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**SCHOOL OF LAW**

**“Street Cred”**

Montré D. Carodine

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## ESSAY

### “Street Cred”

Montré D. Carodine\*

*The killing of unarmed teen Trayvon Martin by a neighborhood watch captain and the purported lackadaisical response to that killing by the Sanford, Florida Police Department riveted the country and sparked an important conversation regarding the breakdown of the relationship between the police and the communities that they serve. Regardless of one’s opinion on what happened the night that Martin was killed, it is undeniable that this entire case has jeopardized the already fragile relationship between law enforcement and not only the Sanford community, but communities across the nation. This Essay considers the effect of the dysfunctional relationship between the police and the communities that they serve on the perceived reliability of the evidence that police provide in our criminal justice system on a daily basis. The evidence rules, which are particularly crucial in criminal cases, should reflect the reality of public perception of law enforcement. I propose that communities call for and legislatures implement a moratorium on the admissibility of certain types of law enforcement testimony in communities with strong levels of distrust of the police. And, in turn, when confidence in the credibility of law enforcement is restored, which is the ultimate goal of this Essay, the evidentiary regime can and should then reflect a new reality and take the opposite approach. The rules of evidence should*

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\* Copyright © 2013 Montré D. Carodine. Associate Dean for Special Programs and Associate Professor, University of Alabama School of Law. I would like to thank Dean Kenneth C. Randall, my colleagues on the University of Alabama School of Law faculty, and the Alabama Law School Foundation for their generous support of my research. I would also like to thank the panelists who participated in the program entitled, Deconstruct and Reconstruct: Reexamining Bias in the Legal System; Searching for New Approaches, at the 2013 Annual Meeting of the Association of American Law Schools. And I would especially like to thank Professors Rex R. Perschbacher and Debra Lyn Bassett for inviting me to participate on the panel.

incorporate a community policing approach to the admissibility of police testimony.

*My approach is novel, as criminal law and evidence scholars have not considered the importance of the community in assessing evidentiary reliability. But we should rely on the community to adjudge police credibility and the evidentiary value of their testimony. This approach is superior to relying solely on prosecutors, judges, and the police themselves. My proposal will help to restore the public's trust in law enforcement, which is at an all-time, critical low.*

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## INTRODUCTION

The killing of unarmed teen Trayvon Martin by a neighborhood watch captain and the purported lackadaisical response to that killing by the Sanford, Florida Police Department riveted the country and sparked an important conversation regarding the breakdown of the relationship between the police and the communities that they serve.<sup>1</sup> More broadly, the case reflects the community's complete distrust of the judicial system that serves it. Regardless of one's opinion on what happened the night Martin was killed, it is undeniable that this entire case has jeopardized the already fragile relationship between law enforcement and not only the Sanford community, but communities across the nation. The conversations in the wake of this tragedy have been quite uncomfortable for some and downright painful for others. Yet these conversations are long overdue and need to continue until there are concrete and sustainable solutions.

This Essay considers the effect of the dysfunctional relationship between the police and the communities that they serve on the perceived reliability of the evidence that police provide in our criminal justice system on a daily basis. And, in turn, I consider the larger systemic ramifications of this problem for the judicial process. I address these fundamental questions: Do police have the necessary "street cred" to be suppliers of reliable evidence in our criminal justice system? If not, how do they get this vital stamp of approval from their communities to ensure their effectiveness and society's safety? And how can our evidence and procedural rules facilitate this endeavor? I believe that once there is a change in the perception of the police, who are for so many people in vulnerable communities the very face of the justice system, there will be a positive effect on overall perceptions of fairness and justice.

In reality, as the Martin case has exposed, law enforcement has a serious credibility problem with the public that it serves. Frankly, a large number of people simply do not trust the police. Studies and anecdotes across the country have revealed that this distrust is often justified and that far too many police engage in deceitful practices, both on the street and in court, as a means of enforcing the law.

In fact, a phrase has even been coined to describe the suspected dishonesty of many police officers in court while under oath:

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<sup>1</sup> See *Sanford Manager: Trust Between Community, Police "is Gone"*, WASHINGTONPOST.COM, Mar. 23, 2012, [http://www.washingtonpost.com/national/sanford-manager-trust-between-community-police-is-gone-126/2012/03/23/g1QAow9RWS\\_video.html](http://www.washingtonpost.com/national/sanford-manager-trust-between-community-police-is-gone-126/2012/03/23/g1QAow9RWS_video.html).

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“testilying.”<sup>2</sup> Yet, daily across the country, police officers are allowed to testify in courts and within a justice system that implicitly (and explicitly) validate their credibility. This Essay challenges the status quo and calls for an evidentiary regime that openly acknowledges the grossly diminished perception of the credibility of law enforcement in the eyes of the public.

The evidence rules, which are particularly crucial in criminal cases, should reflect the reality of public perception. As I will fully put forth below, communities should call for and legislatures should implement a moratorium on the admissibility of certain types of law enforcement testimony in communities with strong levels of distrust of the police. And, in turn, when confidence in the credibility of law enforcement is restored — which is the ultimate goal of this Essay — the rules can and should then reflect a new reality and take the opposite approach. The rules of evidence should incorporate a community policing approach to the admissibility of police testimony. We should rely on the community to adjudge police credibility. This approach is superior to relying solely on prosecutors, judges, and the police themselves.

Part I of this Essay generally explores the community’s role in ensuring that evidence is reliable. I consider recent trends in the community interactions with police as evidence that community trust is a vitally important component to the goals of law enforcement. I highlight the disturbing anti-snitching movement, which is actually encouraging a generation of young people to avoid helping the police in investigations, no matter what the stakes may be.

Part II focuses on the community policing movement. I juxtapose this Part with the previous one to suggest that there are two very different models of police-community relations: one that puts the community’s safety in jeopardy and another that promotes safety and security as well as the integrity of our legal system.

I highlight my relatively recent experiences as a facilitator at a community policing program and my participation in the FBI’s Citizens’ Academy and subsequent involvement in its Alumni Association. My point here is to suggest that community policing programs like these are one of a number of ways that law enforcement can start to rebuild its reputation with the community that it serves. Ironically, Trayvon Martin’s shooter, who has been dubbed a “cop

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<sup>2</sup> See Josh Bowers & Paul Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 222 (2012); Bennet Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836 (2008); Morgan Cloud, *Judges, “Testilying,” and the Constitution*, 69 S. CAL. L. REV. 1341, 1352 (1996).

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wannabe" attended and graduated from a state citizens' police academy in Florida.<sup>3</sup> But these programs should not be used to encourage vigilantism. If used properly and made available, particularly in vulnerable communities that have poor relations with the police, these programs can be extremely valuable.

Part III offers a way that the evidence rules can be utilized to both promote the use of and monitor the effectiveness of the community policing model. I propose that police not be allowed to provide in-court testimony in communities where they have serious credibility problems until they address this problem and substantially improve their relationships with their communities. Specifically, I suggest a moratorium on police testimony in drug and gun possession cases, the types of cases in which the police are most likely to lie to create probable cause in court to convict the defendant.

In many communities there is an absolute state of emergency with respect to police-community relations. A moratorium on police testimony in court is the type of drastic measure needed to address the situation. The communities' views on police credibility should matter and be taken into account in court. The loss of the privilege to testify in court as well as the evidentiary value of their testimony should encourage police to put tremendous effort into fostering positive partnerships with all of their communities. Those who criticize such an approach should recognize that we are already losing valuable and often crucial evidence because of the anti-snitching campaign, which is essentially an anti-police campaign. In the end, my proposal will create a more reliable and effective judicial system, and it will reestablish the long lost and much needed trust of citizens in law enforcement and the judicial system in which police officers operate.

#### I. THE COMMUNITY'S ROLE IN ENSURING RELIABLE EVIDENCE

In this Essay, I will discuss the role of the community with respect to the reliability of evidence from two interrelated angles: the community as a source of reliable evidence, and the community as the judge of the reliability of evidence (namely evidence from police officers, who are representatives of "the law"). To obtain reliable evidence from the community, the community needs to see the system as fair. We should use the community's views to gauge the fairness of the system by allowing the levels of trust within the community to

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<sup>3</sup> Pedro Oliveira Jr. & Gary Buiso, *Trayvon's Killer a Cop Wannabe on Patrol*, N.Y. POST, Mar. 25, 2012, 1:51 AM, [http://www.nypost.com/p/news/national/cop\\_wannabe\\_on\\_paranoid\\_patrol\\_lfV4L1N0W6y0mEwgoU0L7K](http://www.nypost.com/p/news/national/cop_wannabe_on_paranoid_patrol_lfV4L1N0W6y0mEwgoU0L7K).

determine the admissibility of officer testimony in certain cases.<sup>4</sup> The end result will be higher levels of trust in the integrity of the system, which will cause the community to become a more reliable source of evidence. My approach is a community based resolution to the issue of the community's bias against and distrust of the judicial system.

One of the core foundations of our evidence rules is reliability.<sup>5</sup> Indeed, reliability lies at the heart of the successful application of nearly all of our rules.<sup>6</sup> Most of the hearsay exceptions, for example, are rooted in the premise that the source of the evidence was reliable.<sup>7</sup> The hearsay exceptions for business records, for example, are premised on the idea that (before potential litigation arises) members of the business organization have an interest in contributing reliable and accurate information in the creation of business documents because doing so is good for business.<sup>8</sup> Excited utterances are said to be reliable and thus generally exempt from the hearsay ban, because we believe that people are likely to speak most honestly and reliably when they speak spontaneously and while still in an excited state.<sup>9</sup>

After the Supreme Court's landmark *Daubert* decision, the foundational principle for the admissibility of expert testimony is reliability.<sup>10</sup> Expert testimony to be deemed admissible must comport with judges' notions of reliability, particularly in terms of the methods by which the experts arrived at their opinions.<sup>11</sup> There are numerous

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<sup>4</sup> See Part IV.

<sup>5</sup> See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 2 (3d ed. 2003); Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1985 (2008) (noting that common rules of evidence address reliability).

<sup>6</sup> See Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 145 (2004) (noting that "the best evidence and hearsay rules are largely designed to enhance the reliability of the evidence on which the trier of fact bases his or her findings").

<sup>7</sup> See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2729 n.1 (2011) (Sotomayor, J., concurring) ("The rules of evidence . . . are designed primarily to police reliability").

<sup>8</sup> See, e.g., *United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir. 1993) ("First, businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful. Second, routine and habitual patterns of creation lend reliability to business records.").

<sup>9</sup> See John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 216 (1999).

<sup>10</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>11</sup> See *Kumho Tire v. Carmichael*, 526 U.S. 137, 141 (1999) (finding that trial courts are required to ensure the reliability of all types of expert testimony).



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other examples throughout the rules of evidence that demonstrate the importance of reliability on the admissibility of evidence. In general, evidence that we cannot rely upon with some reasonable degree of confidence is simply not all that useful and, hence, will (or should) face serious admissibility hurdles.

Evidence theory has to this point undertheorized the importance of the role of the community at large, as opposed to individuals (like the hearsay declarant or the expert witness), in discussions on reliability of evidence. Indeed, community perceptions of reliability have largely been excluded from the discussion.

But the community’s perspective is worth deconstructing and bringing to the forefront, particularly in the criminal context, where the consequences for admitting unreliable evidence have the potential for being the most severe. Perceptions do, in fact, shape our understanding of reality. And community perceptions affect individual suppliers of evidence, such as eyewitnesses and fact witnesses. The rules of evidence do not really conceive of the community at large as source of evidence nor as a judge of evidentiary reliability. Rather, when the rules focus on human sources of information scrutinized by human “lie detectors,”<sup>12</sup> they focus on individuals in isolation, divorced from the communities to which they belong, which has surely played a role in shaping their perceptions of the legal system and how they will interact with it. The failure to focus on the community’s role in shaping our views of evidentiary reliability contributes the lack of attention that institutional players, such as the police and prosecutors, give to earning and maintaining the public’s trust.

My concern in this Essay is not just how the evidentiary rules can play a role in evaluating the reliability of evidence from members of particular communities, but, more importantly, how the rules can aid in efforts to promote a willingness of certain communities to supply reliable evidence. In a number of ways, the rules do more to deter engagement with the system and to undermine the public’s confidence — particularly in certain communities, than they do to promote it. For example, I have made this argument with respect to Federal Rule of Evidence 609 (and its state counterparts), which permits the impeachment of criminal defendants with their prior convictions. I have previously provided a racial critique of the rule, which

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<sup>12</sup> See George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 577 (1997) (noting the common premise that: “[L]ie detecting is what our juries do best . . . . In the liturgy of the trial, we name the jurors our sole judges of credibility and call on them to declare each witness truth-teller or liar.”).

disproportionately targets and impacts African Americans.<sup>13</sup> Also, feminists have often critiqued the interpretation of various evidence rules, such as those that often arise in domestic violence and rape cases.<sup>14</sup> The rules can readily be seen as tools of subordination that reinforce the existing social order, which has marginalized, or worse, criminalized disfavored groups. From a utilitarian standpoint, I believe that a reform of the rules of evidence, working alongside other reforms, can be used to promote the premise that the criminal justice system is legitimate, which in turn, will encourage more people in the community to respect the system and engage in it.

It is striking that the rules do not address community trust as an element of reliability in criminal cases. As has been shown in other arenas, however, trust and reliability go hand in hand. For example, journalists must rely on sources to provide them with leads on stories. Often these sources are persons with whom they have developed close relationships. The sources feel confident in revealing information because of the trust that has been established and because of the assurance that they will be protected from having their identities revealed. Though there are, of course, distinctions, the relationships with law enforcement and the community need similar levels of trust. There needs to be not only a willingness to share information because of a sense of friendship or loyalty, but there must also be an assurance of protection — perhaps not from having one's identity revealed, but from repercussions from cooperating with law enforcement.

The doctor-patient relationship is another example to consider. A doctor must achieve a certain level of trust from the patient to get him or her to provide the information necessary for the doctor to make a proper diagnosis. In fact, our evidentiary rules have recognized the particular indicia of reliability that attach to this relationship by excepting from the hearsay ban statements made by a patient to a doctor for treatment.<sup>15</sup> At the same time, our privilege rules protect and promote the confidentiality needed within the doctor-patient relationship such that, generally, if a patient does not wish for confidential statements that she made to a doctor to be disclosed, they will not be.

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<sup>13</sup> See generally Montré D. Carodine, "The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521 (2009).

<sup>14</sup> See e.g., Fiona E. Raitt, *Gender Bias in the Hearsay Rule*, in FEMINIST PERSPECTIVES ON EVIDENCE 59, 59-77 (M. Childs & L. Ellison eds., 2000) (critiquing the hearsay rule from a feminist viewpoint).

<sup>15</sup> See FED. R. EVID. 803(4).

Indeed, our privilege rules generally are designed to promote and encourage open communication in various contexts, including the spousal communication privilege, attorney-client communication, priest-penitent privilege, and the psychotherapist-patient relationship.<sup>16</sup> We forgo relevant — and sometimes even crucial — evidence in the name of protecting the relationships and encouraging them to flourish for the good of society.<sup>17</sup> Thus, we utilize the rules of evidence to promote relationships that we value.

Similarly, our rules ought to promote healthy and cooperative relationships with law enforcement, which is vital to the safety and security of all citizens. As a first step, we should always consider the levels of community trust that have been established (or eroded) in weighing the probative value of certain pieces of evidence in criminal cases, such as crucial pieces of evidence collected by the police. My proposal, outlined in Part III, goes further with respect to police testimony, urging a moratorium to be lifted only where there are established levels of community trust in law enforcement.

We should never underestimate the value of the public's trust to the legitimacy and effectiveness of the legal system, particularly with respect to criminal justice. Indeed, "trust is much more effective as a foundation for public compliance with the law than the threat of punishment or reliance upon personal morality. Public distrust not only conflicts with democratic norms, but a public wary of the police is much less likely to be a legally compliant or cooperative one."<sup>18</sup> It is time for the rules of evidence to take community trust in law enforcement seriously. Doing so will lead to a generally more effective and reliable system.

Before we can ever hope to achieve any reasonable level of trust, however, we must first explore fully the degree to which trust in law enforcement has been eroded, particularly in some of this country's most vulnerable, disadvantaged, and disfavored communities. Looking at those perspectives "from the bottom," as Mari Matsuda and others

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<sup>16</sup> Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81, 95 (2011/2012).

<sup>17</sup> See *id.* (noting that with regard to various privileges, the rules of evidence permit: "[T]hree judgments support the existence of the privilege: First, the relationship is one in which open communication is important to society. Second, in the absence of a privilege, such communication will be inhibited. And third, the cost to the legal system of losing access to the privileged information is outweighed by the benefit to society of open communication in the protected relationship.").

<sup>18</sup> Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 183 (2009).

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have urged,<sup>19</sup> is especially important in the criminal justice arena. Indeed, “[l]ooking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”<sup>20</sup>

Additionally, looking to the bottom is a central tenet of the New Legal Realism movement, the methodology I have used in critiquing other rules of evidence<sup>21</sup> and which I use to suggest the reforms I propose in this Essay. The experiences of African Americans, who have experienced the brunt of the cruelty of the mass incarceration movement — spawned by a supposedly “get tough on crime sentiment” — are uniquely useful in shaping a framework for the reform and development of the very rules that govern the manner in which people are convicted and sent to prison. It has been noted that “[b]lack Americans, because of their experiences, are quick to detect racism, to distrust official claims of necessity and to sense a threat to freedom. These intuitions generated from the bottom are useful in making normative choices.”<sup>22</sup>

#### A. *Perceptions of the Judicial System’s Fairness*

Criminologists have urged that the effectiveness of the judicial system is dependent on its perceived legitimacy.<sup>23</sup> The concept of legitimacy includes the idea that “legal authorities are entitled to be obeyed and that [citizens] ought to defer to their judgments.”<sup>24</sup> Studies, in addition to substantial anecdotal evidence, have shown that minorities feel that they are subjected to biased treatment by police and in the court system.<sup>25</sup> Evidence supports this perception of biased

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<sup>19</sup> See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

<sup>20</sup> *Id.* at 324.

<sup>21</sup> *Id.* at 360.

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Jeffrey Fagan, *Legitimacy and Criminal Justice: Introduction*, 6 OHIO ST. J. CRIM. L. 123, 126 (2008) (noting that “lower levels of legitimacy [in the criminal justice system] make social regulation more costly and difficult”); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008) (discussing study showing that legitimacy influences citizens to cooperate with the police, thus enhancing the effectiveness of the criminal justice system).

<sup>24</sup> See TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS*, xiv (2002).

<sup>25</sup> *Id.* at 141-52.

treatment.<sup>26</sup> According to Tyler and Huo’s work, *Trust in the Law*, “[t]hese actual and psychological realities are central to any strategy that seeks to gain consent and cooperation from the members of minority groups, since negative judgments, however accurate or inaccurate, undermine cooperation with legal authorities.”<sup>27</sup> Scholars have suggested that it is in these minority communities that cooperation is most needed because of the high likelihood for minorities to be victims of crimes.<sup>28</sup> I would also suggest that the ramifications of perceived unfairness in the “system” reach beyond boundaries of any particular community, especially today with the heightened awareness of global terrorism and the need of ordinary citizens from all walks of life to aid in the fight against these threats.

#### B. What or Who Is “the Law?”

It would be incredibly simplistic to view the police-community relationship as limited to the police and the community. To the contrary, any bias that is perceived from one legal authority will affect the way one views others. It is important to examine and rehabilitate the police-community relationship, because in vulnerable communities, interactions with the police may be the most prevalent type of interaction with the justice system. In reality, the police represent “the law.”<sup>29</sup> Indeed, “the law” is a common colloquialism for the police. And studies have shown the parallels in perceptions of the police and the law. A National Institute of Justice study, for example, demonstrated that the attitudes of Blacks and Latinos with low socioeconomic statuses toward the legitimacy of legal rules mirrored their views of the police.<sup>30</sup> The same “legal cynicism” that they had with respect to legal norms carried over to their views of the police.<sup>31</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 141.

<sup>28</sup> See Janet Reno, *Civil Rights: A Challenge of Conscience*, 27 CUMB. L. REV. 381, 393-94 (1996-1997); see also Paul Butler, *Paul Butler on Trayvon Martin and Racial Profiling*, THE DAILY BEAST (Mar. 26, 2012), 4:45 AM, <http://www.thedailybeast.com/articles/2012/03/26/paul-butler-on-trayvon-martin-and-racial-profiling.html> (discussing the Trayvon Martin case and racial profiling and noting that “[y]oung black men are frequent victims of crime, and the most likely to be charged with crimes”).

<sup>29</sup> *Definition of “The Law”*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=the+law> (last visited Mar. 3, 2013) (defining “the law” as “law enforcement agents, most often the police”).

<sup>30</sup> ROBERT J. SAMPSON & DAWN JEGGLUM BARTUSCH, ATTITUDES TOWARD CRIME, POLICE AND THE LAW: INDIVIDUAL AND NEIGHBORHOOD DIFFERENCES, NAT. INST. OF JUSTICE, 2 (June 1999), available at <http://www.nij.gov/pdffiles1/fs00d240.pdf>.

<sup>31</sup> *Id.*

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Persons who perceive “the law” to be biased and unfair will likely transfer those same perceptions to other actors in the system, like prosecutors and public defenders, judges, court personnel, and even jurors. So when I speak of the police in this Essay, I am speaking of the ambassadors of the judicial system, the very face of justice.

C. *Distrust of Law Enforcement in Minority Communities*

African American communities have seen police presence more as about “occupying,” or encroaching their territory as a military force would, rather than defending and protecting. That historical perception rings true today. The distrust is also even widespread and pervasive amongst Blacks who have never been at odds personally with the criminal justice system. It cuts across socio-economic standing, education, and status in the Black community. As in other areas of injustice, be it social or economic, “[t]here is something about color that doesn’t wash off as easily as class.”<sup>32</sup>

Furthermore, there is an almost complete unity of thought in the Black community when it comes to the criminal justice system. It is seen as an oppressive and ominous dark storm cloud that hangs over all, threatening to unleash its furor at any time, with or without warning, and without much regard to “class.” Black Americans generally dread the sight of the police, who are the on-the-ground agents for the system. Painful experience after painful experience with law enforcement has systematically, and some might argue irreparably, eroded any element of trust in these officials. The debate in New York over the controversial “stop and frisk” policy is a perfect example of this problem. According to the New York Times, which cites the New York Civil Liberties Union, in 2011, “police officers in New York City stopped and frisked people 685,724 times. Eighty-seven percent of those searches involved blacks or Latinos, many of them young men. . . .”<sup>33</sup>

In another recent piece in the New York Times, a young Black man wrote about the numerous times that he had been “stopped and frisked” by the New York police department. In his opinion piece, entitled “Why is the N.Y.P.D. After Me?,” Nicholas Peart chillingly began:

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<sup>32</sup> Matsuda, *supra* note 19, at 361.

<sup>33</sup> Julie Dressner & Edwin Martinez, Op-Ed., *The Scars of Stop-and-Frisk*, N.Y. TIMES, June 12, 2012, <http://www.nytimes.com/2012/06/12/opinion/the-scars-of-stop-and-frisk.html>.

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WHEN I was 14, my mother told me not to panic if a police officer stopped me. And she cautioned me to carry ID and never run away from the police or I could be shot. In the nine years since my mother gave me this advice, I have had numerous occasions to consider her wisdom.<sup>34</sup>

Mr. Peart then began methodically to describe various incidents in which he was going about his daily business, which did not involve criminal activity, and was jolted out of his routine by law enforcement who harassed him with baseless searches. Mr. Peart was handcuffed and detained in a police car during one of these incidents, which come across as incredible affronts to his dignity. He writes, in a very matter-of-fact manner, that he has now "incorporated" into his "daily life" the possibility that he will be harassed by the police:

These experiences changed the way I felt about the police. After the third incident I worried when police cars drove by; I was afraid I would be stopped and searched or that something worse would happen. I dress better if I go downtown. I don't hang out with friends outside my neighborhood in Harlem as much as I used to. Essentially, I incorporated into my daily life the sense that I might find myself up against a wall or on the ground with an officer's gun at my head. For a black man in his 20s like me, it's just a fact of life in New York.<sup>35</sup>

Then, toward the end of the piece, he offered another chilling statement:

We need change. When I was young I thought cops were cool. They had a respectable and honorable job to keep people safe and fight crime. Now, I think their tactics are unfair and they abuse their authority. The police should consider the consequences of a generation of young people who want nothing to do with them — distrust, alienation and more crime.<sup>36</sup>

Mr. Peart is correct that the police should consider the effect that they are having on this generation of youth, and so should the broader society. Their actions with respect to these groups are

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<sup>34</sup> Nicholas K. Peart, Op-Ed., *Why is the N.Y.P.D. After Me?*, N.Y. TIMES, Dec. 17, 2011, at SR6, available at [http://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html?\\_r=0](http://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html?_r=0).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

counterproductive to the goals of keeping communities — and I mean all communities — safe.

As one commentator remarked, the “mistrust is deeply, historically entrenched . . . . The utter lack of faith [of Blacks] in the criminal justice system is corrosive . . . .”<sup>37</sup> The OJ Simpson case, among several other modern controversies, revealed the deep mistrust that Black Americans have of the criminal justice system and of the police in particular.<sup>38</sup>

Blacks who do not trust the criminal justice system are not without good reason. In addition to the police occupation of minority communities, there is the broader problem of racial profiling, which minorities across the country have complained about for years, with a heightening sense of urgency of late given some high profile incidents.<sup>39</sup> The Black-as-criminal stereotype has led many in law enforcement to use race as an efficient means by which to do their jobs. In the post-9/11 world, many Muslim communities have decried the unfair practices of racial profiling against them as well.<sup>40</sup> But, as commentators have noted, “racial profiling is ineffective as a law-enforcement tool,”<sup>41</sup> and it is also inefficient. Minorities who do not

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<sup>37</sup> Editorial, *When Race Is at Issue*, NEWSDAY, Jan. 3, 2007, at A30, available at 2007 WLNR 77184.

<sup>38</sup> See Capers, *supra* note 2, at 843, 870.

<sup>39</sup> See Butler, *supra* note 28; Richard Fausset & P.J. Huffstutter, *Black Males' Fear of Racial Profiling Very Real, Regardless of Class*, L.A. TIMES, July 25, 2009, <http://articles.latimes.com/2009/jul/25/nation/na-racial-profiling25>.

<sup>40</sup> See AM.-ARAB ANTI-DISCRIMINATION COMM. RESEARCH INST., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: 2003-2007, 88 (Hussein Ibish ed., 2008), available at <http://www.ibishblog.com/sites/default/files/hcr07.pdf> (noting that after 9/11, “Arab-American individuals and organizations would, for the foreseeable future, be placed under a microscope of intense scrutiny for disloyalty and covert sympathy with those who attacked the United States”); see also Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 727, 730 (2003) (noting that “[a]fter September 11, the situation affecting Arabs and Muslims dramatically worsened, and there have been profound effects on their civil rights. Before that fateful date, 80% of Americans considered racial profiling wrong. After September 11, the polls reversed and 60% said profiling was fine, especially if directed against Arabs and Muslims”).

<sup>41</sup> See Kevin R. Johnson, *Taking the “Garbage” Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the “War on Drugs”*, 2007 WIS. L. REV. 283, 310 (2007); see also Russell L. Jones, *A More Perfect Nation: Ending Racial Profiling*, 41 VAL. U. L. REV. 621, 628-29 (2006) (“If the criminal justice system is to meet its goal of crime detection and prevention, it must have the trust of the communities it serves. When law enforcement practices used to stop and investigate minorities are perceived as biased and unfair, minority citizens will have less confidence in the criminal justice system, and thus, will report crimes infrequently, will not be witnesses at trials, or will



trust the police are not as likely to report crimes or voluntarily assist police in their investigations and other law enforcement tasks.<sup>42</sup> Despite this reality, there continues to be ample evidence that police engage in such conduct.<sup>43</sup>

So the justice system in this country has a serious problem in terms of how citizens view its fairness, especially minority citizens. Personal experiences and the experiences of one's community tend to shape views of the justice system. Data gathered in surveys reveal that across racial lines, the system is seen as partial to certain groups. Indeed, one survey revealed that there is "an overwhelming belief that equal justice under the law is more equal to some than to others. And this is important—it's not just specific groups who see inequality. It's the public at large."<sup>44</sup> The study showed that "White and Hispanic-Americans tend to agree that [Blacks] are treated worse than other groups by the legal system."<sup>45</sup>

But research has also revealed that Blacks and Hispanics have similar negative attitudes toward the police.<sup>46</sup> Hispanics in Texas, for example, evaluate the police more negatively than the general public, are more apprehensive or fearful about crime, feel that they are not adequately protected by the police, and think that the police view them negatively and discriminate against them.<sup>47</sup> Indeed, the Justice

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not serve as jurors . . . . A police policy that continuously targets a race or ethnic group for criminal activity indicates to members of the group that they are pariah. They begin to feel that the protections that are given to other races or ethnic groups will not be extended to them. Such a decline in trust leads to a lack of cooperation between police and the targeted groups, which ultimately results in the reduction of criminal deterrence.").

<sup>42</sup> See Butler, *supra* note 28 ("The tragedy of racial profiling is not only that it's ineffective; it makes many of its victims hate the profilers — whether they are police, security guards, or neighborhood-watch people. And that causes a breakdown in trust that makes public safety even more problematic.").

<sup>43</sup> See Allison Hendrix, *Reinforcing Batson Defining the Peculiar: Racial Profiling as an Impermissible Ground for Peremptory Challenge*, 44 CRIM. L. BULL. 691 (2008).

<sup>44</sup> NAT'L CTR. FOR STATE COURTS., HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 3 (1999), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctcomm/id/17>.

<sup>45</sup> *Id.*

<sup>46</sup> See Sutham Cheurprakobkit, *Police-Citizen Contact and Police Performance: Attitudinal Differences Between Hispanics and Non-Hispanics*, 28 J. CRIM. JUST., 325, 327 (2000); see also YUEN J. HUO & TOM R. TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY 39 (2000) ("African Americans and Latinos are less positive about their experiences with legal authorities [including the police] not so much because the outcomes they receive are unfavorable, but because the procedures authorities use do not meet their expectations of fairness.").

<sup>47</sup> See Cheurprakobkit, *supra* note 46, at 327.

Department has found that Hispanics do experience higher rates of violent and property crimes than non-Hispanics.<sup>48</sup> Additionally, research reveals that Hispanics experience “disproportionate overpolicing, disproportionate use of force, harassment, and discourteous treatment.”<sup>49</sup> Hispanics are also “twice as likely to be shot and killed by the police as Whites but only half as likely as Blacks.”<sup>50</sup>

The justice system, and law enforcement in particular, should be very concerned about the public perception that the law does not afford equal treatment to minority communities. Citizens are reluctant to engage in a system that they perceive as unfair. In many instances, this reluctance will result in the loss of evidence or a reduced reliability in evidence. In fact, most participants at a national state judiciary conference “believed the greatest challenge facing the state courts is strengthening the relationship with the public.”<sup>51</sup>

Citizens’ opinions of the justice system matter. It is not just a luxury to have the confidence of citizens; it is a necessity for a properly functioning system of justice.<sup>52</sup> When the system treats certain groups, or is perceived to treat certain groups unequally, an unreliable system necessarily follows.<sup>53</sup> Blacks and other minorities’ distrust of the system “hinders law enforcement because minorities are less likely to report crime or to participate in prosecutions.”<sup>54</sup> Moreover, many minorities simply refuse to serve jury duty, as has been observed when “potential jurors often refuse to serve in crack cases, knowing that the penalties hurt [Blacks] more.”<sup>55</sup> Professor Paul Butler has even urged those Blacks who will participate as jurors to consider engaging in jury nullification and acquitting Black defendants, even though they may be guilty, because of the racial bias in the system.<sup>56</sup> In short, it is

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (citations omitted).

<sup>50</sup> *Id.*

<sup>51</sup> NAT’L CTR. FOR STATE COURTS, *supra* note 44, at 4.

<sup>52</sup> *See id.* at 7.

<sup>53</sup> *See* Angela J. Davis, *Prosecution and Race, The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 35-37 (1998).

<sup>54</sup> *Id.*; *see also* Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 *WASH. L. REV.* 985, 1011 (2003) (noting that “rampant arrests and convictions within a community are stigmatizing and can undermine the community’s long-term relationship with police”).

<sup>55</sup> Richard B. Schmitt, *Panel May Cut Thousands of Prison Terms*, *L.A. TIMES*, Nov. 12, 2007, at A1.

<sup>56</sup> Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 679 (1995) (arguing that the current treatment of Blacks in

simply impossible for the criminal system to be effective without cooperation from minority communities.<sup>57</sup> As aptly pointed out by the Council on Crime and Justice:

The rebuilding of the trust level is important to the *integrity* of the justice system. Most importantly, it is important to the [Black] community whose own peace and safety is best served by a generally accepted respect for the rule-of-law, not by a disproportionate presence of the police and the criminal justice system.<sup>58</sup>

Unfortunately, the attitudes of many minorities with respect to the police are so negative because of negative personal encounters with law enforcement.

#### D. Attitudes Toward Law Enforcement Based on Contacts

Contact between citizens and the police, not surprisingly, have lasting effects on citizens' attitudes.<sup>59</sup> “In general, police contacts — including calls for help and automobile accidents — tend to produce positive citizen attitudes toward the police, . . . [a]lthough several researchers [have] found that citizens who had contact with the police retained more negative attitudes toward the police than those who did not.”<sup>60</sup> Interestingly, research with respect to police interaction with the elderly has shown that the elderly who have had direct contact with the police tend to view them less favorably than those who have had “second-hand” experiences with law enforcement.<sup>61</sup> Generally, negative feelings based on contacts may be the result of verbal harassment by the police or other types of verbal abuse, “insensitivity to community needs,” or “involuntary contact” with the police, i.e., arrests.<sup>62</sup>

Positive interactions with the police can offset the sustained negative attitudes resulting from negative interactions.<sup>63</sup> When people

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the criminal system makes it the “moral responsibility of [B]lack jurors to emancipate some guilty [B]lack outlaws”).

<sup>57</sup> Johnson, *supra* note 41, at 310.

<sup>58</sup> COUNCIL ON CRIME AND JUSTICE, AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 10, available at <http://www.racialdisparity.org/files/African%20American%20Males.pdf> (emphasis added).

<sup>59</sup> See Cheurprakobkit, *supra* note 46, at 326.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

feel that the police have treated them fairly, regardless of the resolution of the issue that prompted the interaction, they tend to walk away with more positive feelings about the police: “Particularly when calling for assistance or being given a traffic citation, citizens who felt they were treated fairly by the police were more favorable about their encounters with police than those who felt unfairly treated, *regardless of whether the police solved the problem about which the citizens called or issued a traffic citation.*”<sup>64</sup>

#### E. The “Anti-Snitching” Campaign

Attitudes regarding the police are also shaped by perceptions regarding the tactics that the police use to do their job. Informants, according to one scholar, “have become law enforcement’s investigative tool of choice.”<sup>65</sup> Indeed, so-called “snitches” are “currently part of a thriving market for information.”<sup>66</sup> Critics of the snitching regime paint a rather sinister picture of law enforcement’s “deal with the devil” in an effort to solve and prevent crime. Snitches are almost always themselves involved in crime, and they are often encouraged to continue their criminal activity in order to collect more information or evidence for law enforcement to use against bigger criminals. Police seem resigned to the snitching model of information gathering, deeming it a necessity for the greater goal of obtaining justice and maintaining order. Many police, it has been urged, are actually quite partial to this system and enjoy their dealings with the criminal element of society.<sup>67</sup> They “fall in love” with “their rats.”<sup>68</sup>

But how has the rampant use of snitches affected the relationship with the police and the law abiding citizenry? In communities that already have fragile relationships with the police, the use of snitches has caused an even greater decline in community relations. In fact, there is currently an anti-snitching campaign sweeping the nation in urban communities.

One of the most interesting aspects of the Stop Snitching, or Anti-Snitching, campaign, a movement in urban culture ignited in response to corrupt police practices, is the fact that it has expanded the notion

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<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 110 (2006).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 111.

<sup>68</sup> *See id.*

of what is considered snitching.<sup>69</sup> Police have relied on snitching as a necessary evil for years. They would use one criminal to "snitch" on others, and without the snitch they would supposedly have no case. This "necessary" means of solving crimes has bitten back in a huge way. It has substantially contributed to widespread distrust of the police, and as such, it perhaps can be analogized to the "necessary" use of torture and its undermining of trust in government actors. Now a generation of young people consider simply reporting crimes to the police as "snitching," and the Stop Snitching campaign tells youth, especially minority youth, that they should not talk to the police under any circumstances.<sup>70</sup>

F. *How Attitudes Regarding Snitching Have Already Contributed to the Development of Evidence Law in Criminal Cases*

It is particularly problematic when witnesses fear and/or trust criminals more than they trust the system. Sometimes this very type of fear has kept witnesses from giving trial testimony or caused them to recant or provide testimony that was inconsistent with their earlier positions. Indeed, there are evidentiary rules and doctrines designed to address these very issues. For example, there is the prior testimony exception to the rule against hearsay,<sup>71</sup> which allows for the admission of prior testimony that occurred at a grand jury proceeding (or other formal judicial proceeding) when a witness is said to be "unavailable."<sup>72</sup>

There are also other exceptions, such as the statements against interest exception and the forfeiture by wrongdoing exception, both of which also require that the witness be unavailable. One of the ways that a witness might be deemed "unavailable" is if the person claims lack of memory or simply refuses to testify despite being ordered by the court to do so.<sup>73</sup> This often happens because of external pressure

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<sup>69</sup> Andrew Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1090 (2011) (stating that most commentators agree that "Stop Snitching" spawned in response to corrupt police practices and is not instead a new form of witness intimidation).

<sup>70</sup> See, e.g., Bret Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1306-10 (2011) (describing a *60 Minutes* report titled "Stop Snitching" where a rapper stated that the only reason one might have to speak with the police is to say: "[H]ello. How you feel. Everything all right. Period.").

<sup>71</sup> See FED. R. EVID. 804(b)(1).

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*; see, e.g., *Williamson v. United States*, 512 U.S. 594, 597 (1994) (noting a witness who feared defendant refused to testify "even though prosecution gave him use immunity and the court ordered him to testify and eventually held him in

on the witness from the community as opposed to pressures from the justice system. Thus, in a sense, evidence doctrine has developed in a way that already acknowledges the tension that can arise between competing loyalties of witnesses.

Moreover, on the flip side of this issue, when “real snitches” engage in the system and testify, there is a decreased reliability in the system. In a sense, evidence law has been developing to address this issue. For example, the Supreme Court in *Williamson v. United States* took a very narrow view of the statements against interest exception to the rule against hearsay.<sup>74</sup> The Court reversed the conviction of an alleged drug dealer who had been charged with trafficking nearly \$2 million worth of cocaine.<sup>75</sup> The defendant had been convicted in part on the admission of a hearsay statement by a person who allegedly was involved in the drug deal. That person later refused to testify at trial but stated previously that he was carrying the drugs for the defendant.<sup>76</sup> He gave a long narrative to the police detailing the drug deal.

The Supreme Court refused to find that the entire statement was “against the interests” of the declarant and held that only truly self-inculpatory statements would be admissible.<sup>77</sup> “One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.”<sup>78</sup> The point is that evidence law has already had to adjust for the so-called problem with the reliability issues with “true snitches.” But it is in a way that *excludes* evidence rather than *includes* evidence.

In fact, I have heard some commentators call for even more restrictive rules on the testimony of snitches and argue that courts should interpret the rules of evidence in a manner that would keep out even more of their testimony. But what if we take a different approach to the same issue, one that was inclusive of evidence, *reliable* evidence?

Police should do much more to cultivate reliable sources of information within the community.<sup>79</sup> As Professor Bret Asbury has argued, the anti-snitching movement is better explained as a reflection

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contempt”).

<sup>74</sup> *Williamson*, 512 U.S. at 599.

<sup>75</sup> *Id.* at 596.

<sup>76</sup> *Id.* at 597.

<sup>77</sup> *Id.* at 603-04.

<sup>78</sup> *Id.* at 599-600.

<sup>79</sup> See generally Asbury, *supra* note 70, at 1306-10 (discussing strategies police officers can employ to strengthen bonds with communities traditionally distrustful of law enforcement).

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of a loyalty decision within certain communities, rather than as some sort of moral or ethical failing by those groups.<sup>80</sup> These communities view cooperation with the police as an act of disloyalty to their group, which has been oppressed by the police and the criminal justice system. There needs to be a paradigm shift, wherein the police *become* a part of the community and engender this type of loyalty.

If the police invested as much time as they now spend engaging with the criminal element and “falling in love with their rats” with other segments of the community, I believe that there would be a higher engagement by broader cross-sections of the community, which would result in a more reliable system overall. I also believe that in the same way that evidence law has adjusted (somewhat) to the snitching problem, it could be used as a tool to promote testimony by persons whom I envision as the “anti-snitch” — the people who come forward in investigations and provide police with information, not because they wish to get a “deal” with respect to their own criminal behavior, but because they see themselves as “partners” with the police in a “community policing system.”

## II. COMMUNITY POLICING

### A. *Why Should We Trust You?*

To this point, I have focused on the need for community trust to encourage citizen engagement, which in turn will ensure an effective and reliable criminal justice system. But the importance of community trust goes even deeper than that. Community trust is the means by which the system will establish its own legitimacy, and it is also the system’s (and hence the community’s) reward for system officials acting legitimately. It is the means *and* the end.

The problem with an illegitimate system is that it undermines the community’s ability to discern who is trustworthy and who is not. Citizens find criminals and the police to be indistinguishable in terms of trustworthiness. As we have a human tendency to categorize in a binary fashion — e.g., “good vs. evil” — the current state of affairs makes it quite difficult to determine who society’s criminals truly are. When the choice is made to elevate loyalty to a particular member of the community (who may actually be a “bad guy”) over representatives of the system (who may be the “good guys”), there is a fundamental flaw in the system. For order to reign in our society

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<sup>80</sup> *Id.* at 1310.

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instead of chaos, the legal system must be the ultimate embodiment of community trust.

How did we get to the current state of disorder in our system? I will diverge briefly in the next subpart and consider the history and evolution of policing. I will then discuss one way in which the concept of community policing can have a very real impact on rebuilding community trust.

### B. *The Evolution of Policing*

Commentators have divided the so-called “history of policing” into three major time periods: the political era, the reform era, and the community policing era.<sup>81</sup> The political era lasted from the latter part of the 1840s until the early part of the twentieth century, and it was marked by a heavy influence of local politicians on the work of police:<sup>82</sup>

Officers generally lived in the area in which they patrolled, and directives were handed down from politicians to beat officers. Ties between these politicians and the officers were so close that officers were often viewed as part of the local police machinery. Demand for the services of these officers often came directly from the local politicians or from citizens themselves. Officers provided many services to the community, including helping needy families, providing coal in the winter, playing “Santa Clause” for children, while also fulfilling the regular duties of crime prevention and control. *Success of the department was measured by the satisfaction of citizens within an officer’s beat.*<sup>83</sup>

During a conference that I attended with law enforcement at the Birmingham Civil Rights Institute, discussed more below, one of the community leaders poignantly pointed out to the law enforcement officers present that there was a loss of connection between the police and the community.<sup>84</sup> This community leader lamented that it was no longer the case that most police officers were actually a part of the communities that they served. They did not physically live there and when they were physically there, they were seen as occupiers.

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<sup>81</sup> Jacqueline Pope, Tena Jones & Shannon Cook, *Citizens Police Academies: Beliefs and Perceptions Regarding the Program*, 3 APPLIED PSYCH. CRIM. JUST., 43, 43 (2007).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (emphasis added).

<sup>84</sup> See Part III.



The reform era of policing "gave rise to what is referred to now as traditional policing."<sup>85</sup> The focus was "strict adherence to law enforcement and little else."<sup>86</sup> Any type of community outreach, which was prevalent during the political era was seen as detracting from the "real job" of policing.<sup>87</sup> The police went from being viewed as "participative members of the community in which they lived" to "distant" "enforcers."<sup>88</sup> Research has demonstrated that although the goal of the reform era was to decrease crime, this decrease did not necessarily happen.<sup>89</sup> This research showed that the "traditional methods" of policing promoted during the reform era were simply not as effective as their proponents believed they were.<sup>90</sup> As some scholars have noted:

[T]he answer, it seemed, lay not in more officers on the street, but in a different strategy of combining officers and community efforts. Thus, a major occupational shift occurred in the law enforcement field during the 1980s with an increased push to improve police-community relations. Incorporating citizens' concerns into the policing philosophy marked a change from the traditional methods of planning based predominantly on internal police data. *Likewise, increased contact between citizens and police officers should, in turn, increase citizens' awareness of the efforts officers were making to control crime.*<sup>91</sup>

The more frequent higher quality the contact between the police and the community, the greater the satisfaction of community members with the work of law enforcement.<sup>92</sup> When police officers treat citizens "as equals," research has shown that citizens' attitudes toward the police have substantially improved.<sup>93</sup> While "citizen-initiated contact" with the police leads to more positive feelings toward the police, police should not necessarily initiate contact less with citizens.<sup>94</sup> To the contrary, to combat the negative perceptions of them, police

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<sup>85</sup> Pope, Jones, & Cook, *supra* note 81 at 43.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 43-44.

<sup>89</sup> *Id.* at 44.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (emphasis added).

<sup>92</sup> See Cheurprakobkit, *supra* note 46, at 326.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 333.

should seek to initiate more positive experiences with the community.<sup>95</sup>

### C. *The Community Policing Concept*

The concept of “community policing” has become widespread, though in some respects it is a vague concept.<sup>96</sup> That being said, a central tenet of the movement is that “private citizens ought to partner with law-enforcement officers to produce higher levels of safety in communities.”<sup>97</sup> Some researchers have remarked that “[a]t the heart of the community policing philosophy is the belief that police efficacy is limited by the public; in the absence of a populace that is supportive and understanding, the police cannot achieve their goals and objectives.”<sup>98</sup> In short, the police cannot do their job without citizens.

Moreover, partnership between communities and the police who serve them should prompt communities to demand more accountability from law enforcement.<sup>99</sup> This in turn is likely to decrease violations of the constitutional rights of community members while also increasing the effectiveness of law enforcement in addressing issues and matters of concern to the community.<sup>100</sup>

Sociological research “affirms that crime is a community problem that can usefully be addressed from a community-based perspective.”<sup>101</sup> In other words, crime is an issue that negatively impacts the community, and it makes sense that the community be involved in addressing it. There are various means by which law enforcement has attempted to collaborate with communities, including crime prevention programs in schools and at social organizations and even community/police prayer vigils.<sup>102</sup>

Indeed, the embracing of community policing principles has prompted many law enforcement organizations across the country to develop various programs such as “the establishment of neighborhood substations, foot and bike patrol, drug awareness classes, and citizens

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<sup>95</sup> See *id.* at 333-34.

<sup>96</sup> See Tracy L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1593 (2002).

<sup>97</sup> See *id.* at 1629; see also Joseph A. Schafer & Elizabeth M. Bonello, *The Citizen Police Academy: Measuring Outcomes*, 4 POLICE Q. 434 (2001).

<sup>98</sup> Schafer & Bonello, *supra* note 97, at 434.

<sup>99</sup> Meares, *supra* note 96, at 1593.

<sup>100</sup> *Id.* at 1629-30.

<sup>101</sup> *Id.* at 1611.

<sup>102</sup> *Id.*

police academies."<sup>103</sup> My focus here will be on community forums and citizens police academies and the role that they can play in improving evidentiary reliability.

1. "Bridging the Gap" Discussions

Studies have shown that increased positive interactions (outside the typical law enforcement encounters) between the police and the community promote better and more positive police-community relations.<sup>104</sup> One well-known example of this fact is the Westside Chicago Prayer vigils in which police and community members participated.<sup>105</sup> Many police officers and community members felt that relations between law enforcement and the community were strengthened as a result of those vigils.<sup>106</sup>

Not long ago, I attended a conference to promote open dialogue between the law enforcement and the community, entitled "Bridging the Gap: Honoring the Past by Embracing the Future."<sup>107</sup> The conference's purpose was to "open the lines of communication," and it addressed issues "relating to law enforcement agencies and the communities that they serve."<sup>108</sup>

The break out sessions that I observed were fascinating. I cannot recall ever being in the presence of so many law enforcement leaders: FBI agents, chiefs of police from surrounding towns and cities, police officers, and sheriffs. There were also civil rights and community activists, several of whom had marched the streets of Alabama during the civil rights movement. Indeed, the conference was located right across the street from the famed Sixteenth Street Baptist Church that became a symbol in the movement for racial justice.

And then there were the young people from the Birmingham area, many of whom were African American students in junior high or high school. To see these different groups from various perspectives and backgrounds was truly remarkable, and frankly, tense at times. Statistics alone would dictate that many of the youth at the conference or someone that they know has had or will have unpleasant

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<sup>103</sup> Vic Bumphus, Larry K. Gaines & Curt Blakely, *Citizens Police Academies: Observing Goals, Objectives, and Recent Trends*, 24 AM. J. CRIM. JUST. 67, 67 (1999).

<sup>104</sup> See Meares, *supra* note 96, at 1620.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See Letter from Lawrence J. Pijaux, Jr., President and CEO, Birmingham Civil Rights Inst., and Charles E. Regan, Acting Special Agent in Charge, Fed. Bureau of Investigation, to author (Apr. 30, 2009) (on file with author).

<sup>108</sup> *Id.*

encounters with law enforcement.<sup>109</sup> But one needn't rely on statistics alone; many of the young people told of their personal stories and explained why they do not trust law enforcement. It is important to note that they only began to share their views of law enforcement after very talented group facilitators successfully "broke the ice." One can only imagine how intimidated these children were in the face of these high ranking officers. Once the children opened up, it was clear that these young people were incredibly distrusting and suspicious of the police. They all had different reasons — some from personal encounters where they felt that they had been racially profiled, others from stories of friends or relatives who felt that they had been racially profiled. For some others, it was the music that they listen to, the television shows that they watch.

Law enforcement engaged these children in a day-long dialogue, which was productive and eye-opening. It was during these discussions that I began to understand how deeply engrained the anti-snitching culture is in some communities. These children viewed reporting a crime as snitching even when they were the victims. The police, at times, seemed very frustrated with the state of affairs and wondered why they did not enjoy the same level of respect and admiration in the community as fireman or other rescue-type professionals. They understood the respect that they needed to earn the children's trust and the degree to which it was sorely lacking. It will, of course, take more than a day-long effort to combat anti-snitching culture. But it was a start.

## 2. The Citizens Academy Model

Very basically, citizens police academies are programs designed to familiarize ordinary citizens with the work of law enforcement.<sup>110</sup> "The general consensus regarding the primary purpose [of citizens police academies] is to enhance the public image [of law enforcement.]"<sup>111</sup> Citizens academies have been around since at least 1977 and have

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<sup>109</sup> See, e.g., Carodine, *supra* note 13, at 534-47 (discussing racial profiling statistics and the high likelihood of Black youth to be targeted by police, arrested, and charged with crimes).

<sup>110</sup> Molly R. Murphy, *Northern Ireland Police Reforms and the Intimidation of Defense Lawyers*, 68 *FORDHAM L. REV.* 1877, 1921 (2000) (noting that citizens academies "provide public courses to demonstrate police procedures, explain the legal context in which police operate and the constraints they operate under, and . . . show how a citizen can be involved in policing").

<sup>111</sup> Bumphus, Gaines & Blakely, *supra* note 103, at 69.

gained in popularity nationwide.<sup>112</sup> The concept has its origins in Britain.<sup>113</sup> The Devon and Cornwall Constabulary, Middlemoor, Exeter started "a police night school for citizens" that year.<sup>114</sup> The school's purpose was to instruct citizens on the goals and procedures of the police.<sup>115</sup> Police "volunteers" taught approximately seventy citizens about police work for ten consecutive weeks.<sup>116</sup> Other constabularies in Britain soon followed, hosting their own "night schools" for citizens.<sup>117</sup>

The first such program in the United States took place in Orlando, Florida in 1985.<sup>118</sup> The Orlando police used the British night schools as a model but made adjustments to fit American policing practices.<sup>119</sup> The Community Relations Unit of the Orlando Police Department initiated the first program and invited the participation of "city commissioners, Neighborhood Watch leaders, business owners, and African American ministers."<sup>120</sup> The major topics in the "curriculum" included Laws of Arrest; Search and Seizure; Internal Affairs; Patrol Operations; Special Operations; Violent Crime Section; Property Section and Special Investigations; Undercover Narcotic Operations; Vice Crimes; and Special Problems in Law Enforcement — Use of Force.<sup>121</sup> At the end of the program, the citizen students "graduated" and received certificates.<sup>122</sup>

The Orlando citizens academy program sparked a nationwide trend. Indeed, the majority of municipal police departments that have a citizens academy program have adopted the Orlando Police Department's model.<sup>123</sup> Research demonstrates that "[p]olice

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<sup>112</sup> *Id.* at 68-69; see also Michael J. Palmiotto & N. Prabha Unnithan, *The Impact of Citizen Police Academies on Participants, An Exploratory Study*, 30 J. CRIM. JUST. 101, 101 (2002).

<sup>113</sup> Palmiotto & Unnithan, *supra* note 112, at 101; see also Schafer & Bonello, *supra* note 97, at 435; *Aiken County Sheriff's Office, ACSO HISTORY*, <http://www.aikencountysheriff.org/index.php?pagenum=28> (last visited Mar. 1, 2013); A.C. Roper, *Community Police Academy: Serving with Ethics and Effort*, BIRMINGHAM POLICE DEP., <http://www.birminghamal.gov/police/CPA.html> (last visited Mar. 1, 2013) [hereinafter *Birmingham Police*].

<sup>114</sup> Palmiotto & Unnithan, *supra* note 112, at 101.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 101-02.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*; see, e.g., *Birmingham Police*, *supra* note 113 (noting that: "The first law

administrators who have implemented a [citizens police academy] consider the academy a positive connection between the police and their community.”<sup>124</sup> The ultimate goal of these programs is simply to decrease crime.

For a number of police departments, the citizens’ academies provide an opportunity for local citizens to get to know police officers in a positive environment.<sup>125</sup> Many of these programs have gained popularity because of their benefits, which include a heightened awareness of the daily workings of local police officers as well as positive engagement with the police.<sup>126</sup> The more interaction that occurs in such an environment between community members and the police, the more citizens will trust (as opposed to be suspicious of) the police.

Unfortunately, many citizens are unaware of such programs. A 2005 empirical study showed that 71% of respondents to a survey were not aware that these programs existed in their communities.<sup>127</sup> Only 2% of respondents had actually participated in such a program, and they generally agreed that the academies were positive programs that encouraged better relationships between community members and the police.<sup>128</sup>

Indeed, empirical evidence has shown that “academies are effective in increasing citizens’ knowledge of the department and positively influencing their perceptions of those in law enforcement.”<sup>129</sup> After having participated in such programs, graduates “reported greater understanding of how their local police department functions and

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enforcement agency in the United States to adopt the program was the Orlando (Florida) Police Department. In 1985, Orlando began what would become a national model. Since then, many major cities in the United States have established them. . . . The Citizen’s Police Academy is part of an ongoing effort to promote a cohesive partnership between the Birmingham Police Department and the community it serves”); *Elk Grove Police Citizens’ Academy*, ELK GROVE POLICE DEPART., <http://www.elkgrovepd.org/information/citizens-academy.asp> (last visited Mar. 3, 2013) (“The Citizens’ Academy is a sixteen week program designed to inform and teach interested citizens the various aspects of municipal policing.”); *Police Citizen Academy*, CITY OF LITTLETON, <http://www.littletongov.org/index.aspx?page=468>, (last visited Mar. 3, 2013) (“The Littleton Police Citizen’s Academy is a series of classes designed to give community members a peek into the inner workings of the Littleton Police Department. A diverse selection of topics is covered in an effort to give attendees an idea of what, why, and how the police operate.”).

<sup>124</sup> Palmiotto & Unninthan, *supra* note 112, at 102.

<sup>125</sup> Pope, Jones & Cook, *supra* note 81, at 46.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 46-47.

increased familiarity with the various programs available.”<sup>130</sup> Furthermore, and perhaps more importantly, graduates felt that their police department “knew which law enforcement issues were important in their community and that they seemed genuinely concerned about helping to resolve these issues.”<sup>131</sup> According to researchers, “[if] the purpose of community policing is to strengthen the relationships between the police and the public, it appears that the academy is capable of achieving this goal.”<sup>132</sup>

Legal scholarship has largely overlooked the potential that such programs have in making real changes in the reliability of our criminal process. Indeed, the existence and prevalence of citizens’ academies across the country has gone largely unnoticed in legal scholarship. There is some social science research on these programs, in which scholars are starting to critique and question their efficacy. But there also needs to be a discussion of how such programs can shape our legal analysis of the criminal process. Law enforcement agencies developed the programs because they recognized that “[t]he degree to which police cultivate support and confidence from the community relates directly to the amount of cooperation they can expect to receive in their law enforcement mandate.”<sup>133</sup>

As I have already noted, far too often, particularly in legal scholarship, commentators fail to explore critically the crucial connection between the effectiveness of our criminal justice system and law enforcement’s relationship with the community. The focus is quite often on exposing — and rightly so — grave violations of individual rights by police, who often are able to take advantage of vulnerabilities, weaknesses, and gaps in our laws as interpreted by a seemingly oblivious (at best) judiciary. But “[t]he primary purpose of community policing programs is crime control that relies upon a more participatory style of management and emphasizes cooperation, communication, and accountability.”<sup>134</sup> And “[t]he general consensus within the literature is that the [citizens police academy] is designed to solicit more citizen cooperation which will help make the community a safer place.”<sup>135</sup>

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<sup>130</sup> *Id.* at 50.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Bumphus, Gaines & Blakely, *supra* note 103, at 69.

<sup>134</sup> *Id.* at 70.

<sup>135</sup> *Id.*

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As discussed above, citizens police academies take place over the course of several weeks.<sup>136</sup> As a result of my involvement in the Birmingham Civil Rights Institute conference that I discussed previously, I was invited by the Birmingham Division of the FBI to participate in their nine-week citizens academy. I will briefly highlight my experience and leave a fuller discussion of my observations for another day. It is enough to say for purposes of this Essay that I walked away from the experience convinced that there need to be more programs such as the one in which I participated with various law enforcement organizations, not just the FBI, and they should target persons from a wide variety of backgrounds.

The purpose of the FBI Citizens' Academy, as stated by the FBI, is to "increase public awareness about the FBI, its mission, its activities, and its people; to provide an avenue for the FBI to hear and respond to community issues and concerns; and to strengthen relationships and improve understanding between the FBI and the communities it serves."<sup>137</sup> Students were also told during our introductory class that the FBI wanted to dispel myths about what the agency really is, as opposed to how it is portrayed in popular culture and the media.

The academy curriculum included discussions led by leading FBI agents in the areas of terrorism, civil rights, evidence response, firearms safety and deadly force policy, white collar crime, violent crime, and cyber crime, among other topics. It was a truly fascinating opportunity to gain insight into the perspective of this storied institution. I would estimate that I spent nearly forty hours interacting with FBI agents and my fellow classmates. I was struck by how much effort the agents put into giving us an inside look at the FBI. The agents presented their material, but they also encouraged questions, even questions that revealed skepticism or that directly challenged them.

I came to realize that the FBI understands, particularly in the post-9/11 era, that having the trust and cooperation of the public is vital to its success, especially in the fight against terrorism. Indeed, while citizens' academies were operating pre-9/11, they became far more common in the post-9/11 world. Without the public's cooperation, law enforcement simply cannot be effective. To achieve that cooperation, law enforcement must have our trust. And to establish such trust, there must be an ongoing dialogue with all segments of the

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<sup>136</sup> W.T. Jordan, *Citizen Police Academies, Community Policing or Community Politics?*, 25 AM. J. CRIM. JUST. 93, 93-94 (2000).

<sup>137</sup> *Birmingham Division: In Your Community*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/birmingham/news-and-outreach/in-your-community/outreach> (last visited Mar. 3, 2013).



community, even those who are the most skeptical. With respect to many communities, this ongoing dialogue requires that law enforcement establish a "friendly presence" in the community, not just an enforcement presence. They will have to make the first move, and in all likelihood, the second and third ones too. It will take much effort to chip away at the distrust that has been built up over the years.<sup>138</sup>

Indeed, I applaud those in law enforcement who are attempting to open the lines of communication and build trust, and I would suggest that it has to be an everyday effort. These citizens' academy programs are certainly not without their critics. That there are skeptics and cynics should come as no surprise. Indeed, people should remain critical in order to improve the reliability of our system. One commentator has questioned, for example, whether citizens police academies are nothing more than public relations tools that the police are utilizing under the guise of a community policing program.<sup>139</sup> A broader critique of community policing has been that it has not yet actually led to the desired "partnership" between the community and the police.<sup>140</sup>

Even if this critique is accurate in a number of communities across our country, it does not mean that the effort needs to be abandoned with respect to community policing generally or with respect to citizens' academies. In fact, these programs would benefit most from including their harshest critics. In other words, skeptics should be some of the prime targets of citizen police academies. It is not enough just to criticize. There must be engagement with representatives of all members of our communities to achieve a more reliable justice system.

Another concern that researchers have noted regarding these programs is that they "[do] not appear to be capturing a diverse population of participants."<sup>141</sup> It seems that many of the persons who participate in these programs are made aware of them through family and friends or others whom they know who have participated in prior academies.<sup>142</sup> This "word-of-mouth publicity often limits the diversity of participants enrolled in such programs."<sup>143</sup>

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<sup>138</sup> I am not so naïve to think that all law enforcement are interested in having this type of relationship with the community, but I do believe that there are many who are.

<sup>139</sup> Jordan, *supra* note 136, at 93.

<sup>140</sup> *Id.* at 94.

<sup>141</sup> *Id.* at 50.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

Of course, there are ways to address these issues, so they are certainly not fatal to the concept of citizens' police academies. Departments could increase the diversity of citizen participation in such programs by having various academies throughout different areas of the community.<sup>144</sup> This effort would help to attract the participation of community members who are unable to travel to attend classes.<sup>145</sup> Moreover, the police would be able to attract persons or groups who have traditionally been more hostile to or distrusting of the police.<sup>146</sup> This inclusion of various locations would also be particularly helpful in addressing community relations issues in "troubled" segments of the community.<sup>147</sup> As one researcher has argued:

A broad base of citizen participation is the foundation of community policing . . . . In order to optimize input from the neighborhoods most affected by crime and police activity, mobilization efforts need to prioritize selection of people from these areas. Most often these persons are minority persons.<sup>148</sup>

### III. INCORPORATING A COMMUNITY POLICING MODEL IN THE RULES OF TRIAL: A MORATORIUM ON POLICE TESTIMONY

Community policing style programs like the ones highlighted above are vital to reestablishing and sustaining positive police-community relationships. The key goal of these programs is building mutual trust. The positive relationships that can result will yield great dividends because members of the community will become more cooperative with the police in their investigations, thus improving the safety of our society.

But there have to be incentives in place within our laws and policies to ensure that law enforcement departments do not just have these programs "on the books" or just utilize them occasionally as public relations tools. Having participated, as a citizen, in some of these programs, I have asked myself, how the law can facilitate the goals of such efforts? As a law professor, I have asked myself, how can the law encourage the type of dialogue and relationships necessary to establish trust between the community and law enforcement? To take it a step further, how can the laws governing criminal trials incorporate a community policing model?

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<sup>144</sup> *See id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 51.

<sup>147</sup> *Id.*

<sup>148</sup> Jordan, *supra* note 136, at 99.

I believe that the evidence rules can play a crucial role in facilitating the rebuilding of community trust in the criminal process. Virtually all of the rules that are applicable in criminal cases have a part to play, but I want to focus my attention in particular on the evidentiary status of witness testimony, specifically police officer witnesses.

Why focus on police testimony? One of the biggest complaints — if not the biggest complaint — about the police is that they lie on a regular basis.<sup>149</sup> Not surprisingly, then, there is a connection between the perception (or reality, in some cases) of the police as habitual liars and the erosion of citizens’ trust in them. In fact, one of the most skeptical questions that I remember hearing from a citizens’ academy classmate was with respect to the practice of police lying and whether there was in fact a “blue wall” of silence. As one commentator notes, the police were once perched on a “pedestal” in our society; but they have now gone from “[e]xalted to suspicious.”<sup>150</sup>

[A]ttitudes have changed, and unconditional deference no longer exists . . . . What the police say happened is no longer accepted without question. This development has opened the door to lawsuits that would not have been brought in the past. And all of that assumes “mainstream” opinions. In some minority communities, the rebuttable (or even irrebuttable) presumption is that police officers are always lying.<sup>151</sup>

The law must address the issues that go to the heart of the breakdown in the relationship between the police and the communities that they serve. Why is it that so many citizens, especially in minority communities, do not trust the word of the police? As discussed above, the distrust of the police has deep historical roots in many communities. It is not just that these communities see the police and the system as oppressive, but they see them as liars, wholly lacking in credibility. For example, when pulling citizens over (often disproportionately minorities and the poor) a common complaint is that the police simply made up a reason (pretext) for the stop.<sup>152</sup> Perhaps even more troubling is the fact that

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<sup>149</sup> See Jon Loevy, *Truth or Consequences: Police “Testilying”*, 36 No. 3 LITIG. 13, 14 (2010) (discussing citizen complaints regarding police deception); Mark Bennett, *Everyday Incidents*, DEFENDING PEOPLE (Aug. 14, 2008, 8:49 PM), <http://blog.bennettandbennett.com/2008/08/everyday-incidents.html> (“Not all cops lie. But if perjury is committed at the criminal courthouse, it’s likely committed by someone with a badge and a gun — that is, a law enforcement officer.”).

<sup>150</sup> See Loevy, *supra* note 149, at 13.

<sup>151</sup> See *id.*

<sup>152</sup> See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the*

our Supreme Court has said that these types of pretextual stops are perfectly legitimate and constitutional.<sup>153</sup> The Court has legitimized not only racial profiling but also blatant police fabrication as a routine method of law enforcement. In short, the system has become a lie.

The historical distrust of the police in minority communities persists today because there is an inherent tension between the policing on the street in an effective manner and serving an adversarial role as a witness against criminal defendants at trial. In some countries where the systems are inquisitorial, such as Germany and France, police act more as neutral investigators instead of adversaries.<sup>154</sup> They report inculpatory as well as exculpatory facts, and judges often supervise them.<sup>155</sup> In the American adversarial system, the police often omit exculpatory facts, as nothing in our system requires them to report facts favorable to defendants.<sup>156</sup> And, worse, police lie to get to the “truth.” The idea is that the “ends justify the means.”<sup>157</sup> In fact, it has been argued that within our system, with its due process and fairness norms, it is inevitable that the police will lie. Procedural mandates, such as the Fourth Amendment, are seen as obstacles to justice that are dealt with, out of necessity, through deception.<sup>158</sup>

But the reliance of the police on deceptive tactics leads to another problem, which ultimately impedes truth seeking in the broader scheme. It is quite difficult, if not impossible, to gain the community’s trust when there is suspicion of widespread lying in court (and on the street) by many police officers. The widespread use of deception as a part of the job is actually antithetical to the overall goals of law enforcement. As Dick Lehr pointed out in an article about testifying in Boston, perceptions regarding police credibility has a direct impact on public safety: “How can police be effective in the tough-sell of persuading civilian witnesses in Boston’s high-crime neighborhoods to come forward if the department’s own credibility is in question? It’s all about public safety and successful criminal justice.”<sup>159</sup> In that same

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*Land*: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering, 98 GEO. L.J. 1005, 1007 (2010).

<sup>153</sup> See Whren v. United States, 517 U.S. 806, 818-19 (1996).

<sup>154</sup> Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 FORDHAM L. REV. 1379, 1384 (2000).

<sup>155</sup> See *id.*

<sup>156</sup> *Id.*

<sup>157</sup> Jerome H. Skolnick, *Deception by Police*, 1 CRIM. JUST. ETHICS 41, 42 (1982).

<sup>158</sup> See *id.*

<sup>159</sup> Dick Lehr, Op-Ed., *A New ‘Bright-Line Rule’ Against Lying*, BOSTON GLOBE (July 31, 2009), [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/07/31/a\\_new\\_bright\\_line\\_rule\\_against\\_lying/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/07/31/a_new_bright_line_rule_against_lying/).

piece, the Boston Police Commissioner took a strong stance against police lying, saying that police in his department who engage in this type of behavior would be terminated after the first offense. The Boston Police Commissioner also noted the devastating impact that police dishonesty has on the system: "Dishonesty is inconsistent with the duties of a police officer,' he says. 'We are paid to be witnesses, and when we are untruthful the system breaks down.'"<sup>160</sup>

Unfortunately Commissioner Davis's stand against testilying and police deception is a relatively isolated one. The vast majority of police departments do not take the issue seriously.<sup>161</sup> Indeed, it is astonishing how acceptable police lying in investigations and in testifying has become.<sup>162</sup> As one commentator has noted, police lying has become so endemic in criminal cases that it has become the norm: The prosecutors know they are lying, the judges know they are lying, and yet the police lie anyway.<sup>163</sup> Joseph McNamara, a former police chief in Kansas City and San Jose and former New York City police officer, wrote the following in an *L.A. Times* piece: "As someone who spent 35 years wearing a police uniform, I've come to believe that hundreds of thousands of law-enforcement officers commit felony perjury every year testifying about drug arrests."<sup>164</sup>

Studies and anecdotal evidence show that police lie most often in drug and narcotics cases and in gun cases.<sup>165</sup> As former Police Chief McNamara noted, "[t]he eroding integrity of law-enforcement officers and the resulting decrease in public credibility are costs of the drug war yet to be acknowledged."<sup>166</sup> Indeed, in an oft-cited study by Myron

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<sup>160</sup> *Id.*

<sup>161</sup> Loevy, *supra* note 149, at 14-16.

<sup>162</sup> David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 466 (1999) (noting that police dishonesty is a "fundamental problem in our justice system and police culture"); Amir Efrati, *Legal System Struggles with How to React When Police Officers Lie*, WALL ST. J., Jan. 29, 2009, at A12 (citing to studies demonstrating that "there's a tacit agreement among many officers that lying about how evidence is seized keeps criminals off the street"); Lehr, *supra* note 159 (noting that in Boston there have been "numerous instances where testilying resulted in wrongful convictions and flawed trials"). *But see* Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008, <http://www.nytimes.com/2008/05/12/nyregion/12guns.html?pagewanted=all&r=0> (noting cases in which judges refused to go along with testilying).

<sup>163</sup> Loevy, *supra* note 149, at 14.

<sup>164</sup> Joseph D. McNamara, *Has the Drug War Created an Officer Liars' Club?*, L.A. TIMES, Feb. 11, 1996, [http://articles.latimes.com/1996-02-11/opinion/op-34758\\_1\\_drug-war-propaganda](http://articles.latimes.com/1996-02-11/opinion/op-34758_1_drug-war-propaganda).

<sup>165</sup> *See* Loevy, *supra* note 149, at 14.

<sup>166</sup> McNamara, *supra* note 164.

W. Orfield, 76% of narcotics officers surveyed admitted to lying to create probable cause.<sup>167</sup> Moreover, there has been a disturbing trend of police officers lying in gun possession cases — so disturbing that some judges have even gone on record and exposed the dishonesty.<sup>168</sup> And criminal defense lawyers, as well as their clients, have long complained that the police lie in order to arrest and ultimately help obtain convictions.<sup>169</sup>

I propose that, at least in those cases — drug and gun possession cases — that there be a moratorium on police testimony in court. It makes sense to focus on cases like these because these cases tend to have the most evidence of police fabrication. These types of cases have also led to a mass incarceration in the United States, particularly of African Americans, and drug prosecutions have played an especially crucial role.<sup>170</sup> More than 50% of federal inmates are incarcerated because of drug convictions, and over 80% drug arrests are for simple possession.<sup>171</sup> Therefore, there is a correlation between the deception (or even perceived deception) of police and the incarceration of a large number of minorities.

It is unlikely that our court system (i.e., judges and prosecutors) or the police themselves will initiate the task of addressing the credibility of the criminal process that it currently facilitates and enables. There are some obstacles to addressing the systemic issue of police credibility in any meaningful way on a case-by-case basis. Indeed, in the relatively few cases in which courts have found that the police perjured themselves, the guilty officers faced no consequences beyond the immediate cases.<sup>172</sup> And though there are some isolated exceptions in some locales of the system attempting to reform itself, as in Boston,<sup>173</sup> it is more likely that the political process will be the means through which change comes about — though admittedly, this is a

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<sup>167</sup> Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987).

<sup>168</sup> Weiser, *supra* note 162 (finding that upon examining recent federal drug cases in New York, noting that there were “more than 20 cases in which judges found police officers’ testimony to be unreliable, inconsistent, twisting the truth, or just plain false”).

<sup>169</sup> See Loevy, *supra* note 149, at 14.

<sup>170</sup> See Bryce Covert, *Race, Gun Control and Unintended Consequences*, THE NATION BLOG (Jan. 15, 2013, 2:33PM), <http://www.thenation.com/blog/172225/race-gun-control-and-unintended-consequences#>; Fareed Zakaria, *Incarceration Nation*, TIME, Apr. 2, 2012, <http://www.time.com/time/magazine/article/0,9171,2109777,00.html>.

<sup>171</sup> See Zakaria, *supra* note 170.

<sup>172</sup> See Loevy, *supra* note 149, at 15.

<sup>173</sup> *Id.* at 15-16.

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challenging task as well. No politician wants to be perceived as soft on crime or anti-police. But the blatant inequalities in our system are becoming increasingly a source of political shame. Moreover, from a very practical standpoint, the anti-snitching campaign and the sentiments that underlie and fuel it are real headaches for law enforcement. Movements like the one sparked by the Trayvon Martin tragedy can provide the necessary platform to see such a legislative measure.

In communities where there has been a substantial breakdown in the public's trust in law enforcement, police officers should not be permitted to testify in drug and gun cases. There is a direct correlation between what is happening on the streets and what is happening in the courtroom, and our rules should reflect that connection. When an officer lies in court to manufacture probable cause, that lie likely originated on the streets when the incident at issue occurred. It is not just the defendant who knows about the lie. Word travels fast in communities, particularly in our social media-driven society. And stories of police misconduct, especially stories that seem to confirm other citizens' experiences, can quickly shape a community's perception of law enforcement.

There should be a moratorium on police testimony in drug and gun cases unless and until community trust has been restored. There should be a special commission set up in all communities to monitor the relationships between law enforcement and the communities that they serve. Those commissions should conduct periodic surveys to determine the state of these relationships. When a majority of the community lacks trust in law enforcement, it signals that the community perception of law enforcement is that their word is not to be trusted. The legal system simply should not and cannot afford to ignore such evidence of community distrust. Police serving those communities should not be allowed to testify at trials based on drug and gun possession charges. Their evidence should be presumed unreliable. Judges are already charged with a gatekeeping function in our system to ensure reliability of evidence. When they find, pursuant to legislative mandates, that a police department has dipped below the acceptable level of trust from the community, they will have the responsibility to refuse to admit the testimony of police officers from those departments.

And what about the inevitable argument that my proposal would allow guilty criminals to go free? If the loss of fabricated testimony means that "guilty" criminals will go free, my response is that the result is because of our own procedural safeguards. If an officer has to make

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up probable cause or fabricate testimony in other ways, then the defendant should not be found guilty; indeed he should not be on trial.

Some people may view this proposal as drastic. But I would argue that the consequences for the state of the police-community relationship in many areas has reached such a dire level that is resulting in far more drastic consequences (such as the Anti-Snitching campaign) than what I propose. What I am proposing will be an incentive for the police to not just talk about improving community relations, but to do the hard and necessary work to accomplish that important goal. As I discussed above, trust in the judicial system is essential to public safety.

Instead of cultivating relationships with their “rats,” once police focus on concerned law abiding citizens, the community’s perception of them will improve. Indeed, as I previously mentioned, police should be cultivating relationships with the persons whom I envision as the “anti-snitch” — the people who come forward in investigations and provide police with information, not because they wish to get a “deal” with respect to their own criminal behavior, but because they see themselves as “partners” with the police in a “community policing system.” Though it is for another article to flesh out, it would be worth considering whether testimony of such people actually deserve “extra” evidentiary status and should be deemed even more reliable than the typical witness’s testimony. It is enough for the proposal in this Essay, however, that we adjust the evidentiary status of the police to reflect the realities of the communities’ perception of them and to facilitate the rebuilding of the community’s trust in those charged with protecting the community.

I recently provided commentary to an article resulting from a symposium on the influence of popular culture on the development of rules of law.<sup>174</sup> Specifically, I commented on Professor Desmond Manderson’s piece, which analyzed the influence of the popular Fox Television series, *24*. In that piece, Professor Manderson focused on the theme “you’re just gonna have to trust me,” Jack Bauer’s mantra. Bauer’s appeal to and reliance on the public’s blind trust appears to be the basis for the legitimacy of many of his actions. In describing how trust ideally should operate to support the rule of law, Professor Manderson explained that “[t]rust which never listens is nothing but megalomania. Ultimately, it has no way of establishing what it most

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<sup>174</sup> DESMOND MANDERSON, MONTRE D. CARODINE, NAOMI MEZEY, ALAN DURHAM, RICHARD SHERWIN, MICHAEL S. PARDO, LAURIE OUELLETTE, GRACE LEE, ANNA MCCARTHY & DAVID E. PATTON, *IMAGINING LEGALITY: WHERE LAW MEETS POPULAR CULTURE* (Austin Sara ed., 2011).



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craves and, being increasingly mistrusted, resorts to greater and greater tyranny."<sup>175</sup>

My recent experiences with some "community policing" type programs have convinced me that it is vitally important for law enforcement to earn and maintain the trust of the community that it attempts to protect. This is just as true in the war against drugs and gangs as it is in the war against terrorism. Community trust is essential in dealing with the complexities of crime fighting generally. Of course, there was a popular and somewhat media-driven "feel good" surge in the immediate post-9/11 world of trust in our system, especially in law enforcement, but such widespread trust does not exist today. There may be a willingness and even an applauding of "extra legal action" in so-called "emergency" situations. But the day-to-day fight against crime generally and terrorism specifically does not really involve ticking time bomb situations. The question becomes when the immediate threat or the sense of urgency is over, how do you convince the community to give you that same level of trust that it does when there is a sense of imminent danger?

[Trust] must always be earned and re-earned, by just these processes of open communication, explanation – and by listening. . . . 'Assuming for the purposes of simplification that there are two parties in the dialogue, then each of these must listen to the other, respond to the other, hear the other's reason's and arguments, be sensitive to the other's feelings, hear the other's stories, and be sensitive to the other's values.'<sup>176</sup>

It is incredibly difficult to sustain a dialogue, however, with communities that have had such negative and even hostile experiences with law enforcement for decades and decades. But it is essential. My proposal with respect to the admissibility of police testimony can be a tool to signal to those communities that the system is making a sincere effort to gain their trust and encourage a partnership with them.

#### CONCLUSION

The breakdown of the relationship between law enforcement and the communities that they serve have essentially led to a state of emergency in some areas. Unless our judicial system responds, the legitimacy and effectiveness of the system, particularly the criminal

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<sup>175</sup> Meares, *supra* note 96, at 1611.

<sup>176</sup> *Id.*

process, are in serious jeopardy. The proposal that there be a moratorium on police testimony, while some may see as drastic, is necessary to restore trust in the system. Communities need to feel empowered in order to feel that they are true partners in this system. They need to know that their views count. As the police have learned over the last several years, the trust and engagement of the community are vital to law enforcement. My proposal will serve as an incentive for police to establish a true and effective community policing model.