Because members of these communities are excruciatingly sensitive to the individual and societal costs of invasive policing, there's no basis for courts to presume that they are better situated than the members of these communities to determine whether community policing tactics embody a reasonable trade off between liberty and order.

Indeed, in at least two respects, it's clear that the judicial and civil libertarian critics of community policing have a less sophisticated understanding of what securing liberty entails than do these communities' residents. The first has to do with the relationship between individual liberty and norms. Individuals don't make choices in isolation; what one chooses to do (to carry a gun; to join a gang; to adopt an aggressive demeanor) can create pressures on others to choose the same. In certain circumstances, all or most individuals can feel constrained to abide by a social norm (such as joining a gang or carrying a gun or behaving aggressively) that all or most of them resent but that none individually is in a position to change.⁹⁷ Where that is so, a law that disrupts the norm can actually enhance liberty by creating a set of choices that individuals value more than the ones they had when that norm was intact.

Curfews and gang-loitering laws enhance liberty in this way. Willingness to venture into the dangerous after-hours world can be seen as a sign of

95. See, e.g., *Hutchins v. District of Columbia*, 942 F. Supp. 665, 666-67 (D.D.C. 1996) (curfew opposed by movie theater), *aff'd*, 1998 U.S. App. LEXIS 10303 (D.C. Cir. May 22, 1998); *The Teen Curfew Works* (editorial), SAN DIEGO UNION-TRIBUNE, Aug. 7, 1994 (affluent families oppose, poor minority favor curfew).

96. See *supra* p. 1165.

97. On joining gangs, see Kahan, *supra* note 65, at 374-75; on carrying guns, see Alfred Blumstein, *Linking Gun Availability to Youth Gun Violence*, 59 L. & CONTEMP. PROBS 5, 11 (1996); on aggressive behavior, see RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* 13-22, 92-93 (1996); Elijah Anderson, *The Code of the Streets*, Atlantic Monthly, May 1994, at 86-89, 94.

toughness among inner-city juveniles, the reluctance to do so as a sign of weakness. Under these circumstances, even juveniles who might prefer not to participate in such behavior can find themselves pressured to join in. Once on the street, moreover, they are exposed not only to risks of criminal victimization, but to further social pressure to become criminal victimizers. Curfews and gang-loitering laws help to extricate juveniles from these pressures. Against the background of such laws, being out at night becomes a less potent means of displaying toughness for the simple reason that fewer of one's peers are around to witness such behavior. Likewise, staying off the street loses much of its reputational sting once the street loses its vitality as a center of night-time social life.⁹⁸ By depicting such laws as interfering with the choices of these same individuals, the critics of the new community policing naively overlook the contribution that such laws make to dispelling widely resented and *unchosen* norms.⁹⁹

The second defect in the critics' understanding of liberty has to do with the politics of law enforcement. If the goal is to maximize liberty, it's a mistake to ignore the pressure that a liberal criminal procedure jurisprudence creates on legislatures to enact illiberal substantive law. When courts invalidate effective policing techniques, legislatures naturally attempt to compensate by adopting even longer prison terms.¹⁰⁰ Indeed, many inner-city residents support anti-loitering laws and curfews precisely because they see them as tolerably *moderate* alternatives to the draconian punishment of minor drug offenses.¹⁰¹ The kids whom the police can't order off the streets today, they realize, are the same ones they'll be taking off to jail tomorrow. The self-defeating result of constitutional decisions invalidating community policing is a society that shows its respect for individual liberty by destroying ever greater amounts of it.

2. SELF-DEFEATING DISCRETION SKEPTICISM

Hostility to discretion—the second prominent theme of the modern criminal procedure regime—also ill fits today's political and social context. Determining how much discretion to give the police necessarily involves a complex trade-off between the need for flexibility and the risk of arbitrary or oppressive enforcement. In a world in which the coercive incidence of community policing was concentrated on a powerless and despised minority, it made perfect sense for courts to assume that communities would systematically overvalue the benefits of discretion and undervalue the costs of it. But

98. See Kahan, *supra* note 65, at 374-75.

99. See, e.g., *Poll Says 77% of Youths support District's Curfew*, WASH. POST, Nov. 7, 1995, at B1; 1998 Chicago Community Policing Convention Resolution Endorsing Chicago's Anti-Gang Loitering Ordinance (over 1,500 teens among 8,500 citizens who signed resolution in support of anti-loitering ordinance).

100. See Stuntz, *supra* note 17; Richard A. Posner, *The Most Punitive Nation*, TIMES LITERARY SUPP., Sept. 1, 1995, at 3, 4.

101. See Meares, *Social Organization*, *supra* note 74.

again, that assumption makes much less sense in settings, such as today's inner-city, in which the citizens who support giving more discretion to the police are the same ones who are exposed to the risk that discretion will be abused. Where that's so, courts again lack the basis for assuming that they are in a better situation than members of the affected community to decide whether a particular degree of discretion is optimal.

In fact, the citizens who are furnishing the support for the new community policing typically display a keen attention to the risks associated with excessive discretion. The Chicago gang-loitering ordinance, for example, was attended by enforcement guidelines that specifically defined who counted as a gang member, in which districts within the city the law could be enforced, and which officers were authorized to enforce the law.¹⁰² The guidelines also required police commanders to consult with "local officials" and "community organizations" before commencing enforcement of the ordinance.¹⁰³ It's conceivable that the degree of discretion that persisted under the law was excessive when measured against the judicial standard embodied in decisions like *Papachristou*. But given the incentives of the law's own supporters to consider both the costs and benefits of discretion, it's unclear why a standard that exacting was necessary.

Ironically, when courts invalidate a well-considered program of community policing, they frequently put a community in the position of tolerating policing strategies that involve even more discretion. A reasonably close substitute for Chicago's invalidated gang-loitering law, for example, would be New York's strategy of order-maintenance policing. The "public order" provisions at the base of that strategy—including laws against public drunkenness, prostitution, aggressive panhandling, jaywalking, and unlicensed street vending—are specific enough on their face to survive vagueness challenges.¹⁰⁴ Yet the officers who must enforce these laws retain considerable latitude about whether to enforce them at all, and if so, where and against whom.¹⁰⁵ Distinguishing legitimate from abusive police behavior is thus much more difficult when a police department engages in general order-maintenance policing than it would be under a gang-loitering ordinance like Chicago's, which is general on its face but which jealously guards against the diffusion of enforcement authority. Indeed, New York's order-maintenance policing has apparently generated a much higher volume of police-misconduct complaints than Chicago's gang-loitering law did.¹⁰⁶

In sum, the decisions that have applied modern criminal procedure to invalidate the new community policing are riddled with contradictions. They

102. See General Order of Chicago Police Department No. 92-4 (Aug. 7, 1992).

103. *Id.*

104. See Livingston, *supra* note 17, at 615-16.

105. See *id.* at 609.

106. See Dan Barry & Deborah Sontag, *Disrespect as Catalyst for Police Brutality*, N.Y. TIMES, Nov. 19, 1997, at A1 (connecting rising incidence of complaints of police brutality in New York to order-maintenance policing).

purport to protect the rights of individuals who favor the very policies under attack; they seek to promote liberty by means that ignore individuals' real choices and that actually increase society's reliance on mass imprisonment; and they oppose discretion needlessly and on grounds that are ultimately self-defeating. The goals that the doctrine is meant to serve are vital ones. But they are goals that the doctrine in fact disserves in today's social and political context. No doctrinal regime can long survive practical embarrassments of this magnitude.

III. WHAT IS TO BE DONE?

It does more harm than good, we've argued, for courts to use the modern regime of criminal procedure to assess the new community policing. It doesn't follow, however, that we have no need for a criminal procedure regime of any kind. The desirability of new community policing depends on certain contextual conditions that might not always be present and that don't necessarily support all forms of the discretionary law enforcement. The task that now confronts jurists and theorists, we believe, is to construct a new regime of procedure that assures the best reconciliation between liberty and order in today's political context.

We now want to take a step, but no more than a step, toward that destination. We will try to identify what we regard as the objectives that the new doctrine must achieve. We will not, however, attempt to translate these objectives into a fully specified set of doctrines. We're skeptical that any useable doctrinal regime can be comprehensively imagined all at once, without the stimulus of real facts and the information gleaned from proceeding incrementally.¹⁰⁷ Factual necessity is the mother of doctrinal invention. It's not too ambitious, however, to imagine more concretely just what it is courts should be trying to invent as factual necessity yields opportunities for doctrinal reform. That is our more modest goal here.

The major development that has undermined the modern regime is the emergence of African-American political strength, particularly in the nation's inner-cities. The foremost doctrinal question, then, is how judicial review of community policing strategies should be recast to take account of this development. The answer, we believe, lies in the adaptation of a *political process theory* of judicial review to criminal procedure. In this section, we spell out what this adaptation entails, why it makes sense morally, and what it would take, legally, for such a doctrine to be administered in a reliable fashion.

A. POLITICAL PROCESS AND CRIMINAL PROCEDURE

It's commonplace to describe constitutional rights—particularly those that relate to criminal justice—as guaranteeing a reasonable balance between

107. See generally Cass R. Sunstein, *The Supreme Court, 1995 Term —Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

liberty and order.¹⁰⁸ The political process theory, as articulated in the famous “*Carolene Products* footnote”¹⁰⁹ and developed more systematically by John Hart Ely,¹¹⁰ specifies how courts should go about determining whether the balance struck by any particular policy is reasonable. If the coercive incidence of a particular policy is being visited on a powerless minority, the theory requires courts to make an independent assessment of whether the order benefits outweigh the liberty costs. This explains why courts strictly scrutinize policies that discriminate on the basis of race, restrict “dangerous” speech, or impose special obligations on account of religion.¹¹¹

But when a community can be seen as *internalizing* the coercive incidence of a particular policy, courts are much less likely to second-guess political institutions on whether the tradeoff between liberty and order is worthwhile. This explains the deference courts afford to *generally applicable* laws under the Privileges and Immunities Clause,¹¹² the dormant Commerce Clause,¹¹³ and even the Free Exercise Clause.¹¹⁴ When courts defer to the political process in those contexts, they aren’t saying that the majority gets to decide what rights minorities have, but rather that the willingness of the majority to bear a particular burden suggests that the policy in question doesn’t embody the political undervaluation of liberty that “rights” are meant to prevent.

The political process theory already explains at least certain aspects of criminal procedure doctrine. Normally, the police must obtain a warrant, supported by probable cause, before they can conduct a search.¹¹⁵ This requirement recognizes that law-enforcement officials cannot be trusted to attach sufficient value to the liberty of individual criminal suspects, whose interests are generally a matter of indifference to the general public.¹¹⁶ Law-enforcement officials needn’t obtain a warrant or even have probable cause, however, to stop motorists at sobriety checkpoints¹¹⁷ or to search all individuals entering airports or government buildings.¹¹⁸ This, too, makes sense under a political process theory: insofar as these policies *do* burden average members of the community, there is much less reason for courts to

108. See, e.g., *Kansas v. Hendricks*, 117 S. Ct. 2072, 2079-80 (1997).

109. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

110. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

111. See Klarman, *supra* note 38, at 747, 754-55, 760-61.

112. See ELY, *supra* note 110, at 83.

113. See *South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

114. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

115. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971).

116. See *id.*; cf. ELY, *supra* note 110, at 96-97.

117. See *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1980) (upholding sobriety checkpoints where uniformly administered to all passing motorists); cf. *Delaware v. Prouse*, 440 U.S. 648, 659-60 (1978) (invalidating random vehicle stops because they involved “standardless and unconstrained discretion”).

118. See *generally* *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

doubt the determination of politically accountable officials that these policies strike a fair balance between liberty and order.¹¹⁹

In the new criminal procedure doctrine, this mode of analysis should be used to modulate the degree of judicial scrutiny afforded to all aspects of discretionary community policing. The uniformly relentless scrutiny associated with the modern regime rests on a presumption that communities never share in the burdens of law-enforcement techniques that restrict the liberty of African-Americans. That assumption made sense before the 1960's civil rights revolution, but makes much less sense today, given the political strength of African-Americans and their own concern to free themselves from the ravages of inner-city crime. So instead of subjecting all law-enforcement techniques to searching scrutiny, courts should now ask whether the community itself is sharing in the burden that a particular law imposes on individual freedom. If it is, the court should presume that the law does not violate individual rights.¹²⁰

The political process theory tells courts not only when they *should* relax the standard of review, but also when they *shouldn't*. Every state now has a law that requires sex offenders who've completed their prison sentences to report their presence to local authorities.¹²¹ These laws have been challenged on various constitutional grounds.¹²² The political process theory doesn't tell us whether these laws embody a reasonable balance between liberty and order, but it does tell us that courts shouldn't defer to the average citizen's judgment on that question: she isn't subject to that burden and likely despises those who are.

If the burden of a law-enforcement policy falls on someone other than the average citizen, deference is due only if the political process can be viewed as sufficiently attentive to that party's interests. Thus, random drug-testing of student athletes is exempted from the warrant requirement not because *student athletes* exercise significant influence in the political process but because their *parents*, who naturally take their children's interests to heart, do.¹²³ Likewise, searches of regulated commercial enterprises, which exert considerable influence in the political process, and which pass the cost of

119. See Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment As Constitutional Theory*, 77 GEO. L.J. 19, 95-96 (1988).

120. For evidence that the degree of scrutiny in such cases makes a difference, see *Hutchins v. District of Columbia*, No. 96-7239, 1998 U.S. App. LEXIS 10303 (D.C. Cir. May 22, 1998). Assessing the constitutionality of a curfew enacted by Washington, D.C., the three-judge panel in *Hutchins* divided three ways on the proper degree of scrutiny under the Due Process Clause. Compare *id.* at *65 (opinion of Rogers, J.) (curfew invalid under "intermediate scrutiny") and *id.* at *72-74 (Tatel, J., concurring in judgment) (curfew invalid under "strict scrutiny") with *id.* at *79-83 (Silberman, J., dissenting) (curfew valid under "rational basis review").

121. See SCOTT MATSON WITH ROXANNE LIEB, *SEX OFFENDER REGISTRATION LAWS: A REVIEW OF STATE LAWS* 5 (Wash. State Inst. Pub. Pol. July 1996).

122. See *id.* at 8-9.

123. See *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995).

regulation onto consumers, are exempt from the warrant requirement under the “administrative search” doctrine.¹²⁴

Our purpose is to suggest a way for courts to approach criminal procedure rights generally, not to describe a fully specified approach for interpreting any particular constitutional guarantee. Nevertheless, it should be clear that the applicability of the political process theory varies across procedural rights.

It’s likely to have selective relevance, for example, to Fourth Amendment search and seizure doctrine. An investigative procedure counts as a “search” for Fourth Amendment purposes if it invades “an expectation of privacy that society is prepared to consider reasonable.”¹²⁵ Where a procedure systematically and meaningfully affects the average member of a community, and that community’s political representatives support that procedure, that’s strong evidence that the procedure violates no reasonable privacy expectation. Where, in contrast, the procedure doesn’t affect the average member of the community, the political process theory suggests that courts must look outside the political process itself for evidence of whether that invasion is reasonable. Likewise, in deciding what counts as “probable cause” for a search, or what types of exigencies excuse compliance with the warrant requirement—determinations that are again informed by societal norms of reasonableness¹²⁶—courts should be willing to credit political support for the search or not depending on how diffusely the burden of the search is distributed.

The political process theory is also likely to have selective relevance to the constitutional doctrines that govern discretionary community policing. The Due Process “void for vagueness” doctrine, for example, attempts to strike a reasonable balance between the need for flexibility in administering the law and the risk of arbitrariness.¹²⁷ Again, if the community at large is

124. See, e.g., *New York v. Burger*, 482 U.S. 691 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981). See generally Wasserstrom & Seidman, *supra* note 119, at 96; William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1044-45 (1995).

125. See, e.g., *United States v. Jacobson*, 466 U.S. 109, 113 (1984).

126. See generally *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972) (“Probable cause does not emanate from an antiseptic courtroom, a sterile library or a sacrosanct adytum, nor is it a pristine ‘philosophical concept existing in a vacuum,’ . . . but rather it requires a pragmatic analysis of ‘everyday life on which reasonable and prudent men, not legal technicians, act.’” (quoting *Bell v. United States*, 254 F.2d 82, 85 (1958) and *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

127. See, e.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); (“A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.”); *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (recognizing that doctrine is sensitive to need for “‘flexibility and reasonable breadth’”).

affected in a vital way by the discretionary policing strategy in question, then the approval of that policy by the community's representatives is compelling evidence that that strategy doesn't present the sorts of dangers that the void for vagueness doctrine is meant to avert. However, when police are able selectively to detain individuals suspected of wrongdoing—even under laws that are very precise on their face—there's no guarantee that the average citizen will be affected in a way that gives her sufficient incentive to police the police for abuse. Consequently, we don't believe that the political process theory would warrant dispensing with the requirement of *Terry v. Ohio*¹²⁸ that such stops be made only on the basis of "reasonable and articulable" suspicion.

In other criminal procedure domains, in contrast, the political process theory is likely to have little if any relevance. The average citizen faces only a very remote prospect, for example, of being a defendant in a criminal proceeding. Consequently, the political process can't necessarily be trusted to place sufficient value on the liberty secured by the guarantees that regulate criminal adjudications. Similarly, because the average citizen is unlikely to be the subject of a police interrogation, we believe the protections associated with *Miranda* and its progeny would also be largely unaffected were the political process theory to be melded into criminal-procedure jurisprudence.

We believe that this political-process approach would vindicate the mainstays of the new community policing. Consider, for example, the CHA building-search policy. The burden of unannounced mass searches fell on everyone who lived in the projects, and not just on persons suspected of wrongdoing. The political representatives of these individuals, moreover, had unambiguously expressed their support for the searches.¹²⁹ To be sure, not everyone who lived in the projects approved the tradeoff between submitting to this intrusive law-enforcement technique and the increased security it delivers. But because these individuals had every chance to voice their opposition in the political process, and because there is every reason to believe that the majority—whose members were affected in exactly the same way—gave due weight to the dissenters' interests, there was no compelling reason for courts to second-guess the community's determination that building searches strike a fair balance between liberty and order.

Curfews and gang-loitering provisions also pass the political process test, albeit in a less straightforward fashion. These laws do indeed burden the liberty of only a minority—gang members in the one case, and juveniles in the other—many of whom might be disenfranchised. But this minority is by no means a despised one. Inner-city teens and even gang members are linked to the majority by strong social and familial ties. It is precisely because they

128. 392 U.S. 1 (1968).

129. See *supra* p. 1167.

care so deeply about the welfare of these persons that residents of the inner-city favor relatively mild gang-loitering and curfew laws as alternatives to draconian penalty enhancements for gang crimes, severe mandatory minimum prison sentences for drug distribution, and similarly punitive measures.¹³⁰ The pervasive sense of “linked fate” between the majority of inner-city residents and the youths affected by curfews and gang-loitering ordinances furnishes a compelling reason *not* to second-guess the community’s determination that such measures enhance rather than detract from liberty in their communities.¹³¹

B. TRUSTING THE AVERAGE CITIZEN

As should be clear, the political process test ultimately turns on normative criteria rather than factual ones. We have suggested that at least some forms of the new community policing—including public-housing building searches, curfews, and gang-loitering laws—pass the test because the average inner-city resident is either directly affected by such policies or cares intimately about those who are. But the same obviously can’t be said of all laws, even ones that are generally applicable on their face. A court shouldn’t accept the claim, for example, that a community has internalized the burden associated with a ban on subversive speech merely because all members of the community were subject to it: the average citizen doesn’t genuinely internalize the burden of that law because she has no desire to engage in such speech and cares little for those who do.¹³²

A court can conclude that a law or policing technique passes the political process test, then, only if the average citizen is affected by that law or policy in a way that entitles her judgment to moral respect. That doesn’t mean that a court has to conclude that the average citizen is right on the merits before it defers. But it does mean that it has to be convinced, based on a complete understanding of her capacities and her situation, that the average citizen is the one entitled to balance the relevant interests and values.

Moreover, this judgment must be a comparative one. The constitutional provisions that regulate community policing are designed to assure a reasonable balance between liberty and order. These provisions, however, are not self-executing; they require some institution—and consequently some *person*—to exercise moral judgment and *decide* whether the balance struck by

130. *See supra* p. 1165.

131. *Cf. Vernonia School Dist.*, 515 U.S. at 649-50, 665 (recognizing that the school board, which made decisions with the support of parents, acted “as guardian and tutor of children entrusted to its care” in adopting random drug-testing policy for student athletes).

132. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545-46 (1993) (invalidating general bar on animal sacrifice on ground that burden is felt only by worshipers of particular sect and thus “‘ha[s] every appearance of a prohibition that society is prepared to impose upon [members of the sect] but not upon itself.’ This precise evil is what the requirement of general applicability is designed to prevent.” (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (Scalia, J., concurring in part and concurring in judgment))).

any particular law or policing technique is reasonable. The civil libertarians and judges who maintain that the average inner-city resident is not competent to make that judgment are necessarily saying that *they* are.

The issue, then, comes down to one of perspective. From *whose* perspective should building searches, anti-loitering laws, curfews, and the like components of the new community policing be evaluated? Who should we trust to judge whether these policies reasonably balance liberty and order in the inner-city?

For two reasons, we believe the answer is the citizens who live there, and not the judges and the civil libertarians who don't. First, only the residents have *concrete, local knowledge*, which is essential to balancing liberty and order in a morally credible way. And second, only local residents are in a position to know whether the social norms that constrain individual choices are welcome or unwelcome.

1. LOCAL KNOWLEDGE

The most obvious reason to credit the average inner-city resident's assessment of the new community policing is that *she* is the one whose interests are most directly affected. She is the one who faces a heightened risk of criminal victimization and who lives with the destructive impact of crime on the economic and social life of those communities; and, at least with respect to the mainstays of the new community policing, *she* is the one who feels the pinch of these laws in a meaningful way. Consequently, she is in the best position, practically and morally, to decide whether the balance they strike between liberty and order is reasonable.

Those civil libertarians and courts that continue to adhere to the modern criminal procedure regime offer several justifications for overriding the decisions of inner-city residents, none of which is satisfying. One is that these individuals choose building searches, curfews, gang-loitering ordinances and the like only because society at large refuses to address the social inequities at the root of inner-city crime.¹³³ This argument is a non-sequitur; obviously, residents of the inner-city face unfairly truncated options, but that hardly justifies coercing them to accept the one option—rampant crime—that they prefer least.

Another version of this argument is strategic: courts shouldn't let the residents of the inner-city choose "quick-fix" law-enforcement policies because that reduces society's long-term incentive to remedy inequity.¹³⁴ This is an exceedingly dubious claim. Thirty years of real-world experience belie the idea that spiraling inner-city crime will somehow force powerful interests *outside* the inner-city to revitalize those communities. The only

133. See, e.g., Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 546-47 (1983) (explaining resident support for housing searches this way).

134. See, e.g., Harvey Grossman, *No: Police Sweeps Make Residents Second-Class Citizens*, 80 A.B.A. J. (1994) (making this argument about housing searches).

thing that can force such change is sustained community-level political organizing, which is hardly inconsistent with accepting curfews, building searches, or gang-loitering ordinances.

What's more, residents of the inner-city are acutely aware of the political dynamics that surround law enforcement. Indeed, many of them support the new community policing precisely because they see it as a politically feasible alternative to severe prison sentences for lawbreakers.¹³⁵ In determining whether these policies reasonably balance liberty and order, can't residents be trusted to take into account themselves how, and in what manner, the new community policing interacts with other policies aimed at improving the quality of life in the inner-city?

At least some courts and civil libertarians say they can't be. The judgment and "self-respect" of inner-city residents, they maintain, has been deformed by social deprivation. Consequently, they lack the capacity to make critical assessments of curfews, gang-loitering ordinances, building searches, and similar policies.¹³⁶

This contention is ripe with self-contradiction. Civil libertarians usually take immense pride in their resistance to paternalism. Respecting individual dignity, they maintain, requires society to refrain from forcing an idealized set of values and preferences on its citizens. Yet upon discovery that inner-city residents favor policies that the ACLU believes violates these persons' rights, too many civil libertarians resort to the very kind of paternalism they should abhor.

But the civil-libertarian claim that inner-city residents lack critical judgment is not just paradoxical; it's manifestly false. The deliberations that attend their support for the new community policing inevitably reflect both an intense commitment to individual liberty and a sophisticated awareness of the risks that the new community policing poses to it.¹³⁷ When the ACLU filed suit in the building-search case, for example, CHA residents were vigorously debating the appropriateness of building searches: although many residents supported the existing CHA policy, some did not, and still others favored a modified search policy.¹³⁸ The heated debate concerning the CHA

135. See *supra* p. 1165-66.

136. See, e.g., *Pratt*, 848 F. Supp. at 796-97 ("Many tenants within CHA housing, apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forgo their own constitutional rights. . . . Finally, this Court has faith that parents and grandparents living in and around CHA housing will reclaim their families and restore to their children self respect and respect for other human beings. If they do, government efforts will succeed; if they do not, all efforts of government, whether within or without constitutional restraints, will fail.").

137. See, e.g., DeNeen L. Brown, *Tenants See Pros, Cons in Clinton Anti-Crime Plan*, WASH. POST, Apr. 19, 1994, at B7 (noting residents' debate over public housing searches); Stebbins Jefferson, *Young Lives Hang in the Balance*, PALM BEACH POST, Mar. 5, 1994, at 22A (noting debate among African-Americans over Miami Curfew).

138. See generally Susan J. Popkin, Lynn M. Olson, Arthur J. Lurgio, Victoria E. Gwiasda & Ruth G. Carter, *Sweeping Out Drugs and Crime: Resident's Views of the Chicago Housing*

building searches *among* CHA residents demonstrates that these individuals don't just accept what's given uncritically. Rather, like other self-respecting persons in a tough situation, they reflect, they complain, they demand, they argue, they fight, and they ultimately *decide* what the best course of action is—unless, of course, that power is taken away from them by courts.

Indeed, perhaps the worst consequence of the ongoing commitment to the modern regime of criminal procedure is its *disempowering* effect on inner-city communities. Criminologists have long recognized that inner-city crime both creates and is sustained by atomization and distrust, forces that lower individuals' ability to engage in the cooperative self-policing characteristic of crime-free communities.¹³⁹ A healthy democratic political life can help to repair these conditions. That's exactly what residents of the inner-city enjoy when they are free to decide for themselves whether to adopt building searches, gang-loitering ordinances, curfews and like policies.¹⁴⁰ Thus, in addition to standing in the way of potentially effective law-enforcement policies, the modern regime preempts deliberative experiences that reduce crime through their effect on public dispositions and habits.

The civil libertarians' critique of the residents' local knowledge also fails because they never tell us why we should trust their *outsiders perspective* more. Whereas the average citizen is immersed in the conditions that the new community policing tries to remedy, the average civil libertarian and judge are not. For them, the values at stake and the difficult tradeoffs that must be made are largely abstractions.

To illustrate, consider an exchange from the City Council hearings on the Chicago gang-loitering ordinance. At the hearings, dozens of inner-city residents—from church leaders, to representatives of local neighborhood associations, to ordinary citizens—testified in favor of the proposed law. Harvey Grossman, Illinois Director of the ACLU, testified against it:

I am a lawyer, and I spend a great deal of time doing nothing more than reviewing ordinances and statutes, and it turns into a little bit of a long exam game We pick apart the statute. We focus on [a] word or [a] phrase, and we try to say why that phrase might or might not be constitutional.¹⁴¹

He then proceeded to “pick apart” the gang-loitering ordinance, demonstrating the tension between it and various judicial precedents.

Alderman William Beavers, a Council member who represents a ward on

Authority's Public Housing Drug Elimination Program, 41 CRIME & DELINQUENCY 73 (1995); 2 Sudhir Alladi Venkatesh, *American Project: An Historical Ethnography of Chicago's Robert Taylor Homes* (unpublished dissertation, June 1997).

139. See, e.g., Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997).

140. See Meares, *supra* note 74.

141. *Transcript of Meeting before Chicago City Council Committee on Police & Fire* 107 (May, 18, 1992, on file with the authors).

Chicago's south side containing several impoverished and crime-ravaged areas, objected to this bookish conception of how to appraise the constitutionality of the law. "I don't know if you are attuned to what's going on in these neighborhoods," he told Grossman. "Maybe I need to take you out there and show you what's really going on."¹⁴² To which Grossman replied that that wouldn't be necessary:

I think our ability to come together and to try to resolve issues [like this] really doesn't . . . depend on if I see what's happening in your neighborhood or you see what's happening in my neighborhood.

Rather, what it does depend on is

empathy or ability to understand what's happening to other people and, two, some commitment, some intellectual integrity and some commitment to principle. And the principle that I am suggesting to you is inviolate. It doesn't change.¹⁴³

Again, there is no perspective-free way to determine whether the mainstays of the new community policing violate the Constitution. Some individual or set of individuals, judging the question in the light of their own experiences and values, must decide whether particular policies embody a reasonable balance between liberty and order.

The person entitled to make that call, we believe, can't possibly be someone who does "nothing more" for a living than "pick apart" statutes and ordinances. It can't possibly be someone who thinks empathy is motivated by "inviolate" "intellectual" "principles" and just "doesn't depend," "really," on "see[ing] what's happening in [inner-city] neighborhood[s]." And most important of all, the person to trust can't possibly be someone who conceives of this tough question as one big "exam game."

The tough issues surrounding the new community policing obviously aren't a "game" for the average inner-city resident. A morally responsible criminal procedure doctrine would recognize that her judgments on these matters is entitled to profound respect.

2. NORMS, LAWS, AND LIBERTY

The remoteness of judges from life in the inner-city does more than interfere with their capacity to *weigh* how the new community policing affects liberty and order. It also interferes with their perception of the contribution that such policing can make to *enhancing* individual liberty through reshaping social norms. Again, this is a phenomenon that the average inner-city resident, by virtue of her immersion in community life, is much better equipped to see.

In most contexts, it makes sense to see law as a constraint on individual liberty. By forbidding some action—whether an abortion, a political speech,

142. *Id.* at 119.

143. *Id.* at 120.

or an assault—the law reduces the number of options from which individuals would otherwise be free to choose. For constitutional purposes, the question for a judge is whether such a constraint on liberty abridges a protected right and, if so, whether such an abridgment is justified by some important state interest.¹⁴⁴

The phenomenon of social norms, however, complicates this picture. In some circumstances, individuals may choose a course of action not because they value it intrinsically but only because others have chosen it. If some restaurateurs, for example, see that the vast majority of restaurants in an area refuse to serve African-Americans, they might feel obliged to follow suit in order to avoid being put at a competitive disadvantage. If some motorcyclists perceive that the vast majority of other cyclists don't wear helmets, they may decide to ride without them too in order to avoid being perceived as timid and unadventurous.¹⁴⁵

In these circumstances, a law forbidding the norm-driven conduct will have an ambiguous effect on liberty. Those who behaved consistently with the norm and who valued it will have lost an option. But those who behaved consistently with it and who resented it will *gain* one: they will now be able to choose the course of conduct that they valued most—providing nondiscriminatory service or riding with a helmet—unburdened by the consequences of acting contrary to norms. Whether liberty is increased or decreased on net can't be determined *a priori* but rather depends on how many individuals resented the norm and how intensely they resented it before the law went into effect.

Many forms of inner-city criminality are fueled by widely resented norms. In a school in which many students are armed, even ones who resent guns will choose to arm themselves.¹⁴⁶ In a neighborhood in which many juveniles hang out on the street corner at night, many will feel compelled to hang out so as not to be excluded from social life.¹⁴⁷ In a community in which gang activity is rampant, many individuals will choose to join gangs, not because they look up to gang members, but because they perceive (incorrectly) that a majority of their peers do and (correctly) that failing to join exposes them to a risk of predation.¹⁴⁸ Laws that interfere with these norms will decrease the liberty of those who intrinsically value carrying guns, hanging out at night, and joining gangs, but *increase* the liberty of those who

144. This "negative" conception of liberty—which posits a simple opposition between individual freedom and law—is the dominant conception of liberty in both modern liberalism, see Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969), and American constitutional law, see Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 *HARV. L. REV.* 445, 486-87 (1997).

145. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943, 963-69 (1995).

146. See Blumstein, *supra* note 97, at 11.

147. See Kahan, *supra* note 65, at 376.

148. See *id.* at 374-75.

want the option of *not* engaging in these activities without suffering the adverse consequences of acting contrary to prevailing norms.

The complicated interactions between law, norms, and liberty should make judges humble. They can't legitimately infer, for example, that curfews, gang-loitering laws, and other elements of the new community policing restrict liberty just because they interfere with individual choices. For those laws, through their effect on norms, may in fact be constructing options that individuals value and wouldn't otherwise have. The only way to figure out what their net effect on liberty is under such circumstances is to determine if the norms they regulate are welcome or unwelcome by a majority of the persons who are subject to them—an empirical question that judges can't possibly answer through introspection.

But assuming the law is one that affects the average citizen in a meaningful way, she *can* determine through introspection whether the norms that fuel the regulated conduct are welcome or unwelcome. Indeed, the overwhelming support of inner-city residents for the elements of the new community policing is strong evidence that these laws are liberty enhancing on net. The complex interplay of norms, law, and liberty is thus another reason for judges to defer to the political process when assessing the constitutionality of such laws.

C. DISCRETION AND ACCOUNTABILITY

To perfect the political process theory of criminal procedure, the new doctrine will need better principles for assessing discretion. We have already noted that the modern regime insists on hyper-specific rules based on the assumption that white political establishments can't be relied on to punish—and can in fact be expected to reward—law enforcers who abuse discretion to harass minorities. That anxiety is less well founded now that law enforcers in America's big cities are accountable to political establishments that more fairly represent African-Americans. Uncompromising hostility to discretion is therefore inappropriate.¹⁴⁹

That doesn't mean, however, that the law should be completely indifferent to discretion. Even assuming political accountability, unbounded discretion creates a risk that individual law enforcers will be able to disregard the will of the community without detection. Indifference to discretion also creates the risk that officials will concentrate burdens on a powerless or despised segment of the community, thereby undermining the confidence that would otherwise be due to the political assessment of the tradeoff between liberty and order associated with a particular policy. The extreme hostility to discretion associated with *Papachristou* is now unwarranted, but courts should still satisfy themselves that communities are allocating authority in a manner that minimizes these risks.

149. See *supra* pp. 1158-59, 1166-71.

Instead of a presumption of hostility to law enforcement discretion, courts must develop constructive methods of guiding discretion of law enforcers in ways that establish and strengthen conduits of political accountability between residents of policed communities and law enforcers. Attention to guiding discretion, then, is an important aspect of insuring that the average citizen properly internalizes the costs of law enforcement. By guiding discretion rather than eschewing it, courts can help to insure that law enforcers are accountable to the average citizen whose decisions about liberty and order we've argued are critical to assessing the new policing.

Chicago's gang loitering ordinance furnishes an example of a community-policing technique that left room for discretion but that also shored up channels of accountability between the police and the policed. The ordinance empowered police officers to order groups including criminal street-gang members to disperse. Enforcement of the ordinance was implemented through regulations that clearly specified who counted as a "gang member," what kinds of behavior counted as "loitering," which officers could enforce the law, and in what neighborhood areas it could be enforced.¹⁵⁰ When evaluated against these regulations, misuse of the ordinance would have been easy to spot—clearly enhancing law enforcement accountability of the police. In addition, by limiting the areas in which enforcement was allowed, these regulations assured that police couldn't confine enforcement of the ordinance to those neighborhoods in which emotional and social connections between gang members and community residents were weak.

The regime of guided discretion erected by these regulations also enhanced accountability by explicitly involving community residents in a partnership with law enforcers in the project of community control. The ordinance was to be enforced only after consultation with "local leaders" and "community organizations"¹⁵¹—the representatives of the average citizen, whose decisions about the appropriate balance between liberty and order, we've argued, deserves greater respect. Given these safeguards, the Illinois Supreme Court should have upheld the gang-loitering ordinance whether or not it satisfied the demand for hyper-precision associated with *Papachristou*.

CONCLUSION

The endurance of the Constitution is a tribute to its powers of adaptation. Adaptation is the story, for example, of the Commerce Clause, which has grown in dimensions in step with the growing complexity of and integration of the national economy.¹⁵² It is the story, too, of the First Amendment's free speech guarantee, which broke free from its modest origins as a prohibition

150. See *supra* p. 1170.

151. See General Order of Chicago Police Department No. 92-4 (Aug. 7, 1992).

152. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 S. CT. REV. 125 (1995).

on “prior restraints” to underwrite a historically unprecedented experiment in democratic self-government and social pluralism.¹⁵³

Adaptation stories of this character, however, don’t have final chapters. They testify to our legal institution’s sensitivity to social and political conditions, which are themselves perpetually in motion. As those conditions change, the enlightened doctrinal innovations of one generation can become barriers to social progress in the next.

We’ve argued that this is exactly what has happened to the Supreme Court’s criminal procedure jurisprudence. The doctrines that make up that jurisprudence reflect the commitment of the Warren and early Burger Courts to combating institutionalized racism. They unquestionably were enlightened in their day. But the conditions that justified them—including the effective exclusion of African-Americans from the political process and the systematic use of law-enforcement resources to suppress them—have abated. Now, far from securing the equality of minority citizens, these same doctrines are holding back these citizens, whose economic and social prospects depend on liberating the inner-city from rampant crime. It’s time for courts to adapt criminal procedure doctrine to these new conditions.

The way for them to do so, we’ve suggested, is to connect the doctrine to the political process theory of judicial review. On this account, judges should relax the degree of scrutiny they afford discretionary community policing when they are confident that the political community has meaningfully internalized the burden that such policing puts on individual liberty. This form of analysis, which is widely employed throughout constitutional law, could easily be adapted to criminal procedure and would reliably ground the determination of whether the law-enforcement techniques associated with the new community policing strike a reasonable balance between liberty and order.

The most important benefit of such a framework, however, is that it would connect constitutional doctrine to the values and insights of the communities in which such policing is taking place. The residents of these communities know first-hand just how bad crime is in the inner-city *and* how large a toll curfews, anti-loitering laws, housing searches, and the like exact on individual liberty. The new community policing poses many tough questions. A doctrine that listens to the answers of the citizens who have the most at stake would be the beginning of both wisdom and legitimacy for a new regime of criminal procedure.

153. See LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* (1985).

Introduction

This edition marks the *Annual Review of Criminal Procedure's* twenty-seventh anniversary. What began as a modest review of criminal decisions rendered by the United States Court of Appeals for the District of Columbia Circuit has expanded into a full-fledged compendium of important criminal procedure rulings by the Supreme Court and the circuit courts. In keeping with the efforts of past *Georgetown Law Journal* members, current *Journal* members sought to make this edition clearer and more comprehensive. If you have any comments or criticisms, please write to us.¹

1. The following citation forms are used in the *Project*:

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