Dignitarian Costs and Benefits of the New Policing

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The title of this short essay seems odd, for a few reasons. First, and perhaps most important, no one is quite sure what dignity means. American jurisprudence often wrestles with the term dignity, often skeptically or grudgingly. At least some of this skepticism is explained by the tendency of American legal theorists to see both procedural and substantive rights doing the work of dignity. And dignity appears nowhere in the constitution. But despite its absence there, dignity appears in caselaw on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. These recent “dignitarian” moves in constitutional caselaw suggest that dignity may have constitutional weight, even if not explicit in the texts of these rights. That gives us a start. So, we can begin to think in consequentialist terms about the dignity harms of these rights violations, and in turn, begin a process of codifying those harms.

Second, the real challenge for this project lies in measuring these harms and assigning monetary weights, or social weights, to what are at times clear injuries, and at other times, are injuries to, say, legitimacy or democratic belonging or other products of social interaction or influences. It is one thing to calculate damages (e.g., lost wages, medical bills, psychologically disfiguring trauma), but quite another to calculate the costs incurred when a person whose dignity is violated decides to withdraw from democratic participation: voting, serving on a jury, or most salient, cooperating with police to solve crimes. At the extremes, persons whose dignity is violated could turn to crime.

Third, we’re hard pressed to quantify the benefits from the “New Policing.” For simplicity, let’s assume a definition of the “New Policing” that follows from Phil Heymann’s 2000 essay, where he describes contemporary policing as a combination

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1 Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and Professor Epidemiology at the Mailman School of Public Health at Columbia University.
2 The Simpsons offers a brilliant illustration of definitional vagueness of dignity See: The Simpsons, “A Milhouse Divided” (Dir. Steven Moore, 1996). The relevant scene is available at: https://www.youtube.com/watch?v=v-NH6TGZTcc
4 European judges and legal scholars have no such difficulties. If you walk into a judicial conference on criminal law in Europe and use the term dignity, heads universally nod affirmatively. It’s written into the German Constitution and elsewhere. Use the term dignity in a similar setting with their American counterparts, and eyeballs will roll like numbers and symbols on a lunatic slot machine. Vicki C. Jackson, “Constitutional Dialogue and Human Dignity: State and Transnational Constitutional Discourse,” 65 Mont. L. Rev. 15-40 (2004). Bruce Ackerman, Dignity is a Constitutional Principle, New York Times, March 30, 2014, at SR5.
6 See, e.g., Tom Tyler and Jeffrey Fagan, XXX, Ohio State J. Criminal Justice (2008)
of the use of analytics or metrics to target policing resources to higher crime places, intensive managerial reforms based on constant updating of those metrics, and aggressive police tactics including investigative stops (stop-and-frisk) and a set of order-maintenance tactics emphasizing arrests and summons for social disorder. We should be able to see benefits from these tactics in terms of lower rates of crime and disorder, but also increased “normal” social and commercial activity in the areas most intensively policed. And there are dignity benefits when people don't suffer liberty incursions from victimization.9

Fourth, recent evidence suggests that the hostile interactions between citizens and police in response to excessive force or police killings of unarmed suspects have led to something of a withdrawal of police from their duties. There no doubt are costs attached to police cynicism and to a pullback in their efforts in the face of criticism. But how to monetize those costs, apart from any damage to normative concerns about the design of police institutions, is another severe challenge.

Each of these leads to a complicated discussion. The rest of this memo provides a brief overview to each.

**Dignity 2.0**

If Leslie Henry carved out a reference space for thinking about dignity and law, then translating dignity incursions into harms and injuries seems an important first step for weighing the costs and balances of policing. This is the project of Dignity 2.0, a term coined by Jonathan Simon to examine dignitarian interests in a procedural context.10 Still, the meaning of dignity in such cases remains not just elusive, but an analytic challenge. Is it a religious term? An expression of a moral norm about the sanctity of the individual and her right to human flourishing? Does it reflect the autonomy and privacy of the individual against an intrusive or coercive state? Is it a placeholder or vessel for a more concrete analysis of procedural or substantive rights? Some refer to a “cult of dignity” that borders on the religious11 or that substitutes for the more complicated moral questions that are raised by modern bioethics.12 Given both the vagueness and diversity of the meanings attached to dignity, it may well be a concept that is better defined in the breach than in the affirmative.

An essential question for this essay is how we think about the harms that result from procedural incursions on dignity13 by police, such as unwarranted arrests or searches or unlawful detentions, however time-limited they may be. These are degradations of dignity, in addition to constitutional problems. For our purposes, following Josh Bowers, I use a simple concept of dignity as the freedom from gratuitous humiliation in

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9 Those might include preventive measures that also may limit liberty, such as avoiding travel at certain times of the day or to certain places that are disorderly or risky.
13 And liberty and autonomy and identity.
the context of power relationships, including the power of police acting as legal authorities.14

**Dignitarian Harms and Injuries**

Costs and harms accrue to the individual from not only the excesses of the New Policing, but as a side effect of its lawful practice as well. The widespread use of coercive police authority to conduct high discretion and intrusive stops, or “field interrogations,” produces at least four incursions on dignity.15 The first is the invasion of the person’s privacy – the coercive incursion on one’s person or property or even identity robs the citizen of the dignity of control, autonomy and privacy. This injury is equally inflicted upon the guilty and the innocent, but far more often on the innocent owing to the inefficiency of the New Policing at detecting crime.16 Second is “targeting harm” – being singled out in public by the police and treated like a criminal suspect.17 The fact that so few stops are accurate ensures the spread of the denial of the dignity of innocence, and especially among citizens in the more powerless communities.

The first two types of harm are often joined. Someone could well ask *why me?* Why would a police officer have a “hunch” that I am a criminal? It could be collective suspicion, or could be a taste for punishment by an officer. Targeting harm, then, encompasses both an *innocence harm* plus the harm to autonomy from targeting. Bennett Capers goes one step further by expressing the subjective feelings of humiliation and rage that result from the feeling of being targeted - of being singled out as a criminal, being stopped by the government in a public space also suggests public discounting of worth – a form of public shaming that derives from the feeling that the feeling that the government has no problem displaying in public that blacks are not equal to whites.18 These are injuries that incur a variety of costs.

The third harm flows from the racial bias in the distribution of these incursions: the signaling of suspicion if not criminality on black citizens simply by virtue of being black or moving about in a black neighborhood. To a lesser extent, the same harms accrue to Latino young men, as well as Latino and Black young adults.19

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15 William Stuntz, *Terry's Impossibility*, 72 St John’s Law Review 1213 (1998). Aggressive police tactics can be a zero-sum game. They can send a message that police are in control and the street is safe for law abiding citizens. While a search for drugs or weapons may entail a temporary detention and search of a suspect, the collateral manifestations of “toughness” or disrespect add little tactical value to the encounter, nor is there any logic to suggest that such tactics make these encounters any more productive.

16 *Floyd v City of New York*


19 Jeffrey Fagan et al., *Street Stops and Broken Windows Revisited*, in (Steven Rice and Michael White, eds.), *Exploring race, ethnicity and policing: Essential readings* (2010).
The racial skew in procedural indignities provides a bump or a premium on top of the harms that may come from the violations of autonomy and uniqueness. Subjecting individual to different treatment due to attributes that have nothing to do with his choices and conducts is an insult on his uniqueness. Bennet Capers refers to this as a form of “public shaming” that is skewed toward Black men. Respect for autonomous agency entails a presumption that every individual is capable and indeed does make rational and moral choices. Assuming otherwise is assuming that for some reason this individual is predisposed to making specific choices (specifically, criminal ones), even if there is nothing in his behavior to indicate that this is the case.

A second racialized injury to dignity concerns equality. The indignity derives in part from the knowledge that their uniqueness is accorded less respect than that of others. White men can walk around in the same neighborhood and would not be suspected of wrongdoing unless they do something suspicious. Pretextual stops, or stops at the very lower boundary of “suspicion”, suggest that Black men can be interdicted with minimal or no justification. The aggregated feeling is that it is more important to respect the autonomy of white people than their autonomy. In dignity terms, that white people are more unique than they are.

Fourth is the indignity of verbal and physical force that accompanies a search. These are not separate either: the indignity of inaccurate police incursions on liberty are compounded by the mix of these harms within any single interaction. Harsh treatment compounds the second and third harms - the assault on the dignity of innocence – by signaling the legitimacy of the predicate of race-based suspicion that seems to have motivated an unjustified police interdiction.

The claim that these matters translate to injuries, and perhaps damages, has some empirical backing. Public health records show that living in a neighborhood where aggressive policing is the norm may affect one’s mental health status, especially for the young men who are the targets of the stops. Survey data shows much the same: repeated and intensive police contact predicts increased levels of anxiety, symptoms of PTSD, and internalization of stigma with lasting psychological harms.

Misdemeanor arrests, especially for order maintenance crimes, also incur costs, and perhaps injuries owing to stigma. Arrests are as likely to result in dismissal as they are...
in a plea.\textsuperscript{25} Arrestees may incur a web of fines and fees\textsuperscript{26} that have straightforward monetary costs, as well as days of lost wages to appear for multiple court dates.\textsuperscript{27} Some may plead simply to end what appears to be an open-ended process that is more concerned with managing defendants than with adjudicating guilt or innocence.\textsuperscript{28} That plea could have secondary costs in reducing workplace viability and human capital.

Together with damages, these processing costs also can be aggregated and monetized across populations and neighborhoods. The costs are likely to weigh more heavily on nonwhites, whose incomes are generally lower than Whites, and whose access to capital can be attenuated. A full accounting of costs would also include the costs associated with the marginal increase in crimes (and criminal justice processing) of those whose response to dignitarian harms includes iatrogenic participation in crime.

\textit{De-Policing}

A contentious claim about policing is that police withdraw from the New Policing in response to criticisms from community groups and political representatives.\textsuperscript{29} The claim is contentious in two ways. First, there is only anecdotal evidence of a police withdrawal and its effects on crime. \textit{Terry} stops have declined in Chicago, following the surge of criticism of police following the release of a video of a police killing of an unarmed teenager. Misdemeanor arrests declined in Baltimore following demonstrations after the Freddie Gray killing by police,\textsuperscript{30} although the decline appears to be temporary and has been reversed.\textsuperscript{31} In each case, in these two cities, there is some evidence of an increase in crime. But other cities have experienced police slowdowns or withdrawals, but without a concurrent increase in crime.

Assume a slowdown and some effect on crime. And assume that the slowdown is a consequence of adoption of a policing model – the New Policing - that increases the risks of severe adverse events – shootings, other injuries, deaths. And assume a hostile reaction by communities to police. In that case, the dignitarian interests of police become part of the calculus of the costs and benefits of the New Policing. Police reject

\textsuperscript{25} Issa Kohler-Hausmann, Managerial Justice, 66 \textit{Stanford Law Review} 611 (2014)
\textsuperscript{26} Alexes Harris, A Pound of Flesh (2016). Logan and Wright, Mercenary Justice, \textit{U Illinois L Rev.} (2014)
\textsuperscript{27} William Glaberson, Justice Delayed, New York Times series
\textsuperscript{28} Id. See, also, Issa Kohler-Hausmann, supra.
\textsuperscript{31} Baltimore Sun
the criticisms of their work as hostile attributions of collective culpability owing to the negligence or recklessness of a small group of officers. But if a slowdown or withdrawal does in fact lead to a crime increase, these costs too become part of the calculus of costs and benefits.

**Returns and Benefits**

Is there an offset in crime reduction, with calculable returns to public safety and reduced criminal justice outlays? First, at the margins, any declines in crime attributable to a particular policing model should be evident beyond any long term secular decline.

Second, the effects should be disaggregated by crime type and cost type associated with the crime decline. Savings in petty thefts, for example, may be dwarfed by savings in medical costs due to violent crime.

The evidence of crime declines owing to the New Policing is thin. One study in New York suggests that there is little crime reduction from a saturate regime of investigative stops. Where reductions are measurable, they are quite small, and offset by the legitimacy and dignitarian costs of associated with the New Policing model. Moreover, it is still unclear if the police component of crime declines can be attributed to the surge in the presence of the police in higher crime places, or the tactics that police use once allocated. If it is police presence, then the cost calculus is quite different: the payouts from litigation, and the dignitarian costs of the New Policing, can be avoided by simply mounting a show of force and a credible deterrent effect.

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