

Reforming Criminal Justice

Volume 2: Policing

Erik Luna

Editor and Project Director

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a report by

The Academy for Justice

with the support of



CHARLES KOCH FOUNDATION

 **Sandra Day O'Connor
College of Law**
Arizona State University

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The Academy for Justice
www.academyforjustice.org
Erik Luna, Project Director

A project of the
Sandra Day O'Connor College of Law
Arizona State University
Mail Code 9520
111 E. Taylor St.
Phoenix, AZ 85004-4467
(480) 965-6181
<https://law.asu.edu/>

Suggested Citation

Bluebook: 2 REFORMING CRIMINAL JUSTICE: POLICING (Erik Luna ed., 2017).

APA: Luna, E. (Ed.). (2017). *Reforming Criminal Justice: Policing* (Vol. 2). Phoenix, AZ: Arizona State University.

CMS: Luna, Erik, ed. *Reforming Criminal Justice*. Vol. 2, *Policing*. Phoenix: Arizona State University, 2017.

Printed in the United States of America

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Sex Offender Registration and Notification—*Wayne A. Logan*

Clemency—*Mark Osler*

Project Participants

Albert Alschuler, Julius Kreeger Professor Emeritus of Law and Criminology,
University of Chicago

José B. Ashford, Professor of Social Work and Sociology, Director of the
Office of Offender Diversion and Sentencing Solutions, and Affiliate
Professor of Criminology and Criminal Justice, Law and Behavioral
Science, and Justice and Social Inquiry, Arizona State University

James Austin, President, JFA Institute

Susan Bandes, Centennial Distinguished Professor of Law, DePaul University

Jessica Berch, Lecturer in Law, Arizona State University

Douglas A. Berman, Robert J. Watkins/Procter & Gamble Professor of Law,
The Ohio State University

Stephanos Bibas, Professor of Law, Professor of Criminology, and Director of
the Supreme Court Clinic, University of Pennsylvania

Guyora Binder, SUNY Distinguished Professor of Law, Hodgson Russ Faculty
Scholar, and Vice Dean for Research & Faculty Development, University
of Buffalo

Richard Boldt, T. Carroll Brown Professor of Law, University of Maryland

Clint Bolick, Justice, Supreme Court of Arizona, and Research Fellow at the
Hoover Institution

Richard J. Bonnie, Harrison Foundation Professor of Medicine and Law,
Class of 1941 Research Professor of Law, Professor of Psychiatry and
Neurobehavioral Sciences, Professor of Public Policy, and Director of the
Institute of Law, Psychiatry and Public Policy, University of Virginia

Rebecca Bowman-Rivas, Law and Social Work Services Program Manager,
University of Maryland

Darryl K. Brown, O.M. Vicars Professor of Law, University of Virginia

Shawn D. Bushway, Professor of Public Administration & Policy and Professor
of Criminal Justice, University at Albany, State University of New York

Paul Butler, Albert Brick Professor in Law, Georgetown University

Devon W. Carbado, The Honorable Harry Pregerson Professor of Law
and Associate Vice Chancellor, BruinX, the Office of Equity, Diversity,
and Inclusion, University of California, Los Angeles

Paul G. Cassell, Ronald N. Boyce Presidential Professor of Criminal Law and
University Distinguished Professor of Law, University of Utah

Jennifer M. Chacón, Professor of Law, University of California, Irvine

- Gabriel J. Chin, Edward L. Barrett Chair in Law and Martin Luther King, Jr.
Professor of Law, University of California, Davis
- Todd R. Clear, University Professor of Criminal Justice, Rutgers University
- David Cole, Hon. George J. Mitchell Professor in Law and Public Policy,
Georgetown University, and National Legal Director for the American
Civil Liberties Union
- Beth A. Colgan, Assistant Professor of Law, University of California,
Los Angeles
- Francis T. Cullen, Distinguished Research Professor Emeritus of Criminal
Justice and Senior Research Associate, University of Cincinnati
- Gregory DeAngelo, Assistant Professor of Economics,
West Virginia University
- Scott H. Decker, Foundation Professor of Criminology & Criminal Justice and
Director of the Center for Public Criminology, Arizona State University
- Deborah W. Denno, Arthur A. McGivney Professor of Law and Founding
Director of the Neuroscience and Law Center, Fordham University
School of Law
- Sharon Dolovich, Professor of Law and Director of the UCLA Prison Law and
Policy Program, University of California, Los Angeles
- Cara H. Drinan, Professor of Law, The Catholic University of America
- Donald A. Dripps, Warren Distinguished Professor of Law, University of
San Diego
- Mark A. Drumbl, Class of 1975 Alumni Professor of Law and Director of the
Transnational Law Institute, Washington and Lee University
- Ira Ellman, Charles J. Merriam Distinguished Professor of Law and
Affiliate Professor of Psychology Emeritus, Arizona State University, and
Distinguished Affiliated Scholar, Center for the Study of Law and Society,
University of California, Berkeley
- Jeffrey Fagan, Isidor & Seville Sulzbacher Professor of Law and Professor of
Epidemiology, Columbia University
- Roger A. Fairfax, Jr., Jeffrey & Martha Kohn Senior Associate Dean for
Academic Affairs and Research Professor of Law, George
Washington University
- Barry C. Feld, Centennial Professor of Law Emeritus, University of Minnesota
- Henry F. Fradella, Professor of Criminology and Associate Director of the
School of Criminology and Criminal Justice, Arizona State University

-
- Barry Friedman, Jacob D. Fuchsberg Professor of Law, Affiliated Professor of Politics, and Director of the Policing Project, New York University
- Brandon L. Garrett, Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs, University of Virginia
- Stephen P. Garvey, Professor of Law, Cornell University
- Adam M. Gershowitz, Professor of Law and Associate Dean for Research & Faculty Development, College of William & Mary
- Aya Gruber, Professor of Law, University of Colorado
- Rachel A. Harmon, F.D.G. Ribble Professor of Law, University of Virginia
- David A. Harris, Professor of Law and John E. Murray Faculty Scholar, University of Pittsburgh
- Karen McDonald Henning, Associate Professor of Law, University of Detroit Mercy
- Peter Henning, Professor of Law, Wayne State University
- Lindsay Herf, Executive Director, Arizona Justice Project
- Silas Horst, Public Policy Analyst, Koch Companies Public Sector, LLC
- Douglas Husak, Distinguished Professor of Philosophy, Rutgers University
- Elizabeth Joh, Professor of Law, University of California, Davis
- Allison Kasic, Associate Director of Research, Charles Koch Foundation
- Nancy J. King, Lee S. & Charles A. Speir Professor of Law, Vanderbilt University
- Susan R. Klein, Alice McKean Young Regents Chair in Law, University of Texas
- Cecelia M. Klingele, Associate Professor of Law, University of Wisconsin, and Associate Reporter, *Model Penal Code: Sentencing*, American Law Institute
- Jason Kreag, Associate Professor of Law, University of Arizona
- Alex Kreit, Professor of Law and Co-Director of the Center for Criminal Law and Policy, Thomas Jefferson School of Law
- Máximo Langer, Professor of Law and Director of the Transnational Program on Criminal Justice, University of California, Los Angeles
- Jennifer E. Laurin, Professor of Law, University of Texas
- Richard A. Leo, Hamill Family Professor of Law and Psychology, University of San Francisco

- Stefanie Lindquist, Deputy Provost, Vice President for Academic Affairs, and Foundation Professor of Law and Political Science, Arizona State University
- Elizabeth F. Loftus, Distinguished Professor of Psychology and Social Behavior, and Professor of Law, University of California, Irvine
- Wayne A. Logan, Gary & Sallyn Pajcic Professor of Law, Florida State University
- Vera Lopez, Associate Professor of Justice and Social Inquiry, Arizona State University
- Erik Luna, Amelia D. Lewis Professor of Constitutional & Criminal Law, Arizona State University
- Edward Maguire, Professor of Criminology, Arizona State University
- Sandra G. Mayson, Assistant Professor of Law, University of Georgia
- Richard H. McAdams, Bernard D. Meltzer Professor of Law, University of Chicago
- Daniel S. Medwed, Professor of Law and Criminal Justice, and Faculty Director of Professional Development, Northeastern University
- Michael Millemann, Professor of Law, University of Maryland
- Eric J. Miller, Professor of Law and Leo J. O'Brien Fellow, Loyola Law School, Los Angeles
- Marc L. Miller, Dean and Ralph W. Bilby Professor of Law, University of Arizona
- Russell A. Miller, J.B. Stombock Professor of Law, Washington and Lee University, and Editor-in-Chief, *German Law Journal*
- Jeffrey A. Miron, Senior Lecturer and Director of Undergraduate Studies in the Department of Economics, Harvard University, and Director of Economic Studies, Cato Institute
- John Monahan, John S. Shannon Distinguished Professor of Law, Joel B. Piassick Research Professor of Law, Professor of Psychology, and Professor of Psychiatry and Neurobehavioral Sciences, University of Virginia
- Stephen J. Morse, Ferdinand Wakeman Hubbell Professor of Law, Professor of Psychology and Law in Psychiatry, and Associate Director of the Center for Neuroscience & Society, University of Pennsylvania
- Erin Murphy, Professor of Law, New York University

-
- Jeffrie G. Murphy, Regents' Professor of Law, Philosophy, and Religious Studies, Arizona State University
- Daniel S. Nagin, Teresa & H. John Heinz III University Professor of Public Policy and Statistics, Carnegie Mellon University
- Alexandra Natapoff, Professor of Law, University of California, Irvine
- Tess Neal, Assistant Professor of Psychology and Director of the Clinical and Legal Judgment Lab, Arizona State University
- Michael M. O'Hear, Professor of Law, Marquette University
- Mark Osler, Robert & Marion Short Distinguished Chair in Law, University of St. Thomas
- Julie Rose O'Sullivan, Professor of Law, Georgetown University Law Center
- John T. Parry, Associate Dean of Faculty and Edward Brunet Professor of Law, Lewis & Clark Law School
- John F. Pfaff, Professor of Law, Fordham University
- Ellen S. Podgor, Gary R. Trombley Family White-Collar Crime Research Professor and Professor of Law, Stetson University
- Maria Ponomarenko, Adjunct Professor of Law and Deputy Director of the Policing Project, New York University
- Eve Brensike Primus, Professor of Law, University of Michigan
- Doris Marie Provine, Professor Emerita of Justice & Social Inquiry, Arizona State University
- Katherine Puzauskas, Supervising Attorney of the Post-Conviction Clinic, Arizona State University
- Lisa Rich, Associate Professor of Law, Texas A&M University
- L. Song Richardson, Interim Dean and Professor of Law, University of California, Irvine
- Daniel Richman, Paul J. Kellner Professor of Law, Columbia University
- Paul H. Robinson, Colin S. Diver Professor of Law, University of Pennsylvania
- Andrea Roth, Assistant Professor of Law, University of California, Berkeley
- Michael J. Saks, Regents' Professor of Law and Psychology, Arizona State University
- Jessica Salerno, Assistant Professor of Social and Behavioral Sciences, Arizona State University
- Erin A. Scharff, Associate Professor of Law, Arizona State University

- Margo Schlanger, Wade H. and Dores M. McCree Collegiate Professor of Law,
University of Michigan
- Nick Schweitzer, Associate Professor of Social and Behavioral Sciences,
Arizona State University
- Michael Scott, Clinical Professor of Criminology & Criminal Justice and
Director of the Center for Problem-Oriented Policing, Arizona
State University
- Michael S. Shafer, Professor of Social Work, Director of the Center for
Applied Behavioral Health Policy, and Affiliate Professor of Criminology
& Criminal Justice, Arizona State University
- Bijal Shah, Associate Professor of Law, Arizona State University
- Mary Sigler, Lincoln Professor of Law and Ethics, Arizona State University
- Dan Simon, Richard L. & Maria B. Crutcher Professor of Law and Professor
of Psychology, University of Southern California
- Jonathan Simon, Adrian A. Kragen Professor of Law and Director of the
Center for the Study of Law and Society, University of
California, Berkeley
- Christopher Slobogin, Milton Underwood Professor of Law, Affiliate
Professor of Psychiatry, and Director of the Criminal Justice Program,
Vanderbilt University
- Elizabeth Smith, Forensic Social Work Fellow, University of Maryland
- Stephen F. Smith, Professor of Law, University of Notre Dame
- Cassia Spohn, Foundation Professor of Criminology and Director of the
School of Criminology and Criminal Justice, Arizona State University
- Carol S. Steiker, Henry J. Friendly Professor of Law and Faculty Co-Director
of the Criminal Justice Policy Program, Harvard University
- Jordan M. Steiker, Judge Robert M. Parker Endowed Chair in Law and
Director of the Texas Capital Punishment Center, University of Texas
- Yvonne Stevens, Instructor of Law and Research Fellow & Community
Outreach Coordinator for the Center for Law, Science and Innovation,
Arizona State University
- Megan Stevenson, Assistant Professor of Law, George Mason University
- Scott E. Sundby, Professor of Law and Dean's Distinguished Scholar,
University of Miami

-
- Chris W. Surprenant, Associate Professor of Philosophy and Director of the Alexis de Tocqueville Project on Law, Liberty, and Morality, University of New Orleans
- Michael Tonry, McKnight Presidential Professor in Criminal Law and Policy, University of Minnesota
- Jenia I. Turner, Amy Abboud Ware Centennial Professor in Criminal Law, Southern Methodist University
- Susan Turner, Professor of Criminology, Law, and Society and Director of the Center for Evidence-Based Corrections, University of California, Irvine
- Steven J. Twist, Adjunct Professor of Law, Arizona State University
- Xia Wang, Associate Professor of Criminology and Criminal Justice, Arizona State University
- Robert Weisberg, Edwin E. Huddleson, Jr. Professor of Law and Faculty Director of the Stanford Criminal Justice Center, Stanford University
- Gary L. Wells, Professor of Psychology, Distinguished Professor of Liberal Arts and Sciences, and Wendy & Mark Stavish Chair in Social Sciences, Iowa State University
- Michael D. White, Professor of Criminology and Associate Director of the Center for Violence Prevention and Community Safety, Arizona State University
- Kevin A. Wright, Associate Professor of Criminology, Arizona State University
- Ronald F. Wright, Needham Y. Gulley Professor of Criminal Law, Wake Forest University
- Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice
- Shi Yan, Assistant Professor of Criminology, Arizona State University
- Franklin E. Zimring, William G. Simon Professor of Law and Director of the Criminal Justice Research Program, University of California, Berkeley

Reforming Criminal Justice

Volume 2: Policing

Editor's Note

The present volume of *Reforming Criminal Justice* examines critical issues in policing, including the decisions to investigate particular individuals, the role that race plays in such decisions, and the methods of obtaining evidence. For the most part, the chapters are as advertised (so to speak)—their titles accurately and succinctly convey the topic at hand. The goal of each chapter is to increase both professional and public understanding of the subject matter, to facilitate an appreciation of the relevant scholarly literature and the need for reform, and to offer potential solutions to the problems raised by the underlying topic. This approach is taken in the report's other volumes, which address additional areas of criminal justice that are worthy of attention and even reconsideration.

For interested readers, Volume 1 contains a preface describing the background of this project and the reasons for writing the report, as well as offering a more elaborate introduction to the report's creation and contents. The preface also mentions several limitations, one of which bears repeating here: Each chapter carries the weight only of its author(s). The other participants in this project have not endorsed the arguments made in each chapter. Likewise, an author's references to other chapters in this report are provided for the convenience of the reader and do not indicate that the author necessarily approves of the arguments presented in the cited chapters.

Nonetheless, the authors were chosen to contribute to the report precisely because they are leaders in their respective fields and are known to be thoughtful and reasonable. Their chapters were reviewed in a process involving some of the best and brightest in the academic world. Moreover, this report is not intended as the end-all of debate about criminal justice reform. To the contrary, it hopes to rekindle the discussion with the input of those whose lifework is the study of criminal justice.

– Erik Luna

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Democratic Accountability and Policing

Maria Ponomarenko and Barry Friedman†*

Often when people talk about accountability in policing, they are focused on “back-end” accountability, which kicks in after something has gone wrong. What is needed in policing is accountability on the “front end”—which means that the public gets to have a say in what the rules for policing should be in the first place. Having front-end, democratic rules for policing helps to ensure that policing practices are consistent with community values and expectations, and can help build trust and legitimacy between the community and the police. This chapter makes the case for front-end accountability in policing, acknowledges some of the challenges to doing so, and highlights some possible models for bringing this sort of accountability about.

INTRODUCTION

There is a failure of accountability around policing, but it is not where most people think. When people talk about accountability in policing, they usually are referring to the back end. Something has happened, it is not what should have happened, and so someone must be held accountable. This is the sort of accountability that people envision when they talk about the need for officer discipline, or civilian review boards, or inspectors general, or judicial review. All of these mechanisms are aimed at addressing *misconduct*.¹

What policing is sorely lacking is accountability on the front end, *before* policing officials take action. Front-end accountability involves questions like: What should the rules be that govern policing? What even counts as misconduct? And what should the proper conduct have been in the first place? These sorts of questions we leave almost entirely to the police themselves to resolve. (And, to some minor degree, to the courts and the Constitution.) We exclude almost entirely the hallmark of accountability in democratic government—the people.

* Adjunct Professor of Law and Deputy Director of the Policing Project, New York University.

† Jacob D. Fuchsberg Professor of Law, Affiliated Professor of Politics, and Director of the Policing Project, New York University.

1. See Rachel A. Harmon, “Legal Remedies for Police Misconduct,” in the present Volume.

Front-end, democratic, accountability is pervasive throughout the rest of executive government. Before the Environmental Protection Agency (EPA) announces new emission standards, it asks for public comment. If the local school board wants to change the bus route, it typically holds a hearing. And if a member of the public wants to read the school board's bylaws or learn about its policies, all she has to do is ask (or go to the school board's website). Although the precise mechanisms of democratic accountability vary across agencies and levels of government, they typically satisfy these four basic criteria:

- There are rules (or standards, or policies) in place *before* officials act.
- The rules are *transparent*, so all can know what they are.
- The rules are formulated with *public input*.
- To the extent possible, the rules are *rational*, in that they are designed to do more good than harm.

There are of, course, plenty of rules in policing. There are directives and general orders and constitutional rules. But what there is precious little of are *democratic* rules that meet the four criteria above.

The absence of front-end, democratic accountability in policing is troubling for at least two reasons. First, absent public input, there is a risk that the rules and policies that police officials adopt will not reflect community values or needs. Indeed, as we have seen time and again—on issues ranging from electronic surveillance to the use of military-grade equipment—when the people are given a voice in policing, policy shifts. In a democracy, that is cause for concern.

Second, democratic accountability is essential to agency legitimacy. In recent years, there has been a lot of talk about the legitimacy of policing, and about a loss of trust in the police. It is a simple fact that for any agency of government to do its job, it needs the support of the public. But people are less likely to support an agency over which they have little or no say—particularly if the agency has a huge impact on their lives.

To be clear, this brief, preliminary statement of the issue hides substantial nuance and complication, which we want to acknowledge at the outset. When we speak of “rules,” we intend that as a stand-in for rules, standards, policies, or other concrete approaches to policing. Given the nature of policing, some of the decisions that departments face—how best to deal with juvenile crime,² for example—may not be reducible to a fixed set of rules, but rather may involve a mix of priorities, programs, and targeted interventions. What matters is that

2. See generally Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report.

there is an opportunity for democratic engagement around the tactics and techniques the police employ, whatever the form the implemented policy takes. Similarly, when we talk about the “public” or the “community” in democratic policing, we recognize—of course—that in reality there are many communities and even within communities there rarely is one single community view. This undoubtedly poses a challenge to implementing democratic policing, but is not an argument in favor of the status quo.

What is important, at bottom, is that officials both in and out of law enforcement have recognized the need for greater democratic engagement around policing. In 2015, the President’s Task Force on 21st Century Policing issued a report that repeatedly called for policing agencies to involve community members in setting policies and priorities for policing.³ The International Association of Chiefs of Police likewise has recognized the importance of formally involving the public “in the business of the police department.”⁴

Unfortunately, bringing this sort of democratic governance to policing will not be an easy task. It requires a substantial culture shift within policing agencies. We also lack good models for what democratic engagement should look like. Whatever models are employed must be scalable to the vastly differing size of over 15,000 different law enforcement agencies and their communities. And they must operate in a way that enhances, and does not detract from, the public-safety function of policing. Democratic accountability should foster public safety, not jeopardize it.

To that end, we recommend:

- development of clear and comprehensive rules and policies on all aspects of policing that affect the rights and interests of the public, whatever the formality of those rules and policies;
- development, implementation, and evaluation of different models of police-community engagement over policing policy and practice;
- amendment of existing administrative procedure acts to make clear policing agencies are “agencies” within their ambit—and to clarify which policing activities should be subject to democratic processes; and

3. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, OFFICE OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (2015), https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

4. INT’L ASS’N OF CHIEFS OF POLICE, NATIONAL POLICY SUMMIT ON COMMUNITY-POLICE RELATIONS 16 (2015), http://www.iacp.org/Portals/0/documents/pdfs/CommunityPoliceRelationsSummitReport_web.pdf.

- funding and technical assistance—both from the Department of Justice and private organizations—to support agency adoption of mechanisms of front-end accountability.

I. HOW DEMOCRACY OPERATES AND WHY POLICING DIFFERS

Accountability in executive government has two halves: the front end and the back end. Front-end accountability—by which we mean that there are rules in place before officials act, which are transparent, and formulated with public input—further several important goals. (Keep in mind the broad way we are using the word “rules” here.) Rules ensure that agency conduct is the product of considered judgment as opposed to the ad hoc decisions of individual officials.⁵ This promotes consistency and reduces the risk of arbitrariness. Making rules public puts individuals on notice about how government officials intend to operate—so that they can adjust their own conduct accordingly, or complain if the rules are not what they should be. Public participation can improve the quality of rules by ensuring that officials have all of the information they need to make sensible policy. It also helps to make clear that government officials are, to the extent possible, responsive to the popular will.

Back-end accountability is aimed at making sure that those rules are followed, typically by imposing consequences either on the agency or its officers if they are not.⁶ If implemented properly, back-end accountability also can motivate agencies to develop better rules on the front end. But back-end accountability is unlikely to be effective unless the front-end rules are sufficiently clear and transparent so that officers and the public know what is expected. (One of the basic requirements of the rule of law is that officials can only be held responsible for violating rules of which they should have been aware.)

This dual model of governmental accountability is applied in many different ways throughout government. In its most elaborate form, there is legislation, often supplemented by administrative rulemaking, and followed by various back-end mechanisms such as auditing by an inspector general or judicial review for those affected by agency action. But in many parts of American government, these same principles are implemented more simply. At the local level, democratic input often is achieved through public hearings, and open-government and sunshine acts. Sometimes a simple town hall can provide input for decision-makers, indicating to them what course of action is preferable, and where caution is warranted.

5. For a discussion of the prospect of rules for prosecutorial discretion, see John F. Pfaff, “Prosecutorial Guidelines,” in Volume 3 of the present Report.

6. See Harmon, *supra* note 1.

The important point, though, is that, by and large, government is open on the front end. Although we leave elected and appointed officials free (within bounds) to do their jobs and apply their expertise, there is a general recognition that those officials work for the public, that what they do should be transparent to the public, and that the public has regular and continuing opportunities (and, to some extent, obligation) to weigh in about how it is governed. In essence, the public (and not courts and constitutional law) determines in the first instance what is in bounds for those officials, and what is not.

A. THE LACK OF FRONT-END ACCOUNTABILITY IN POLICING

One of the reasons accountability is such a concern in policing today is because the existing mechanisms of accountability are focused primarily on the back end, with very little on the front end. Which is to say, existing mechanisms primarily are concerned with identifying and sanctioning misconduct. Yet, not only is it very difficult to impose meaningful back-end accountability if there is no clarity on the front end, but to focus almost single-mindedly on the back end misses everything important about the front end. The focus on misconduct ignores what the public thinks is rightful conduct in the first place. That is where attention is needed in policing.

To be clear, there are rules in policing. Policing officials would suggest they have too many rules. Policing agencies are governed by manuals, standard operating procedures, and general orders. They also must comply with constitutional rules formulated by courts. There even are some legislative rules. For example, the federal Electronic Communication Privacy Act provides a nationwide set of rules for collecting certain electronic communications,⁷ and a number of states have statutes governing matters ranging from interrogations to the use of drones.

But existing rules are, at best, a patchwork quilt. Police manuals often will cover a host of minutiae from how uniforms are buttoned to policies on paid time off, but have no policy on whether youths can be used as informants. Constitutional rules are supposed to set a floor for conduct; they do not even pretend to provide adequate guidance for policing policy, nor should they. State legislation—although important—is hardly comprehensive as to the many things policing agencies do.

What is needed is guidance *from the public* about how the police go about policing. To return to the point we made earlier, this will not always be through formal rules. Guidance may come in the form of generalized standards, or

7. 18 U.S.C. §§ 2510-2712.

statements about enforcement priorities, or programs developed in partnership with the community to address specific concerns. Some communities may want the police to focus on traffic enforcement; others may be concerned about drug markets. Some communities may have no objection to frequent surveillance in the form of license-plate readers or CCTV; others may have strong feelings against it.⁸ The point is that the police ought not to be making these decisions without input and direction from the public, for whom they work.

There are some few scattered examples of public participation in front-end policymaking. In Los Angeles, department policies are formulated by a civilian police commission, which holds public hearings before adopting new rules. Consent decrees between the Justice Department and several major city police departments—including Seattle’s, Cleveland’s, and Portland’s—have required the agencies to set up civilian police commissions to provide ongoing input into the reform process. A number of police departments also have set up more-informal advisory bodies to provide input on policy and practice.⁹ Some departments have worked closely with the public on problem-oriented policing, which is not necessarily the same as getting input on policing policy, but is a step in the right direction.

But despite these efforts, democratic policymaking in policing is the exception, not the norm. In many jurisdictions, the rules governing policing are not even available to the public. And there are few if any structured opportunities for public input into policing rules, policies, and tactics. Although police officials may hold community meetings to inform the public of recent crime trends (or ask for the community’s help in identifying public-safety issues of concern), they almost never involve the public in formulating the policies and practices that shape how public-safety problems are addressed. They don’t ask the public *how* it wants to be policed.

In making this point, we do not mean to suggest “the public” will have one set of views. Quite obviously, the questions around policing often are contentious, and fraught with disagreement. This is true on countless issues as diverse as the use of stop-and-frisk, when and how to deploy body cameras (and when the footage should be available to the public), and police use of social-media tracking. But this is true of many if not most areas of government. The fact of public disagreement hardly excuses the need for democratic engagement.

8. For a discussion of high-tech surveillance, see Christopher Slobogin, “Policing, Databases, and Surveillance,” in the present Volume.

9. *Citizen Advisory Boards*, CITY OF PHX., <https://www.phoenix.gov/police/neighborhood-resources/citizen-advisory-boards> (last visited Apr. 11, 2017).

Nor is it an answer to say that police are accountable on the front end because police chiefs serve at the pleasure of the mayor or city council (or because sheriffs are directly elected by the people). The problem with relying exclusively on electoral or chain-of-command accountability is that absent a strong push from the public, elected officials rarely have an incentive to involve themselves too closely in how policing occurs, in actually governing the police. And without transparency or public engagement around specific policies and practices, most members of the public simply are not aware of the practices that policing agencies or sheriffs adopt to address crime in their communities—and so are unlikely to give officials the push they need. Electoral accountability is accountability at wholesale, but as with other issues in government, the public's views should be welcome at retail—on specific tools, tactics and strategies that the police employ.

B. WHY IT MATTERS

The lack of front-end accountability contributes to many of the concerns that have been expressed about policing in recent years—both about specific policing practices, and about the loss of trust and legitimacy around policing in some communities.

For example, there is today a great deal of attention to the use of force by policing agencies, and in particular, about police shootings of unarmed civilians.¹⁰ After these shootings, there are calls for accountability, followed by disappointment when grand juries fail to indict the officers, or departments fail to impose serious discipline. But the criminal law usually is too blunt an instrument with which to achieve meaningful accountability. It has its place, to be sure, but it alone is not going to prevent troubling incidents from occurring. Oftentimes, department rules regarding use of force—binding front-end rules—are shockingly sparse. The primary standard in too many jurisdictions is the thin admonition from the Supreme Court in *Graham v. Connor* that the use of force at the moment it is employed must be “reasonable” under the totality of the circumstances.¹¹ The constitutional standard says nothing about what the officers should have done to try to avoid the need to use force in the first place—such as maintaining a safe distance from the suspect, or

10. See, e.g., L. Song Richardson, “Police Use of Force,” in the present Volume.

11. *Graham v. Connor*, 490 U.S. 386, 396 (1989); Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 102 VA. L. REV. (forthcoming 2017) (manuscript at 29), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759.

employing de-escalation techniques. Nor do they address the training that officers should receive about how to deal with the mentally ill, who account for a disproportionate share of police shootings.

Similar concerns have arisen about law enforcement's use of various surveillance technologies, from location-tracking to aerial surveillance using drones or airplanes.¹² In Baltimore for example, there was a public outcry after it was reported that the police had for months been deploying aircraft-mounted cameras across the city in an effort to detect crime—without telling anyone outside the department, including the mayor.¹³ There have been similar examples in Compton, California, and in New York City.¹⁴ But despite these upheavals, there is little clarity about what is to be done. That is because there presently is no requirement that police officials obtain public approval prior to deploying new surveillance technologies—and with the exception of the Fourth Amendment's thin regulation of "searches" and "seizures," no formal rules on what the policies regarding the use of these technologies should be. Law enforcement officials are left on their own to make these decisions.

It is simply inconceivable that we would try to regulate a bureaucratic organization possessing such a complex and serious mission through the blunt instrument of constitutional law. We would not want constitutional law to be so intricate, nor so confining. Too often, courts step in wielding constitutional law because no one else has stepped up to draft sensible rules to govern a particular policing practice. But the fact that courts act as a backstop hardly excuses the failure to do the job in the first place.

The lack of public participation in formulating what rules there are also has had significant consequences for the relationship between the community and the police. Many have commented in recent years on the loss of legitimacy and trust in the police in some communities, particularly in communities that need to rely on police the most to combat crime.¹⁵ This is unsustainable.

12. See, e.g., Slobogin, *supra* note 8.

13. Yvonne Wenger, *Few in City Hall Knew About Baltimore Police Surveillance Program*, BALT. SUN (Sep. 9, 2016), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-sun-investigates-who-knew-20160902-story.html>.

14. Conor Friedersdorf, *Eyes Over Compton: How Police Spied on a Whole City*, THE ATLANTIC (Apr. 21, 2014), <http://www.theatlantic.com/national/archive/2014/04/sheriffs-deputy-compares-drone-surveillance-of-compton-to-big-brother/360954/>; Conor Friedersdorf, *The NYPD is Using Mobile X-Ray Vans to Spy on Unknown Targets*, THE ATLANTIC (Oct. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/10/the-nypd-is-using-mobile-x-rays-to-spy-on-unknown-targets/411181/>.

15. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 3, at 9; INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 4, at 6.

Police officials cannot do their jobs without community support. They rely on the community to report crime when it occurs, and to help identify those responsible. They also rely in large part on voluntary compliance with the law. When community support is lacking, public safety suffers as a result.

There is a direct and demonstrable link between the absence of front-end accountability and the loss of trust in the police. Research consistently has shown that individuals are more likely to cooperate with the police if they perceive policing as legitimate—and that an essential component of legitimacy for all government institutions is voice.¹⁶ Although much of the recent focus on voice and legitimacy in policing has been on individual encounters between officers and civilians (often referred to as “procedural justice”), the same principles apply more broadly to the relationship between the community and the police. When community members are given a voice in setting policy, they are more likely to view the policies and the police themselves as legitimate—even if they disagree in part with some of the policy choices that police officials ultimately make.

C. HISTORICAL REASONS FOR THE LACK OF FRONT-END ACCOUNTABILITY

For virtually any other agency of government, we would not tolerate this lack of accountability on the front end. Why do we do so for policing? One answer is history.

For the first half of the 20th century, the principal goal of police reform had been to *isolate* policing from politics, not make it more accountable. Policing agencies as we know them today first came into being in America’s cities in the mid-19th century, and they very quickly became a part of corrupt urban machines. They also were badly mismanaged, and for the most part hopelessly ineffective. Beginning in the 1910s, a series of commissions and exposés drew attention to the problems of policing.¹⁷ They argued that if politics and

16. TRACEY L. MEARES & PETER NEYROUD, NAT’L INST. OF JUSTICE, NEW PERSPECTIVES IN POLICING BULLETIN: RIGHTFUL POLICING 5 (2015), <https://www.ncjrs.gov/pdffiles1/nij/248411.pdf>; see also LORRAINE MAZEROLLE ET AL., LEGITIMACY IN POLICING: A SYSTEMATIC REVIEW (2013); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 344-45 (2011).

17. NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON POLICE 1-6 (1931); August Vollmer & Albert Schneider, *The School for Police as Planned at Berkeley*, 7 J. CRIM. L. & CRIMINOLOGY 877, 877 (1917).

incompetence was the problem, the solution was to “professionalize” policing and make it autonomous from the political establishment.¹⁸

Although well-intentioned, these reforms had unfortunate consequences for the relationship between the community and the police. Police had acquired some of the markers of professionalism—including more training, civil-service protection, and improved technology—but they also became increasingly isolated from the community in ways that bred mutual suspicion and distrust. Two presidential commissions in the 1960s, investigating (among other things) widespread urban rioting, concluded that police needed to be integrated more with their communities, and that communities needed to have greater say.¹⁹ For a variety of reasons, however, these reforms have been slow to take hold.

D. LEGAL REASONS FOR THE LACK OF FRONT-END ACCOUNTABILITY

There also is a technical legal reason that the activities of policing agencies have eluded democratic accountability. It is somewhat abstract, but it is important. Under most administrative procedure acts, agencies (and in most states, police are in fact considered agencies) are required to engage in public rulemaking only if their activities impose new obligations on the public or alter the public’s rights in some way. If the EPA wants to require factories to install better smoke screens, it must first go through notice and comment rulemaking. The same is true if a local licensing board wants to raise its fees, or change the licensing requirements in some way.

Policing typically is exempted from these rulemaking requirements because as a formal matter the police lack the authority to impose new burdens on people or change their rights. Police officials enforce the laws that legislatures adopt. And they are required to do so within the bounds of constitutional law. If they *violate* someone’s rights, that person can (at least theoretically) bring a lawsuit and seek damages in compensation. So, in theory at least, the police are not even empowered to do the sorts of things—alter rights and impose responsibilities—that trigger the requirement of obtaining public input.

18. SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* (1977).

19. THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>; U.S. NAT’L COMM’N ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968).

The problem, however (and obviously), is that there is a big difference between theory and reality. In practice, policing tactics affect our rights regularly, and there is not always judicial recourse. Your data may be collected without your even knowing it, such as when a license-plate reader records your location at a particular time. Being stopped and frisked is a serious intrusion,²⁰ but most people lack the time and resource to take a wrongful stop to court. Taking this formal legal argument seriously would mean that if the government extracts a dollar from you, there must be serious process, but not so if it aims a gun at your head, installs malware on your computer to track your communications, or plants drones over your house. As a practical matter, much of modern-day policing, from stop-and-frisk to surveillance, affects people's rights in significant ways. And for much of this there is little effective judicial redress, for reasons running from harsh justiciability requirements to the fact that a certain amount of what the police do is secret. Front-end democratic participation in policing decisions is essential.

II. PRIOR ATTEMPTS TO BRING FRONT-END ACCOUNTABILITY TO POLICING

Beginning in the 1960s, there have been repeated efforts, both within the academy and among practitioners, to bring elements of front-end accountability to policing. Some of these efforts have focused primarily on the need for rules to guide officer decision-making. Others have focused more on the need to strengthen relationships between the community and the police through collaboration and voice. Only in recent years have there been any serious attempts to bring the traditional mechanisms of democratic accountability to policing.

A. THE RULEMAKING MOVEMENT

In the late 1960s and early 1970s, a number of prominent scholars and judges—responding in part to the concerns about policing described above—drew attention to the problem of police discretion, and called for greater rulemaking by the police. Some, like Professor Anthony Amsterdam and Judge Carl McGowan, had grown increasingly skeptical of the ability of courts to fashion sufficiently detailed rules to inform the sorts of decisions that police made each day.²¹ Others, like Professor Kenneth Culp Davis, saw parallels between discretion in policing and in other areas of executive government,

20. See, e.g., Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in the present Volume; see also Jeffrey Fagan, “Race and the New Policing,” in the present Volume; David A. Harris, “Racial Profiling,” in the present Volume.

21. Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

and thus saw rulemaking—which had come into greater use by administrative agencies in this period—as a promising solution.²²

Also in this period, a number of organizations sponsored projects to develop model rules and policies for the police. The American Law Institute developed its *Model Code of Pre-Arrest Procedure*, and the American Bar Association issued its comprehensive *Standards Relating to the Urban Police Function*. The Texas Criminal Justice Council partnered with the International Association of Chiefs of Police (IACP) to issue model rules on key areas of policing. Professors at several universities—often working in partnership with law-enforcement agencies—also produced model rules.²³

But despite the best of intentions, not much came of these efforts. First, all of the projects were much more about rules than they were about democracy. All were drafted by lawyers and academics, and there was little or no public input into the endeavors. Some also were focused more on codifying existing (mostly constitutional) law, than on formulating much-needed policy on what policing should look like. Finally, policing agencies did not have much of an incentive to formally adopt these rules as policies—except sporadically “in response to a lawsuit, political pressure, or other emergency.”²⁴ In 1986, Samuel Walker observed that police rulemaking was a “patchwork phenomenon.”²⁵

22. KENNETH CULP DAVIS, *POLICE DISCRETION* (1977).

23. MODEL RULES: WARRANTLESS SEARCHES OF PERSONS AND PLACES (Project on Law Enforcement and Rulemaking 1974); SHELDON KRANTZ ET AL., *POLICE POLICYMAKING: THE BOSTON EXPERIENCE* (1979); FRED WILEMAN, *MODEL POLICY MANUAL FOR POLICE AGENCIES* (1976).

24. Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 363 (1986).

25. *Id.* A number of scholars continued to advocate for police rulemaking throughout the 1980s and 1990s. Some, like Wayne LaFave and Samuel Walker, echoed the prior scholarship by focusing on the need for agencies to formally adopt administrative rules to govern officer decisions about various practices including the use of force and surveillance. *Id.*; Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990). Others emphasized the need for more informal guidelines—drafted with community input—to govern the sorts of discretionary enforcement decisions that officers routinely faced when engaging in “order maintenance” policing. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197.

B. COMMUNITY POLICING AND “POWER SHARING”

One of the key requirements of front-end accountability—community involvement in agency decision-making—was picked up in the 1980s as a key component of what eventually came to be known as “community policing.” Although community policing has become a catch-all term for a variety of department programs and strategies—many of which have little to do with accountability—one of its core ideals is that the police and the community share jointly in the responsibility for providing public safety, and should work collaboratively to address community problems and concerns.

Perhaps the most influential statement on the need for community involvement in setting policy came from Houston Police Chief Lee Brown in a 1989 essay he wrote for the Harvard Executive Session on Policing. Brown emphasized that true community policing necessitated “power sharing” which he defined as community participation in decision-making processes around “strategic planning, tactic implementation, and policy development.”²⁶

The “power sharing” component of community policing, however, never really took hold. Although agencies introduced a variety of mechanisms to facilitate collaborative decision-making, including beat meetings and various community partnerships, most of these efforts were focused on identifying and addressing specific community problems—like speeding or blight—instead of dealing with broader questions of department policy and practice. As crime rates continued to climb through the 1980s and 1990s, the more collaborative vision of community policing also generally lost out to more-aggressive enforcement practices like “broken windows” or “order maintenance” policing that left much less room for community involvement.

C. AN EMERGING CONSENSUS

A new wave of scholars have in recent years renewed calls for administrative regulation for policing. Daphna Renan and Chris Slobogin, as well as the co-authors of this piece, Barry Friedman and Maria Ponomarenko, have argued in favor of treating policing agencies as just that—agencies—subject to the regular processes of administrative law.²⁷ John Rappaport has urged courts to

26. LEE P. BROWN, NAT’L INST. OF JUSTICE, COMMUNITY POLICING: A PRACTICAL GUIDE FOR POLICE OFFICERS 5–7 (1989), <https://www.ncjrs.gov/pdffiles1/nij/118001.pdf>.

27. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039 (2016); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016). Andrew Crespo has dubbed these scholars the “New Administrativists.” See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2059 (2016).

use existing doctrines to nudge policing agencies toward greater use of internal rulemaking procedures. Sunita Patel and Samuel Walker have both lauded the “community engagement” provisions in Justice Department consent decrees.²⁸ And David Thacher has highlighted the ways in which focused deterrence programs—like Operation Ceasefire—incorporate principles of front-end accountability by establishing clear guidelines and enforcement priorities, providing “notice” to potential offenders of what to expect, and including community members in their development and implementation.²⁹

Some of these same ideas also were featured prominently in the Final Report issued in 2015 by the President’s Task Force on 21st Century Policing. The Task Force emphasized the need for “clear and comprehensive policies” on everything from the use of force to the handling of mass demonstrations to the conduct of searches and seizures to the adoption of new technologies.³⁰ The task force also urged agencies to develop a “culture of transparency” and “make all department policies available for public review.”³¹ Finally and most importantly, the Task Force repeatedly called for community participation in formulating policies and setting crime-fighting priorities.

The core insight that runs through much of this scholarship and commentary is that front-end engagement around policing policies and practices is essential not only to the legitimacy of policing, but also its effectiveness. The Task Force emphasized throughout its report the importance of police legitimacy to securing community cooperation and improving public safety. It also noted the many complex questions police departments face—particularly around the use of new technologies—that would benefit from comprehensive ex ante policymaking and thorough vetting with community groups.³² Similarly, in *Democratic Policing*, we highlighted numerous instances whereby increased public participation in police decision-making had resulted in the adoption of new crime-fighting strategies that improved both crime rates and community satisfaction.³³

28. Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOH Consent Decrees*, 51 WAKE FOREST L. REV. 793, 799 (2016); Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615.

29. David Thacher, *Channeling Police Discretion: The Hidden Potential of Focused Deterrence*, 2016 U. CHI. LEGAL F. 533.

30. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 3, at 2, 32.

31. *Id.* at 13.

32. *Id.* at 31-33.

33. Friedman & Ponomarenko, *supra* note 27, at 1879-81.

III. ASSESSING THE MODELS OF FRONT-END ACCOUNTABILITY

Despite the growing consensus on the need for front-end accountability around policing, there are, unfortunately, few models of what this sort of accountability should look like, and a variety of obstacles to nationwide implementation. Many of the existing models—like the community police commissions established under Justice Department consent decrees—still are too new to know for sure how well they will fare in the long run. And although there are models from outside of policing, like notice-and-comment rulemaking, or open meetings, that may be brought to bear, these models may need to be adjusted in various ways to account for some of the differences between policing and other areas of government. Here we offer a preliminary overview of some of the key obstacles to front-end accountability, as well as the possible models for jurisdictions to consider.

A. CHALLENGES FOR DEMOCRATIC ACCOUNTABILITY

Some of the challenges for bringing front-end accountability to policing stem from the unique features of policing that distinguish it from other areas of government. For example, unlike school management or environmental regulation, policing inevitably requires some measure of secrecy. Too much transparency can make it easier for criminals to evade detection. The flip side, though, is that the public cannot provide meaningful input on policing policies unless it knows what those policies are.

In general, the need to keep certain information confidential should not impede front-end engagement with the public. For most aspects of policing—such as the conduct of searches and seizures, or the use of new technologies like license-plate readers and body-worn cameras—agencies can (and some do) make their policies available to the public without impeding public safety. Even for more sensitive aspects of policing—like the use of SWAT teams or confidential informants³⁴—agencies can disclose in general terms how these tactics are regulated so as to facilitate public engagement. The New Jersey Attorney General’s Office, for example, has issued detailed, public guidelines regarding the use of juvenile informants, including the steps that agencies must take to ensure their safety.³⁵ That said, there undoubtedly are some areas of policing where these sorts of lines will be harder to draw—and it may require some work on the part of agencies and elected officials to determine where the lines should be.

34. See generally Daniel Richman, “Informants and Cooperators,” in the present Volume.

35. N.J. STATE ATTORNEY GENERAL, NEW JERSEY LAW ENFORCEMENT OFFICERS’ REFERENCE MANUAL: HANDLING JUVENILE OFFENDERS OR JUVENILES INVOLVED IN A FAMILY CRISIS app. 10 (1997).

Another consideration concerns the question of expertise. In most areas of administrative government—from nuclear regulation to environmental policy—there are people outside of government, often in private industry, who have as much if not more expertise on the subject matter than the agencies themselves. This often is not the case when it comes to policing. Although academics, policy advocates, and community activists have important information and insights to bring to bear, they often lack the practical experience with policing necessary to assess how particular policies actually will work when deployed in the field.

Claims about expertise, however, provide no excuse for excluding the public from police policymaking. The public weighs in on many complicated issues, from health insurance to energy policy. It does mean that policing agencies need to take affirmative steps to educate community members about what they see as important considerations and tradeoffs, so as to facilitate a more informed exchange of views. Central to public input into policing is public education.

Relatedly, it is an unfortunate reality that some of the communities that are most policed—and are therefore the most in need of input about what policing should look like—also are the least well-organized to participate in democratic processes. As David Thacher and others have argued, one of the pitfalls of looking to the public to help shape policies and priorities is that not all members of the community are equally positioned to make their voices heard: “if police are responsive to the community groups that do organize, they run the risk of winding up with skewed priorities that benefit the better-off at the expense of the poor.”³⁶

In developing models of public engagement, agencies will need to take special care to ensure that they are hearing from all communities—which may involve taking affirmative steps to engage more-marginalized groups. There is not likely to be one single community view on policing issues, so policing policy should try to accommodate competing views. When competing views cannot be reconciled by the police, more-formal municipal or state decision-making may be required. (One advantage of policing, though, is that it is extremely localized, and so it may be possible to take fine-grained community views into account in developing policy.)

Two additional challenges reflect the simple fact that front-end accountability largely has been absent from policing—and so will require some changes within policing agencies to bring about. First, most agencies presently lack the

36. David Thacher, *Equity and Community Policing: A New View of Community Partnerships*, 20 CRIM. JUST. ETHICS 3, 3 (2001).

institutional capacity necessary to undertake broad-based public engagement over department policies and practices. Existing department policies often are quite long, and full of legal jargon. In order to solicit public input, agencies will need to find ways to present their policies or ideas to the public in ways that people actually can understand. Agencies also will need to develop mechanisms to reach out into the community—including communities that have not always worked closely with law enforcement. And they will need to have a process in place to aggregate and evaluate the feedback received, and then incorporate this information into the final policy.

Instituting front-end accountability also will require a significant cultural shift in policing, both among department leadership and the rank and file. Because policing largely has been insulated from this sort of democratic control, it will take time for officials to get used to the idea of asking the public for input into the way they do business. A particularly stark example of police skepticism toward civilian involvement is a statement issued by the Chicago Lodge of the Fraternal Order of Police after the Chicago Police Department released its draft use-of-force policy for public comment. The FOP wrote that the department's decision signaled that things had become "completely upside down when it comes to policing in Chicago.... [T]his latest attempt to extend the authorship of one of our General Orders to civilians certainly speaks to the unprecedented times that the Law Enforcement community faces in 2016."³⁷ Still, there have been promising signs in recent years that this sort of cultural change is possible.

B. MODELS OF FRONT-END ACCOUNTABILITY

Elsewhere in government, there are essentially three models of front-end accountability: the "legislative" model, the "agency" model, and the "board or commission" model. Under the legislative model, popularly elected officials—in federal or state legislatures, or municipal councils—draft the rules and regulations that agencies must follow. Under the agency model, the agency itself drafts new policies or regulations and then solicits public input. This is the model used by most state and federal agencies, like OSHA or the EPA. Under the board or commission model, an outside entity is tasked with engaging the public around the agency's policies and priorities. Sometimes these sorts of boards have formal governing authority. In most jurisdictions, for example, the school superintendent answers to a school board, which sets district policies and holds regular public hearings to gather community input on what the policies should be. But in many contexts, these boards are advisory. Municipal

37. Facebook Announcement (on file with authors).

governments often have more than a dozen councils and commissions tasked with making recommendations about specific policy areas—like housing, or libraries, or historical preservation—which the relevant governing body then takes into account in setting policy.

Although the legislative model has been used from time to time to set rules for policing—particularly around technology and electronic surveillance—it is unlikely that the legislative model alone can fully address the front-end accountability gap around policing. First, for reasons having to do with the particular configuration of interest groups and incentives around policing, legislatures generally have preferred to take a hands-off approach. Second, even if legislatures took more of an interest in policing, they typically lack both the time and expertise necessary to draft the sorts of detailed rules that departments need. A legislature might specify that all agencies that use body-worn cameras must ensure that cameras are turned on for certain categories of encounters. But a legislature is unlikely to get into the weeds of whether a sergeant or lieutenant should be responsible for reviewing footage—or what the precise consequences should be for officers who fail to turn the cameras on. Throughout the rest of government, we typically look to legislatures to set broad policy, and then look to agencies to craft more-detailed rules to bring these policies into effect. (That said, there unequivocally should be more legislative engagement around policing issues, particularly at the state level.)

The agency model has a number of advantages in the policing context. Although it would require policing agencies to build up some internal institutional capacity, it would not require the creation of an entirely new entity to do this sort of work. This model recognizes that policing agencies have considerable expertise that they can bring to bear both on drafting initial policies and incorporating public comments. It also may be more effective in promoting closer ties between the community and the police: by engaging community members directly around policies and practices, agencies can create a foundation for collaboration in other contexts as well. Finally, given the significant culture shift that this sort of engagement requires, policing agencies may be more willing to embrace front-end accountability if they retain some control over the process.

The main challenge with the agency-driven model is making sure that policing agencies actually solicit public input when developing new policies—and then incorporate the input into their decision-making processes. Elsewhere in government, there are a variety of mechanisms in place to ensure that public participation amounts to something more than window dressing. The

most common of these is judicial review. Under the federal (and most state) administrative procedure acts, agencies are required to go through notice-and-comment rulemaking before adopting new regulations—and then are required to address each of the comments received and explain how the comment is reflected in the final rule, or why the agency chose to go another way. Courts then review the record of comments and responses to ensure that the agency provides an adequate explanation of its final rule. Although the vast majority of rules or policies never are challenged in court, the availability of review ensures that agencies consider fully the comments they receive. State and local governments also encourage agency responsiveness in other ways—for example, by requiring agencies to submit final rules to legislative committees for review. Any serious model of agency-driven front-end accountability will need to have some analogous mechanisms in place to ensure that community input is given serious weight.

The other possible model, as we have said, involves setting up an independent board or commission to facilitate the community engagement component of front-end accountability. A number of jurisdictions have done so, either voluntarily or under agreement with the Department of Justice. With the exception of a very few commissions in the United States, like the Los Angeles Police Commission—which is responsible for reviewing and approving department policies—the vast majority of the existing entities are advisory in character.³⁸ Still other jurisdictions have set up civilian oversight entities that, while focused primarily on back-end review of specific incidents, are authorized to make policy recommendations as well. In these jurisdictions, it may be possible to leverage the resources of existing entities instead of setting up an entirely new board.

One advantage of the board or commission model is that it potentially can mitigate some of the concerns with agency responsiveness. Individuals who serve on such an entity are likely to be more motivated than the agency both to actively solicit public input on policies and practices, and to monitor the policymaking process to ensure that the agency actually responds to the input it receives. Of course, the degree to which an outside entity can serve this “watchdog” function depends on the scope of its authority, its resources, and its access to department decision-making processes. But even without formal authority, the board or commission potentially can nudge agencies to be more responsive to community concerns—and alert elected officials when the agency fails to do so.

38. For a discussion of the various commissions created under the Justice Department decrees, see Patel, *supra* note 28, at 816-67.

Still, experience across the country suggests that there are a number of challenges with this model as well. Because boards often are composed of volunteers, they may not have the time and resources necessary to conduct policy research and facilitate broad-based engagement. Paid support staff can help, but add to the expense. There also are complicated questions about the mechanisms through which members ought to be selected to ensure that they are viewed as credible intermediaries both by the policing agency and the community.³⁹

In sum, both the agency and board or commission models can—with some tinkering and adjustment—be adapted to facilitate front-end, democratic accountability in policing. What is needed is more research and experimentation to implement and improve upon these models and develop approaches to front-end accountability that are tailored to policing generally, as well as to the specific needs of particular jurisdictions.

RECOMMENDATIONS

There are challenges to bringing front-end accountability to policing, but then government is full of challenges. What is clear is that it no longer is appropriate to leave policing agencies free to make all their decisions as to how they will police without this sort of front-end democratic engagement. The following are recommendations for steps that jurisdictions can take to support these efforts and help get policing on a more democratic footing.

- 1. Where possible, develop clear and comprehensive rules and policies for policing.** Clear rules, adopted in advance of official action, are an essential component of democratic governance. Agencies should review their policy manuals to determine whether they provide sufficient guidance to officers about key enforcement decisions—for example, when to issue a summons or a warning, as opposed to making an arrest—as well as the use of various policing practices and technologies that implicate individual rights. Policies should go beyond legal platitudes—like reasonableness under the totality of the circumstances—and provide concrete and meaningful guidance on the many choices that officers face.
- 2. Develop models of police-community engagement.** As we have recognized throughout, not all policing decisions will take the form of formal rules or policies. But whether through formal rules or informal

39. Joanna Schwartz notes, for example, that some civilian oversight agencies “are criticized for being overly sympathetic to law enforcement, and others are criticized for being overly hostile”—and suggests that part of the difference may reflect the processes through which they are selected. Joanna Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 466.

strategic approaches, the public should have a voice. To this end, agencies should work with national law-enforcement organizations and academic practitioners to develop, implement, and evaluate models of democratic engagement around policing policies and practices.

3. **Amend existing administrative procedure acts to bring policing within their ambit.** States and municipalities can encourage the development of front-end accountability by amending administrative procedure acts to make clear that policing agencies are “agencies” within their ambit—and to set out clear guidelines for when policing activities should be subject to democratic processes. The existing tests for when public rulemaking is required—typically, when agencies impose binding obligations on the public or alter individual rights—largely exempt policing agencies from the procedural requirements of existing APAs. One approach would be to specify in advance the sorts of policies and practices that must be subjected to public input, including searches and seizures, the use of force, and the use of surveillance technologies.
4. **Provide funding and technical assistance to support agency implementation.** The Department of Justice, state criminal justice organizations, and private foundations should provide funding and technical assistance to help agencies and organizations that partner with them build up the institutional capacity necessary to facilitate community engagement around policing policies and practices. The COPS Office at the Department of Justice already supports some of this work both through grants under its Community Policing Development Program, and through technical assistance under its Critical Response and Collaborative Reform initiatives, and should continue these efforts. Private foundations also can be an important resource not only for jurisdictions looking to implement programs, but also for researchers who can evaluate and help improve upon existing models.

Legal Remedies for Police Misconduct

Rachel A. Harmon*

Federal courts have limited the legal remedies for constitutional violations in policing to the point that they do not discourage police misconduct to the satisfaction of many communities. States and police departments impose additional penalties on police officers who violate the law, but only inconsistently, leading communities to distrust these solutions as well. Yet, because there are so many mechanisms for scrutinizing police conduct, officers often feel overregulated. Policymakers and legislators cannot change all of the obstacles to using litigation to improve policing. But by making it easier and less expensive for departments to adopt helpful reforms, by encouraging community input into police policymaking, and by supporting research, data collection, and transparency in policing, they can promote policing practices that protect rights and build community trust. In these ways, policymakers and legislators can improve police accountability, even as courts make it harder for private citizens and public officials to use legal remedies to do so.

INTRODUCTION

Police play a critical, but complicated, role in any free society. Officers promote public safety by stopping and deterring crime and disorder and by bringing criminals to justice. But the same powers we give police to achieve these goals—the powers to command, search, arrest, and use force against members of the public—can also enable officers to undermine freedom. In the name of public order and crime control, police sometimes cause individuals and communities substantial harm: they break down front doors and enter homes; they take personal property; they injure, and they kill. The law permits these harms under limited circumstances, and individuals are required to bear them. When police interfere with liberty in ways that go beyond the bounds of the law, however, they not only harm people without legal justification, but they also threaten the trust between the government and its citizens that is fundamental to a democratic society.¹

* E.D.G. Ribble Professor of Law, University of Virginia School of Law.

1. See generally Barry Friedman & Maria Ponomarenko, “Democratic Accountability and Policing,” in the present Volume.

Ideally, policing would promote public safety, maintain the trust and cooperation of the community, and simultaneously minimize any harm officers do to members of the public, even those suspected of crime, and even beyond the standards the law sets. But even if policing does not reach these goals, there is one touchstone on which everyone can agree: American policing must live up to the dictates of the law, and most especially, the basic law of the land, the U.S. Constitution. The Constitution is not a gold standard for policing; policing that satisfies its commands may still do too much harm overall and distribute that harm unfairly.² But the Constitution does provide minimum requirements that help ensure that the government does not focus unjustly on individuals and that there are limits to what the government may do in the name of law enforcement. Satisfying those minimum requirements is essential to the legitimacy of policing.

A variety of legal remedies for constitutional violations by police officers, including the exclusionary rule, civil suits for damages or reform, and criminal prosecution, exist to ensure that officers follow the law and to provide redress when they do not. In recent years, commentators have increasingly complained that police officers violate the law with impunity because these legal means for controlling their behavior are too weak. Over several decades, federal courts have left legal remedies for constitutional violations in place, but cut away at them so that, although they are frequently invoked, they are often not effective at remedying or deterring constitutional violations. The consequence is that policing has a lot of law and little remedy. Police officers are surrounded by potential legal review for every act, even legitimate ones, making them feel constantly scrutinized and overregulated. And yet, the law only infrequently holds officers and departments accountable for constitutional violations, leaving victims of police misconduct and their communities deeply dissatisfied. Both police and citizens feel wronged by the present system.

The problems with federal remedies are not easy to fix. Without changing long-standing federal statutes, little can be done by policymakers to reverse the limits to federal remedies imposed by courts, at least in the short run. Still, policymakers can promote lawful policing that builds community trust. First, they can encourage maximal use of existing remedies by federal officials, including legal remedies that have as yet been underutilized to deter misconduct, such as withholding federal funds from departments that discriminate on the basis of race or religion. Second, they can encourage local departments to adopt internal reforms by providing grants and technical assistance for improving departmental training, supervision, and internal accountability. Third,

2. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763, 776-81 (2012).

policymakers can facilitate data collection and transparency by departments. This is essential to allow communities to engage with departments to ensure policing that is legal, fair, and consistent with community values. Finally, policymakers can improve national data on policing and support research specifically directed at figuring out how departments can best promote civil rights and minimize harm while also protecting public safety.

This discussion focuses on legal remedies for Fourth Amendment violations.³ The major federal remedies for Fourth Amendment violations are the exclusionary rule; private civil suits for money damages; private civil suits for equitable relief; public civil suits for equitable relief; and criminal prosecution of police officers. The exclusionary rule permits criminal defendants to seek to exclude from their criminal trials evidence that resulted from an illegal search or seizure, primarily to deter future constitutional violations by police officers.⁴ Statutes authorizing civil litigation allow individuals to sue officers, departments, and cities for monetary damages both to compensate victims for their injuries and to discourage future misconduct. Individuals may also sue for equitable relief when money damages are insufficient to remedy a constitutional problem: Federal law permits private plaintiffs to seek both declaratory relief (a declaration by the court clarifying the legal rights of the parties) and injunctive relief (a judge's command to do or refrain from doing some act) against police departments as a means of preventing constitutional violations. Federal law also authorizes the U.S. Department of Justice to sue police departments engaged in a pattern and practice of constitutional violations for declaratory or injunctive relief. This relief often takes the form of structural reforms to the department designed to end that pattern. Finally, the Department of Justice can criminally prosecute officers who willfully violate the Constitution in order to punish them and deter future lawbreaking.

In addition to these federal remedies, states also authorize legal responses to police misconduct that violates state law. Since many states authorize police officers to search, stop, arrest, and use force up to or very near the limits on police power established in Fourth Amendment doctrine, state legal remedies that deter violations of state law will also discourage federal constitutional violations. In practice, most state remedies for police misconduct follow closely

3. Although the Constitution also regulates the police through the First, Fifth, Sixth, and Fourteenth Amendments, Fourth Amendment protections against unreasonable searches and seizures, including the unreasonable use of force, are most central to the project of policing and are of widest public concern. With the exception of the exclusionary rule, the remedies discussed here largely operate similarly for other kinds of constitutional violations.

4. See *United States v. Davis*, 564 U.S. 229, 236 (2011); *Herring v. United States*, 555 U.S. 135, 141 (2009).

their federal counterparts. All states authorize evidentiary exclusion, civil suits for damages, and criminal prosecutions, though state remedies sometimes apply in circumstances in which federal law would not. In addition, almost all states use a mechanism for which there is no federal counterpart, known as delicensing or decertifying officers. When an officer is decertified or delicensed, he no longer has the state's permission to act as an officer. This remedy, which is called decertification here, is also discussed below.

Though recent public debate about policing has often emphasized the importance of holding individual police officers accountable for instances of lawbreaking, preventing constitutional violations critically demands involving police departments in reform. Officers will violate the law if they are insufficiently trained or equipped to follow it, a condition that is determined largely by departments and municipalities rather than officers themselves. Moreover, departments create both incentives to violate the law, for example, by instructing officers to engage in frequent stops and arrests without regard to their legality, and incentives not to do so, for example, by imposing discipline for breaking legal rules. In order to discourage future constitutional violations, legal remedies must therefore target not only the officers who commit the violations but the departments that train and guide them.

I. THE EXCLUSIONARY RULE

In 1961, in *Mapp v. Ohio*, the U.S. Supreme Court forbade state courts from allowing evidence obtained in violation of the Fourth Amendment to be admitted in criminal cases.⁵ In the decades since, the possibility of evidentiary exclusion has encouraged criminal defendants to challenge police behavior, making evidence suppression the most common Fourth Amendment remedy, and the litigation over motions to suppress the primary context in which Fourth Amendment rights have been refined by courts. The threat of evidentiary exclusion also gave departments good reason to train officers in constitutional law and to encourage officers to follow it, and over time, the exclusionary rule has helped the Fourth Amendment become central to how police officers and executives view good policing. Almost undoubtedly, the exclusionary rule has transformed American law enforcement for the better. In recent years, however, limits on the exclusionary rule have reduced its significance.

From the beginning, the exclusionary rule has been a subject of considerable controversy. In order to deter constitutional violations, the government is forbidden under the rule from using otherwise relevant and trustworthy criminal evidence, which oftentimes means, as then-Judge Cardozo noted,

5. 367 U.S. 643 (1961).

“The criminal is to go free because the constable has blundered.”⁶ Unlike in the case of civil damages for a constitutional violation, the extent of the benefit to the criminal defendant is not correlated with the extent of the constitutional violation. Instead, the guiltier a defendant is and the more serious his criminal conduct, the more he may be helped by excluding illegally-obtained evidence. Thus, the rule appears to provide too much benefit to many criminal defendants. At the same time, the exclusionary rule provides too little benefit for the innocent, since if a person is not charged or the government forgoes the evidence, the exclusionary rule provides no remedy. The exclusionary rule also does not deter unconstitutional policing that is unlikely to produce evidence—such as the use of excessive force or police activity designed to harass or to punish rather than to promote criminal adjudication.⁷ These are considerable limitations for a constitutional remedy in policing. To these traditional complaints about the rule, the Supreme Court has added another in recent years: The concern that excluding evidence unfairly impugns and injures police officers who have stepped across complicated constitutional boundaries only by accident.⁸

In light of these concerns, perhaps it is little surprise that academics have long debated the exclusionary rule on legal, policy, and empirical grounds. They have criticized Supreme Court decisions on the rule; contested its legal status and policy justifications; argued about whether it deters misconduct; disagreed about its effects on criminal prosecutions and crime rates; and proposed many alternative schemes. Although the arguments have evolved over time, it is fair to say that in this vast academic literature, lively disagreement exists—and has existed for decades—about every aspect of the rule.⁹

Whatever the ongoing scholarly debate, since the 1970s, the Supreme Court has moved in a largely singular direction with respect to the rule. It has expanded an array of exceptions that permit the government to use illegally-obtained evidence, at least some of the time. These exceptions fall into two

6. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

7. *See Terry v. Ohio*, 392 U.S. 1, 14-15 (1968).

8. *See, e.g., Davis*, 564 U.S. at 239 (“[I]solated, ‘nonrecurring’ police negligence . . . lacks the culpability required to justify the harsh sanction of exclusion.” (quoting and citing *Herring*, 555 U.S. at 137, 144)); *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (refusing to apply the exclusionary rule in large part because “[n]either the officer’s alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression”).

9. The debate has been so extensive for so long that Randy Barnett could credibly write in 1983, “The ongoing discussion of the merits of the exclusionary rule is as old as the rule itself. It would be impossible to review it here.” Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 938 (1983). The discussion has stayed voluminous and ferocious in the more than 30 years since.

basic categories. First, the Court has repeatedly limited the legal proceedings to which the rule applies. Thus, illegally-obtained evidence can be used in non-criminal proceedings, such as civil suits, tax proceedings, and deportation hearings; in post-conviction proceedings, such as habeas corpus proceedings; and in criminal non-trial proceedings, such as grand-jury proceedings and preliminary hearings.¹⁰ Second, the Court has chipped away at the application of the exclusionary rule within criminal trials. It has expanded the good-faith exception, which increasingly limits exclusion to cases involving egregious police behavior; standing doctrine, which restricts the set of defendants who may invoke the rule against an illegal search; and limits on the fruit-of-the-poisonous-tree doctrine, which permit the use of evidence even though it was obtained in connection with an illegal activity.¹¹

Because of these doctrines, exclusion is now often exceptional rather than ordinary, even when a constitutional violation occurs. Moreover, there is no indication that the Court is done tinkering with the attenuation doctrine, a component of the fruit-of-the-poisonous tree analysis, or the good-faith exception, both of which the Court has expanded in recent years.¹² Since the decisions that limit the exclusionary rule are largely based on judicial interpretation of the U.S. Constitution, they cannot be changed easily by policymakers. Accordingly, however influential the rule has been in policing in the last six decades, the new parameters of the rule suggest that it may not be nearly as important in influencing police conduct in the future.

Though federal policymakers have little opportunity to alter the federal exclusionary rule, state lawmakers are differently situated. All states have as part of their constitutions state equivalents to the Fourth Amendment, which can be more expansive in their protections of criminal suspects, but often follow federal law. These state constitutional provisions are enforced with state exclusionary doctrines, and those rules are sometimes broader than their federal counterpart, imposing a remedy for misconduct that violates both state and federal law, even when the federal exclusionary rule does not. For example, under federal law, if an officer illegally arrests a suspect because he

10. See, e.g., *Stone v. Powell*, 428 U.S. 465, 489-95 (1976) (habeas proceedings); *United States v. Janis*, 428 U.S. 433, 447 (1976) (federal civil suits); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (grand jury proceedings).

11. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (good faith exception); *United States v. Payner*, 447 U.S. 727 (1980) (standing doctrine); *Hudson v. Michigan*, 547 U.S. 586 (2006) (attenuation doctrine); *Murray v. United States*, 487 U.S. 533 (1988) (independent source doctrine).

12. See, e.g., *Strieff*, 136 S. Ct. 2056 (expanding the attenuation doctrine); *Herring v. United States*, 555 U.S. 135 (2009) (expanding the good faith exception).

negligently believes an arrest warrant exists, the evidence he discovers in any search incident to that arrest is admissible under the good-faith exception to the exclusionary rule. But some states do not recognize a good-faith exception to their own exclusionary rule, and therefore exclude the same evidence from any state criminal case.¹³ If a state excludes evidence that was obtained in violation of federal law in enforcing its own constitutional standards, it can incidentally deter future federal constitutional violations. States could go further, for example, by extending evidentiary exclusion beyond constitutional violations to violations of statutes, such as state restrictions on the power to arrest, or by supplementing evidentiary exclusion with administrative punishments against officers or payments to those against whom evidence is illegally obtained. Thus, state lawmakers have several avenues for reducing police misconduct that are not subject to the limits imposed on federal remedies by federal courts.

II. CIVIL SUITS FOR DAMAGES

The Civil Rights Act of 1871—codified at 42 U.S.C. § 1983 and often known simply as Section 1983—provides a statutory basis for civil suits against police conduct that violates the U.S. Constitution or federal law as a means to deter unconstitutional conduct, vindicate constitutional rights, and provide compensation for victims of constitutional violations.¹⁴ This long-standing statute gained new traction in the late 1970s after the Supreme Court clarified the circumstances in which the suits were available to plaintiffs and Congress passed 42 U.S.C. § 1988, which permitted prevailing parties in Section 1983 cases to recover reasonable attorney’s fees.¹⁵

Although Section 1983 suits are far less common than motions to suppress evidence under the exclusionary rule, Section 1983 authorizes a remedy in circumstances in which the exclusionary rule does not. Unlike the exclusionary rule, which is tied to the Fourth Amendment, Section 1983 permits plaintiffs to seek redress for violations of other constitutional rights, such as those protected by the Equal Protection Clause and the First Amendment. Civil damages actions also permit a remedy for kinds of Fourth Amendment violations the exclusionary rule does not address, such as constitutionally excessive force—which produces no evidence—and Fourth Amendment violations against those who are never charged with a crime.

13. See, e.g., *Gary v. State*, 422 S.E.2d 426 (Ga. 1992) (holding that no good faith exception to the exclusionary rule exists under state law); *State v. Marsala*, 579 A.2d 58 (Conn. 1990) (same).

14. 42 U.S.C. § 1983.

15. 42 U.S.C. § 1988.

Despite the potential scope of Section 1983, plaintiffs face many practical barriers to bringing lawsuits. There may not be independent witnesses to an event, making misconduct difficult to prove. Victims of police misconduct often have criminal records or other qualities that may make them unappealing to juries, who are, in any case, reluctant to second-guess police decision-making, given the risks officers face on the street. In addition, because of uncertain outcomes and legal obstacles to recovery, potential plaintiffs cannot always find willing, effective, and experienced attorneys to represent them.

Beyond these practical hurdles, there are often overwhelming legal obstacles to Section 1983 actions. Most importantly, according to the Supreme Court's interpretation of the statute, individual officers are entitled to "qualified immunity" from civil damages for violating a person's constitutional rights unless the right at issue was "clearly established" at the time of the alleged conduct.¹⁶ In recent years, the Supreme Court has required increasingly specific and robust precedent to establish a constitutional right clearly, noting that "existing precedent must have placed the statutory or constitutional question beyond debate," with the result that qualified immunity protects all but the "plainly incompetent" officer.¹⁷

At the same time, the Court has allowed lower courts additional discretion to avoid issuing decisions that constitute the precedents plaintiffs need in order to satisfy qualified immunity doctrine. In 2001, the Supreme Court required lower courts confronted with motions for summary judgment to address whether a constitutional right would have been violated *before* determining whether the right was clearly established.¹⁸ This decision ensured that even if a plaintiff lost because of qualified immunity, officers would know in the future whether the challenged conduct is illegal, and plaintiffs could recover for future violations. In 2009, in *Pearson v. Callahan*, the Court reversed course, permitting lower courts discretion to decide these two questions in either order.¹⁹ This discretion has the advantage of allowing courts to avoid deciding complex questions of constitutional law unnecessarily. However, it also permits courts to repeatedly avoid assessing the constitutionality of police conduct on the ground that in each case, as in the case before, the question has not yet been clearly established by prior law, and therefore there is no liability even if there

16. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982) (establishing qualified immunity under § 1983 for government officials with discretionary functions).

17. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 743 (2011)).

18. *Saucier v. Katz*, 533 U.S. 194 (2001).

19. 555 U.S. 223 (2009).

was a violation. When courts refrain from deciding constitutional questions in this way, plaintiffs challenging similar conduct will keep losing their lawsuits, and actions that violate the Constitution may remain undeterred.

Qualified immunity is available only to individual officers, not departments and municipalities.²⁰ However, there are other legal obstacles to suits against those defendants. A city (or its department) is only liable under Section 1983 for constitutional violations that it causes through its policies or customs. To establish liability against a city, a plaintiff must show that there was a constitutional violation, that the city caused the violation, and that the violation is attributable to a city policy, formal or informal.²¹ Usually, proving these elements requires evidence that city actors knew of and permitted a pattern of similar constitutional violations,²² as well as evidence that the constitutional violation was actually caused by and was closely related to the policy deficiency.²³ In many cases, proving municipal liability is therefore not only difficult, but requires extensive, expensive discovery.

Even when plaintiffs win civil suits for damages or settle them favorably against individuals or departments, damages actions may not influence police conduct going forward. Individual officers are almost always indemnified by their departments for judgments against them.²⁴ This means that judgments against individuals are paid for by departments and cities rather than by individual officers. In theory, paying out money should lead departments and cities to seek to prevent constitutional violations by officers to avoid future payments. But in practice, cities sometimes use financial arrangements to pay settlements and judgments that do not penalize police departments, and therefore do not create strong incentives to avoid additional violations.²⁵ As a consequence, though Section 1983 damages actions can result in considerable costs to cities, they often do little to deter misconduct.

III. CIVIL SUITS FOR EQUITABLE RELIEF BY PRIVATE ACTORS

Under federal law, when compensatory damages are an inadequate remedy for a constitutional violation, especially a future harm, private plaintiffs, individually or in aggregate, may seek alternative remedies, known as “equitable relief.” This relief usually takes the form of a court’s declaration of the rights

20. See *Owen v. City of Independence*, 445 U.S. 622, 657 (1980).

21. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-92 (1978).

22. *Connick v. Thompson*, 563 U.S. 51, 62 (2011).

23. *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989).

24. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

25. See Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016).

of the parties or an injunction—a court order requiring or prohibiting certain actions. Equitable relief can be simple and prohibitory or can involve complex mandates for changing government behavior, and private plaintiffs sometimes sue municipalities seeking an order requiring government agencies to engage in substantial departmental reforms. These reforms do not act—like damages or the exclusionary rule—to deter constitutional violations indirectly. Instead, they are intended to cure the systemic conditions that cause constitutional violations.

Lawsuits for complex reforms, often known as structural reform litigation, developed in the 1950s and expanded through the mid-1970s. This litigation was not then and is not now limited to police departments. In fact, structural reform litigation has been more often and more famously used for other purposes, such as to desegregate schools, to improve prison conditions, and to fight housing discrimination by local and state agencies. Nevertheless, both simple and complex forms of equitable relief are often sought in suits against police departments.

Scholars and commentators have long been divided over the value and legitimacy of suits for equitable relief. By the mid-1970s, the U.S. Supreme Court sided with skeptics and imposed some significant limits on private efforts to obtain declaratory relief and injunctions. For plaintiffs challenging policing practices, the most important of these limits is the Court's application of constitutional standing requirements. In *City of Los Angeles v. Lyons*, the Court held that the plaintiff, Lyons, who had been choked to unconsciousness by police officers during a traffic stop, had not demonstrated a “real and immediate” threat of future injury sufficient to establish Article III standing for injunctive relief.²⁶ Even if the Los Angeles Police Department used illegal chokeholds, as Lyons alleged, the Court held that “it is no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.”²⁷ Therefore, he could not sue for injunctive relief. Although *Lyons* applies to all private suits for injunctions, the rule of *Lyons* has proven to be an especially high bar for plaintiffs challenging police practices, and in particular, challenges to the use of force, because of the seemingly unpredictable nature of individual police/citizen interactions. Thus, private suits for equitable relief have not played nearly as substantial a role in reforming police departments' civil rights practices as they have played in changing other public enterprises.

26. 461 U.S. 95, 105 (1983).

27. *Id.* at 108.

While *Lyons* limited suits for equitable relief, it did not eliminate them entirely. Instead, *Lyons* shapes the litigation that does occur, permitting some kinds of cases against police departments and not others. In particular, courts are more likely to find standing and allow equitable challenges under *Lyons* when a policy targets relatively innocent or common conduct, when the department engages in the challenged conduct frequently, when some plaintiffs have suffered harm more than once, and when the department directs the challenged conduct against a visible subpopulation of which the plaintiff is part.²⁸ Each of these conditions raises the probability that a particular plaintiff will experience future constitutional injury. Some police practices are far more likely than others to meet these conditions. For example, plaintiffs challenging racial profiling, or the illegal, widespread use of enforcement strategies such as stops, frisks, and arrests against minor conduct, will more easily satisfy the requirements of *Lyons* than plaintiffs attempting to change strip-search practices at jails or uses of excessive force.²⁹ In this way, and others, court-imposed limits on suits for equitable relief have made such suits a powerful but infrequent tool for challenging and changing unconstitutional conduct by law enforcement.

IV. CIVIL SUITS FOR EQUITABLE RELIEF BY PUBLIC ACTORS

While Section 1983 has long provided a vehicle for private plaintiffs to seek injunctions or structural reform of police departments to prevent constitutional violations, until more recently there was no similar authority available to public actors. In 1994, Congress gave the Department of Justice the power to bring suits for equitable relief against police departments in the Violent Crime Control and Law Enforcement Act.³⁰ Using this authority, the Department of Justice has developed a program of investigating and suing police departments engaged in a “pattern or practice” of constitutional violations and negotiating settlements that impose significant changes on those departments. As of the beginning of 2017, the Department of Justice had engaged in substantial investigations of 69 departments and had entered into 40 reform agreements.³¹

28. See, e.g., *Chang v. United States*, 738 F. Supp. 2d 83, 92 (D.D.C. 2010); *National Congress for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 160-62 (S.D.N.Y. 1999).

29. For discussions of some of these police practices, see Jeffrey Fagan, “Race and the New Policing,” in the present Volume; Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in the present Volume; Devon W. Carbado, “Race and the Fourth Amendment,” in the present Volume; David A. Harris, “Racial Profiling,” in the present Volume; and L. Song Richardson, “Police Use of Force,” in the present Volume.

30. 42 U.S.C. § 14141.

31. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 3 (2017), <https://www.justice.gov/crt/file/922421/download>.

Because political disagreement exists about both the use of structural reform litigation and the need for policing reform, pattern or practice investigations and litigation by the Department of Justice has varied in volume and aggressiveness during the three presidential administrations that have had the power to enforce the law.³² Despite this variation, there are some notable constants in pattern-and-practice suits brought by the Department of Justice so far. First, the investigations and suits have focused heavily on the use of excessive force; illegal stops, searches, and arrests; and discriminatory policing by departments.³³ Second, in most cases, when the Department of Justice has found a pattern or practice of constitutional violations by a police department, it has entered into an enforceable agreement with the municipality in which the city agrees to make substantial and specific reforms to the police department. Most of these agreements have been in the form of court-enforceable consent decrees.³⁴ Third, implementation of the consent decrees has been monitored by independent teams who report to the federal courts supervising the decrees.³⁵ Finally, although the reforms sought by the Civil Rights Division have evolved over time, they have consistently emphasized reducing discrimination, clarifying the policies that officers follow, improving training and supervision, strengthening data collection and transparency, and reforming citizen complaint and internal accountability systems within police departments.³⁶

Legal scholars and other commentators have long viewed pattern-and-practice suits as a powerful tool for improving policing, and the program is largely considered successful in reforming departments that have substantial ongoing problems. Still, these suits raise some concerns. Pattern-and-practice suits are resource intensive for both the federal government and the cities that are sued, and they can represent a substantial federal intrusion in local government. In addition, the limited empirical research studying the effects of pattern-and-practice suits so far has found that, though reforms adopted seemed to improve internal processes and reduce unconstitutional policing,

32. *See id.* at 19.

33. *See id.* at 6.

34. *See id.* at 20-21.

35. *Id.* at 21-22.

36. *See id.* at 25-30.

they also tended to alienate line officers.³⁷ Finally, reforms imposed by consent decree may not be self-sustaining once ongoing monitoring by the Department of Justice and the federal court ends.³⁸

In recent years, the Department of Justice has sought to refine its pattern-and-practice program to address some of these concerns. It has also supplemented this program with an alternative: voluntary technical assistance for departments struggling to prevent constitutional violations through the COPS Collaborative Reform program. Additional research could permit the Department of Justice to use both programs where they are most needed and to encourage effective and cost-efficient types of reform. However, in light of Attorney General Jeff Sessions' skepticism about institutional causes for police misconduct and about the costs and benefits of suing departments, it is unlikely that pattern-and-practice litigation will play as significant a role in promoting reform over the next several years as it has in the recent past.³⁹

When suing police departments for a pattern or practice of constitutional violations, the Department of Justice often also invokes Title VI of the Civil Rights Act of 1964⁴⁰ (Title VI) and the Omnibus Crime Control and Safe

37. See, e.g., CHRISTOPHER STONE ET AL., HARVARD KENNEDY SCH. PROGRAM IN CRIMINAL JUSTICE POLICY AND MGMT., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD (2009), https://www.hks.harvard.edu/content/download/67474/1242706/version/1/file/Harvard_LAPD_Report.pdf; ROBERT C. DAVIS ET AL., VERA INST. OF JUSTICE, CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE (2005), https://storage.googleapis.com/vera-web-assets/downloads/Publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree/legacy_downloads/277_530.pdf. But see THE BROMWICH GROUP LLC, OFFICE OF THE D.C. AUDITOR, THE DURABILITY OF POLICE REFORM: THE METROPOLITAN POLICE DEPARTMENT AND USE OF FORCE: 2008-2015 xvii-xix (2016), http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf. Research on the consequences of these suits has been hampered by methodological challenges and is limited in both quantity and scope. See Rachel A. Harmon, *Evaluating and Improving Structural Reform in Police Departments*, 19 CRIMINOLOGY & PUB. POL'Y 617 (2017).

38. See Joshua M. Chanin, *Examining the Sustainability of Pattern or Practice Police Misconduct Reform*, 18 POLICE Q. 163 (2015); DAVIS ET AL., *supra* note 37.

39. See Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Attorney General Jeff Sessions Delivers Remarks at National Association of Attorneys General Annual Winter Meeting (Feb. 28, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-national-association-attorneys-general>.

40. 42 U.S.C. §§ 2000d-2000d-7.

Streets Act of 1968⁴¹ (Safe Streets Act).⁴² Both laws prohibit police departments that receive federal funds, training, or technical assistance from discriminating in their programs. These statutes could discourage unconstitutional and other illegal discrimination by threatening to deny federal funds to departments that engage in it. This threat might motivate reform in some departments, especially those that receive substantial federal aid or that can easily reduce discrimination, but the Department of Justice has rarely invoked these statutes outside of the pattern-and-practice suits, and private rights of action are limited. As a result, these statutes do not seem to play a significant role in motivating reform. Presumably, federal agencies could enforce Title VI and the Safe Streets Act more often to discourage discrimination.⁴³ But given the practical, policy, and political obstacles to denying departments federal funding, along with the limited scope of the existing statutes—which do not address misconduct other than discrimination—it seems unlikely that these statutes will soon have significant influence on policing.

V. CRIMINAL PROSECUTION

Police officers may be prosecuted for constitutional violations under both federal and state law. Under federal law, 18 U.S.C. § 242 makes it a crime to willfully deprive any person of his or her constitutional rights. This statute provides the most common tool used by federal prosecutors to charge police officers for constitutional violations. Though it is often used to punish excessive force in violation of the Fourth Amendment, this statute can also be used to punish a variety of other constitutional violations, including false arrest, sexual assault during arrest or detention, illegal seizures of property, and the use of unconstitutional restraints or conditions of confinement.

Criminally prosecuting police officers is harder than suing them civilly. As in all criminal cases, prosecutors are required to prove elements of a crime beyond a reasonable doubt, and Section 242 has elements that can be especially difficult to prove. A federal prosecutor must establish not only that the officer violated the Constitution, but also that the officer did so “willfully,” that is, that

41. 42 U.S.C. § 3789d.

42. See, e.g., Complaint, *United States v. City of Baltimore Police Dep’t*, No. 17-cv-00099, 2017 WL 1301500 (D. Md. joint motion for entry of consent decree granted Apr. 7, 2017); Complaint para. 2, *United States v. City of Ferguson*, No. 16-cv-00180 (E.D. Mo. joint motion for entry of consent decree granted Apr. 19, 2016); Complaint para. 1, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (E.D. La. 2013) (No. 12-cv-01924).

43. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 53 (2012).

the officer had the specific intent to do what the law forbids.⁴⁴ Since principles of federal prosecution prohibit prosecutors from bringing federal charges unless they believe that the government will likely prevail at trial,⁴⁵ even initiating a criminal case can be challenging. Not surprisingly, fewer than 100 federal prosecutions are brought against law enforcement officials for constitutional violations each year.⁴⁶

Some states have criminal laws that specifically criminalize excessive force or other violations of law by the police. Most state prosecutions, however, use generally applicable statutes, such as those prohibiting criminal homicide or assault, to prosecute police officers who act outside their authority. For example, a state might prosecute an officer who uses excessive force resulting in death with murder or reckless homicide. The officer can then invoke self-defense or a public-authority defense to counter such a charge, since all states permit officers to use force to defend against threats to their safety and to conduct arrests. The details of state-law defenses available to officers vary from state to state. As a result, the potential for criminal liability also varies. For example, while police officers may be prosecuted for negligent homicide in New York,⁴⁷ a police officer can be held criminally liable for using deadly force in Washington state only with “malice and without a good faith belief” that the force was justified, a much more restrictive mental state.⁴⁸ States also differ in their processes for investigating and charging police officers. Although most leave criminal prosecutions of officers to local prosecutors, several permit state officials or specially appointed independent prosecutors to investigate and criminally charge the police.

Many commentators have criticized prosecutors, especially local prosecutors, for failing to bring criminal police-misconduct cases often enough. These criticisms grew especially loud after grand juries declined to indict officers for the highly publicized deaths of Michael Brown in Ferguson, Missouri, and Eric

44. *Screws v. United States*, 325 U.S. 91, 105 (1945).

45. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-27.220 B (2017), <https://www.justice.gov/usam/united-states-attorneys-manual> (indicating that “the attorney for the government should commence or recommend federal prosecution only if he/she believes that the person’s conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction”).

46. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION HIGHLIGHTS: 2009-2017 (2017), <https://www.justice.gov/crt/page/file/923096/download> (indicating that more than 580 law enforcement officers of all types were prosecuted between 2009 and 2016); Brian R. Johnson & Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. § 242 Criminal Prosecutions, 2001-2006*, 34 CRIM. JUST. REV. 196 (2009).

47. See N.Y. PENAL LAW §§ 125.10, 35.30.

48. WASH. REV. CODE § 9A.16.040.

Garner in New York City. Although data is too limited to know how many police officers are prosecuted for misconduct in the states, the available evidence suggests that successful criminal cases are not common. In the last several years, many states have considered statutory reform proposals to strengthen criminal prosecutions of police officers. For example, in 2014, Wisconsin passed a law requiring an independent agency rather than local prosecutors to investigate and make decisions about prosecuting police officers who use deadly force.⁴⁹ California passed a statute in 2015 prohibiting the use of grand juries to decide whether to charge police officers for the use of force, though the statute was later found to violate the state Constitution.⁵⁰ Other states have passed or are considering similar legislation.⁵¹ Members of Congress have also introduced bills to make it easier to prosecute officers.⁵²

Though independent prosecutors may increase public confidence in decisions about charges against officers, some legislative efforts to increase prosecutions may not have their intended effect. Criminal charges against police officers are stymied by a complex set of factors, some of which are not easily changed. Under federal law, for example, criminal prosecutions depend on the clarity of the constitutional standards that govern police action, as well as proof of willfulness, and the standards that govern the use of force are especially indefinite. Moreover, although eliminating investigative grand juries in police

49. WIS. STAT. § 175.47(3)(a).

50. CAL. PENAL CODE §§ 917(b), 919(c). However, the California Court of Appeal has held that § 917(b) violates the state's Constitution. *See* *People v. Sup. Ct.*, 212 Cal. Rptr. 3d 636 (Cal. Ct. App. 2017).

51. *See, e.g.*, 50 ILL. COMP. STAT. 727/1-10(b) (requiring that “[n]o investigator involved in the investigation may be employed by the law enforcement agency that employs the officer involved in the officer-involved death, unless the investigator is employed by the Department of State Police and is not assigned to the same division or unit as the officer involved in the death”); UTAH CODE ANN. § 76-2-408; WASHINGTON STATE JOINT LEGISLATIVE TASK FORCE ON THE USE OF DEADLY FORCE IN COMMUNITY POLICING, FINAL REPORT TO THE LEGISLATURE AND GOVERNOR 13 (2016), <http://leg.wa.gov/JointCommittees/DFTF/Documents/DFTF-FinalReport.pdf> (recommending removing malice from WASH. REV. CODE § 9A.16.040, and other changes to the law); S.B. 5073, 65th Leg., Reg. Sess. (Wash. 2017) (proposing removing malice from WASH. REV. CODE § 9A.16.040).

52. *See, e.g.*, Mike Allen, *Holder's Parting Shot: It's Too Hard to Bring Civil Rights Cases*, POLITICO (Feb. 27, 2015), <http://www.politico.com/story/2015/02/eric-holder-civil-rights-interview-mike-allen-115575>; Police Accountability Act of 2015, H.R. 1102, 114th Cong. (2015) (bill introduced by Georgia Congressman Hank Johnson to make murder and manslaughter committed by police officers federal crimes); Press Release, Rep. Johnson Reintroduces Police Accountability Act (Feb. 26, 2015), <https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-reintroduces-police-accountability-act>.

cases may put more political pressure on prosecutors to bring cases,⁵³ it also threatens an effective tool for securing evidence against officers: compelling and locking in testimony from reluctant law enforcement witnesses. Finally, independent prosecutors, like those from the same jurisdiction as the officer, can only bring charges against officers who have violated criminal statutes.

Criminal prosecutions against police officers are likely to be inevitably too rare to deter much misconduct. Nevertheless, they remain of substantial symbolic and normative importance. No other form of remedy so clearly expresses the government's condemnation of specific police violations of law, and none shows as much respect for the victims of police misconduct, especially with respect to police violence. Prosecutions also build public confidence in the government's commitment to lawful policing and fair application of criminal justice. Legislative efforts to pass straightforward criminal statutes governing the use of excessive force that do not turn on constitutional standards might help this effort. At the same time, no other form of remedy so clearly blames the officer rather than systemic factors for misconduct. Though policymakers should continue to seek ways to strengthen efforts to prosecute officers when they violate criminal law, criminal prosecutions should not replace other efforts to deter departmental causes of police misconduct. Moreover, criminal prosecutions must continue to be carried out with a strong commitment to fairness to police officers when they are defendants, even as prosecutors seek to vindicate the interests of victims and society as a whole.

VI. STATE DECERTIFICATION

State and local police officers possess coercive power beyond that of civilians only by permission of the state in which they work. Accordingly, every state licenses or certifies officers. In most states, the commissions that provide for the training and certification of officers, or other state boards, also have the power to deprive an officer of his license or certification to punish serious misconduct.⁵⁴ While the threat of decertification may discourage bad acts, decertification also has a more direct effect: It prevents future violations of the public trust by stopping officers who have committed serious misconduct from continuing to serve as sworn officers in the state. Decertifying officers can also help reassure the public about the state's commitment to law-abiding law

53. For a discussion of grand jury practice, see Roger A. Fairfax, Jr., "Grand Jury," in Volume 3 of the present Report.

54. See Loren T. Atherley & Matthew J. Hickman, *Officer Decertification and the National Decertification Index*, 16 POLICE Q. 420 (2013); RAYMOND A. FRANKLIN ET AL., INT'L ASS'N DIRS. OF LAW ENF'T STANDARDS AND TRAINING, 2009 SURVEY OF POST AGENCIES REGARDING CERTIFICATION PRACTICES (2009).

enforcement and demonstrate law enforcement's commitment to professional norms. Presently, decertification is inconsistently used, and police departments do not have reliable access to information about decertifications in other states. More systematic use of this tool and an improved system for communicating decertification actions between states, could improve its capacity to reduce police misconduct.

Decertification is especially important in preventing officers who have been fired for misconduct in one department from moving to another department in the same state and repeating the misconduct. Anecdotal evidence suggests that in the absence of decertification, officers who have been disciplined or fired for violating individual rights frequently find employment in smaller departments with poor candidate screening or more limited resources for hiring highly-qualified officers.⁵⁵ Although civil liability for improper hiring could theoretically discourage hiring of abusive officers, successful suits are rare.⁵⁶ Consequently, in the absence of decertification, which blocks officers from being hired elsewhere in the state, the law may play a limited role in hindering problematic officers from moving to new positions.

Although decertification may be used to punish federal constitutional violations, no state limits it to this function. Thus, decertification can also serve as a remedy for a variety of kinds of police misconduct, such as offering to drop criminal charges in exchange for sex acts, that may not violate constitutional rights. However, state decertification laws vary in breadth, and some states only decertify officers who have been convicted of crimes. Moreover, states vary in how often they apply their statutes, with some states only rarely decertifying officers.

In order for decertification to have its full effect, states should not only actively decertify officers who no longer meet state standards, but agencies should also consider prior out-of-state decertifications when hiring officers. This requires that agencies have access to an accurate and complete national database of state decertifications. While there is a National Decertification Index, states add to it only voluntarily, federal support for the database has been limited and variable, and state participation is incomplete and frequently slow. Further federal support for the National Decertification Index would improve the degree to which state decertification efforts serve the purpose of deterring and preventing future constitutional violations by the police.

55. See Roger Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 149 (2012).

56. See MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* § 4:20, at 580 (3d ed. 2015).

VII. DEPARTMENTAL AND MUNICIPAL REMEDIES

Some of the most effective means of preventing police misconduct are within the control of police departments and municipalities. There is wide agreement that hiring well-qualified officers, providing them with extensive and ongoing training, setting forth specific and realistic policies to guide their work, and supervising them well are all critical to ensuring that officers comply with the law. In addition to these management practices, however, departments and municipalities also respond to specific incidents of misconduct in ways that can affect future officer behavior. Most importantly, departments and cities receive citizen complaints about officer conduct, and they investigate and impose discipline for violations of law and departmental policies. This process is important both for deterring misconduct and for communicating a commitment to lawful policing. Since disciplinary mechanisms can be used for misconduct that violates departmental policies as well as law, these mechanisms have far greater potential impact on policing than legal remedies that merely enforce constitutional law.

In most cities, citizen complaints about officer misconduct are investigated and resolved by units of the police department itself, often known as internal affairs units, and discipline, if appropriate, is imposed by command staff. Like legal remedies, internal affairs units often impose scrutiny and burdens that officers resent, and yet rarely vindicate the interests of individuals who feel mistreated by the police. Scholars and other commentators widely criticize internal complaint, investigation, and disciplinary systems in police departments for their ineffectiveness, bias, and lack of transparency. The Department of Justice has leveled similar criticisms in its pattern-and-practice investigations. In many cities, communities distrust the police in part because they believe that internal disciplinary mechanisms do not work.

Departments can undermine disciplinary systems in subtle ways. Some departments make it difficult for citizens to file complaints by requiring them to file in person or by refusing to accept third-party or anonymous complaints. Even when departmental policies formally permit complaints easily, individual officers often resist complaint intake, discouraging citizens from revealing misconduct to the department. Once someone does complain, departments may fail to conduct thorough and fair investigations. They sometimes fail to interview complainants and witnesses or collect relevant documents. Or they favor officers in the process such that misconduct can almost never be proven to the requisite standard.

Because of these kinds of problems, and the underlying difficulties of proving misconduct, departments sustain misconduct complaints infrequently, even against officers who face repeated, similar, independent complaints. They rarely impose substantial disciplinary penalties when they sustain violations. And when departments do impose discipline, their findings and penalties are sometimes overturned by administrative review boards and arbitrators, who often are biased in favor of officers. Finally, in many cities, the entire process of complaint intake, investigation, and discipline is subject to delays and secrecy, leaving the public in the dark and officers in limbo. As a consequence, internal disciplinary systems frequently lack credibility and fail to promote policing that adheres to law and departmental policy.

In a minority of municipalities, complaints and investigations are conducted or reviewed outside the police department by an independent agency, often in some form of what is known as civilian review. These agencies vary enormously, but few seem to be especially effective in addressing misconduct. First, many are limited in structure, powers, and purpose. They may have no subpoena power or investigative resources. Some do not take complaints directly, receiving them only through the police department. They are often staffed either by former officers, who are viewed as biased in favor of the police, or by volunteers, who are perceived to lack appropriate skills and knowledge. And independent agencies frequently consider only individual instances of misconduct rather than deficiencies in policies or other systemic failures that might lead to patterns of misconduct. Even beyond these structural limits, instances of alleged misconduct investigated by independent agencies face the same challenges of proof and the same lack of independent witnesses as other efforts to assess misconduct. Although independent review is popular and may provide a forum for public input into policing, civilian review agencies do not seem to meaningfully prevent or remedy officer misconduct.

VIII. LOOKING BEYOND CONSTITUTIONAL REMEDIES

As the above discussion suggests, legal remedies generate a loose patchwork of methods for remedying and preventing police misconduct. Criminal defendants challenge illegal searches and seizures with the exclusionary rule when they can. Victims of unconstitutional police violence sue for damages when qualified immunity does not bar them. Private plaintiffs challenge discriminatory policing through litigation for equitable litigation, when *Lyons* permits it. The federal government sues local police departments to target patterns of misconduct, at least when the administration favors doing so, and occasionally states and the federal government prosecute individual

officers, mostly for unconstitutional uses of force. But this patchwork has holes. Especially with court decisions narrowing the exclusionary rule, civil damages, and private equitable relief, some victims of unconstitutional actions by the police have no meaningful way to demand to be made whole or to spur preventative reform through the legal system.

Court-imposed limits on constitutional remedies have also made it increasingly difficult to clarify the scope of constitutional rights with respect to the police, a necessary precondition for shaping police behavior. It has long been true that federal criminal prosecutions for civil rights violations could only be brought for violations of rights previously made definite by a court decision or other rule of law.⁵⁷ As a result, such criminal prosecutions have not served as a forum for refining or extending such rights. Since structural reform litigation usually settles, forestalling any court ruling on the constitutional issues at stake, it similarly does not provide a mechanism for resolving disputes about legal rights. Instead, for decades, legal rights involving police action have been developed primarily through rulings on motions to exclude evidence in criminal cases and less often in private civil suits for damages under Section 1983.

Recently, however, changes in the law have made refining rights in both contexts more difficult. First, the expanded good-faith exception and other limits on the exclusionary rule make it unnecessary for judges to decide constitutional questions raised by motions to suppress evidence because, where evidence will not be excluded even if a constitutional violation exists, a judge need not address the constitutional question.⁵⁸ Instead, the judge can deny motions without determining whether the officer acted illegally. Two changes in qualified immunity doctrine, discussed above, have similar effect. First, though it has long been clear that civil damages are prohibited unless the government official violated “clearly established statutory or constitutional rights of which a reasonable person would have known,”⁵⁹ the Court has imposed substantially more restrictive interpretations on what qualifies as “clearly established” for purposes of qualified immunity in recent years.⁶⁰ Second, Supreme Court doctrine now permits courts to decide whether there is qualified immunity before deciding the scope of the constitutional right.⁶¹ Both doctrines permit courts to avoid constitutional decisions, and as a result,

57. *Screws v. United States*, 325 U.S. 91, 103 (1945).

58. *See supra* note 11 and accompanying text.

59. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

60. *See, e.g., supra* note 17 and accompanying text.

61. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

individuals have fewer opportunities to press courts to define constitutional rights and fewer opportunities to secure their protection.

Perhaps more importantly, even when constitutional remedies succeed in court, they often fail to generate the reforms widely thought most critical to effective and rights-respecting policing: more careful policy development, training, supervision, and internal accountability mechanisms inside police departments. The exclusionary rule has limited scope. Criminal prosecutions of officers are uncommon, and in any case, affect individuals more than departments, and therefore are unlikely to stimulate departmental reform. Civil suits for money damages against officers and municipalities do not always translate easily into political incentives for police chiefs and departments to reform. Structural reform litigation is simply too rare to induce departments to adopt expensive reforms to avoid it, and too resource-intensive to conduct against more than a handful of police departments each year. And decertification requires police chiefs and state agencies (filled with former police officers) to police their own, a practice that is as challenging in policing as it is in other professions. The common legal remedies currently used for police misconduct may simply be unable to achieve the goal of substantially increasing legal compliance by law enforcement, at least very far beyond current levels.⁶²

Even if constitutional rights were easier to vindicate, public concerns about police action increasingly go beyond the Constitution. Although constitutional rights provide an important floor below which police action cannot go, they do a poor job of balancing competing interests when the police enforce the law and individuals are harmed. Because rights are held by individuals, they often do not limit policing practices that impose substantial aggregate harm to communities. Because they are defined categorically and in advance, they must be more permissive toward law enforcement than a careful weighing of the interests at stake would warrant in order to permit discretion in extreme cases.⁶³ And because they are defined and applied in the context of court rulings, they are formulated based on considerations, such as the ease of judicial administration, that have nothing to do with whether the police practices in question are overly harmful.⁶⁴ Though policing is substantially improved in recent decades, some contemporary policing practices nevertheless impose

62. See Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33 (2012).

63. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763, 776-81 (2012).

64. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 328-31 (2016).

significant harm and sometimes distribute that harm unfairly. Today, more than ever, we should seek effective policing that not only abides by the law but goes beyond legal requirements to minimize harm and build community trust.

This is not to say that constitutional and other legal remedies for policing are no longer important. As the above descriptions suggest, constitutional remedies serve functions other than shaping police action. Criminal prosecutions of officers remain a principal way to declare conduct culpable and to show societal respect for victims. Civil damages compensate injured plaintiffs. And structural reform litigation mitigates systemic problems in policing. Thus, reformers may want to push to strengthen these remedies in the courts; to support pattern-and-practice suits and criminal prosecutions by the Department of Justice; and to promote stronger state tort remedies and criminal prosecutions. Nevertheless, those interested in reform would be wise to look beyond expanding constitutional and statutory remedies to consider alternative means of spurring changes in departments.

RECOMMENDATIONS

More specifically, beyond altering legal remedies that enforce constitutional standards, policymakers can promote better policing by focusing on three critical tasks.

1. **Making it easier for departments to adopt effective reforms.** Informing police departments about conditions that lead to misconduct and encouraging reforms to avoid them can strengthen local policing. Departments, officers, communities and critics of policing can all agree that the federal government should help departments protect civil rights by giving them technical assistance, by providing them information about best practices for accountability as well as effectiveness, and by subsidizing critical reform efforts. The Department of Justice already does some of this, for instance, through its COPS Collaborative Reform Initiative, which assesses the practices in individual agencies in a non-adversarial way and makes recommendations for reforms, and through some accountability-oriented grant programs, such as those that have provided subsidies for body cameras. But these efforts are limited and far more could be done.
2. **Facilitating effective community input and local political accountability.** Getting communities involved in forming police policy and regulation is likely to help make legal remedies less necessary. At a departmental level, this can be done through strategies such as problem-oriented policing and community policing and other practices that solicit local community

input into policing priorities and practices. States and localities should also refine and clarify the limits on police power and should restrict the most intrusive and least effective policing practices. And the federal government should ensure that federal programs facilitate rather than undermine police accountability efforts by state and local governments. Thus, for instance, federal programs should not provide resources that allow departments to adopt intrusive policing techniques without ensuring local political support.⁶⁵

- 3. Improving research, data collection, and transparency.** As noted at the start of this chapter, policing should seek to be both effective and lawful, and it should engender the trust and confidence of the community. Achieving these multiple goals requires that police departments collect and share with the public data about their actions and policies, especially in areas that raise community concern, such as the use of force. President Obama's Police Data Initiative took limited steps in this direction, but far more could and should be done to ensure transparency in American policing.

Data about what police departments are doing is not the only kind of information critical to governing the police. In addition, departments and communities need to be able to evaluate and compare different policing practices. This requires research not only about effectiveness in policing, but also about the institutional conditions that can reduce misconduct and community distrust. Such research requires funding, which presently is exceptionally limited. Instead, money for research in policing heavily favors studies of the effectiveness of crime-control measures, without adequate attention to legality or to reducing harm. Together, data and research can help us describe more accurately what policing looks like today, allow communities to weigh in on how it should be different, and encourage the most effective and efficient means of getting from the current state of affairs to the one we desire.

65. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 944-53 (2015).

Stop-and-Frisk

Henry F. Fradella* and Michael D. White†

Although stop-and-frisk has a long history as a policing tactic rooted in particularized, reasonable suspicion of criminal activity, several U.S. jurisdictions morphed stop-and-frisk into a broad and sometimes aggressive crime-control strategy. The recent experiences in many jurisdictions demonstrate a strong disconnect between constitutionally sanctioned principles and policing practice. Arguably, stop-and-frisk has become the next iteration of a persistent undercurrent in racial injustice in American policing. Although stop-and-frisk has a legitimate place in 21st-century policing, changes must be made to prevent officers from engaging in racially biased or otherwise improper and illegal behavior during stops of citizens. Recommended reforms include better selection of police personnel during recruitment, improved training, clearer administrative policies, enhanced supervision of officers with corresponding accountability mechanisms, and external oversight.

INTRODUCTION

In 1968, the U.S. Supreme Court decided the landmark case of *Terry v. Ohio*.¹ In the interest “of effective crime prevention and detection,” the Court built on an English common law tradition justifying a *stop* when it held that “a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.”² Moreover, during

* Professor and Associate Director, School of Criminology and Criminal Justice, Arizona State University.

† Professor, School of Criminology and Criminal Justice, Arizona State University; Associate Director, Center for Violence Prevention and Community Safety, Arizona State University. This chapter is derived from MICHAEL D. WHITE & HENRY F. FRADELLA, *STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC* (2016). The authors gratefully acknowledge New York University Press for their gracious permission to distill the book into this chapter. The authors also thank Kyle Meditz Ernst for her assistance with assembling this chapter. Finally, the authors deeply appreciate the insightful feedback we received on previous drafts of this chapter from Albert W. Alschuler, Susan Bandes, Karen Henning, Delores Jones-Brown, Michael Scott, and Scott Sundby.

1. *Terry v. Ohio*, 392 U.S. 1 (1968).
2. *Id.* at 22.

that encounter, an officer might also be justified in conducting a *frisk* for the reasons Chief Justice Earl Warren summarized as follows:

[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man, in the circumstances, would be warranted in the belief that his safety or that of others was in danger.³

More than 40 years after *Terry v. Ohio* was decided, U.S. District Judge Shira Scheindlin presided over two cases in which residents of New York City alleged that *Terry's* “stop-and-frisk”⁴ authority had been seriously abused by New York City Police Department (NYPD) officers.⁵ When she ruled that the NYPD had violated New Yorkers’ Fourth and Fourteenth Amendments to the U.S. Constitution, Judge Scheindlin said that, “[t]he City acted with deliberate indifference toward the NYPD’s practice of making unconstitutional stops and conducting unconstitutional frisks. Even if the City had not been deliberately

3. *Id.* at 27.

4. The authors are aware of the fact that the punctuation of the phrase *stop-and-frisk* varies considerably by style guide. The Associated Press, for example, calls for the words to be in quotations when used as a subject or object noun phrase, while separating the words with hyphens when used as compound modifier. But even the Associated Press is wildly inconsistent in how their style guide is actually used. See *Stopses and Friskses*, HEADSUP BLOG: THORTS AND COMMENTS ABOUT EDITING AND THE DESKLY ARTS (Aug. 12, 2013), <http://headsuptheblog.blogspot.com/2013/08/stopses-and-friskses.html>. For the sake of consistency and readability, we hyphenate the phrase stop-and-frisk all the time when referring to the tactic as sanctioned by *Terry* and its progeny. In contrast, we differentiate how the practice was used as a widespread crime control strategy in New York City and elsewhere by referring to it as “Stop, Question, and Frisk” (“SQF”). See *infra* Part III.

5. Complaint, *Daniels v. City of New York*, 1:99-cv-01695-SAS (S.D.N.Y. Mar. 8, 1999); Complaint and Demand for Jury Trial, *Floyd v. City of New York*, 08-cv-01034-SAS (S.D.N.Y. Jan. 31, 2008), http://ccrjustice.org/files/Floyd_Complaint_08.01.31.pdf; see also *Daniels v. City of New York*, 138 F. Supp. 2d 562 (S.D.N.Y. 2001); *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), *stay granted sub nom.* *Ligon v. City of New York*, 538 F. App’x 101 (2d Cir. 2013), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

indifferent, the NYPD's unconstitutional practices were sufficiently widespread as to have the force of law."⁶

Although the NYPD's aggressive approach to stop-and-frisk may have garnered the most attention, the strategy generated similar controversies in other jurisdictions throughout the United States.⁷ On one hand, *Terry* stops are constitutionally permissible and are grounded in a historical and legal tradition dating back hundreds of years. Moreover, few people would disagree that law enforcement officers should be able to take action to protect themselves under circumstances reasonably indicating that they, or others, may be in danger.

On the other hand, the events in New York and other jurisdictions reveal gross overuse and misuse of stop-and-frisk resulting not only in violations of citizens' constitutional rights, but also in strained police-community relationships; damage to police legitimacy; and significant emotional, psychological, and physical consequences to citizens, especially those of racial or ethnic minority backgrounds. Indeed, the line between a sound, constitutionally approved police practice and racial profiling has become so blurred that some city and police leaders have faced media scrutiny and backlash from citizens when they consider adopting a stop-and-frisk program.⁸ But stop-and-frisk can be reformed.

First, an officer's decision to detain a person temporarily on suspicion of criminality must be viewed as an exercise of police discretion. The policing literature suggests that effective hiring practices, proper training, clear administrative guidance, and sufficient supervisory oversight can all help to properly control police discretion so that it is exercised in a fair and just manner. But unlike some other discretionary decisions that the law neither explicitly requires nor prohibits, an officer's decision to stop someone, along with the

6. *Floyd*, 959 F. Supp. 2d at 562. The authors note that Judge Scheindlin was eventually removed from the case by the Second Circuit. Importantly, however, the appellate court did not make any changes to her findings of fact or conclusions of law. And although the appeal was settled before resolution on its merits, it is clear that Judge Scheindlin's perceptions of the NYPD's use of stop-and-frisk as an aggressive, city-wide strategy for fighting crime were shared by many New Yorkers. Among other things, William de Blasio was elected mayor in a landslide after having run on platform to end the strategy. See Michael Barbaro & David W. Chen, *De Blasio Is Elected New York City Mayor in Landslide*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/nyregion/de-blasio-is-elected-new-york-city-mayor.html>.

7. See MICHAEL D. WHITE & HENRY F. FRADELLA, *STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC* (2016).

8. See Ray Jablonski, *Cleveland Councilman Zack Reed Proposes Instituting Version of 'Stop and Frisk' Policy in Cleveland Police*, CLEVELAND.COM (July 23, 2014), http://www.cleveland.com/metro/index.ssf/2014/07/cleveland_councilman_zack_reed_6.html. For a discussion of racial profiling, see David A. Harris, "Racial Profiling," in the present Volume.

subsequent decision to pat down the person for weapons, are both constrained by law. Thus, and to the second point, the tactic must be used in a manner that satisfies the constitutional standards regarding reasonable suspicion.⁹ And third, stop-and-frisk must be employed with sensitivity to citizens' concerns. Thus, assessment of the tactic should occur through a procedural justice lens.

I. THE ORIGINS OF STOP-AND-FRISK AUTHORITY

English constables and “watchmen” were permitted to detain “night-walkers”—suspicious people encountered at night.¹⁰ Indeed, those on the night watch could legally “arrest such as pass by until the morning, and if no suspicion, they are then to be delivered [released], and if suspicion be touching them, they shall be delivered to the sheriff.”¹¹ Even private citizens had the authority to detain and question suspicious “night-walkers.”¹²

In 1939, the Interstate Commission on Crime authorized a study to examine how arrests were made across the United States. The study examined the feasibility of creating a model law that states could adopt to harmonize arrest practices across the country and to bring the actions of police into alignment with constitutional standards.¹³ Once drafted, that model law became known as the Uniform Arrest Act. Its provisions dealt with nine types of police-initiated contacts with citizens, the first two of which were “[q]uestioning and detaining suspects” and “[s]earching suspects for weapons.”¹⁴ Section 2 of the Uniform Arrest Act provided: “A peace officer may stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is

9. It should be noted that stop-and-frisk at the incident (or tactical) level is governed by law. This should be distinguished from SQF policies that are enacted at the departmental (or strategic) level. The former requires that we examine whether the suspect’s civil liberties were violated and whether the officer made a wise investigative and personal safety decision. The latter requires that we examine whether the general policy/strategy of encouraging officers to stop and frisk lots of people—presumably in furtherance of a crime control/crime prevention goal—is (a) an effective strategy; (b) a constitutionally permissible strategy; (c) a procedurally just strategy; and (d) the optimal strategy for achieving the particular objective. Thus, for example, as will be explained in this chapter, the problem in New York City was not just that many police officers did not seem to understand the constitutional standards governing stop-and-frisk as a tactic, but also that NYPD command staff pressed officers to engage in SQF on a massive, proactive basis as a strategic approach to controlling certain forms of crime.

10. John A. Ronayne, *The Right to Investigate and New York’s “Stop-and-Frisk” Law*, 33 FORDHAM L. REV. 211, 214 (1964).

11. 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 96 (Robert H. Small ed., 1847) (1736); see also *Lawrence v. Hedger*, 3 Taunt. 14, 128 Eng. Rep. 6 (C.P. 1810).

12. 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 129 (8th ed. 1824) (1716).

13. Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 316–17 (1942).

14. *Id.* at 317.

about to commit a crime. ... The total period of detention provided for by this section shall not exceed two hours.”¹⁵ Additionally, Section 3 of the Act stated that an officer was permitted to conduct a “search for a dangerous weapon ... whenever he has reasonable ground to believe [a person stopped or detained for questioning] ... possesses a dangerous weapon.”¹⁶

In 1941, the legislatures of New Hampshire and Rhode Island adopted the Uniform Arrest Act as the laws of their states.¹⁷ Delaware followed suit in 1951.¹⁸ Other states enacted statutes authorizing stop-and-frisk practices that were not consistent with the Uniform Arrest Act.¹⁹ As a consequence, considerable variation persisted across states with regard to stop-and-frisk authority. Prompted by the need to clarify the scope of permissible conduct during stop-and-frisk procedures (and, perhaps, concerns about how vagrancy and loitering laws contributed to police infringements on constitutionally protected liberty interests),²⁰ the U.S. Supreme Court issued three landmark rulings in 1968 that set federal constitutional benchmarks for stop-and-frisk within the framework of the Fourth Amendment: *Terry v. Ohio*²¹ and the companion cases of *Sibron v. New York* and *Peters v. New York*.²² Collectively, these rulings afforded police the discretion to stop citizens based on reasonable suspicion. This standard of proof required more than a mere hunch, but less evidence than probable cause; it is satisfied when a law enforcement officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” a brief, limited stop to investigate whether criminal activity is afoot.²³ These cases also made clear that law enforcement officers may superficially “pat down” a suspect if there is reasonable suspicion to believe the suspect is armed. Such frisks are limited to cursory inspections for weapons

15. *Id.* at 320–21.

16. *Id.* at 325.

17. 1941 N.H. Laws 242, ch. 163 (codified as amended at N.H. REV. STAT. ANN. §§ 594:1–594:23 (1955)); 1941 R.I. Pub. Laws 21, ch. 982 (codified as amended at R.I. GEN. LAWS ANN. §§ 12-7-1 to 12-7-17 (1956)).

18. 48 Del. Laws 769, ch. 304 (1951) (codified as amended in DEL. CODE ANN. tit. 11, §§ 1901–1912 (1953)).

19. Ronayne, *supra* note 10, at 215.

20. See Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 604 (1956); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (invalidating a vagrancy ordinance on vagueness grounds).

21. 392 U.S. 1 (1968).

22. 392 U.S. 40 (1968).

23. *Terry*, 392 U.S. at 21.

and, therefore, may not involve a “general exploratory search for whatever evidence of criminal activity he might find.”²⁴

Justice William Douglas wrote the lone dissenting opinion in *Terry*. He rejected the notion that the Reasonableness Clause of the Fourth Amendment could provide a basis to support stop-and-frisk outside the usual probable cause standard.²⁵ Indeed, Douglas presciently cautioned that the reasonable suspicion standard—one so low that it would not justify a magistrate issuing a warrant—would not ring a “bell of certainty.”²⁶ Rather, such a low and amorphous standard would be a blank check for law enforcement officers to exercise nearly unbridled discretion without regard to constitutional protections:

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.²⁷

Perhaps as reaction to the concerns Douglas raised in his dissent in *Terry*, Chief Justice Earl Warren’s majority opinion in the case was written very cautiously and narrowly.²⁸ The opinion could have been applied in a manner limited to police safety stops. But through subsequent cases—most notably *Adams v. Williams*²⁹ and *Delaware v. Prouse*³⁰—*Terry* gradually was interpreted as granting police expansive “stop” authority³¹ to conduct broader, more general investigative detentions than night-walker statutes which, by the terms, were

24. *Id.* at 30.

25. *Id.* at 35–39 (Douglas, J., dissenting).

26. *Id.* at 37.

27. *Id.* at 38–39.

28. Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camera and Terry*, 72 MINN. L. REV. 383 (1988).

29. 407 U.S. 143 (1972) (upholding a vehicle stop and a “frisk” of a car for a handgun that was found exactly where an informant had told the officer it would be found).

30. 440 U.S. 648 (1979) (declaring unconstitutional random spot checks of cars made without a pre-established protocol, but in doing so, paving the way for *Terry*’s stop authority upon reasonable suspicion to justify systematic roadblocks that foster traffic safety); see also, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

31. Our arguments for reform advocate reining-in police discretion so that the practice of stop-and-frisk brings *Terry* back to its more limited, cautious roots. See *infra* Part IV.

confined to night-time detentions to prevent breaches of the peace.³² Moreover, those who made arrests under night-walker statutes were subject to liability for false imprisonment if the overnight detention was not justified. As Rosenthal noted, “[u]nder the contemporary qualified immunity doctrine, in contrast, officers face no personal liability even if they violate Fourth Amendment standards, as long as their judgment under the circumstances is considered reasonable.”³³ Courts assess the validity of stop-and-frisks under the reasonable suspicion standard by considering “the whole picture”—all of the facts known under the “totality of the circumstances.”³⁴ Importantly, judges are supposed to defer to the professional judgment and experience of police when assessing the totality of the circumstances.³⁵

Throughout the 1980s, the Court exempted several classes of stops from the usual requirements of *Terry*.³⁶ For example, in *United States v. Mendenhall*, the Court ruled that a stop had not occurred when federal agents approached the defendant in the open concourse area of an airport.³⁷ Because the agents neither wore uniforms nor displayed weapons, and because they requested—but did not demand—to see the defendant’s ticket and identification, the Court reasoned that the encounter did not constitute a stop that qualified as a seizure for Fourth Amendment purposes. Rather, the stop was deemed a voluntary and cooperative encounter because at no time should a reasonable person

32. Ronayne, *supra* note 10, at 213–15.

33. Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case against Terry v. Ohio*, 43 TEX. TECH. L. REV. 299, 333 (2010).

34. *United States v. Cortez*, 449 U.S. 411, 417 (1981).

35. *Id.* at 421–22 (emphasizing that the relevant line of inquiry in the case was “whether, based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity”). For an analysis of how deference to police experience factors into the reasonable suspicion standard, see David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 666 (1994).

36. At first blush, the cases discussed in the remainder of Part II may appear to lack a common thread other than expanding stop-and-frisk authority. But there is a theoretical connection between *Terry* and these cases if *Terry* is viewed as having accomplished more than authorizing stop-and-frisk under the Fourth Amendment. Indeed, *Terry* severed the Reasonableness Clause from the Warrant Clause, thereby carving-out swathes of police conduct exempt from both the requirements of probable cause and a warrant. See, e.g., Earl C. Dudley Jr., *Terry v. Ohio, The Warren Court and the Fourth Amendment: A Law Clerk’s Perspective*, 72 ST. JOHN’S L. REV. 891 (2012); Luis G. Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M. L. REV. 33 (1979–80). Thus, all of the cases highlighted in the remainder of Part II were decided with regard to a balancing test aimed at “reasonableness” divorced from other Fourth Amendment principles.

37. *United States v. Mendenhall*, 446 U.S. 544 (1980).

in the defendant's situation have ever felt that she could not leave.³⁸ Then, in *I.N.S. v. Delgado*, the “free to leave” test morphed into something even more restrictive on personal liberty: free to continue working and moving about a factory while armed agents wearing badges roamed the premises questioning people about their immigration status.³⁹ The Court further narrowed *Terry* in *Florida v. Bostick* when it clarified that law enforcement officers have the authority to stop and ask basic investigatory questions—including requests to examine identification or to search luggage of bus passengers—without there being a seizure for Fourth Amendment purposes “as long as the police do not convey a message that compliance with their requests is required.”⁴⁰ In short, *Bostick* interpreted *Mendenhall*'s free-to-leave test by narrowing the inquiry to one of coercive police tactics through shows of authority from the perspective of a “reasonable, innocent person.”⁴¹

In other cases, the Supreme Court extended the authority of police to conduct frisks. Consider that in *Michigan v. Long*, the Court permitted the police to conduct a brief search of the passenger compartment of a car to look for hidden weapons.⁴²

Perhaps most importantly, the Court has partially retreated from *Sibron*'s holding that reasonable suspicion needed to be based on more than just hunches. In *Alabama v. White*, the Court upheld a stop of a vehicle based on an anonymous tip even though there was no indication of the reliability of the tip.⁴³ At first blush, *Alabama v. White* might not appear to have retreated from *Sibron*'s holding since an anonymous tip is more than a hunch, but it paved the way for the decision in *Michigan Department of State Police v. Sitz*, which authorized sobriety checkpoints at which police stopped drivers *without any* particularized suspicion of driving while impaired.⁴⁴ *Illinois v. Wardlow* approved

38. *Id.* at 554–55.

39. *I.N.S. v. Delgado*, 466 U.S. 210 (1984).

40. *Florida v. Bostick*, 501 U.S. 429, 435 (1991).

41. *Id.* at 438.

42. *Michigan v. Long*, 463 U.S. 1032, 1035 (1983).

43. *Alabama v. White*, 496 U.S. 325, 329 (1990).

44. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990). In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court curtailed law enforcement authority to use drug-sniffing dogs at roadblocks on the grounds that the DUI checkpoints sanctioned in *Sitz* were “designed to serve special needs, beyond the normal need for law enforcement,” *id.* at 37 (internal quotations omitted); whereas suspicionless searches using drug-sniffing dogs at roadblocks impermissibly extended into the realm of investigating “ordinary criminal wrongdoing.” *Id.* at 38. Nonetheless, *Sitz* remains good law insofar as it permits stops of vehicles at DUI checkpoints without any particularized suspicion of impaired driving.

an inference of suspicion from flight⁴⁵—an inference that logically extends to any type of evasive behavior.⁴⁶ *Whren v. United States* upheld pretextual stops, thereby allowing police to conduct stops for minor infractions so they could investigate other, more serious crimes.⁴⁷ And because *Minnesota v. Dickerson* approved of the so-called “plain feel” exception,⁴⁸ police likely have an incentive to frisk people even when they do not actually fear the presence of a weapon,⁴⁹ but rather hope to feel some drugs in the pat-down—a seemingly permissible pretext in light of *Whren*.⁵⁰ Notably, Justice Antonin Scalia wrote a concurring opinion in *Dickerson* in which he expressed doubts about the constitutionality of *Terry* as applied “frisks” because it exceeded the scope of authority granted to watchmen under English night-walker statutes. Scalia expressed doubt that “the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity.”⁵¹ In other words, where we are today with stop-and-frisk authority under *Terry* is not necessarily a preordained constitutional conclusion.

In short, Fourth Amendment jurisprudence has steadily expanded stop-and-frisk authority since the early 1980s. Notably, this expanded authority increased the risk that officers would employ racial, ethnic, and socioeconomic class stereotypes as part of a calculus of suspicion to initiate stop-and-frisks. The expansion of this authority, and the increased risk of racial profiling, is especially problematic when considering the persistent undercurrent of

45. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

46. Hundreds of cases have relied on evasion in a high-crime area to justify *Terry* stops. See Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1590 n.12 (2008).

47. *Whren v. United States*, 517 U.S. 806, 811–12 (1996).

48. *Minnesota v. Dickerson*, 508 U.S. 366, 371 (1993).

49. To be clear, we are not suggesting that *Whren* led to *Dickerson*. In *Sibron*, the Court held that the test is whether a reasonable person would find a frisk to be justified under the circumstances, regardless of whether the particular officer conducting the frisk subjectively believed it was justified. *Whren* passed up the opportunity to alter *Sibron* by applying the “reasonableness” analysis to pretextual stops where an officer stops someone in a situation in which no other officer would do so. Because *Whren* failed to find such action unreasonable, our point is that the combination of *Dickerson* and *Whren*—the combination of “plain feel” without the ability to challenge a frisk as being pretextual—created an incentive for law enforcement officers to conduct frisks even when they do not suspect the presence of a weapon.

50. Janet Koven Levit called such pretexts “the Death of *Terry v. Ohio*.” Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 145 (1996); see also Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882 (2015).

51. *Dickerson*, 508 U.S. at 381 (Scalia, J., concurring).

racial injustice throughout nearly two centuries of American policing—an undercurrent that is even evident in the *Terry* decision itself. Consider that in his opinion in *Terry*, Chief Justice Warren noted that stop-and-frisk activities by police contributed to racial strife:

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to “stop and frisk”—as it is sometimes euphemistically termed—suspicious persons.⁵²

The opinions in *Terry*, however, omitted or glossed over several important facts relevant to the racial issues underlying the case. Indeed, nowhere in any of the opinions in *Terry* does any justice mention that both Terry and his co-defendant, Chilton, were Black men.⁵³ Nor does any justice mention that a third man, Katz—a White man whom a police officer observed interacting with Terry and Chilton—was not charged; he was held as a “suspicious person” and released after two days.⁵⁴ According to the transcript of the trial court’s suppression hearing in *Terry*, Officer McFadden testified that when he saw the men standing on the street, “they didn’t look right to [him] at the time.”⁵⁵ Criminologists Delores Jones-Brown and Brian Maule suggested that McFadden’s attention may have been drawn to the men on account of their race.⁵⁶ This conclusion is bolstered by a number of ambiguities and inconsistencies in McFadden’s account of the case. As law professor Lewis R. Katz noted, McFadden could not explain why he was initially suspicious of the men; he repeatedly changed the number of trips the men made up and down the street; and he expressed uncertainty regarding the type of store into which the men were looking.⁵⁷ Thus, the reasonableness of the initial stop appears to be more open to debate than the *Terry* decision suggests. The failure of the

52. *Terry v. Ohio*, 392 U.S. 1, 9–10 (1968).

53. John Q. Barrett, *Appendix B: State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN’S L. REV. 1387 (1998).

54. *Id.* at 1465.

55. *Id.* at 1456.

56. Delores Jones-Brown & Brian A. Maule, *Racially Biased Policing: A Review of the Judicial and Legislative Literature*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 140, 145 (Stephen K. Rice & Michael D. White eds., 2010).

57. Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 430–32 (2004).

Court to address the questionable reasonableness of the stop in *Terry* illustrates how the very foundation of the reasonable-suspicion standard in American constitutional law masks racially disparate stop-and-frisk practices with the cloak of race-neutrality.⁵⁸

II. A REVIEW OF THE LITERATURE DOCUMENTING THE RISE AND IMPACT OF “SQF”

Terry and its progeny clearly constitutionally sanctioned stop-and-frisk as a policing tactic. But stop-and-frisk morphed into an aggressive crime-control strategy quite different from the tactic outlined in *Terry*, largely as a result of policing activities in New York City. We differentiate the tactic of stop-and-frisk under *Terry* from the New York City “Stop, Question, and Frisk” (SQF) strategy by capitalizing the latter and referring to it by the acronym “SQF.”⁵⁹

A. THE RISE OF SQF IN NEW YORK CITY

Like many cities across the United States, New York experienced a major spike in violence, crime, and disorder in the 1980s.⁶⁰ Much of the violence in New York was driven by the emergence of crack cocaine and competition for the drug market.⁶¹ Homicides climbed steadily from 1,392 in 1985 to 2,262 in 1990.⁶² At the same time, the city and subway system were struggling with rampant social and physical disorder.⁶³ Marijuana, heroin, cocaine, and crack cocaine were regularly and openly being sold on street corners, blocks, and city parks.⁶⁴ Kelling and Coles estimated that “[a]pproximately 1,200 to 2,000 persons a night” were sleeping in the subway system.⁶⁵

58. See Thomas B. McAfee, *Setting Us Up for Disaster: The Supreme Court’s Decision in Terry v. Ohio*, 12 NEV. L.J. 609, 612–13 (2012); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1278–79 (1998). For an in-depth discussion of how racial stereotypes contribute to police officer suspicion in the SQF context, see Henry F. Fradella, Weston J. Morrow & Michael D. White, *Terry and SQF Viewed Through the Lens of the Suspicion Heuristic*, 52 CRIM. L. BULL. 871 (2016).

59. See generally Jeffrey Fagan, “Race and the New Policing,” in the present Volume.

60. For a full discussion on the NYPD prior to 1994, see JAMES LARDNER & THOMAS REPPETTO, *NYPD: A CITY AND ITS POLICE* (2000).

61. See generally Roland G. Fryer, Jr. et al., *Measuring Crack Cocaine and Its Impact*, 51 ECON. INQUIRY 1651 (2013).

62. Michael D. White, *The New York City Police Department, Its Crime Control Strategies and Organizational Changes, 1970–2009*, 31 JUST. Q. 74, 79 (2014).

63. GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 117–18 (1996).

64. Bruce D. Johnson, Andrew Golub & James E. McCabe, *The International Implications of Quality-of-Life Policing as Practiced in New York City*, 11 POLICE PRAC. & RES. 17, 18 (2010).

65. KELLING & COLES, *supra* note 63, at 117–18.

The New York Transit Authority appointed William Bratton as chief of the transit police to address crime and disorder in the subway system.⁶⁶ Chief Bratton partnered with criminologist George Kelling to develop an enforcement strategy based on Wilson and Kelling's "broken windows" theory.⁶⁷ This broken-windows based strategy targeted low-level offenses (e.g., turnstile jumping), as well as social and physical disorder through frequent arrests and removals from the subway system.⁶⁸ Over the next two years, the level of disorder dropped dramatically, and felony offenses declined by 30%.⁶⁹

New York City Mayor Rudolph Giuliani appointed William Bratton to become the commissioner of the NYPD in 1994, and Bratton immediately began implementation of a broken-windows based strategy throughout New York.⁷⁰ Under Bratton (January 1994–April 1996) and his successors Howard Safir (April 1996–August 2000), Bernard Kerik (August 2000–January 2002), and Raymond Kelly (January 2002–January 2014), SQF emerged as one of the primary strategies not only to achieve order-maintenance by targeting disorder and quality-of-life offenses (e.g., replicating the subway strategy on a larger scale), but also as a means of reducing gun violence through the seizure of illegal firearms and through the intensive investigation of gun-related incidents.⁷¹ Importantly, the aggressive manner in which NYPD officers used SQF to achieve these ends ignored the principles of community policing, causing community resentment, rather than fostering police-community collaboration. This, in turn, contributed to critics charging that the NYPD over-enforced quality-of-

66. *The Life and Times of Incoming NYPD Commissioner William Bratton*, N.Y. DAILY NEWS (Dec. 5, 2013), <http://www.nydailynews.com/news/politics/timeline-new-nypd-commissioner-bratton-article-1.1538689>.

67. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. Broken windows theory posits that minor forms of social and physical disorder cause a breakdown in informal social control as citizen investment in an area diminishes. As citizens withdraw from the area, the level of disorder increases and the risk for more serious types of crime to emerge becomes greater. The theory suggests that police focus enforcement efforts on disorder and quality-of-life offenses as a mechanism for reengaging law-abiding citizens' commitment to the area. Under Chief Bratton, the transit police adopted a broken windows-based strategy in the subway system.

68. See Ana Joanes, *Does the New York City Police Department Deserve Credit for the Decline in New York City's Homicide Rates? A Cross-City Comparison of Policing Strategies and Homicide Rates*, 33 COLUM. J.L. & SOC. PROBS. 265 (2000) (citing Jackson Toby, *Reducing Crime: New York's Example*, WASH. POST, July 23, 1996, at A17).

69. *Id.* at 265.

70. Alison Mitchell, *Giuliani Appoints Bostonian to Run New York's Police*, N.Y. TIMES (Dec. 3, 1993), <http://www.nytimes.com/1993/12/03/nyregion/giuliani-appoints-bostonian-to-run-new-york-s-police.html>.

71. White, *supra* note 62, at 84.

life infractions through a zero-tolerance approach because officers could easily justify the stops under the reasonable suspicion standard.⁷² Nonetheless, the aggressive use of SQF as a department-wide strategy had the endorsement of Mayor Rudolph Giuliani (1994–2001) and Mayor Michael Bloomberg (2002–2013). Thus, SQF enjoyed political support for a considerable period of time and under two successive administrations that spanned nearly 20 years.

The NYPD's use of SQF increased steadily in the late 1990s into the 21st century. In 2003, for example, NYPD officers conducted more than 160,000 SQFs.⁷³ In 2003, the NYPD implemented "Operation Impact," a hot-spots strategy where police commanders identified 24 high-crime "Impact Zones" that would be targeted with "saturation foot patrol in combination with resources from a variety of departmental divisions."⁷⁴ SQF activity increased dramatically over the next several years, peaking at more than 685,000 in 2011.⁷⁵ As the frequency of stops increased, critics attacked the strategy's low rates of return. Jones-Brown and colleagues found that of the 540,320 stops in 2008, just 6.0% (32,206 stops) resulted in an arrest and an additional 6.4% (34,802 stops) resulted in a summons; thus, the percentage of "innocent stops"—those not resulting in summons or arrest—accounted for roughly 87.6%.⁷⁶ Similarly, the percentage of stops resulting in the recovery of a gun dropped from 0.39% (627 guns recovered out of a total of 160,851 stops, representing only one gun recovered per 257 stops) in 2003 to 0.15% in 2008 (824 guns recovered out of a total of 540,320 stops, representing only one gun recovered per 656 stops).⁷⁷ Furthermore, SQFs became an increasing basis for citizen complaints, rising

72. See, e.g., Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 476 (2000); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 *GA. L. REV.* 1253, 1282 (1999).

73. *Stop-and-Frisk Data*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Apr. 5, 2017); see also N.Y. POLICE DEP'T, *STOP, QUESTION AND FRISK REPORT DATABASE*, http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml (last visited Dec. 23, 2016) [hereinafter *NYPD STOP-AND-FRISK DATABASE*].

74. David Weisburd, Cody W. Telep & Brian A. Lawton, *Could Innovations in Policing Have Contributed to the New York City Crime Drop Even in a Period of Declining Police Strength?: The Case of Stop, Question and Frisk as a Hot Spots Policing Strategy*, 31 *JUST. Q.* 129, 136–37 (2014).

75. *Stop-and-Frisk Data*, *supra* note 73.

76. DELORES JONES-BROWN, JASPREET GILL & JENNIFER TRONE, *STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER* 10–11 (2010), http://static.prisonpolicy.org/scans/PRIMER_electronic_version.pdf.

77. *Id.* at 10–13 fig.8B.

from a quarter (24.6%) of all complaints filed against the police in 2004 to a third (32.7%) of all complaints in 2008⁷⁸

As the use of SQF expanded dramatically, the NYPD drifted away from the central tenets of broken-windows theory, and the program devolved into a strictly zero-tolerance approach against social disorder such as public drunkenness, vandalism, loitering, panhandling, prostitution, and the like.⁷⁹ In other words, rather than focusing on the “amelioration” of disorder in partnership with the community, the NYPD focused on the “interdiction” of disorder without regard to community policing practices.⁸⁰ These efforts led the NYPD to implement a set of practices that encouraged the aggressive pursuit of individuals through SQF, rather than mutually beneficial interactions with law-abiding citizens.⁸¹ This zero-tolerance mentality compounded the police department’s disconnect from the community, especially by de-emphasizing informal interactions between police and the community in the manner advocated by both community policing principles and broken-windows theory.⁸²

B. CRIME-CONTROL BENEFITS OF SQF

During the time that the NYPD implemented its order-maintenance strategy to target disorder, illegal gun carrying, and crime—with SQF as a central feature—the city witnessed a large, prolonged drop in recorded crime. “From its peak in 1990 until 2000, violent crime in the city dropped about 60.3%, and property crime declined 63.7%. . . . Between 2001 and 2010, violent crime dropped 37.2% and property crime declined 37.0%.”⁸³ These declines in

78. *Id.* at 14 fig.9.

79. Waldeck, *supra* note 72, at 1273–74.

80. Fagan & Davies, *supra* note 72, at 468.

81. Waldeck, *supra* note 72, at 1274.

82. Michael D. White, Henry F. Fradella & James R. Coldren, Jr., *Why Police (and Communities) Need ‘Broken Windows,’* CRIME REP. (Aug. 11, 2015), <http://thecrimereport.org/2015/08/11/2015-08-why-police-and-communities-need-broken-windows/> (explaining how SQF, as implemented by the NYPD, strayed far from the central principles of broken windows theory).

83. See Weisburd, Telep & Lawton, *supra* note 74, at 130 (reporting UCR data gathered from the annual *Crime in the United States* report and from the FBI’s UCR website, <http://www.fbi.gov/about-us/cjis/ucr/ucr>).

crime in New York City were at a level constituting roughly twice the national average.⁸⁴ The drop in homicides was even more pronounced. In 2007, there were 496 homicides in New York, down from 2,245 in 1990.⁸⁵

Proponents of SQF, such as former NYPD Commissioner Raymond Kelly and former New York City Mayor Michael Bloomberg, argue that these statistics are evidence that the strategy is effective.⁸⁶ But whether SQF caused or contributed to the crime decline in New York City is a hotly contested proposition.⁸⁷ Several studies suggest a causal connection (although some of these studies have been criticized for their methodological limitations). Corman and Mocan reported that misdemeanor arrests were associated with declines in robbery, motor-vehicle theft, and grand larceny, but not homicide, assault, burglary, and rape.⁸⁸ Similarly, Kelling and Sousa found that misdemeanor arrest levels were significantly associated with reductions in violent crime, while controlling for several relevant community factors.⁸⁹ Smith and Purtell found that Operation Impact had a significant effect on crimes-against-persons in Impact Zones.⁹⁰ Smith and Purtell also examined the effects of SQF on crime in New York, and they found that there was a significant inverse relationship between stop rates

84. *Id.*; see also FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2012).

85. Chris Mitchell, *The Killing of Murder*, N.Y. MAG. (Jan. 7, 2008), <http://nymag.com/nymag/features/42603/>; see also Richard Rosenfeld, Robert Fornango & Andres F. Rengifo, *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988-2001*, 45 CRIMINOLOGY 355, 375-77 (2007).

86. *New York Police Commissioner Ray Kelly Calls Stop-and-Frisk Decision 'Disturbing and Offensive'* (Transcript), N.Y. DAILY NEWS (Aug. 12, 2013), <http://www.nydailynews.com/news/politics/new-york-police-commissioner-ray-kelly-comments-stop-and-frisk-decision-article-1.1424689>; Michael R. Bloomberg, *'Stop and Frisk' Keeps New York Safe*, WASH. POST (Aug. 18, 2013), https://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aafe5a5f84_story.html.

87. For full treatment of this question, see 31 JUST. Q. 1 *et seq.* (2014) (special issue on the New York City crime decline).

88. Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 255 tbl.3 (2005); see also ROBERT C. DAVIS & PEDRO MATEU-GELABERT, *RESPECTFUL AND EFFECTIVE POLICING: TWO EXAMPLES IN THE SOUTH BRONX* (1999), http://archive.vera.org/sites/default/files/resources/downloads/respectful_policing.pdf.

89. GEORGE L. KELLING & WILLIAM H. SOUSA, JR., *MANHATTAN INST., DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS* (2001), http://www.manhattan-institute.org/pdf/cr_22.pdf.

90. DENNIS C. SMITH & ROBERT PURTELL, *AN EMPIRICAL ASSESSMENT OF NYPD'S "OPERATION IMPACT": A TARGETED ZONE CRIME REDUCTION STRATEGY 9* (2007), <http://wagner.nyu.edu/files/faculty/publications/impactzoning.doc>.

and robbery, burglary, motor-vehicle theft, and homicides rates.⁹¹ Zimring argued that New York’s crime decline from 1990 through 2009 was largely attributable to the NYPD’s policing practices, although he emphasized that he could not disentangle stop-and-frisk from other changes in policing that occurred at about the same time.⁹²

Conversely, there are a number of more recent studies—many of which used more sophisticated quantitative methods than the first wave of empirical research on the impact of SQF on crime New York City—that indicate the relationship between SQF and the crime decline in New York City is modest at best.⁹³ For instance, Rosenfeld and Fornango found that police stops did not decrease robbery and burglary rates.⁹⁴ In a re-analysis of Kelling and Sousa’s data, Harcourt and Ludwig found no significant relationships between policing minor disorder offenses and New York City’s crime decline.⁹⁵ MacDonald and colleagues conducted a comprehensive examination of the crime effects of Operation Impact (with a specific focus on SQF). They concluded that “saturating high crime blocks with police helped reduce crime in New York City, but that the bulk of the investigative stops did not play an important role in the crime reductions. The findings indicate that crime reduction can be achieved with more focused investigative stops.”⁹⁶ This conclusion is bolstered by recent New York City crime data. Although the number of stops conducted by NYPD officers declined by more than 90% between 2011 (the height of the SQF program) and 2014 (the year after SQF was discontinued as part of the

91. See Report of Dennis C. Smith, Ph.D. at 19 & 63, n.32, *Floyd v. City of New York*, 813 F. Supp. 2d 457 (S.D.N.Y. Nov. 15, 2010) (No. 08 Civ. 01034), 2010 WL 9532297 (citing Dennis Charles Smith & Robert Purtell, *Does Stop-and-Frisk Stop Crime?* (paper presented at the Annual Research Conference of the Association of Public Policy and Management, Nov. 2008)); see also Dennis C. Smith, *Stop and Frisk Has Lowered Crime in Other Cities*, N.Y. TIMES (July 19, 2012), <http://www.nytimes.com/roomfordebate/2012/07/17/does-stop-and-frisk-reduce-crime/stop-and-frisk-has-lowered-crime-in-other-cities>.

92. ZIMRING, *supra* note 84.

93. Magdalena Cerdá et al., *Misdemeanor Policing, Physical Disorder, and Gun-Related Homicide: A Spatial Analytic Test of “Broken-Windows” Theory*, 20 EPIDEMIOLOGY 533, 537–38 (2009); Magdalena Cerdá et al., *Investigating the Effect of Social Changes on Age-Specific Gun-Related Homicide Rates in New York City During the 1990s*, 100 AM. J. PUB. HEALTH 1107, 1111–12 (2010); Rosenfeld, Fornango & Rengifo, *supra* note 85, at 375–77.

94. Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003-2010*, 31 JUST. Q. 96, 116 (2014).

95. Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 276–77 (2006).

96. John MacDonald, Jeffrey Fagan & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, 11 PLoS 1 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614058.

settlement of the lawsuits in which the NYPD's use of SQF was found to be unconstitutional), the quality of those stops has increased and the crime rate has continued to decrease:

The percentage of stops resulting in arrest has more than doubled. The percentage of stops where weapons and contraband were seized remain low, but those percentages have doubled or tripled compared to the 2011 rates. In short, the NYPD has altered its day-to-day practices with regard to stop-and-frisk, to the benefit of thousands of New Yorkers. And importantly, the reforms in the NYPD's stop-and-frisk program coincided with continued declines in crime and violence in New York, especially homicides, which declined by 35% from 2011 to 2014.⁹⁷

Notably, the decrease in the overall crime rate and the homicide rate, in particular, has continued: 2016 formed a record low for homicides in New York, down approximately 4% from 2015.⁹⁸

C. THE SOCIAL COSTS

Regardless of the impact on crime, there is considerable evidence demonstrating that the NYPD's SQF program exacted significant social costs that were disproportionately experienced by members of racial and ethnic minority groups. By the end of the 1990s, SQF had become a point of contention among ethnic minorities. A Vera Institute of Justice study examined the experiences of more than 500 people who had been stopped by the NYPD:

1. 44% of young people surveyed indicated they had been stopped repeatedly—nine times or more.
2. Less than a third—29%—reported ever being informed of the reason for a stop.
3. 71% of young people surveyed reported being frisked at least once, and 64% said they had been searched.
4. 45% reported encountering an officer who threatened them, and 46% said they had experienced physical force at the hands of an officer.

97. Michael D. White et al., *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 62–63 (2016).

98. NEW YORK CITY POLICE DEPT., CITYWIDE SEVEN MAJOR FELONY OFFENSES, 2000-2016 (2017), http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/seven-major-felony-offenses-2000-2016.pdf.

5. One out of four said they were involved in a stop in which the officer displayed his or her weapon.
6. 61% stated that the way police acted toward them was influenced by their age.
7. 51% indicated that they were treated worse than others because of their race and/or ethnicity.⁹⁹

The racial focus of SQF was acknowledged and minimized by New York City and NYPD leaders.¹⁰⁰ Former Mayor Michael Bloomberg stated publicly that, according to the department's statistics on violent-crime suspects, "we disproportionately stop whites too much and minorities too little."¹⁰¹ In 2013, an officer in the 40th precinct recorded his commanding officer directing him to stop "the right people, at the right time, at the right location," described as "male blacks, 14 to 20, 21."¹⁰² The Center for Constitutional Rights (CCR) interviewed 54 people who had been subjected to SQF in order to paint a clearer picture of the "human impact" of the program. The CCR concluded:

99. JENNIFER FRATELLO ET AL., COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS iii, 34 fig.14 (2013), http://archive.vera.org/sites/default/files/resources/downloads/stop-and-frisk_technical-report.pdf.

100. See, e.g., Ray Kelly, *The NYPD: Guilty of Saving 7,383 Lives*, WALL ST. J. (July 22, 2013), <http://www.wsj.com/articles/SB10001424127887324448104578616333588719320>.

101. Jennifer Fermino, *Mayor Bloomberg on Stop-And-Frisk: It Can Be Argued 'We Disproportionately Stop Whites Too Much. And Minorities Too Little.'* N.Y. DAILY NEWS (June 28, 2013), <http://www.nydailynews.com/new-york/mayor-bloomberg-stop-and-frisk-disproportionately-stop-whites-minorities-article-1.1385410>. It should be noted that Bloomberg was essentially making the case that police should be stopping and searching people of various races, ethnicities, genders, and ages in rough proportion to their representation in the known offending population. Conversely, many critics of disparate rates of police stops and other interventions base their criticism on a contrary assumption, namely that police ought to stop people of various demographic groups on the basis of their representation in the general population of that jurisdiction (or perhaps of the relevant neighborhood). The lack of consensus as to which is the proper basis for calculating disparity leads to debates about the propriety of police practices that cannot be resolved. Even if, for the sake of argument, the latter approach were used to measure racial and ethnic disparities (which we do not endorse), that would not necessarily translate into the propriety of police practices premised on that measurement approach. Put differently, even if it were proven that young Black men were disproportionately represented among offenders of certain crimes (a supposition we reject, but offer here only for the sake of argument), that fact would not, in and of itself, justify SQF practices that targeted young Black men. Rather, it would call for consideration of alternate police strategies that could yield the same crime-control benefits without incurring the same police-legitimacy costs.

102. Graham Rayman, *New NYPD Tapes Introduced in Stop and Frisk Trial*, VILLAGE VOICE (Mar. 22, 2013), <http://www.villagevoice.com/news/new-nypd-tapes-introduced-in-stop-and-frisk-trial-6721026>.

These interviews provide evidence of how deeply this practice impacts individuals and they document widespread civil and human rights abuses. ... The effects of these abuses can be devastating and often leave behind lasting emotional, psychological, social, and economic harm. ... Residents of some New York City neighborhoods describe a police presence so pervasive and hostile that they feel like they are living in a state of siege.¹⁰³

The overt racially charged statements by city and police leaders, along with clear racial disproportionality in the administration of the SQF program, illustrates the persistent undercurrent of racial injustice in New York City policing. Unfortunately, though, New York is not the only U.S. city with such problems. Allegations of widespread unconstitutional SQF practices have been made in many jurisdictions, including Philadelphia, Pennsylvania; Newark, New Jersey; Miami Gardens, Florida; and Chicago, Illinois, just to name a few that resulted in either class-action civil litigation or in-depth media investigations.¹⁰⁴ As was the case in New York, both Fourth Amendment (i.e., stops are being made without reasonable suspicion) and Fourteenth Amendment (i.e., racial profiling) concerns permeated policing practice in spite of the low “hit rates” such strategies yielded.¹⁰⁵

Also consider the highly publicized deaths of Eric Garner, Michael Brown, and Freddie Gray—all of which stemmed from *Terry* stops.¹⁰⁶ On July 17, 2014, NYPD officers approached Eric Garner on a street corner in Staten Island

103. CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 1 (2012), <http://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>.

104. See, e.g., Complaint at 21, *Bailey v. City of Philadelphia*, No. 210CV05952, 2010 WL 4662865 (E.D. Pa. Nov. 4, 2010), http://www.aclupa.org/download_file/view_inline/669/198/; Settlement Agreement, Class Certification & Consent Decree at 3–5, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. June 21, 2011), http://www.aclupa.org/download_file/view_inline/744/198/; Plaintiffs’ Third Report to Court and Monitor on Stop and Frisk Practices at 4, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. Mar. 19, 2013), <http://www.clearinghouse.net/chDocs/public/PN-PA-0013-0003.pdf>; UDI OFER & ARI ROSMARIN, AM. CIVIL LIBERTIES UNION OF N.J., STOP-AND-FRISK: A FIRST LOOK 5–9 (2014), https://www.aclu-nj.org/files/8113/9333/6064/2014_02_25_nwksnf.pdf; Alice Brennan & Dan Lieberman, *Florida City’s “Stop and Frisk” Nabs Thousands of Kids, Finds 5-year-olds “suspicious,”* FUSION (May 9, 2014), <http://fusion.net/story/5568/florida-citys-stop-frisk-nabs-thousands-of-kids-finds-5-year-olds-suspicious/>; AM. CIVIL LIBERTIES UNION OF ILL., STOP AND FRISK IN CHICAGO 2 (2015), http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf.

105. See the sources cited in note 104, *supra*. See also Fagan, *supra* note 59; Harris, *supra* note 8.

106. See generally L. Song Richardson, “Police Use of Force,” in the present Volume.

because they suspected that he was selling unlicensed cigarettes.¹⁰⁷ The incident was captured on a bystander's cell phone. After brief questioning, officers attempted to take Garner, a 400-pound man, into custody. During the struggle, Officer Daniel Pantaleo applied a chokehold and Garner can be heard stating nearly a dozen times that he cannot breathe. Garner lost consciousness after the struggle; he was pronounced dead an hour later. Five months later, a grand jury refused to indict Officer Pantaleo, sparking waves of protests.¹⁰⁸

On August 9, 2014, Ferguson police officer Darren Wilson observed Michael Brown and Dorian Johnson walking in the middle of the street. There is no video of the incident and the facts are disputed, but what is clear is that the initial stop of Brown and Johnson led to a struggle between Wilson, who was still seated in his patrol car, and Brown, who was next to the car.¹⁰⁹ Physical evidence supports Officer Wilson's assertion that there was a struggle over Wilson's gun and that one shot was fired while he was still in his car.¹¹⁰ Wilson got out of the patrol car and fired several more shots that killed Michael Brown. Officer Wilson claimed that Brown had turned and was charging at him. Other testimony indicated that Brown had his hands up and was posing no threat to Wilson.¹¹¹ Protests and civil disorder began shortly after Brown's death and continued for several days. On August 16, 2014, Missouri Gov. Jay Nixon declared a state of emergency in Ferguson. On November 24, 2014, a grand jury declined to indict Officer Wilson for Michael Brown's death.¹¹²

On April 12, 2015, Baltimore police officers attempted to stop and question Freddie Gray. Gray fled from the officers, but he was quickly taken into custody and arrested for possessing an illegal switchblade. During his transport in a

107. See Jericka Duncan, *Eric Garner Case: Video of Chokehold's Aftermath Raises New Questions*, CBS NEWS (Dec. 6, 2014), <http://www.cbsnews.com/news/second-tape-of-nypd-chokehold-raises-new-questions-in-eric-garner-case/>.

108. *Id.*; see also J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

109. Matt Pearce, *Back Story: What Happened in Michael Brown Shooting in Ferguson, Mo.?*, L.A. TIMES (Nov. 24, 2014), <http://www.latimes.com/nation/la-na-back-story-ferguson-shooting-story.html>.

110. U.S. DEP'T OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 16–26 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

111. *Id.* at 27–35.

112. Monica Davey & Julie Bosman, *Protests Flare after Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

police van, Gray slipped into a coma and died several days later on April 19.¹¹³ Autopsy findings indicate that Gray died from injuries to his spinal cord.¹¹⁴ Though there are questions about whether force was used during the arrest, Baltimore Police Commissioner Anthony Batts acknowledged that Freddie Gray was not properly secured during the van transport. Protests and civil disorder erupted after Gray's death. On May 1, 2015, six officers were charged with Freddie Gray's death by the State Attorney's Office, and on May 21, 2015, a grand jury indicted the six officers.¹¹⁵ A mistrial was declared in the first trial of one of the officers after the jury failed to reach a unanimous verdict.¹¹⁶ Three other officers were acquitted in separate bench trials between May and July of 2016, which, in turn, led the state to drop the charges against all of the remaining officers.¹¹⁷

The numerous allegations of racial profiling that have emerged in the wake of stop-and-frisk programs, and the deaths of Eric Garner, Michael Brown, and Freddie Gray, demonstrate the persistent undercurrent of racial injustice in American policing. Moreover, the perceived discriminatory treatment of racial and ethnic minorities during SQF adversely affects citizen trust and faith in the police. This problem is likely to be exacerbated as the expanding interpretation of the Second Amendment results in so many citizens legally carrying firearms,¹¹⁸ a fact which, in turn, can combine with implicit bias to create a suspicion profile that targets young men of racial and ethnic minority backgrounds.¹¹⁹

113. David A. Graham, *The Mysterious Death of Freddie Gray*, THE ATLANTIC (Apr. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-mysterious-death-of-freddie-gray/391119/>.

114. Justin Fenton, *Autopsy of Freddie Gray Shows 'High-energy' Impact*, BALTIMORE SUN (June 24, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-autopsy-20150623-story.html>.

115. Richard Pérez-Peña, *Six Baltimore Officers Indicted in Death of Freddie Gray*, N.Y. TIMES (May 21, 2015), <http://www.nytimes.com/2015/05/22/us/six-baltimore-officers-indicted-in-death-of-freddie-gray.html>.

116. Justin Fenton & Kevin Rector, *Mistrial Declared in Trial of Officer William Porter in Death of Freddie Gray*, BALTIMORE SUN (Dec. 16, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-porter-trial-jury-wednesday-20151216-story.html>.

117. Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALTIMORE SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html>.

118. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010); see also Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1 (2015); Franklin E. Zimring, "Firearms and Violence," in Volume 1 of the present Report.

119. See Fradella et al., *supra* note 58.

Research strongly demonstrates that procedural justice—or the manner in which police are perceived to treat citizens—is crucial to achieving police legitimacy.¹²⁰ Furthermore, the President’s Task Force on 21st Century Policing recently concluded that “[t]rust between law enforcement agencies and the people they protect is essential in a democracy.”¹²¹ To foster trust and legitimacy, police officers must be impartial and consistent in their decisions, and must treat all people with dignity, fairness, and respect. The community policing and police legitimacy frameworks provide an important lens for consideration of the role of stop-and-frisk going forward.

III. ASSESSMENT: WAYS TO FIX STOP-AND-FRISK

Aggressive SQF strategies (i.e., those enacted department-wide through either formal or informal policies) have no place in 21st-century policing. Not only do such broad strategies lend themselves to racial and ethnic profiling along the lines of which occurred in New York City, but they also damage police-community relations in ways that stray from the tenets and aims of broken-windows theory. But stop-and-frisk as a particularized tactic—one that is judiciously employed by individual police officers when objective circumstances give rise to reasonable suspicion of criminal activity—can help prevent crime if the practice is viewed as an exercise in police discretion. With that in mind, we offer suggestions for reforming stop-and-frisk as a tactic using the vast literature on the control of police discretion.

Ideally, an officer witnesses something that generates reasonable suspicion (i.e., bulge in the waistband, behavior suggesting potential criminal activity), and then initiates a stop. This decision to stop a civilian, and consequently to conduct a frisk (or even a search), is based in officers’ discretionary authority. Many influences impact the development of individual police officer discretionary behaviors, including their training, expertise, and overall field experience. Stop-and-frisks that are discriminatory or otherwise fail to meet the constitutionally required threshold are of main concern

120. Tom R. Tyler, *Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006); John E. Eck & Dennis Rosenbaum, *The New Police Order: Effectiveness, Equity, and Efficiency in Community Policing*, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES 3 (Dennis Rosenbaum ed., 1994).

121. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

and generate controversy surrounding police-initiated stops of citizens.¹²² Therefore, it is important to explore how police departments can control their officers' decisions to initiate stops of citizens, to ensure that such stops meet constitutional standards and do not violate citizens' rights, and to mitigate the potential for police misconduct.

For more than 40 years, researchers have investigated how to impact officers' situational decision-making during encounters with citizens. These efforts have explored predictors of a range of behaviors, including arrest, use of force (including deadly force), decisions to conduct automobile pursuits, and use of canines. One empirically evident fact is that combating police misconduct is complex and goes far beyond quick fixes (e.g., increased training) or removing a few "bad apples" that consistently make poor decisions.¹²³ Additionally, various aspects of police culture can further inhibit attempts to stem police misconduct at the department level. Research has consistently demonstrated the powerful nature of the informal police culture, particularly with regard to how it can shape officer behavior in the field, and how difficult it is to change.¹²⁴

Clearly, the challenges surrounding these are daunting and they must be addressed in the context of the larger historical backdrop of racial injustice in American policing. However, the larger body of research on police discretion offers numerous lessons that can guide effective reform. Police departments should consider adopting changes reflective of the following recommendations in order to prevent their officers from engaging in racially biased or otherwise improper and illegal behavior during stops of citizens: recruitment, training, administrative policies, supervision with corresponding accountability, and external oversight.

122. It should be noted that it might be possible to eradicate discrimination in stop-and-frisks and ensure that all stops are conducted in accordance with the Constitution, but nonetheless still have a problem with how people perceive stop-and-frisk as a tactic. That is because stops are inherently intrusive and unpleasant and frisks are even more so. Adherence to the four tenets of procedural justice (voice, transparency, fairness, and impartiality) can help minimize these concerns, but since no one likes being stopped, it very may well be that the public might prefer other approaches to policing that can prevent crime without depending significantly on intrusive and unpleasant police actions. But such solutions are beyond the scope of this chapter and our arguments for reforming stop-and-frisk as a police practice.

123. JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993).

124. *Id.*; JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* (1966).

A. CAREFUL SELECTION OF PERSONNEL

In 1967, the President's Commission on Law Enforcement and the Administration of Justice established standards for the screening of police recruits.¹²⁵ As a result, law enforcement agencies have implemented processes to screen out applicants ill-suited for the profession due to concerns over mental health, criminal history, poor credit, troubling interpersonal relationships, and other "red flags," especially through the use of thorough background checks.¹²⁶ The screening-out process typically occurs within the context of concerns over corruption and brutality, but the lessons are equally relevant for abuse of discretion in stop-and-frisk.

A screening-in process is also important. Despite the limited success of efforts to identify predictors of good policing, relevant personal attributes certainly include good judgment, an even temperament, respect and appreciation for diversity, creativity and problem-solving skills, ability to think on one's feet and handle pressure, and leadership skills.¹²⁷ Additionally, scholars have noted a need for a college education to develop the relevant skills to be an effective police officer and reduce the likelihood of misconduct.¹²⁸ One recent study found that departments with an associate's degree requirement for applicants experienced fewer citizen complaints of police use of force and fewer citizen assaults on their officers.¹²⁹ Officers who possess empathy, moral acceptance of coercive authority, protection of the vulnerable, and problem-solving, what some have called good craftsmanship, will be less likely to engage in racially biased and otherwise improper behavior during encounters of any kind with citizens.¹³⁰ Therefore, departments should carefully and aggressively seek out these characteristics.¹³¹

125. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967).

126. See JAMES J. FYFE & ROBERT J. KANE, *BAD COPS: A STUDY OF CAREER-ENDING MISCONDUCT AMONG NEW YORK CITY POLICE OFFICERS* (Feb. 2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/215795.pdf>; WILLIAM K. MUIR, *POLICE: STREETCORNER POLITICIANS* (1977).

127. J. Douglas Grant & Joan Grant, *Officer Selection and the Prevention of Abuse of Force, in AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 150 (William A. Geller & Hans Toch eds., 1995).

128. Christopher J. Harris, *The Onset of Police Misconduct*, 37 *POLICING: INT'L J. POLICE STRATEGIES & MGMT.* 285 (2014).

129. John A. Shjarback & Michael D. White, *Departmental Professionalism and its Impact on Indicators of Violence in Police-Citizen Encounters*, 19 *POLICE Q.* 32 (2016).

130. Egon Bittner, *The Police on Skid Row: A Study of Peace Keeping*, 32 *AM. SOC. REV.* 699 (1967).

131. For a more in-depth discussion of both screening-out and screening-in processes, see WHITE & FRADELLA, *supra* note 7, at 117–123.

B. TRAINING

Careful recruit selection must be followed with effective training in the police academy, as well as later through field and in-service training. At the academy, the goal of training is to provide officers with the basic skills and knowledge necessary to become a police officer. Cadets must receive a clear message at this early stage that racially biased stop-and-frisks are inappropriate, illegal, and will not be tolerated. Following graduation from the academy, officers are typically assigned to a veteran officer for a period of field training. This is a formative stage of a police officer's career, and it is critically important for field-training officers to impart the message that racially biased *Terry* stops are not consistent with the principles of good policing. The final form of training, called "in service," where officers periodically receive additional training while on the job, can be used to "refresh" officers on ethical issues, such as avoiding discriminatory decision-making, and to resend the message that the department leadership denounces racial bias and expects the same from its officers.

Properly trained officers are less likely than poorly trained officers to engage in unconstitutional stop-and-frisk practices. Fyfe's work exploring the impact of training on violence provides several suggestions for successful training practices, including that it should be: realistic (adult learning, role plays, instruction by legal experts, and coverage of implicit bias¹³² and its effect on the suspicion heuristic¹³³) and continuous; tailored to the department and the community; and focused on the means (or process), not just the ends (i.e., avoiding the split-second syndrome).¹³⁴ Similarly, Bayley and Bittner stated that learning can be "accelerated and made more systematic" by relevant training that brings the reality of police work into the academy.¹³⁵ Fyfe's arguments on the importance of training are persuasive:

The development of successful boxers, diplomats, combat soldiers, and trial lawyers demonstrates that maintaining one's temper under stressful and confrontational conditions is a skill that can be taught. At the broadest level, police training designed to do so may involve providing students with what Muir called

132. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* (2016); JUSTIN D. LEVINSON & ROBERT J. SMITH, *IMPLICIT RACIAL BIAS ACROSS THE LAW* (2012).

133. Fradella et al., *supra* note 58.

134. James J. Fyfe, *Training to Reduce Police-Civilian Violence*, in *AND JUSTICE FOR ALL*, *supra* note 127, at 165.

135. David H. Bayley & Egon Bittner, *Learning the Skills of Policing*, 47 *LAW & CONTEMP. PROBS.* 35, 53 (1984).

understanding—a nonjudgmental sense that people’s behavior, no matter how bizarre or provocative, may usually be explained by factors that go beyond the dichotomy of good and evil. ... Even if genuine *understanding*, as defined by Muir, cannot be imparted to individuals who bring extremely narrow views to policing, officers can be made to know in training that they simply will not be permitted to act out their prejudices through violent, or even discourteous conduct.¹³⁶

By adopting evidenced-based training policies, law-enforcement agencies can create an environment of intolerance toward unconstitutional stop-and-frisk practices, other forms of police misconduct, and better meet the needs of their respective communities.¹³⁷

C. ADMINISTRATIVE POLICY

Administrative guidance in the form of policies, rules, and procedures communicates to officers what a police department expects, what is considered acceptable, and what will not be condoned.¹³⁸ An administrative-rulemaking framework that has three basic components helps to ensure accountability with regard to critical incidents, such as use of force.¹³⁹ First, agencies should develop written policies that specify what is (and what is not) appropriate behavior during given circumstances. Second, agencies should require officers to write a written report following a critical incident. Third, agencies should require supervisory review of critical-incident reports to ensure the officer acted within policy and law.

136. Fyfe, *supra* note 134, at 174. Notably, Fyfe put these principles in practice as part of the Metro-Dade Police/Citizen Violence Reduction Project, which culminated in the development of a five-day role-play training program. Results from the project indicate substantial reductions in use of force, officer injuries and citizen complaints after the training program was implemented. James J. Fyfe, *Police/Citizen Violence Reduction Project*, 58 FBI L. ENFORCEMENT BULL. 18 (1989).

137. For a more in-depth discussion how training helps to control discretionary decision-making by law enforcement officers, see WHITE & FRADELLA, *supra* note 7, at 124–131.

138. VICTOR E. KAPPELER, RICHARD D. SLUDER, & GEOFFREY P. ALPERT, *FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING* (1998).

139. SAMUEL WALKER & CARL A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2d ed. 2014).

The adoption of clearly articulated policies governing police stops of citizens, with specific prohibitions of racial profiling, is absolutely crucial for controlling police behavior.¹⁴⁰ The body of research that highlights police departments' success in managing officer discretion across a wide range of police actions provides an important backdrop for consideration of stop-and-frisk practices. Supervisory review and accountability is especially critical for stop-and-frisk because the practice generally does not reach the level of being classified as a critical incident. The "invisible" nature of such stops presents a unique challenge for effective discretionary control and guidance. That said, it is well established that officers' behavior changes when they know that violations of policy will have consequences. In plain terms, officers seek to avoid behavior that will get them into administrative trouble. This has been demonstrated across a range of officer field behaviors, particularly with use of deadly force¹⁴¹ and automobile pursuits,¹⁴² and it applies equally well to stop-and-frisk.¹⁴³

D. SUPERVISION AND ACCOUNTABILITY

Supervision of police officers is a critical department task that serves as a foundational element in the agency's effort to control officer field behavior, including stop-and-frisk practices.¹⁴⁴ Key principles of effective police supervision include proper span of control (8-10 officers per sergeant), proper training (good supervision can and should be taught), and holding supervisors accountable for the behavior of their subordinates.¹⁴⁵ The International Association of Chiefs of Police stated that "many officers face temptations

140. As Barry Friedman and Maria Ponomarenko suggest, the public has an important role to play in the development of these policies. Public participation in policymaking promotes accountability and increases transparency, both of which can help improve policy legitimacy in eyes of community members. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); Barry Friedman & Maria Ponomarenko, "Democratic Accountability and Policing," in the present Volume.

141. James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165 (1988).

142. GEOFFREY P. ALPERT, *POLICE PURSUIT: POLICIES AND TRAINING* (1997).

143. For a more in-depth discussion of the role administrative policy plays in limiting the exercise of unbridled police discretion, see WHITE & FRADELLA, *supra* note 7, at 132-37.

144. See generally THE MOLLEN COMMISSION, ANATOMY OF FAILURE, A PATH FOR SUCCESS: THE REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE NEW YORK CITY POLICE DEPARTMENT (1994), <https://archive.org/download/MollenCommissionNYPD/4%20-%20Mollen%20Commission%20-%20NYPD.pdf>. As an example of the importance of supervision with corresponding accountability, Weisburd and colleagues reported that nearly 90% of police officers surveyed agreed that effective supervision prevents misconduct such as racially-biased policing. DAVID WEISBURD ET AL., *POLICE ATTITUDES TOWARD ABUSE OF AUTHORITY: FINDINGS FROM A NATIONAL STUDY* (2000).

145. KAPPELER ET AL., *supra* note 138; SKOLNICK & FYFE, *supra* note 123.

every day ... management has the capacity and control to reinforce high integrity, detect corruption, and limit opportunities for wrongdoing.¹⁴⁶ These words apply to *Terry* stops as well as they do for other forms of police field behavior. Simply put, if officers believe they will be caught and punished for unconstitutional stop-and-frisk behaviors, they will be less likely to engage in those activities.¹⁴⁷ Technology like body-worn cameras (BWCs) offer a unique opportunity for police departments to track and monitor officers through systematic (or at least periodic) review of BWC footage.¹⁴⁸ For example, supervisory authority to review BWC footage could be structured in a number of ways to enhance accountability. Review authority could be limited to a specific set of encounters, circumstances, or officers (e.g., all use-of-force encounters; only probationary officers). Supervisory authority could also be random or systematic, where a sergeant is required to review some number of randomly selected videos per month for each officer. Finally, supervisor authority to review BWC footage of officers could be broad and unfettered (e.g., sergeant has authority to review any video at any time). Supervisor authority to examine BWC footage that captures stop-and-frisk activities could be included in any of the aforementioned review protocols.¹⁴⁹

E. EXTERNAL OVERSIGHT

The auditor model of oversight offers great promise as a reform and accountability mechanism. Under this model, one individual (or office) with some degree of legal and/or policing expertise serves as a full-time independent auditor. Auditors are typically permanent positions created by local or state law, and in the vast majority of cases, they have much greater authority than the more traditional citizen oversight board.¹⁵⁰ Specific functions of an auditor include a range of activities such as auditing the complaint process, auditing police operations (which can include review of BWC footage), policy review, community outreach, and contributing to transparency by publishing reports that detail the activities of the auditor.¹⁵¹ External oversight through an independent auditor provides a critically important check on police officers'

146. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, BUILDING INTEGRITY AND REDUCING DRUG CORRUPTION IN POLICE DEPARTMENTS 53 (1989).

147. CARL B. KLOCKARS ET AL., THE MEASUREMENT OF POLICE INTEGRITY (2000).

148. See generally MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE (2014).

149. For a more in-depth discussion of the importance of supervision, accountability, and commitment from the top of policing organizations in influencing the exercise of police discretion, see WHITE & FRADELLA, *supra* note 7, at 137–41.

150. WALKER & ARCHBOLD, *supra* note 139.

151. *Id.*

discretionary decision-making.¹⁵² For an auditor to be particularly useful, we echo David A. Harris' suggestion that the police compile data on every pedestrian stop, including: (1) a description of the time, place, and length of the stop; (2) the race or ethnic group of the person stopped as perceived by the officer; (3) the behavior witnessed by the officer that led to the stop; (4) whether a frisk was performed; (5) whether the frisk revealed a weapon and the type of weapon; (6) whether the frisk revealed other contraband and the type of contraband; and (6) whether a warning, citation or arrest occurred, and for what offense.¹⁵³

RECOMMENDATIONS

There is little consensus on the crime-control effects of SQF in New York City or similar programs elsewhere. Although New York experienced a significant crime decline that coincided with numerous changes in the NYPD under William Bratton's leadership—one of which was increased use of SQF—crime declined in many other places that did not employ aggressive use of stop-and-frisk. Moreover, the NYPD's overuse and misuse of stop-and-frisk violated the constitutional rights of thousands of New Yorkers. The unconstitutional SQF program produced severe collateral consequences that negatively affected the emotional and physical well-being of thousands of New Yorkers; caused significant damage to the NYPD's relationship with members of racial and ethnic minority groups in neighborhoods throughout the city; and seriously impaired the NYPD's ability to effectively fight crime in those neighborhoods. Unfortunately, the experiences in New York were witnessed in other jurisdictions that also overused and misused stop-and-frisk.

Terrystops were intended to be used as an individualized crime-investigation tactic that police could employ in response to suspect behaviors that generated reasonable suspicion of criminal activity.¹⁵⁴ But the SQF program in New York City expanded far beyond these original intentions into a pervasive, department-wide surveillance program that sought to generate deterrence through fear of being stopped. A program designed in this manner is at great risk of producing unconstitutional behavior on the part of the police.¹⁵⁵ Moreover, the deployment of an NYPD-like SQF program in communities

152. For a more in-depth discussion of how oversight helps to limit the exercise of police discretion, see WHITE & FRADELLA, *supra* note 7, at 141–45.

153. Harris, *supra* note 8.

154. Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015).

155. Jeffrey Bellin, *The Inverse Relationship between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495 (2014).

where the racial-injustice undercurrent is strong will undoubtedly exacerbate tensions between police and minority citizens, and will quickly erode the limited reserves of police legitimacy. When police-minority community relations reach this level, they represent a powder keg that will explode in the wake of a controversial arrest, use of force, or citizen death. Michael Brown in Ferguson and Freddie Gray in Baltimore demonstrate this tragic point.

1. **Because stop-and-frisk is, in its most basic form, an exercise in discretion, the literature on effective police discretion control offers lessons for reforming stop-and-frisk activities.** Those lessons are grounded in careful recruit selection, training, administrative policy, supervision, accountability, and external oversight. In particular, an auditor can assess the legality of stops and can engage with citizens to assess the potential for collateral consequences.
2. **Technology also offers potential to control officer decision-making during stop-and-frisk activities.** For example, *big data*—“vast troves of information that can be used by police such as databases that capture criminal and driving history, biometric data, employment and housing records, spending habits, and a wide range of other individually-specific behaviors or attributes”¹⁵⁶—could be harnessed in ways that satisfy the Fourth Amendment’s requirements for particularized suspicion justifying a *Terry* stop.¹⁵⁷ And BWC footage can be reviewed by first-line supervisors, training units, internal affairs units, or by external auditors. The technology also represents an opportunity for police departments to demonstrate accountability and transparency to their communities.
3. **Finally, stop-and-frisk, if used justly and selectively (and not as a widespread deterrence-based program), can be successfully applied within a number of contemporary policing frameworks that stress procedural justice,** such as community-oriented policing and problem-oriented policing. Procedural justice involves treating people with dignity and respect; giving individuals “voice” during encounters (an opportunity to tell their side of the story); being neutral and transparent in decision-making; and conveying trustworthy motives.¹⁵⁸ Stop-and-frisk activities

156. WHITE & FRADELLA, *supra* note 7, at 178.

157. See Ferguson & Bernache, *supra* note 46, at 1607–08 (2008); Jackson Polansky & Henry F. Fradella, *Does ‘Precrime’ Mesh with the Ideals of U.S. Justice? Implications for the Future of Predictive Policing*, 15 CARDOZO PUB. L., POL’Y, & ETHICS J. (forthcoming 2017). For a discussion of some of these issues, see Christopher Slobogin, “Policing, Databases, and Surveillance,” in the present Volume.

158. LORRAINE MAZEROLLE AT AL., LEGITIMACY IN POLICING (2012).

should be examined critically in terms of legal standards (was there articulable reasonable suspicion?) and in terms of procedural justice standards. During a stop-and-frisk, was the citizen treated with dignity and respect? Was the citizen given an opportunity to tell his or her side of the story? Was the officer neutral and transparent? Did the officer convey trustworthy motives? Police departments that benchmark their stop-and-frisk practices along these standards, while applying the lessons described above, will achieve police legitimacy in the eyes of their citizens and will emerge as leadership organizations in 21st-century policing.

Race and the New Policing

Jeffrey Fagan*

Several observers credit nearly 25 years of declining crime rates to the “New Policing” and its emphasis on advanced statistical metrics, new forms of organizational accountability, and aggressive tactical enforcement of minor crimes. This model has been adopted in large and small cities, and has been institutionalized in everyday police-citizen interactions, especially among residents of poorer, often minority, and higher-crime areas. Citizens exposed to these regimes have frequent contact with police through investigative stops, arrests for minor misdemeanors, and non-custody citations or summons for code violations or vehicle infractions. Two case studies show surprising and troubling similarities in the racial disparities in the new policing in vastly different areas, including more frequent police contact and new forms of monetary punishment. Low-level “public order” crimes and misdemeanors are the starting point for legal proceedings that over time evolve into punishments leading to criminal records with lasting consequences. In these regimes, warrants provide the entry point for processes that move from civil fines to criminal punishment. The chapter concludes with a menu of reforms to disincentivize the new policing while creating new forms of accountability to mitigate its harms.

* Isidor and Seville Sulzbacher Professor of Law, and Professor of Epidemiology, Columbia University. Fagan was consultant to the U.S. Department of Justice, Special Litigation Section, in the investigation of the Ferguson, Missouri Police Department. He also was expert for Plaintiffs in *Floyd v. City of New York* challenging the constitutionality of the stop and frisk program of the New York City Police Department. The author wishes to thank the workshop participants at the Academy for Justice conference on criminal justice reform for very helpful comments. Nicola Anna Cohen and Chris E. Mendez provided outstanding research assistance. All opinions and any errors are those of the author alone. Portions of this chapter appeared in Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation*, 105 GEO. L.J. ONLINE (forthcoming 2017).

INTRODUCTION

In popular and political culture, many observers credit nearly 25 years of declining crime rates to the “New Policing.”¹ Breaking with a past tradition of “reactive policing,” the New Policing emphasizes advanced statistical metrics, new forms of organizational accountability, and aggressive tactical enforcement of public-order crimes or violations.² The existing scholarship on the new policing has focused mainly on the nation’s major cities, where high population density, elevated crime rates, and sizable police forces provide pressurized laboratories for police experimentation, often in the spotlight of political scrutiny.

This scholarship has generally overlooked how the New Policing has been woven into the social, political, and legal fabrics of smaller, less densely populated areas. These areas are characterized by more intimate and individualized relationships among citizens, courts, and police, as well as closely spaced local boundaries with a considerable flow of persons through small administrative entities such as villages and towns. Crime rates rarely approach those of urban centers, although these places are hardly strangers to violence or other crime.³ New attention to crime in the smaller areas followed the 2014 Department of Justice investigation into policing in Ferguson, Missouri, which revealed how the New Policing unfolds in these less densely populated areas.⁴

These two policing contexts showed that the differences are far less than one might imagine. Residents of cities have frequent contact with police in the form of stop-and-frisk encounters—investigative stops or field interrogations based on low levels of suspicion.⁵ High rates of citations (summons) and

1. See, e.g., Philip B. Heymann, *The New Policing*, 28 *FORDHAM URB. L.J.* 407, 413–14 (2000); see also FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* x–xi (2011). For a review, see Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 *J. ECON. PERSP.* 163, 171–81 (2004).

2. See WILLIAM BRATTON & PETER KNOBLER, *THE TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC* 239 (1998); CHRISTOPHER DICKEY, *SECURING THE CITY: INSIDE AMERICA’S BEST COUNTERTERROR FORCE—THE NYPD* 106 (2010); GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 188–91 (1996).

3. See generally Allen E. Liska, John R. Logan & Paul E. Bellair, *Race and Violent Crime in the Suburbs* 63 *AMER. SOC. REV.* 27 (1998).

4. See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 2–6 (2015) [hereinafter *FERGUSON REPORT*].

5. See Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in the present Volume; Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 *U. CHI. L. REV.* 159, 168–69, 175–76 (2015).

misdeemeanor arrests also draw people into systems of legal sanctions and control, often for low-level, nonviolent offenses or administrative codes.⁶ Arrests require court appearances, even if a summons is issued in lieu of custody. Failure to appear in court or pay a fine can result in an arrest warrant. For those taken into custody, arrest requires posting bail for those not granted release on their own recognizance, or stays of varying length in pretrial detention for those unable to make bail.⁷ Summons for violations of administrative codes, vehicular violations, and other civil ordinances also are a staple of these police practices, resulting in fines or repetitive court appearances.⁸

An additional line of scholarship has looked more closely at how the tactics of the New Policing have become institutionalized in police-citizen interactions in the everyday lives of residents of poorer, predominantly minority, and higher-crime areas of the nation's cities. The internalization of harsh policing into everyday social interactions can produce cynicism toward law and legal actors, and a withdrawal of citizens from cooperation with the police to control crime.⁹

Residents of smaller areas face parallel issues. In these areas, despite generally lower crime rates, policing takes a different form: widespread pretextual traffic stops, extensive use of citations for vehicle defects,¹⁰ and citations for traffic violations (usually speeding) or administrative codes (high weeds on the property).¹¹ This policing model can and often does result in fines, arrests and summonses requiring multiple court appearances. Few of these contacts result

6. See Alexandra Natapoff, "Misdemeanors," in Volume 1 of the present Report [hereinafter Natapoff Chapter]; Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 639, 668 (2014); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1358–59 (2012).

7. See Megan Stevenson & Sandra G. Mayson, "Pretrial Detention and Bail," in Volume 3 of the present Report.

8. See Beth A. Colgan, "Fines, Fees, and Forfeitures," in Volume 4 of the present Report; JACK MAPLE & CHRIS MITCHELL, *THE CRIME FIGHTER: PUTTING THE BAD GUYS OUT OF BUSINESS* 214 (2000).

9. See David A. Harris, *The Dangers of Racialized Perceptions and Thinking by Law Enforcement*, in DEADLY INJUSTICE: TRAYVON MARTIN, RACE, AND THE CRIMINAL JUSTICE SYSTEM 146, 155–56 (Devon Johnson et al. eds., 2015). See generally CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014); Monica C. Bell, *Police Reform and the Dismantling of Legal Cynicism*, 126 YALE L.J. (forthcoming 2017); Mark T. Berg et al., *Cynical Streets: Neighborhood Social Processes and Perceptions of Criminal Injustice*, 54 CRIMINOLOGY 520 (2016); Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AMER. SOC. REV. 857 (2016).

10. Such as broken taillights or expired registrations. For a discussion of pretextual stops and racial profiling, see David A. Harris, "Racial Profiling," in the present Volume.

11. FERGUSON REPORT, *supra* note 4.

in jail time, but many result in monetary costs for fees as well as fines and other financial sanctions.¹² These financial burdens can metastasize from simple fines to warrants, from warrants to criminal arrests, and further to more severe penalties and a criminal conviction. In turn, exposure to criminal punishment imposes social and economic burdens with both near- and long-term impacts on employment, housing, and other social assets.

This chapter explores the design of these regimes and their impacts on citizens' lives. In both cities and small places, policing has evolved from discretionary enforcement of civil and criminal codes to programmatic efforts to use legal sanctions that entangle citizens in an administrative regime with punitive consequences. These regimes of investigative stops, misdemeanor arrests and civil summonses are influenced by, and draw justifying ideology from, practices common to "Broken Windows" models of policing that are now common in cities across the United States.¹³ Broken Windows policing, with its focus on controlling social disorder, overlaps with proactive tactics such as stop-and-frisk, and the regimes of intensive use of misdemeanor arrests. In this design, the adjudication of guilt or innocence is replaced by a system that imposes social controls on the one hand, and a latent fiscal and social tax on the other.¹⁴ That these taxes fall most heavily on poor, non-White people is a significant feature of the New Policing.

Part I of the chapter provides case studies of New York and Ferguson, illustrating how the New Policing works in these two different contexts, especially the racial disenfranchisement that seems an inevitable outcome of these regimes. Part II discusses the consequences that citizens are assessed, including potential long-term consequences. Part III concludes the chapter with proposals for reform that can cabin these tactics and redirect police attention to more serious forms of crime.

12. See Colgan, *supra* note 8; Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1186–1189. See generally ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS A PUNISHMENT FOR THE POOR 26–46 (2016); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation*, 106 GEO. L. J. ONLINE (forthcoming 2017).

13. BRATTON & KNOBLER, *supra* note 2, at 239; DICKEY, *supra* note 2, at 106; KELLING & COLES, *supra* note 2, at 188–91.

14. Kohler-Hausmann, *supra* note 6.

I. THE NEW POLICING

A. NEW YORK

In both popular and political culture, New York City epitomizes the New Policing. The city's policing regime in fact sustained much of the policy and empirical literature on the nationwide crime decline throughout the second half of the 1990s and for years after. The theory of "Broken Windows" and policing disorder animated the New Policing,¹⁵ and was put into practice in the early 1990s. The theory suggested that the appearance of social or physical disorder signaled vulnerability to would-be criminal offenders and in turn increased crime rates. The practical application of the theory was a broad-based program of investigative stops (stop-question-and-frisk, or SQF), misdemeanor arrests, and summons for non-criminal violations of administrative codes. Officers were deployed strategically based on crime mapping and metrics, and managers were closely monitored by police executives for their impacts on crime.

"Proactivity" in the form of *Terry* stops¹⁶ and "vigorous enforcement of laws against relatively minor [misdemeanor] offenses"¹⁷ became core elements of the New Policing.¹⁸ Other research portrayed proactivity as a mixture of drug enforcement and community policing.¹⁹ Empirical research showed mixed support for the theory.²⁰ Early research showed that aggressive enforcement of minor crimes—usually through arrest—deterred crime by signaling the risks

15. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

16. See *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* permitted temporary stops and detentions based on reasonable suspicion that crime was "afoot," supplanting the more demanding probable cause standard and memorializing police discretion as the gateway to street stops. *Id.* at 30.

17. Charis E. Kubrin et al., *Proactive Policing and Robbery Rates Across U.S. Cities*, 48 CRIMINOLOGY 57, 57 (2010).

18. The original Broken Windows essay, whose ideas informed the New Policing and its proactive prong, argued that arrest should be a last resort when other efforts failed to ameliorate the disorderly conditions that invite crime. Kelling & Wilson, *supra* note 15. By 2000, Kelling had embraced the notion of using arrest authority systematically and aggressively to stop minor crime from growing into more serious crime patterns and problems. See KELLING & COLES, *supra* note 2, at 108–56.

19. See, e.g., Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 318 (2004).

20. See, e.g., WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 73–75 (1992).

of detection and punishment to criminal offenders.²¹ However, reanalyses of those data undermined Broken Windows' claims.²² One study showed a sharp decline in gun violence in New York City in the early 1990s and gave partial credit to new police tactics, but emphasized the epidemic nature of the crime increase and decline.²³ Other work credited aggressive policing in the form of drug-related misdemeanor arrests for the reduction in murder and other violence in New York City in the 1990s.²⁴ Others found very small effects of misdemeanor arrests on crime,²⁵ while some studies simply rejected the causal claims of New Policing advocates.²⁶ Other research challenged the core notions

21. See Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 217, 238–39 (Jens Ludwig & Philip J. Cook eds., 2003); Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 *LAW & SOC'Y REV.* 163, 183–85 (1988). See generally Daniel S. Nagin, “Deterrence,” in Volume 4 of the present Report; Daniel S. Nagin, *Deterrence in the 21st Century: A Review of the Evidence*, 42 *CRIME & JUSTICE* 199–263 (2013).

22. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 *MICH. L. REV.* 291, 312–27 (1998).

23. Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 *J. CRIM. L. & CRIMINOLOGY* 1277, 1297–98, 1313–16 (1998).

24. Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 *J.L. & ECON.* 235, 261–63 (2005).

25. See, e.g., Richard Rosenfeld & Robert Fornango, *The Impact of Economic Conditions on Robbery and Property Crime: The Role of Consumer Sentiment*, 45 *CRIMINOLOGY* 735, 750 (2007).

26. BERNARD HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 8–11 (2001); ANDREW KARMEN, *NEW YORK MURDER MYSTERY* 117–21 (2000); Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 *CRIME & DELINQ.* 171, 177–78 (1999); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 *U. CHI. L. REV.* 271, 317–20 (2006); Ana Joanes, *Does the New York City Police Department Deserve Credit for the Decline in New York City's Homicide Rates? A Cross-City Comparison of Policing Strategies and Homicide Rates*, 33 *COLUM. J.L. & SOC. PROBS.* 265, 303–304 (1999); Richard Rosenfeld et al., *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988-2001*, 45 *CRIMINOLOGY* 355, 377 (2007). But see ZIMRING, *supra* note 1, at 149; FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 155–56 (2006).

of the disorder-crime relationship, showing that the connections between crime and disorder are uncertain.²⁷

B. RACE AND THE NEW POLICING IN NEW YORK

Race is one of two components of these policing regimes that expose its fault lines.²⁸

In New York, proactivity resulted in very high rates of street stops, misdemeanor arrests, and court summonses, all of which potentially swept up neighborhood residents into legal controls, disproportionately to both racial composition and local crime rates, and with little to show for it.²⁹ From 2004 to 2014, police in New York recorded 4,811,769 stops.³⁰ Stops were concentrated in police precincts and census tracts with high proportions of Black, Black Hispanic and White Hispanic population, after controlling for local crime rates.³¹ In other words, rather than allocating stops according to local crime rates, as theory would dictate, there were more officers per crime and more stops per crime in areas with higher concentrations of Black and Latino populations. Compounding the unequal distribution of policing, stops rarely

27. HARCOURT, ILLUSION OF ORDER, *supra* note 26, at 309; RALPH B. TAYLOR, BREAKING AWAY FROM BROKEN WINDOWS 18 (2000) (finding no evidence that crime is related to disorder); Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests In New York City, 1989-2000*, 6 CRIMINOLOGY & PUB. POL'Y 165, 176 (2007); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637–38 (1999) (finding no direct link between disorder and crime). *But see* GEORGE L. KELLING & WILLIAM H. SOUSA, JR., DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS 18 (2001) (finding evidence that crime is related to disorder); SKOGAN, *supra* note 20, at 10, Corman & Mocan, *supra* note 24, at 262; Rosenfeld et al., *supra* note 26, at 366–67.

28. The other is the imposition of transactional costs both monetary and legal. I discuss that next.

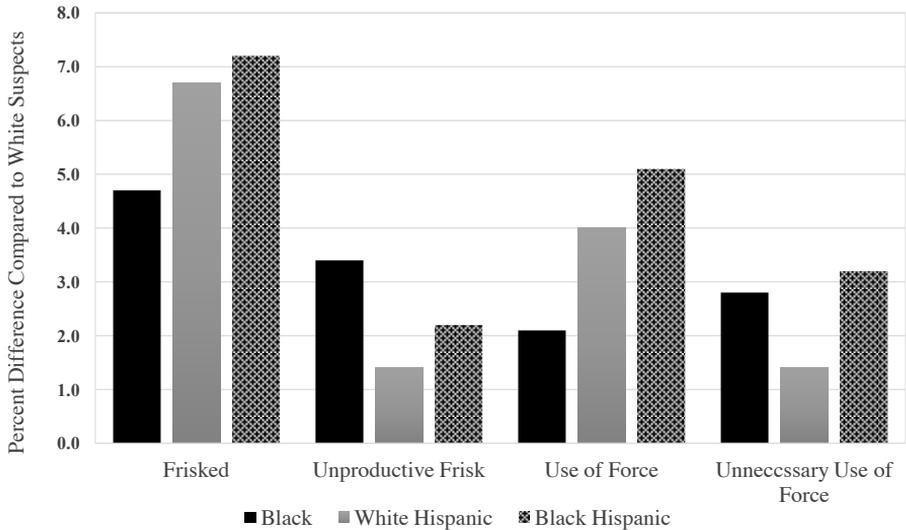
29. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). *See* Report of Jeffrey Fagan, Ph.D., at tbls. 5–9, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034 (SAS)); Sharad Goel et al., *Combatting Police Discrimination in an Age of Big Data*, 20 NEW CRIM. L. REV. 181-232 (2017); *see also* Fradella & White, *supra* note 5.

30. *Stop, Question and Frisk Database*, N.Y.C. POLICE DEP'T, http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml (last visited Mar. 23, 2017).

31. *See, e.g.*, Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING 309, 309–10 (Stephen K. Rice & Michael D. White eds., 2010). *See also* *Floyd*, 959 F. Supp. 2d, at 560, 587, 589, 661.

resulted in arrests or seizures of contraband.³² The few stops that did result in arrests rarely involved serious crimes, and few resulted in convictions or punishment.³³

Figure 1. Percent Differences in Stop Outcomes by Suspect Race, New York City, 2004-14



Note: Bars represent average difference in rates of stop outcomes by race, relative to the average for Whites and other races. Standard errors in parentheses, clustered by precinct. Regressions include controls for year, the suspected crime and the basis of suspicion for the stop.

What takes place during the stop is another dimension of the New Policing. Aggressive stops were a hallmark of the New Policing, suggesting that stops not only were aimed at detecting contraband or perhaps those with outstanding warrants, but were a form of rough justice that signaled a deterrent component of police contact.³⁴ Figure 1 and Appendix Table 1 show evidence of racial disparities in the use of frisks and force in interactions between officers and suspects. Relative to White suspects who have been stopped, all three non-White groups were more likely to be frisked. For example, Blacks were frisked

32. See *Floyd*, 959 F. Supp. 2d. at 558–59; see also Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 ANNALS APPLIED STAT. 365 (2016).

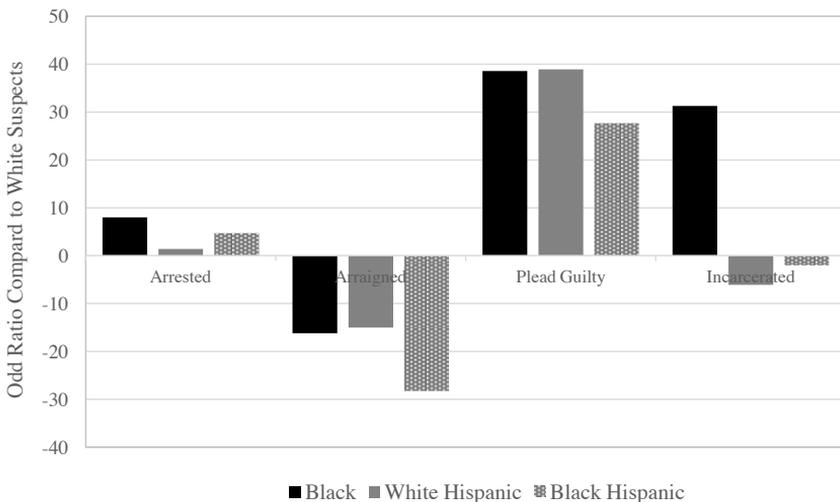
33. See ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATT’Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES 8–9 app. G (2013).

34. See, e.g., Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2323–25 (2014); Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 10 J. CRIM. L. & CRIMINOLOGY 335, 343 (2011).

4.7% more often than Whites, White Hispanics 6.7% more often than Whites, and Black Hispanics 7.2% more often than Whites. These differences all were statistically significant. But police also conduct many frisks where there was no indication of the presence of a weapon or violent behavior either in the suspected crime or in the suspicion bases of the stop. The second set of bars in Figure 1 describes these as *unproductive frisks*. Again, police conducted these frisks significantly more likely for three non-White racial or ethnic groups compared to Whites.

Two additional sets of comparisons show differences by race in the use of force during a stop, and also for the “unnecessary” use of force: that is, force used in the absence of either weapons or violent behavior in the reason for the stop.³⁵ Force was used 2.8% more often for Black suspects compared to Whites, 4.0% for White Hispanics, and 5.1% for Black Hispanics. Unnecessary force rates were consistently higher for non-White suspects compared to White suspects. These difference in both force and unnecessary force also were statistically significant. One implication of these analyses of the outcomes of frequent and racially skewed stops is that a resident of—or visitor to—minority neighborhoods under the New Policing moves about in their everyday social interactions knowing that they face nonconsensual police contact that is procedurally punitive even though there often is at best weak evidence of criminal wrongdoing.

Figure 2. Odds Ratios of Sanction Rates by Suspect Race, New York City, 2004-12



35. See generally L. Song Richardson, “Police Use of Force,” in the present Volume.

The fate of stops in these cases is another dimension to assess the impacts of the New Policing. Figure 2 and Appendix Table 2 show the odds ratio of racial disparities in the outcomes of street stops from 2009 to 2012 from the decision to arrest through sentencing for those cases that survive into court, comparing non-White to White suspects. An odds ratio of 0 indicates no difference, and a negative value indicates that the outcome is less likely for that group compared to Whites. In 12 of 15 analyses in Appendix Table 2 testing for disparate treatment by race or ethnicity, we observe significant effects that suggest harsher treatment of Black, Black Hispanic, and White Hispanic suspects.

Whether the stop resulted in an arrest, indicative of probable cause and a higher standard for the contact than the *Terry* standards of reasonable suspicion,³⁶ is the first dimension of sanction outcomes. Figure 2 shows that relative to White suspects, all three groups of non-White suspects were more likely to be arrested if stopped but less likely to be arraigned if arrested. Details of the reasons for the attrition of nearly 18% of the arrests were not available. Generally, cases may drop out if quashed at the precinct by police supervisors, or if they were declined for prosecution due to legal insufficiency or other evidentiary concerns.³⁷ The lower arraignment rate suggests the legal insufficiency of these arrests. The fact of an arrest that is dropped transforms the arrest process into a form of front-end punishment for non-White suspects, yet another expression of the managerialism³⁸ that characterizes the New Policing.

36. Jeffrey Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 101, 111–13.

37. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1655–56, 1656 n.1 (2010). Bowers suggests that prosecutors inherently have the power not to charge and do so for three possible reasons: legal reasons (such as insufficient evidence); administrative reasons (such as prioritizing case assignments, inability to produce complaining witnesses); and equitable reasons (such as moral-judgment-based assessments of the seriousness of the crime, the culpability of the suspect, or the character of actors). *Id.* at 1656–57.

38. Kohler-Hausmann, *supra* note 6, at 648–49

Once arraigned, non-White suspects are 27.7% to 38.6% more likely to be convicted, but for less serious crimes. Appendix Table 2 shows that if convicted, non-White suspects are 45.3% to 87.8% more likely to be convicted of a less serious charge with a lower sentencing tariff. But, Figure 2 shows that even with lower convictions charges, Black defendants relative to Whites are more likely (31.2%) to serve time in jail or be sentenced to prison.³⁹

This duality for Black and other non-White suspects—arrests that lead to no charges or non-serious charges, coupled with a greater risk of a criminal sanction and incarceration—seem to be present in tandem in this part of the New Policing. We observe much the same for Black Hispanic suspects, although their incarceration risks at the end of the process are not significantly greater than White suspects. The results are similar for White Hispanic suspects, with the exception of arrests conditional on stops. These events form a grinding process of accumulating arrest records that may increase in number over time to produce at some tipping point a spell of incarceration. The consequences are severe, though. Even if there is low risk of jail time, the effect of imposing a criminal conviction becomes nearly indelible. A criminal conviction is a permanent mark, one that is not easily removed through sealing or expunging of records, and that can be a negative asset when seeking employment in the private sector or several types of housing.⁴⁰

C. FERGUSON

Long before the protests erupted in Ferguson over the shooting of unarmed Black teenager Michael Brown by White officer Darren Wilson, the Ferguson Police Department (FPD) practiced its own version of New Policing.⁴¹ But unlike the high-crime urban laboratories of the New Policing, Ferguson was not plagued by high rates of violent crime; in fact, violent crime rates were declining

39. Results show odds ratio is compared to White suspects. N=2,396,314 stops. The total arrests recorded were 148,880; 7,500 cases were eliminated because of duplicate or incomplete arrest identifiers. In addition, 146,323 cases resulted in issuance of a summons. Logistic regressions for arrest and arraignment were estimated with controls for suspect age and gender, and controls effects for year and arrest charge. Models for arraignment were estimated conditional on probability of any sanction (arrest or summons). Models for conviction (plea) were ordered probits estimated conditional on arraignment. Models for incarceration were order probit regressions based on probability of conviction. Robust standard errors in all models were clustered by police precinct. For a discussion of the impact of race on sentencing, see Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

40. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959–60 (2003); see also James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 207–10 (2008).

41. FERGUSON REPORT, *supra* note 4, at 3–5.

in Ferguson for several years preceding the Michael Brown shooting and the protests.⁴² Instead, small towns like Ferguson turned to a model based on the saturation of misdemeanor enforcement, traffic and other vehicular codes, and enforcement of civil codes. In this way, the policing model in Ferguson reflected a variation of New Policing that closely resembles the type of managerial justice that characterized misdemeanor enforcement in urban areas. The reliance on code enforcement, traffic enforcement, and misdemeanor arrests suggests a thread connecting the order-maintenance prong of New Policing in cities with New Policing in less urban locales such as Ferguson.

What made Ferguson unique was the profit motive that had been injected into the policing regime.⁴³ The policing regime was designed to extract revenue not only from Ferguson residents, but also from people passing through Ferguson from nearby municipalities. The proximity of Ferguson to its surrounding areas created a spatial concentration that broadened the reach of FPD policing to non-residents.⁴⁴ FPD enforcement was tailored to this revenue-generating goal. The offenses cited by FPD officers in traffic stops and other citizen contacts generated a volume of fees and fines that were integrated into the municipal budget.⁴⁵ When persons failed to pay these financial penalties, further fees and interest followed, compounding debt. These non-criminal court actions often grew into criminal matters when failures to pay led to criminal warrants. Once arrested for the outstanding warrants, the compounding of LFOs described earlier sank these individuals, already poor, deeper into poverty.⁴⁶ The racial component of these policing dynamics compounded the historical racial inequalities in Ferguson.⁴⁷

D. RACE AND POLICING IN FERGUSON

The Ferguson Report not only documented extraordinary racial disparities in both traffic enforcement but also in enforcement of civil codes.⁴⁸ Several measures of discretionary police behavior more closely show the role of race in traffic enforcement. The implications of stops, tickets, arrests, and seizures are evident not only in the generation of revenue, but also in the creation of criminal liability.

42. *Id.* at 7 n.7 (indicating that the records of the FPD and the FBI “show[ed] a downward trend in serious crime” from 2004–2014).

43. *Id.* at 2; *see also Developments in the Law: Policing and Profit*, 128 HARV. L. REV. 1723, 1734–35 (2015).

44. Fagan & Ash, *supra* note 12, fig.2.

45. FERGUSON REPORT, *supra* note 4, at 2.

46. *Id.* at 4.

47. *Id.* at 76–78.

48. *Id.* at 7.

The regression results in Figure 3 and Appendix Table 3 tested for racial differences in police decisions during these stops.⁴⁹ The results are conditioned at predicate stages of each case: whether contraband is seized depends on whether the driver or vehicle is searched, and whether a warrant arrest is the reason for the arrest compared to other reasons. These regressions, like those in previous tables, provide controls for several non-race factors—in particular the stated reason for the stop—that may be correlated both with race and policing choices.

Controlling for the reason for the stop, the first column in Figure 3 shows that Black drivers were 35% more likely than Whites to be ticketed pursuant to a stop. The second column shows that Blacks are 93% more likely, or nearly twice as likely, to be arrested.⁵⁰ These statistically significant results suggest that these patterns are unlikely to occur by chance alone. The search results in the third column show that Blacks are 67% more likely than Whites to have their vehicle searched once stopped, again a statistically significant effect. But the fourth column shows that seizures of contraband are *less* likely for vehicles operated by Blacks, conditional on being searched. In this case, the 26% lower odds of a “hit” (seizure) for Blacks (not statistically significant) suggests that stops and searches are a form of preference-based rather than statistical discrimination.⁵¹

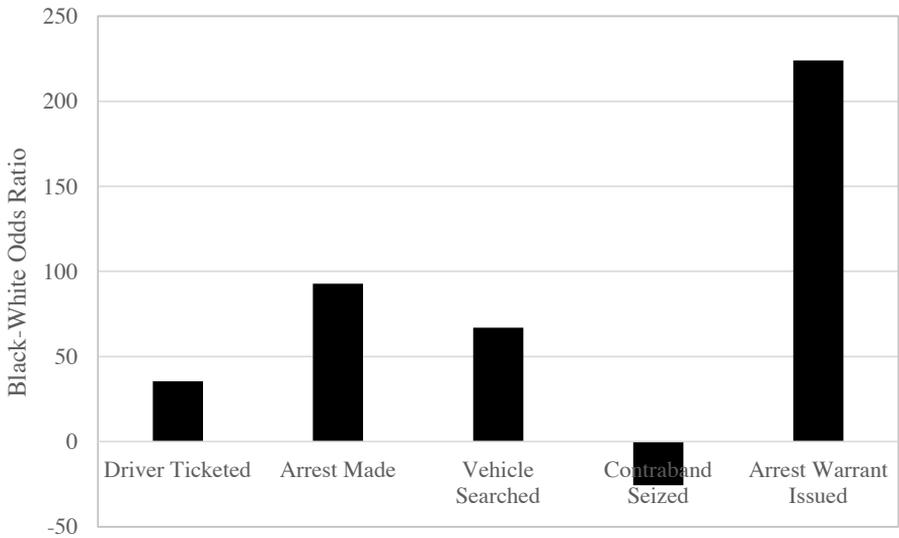
Why bother to continue stopping and searching Black motorists if there is no greater likelihood that those searches will pay off, other than a preference to stop Blacks? This is the essence of preference-based discrimination under the New Policing. Statistical discrimination would reflect a tendency to stop one group at a higher rate than another group based on observable characteristics such as known crime rates. But preference-based discrimination would reflect a tendency to prefer one group for stops over others based on factors unrelated to observable differences in the targeted behavior, such as race. Preference-based discrimination suggests that the purpose of stops is to select a particular group for criminal justice attention, independent of the likelihood of a positive result. If police in Ferguson are stopping Blacks more often without finding

49. Table 3 compares the probability of each of several outcomes of a police encounter by race as a percentage of the number of stops, and then comparing the rates by race to those of Whites. See Fagan & Ash, *supra* note 12, tbl.4 & fig.3.

50. It is possible that drivers exhibit unreported behaviors that might lead to a decision to sanction them. If there are such differences in suspect behavior leading to tickets or arrests, those behaviors are not described by the officers in official reports.

51. Jeff Dominitz & John Knowles, *Crime Minimization and Racial Bias: What Can We Learn from Police Search Data?*, 116 *ECON. J.* F368, F379 (2006); see also Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 *REV. ECON. & STAT.* 163 (2009).

Figure 3. Odds Ratio by Race Effects on Stop Outcomes, Ferguson, 2010–2013



more drugs or weapons, it suggests that these are punitive searches, further evidence of disparate racial treatment before the law.

Column 5 in Figure 3 shows that for Black defendants, an arrest warrant is more than twice as likely to result from a traffic stop or other citation compared to White defendants. Enforcement in Ferguson produced an astonishing volume of warrants: the municipal court in Ferguson issued 32,975 warrants in 2013,⁵² more than one per resident and most likely, more than one for every motorist passing through Ferguson,⁵³ and nearly all for nonviolent offenses.⁵⁴ Recall that the median per capita income in Ferguson in 2013 was \$40,660, and that nearly one in four persons lived below the poverty line.⁵⁵ That this is racially skewed suggests again a racial tax against those who can least afford it.

This pattern is consistent with the emphasis that FPD officers and municipal executives place on enforcement of warrants, and the motivating role of outstanding warrants in determining the outcomes of stops. Warrant arrests lead to criminal punishment, in turn leading to LFOs that add monetary

52. MISSOURI SUPREME COURT, MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2013, at 302–03, <http://www.courts.mo.gov/file.jsp?id=68905>.

53. See FERGUSON REPORT, *supra* note 4, at 6.

54. MISSOURI SUPREME COURT, *supra* note 52, at 173–94.

55. *American FactFinder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (search Community Facts field for “Ferguson, MO”; then select “Show All”).

costs to the liberty costs of warrant arrests. Here, if the goal of policing is to detect persons with outstanding warrants and continue the economic drain on those defendants, then the police are in fact maximizing on that goal—a form of statistical discrimination. But it is the predicate processes of stops, citations, and searches that lead to the issuance of a warrant that is infected with race-based and preferential discrimination. In other words, if police are stopping Black motorists with the hope of getting a warrant arrest, the ocean of outstanding warrants among Black drivers makes this a good bet by the FPD.

Once these cases get to court, the pattern of racially disparate policing continues. An important mechanism for the proliferation of warrants and subsequent warrant arrests is the operation of the municipal court system in Ferguson, and elsewhere in the northeastern corner of St. Louis County.⁵⁶ The processes described in Figure 3 and Appendix Table 3 result in a racially skewed population in the Municipal Court, where most of these cases are resolved. Although Blacks are 67% of the Ferguson population, they are 74% of Municipal Court defendants. Within that court population, they are 81% of the population receiving summonses, 91% of those with warrants issued for their arrest, and 95% of the persons arrested.⁵⁷ Black defendants in the Municipal Court average 3.5 citations per appearance, about 50% more than the rate of 2.3 summonses per White defendants. Black defendants average 4.7 warrants per defendant, compared to 1.4 warrants per White defendant. They have 2.25 arrests each (relative to just 0.3 for Whites). Finally, as shown earlier, Blacks have more warrants and arrests when controlling for the number of summonses.

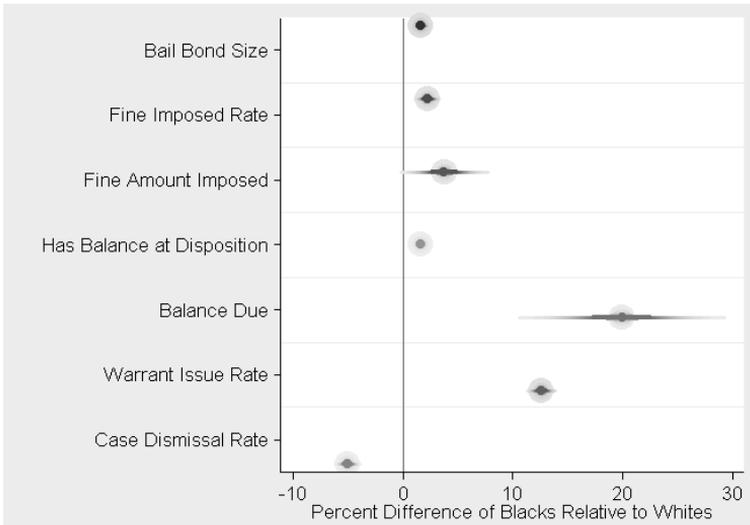
Figure 4 summarizes a series of regressions showing outcomes of cases by race once they enter the Municipal Court.⁵⁸ The figure reports the average percent difference in each outcome between Black and White defendants, providing simple measures of racial disparities in misdemeanor justice. By using percentages, the results are comparable on the same scale.

56. See THOMAS HARVEY ET AL., ARCH CITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 27–37 (2014), <https://www.courts.mo.gov/file.jsp?id=98433>.

57. Fagan & Ash, *supra* note 12.

58. The full results are shown in Fagan & Ash, *supra* note 12, tbl. 6. The regressions include several covariates that measure non-race factors, both legal and demographic. We also include fixed effects for the range of offenses that bring people into the Municipal Court and that one would expect to affect penalties and other outcomes. The standard errors in the regressions are clustered by the defendant's resident zip code, to adjust the significance estimates for local crime and social conditions.

Figure 4. Effect Sizes of Black-White Differences in Case Outcomes, Ferguson (Mean, 95% CI)



Race has a substantial impact on each outcome after controlling for potential non-racial influences on court outcomes. The results in the first row can be translated into dollar amounts. For bail bond size, Figure 4 shows that conditional on the same offense, bail bond amounts imposed on Black defendants are more than \$400 higher, creating barriers for those defendants to make bail. As noted earlier, a spell of pretrial detention adversely affects the disposition and sentence in criminal cases, and creates personal hardships for defendants with work or school commitments or child-care duties. These hardships are skewed heavily toward Blacks. Once adjudicated, usually via plea agreement, Blacks are 2.5% more likely to have a fine imposed than Whites for the same offense. In contrast, Black defendants are 5.8% less likely to have their cases dismissed than White defendants, suggesting more formal adjudication and the likelihood of an LFO or a criminal record, or both.

Conditional on receiving a fine, the fine for the same offense is 4% larger on average for Blacks. These stricter penalties are further reflected in worse outcomes following the fine levy. Blacks are 2% more likely to have a positive financial obligation at the end of the case, meaning they have been unable—compared to Whites—to pay the full fine amount by the time the court case nears its conclusion. Conditional on having any balance at all, that balance is 22% larger. These impacts are statistically significant. And remember once again that the Ferguson population is often poor and otherwise earns a

median household income of barely more than \$40,000.⁵⁹ Finally, Blacks are significantly more likely to have a warrant issued and more likely to be arrested. Strikingly, Blacks are 15% more likely to have a warrant issued than Whites. This may reflect the stricter monetary penalties resulting in more delinquency, or it may again reflect an independent source of racially based treatment.

II. THE NEW POLICING AS A LATENT RACIAL TAX

The New Policing exacts two types of latent taxes on persons who are brought into the criminal justice system, whether by stops and arrests, as in New York, or through a program of saturated traffic enforcement in Ferguson. One regime starts with the imposition of monetary taxes that morph into criminal liability, while the other starts with panvasive and intrusive street stops that sweep suspects into the police gaze and for some, into the courts and jails.⁶⁰ Each has a monetary component and each can end with a stigmatizing criminal conviction.

Monetary penalties have proven to be quite popular in state legislatures and in criminal legal institutions.⁶¹ Fines are seen both as a legitimate deterrent to wrongdoing and a means of transferring the costs of criminal justice administration (courts, police, prisons, etc.) to the prisoner, costs that would otherwise fall on ostensibly law-abiding taxpayers. Further, administrative fees allow state and local legislators to get around tough rules limiting local tax increases. Fines and administrative fees therefore provide a path to budgetary relief with limited legislative or court oversight. Much of this is administrative, not statutory, rule-making, a tax that is not called a tax.

But the impetus for this form of taxation runs deeper into the culture of criminal justice. Professor Alexes Harris shows that it is not simply fiscal interests in recuperating costs from poor defendants that seemed to animate the institutional postures; rather, Professor Harris shows how these fines are shaped by perceptions of criminal defendants—regardless of crime severity—

59. Fagan & Ash, *supra* note 12, tbl. 1.

60. See Christopher Slobogin, *Panvasive Surveillance, Political Process Theory and the Nondelegation Doctrine*, 102 GEO. L. J. 1721, 1723 (2014) (characterizing “panvasive” surveillance as large scale police mobilization to surveil and contact citizens without reasonable suspicion, most of whom are innocent of any wrongdoing).

61. *Policing and Profit*, *supra* note 43.

as deserving of this extra burden beyond formal punishments.⁶² In effect, this view of defendants reflects a justifying ideology about the undeserving offender that links money to crime and punishment.⁶³

A. CRIMINAL JUSTICE TAXES

The expansion of misdemeanor justice, driven in part by the New Policing, commonly imposes non-trivial fines and fees at each stage of the process, from arrest to efforts to expunge criminal records.⁶⁴ Ferguson illustrates this newly expanded system of fee-based criminal justice that taxes defendants. Disparate racial treatment at each stage of processing in Ferguson skews the tax toward minorities, whose economic position often is more tenuous than that of their White counterparts. Traffic stops lead to tickets and fines, and the inability to pay those fines can lead to criminal arrests. Once arrested, the inability to post bail raises issues both before and after adjudication. Defendants charged with minor misdemeanors or outstanding warrants may have difficulty retaining counsel if required to pay a fee to establish indigency, or the assignment of counsel may be delayed during the scramble to post bond in the interim between arrest and first appearance.⁶⁵

The risk of fee default at that stage leading to pretrial delay or—worse—pretrial detention in turn leads to the risk of an adverse court outcome in terms of charging and sentencing. Empirical studies confirm that defendants who are detained pretrial are more likely to be convicted by plea or trial, and also receive

62. HARRIS, *supra* note 12, at 14–15; *see also* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52 (1982). Having offenders pay for pre-adjudication costs, including filing fees, and vetting their eligibility for indigent defense, presumes that they are in fact guilty of a criminal offense or a civil violation. Given the high rates of plea bargaining in the lower criminal courts in misdemeanor cases, as well as the high rates of prosecutorial declination and court dismissal, this is an assumption fraught with risk and potentially error.

63. *See, e.g.*, John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 260, 260 (2005).

64. Logan & Wright, *supra* note 12, at 1185; *see also* HARRIS, *supra* note 12, at 18, 42. Although there are monetary burdens associated with felony case processing, such as taxing offenders to pay for probation or drug treatment or electronic monitoring in lieu of jail, these measures affect a smaller population facing prison.

65. *See generally* Eve Brensike Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report.

harsher sentences.⁶⁶ Failure to pay the latent taxes of fees, in effect, prejudices court outcomes and all the burdens that come with either a monetary fine or a criminal conviction. In effect, these regimes require defendants—assuming they can afford them—to pay fees and costs for the very court processes that lead to their punishment.⁶⁷ It seems that the municipality of Ferguson was cloaking its taxing power in the exercise of police power by functionally equating the power of taxation with the power to punish.

Criminal justice taxation in New York had features similar to Ferguson, but also distinct to the managerialism that characterized the New Policing there. In this setting, transactional costs exact a different tax on defendants, but a tax that still can lead to criminal conviction and associated stigma and burdens. Black and Latino suspects face stops with no arrests, and often, arrests with either no charges or trivial charges. Still, these cases require repeated court appearances over several months before they reach a conclusion. Monetary costs follow, whether in the form of processing fees for cases or for lost time and wages from the disruption of repeat court appearances.

If convicted, usually for the least serious grades of misdemeanors, the stigma of a criminal conviction attaches, creating social and economic burdens and deficits.⁶⁸ At the same time, for the few cases that proceed to court, most plead out after long delays and multiple court appearances, coupled with a greater risk of a criminal sanction and incarceration. Overall, summonses are as often dismissed as they are sustained, if not more often, but are more likely to be dismissed when issued in neighborhoods with higher proportions of Black residents.⁶⁹ Those that are sustained often result in monetary costs, an example of the burdens of legal financial obligations.⁷⁰ But whether dismissed or sustained, there are costs (beyond the fine) attached to court appearances

66. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Pretrial Detention*, 69 *STAN. L. REV.* (forthcoming 2017) (showing evidence detained defendants are 25% more likely than similarly situated releasees to plead guilty, 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice the average sentence); see also Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 1, 18 (2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777615 (showing that that pretrial detention leads to a 13% increase in the likelihood of being convicted compared to similarly situated persons who were released before adjudication). See generally Stevenson & Mayson, *supra* note 7.

67. Logan & Wright, *supra* note 12, at 1190–92. See Fagan & Ash, *supra* note 12.

68. See, e.g., Natapoff Chapter, *supra* note 6.

69. Fagan & Ash, *supra* note 12, tbl.10.

70. For an example of the burdens of pretrial bail, see Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization* 45 *J. LEGAL STUD.* 471, 472 (2016).

simply to answer the summons. If these processing fees—taxes, in effect—are skewed racially by selective enforcement targeting Black or Latino persons—or neighborhoods with high concentrations of Black and Latino residents—the Sixth Amendment concerns multiply, raising both due process and equal protection claims under the Fourteenth Amendment.⁷¹ Costs to the defendant, usually Black or Latino, are exacted through court appearances.

Because these pre-adjudication processing fees are not technically punishment, their status exempts them from constitutional scrutiny under the Eighth Amendment. They may, however, interfere with a defendant's rights under the Sixth Amendment.⁷² For example, poor defendants may be unable to pay for filing fees to determine their eligibility for indigent defense. Exercising the right to obtain a lawyer at the state's expense cannot constitutionally be conditioned on ability to pay.⁷³ In arguing their case, poor defendants may be unable to pay fees to obtain documents such as medical, employment, or housing records. The cost of this tax is a disadvantage at adjudication and a greater risk of conviction and its associated burdens.

B. A POVERTY TAX

The onset of New Policing reached deeply into the lives and the pockets of mostly poor and predominantly minority citizens,⁷⁴ potentially deepening any pre-existing impoverishment⁷⁵ while aggravating racial disparities in criminal justice.⁷⁶ The expansion of misdemeanor justice collided with the new forms of taxation on criminal offenders to multiply the reach of New Policing to penetrate minority communities significantly more often and more intensively than in predominantly White communities. For example, an analysis of 27 independent datasets showed that non-Whites were nearly one-third more likely (26% as compared to 20%) than Whites to be arrested.⁷⁷ Other empirical

71. See, e.g., HARRIS, *supra* note 12.

72. Logan & Wright, *supra* note 12, at 1224.

73. Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963).

74. HARRIS, *supra* note 12, at 11–12; see also Logan & Wright, *supra* note 12, at 1177.

75. AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 6–10 (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf.

76. HARRIS, *supra* note 12, at 14–15, 156; see also Logan & Wright, *supra* note 12, at 1177.

77. Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 490–91 (2011).

studies confirm racial or community influences on the decision to arrest.⁷⁸ Stops and arrests also spill over to bias in the form of exclusions from serving on juries,⁷⁹ or college enrollment, attendance and achievement.⁸⁰ In other words, stops and arrests will beget stops and arrests and “spillover discrimination,” simply by stigmatizing a neighborhood or smaller area as a “high-crime area.”

A connecting thread between large and small cities is the expanding net of legal, social, and economic consequences of misdemeanor arrests and convictions: a criminal record; an immigration hold and detention leading perhaps to deportation; eviction from public housing or failure to meet rent obligations; suspension of driving privileges; disruptions in employment or schooling; and child-custody disruption.⁸¹ For those unable to post bond, a pretrial spell in jail can bias later proceedings toward harsher dispositions and sentences.⁸² Failure to be present at any of a sequence of court dates can lead to a warrant and criminal arrest. In the wider community, harsh enforcement of minor disorder violations takes a psychological toll. Persistent “crackdowns”

78. See, e.g., David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55 (2008); Karen F. Parker, Brian J. Stults & Stephen K. Rice, *Racial Threat, Concentrated Disadvantage and Social Control: Considering the Macro-Level Sources of Variation in Arrests*, 43 CRIMINOLOGY 1111 (2005); Douglas A. Smith, Christy A. Visher & Laura A. Davidson, *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1984).

79. Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL’Y REV. 387, 412-14 (2016) (showing how prosecutors use prior arrests of prospective jurors as race-neutral explanations to justify peremptory strikes of Blacks during voir dire).

80. Alex O. Widdowson, Sonja E. Siennick & Carther Hay, *The Implications of Arrest for College Enrollment: An Analysis of Long-Term Effects and Mediating Mechanisms*, 54 CRIMINOLOGY 621, 624-26 (2016) (showing that arrested youth were 9% less likely than non-arrested youth to enroll in a four-year college within a decade after high school graduation).

81. See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 300-06 (2009); see also Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820-44 (2015) (discussing the consequences of arrests); Gabriel J. Chin, “Collateral Consequences of Criminal Conviction,” in Volume 4 of the present Report.

82. Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879, 880, 895 (2008); Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299, 313 (2003).

on the day-to-day activities of neighborhood residents in public spaces insert police into the developmental landscape of children living in those areas, leading to tensions and cynicism between citizens and police, even among neighborhood children.⁸³

In cities, as in suburbs and exurbs, movements of citizens are affected by police tactics. When police routinely intervene in the everyday lives of citizens, they impose social interaction costs that inevitably deter residents from moving freely. And when these police actions produce legal and economic consequences for those already in disadvantaged social positions, those consequences effectively lock them in already disadvantaged places by constraining choices of neighborhood selection.⁸⁴ Even when a neighborhood changes for the better, it retains its status relative to other neighborhoods that are changing simultaneously.⁸⁵ Since police deployments and actions are racialized and focused in poor and segregated places, police in effect reproduce inequality, racial stratification and segregation through criminal legal enforcement actions that can constrain mobility.

Linking policing to the reinforcement of racial boundaries is not new; indeed, defense of property has been cited often in explaining police actions.⁸⁶ One consequence of the New Policing, then, is to reinforce racial residential segregation by deterring movement and burdening non-Whites with criminal cases. This in turn leads to additional types of taxation. First, the blocking effects of segregation on mobility serve to consign those living in segregated neighborhoods to long-term exposure to a set of social and psychological toxins that reinforce the individual and collective disadvantages of these

83. Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 Soc. JUST. RES. 217, 229–31 (2005); see also PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 150, 157 (2013) (showing that the presence of police is part of a spectrum of persistent disadvantages facing residents in Black poor minority neighborhoods).

84. Robert J. Sampson & Patrick Sharkey, *Neighborhood Selection and the Social Reproduction of Concentrated Inequality*, 45 DEMOGRAPHY 1, 20–21 tbl.4 (2008) (showing the intergenerational reproduction of racial inequality through constrained mobility pathways that vary by race and ethnicity).

85. Robert J. Sampson & Jeffrey D. Morenoff, *Durable Inequality: Spatial Dynamics, Social Processes, and the Persistence of Poverty in Chicago Neighborhoods*, in *POVERTY TRAPS* 176, 199 (Samuel Bowles et al. eds., 2006).

86. Raising the costs for Black residents or visitors to move freely through either mixed or predominantly White social spaces would ward off encroachments that might diminish property value, or protect against property loss. Those motives, together with personal safety fears, were drivers of the move toward segregation in early twentieth century St. Louis. See RICHARD ROTHSTEIN, *THE MAKING OF FERGUSON* 3 (2014), <https://perma.cc/2N27-CTHB>.

poverty traps.⁸⁷ Perhaps most important is subsequent exposure to crime and victimization. Across studies, there is a robust and persistent link between racial residential segregation and neighborhood rates of violent crime.⁸⁸

Second, racial segregation and inequality impacts the economic lives of Black persons in their access to capital and their ability to multiply it. Limited access to capital reduces the ability of Black and other minority business borrowers to invest and multiply their capital. One study of borrowing for home mortgages showed that Black borrowers are 30% more likely to have their business-loan applications rejected compared to White borrowers, after controlling for a rich set of alternative factors including the borrower, the firm and the characteristics of the lender.⁸⁹

If the New Policing is reinforcing and deepening segregation, these empirical studies suggest that it also is contributing to health disparities, higher risks of mortality and crime victimization, and attenuated access to educational and employment and economic opportunities, effects that are produced by segregation.⁹⁰ These deficits compound the direct economic burdens imposed by New Policing and the regimes of legal financial obligations that can deepen segregation. Together with poor housing conditions and limited access to basic neighborhood amenities, segregation appears to have a churning effect on the processes and structures that contribute to sustained economic disadvantage, or the perpetuation of poverty traps through downward socioeconomic mobility.⁹¹ In other words, New Policing contributes to being “stuck in place,” or the cross-generational legacy of urban disadvantage.⁹²

87. Sampson & Morenoff, *supra* note 85, at 199 (“[N]eighborhoods remain remarkably stable in their relative economic standing ... which means that the overall pattern of neighborhood inequality did not change much over time [and that] further change is invariably in the direction of greater racial homogeneity and more poverty.”).

88. John R. Logan & Steven F. Messner, *Racial Residential Segregation and Suburban Violent Crime*, 68 SOC. SCI. Q. 510, 510 (1987) (arguing for the consideration of “racial residential segregation as an independent variable with important consequences for metropolitan communities”); Ruth D. Peterson & Lauren J. Krivo, *Racial Segregation and Black Urban Homicide*, 71 SOC. FORCES 1001, 1001, 1006 (1993) (showing evidence from 125 central cities that “social isolation ... is the mechanism by which segregation leads to higher levels of homicide among African Americans.”).

89. Darius Palia, *Differential Access to Capital from Financial Institutions by Minority Entrepreneurs*, 13 J. EMPIRICAL LEGAL STUD. 756, 777–78 (2016).

90. For a detailed review, see Fagan & Ash, *supra* note 12.

91. SHARKEY, *supra* note 83, at 114–15.

92. *Id.* at 117.

III. A REFORM AGENDA

The balance of costs and benefits from the New Policing suggests the necessity for rethinking of these regimes. A program of reform can be designed to link institutional and statutory design to the strengths of these models but more important to mitigate their adverse effects. Some of the proposed reforms suggest a regulatory design, whether through internal audits and collaboration from within, or by regulation through political oversight. Some may lead to other democratic processes with multiple stakeholders. In extreme cases, reform may come through the last resort of litigation. Some of the proposed reforms require activating available oversight mechanisms, while other reforms suggest the creation either of new entities or methods to integrate the missions and activities of existing ones. Some reforms will require statute, others administrative regulation. Some will require the involvement of professional oversight groups. Most will be cost-free, although for cities like Ferguson, there are important measures to limit revenue derived from fines and fees, requiring some hard choices in municipal budgets. These tradeoffs are necessary to mitigate harms.

A. CAP REVENUE FROM TRAFFIC AND NON-TRAFFIC FINES

Missouri passed SB 5 in 2015, legislation that mitigated harms to motorists in two ways. The first was aimed at persons who received tickets or summons. The bill limits fines imposed when combined with court costs to \$300 for minor traffic violations.⁹³ The bill also creates a provision for taxpayers to request an income-tax offset for the amounts of unpaid court costs, fines, fees and other amounts ordered by a municipality in excess of \$25.⁹⁴ These provisions are aimed at minimizing the criminal justice “tax” on persons resulting from the excesses of the New Policing. A second provision of the bill, called *Mack’s Creek Law*, lowers the cap on municipal revenue from traffic fines from 30% to 20%, effective in 2016, and lowering the cap in St. Louis County to 12.5%.⁹⁵

The downside of these measures is a potential shift in taxpayer burden to homeowners and business owners, to make up the shortfall and ensure continuity in police services. To avoid that shift in tax burden, a new bill, SB 572, was introduced and approved in 2016 that applies the same limits to fees and fines imposed for non-traffic violations⁹⁶ in Missouri SB 5. These measures reduce the incentives for local government through its police to pursue the

93. MO. REV. STAT. § 479.353.

94. *Id.* § 479.356.

95. *Id.* § 479.359 (repealing § 302.341).

96. Such as high weeds or peeling house paint.

revenue-generating “taxation” prong of the New Policing, and are a model for other jurisdictions that may abuse their discretionary policing authority to create revenue streams that benefit the municipality as well as the police officers and courts imposing those fines.

B. ADJUDICATION OF GUILT AND SENTENCING

Managerialism in the criminal courts diminishes incentives for adjudicating guilt or innocence and replaces those incentives with calendar management and expedited court resolution.⁹⁷ Court reforms that strengthen the ability of defendants to defend against the charges and reduce the reliance on pleas are important to reduce the criminal justice and poverty taxes imposed by the New Policing on those arrested. Several measures are needed to realize this goal.

1. Strengthen indigent defense to avoid reliance on pleas to close cases.
2. Develop race-neutral, risk-based instruments to determine pretrial release eligibility and, failing to secure release, to determine bail amounts.
3. Take speedy trial rules seriously.⁹⁸
4. Limit the number of non-appearances by police to two before dismissal of charges.
5. Cap bail amounts within defendant means to pay.
6. Introduce means tests for fines to avoid default and subsequent criminal arrest warrants.
7. Provide assistance for expungement of arrest records.
8. Provide advisory counsel for persons responding to summons for ordinance and civil violations.

These measures are structural reforms that require policy levers more than statutory change, as well as court rules that judges can impose in the interest of justice for indigent defendants facing fines or jail. Their goal is to reduce reliance

97. Stephen Bright & Sia Sanneh, *Fifty Years of Defiance and Resistance after Gideon v. Wainwright*, 122 *YALE L.J.* 100, 102 (2013) (critiquing the current state of courts as “plea mills: courts of profit that impose fines without any inquiry into the ability of defendants to pay, thus setting them up for failure and return to jail”); see also Kohler-Hausmann, *supra* note 6, at 643 (citing the flood of dismissals and heavily discounted sentences issued by judges “simply to secure quick and easy pleas”).

98. William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, *N.Y. TIMES* (April 30, 2013), <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html?smid=tw-share> (citing the abuse by prosecutors of “increasingly elastic speedy-trial rules of the Bronx were finally stretched too far by delay after delay, prosecutors would sometimes drop the cases as if they were never quite worth their time anyway”).

on pleas and the piling up of the secondary costs of a criminal conviction, costs that can create impediments to social and economic stability and mobility. In the case of summons, advisory counsel can assist respondents who may seek to challenge the validity of a summons, or who can advise respondents of their procedural rights with respect to payment.

C. INSTITUTIONAL REFORM

A number of mechanisms to mass data can be implemented to create internal mechanisms to audit and regulate police activity. It is ironic that the emphasis on metrics in the New Policing has not been redirected to measure the performance and impacts of these policies on the lives of the policed. A few common-sense steps, borrowing from education and medicine, can shed light on the production of criminal convictions for the least serious crimes.

1. Require audits and reporting by state attorneys general.⁹⁹
2. Ensure transparency and public access to data on the progression and outcomes of cases, with details on the benchmarks.
3. Mandate a duty of responsible administration of policing as a matter of due process, with remedies for violations.¹⁰⁰

D. LITIGATION

Development of state-level statutes providing the remedies and relief available under 42 U.S.C. § 14141, including civil-rights actions by states when police are found to have engaged in a pattern and practice of violations.¹⁰¹

Litigation—whether through § 14141 or instead through claims brought by individuals under 42 U.S.C. § 1983—is a last resort when democratic and political oversight fails to remedy recurring civil-rights violations. But the shifting political landscape in the U.S. Department of Justice suggests that federal civil-rights litigation may by necessity give way to state actions.¹⁰² State actions have the advantage of leveraging the legitimacy of state elected

99. The new legislation in Missouri has strong reporting requirements that mandate accounting by municipalities of their police activity and linkages to their revenue streams.

100. See Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability*, 33 *YALE J. ON REG.* 165 (2016).

101. See Samuel Walker & Morgan MacDonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern and Practice” Statute*, 19 *GEO. MASON U. CIV. RTS. L.J.* 479 (2009) (arguing for a state law closely modeled from 42 U.S.C. § 14141 to effect change in local policing when police create a pattern of violations of state constitutional rights).

102. Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, *N.Y. TIMES* (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html?smid=tw-share>.

officials in bringing about reforms to policing under state constitutional law. Some state attorneys general have used state power in federal court under a *parens patriae* doctrine to bring about police institutional reform.¹⁰³ There also are new models of local democratic oversight of police, some spurred by DOJ consent decrees pursuant to § 14141, that have created new governance structures that blend police and government interests with interests of citizens, civil-rights advocates and lawyers, and police representatives to oversee all facets of policing.¹⁰⁴ In these instances, the work of local entities exercising citizen review takes place in parallel with DOJ monitoring, but ultimately supplants it once federal oversight ends.

E. COLLABORATIVE REFORM

Collaborative reform is an internal process where officers both at all levels of the police hierarchy and across command units pool their expertise to create new responses to complex crime problems. Crime problems in this view are contextually embedded in social and spatial contexts, where crime is common to a location. Crime problems may also reflect the acts of persons or groups, requiring a different response. In each instance, the pooled knowledge of multiple actors within police institutions, with diverse viewpoints and experience, is applied in a problem-solving process to identify tactical responses to crime problems. Cincinnati adopted a collaborative model in response to civil-rights litigation over use of force in the early 2000s.¹⁰⁵ The current model has now been in practice for close to a decade.¹⁰⁶ Reception by the police has been positive, and the core tenets of the model—“problems are dilemmas to be engaged in and learned from”—are deeply embedded in the police culture.¹⁰⁷

103. See, e.g., *People v. Town of Wallkill*, No. 01-Civ-0364, 2001 U.S. Dist. LEXIS 13364 at *19–*20 (S.D.N.Y. Mar. 16, 2001) (upholding attorney general’s *parens patriae* authority where legal standards and practical difficulties made it unlikely that individual victims of police misconduct could secure the sort of systemic, prophylactic injunctive relief sought); see also Jay L. Himes, *State Parens Patriae Authority: The Evolution of the State Attorney General’s Authority* (2004) (unpublished manuscript).

104. J.B. Wogan, *The New, More Powerful Wave of Civilian Oversight of Police*, GOVERNING, <http://www.governing.com/topics/public-justice-safety/gov-police-civilian-oversight-oakland-seattle.html> (last visited Mar. 25, 2017); see also JOSEPH DE ANGELIS, RICHARD ROSENTHAL & BRIAN BUCHNER, *CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: A REVIEW OF THE STRENGTHS AND WEAKNESSES OF VARIOUS MODELS* (2016).

105. Sabel & Simon, *supra* note 100, at 193.

106. See Collaborative Agreement, *In re Cincinnati Policing*, No. C-1-99-317 (S.D. Ohio Aug. 5, 2002), available at <http://www.cincinnati-oh.gov/police/department-references/collaborative-agreement/> (last visited Mar. 25, 2017); see also *In re Cincinnati Policing*, 209 F.R.D. 395, 400 (S.D. Ohio 2002).

107. Collaborative Agreement, *supra* note 106, at 2.

The generalizable lesson from Cincinnati's experience, which has been closely monitored and studied by legal and social-science scholars, is the importance of creating an integrated organizational design that shares expertise and problem-solving responsibility among officers across ranks and commands, and instantiates this ethos throughout the police organization. This is a sharp departure from the traditional hierarchical and centralized decision-making and strategic planning models in contemporary police institutions. The reform process also illustrates a principle of "duty of responsible administration," where a comprehensive restructuring is a predicate to meaningful and effective reform.¹⁰⁸ These are not simple reforms, but these experiments are substantive changes to the New Policing models of centralized and aggressive intervention that seem to create harm with little to show for it.

F. MITIGATING HARM

The New Policing has several liabilities, beyond those illustrated in this chapter. First, there have been 25 investigations into law-enforcement agencies conducted since 2009 by the Special Litigation Section of the DOJ's Civil Rights Division (CRD) under 42 U.S.C. § 14141.¹⁰⁹ The CRD is currently enforcing 19 agreements—including 14 consent decrees and one post-judgment order—in counties and state agencies.¹¹⁰ Since the inception of "pattern and practice" interventions in the 1990s, a total of 40 police agencies have entered into either stipulated settlements or consent decrees, committing local police to a series of court-supervised structural and policy reforms.¹¹¹ Three others are in negotiation now, in Ferguson, Baltimore and Chicago, but it is uncertain whether they will be implemented by the DOJ under Attorney General Jeff Sessions.¹¹² This all has taken place in the era of the New Policing, with its aggressive approach to less serious crimes and signs of social disorder.

108. Sabel & Simon, *supra* note 100, at 201.

109. *Special Litigation Section Cases and Matters*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0#police> (last visited Mar. 25, 2017).

110. *Id.*

111. See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 3* (2017), <https://www.justice.gov/crt/file/922421/download>; see also Goldie Taylor, *More than 20 U.S. Cities are Currently under a DOJ Consent Decree, But do They Really Work?*, BLUE NATION REV. (May 27, 2015), <http://archives.bluenationreview.com/more-than-20-u-s-cities-are-currently-under-a-doj-consent-decree-but-do-they-really-work/>.

112. Lichtblau, *supra* note 102; see also Ryan J. Reilly, *Jeff Sessions Didn't Read DOJ's Chicago Police Report—But He Thinks It's "Anecdotal,"* HUFFINGTON POST (Feb. 28, 2017), http://www.huffingtonpost.com/entry/jeff-sessions-doj-police_us_58b4a2eae4b060480e0b1ce6.

Second, there is no reliable evidence of its overall effectiveness in reducing crime. In fact, recent studies suggest that policing models that redirect attention from policing disorder and focus instead on indications of actual and more serious crime have stronger crime-reduction effects.¹¹³ Under the New Policing, the yield for public safety is low if these low-level crimes or signs of disorder are not gateways to violence or major property crimes. More important, the standard of proof there is intrinsically low. In a succession of Supreme Court cases in recent years, the reasonable-suspicion standard has expanded to include pretextual stops (*U.S. v. Whren*),¹¹⁴ neighborhood characteristics (*Illinois v. Wardlow*),¹¹⁵ “honest mistakes” leading to unlawful stops and arrests (*Herring v. U.S.*),¹¹⁶ and unlawful stops that lead to arrests for outstanding warrants (*Utah v. Strieff*).¹¹⁷ The bases of suspicion, in other words, have expanded beyond the capacity of courts or police agencies to effectively regulate the power to conduct investigative stops.

More important, the intrinsically low standard for investigative stops (and the arrests or summons that follow) inevitably leads to police intervention in inherently benign acts. This distracts police from intervening in the more harmful ones. It is only in the narrow shared space where suspicion of more serious crime overlaps with the general interest of the New Policing regimes that it makes sense to intervene in the benign act at a lower standard of proof, and the size of that shared space is part of a contentious debate. The social harms from undetected harmful acts—when police are distracted from more serious crimes to the less serious in the hope of discovering a more harmful act—will far outweigh any private or small-scale benefits from intervening in

113. See John MacDonald, Jeffrey Fagan & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, 11 PLoS ONE e0157223, 10–11 (2016); see also Fagan, *supra* note 36.

114. 517 U.S. 806 (1996) (declaring that any traffic or vehicular offense or suspected traffic or vehicular offense is a legitimate basis for a stop, no matter how pretextual the suspected offense).

115. 528 U.S. 119 (2000) (allowing presence in a high crime area to be a factor in police decisions to conduct an investigative stop, without specifying the parameters of “high crime area”).

116. 555 U.S. 135 (2009) (allowing a good-faith exception to the exclusionary rule when for an arrest is based on erroneous information or negligent error).

117. 136 S. Ct. 2056 (2016) (allowing an arrest for an outstanding warrant even if the warrant was discovered in an unlawful investigative stop).

the benign acts whose connections to serious crime are tenuous at best. In other words, do not sweat the little stuff, and focus on more serious acts with more consequential public harms. This is simple regulatory algebra.¹¹⁸

This leads directly to the final recommendation: law enforcement and citizen interests are better served by a recalibration of the jurisprudential and operational basis for the New Policing's standards to move them closer to a *Mapp's* more exacting probable-cause standard,¹¹⁹ and moving away from the more subjective reasonable-suspicion standard of *Terry*.¹²⁰ A more workable and easily understood standard for regulating police use of the stop power would create a more comfortable space internally for police to monitor, audit, and regulate compliance with constitutional law as well as internal policy. And it can provide a standard that moves away from the subjective criteria that are less vulnerable to cognitive error, perceptual distortions, and social harms.¹²¹ Secondary benefits for legitimacy and cooperation may well follow.

RECOMMENDATIONS

This section summarizes the major reforms for law and policy that this chapter recommends:

1. Increase the specificity of the reasonable suspicion standard as the basis for investigative stops to more closely approximate an exacting probable cause standard.
2. Institute caps on municipal revenue from traffic fines and non-traffic violations.
3. Strengthen indigent defense to avoid reliance on pleas to close low-level misdemeanor cases.
4. Use race-neutral, risk-based instruments to determine pretrial release eligibility and to determine bail amounts.
5. Take speedy trial rules seriously by limiting the number of appearances for adjudication of misdemeanors.

118. See, e.g., Louis Kaplow, *Burden of Proof*, 121 *YALE L. J.* 738 (2011) (arguing that strong evidence is necessary to assign liability or culpability since the proof burden can affect the design accuracy of enforcement); see also Fagan, *supra* note 36.

119. *Mapp v. Ohio*, 367 U.S. 643 (1961).

120. *Terry v. Ohio*, 392 U.S. 1 (1968).

121. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 615 (S.D.N.Y. 2013) (linking the low seizure rates to Fourth Amendment violations in carrying out *Terry* stops).

6. Develop state-level statutes providing remedies and injunctive relief, including civil-rights actions by states when police are found to have engaged in a pattern and practice of constitutional violations.
7. Create incentives for collaborative reforms between police and community to revise non-productive and harmful policing strategies.

Appendix Table 1. OLS Regression of Racial Differences in Stop Outcomes, 2004-2014

	Stop Outcome				
	(1)	(2)	(3)	(4)	(5)
Suspect Race	Frisked	Unproductive Frisk	Use of Force	Unnecessary Use of Force	Arrest Made
Black	.047***	.034***	.021*	.028***	-.003
	(.010)	(.006)	(.011)	(.008)	(.003)
White Hispanic	.067***	.014**	.040***	.014**	.002
	(.012)	(.005)	(.011)	(.006)	(.002)
Black Hispanic	.072***	.022***	.051***	.032***	.006*
	(.008)	(.006)	(.010)	(.008)	(.003)
Sample Restriction	-	If Frisked	-	If Force Used	-
N	4,811,769	2,519,934	4,811,769	1,076,575	4,811,769
Adj. R-sq	.228	.026	.052	.024	.014

Significance: * = $p < 0.05$, ** = $p < 0.01$, *** = $p < 0.001$.

Note: Average difference in rates of stop outcomes by race, relative to the average for Whites and other races. Standard errors in parentheses, clustered by precinct. Regressions include year fixed effects and controls for the reason for the stop. Robust standard errors in parentheses, clustered by precinct. Data include all stops for 2004 through 2014.

Appendix Table 2. OLS Regressions on Sanction Rates for SQF Cases by Suspect Race, New York City, Street Stops 2009-14 (Odds Ratios, SE)

	N, %	Black		Black Hispanic		White Hispanic	
Arrested ^a	142,596	1.08	***	1.047	***	1.014	ns
	5.9%	(.012)		(.011)		(.010)	
Arraigned ^b	117,425	.832	**	.717	***	.850	**
	82.4%	(.062)		(.058)		(.064)	
Adjudicated or Plead Guilty ^c	71,795	1.386	***	1.389	***	1.277	***
	61.1%	(.079)		(.085)		(.065)	
Conviction Offense ^d	71,795	1.543	***	1.453	***	1.878	***
	Felony	9.3%	(.113)	(.104)		(.072)	
Misdemeanor	53.5%						
Violation	37.2%						
Sentence ^e	71,795	1.312	**	0.98	ns	0.939	ns
	Time served or no time	44.5%	(.079)	(.064)		(.261)	
Fine or Probation	42.4%						
Jail or Prison	13.1%						

Odds ratio is compared to White suspects. N=2,396,314 stops.

Significance: * $p < .10$, ** $p < .05$, *** $p < .01$

a. The total arrests recorded were 148,880. 7,500 cases were eliminated because of duplicate or incomplete arrest identifiers. In addition, 146,323 cases resulted in issuance of a summons.

b. Models estimated with controls for age and gender, and fixed effects for year and arrest charge. Models estimated conditional on probability of arrest or summons. Standard errors clustered by police precinct

c. Models estimated with controls for age and gender, and fixed effects for year and arraignment charge. Models estimated conditional on probability of arraignment. Standard errors clustered by precinct.

d. Ordered logit regression of cases conditional on probability of conviction. Estimates control for age and gender, and fixed effects for year and arraignment charge.

e. Ordered logit based on sentences of time served, fine, probation, jail, prison conditional on conviction. "No time" includes conditional discharge. Models estimated based on probability of conviction. Controls for age and gender. Fixed effects for year and conviction charge.

Appendix Table 3. Logistic Regression of Race Effects on Stop Outcomes, Ferguson, 2010–2013 (Odds Ratio, SE)

	Stop Outcome				
	Driver Ticketed	Arrest Made	Vehicle Searched	Contraband Seized	Warrant Arrest
Black-White Odds Ratio	1.354+	1.928**	1.670**	0.744	3.241**
(Standard error)	(.236)	(.297)	(.235)	(.171)	(.921)
Sample Restriction	-	-	-	If Searched	If Arrested
N of Cases	11592	11592	11592	1203	951
Pseudo R-sq.	.359	.063	.101	.041	.083

Notes. Standard errors in parentheses, p-values in brackets.

Significance: + $p < 0.10$, * $p < 0.05$, ** $p < 0.01$. Robust standard errors clustered by arresting officer. Models include controls for driver age and gender, officer assignment (patrol vs. traffic), indicator for two officers with extreme level of stop activity, and the reason for the stop. Column 4 is estimated conditional on a search occurring. Column 5 is estimated conditional on an arrest being made.

Racial Profiling

*David A. Harris**

This chapter will explore the topic of racial profiling by police. First, the chapter defines the term racial profiling for purposes of the discussion. Next, the chapter describes the points at which racial profiling arises in law enforcement, and the legal tools and incentives that drive it. It then describes the harm that racial profiling does to people, and to the criminal justice system as a whole. The chapter explores the cost to public safety that racial profiling entails, and closes with five concrete suggestions for combatting this long-term problem.

INTRODUCTION

When discussions of racial profiling happen among members of community groups, especially people of color and their allies, the phrase usually brings forth reactions, stories, and statements that point to any kind of discriminatory action that reveals racial animosity—usually, though not necessarily, at the hands of the police. If, on the other hand, discussions occur among a group of police officers or their allies, the reactions differ considerably. To these people, the phrase connotes a newer, more subtle way of calling all police officers racists, or of saying that routine police practices, such as stopping vehicles for traffic enforcement, have become infected with institutional racism.

Neither of these reactions captures the meaning of racial profiling.¹ When it occurs, racial profiling does constitute one form of racial discrimination; however, not every form of discrimination that might arise, even discrimination by police officers, constitutes racial profiling. And not every use of the phrase implies racial animus by individual officers. This muddiness in the definition of racial profiling has implications beyond the semantic; if we do not understand what racial profiling really is, our chances of understanding the harm it causes or of finding ways to address it drop. Defining the problem correctly matters. Therefore, it will pay dividends to start with a working definition of the term.

* Professor of Law and John E. Murray Faculty Scholar, University of Pittsburgh.

1. In fact, it might be better to use the phrase “racially biased policing,” as a number of those who read the initial draft of this chapter suggested. Racial profiling, they said, is both under-inclusive and over-inclusive, and does not accurately capture the full concept. I agree with some of this insightful criticism. But for better or worse, racial profiling is the phrase that people recognize and associate with racially biased policing. Therefore, I will use that phrase, and will attempt to compensate for its shortcomings by providing a useful definition.

Whatever we might say about the way people use the term, some things about racial profiling remain certain. It is a real, measurable phenomenon; and it causes real harm to people, and to public safety. It is not just a matter of concern to African-Americans, Latinos, and other people of color, who feel the sting of the practice directly. It is an issue for all Americans who care about fairness, justice, and public order—in short, everyone. We must do all we can to curtail it as much as possible.

I. DEFINITION

One reasonable working definition for racial profiling reads:

Racial profiling is the use of racial or ethnic appearance by police as one factor, among others, to decide who is suspicious enough to attract police attention that may result in detention, questioning, a search, or other routine police action.²

Another useful definition says:

[R]acial profiling is defined as any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.³

Other definitions might work just as well,⁴ but these, which are reasonably close, will serve as a starting point for this discussion. A few particulars deserve explanation and attention.

2. I have used similar definitions elsewhere. See, e.g., David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L. REV. 423, 426 (2003) (defining racial profiling as “the use of race by police as one factor among other in deciding whom to stop, question and search”).

3. DEBORAH RAMIREZ, JACK McDEVITT & AMY FARRELL, U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE TO RACIAL PROFILING DATA COLLECTION SYSTEMS 3 (2000).

4. See also various definitions in DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 10–11, 48–51 (2002); The End Racial Profiling Act (ERPA), S. 1670, 112th Cong. § 2(7) (2011) (defining racial profiling as “the practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure”); *Racial Profiling*, NAT’L INST. OF JUST., <https://www.nij.gov/topics/law-enforcement/legitimacy/pages/racial-profiling.aspx> (“Racial profiling by law enforcement is commonly defined as a practice that targets people for suspicion of crime based on their race, ethnicity, religion or national origin.”).

First, note that while the phrase racial profiling focuses on race, the definition also includes ethnic profiling. (The second definition also includes national origin, for purposes of greater clarity.) In practice, racial profiles have targeted not just African-Americans but Latinos and sometimes other ethnic groups. Therefore, it makes sense to make the definition wide enough to include them. Second, note that the first definition speaks in terms of appearance. What counts, in terms of how a police officer might use racial profiling either consciously or unconsciously, is what the racial or ethnic identity of the person *appears to be* to the officer. It will be on that basis that the officer decides whether the person seems suspicious, not what the *actual* racial or ethnic identity of the person may be. What counts is what the officer thinks the person's racial or ethnic identity is.

Third, note that the police need only use racial or ethnic appearance as one factor among others, not the sole factor, in deciding whether the person observed seems suspicious. Many definitions in statutes, rules, and policies have defined the practice as based solely on racial appearance.⁵ No action a police officer takes—neither a traffic stop nor a pedestrian stop, for example—happens because of just one factor. Many factors might come into play in any explanation of an officer's behavior: the event having taken place in darkness, presence in a high-crime area, the subject's dress, or the number of subjects present, for example. Therefore, using a definition that includes this "solely" approach effectively defines the problem out of existence.

Fourth, the definition focuses on how perceived race or ethnic identity may lead a police officer to take routine enforcement actions,⁶ such as a traffic stop or stop-and-frisk.⁷ But this may be too narrow an understanding of racial and ethnic profiling. In point of fact, we have seen racial and ethnic profiling used for at least two other important purposes: profiling directed at national security—what one could call anti-terrorism racial profiling—and at

5. See, e.g., CONN. GEN. STAT. § 54-11(b) ("For the purposes of this section, "racial profiling" means the detention, interdiction or other disparate treatment of an individual solely on the basis of the racial or ethnic status of such individual.").

6. One point implied here is that this discussion of racial profiling focuses on police actions. While some use the term to describe actions outside the realm of law enforcement—for example, a taxi driver who will not pick up black passengers—racial profiling refers to police actions. The taxi driver's actions may indeed constitute racial discrimination, and they may have their own pernicious and damaging effects. But they cannot compare to the possible effects of a powerful state agent depriving a citizen of property or liberty or even life itself. Moreover, law enforcement profiling has an actual history growing out of the use of various kinds of criminal profiles; the taxi driver's behavior comes from a different context.

7. See Jeffrey Fagan, "Race and the New Policing," in the present Volume; Henry F. Fradella & Michael D. White, "Stop-and-Frisk," in the present Volume; Devon W. Carbado, "Race and the Fourth Amendment," in the present Volume.

immigration, in which people who appear foreign (especially Latinos) become targets because police suspect they may be undocumented or otherwise out of status vis-à-vis immigration laws.⁸ Therefore, each of the definitions above should include targeting for purposes not just of routine law enforcement or criminal enforcement, but also for purposes of anti-terrorism or immigration enforcement. Fifth, notice one thing that does not appear in the definition. The use of a person's racial or ethnic appearance as part of a reasonably detailed description⁹ of a known suspect does not constitute racial profiling. Rather, as long as the description, usually from a witness or victim but also from a police officer, yields a description of a particular person, using that description to attempt an apprehension of that particular person does not use race or ethnic appearance the same way that racial profiling does. Rather, it constitutes good police work and may assist in the apprehension of the right person.

With all of those points in mind, this is the definition we will use in this chapter:

Racial profiling means any police-initiated action that relies on racial or ethnic appearance as one factor among others, rather than the behavior of an individual or information, resulting in police actions such as questioning, stop-and-frisk, or searches for purposes of criminal, national-security or anti-terrorism, or immigration investigation. Racial profiling does not include the use of racial or ethnic appearance as part of a reasonably detailed description that enables police to identify an individual suspect.

II. THREE WAVES OF RACIAL PROFILING

When racial profiling first surfaced in national discussions, in the 1990s, the subject referred to police actions that formed part of drug-enforcement efforts. But, as events have illustrated in the years since, racial and ethnic profiling is a tactic that has been repurposed and used in various contexts at least since the late 1980s and early 1990s. Looking back, we can see three waves of racial

8. See generally Jennifer M. Chacón, "Criminalizing Immigration," in Volume 1 of the present Report.

9. I use the phrase "reasonably detailed" to exclude simple, very general descriptions. For example, "young black male, wearing jeans and white t-shirt, and baseball cap" would be far too general to make for a useful description. It would describe a huge percentage young black men in any neighborhood on almost any given day, and would not allow a police officer to pick out any particular person as suspicious. On the contrary, it would give the officer a license to stop almost every young black man. Rather, I refer to what seminar participant Devon Carbado of UCLA School of Law called a "thick description"—one that might include race but also enough other detail that would allow law enforcement to distinguish people of the same racial or ethnic group from each other.

profiling: The first targeted drug trafficking, the second focused on post-9/11 terrorism dangers, and the third targeted undocumented immigration.

Racial profiling, as we know it, began in the 1980s.¹⁰ The federal Drug Enforcement Administration had, for some years, focused drug-interdiction efforts at airports. The agency believed that the purveyors of a considerable amount of the illegal drugs consumed in the U.S. transported them in luggage on commercial airline flights, and DEA agents began watching airline passengers for signs that they were serving as drug transporters. Agents made some arrests and seizures in these efforts, and from the common factors observed in these seizures, the agency put together its “drug courier profile”: a list of common characteristics of those found carrying loads of narcotics. The factors included travel to or from so-called drug-source cities; paying for tickets with cash, with little or no advance notice; trips with rapid returns from the drug source cities; and various behaviors supposedly associated with drug transportation, such as getting off of the aircraft last or carrying only hand-held luggage. These drug profiles often constituted nothing more than the factual commonalities of agents’ top drug busts; they paid no attention, for example, to the largest number of stops agents made, often using the same criteria, in which police uncovered no evidence. And they used no even remotely rigorous statistical analysis to see if the factors used actually predicted the targeted behavior any better than would random selection of passengers. Nevertheless, the U.S. Supreme Court decided that such profiles of factors, any or all of which constituted innocent behavior, could in the aggregate give officers sufficient reasonable suspicion for a legal stop.¹¹

Notwithstanding the weaknesses in the profiling approach, the DEA noticed when an up-and-coming Florida State Trooper (later the sheriff of Volusia County, Florida) named Bob Vogel applied the same reasoning to making traffic stops on Florida highways, which often led to large-scale drug busts. Like the DEA in airports, Vogel accounted only for his successes in constructing his list of “cumulative similarities” and not the much larger number of stops

10. For an expanded version of this historical background, see HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 16–23, 48–51, 53–62.

11. United States v. Sokolow, 490 U.S. 1 (1989). *Sokolow* could be said to show the naiveté of the U.S. Supreme Court in accepting the drug courier profile without any real critical examination. Judges in lower federal courts had noticed that, even though the drug courier profile seemed to land almost uncannily on the exact constellation of factors in any given case, when looked at over the great run of cases, it varied quite significantly—often within their assessments of the very same factor in different cases. See, e.g., United States v. Hooper, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting) (calling the drug courier profile “laughable” because “it is so fluid that it can be used to justify designating anyone a potential drug courier if the DEA agents so choose”).

in which he found nothing, despite the presence of some or all of those same similarities. Based on Vogel's work, the federal government established a program to train state and local police in his methods. The program, called "Operation Pipeline," sought to instruct state and local police departments in drug interdiction on highways using a drug-courier profile. By the early 1990s, approximately 27,000 police officers from all over the U.S. received Pipeline training, paid for by millions of federal dollars through the U.S. Department of Justice. And these officers, in turn, created profiling-based drug interdiction units in their own departments. The DEA and other agencies involved have always denied that racial or ethnic appearance played any role—even as just one factor—in any of their profiling training. But the evidence says otherwise. Training films and other materials mentioned race or ethnicity as a factor; other times, without mentioning race or ethnicity, the materials simply portrayed all the guilty parties (in a training video, for example) with the same obvious racial or ethnic markers.

To observers of these trends, it came as no surprise when, in the 1990s, following directly from the DOJ-based Pipeline training, state police drug-interdiction units seemed to concentrate on highway traffic stops of men from minority groups, particularly African-Americans, but also Latinos. The two most well-known racial-profiling cases of the 1990s, *State v. Pedro Soto*¹² in New Jersey and *Wilkins v. Maryland State Police*¹³ in Maryland, laid bare the racialized practices of those states' interdiction practices, and how deeply infected with race they had become. In *Soto*, defense expert John Lamberth's work showed that the race of the driver or occupants of the vehicles stopped is "a decisive factor or a factor with great explanatory power" in determining who is stopped, and the disparity between which drivers police stopped and the racial composition of drivers on the highway "is strongly consistent with the existence of a discriminatory policy ... of targeting blacks for stops and investigation."¹⁴ Lamberth made similar findings in the *Wilkins* case.¹⁵ Thus, by 2001, with the introduction of the End Racial Profiling Act, anti-drug police work had become the focus of racial and ethnic profiling.

12. *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

13. *Wilkins v. Md. State Police*, No. 93-468 (D. Md. filed Feb. 12, 1993).

14. HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 56 (quoting Lamberth).

15. Report of John Lamberth Ph.D. at 62, *Wilkins v. Md. State Police*, No. 93-468 (D. Md. Nov. 8, 1996).

This shifted dramatically with the terrorist attacks targeting New York City and Washington, D.C., on September 11, 2001. In reaction to these shocking and horrible attacks, carried out by 19 men from the Middle East, the focus of profiling was no longer drug trafficking, but stopping terrorists, particularly those who would try to use the aviation industry to target civilians. Polling showed the reality in this shift quite starkly. Prior to the attacks, almost 80% of Americans—all Americans, not just people of color—knew what racial profiling was, and thought it should stop.¹⁶ After the September 11 attacks, a strong majority of all Americans—including those, such as African-Americans and Latinos, who had themselves felt the sting of profiling—said they believed profiling had a legitimate place, as long as it targeted people who appeared to be Arabs and/or Muslims, in airports.¹⁷ Thus began the second wave of profiling: Anti-terrorism profiling, people said, was just a common-sense measure to make us safe from a new danger in a more perilous world. And we could not afford to let political correctness or delicate feelings get in the way of safety from murdering terrorists who wanted to kill us. Never mind that intelligence officials warned, in the direct aftermath of the September 11 attacks, that such racial or ethnic or religious targeting was itself dangerous and would make us less safe, by alienating the very allies we would need to fight the new scourge, and would play into our enemies' hands. Profiling of Arabs and Muslims became one of the consensus obvious answers to the new problem of terrorism.

Readers can see a good example of this thinking in a piece of writing by Stanley Crouch. Crouch, a well-known African-American cultural critic and novelist, and a recipient of the MacArthur Foundation's so-called "genius grant," captures the idea well in a column he wrote at the time for the *New York Daily News* that ran across the country; one paper titled it "Wake Up: Arabs Should Be Profiled." The key lines read:

All those who denounce so-called Arab profiling ... need to put their faces in a bowl of cold water for a few seconds and wake up.... [I]f pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out,

16. Frank Newport, *Racial Profiling Is Seen as Widespread, Particularly Among Young Black Men*, GALLUP (Dec. 9, 1999), <http://www.gallup.com/poll/3421/racial-profiling-seen-widespread-particularly-among-young-black-men.aspx>.

17. Jeffrey M. Jones, *Americans Felt Uneasy Toward Arabs Even Before September 11*, GALLUP (Sept. 28, 2001), <http://www.gallup.com/poll/4939/americans-felt-uneasy-toward-arabs-even-before-september.aspx> ("Nearly six in 10 Americans interviewed" after the attacks "favored requiring people of Arab descent to undergo special, more intensive security checks when flying on American airplanes.").

that is the unfortunate cost that [the innocent Arabs] must pay to reside in this nation.¹⁸

The irony that substituting a few words—“blacks” for “Arabs,” and “drug offenses and violence” for “mass murder”—would make his statement a pitch-perfect justification for racial profiling for drug offenders seems not to have occurred to Mr. Crouch. No doubt that happened because preventing terrorism seems different: The risk of such a devastating occurrence as the September 11 attacks simply does not compare to stopping some drug couriers. Yet the mechanism—and its reliance on racial and ethnic characteristics—remains the same.

The third wave of profiling began to emerge several years after the September 11, 2001, terrorist attacks. Advocates for tighter immigration controls, and for deportations of undocumented persons in the U.S., had tried for years to get local authorities to assist in deportation efforts, without success. Local police, for their part, wanted no part of this effort, because they understood that becoming adjunct forces to federal deportation efforts would cause their own immigrant communities—both undocumented and documented people—to fear involvement with them. That fear would cause people to avoid calling police with reports of crime for fear of bringing immigration policing into any given situation. This would give predators in the community—robbers, killers, domestic-violence perpetrators, even child molesters—free rein. Nevertheless, advocates proposed several pieces of legislation in the mid-2000s, such as the CLEAR (Clear Law Enforcement for Criminal Alien Removal) Act,¹⁹ with the aim of increasing immigration enforcement through local involvement. A large number of American law enforcement agencies opposed the CLEAR Act, and it did not pass. And the third wave really crested in 2010, with the passage of Arizona’s S.B. 1070,²⁰ the so-called “show your papers” law, which required police officers in Arizona to inquire about the immigration status of people they encountered—without any use of racial profiling.

As 2017 began, we saw the beginnings of a reprise of the second and third waves. The Trump administration’s executive order to ban all refugees from Syria, as well as entry into the country from seven Muslim-majority countries, showed that those who favor using the second wave of profiling have reawakened, many years after September 11 and in the age of ISIS terror attacks around the world. And the administration’s plans for a massive border

18. Stanley Crouch, *Wake Up: Arabs Should Be Profiled*, ST. LOUIS POST-DISPATCH, Mar. 19, 2002, at B7.

19. Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2761, 108th Cong. (2003).

20. *Fact Sheet for Senate Bill 1070*, ARIZONA STATE SENATE (Jan. 15, 2010), <http://www.azleg.gov/legtext/49leg/2r/summary/s.1070pshs.doc.htm>.

wall, its ratcheting up of arrest and deportation actions against people guilty of, accused of, or even suspected of very minor crimes, brings the third wave of profiling back into play. The tactic has not varied during each of the waves: Racial or ethnic appearance serves as a proxy factor for suspicion of some kind of purported wrongdoing—of drug trafficking or criminal involvement, or terrorism, or of undocumented status. The impact remains the same: large numbers of people sharing a set of immutable physical characteristics, the vast majority having no plausible connection to the suspect activity at all, stopped, questioned, searched, and put under suspicion in various ways, sometimes quite publicly. And the results do not change because this tactic is ineffective, and in all probability makes us less safe from whatever it is we fear in the particular context.

III. WHERE RACIAL PROFILING MANIFESTS ITSELF

With the working definition above, we can ask how and where the practice manifests itself. The primary places in law enforcement that one sees the use of racial profiling are traffic stops and pedestrian stops (the latter usually, though not always, coming during so-called “*Terry* stops,” also known as stop-and-frisk activity). These two types of police actions make up fully half of all encounters that Americans have with police officers.²¹

Most anyone who drives in the U.S. understands how a traffic stop works. A police officer, witnessing the commission of a driving infraction (e.g., exceeding the speed limit or failure to use a required signal before a turn), or observing a defect with a vehicle’s equipment (e.g., a cracked taillight or a non-working headlight) or its required licensing items (plates, stickers or the like), any of which may violate the criminal law, may order the driver to pull over. Once stopped, the officer typically approaches the vehicle, addresses the driver, and requests the driver’s license, vehicle registration, and (usually) required proof of insurance. The officer takes these documents back to the police car and uses the police radio or an in-car computer to run checks on the driver and the stopped vehicle. Regarding the driver, the officer checks for active arrest warrants and for his or her history of driving citations, accumulated points, and/or license suspensions. As for the vehicle, the officer attempts to ascertain whether the vehicle’s registration and tags are current and proper, and to learn whether the vehicle has been reported stolen. Assuming that these checks come back “clean,”

21. *Study Finds Some Racial Differences in Perceptions of Police Behavior During Contact with the Public*, BUREAU OF JUSTICE STATISTICS (Sept. 24, 2013), <https://www.bjs.gov/content/pub/press/pbtss11rpa11pr.cfm> (Police Public Contact Survey for 2011 finds that half of all encounters with police occur during traffic and pedestrian stops).

the officer then decides whether to issue one or more citations to the driver, or instead warn the driver to avoid the conduct that caught the officer's attention or to fix problems with the vehicle. This usually takes 20 to 30 minutes.

This describes the common, routine traffic stop. But in many such stops, another set of actions takes place. And therein lies the reason that African-Americans and Latinos have long complained that police have targeted them for traffic-enforcement action.

First, understand that traffic codes are incredibly detailed and voluminous. Each state traffic code includes literally hundreds of laws that govern operation of the vehicle, vehicle equipment, and required licenses.²² Given the exhaustive degree of vehicle regulation, no driver can avoid violations of some kind, even with the greatest degree of care and attention. Police officers know this; by watching any driver carefully for a few blocks, they know they will witness a violation. One officer, quoted in a well-known 1967 book discussing police techniques, said, "You can always get a guy on a traffic violation if you tail him for a while, and then a search can be made."²³ Another officer, in the same book, said, "In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of the traffic law."²⁴ We can forgive these officers for their lack of understanding of the nuances of the current law regarding searches following stops;²⁵ they spoke decades ago. But they get the larger point. Given that every driver violates some aspect of the vehicle code during any short drive, traffic enforcement does not focus on detecting and addressing all, or even some large percentage, of the infractions committed. Rather, it becomes a matter of selecting *which* drivers committing violations to stop. This selection of drivers, from among all violators (i.e., all drivers) constitutes a prototypical exercise of police discretion: the exercise of judgment by officers, in which they decide when, how, and against whom to direct their law enforcement authority.

22. *E.g.*, Pennsylvania Vehicle Code, <http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/75/75.HTM> (including, for example, more than fifty provisions regarding license plates, ten provisions regarding registration suspensions, more than twenty provisions on licenses, forty-eight provisions describing "Rules of the Road in General," over fifty "Miscellaneous" provision covering "Offenses in General," "Serious Offenses," and offenses involving accidents, and many other governing vehicle equipment).

23. LAWRENCE F. TIFFANY, ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, AND ENCOURAGEMENT AND ENTRAPMENT 131 (1967).

24. *Id.*

25. Simply making a legal stop would not, without evidence of some other offense, allow the officer to conduct a search of either the vehicle or its occupants.

Police discretion is nothing new, and in an overall sense the opportunity for officers to exercise discretion should not cause fear. Police officers should exercise sound judgment in exercising their authority; not every violation of law requires formal action and sanctions. Problems arise, however, when discretion has few or no boundaries—when the behavior that violates the law is so broad that anyone might come under suspicion. Because there exist few real limits on police action against vehicle drivers, officers can convert enforcement of traffic into investigation of other matters, for different, more intrusive and far more serious purposes. Put differently, without effective legal limits on discretion, traffic enforcement, for which police have extraordinarily broad legal authority, can become a pretext for police action of other types for which no legal authority actually exists. And the U.S. Supreme Court has constructed a perfect legal regime to allow police to use traffic stops as such pretexts. In a 1996 case, *Whren v. United States*,²⁶ the practice of racial profiling came squarely before the Court. In *Whren*, Washington, D.C., vice officers, operating in plain clothes in an unmarked vehicle and on patrol for signs of drug activity, observed a sport utility vehicle. Their attention drawn, the officers followed the vehicle, which violated some traffic laws in short order. The officers stopped the vehicle, driven by a young black man, and walked up to the cab; there they observed the passenger, another young black man, in possession of cocaine.²⁷ The defendant argued that while the police may indeed have observed traffic offenses, these officers—plainclothes officers in an unmarked vehicle, whose own departmental regulations actually prohibited them from making traffic stops²⁸—were using their discretion to make traffic stops in order to investigate citizens for drug offenses, without evidence of drug crimes.²⁹ In other words, the great discretion officers possessed to stop drivers for ubiquitous traffic offenses was being used as a pretext for a wholly different type of police work: drug investigation. The Supreme Court also had before it statistics from investigations in other jurisdictions that showed how police in those places had made a practice of using traffic enforcement against African-Americans and people of color at rates far greater than their

26. *Whren v. United States*, 517 U.S. 809 (1996).

27. *Id.* at 809–10. These details can also be found in David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 547–48 (1997).

28. The D.C. Metropolitan Police Department regulations prohibited stops by plain clothes officers, and stops by any officers driving unmarked vehicles. Harris, *supra* note 27, at 549 n.38.

29. Brief for Petitioners at 13–14, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 75758.

presence on the roads.³⁰ In other words, the defendant argued that police used traffic enforcement in a discriminatory manner, based on the racial or ethnic appearance of the driver—racial profiling by any reckoning.

The Court’s opinion constituted both a reaction to the legal arguments, and a validation of a pernicious police procedure. Pulling a driver over for a traffic stop operated as a full seizure, for purposes of the Fourth Amendment to the Constitution, said the Court; any such seizure would require probable cause, as required by the Fourth Amendment. The Court declared that anytime an officer observed a traffic infraction, this established the necessary probable cause for the stop. It did not matter, the Court said, whether the officer performed the stop to enforce the traffic rules and make the roads safer, or if his or her motivation came from some other purpose entirely; as long as the officer had seen a traffic offense, his or her real motivations in making the stop did not matter.³¹ The police could not, the Court continued, use the power to make traffic stops in a racially discriminatory way; but evidence that they had done so would have no impact on the power of police to make such stops. A person who felt that he or she had faced racial discrimination by police who conducted the stop could file a lawsuit under the Equal Protection Clause of the Fourteenth Amendment. But the stop, and any evidence that resulted from it, would stand.³²

Even the most obtuse observer would understand the subtext to the Court’s opinion. The police might, indeed, be using traffic enforcement as a way to investigate drug offenses, even when there existed no evidence at all of drug activity. But the courts would not intervene to stop this police practice. Henceforth, the police had the Supreme Court’s approval to use traffic enforcement as a pretext to investigate other crimes, and even evidence that police might use this tool with a decidedly racial cast, as had been proven in Maryland and New Jersey, would not change this for Fourth Amendment purposes.

Once the police stop a vehicle—and *Whren* gives them the power to stop any vehicle, almost anytime, simply by following it long enough to see the inevitable traffic violation—the police may then engage in other activities, beyond those described above that are part of the normal process of traffic enforcement. They can use their time standing outside the car and the driver’s window to look inside the vehicle, seeking evidence in plain view of an unrelated criminal violation: a partially smoked marijuana cigarette or a concealed weapon, for

30. *Id.* at 25–26.

31. *Whren*, 517 U.S. at 812–14.

32. *Id.* at 813. See generally Paul Butler, “Race and Adjudication,” in Volume 3 of the present Report.

example. The visual (or olfactory) detection of another offense would give an officer probable cause for an arrest and seizure of the contraband seen,³³ which would in turn allow an officer to fully seize (i.e., arrest) the driver and often the passengers, and also to search some or all of the vehicle's interior.³⁴ If merely looking inside the vehicle does not give officers probable cause, they can then begin to question the occupants, without benefit of *Miranda* warnings, about their activities, what might be in the car, or anything else.³⁵ The occupants need not answer, but most will. Inevitably, this questioning will land in a familiar place: "You're not carrying any drugs or illegal weapons in the vehicle, are you? Any large amounts of money?" When the answer comes—almost surely, "no"—the next question follows as night follows day: "Well, you won't mind if I search your car, would you?" Having already said they have no guns or contraband or evidence, most drivers will find themselves hard-pressed to refuse and give the police permission to perform the so-called "consent search."³⁶ And if the driver does not grant permission, the police can use a drug-sniffing dog to search the car and its contents as long as the stop has not yet ended.³⁷

Thus traffic stops, and the Supreme Court cases that have sprung up around them, have created the opportunity for police to engage in enforcement with almost no bounds on their discretion. Anyone can be stopped, during almost any short drive; and the Court has given police the ability to enlarge the traffic enforcement activity into something much larger: investigation for other crimes, primarily drug crimes, for which no evidence exists.

But just because traffic stops give police a legal pretext to stop and investigate anyone, for anything, almost anytime, this does not mean that the police will, in fact, use this power against *just anyone*. In fact, the data we have, going all the way back to the earliest racial-profiling cases in New Jersey³⁸ and Maryland,³⁹ show that the police in many jurisdictions usually use this power much more often against African-Americans and other people of color.⁴⁰ And when the

33. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plain view exception).

34. *Arizona v. Gant*, 556 U.S. 332 (2009).

35. *Berkemer v. McCarty*, 468 U.S. 420 (1984).

36. *Schneckloth v. Bustamonte*, 412 U.S. 217 (1973); *see also infra* note 60 and accompanying text.

37. *United States v. Place*, 462 U.S. 696 (1983); *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

38. *State v. Pedro Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996); *see also* HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 53–56.

39. Complaint, *Wilkins v. Maryland State Police*, No. 93-468 (D. Md. filed Feb. 12, 1993); Harris, "Driving While Black," *supra* note 27, at 563–66.

40. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 277–81 (1999).

stop leads to a consent search, this power is also used disproportionately: People of color get asked for consent to search much more often than others.⁴¹

Racial profiling also manifests in another common type of police/citizen encounter: stop-and-frisks. In the 1968 case of *Terry v. Ohio*,⁴² the U.S. Supreme Court set out the Fourth Amendment standards applicable to stop-and-frisks: temporary detentions of persons for investigation of suspected criminal activity, and cursory searches of outer clothing (often called “pat-downs”) for suspected weapons. The Court said that when a police officer possesses reasonable, fact-based suspicion that crime is afoot and it involves a particular individual, the officer may temporarily detain that person to ask questions or otherwise dispel the officer’s suspicions.⁴³ In the event that the officer also has reasonable, fact-based suspicion to believe that the person may be armed and dangerous (either because the crime suspected would likely require a weapon or because the officer sees evidence of the presence of a weapon, such as a bulge under the clothing in a place where people carry weapons), the officer may perform a limited search of the suspect by patting down the person’s outer clothing to detect weapons.⁴⁴ A hunch or a gut feeling will not support a stop or frisk; rather, the officer must have a reasoned, fact-based suspicion.⁴⁵

Even in the *Terry* opinion itself, the Supreme Court conceded that police had used this very type of activity in abusive ways against people of color.⁴⁶ It should not surprise anyone, then, to learn that patterns of racial profiling have also arisen in stop-and-frisks in the 21st century. The most prominent example of this comes from New York City. During the eight years of the mayoral administration of Rudolph Giuliani, the police increased stop-and-frisk activity significantly; by 1999, New York Police Department officers conducted roughly 100,000 *Terry* stops per year.⁴⁷ That number seemed huge—until Michael Bloomberg became mayor in 2002 and appointed Raymond Kelly as police commissioner. Between 2004 and 2012, the police in New York conducted 4.4

41. *Id.*

42. *Terry v. Ohio*, 392 U.S. 1 (1968). See generally Fradella & White, *supra* note 7.

43. *Terry*, 392 U.S. at 21, 23.

44. *Id.* at 27.

45. *Id.* at 22, 27. Note that the officer need not have enough evidence to amount to probable cause, the usual standard for an arrest and a full search; rather, reasonable suspicion, a lower standard, suffices, but must still be based on facts, not instinct or intuition.

46. The Court noted “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,” even as it minimized the ability of the exclusionary rule to successfully tame these problems. *Id.* at 14–15.

47. THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICE: A REPORT FROM THE OFFICE OF THE ATTORNEY (Dec. 1, 1999) [hereinafter OAG REPORT].

million stops.⁴⁸ By 2004, stops reached 314,000 per year; roughly triple the pace of the late 1990s; by 2011, *Terry* stops had more than doubled again, totaling 686,000 per year.⁴⁹ With the number of *Terry* stops climbing every year along with a ballooning number of complaints by minority citizens, opponents brought a federal civil-rights action, *Floyd v. City of New York*, challenging the constitutionality of the stop-and-frisk practices.⁵⁰ A 2013 trial laid bare the facts: Among those 4.4 million *Terry* stops, 52% involved African-Americans, 31% involved Latinos, and 10% involved whites (the city's population at the time was 23% black, 29% Latino, and 22% white); 88% of these actions yielded no contraband, no arrests or even summonses; and only 1.5% turned up guns (the stated goal of the actions).⁵¹ While the Court carefully noted that it only passed upon the *constitutionality* of the stop-and-frisk activity, and made no judgment concerning the *effectiveness* of that activity,⁵² the data disclosed in the trial nevertheless told an important story about standards and effectiveness. Officers were much more likely to stop and frisk African-Americans and Latinos than whites, but they were *more likely to find weapons or contraband on whites than either African-Americans or Latinos*.⁵³ This means that police officers viewed African-Americans and Latinos as suspicious based on less evidence than they did when judging suspiciousness among whites. Based on these judgments and the actions taken as a result, they got a lower return (in terms of stop-and-frisks resulting in seizures of guns or other contraband, or resulting in arrests or summonses) than when they stopped and frisked whites.

Given all of this information, the federal judge made the following findings:

[T]he evidence at trial revealed that the NYPD has an unwritten policy ... targeting ... young black and Hispanic men.... This is a form of racial profiling. While a person's race may be important if it fits the description of a particular crime suspect, it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals. The Equal Protection Clause does not permit race-based suspicion.⁵⁴

48. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 588 (S.D.N.Y. 2013).

49. *Id.*

50. Complaint, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034). See Fagan, *supra* note 7.

51. *Floyd*, 959 F. Supp. 2d at 558–59.

52. *Id.* at 556.

53. *Id.* at 559.

54. *Id.* at 561.

IV. WHAT MAKES PROFILING GO?

Given everything we know, what makes racial profiling attractive to police officers? What makes it possible to use racial profiling as part of a tactical response to crime?

The answer to the first question concerns belief, rather than fact. In short, some number of police officers—it is impossible to state a percentage—simply remain convinced that racial profiling remains the right tool to help them focus on the proper suspects. Thinking in terms of the tens of thousands of cars that stream down a busy highway each day, the police tasked with drug interdiction may not know which few of those vehicles contain loads of drugs, and they cannot stop them all, so they look for clues to enable themselves to target their efforts. They may look for neutral clues, such as rental vehicles (more likely, they believe, to be used for this purpose than privately owned vehicles) that adhere very closely to the speed limit (which few drivers do), and the like, but the race of the driver also plays a role in the constellation of factors. Marshall Frank, a writer and retired former police officer who retired as a captain from the Miami-Dade Police Department, spelled out the rationale in an article he wrote for the *Miami Herald*. Frank says people can “[l]abel me a racist if you wish, but the cold fact is that African Americans comprise 12 percent of the nation’s population, but occupy nearly half the state and federal prison cells.”⁵⁵ This, he says, justifies taking race into account in deciding which people seem suspicious.

The same reasoning applied in the New York Police Department under Commissioner Kelly. In the *Floyd* litigation, the court heard testimony from a number of high-ranking officers who testified that NYPD officers stopped disproportionate numbers of African-Americans and Latinos because they understood how to look for “the right people”⁵⁶ when they were on patrol. With African-Americans and Latinos overrepresented among the criminal suspect populations in particular areas, the highest-ranking uniformed person in the NYPD testified that those “right people” were usually young black and Latino men, because “who is doing those shootings? Well, it’s young men of color in their late teens, early 20s.”⁵⁷

Aside from the question of why officers use racial profiling, there is the question of what makes it work. The answer involves, first, one particular legal tool, and then more broadly the incentives within police departments and

55. Marshall Frank, *Racial Profiling: Better Safe than Sorry?*, MIAMI HERALD (Oct. 19, 1999).

56. *Floyd*, 959 F. Supp. 2d at 561.

57. *Id.* at 604.

agency structures. For racial profiling that occurs during traffic stops, recall that the Supreme Court gave the green light for the stop itself in the *Whren* case: Any observed traffic offense gives police full probable cause to stop the vehicle, and in doing so, run criminal- and traffic-activity checks on the driver, look through the windows and talk to the driver and occupants. But a legal stop, without more—finding a warrant for the driver’s arrest, or seeing evidence of a criminal offense inside the car—would not allow the officer to take any other action, and in particular, the officer could not search the car itself. However, as mentioned earlier, police have a powerful tool to get the search to happen: a consent search. The consent search is a search made pursuant to a request made by a police officer to search the vehicle and perhaps the driver, or any pedestrian, as long as the person freely grants permission. This tool, conferred by the Supreme Court in a 1973 case called *Schneckloth v. Bustamonte*,⁵⁸ allows police to ask for consent to search in cases in which they have no probable cause to search and no reasonable suspicion for even a *Terry* frisk. Under *Schneckloth*, asking for consent does not require probable cause, or fact-based suspicion, or any evidence at all, the Court has said. Making the request is completely discretionary, and police do not have to tell the person that he or she has a constitutional right to refuse consent.⁵⁹ The police need only get non-coerced permission, and naturally most people feel hesitant to deny a police officer’s request. The officer is, of course, the literal embodiment of state authority: clothed in the state’s uniform, carrying a weapon, and possessed of discretion to take police action (e.g., making an arrest or giving a citation) or not. Few people will want to say no and seem uncooperative or guilty. Caught in this vice, the overwhelming number of drivers agree to the search and allow police to comb through their cars.⁶⁰ This allows police to convert many traffic stops into full searches for drugs, guns, or any other contraband, with no evidence of these crimes. As long as the consent comes freely and without coercion, the Supreme Court has said, a consent-based search remains perfectly valid. Without the ability to conduct consent searches, many traffic stops would remain just traffic stops; no further investigation (for hidden drugs or weapons) based on racial profiling would take place.

58. *Schneckloth v. Bustamonte*, 412 U.S. 217 (1973). See generally Carbado, *supra* note 7.

59. *Schneckloth*, 412 U.S. at 227; *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

60. E.g., Ilya Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the Consensual Police-Citizen Encounter 199–200* (1999) (unpublished Ph.D. dissertation, Rutgers University); see also Ilya Lichtenberg, *Impact of a Verbal Warning on Police Consent Search Practices*, 32 J. CRIM. JUST. 85 (2004). This includes many drivers whose vehicles actually contain contraband.

Two incentives also underlie the use of profiling. First, law enforcement tends to incentivize police activities such as arrests. This seems understandable, in at least one sense: arrests mean that an officer has apprehended an alleged criminal. It is also understandable in another sense: We can count arrests, and therefore they make good benchmarks and measurements of success. (In contrast, it is much harder to measure something like how an officer improves relations with his or her community, or how the officer connects with citizens.) An officer who makes more arrests will receive greater recognition, will have a better chance for promotion or plum assignments, and other similar benefits. Therefore, any activity that will get an officer more arrests will have greater value. Stop-and-frisks or traffic stops can lead to arrests (though not as often as many people think).⁶¹ This means that these activities (traffic stops and *Terry* stops) will proliferate, and since racial profiling can infect them, as we have seen, racial profiling will also increase. In addition, a police department might actually incentivize stop-and-frisks or traffic stops *as ends in themselves*, not just as activities leading to arrests. This is precisely what happened in New York City, resulting in hundreds of thousands of stop-and-frisks every year, with much of this activity based upon racial profiling.⁶²

We must add another incentive to this discussion: civil asset forfeiture. Civil asset forfeiture allows police to seize property of any kind—vehicles, homes, or cash—upon allegations that the assets are or have been involved in criminal activity.⁶³ Seized items could include cash earned from criminal activity or intended for use in such activity (e.g., drug profits or money to make drug purchases), or property purchased with that money. When law-enforcement agencies seize these assets, the owner must go to court and prove the “innocence” of the asset, at his or her own expense. Should the owner fail to do so, the property can be kept by the government—perhaps in whole or in part by the law enforcement agency itself. Sometimes the asset, such as a

61. For example, the *Floyd* litigation revealed that the millions of stops in New York City uncovered enough evidence to result in either an arrest or a citation only twelve percent of the time. Those police did not arrest or cite those who they stopped a full 88% of the time. *Floyd*, 959 F. Supp. 2d at 558–59.

62. *Id.* at 560–61 (“The foregoing evidence shows that officers are routinely subjected to significant pressure to increase their stop numbers, without corresponding pressure to ensure that stops are constitutionally justified.... [T]his is a predictable formula for producing unjustified stops. To paraphrase a statement by [a high ranking NYPD official] from his 2010 memo, imposing numerical performance goals for enforcement activities, without providing effective safeguards to ensure the activities are legally justified, “could result in an officer taking enforcement action for the purpose of meeting a [performance goal] rather than because a violation of the law has occurred.”).

63. See Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

vehicle, may find a place as a piece of police equipment (perhaps an unmarked police car); other times, assets like cash find their way into law enforcement budgets.⁶⁴ This may happen under state law or (when state law does not permit this) through a federal program called “equitable sharing,”⁶⁵ in which forfeitures by state or municipal law enforcement agents are “adopted” by the federal government, with a substantial percentage of the seizure’s value kicked back to the seizing agency. This amounts to policing for profit: Agencies go out and “earn” increasing shares of their budgets by seizing the property of citizens, who are often unable to mount the fight it takes to get the property back. This activity has become quite a valuable source of law enforcement funding, thus strongly incentivizing the police conduct during which these forfeitures occur: chiefly (though not only) traffic stops.⁶⁶ And to the extent that traffic stops are a major—perhaps *the* major—place in the system in which racial profiling may manifest itself, these incentives propel it forward.

V. THE HARM RACIAL PROFILING DOES TO INDIVIDUALS AND THE CRIMINAL JUSTICE SYSTEM

The use of racial or ethnic appearance as an indicator of suspicion inflicts significant harm on both individuals subjected to police attention, and on the system as a whole. For individuals, they find their freedom of movement restricted in a way that is perhaps infrequent and not permanent, but arbitrary and more than a little inconvenient. As the Supreme Court has said, a stop-and-frisk is not a “mere ‘petty indignity.’”⁶⁷ It halts a person’s progress through the day, at the insistence of police officers—and thus at the hands of the state. The subject experiences questioning, and may suffer probing physical touching, including in private areas, from outside the clothing. All of this occurs in public, in full view of passersby and perhaps neighbors, many of whom may wonder what the subject has done—or, who assume that the subject *has* done something—to deserve this sort of negative attention. A traffic stop may not (in fact, without more evidence, cannot) include even a brief cursory physical search of the person. But any traffic stop that moves beyond the ordinary

64. E.g., Ronald Fraser, *It’s Time to End Pa’s Civil Forfeiture Nightmare*, PENN LIVE (Sept. 23, 2016), http://www.pennlive.com/opinion/2016/09/its_time_to_end_pas_civil_fore.html.

65. U.S. DEP’T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2009), <https://www.justice.gov/criminal-afmls/file/794696/download>.

66. For an excellent overview of federal and state forfeiture practices, the use of these practices to pad law enforcement budget, and even the involvement of private companies in these practices, see Michael Sallah et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged With Crimes*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

67. *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

“license, registration, please stay in the vehicle” procedure, with the occupants moved out of the car and perhaps seated on the curb, and especially with a driver’s vehicle undergoing a search, will surely produce the same sorts of feelings in the subject and in other people in the area. With African-Americans sometimes experiencing force and even violence at the hands of police more often than whites,⁶⁸ stop-and-frisks and traffic stops may even inspire fear for one’s life. In short, the effects on the individuals involved may include apprehension, fear and anger at the physical violation, public embarrassment, or worse. Each of these incidents becomes a story that is shared with others in the family, with others in the same neighborhoods, and with others in the same racial and ethnic groups. This leads to widely held perceptions across these groups that they—all the members of these racial or ethnic groups, not just the few individuals who may have engaged in some criminal conduct—are the actual target.⁶⁹

This aggregation of individual damage points to why racial profiling is deeply damaging on a societal level—not just to the communities subjected, but to all citizens, and even to police and their efforts to fight crime and disorder. When whole groups share stories about being targeted by police, this reinforces (or creates anew) the message that police enforcement practices land on people not because of what they do, but because of how they look—that is, the racial or ethnic group to which they belong. By any moral measure, this seems wrong; regarding people as suspicious and therefore subject to police intrusion simply because they share a set of immutable physical characteristics with some very small number of people who have engaged in criminal acts cannot meet any standard of individualized justice. The state—through its agents, the police—has the power to step in to investigate and prevent crime, but in order to do so, police must meet legal standards that require some amount of evidence stemming from the personal conduct of the suspect, or because they match the appearance of a perpetrator (in a somewhat detailed, not general, way) witnessed by others. This is the meaning behind our constitutional requirements of probable cause and reasonable suspicion; the latter may be a lower standard than the former, but even reasonable suspicion requires some particularized, individual evidence upon which to base suspicion of the individual observed.⁷⁰

68. E.g., William Terrill, Eugene Paoline & Jacinta Gau, *Race and the Police Use of Force Encounter in the United States*, BRITISH J. CRIMINOLOGY (forthcoming 2017) (white officers use greater force on black suspects than they do on white suspects, but African American officers use force against both black and white suspects at similar rates).

69. See HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 90–92, 94–99.

70. United States v. Cortez, 449 U.S. 411 (1981) (requiring individualized, particularized suspicion).

When this type of harm, both to individuals and to groups, accumulates, we experience real injury to the collective good. When people suspect or begin to believe that the police treat them suspiciously based upon racial or ethnic appearance, it undermines the very legitimacy of the police, and even of the law itself. The work of Tom Tyler⁷¹ demonstrates that when the police treat people in ways that seem unfair, discriminatory, rude, and heedless of their viewpoint and their humanity, people regard the action, and the very authority the officer exercises, as illegitimate. It makes the citizen less likely to accept the outcome, less likely to obey the law, less likely to assist an officer when he or she needs help, and less likely to regard the police as a force for good and for safety. Tyler's work on these concepts, referred to broadly as "procedural justice," has shown that when people are treated fairly and with due regard to their humanity, they have a much greater willingness to accept the outcome of the encounter—a traffic citation, a summons or an arrest—with some degree of equanimity. The effect goes beyond police/citizen encounters as well. Police make arrests all the time, and they make more of them, of more dangerous people, in neighborhoods with higher levels of more serious crime. Eventually, cases that stem from these arrests for serious cases move through the court system, and some number of them go to trial. When most street crime cases go to trial, police often serve as witness; in some number of those cases, they are the *only* witnesses. When police testify in trials, they usually do so in front of a jury. And in communities in which police/community relations have suffered because of racial profiling, jury members, drawn from that community may feel a degree of real skepticism about the honesty of police testimony. When jurors feel reluctant to believe the police, because of their own negative experiences with them or because they have heard stories of such bad experiences from family or community members for years, this may cause untoward consequences. Jurors who feel they cannot accept the word of police officers under oath may vote to acquit a defendant—sometimes, a truly bad and dangerous defendant who should go to prison—who then goes free. Obviously, this cannot benefit the communities to which such dangerous actors return; those communities need to have predators taken off their streets, not put back on them. Freedom allows these defendants to continue their criminal conduct and victimize others, further damaging the community. This outcome can only frustrate police officers, who have worked to make the arrest and have it stick. Yet one can see how racial profiling may create exactly the conditions—deep mistrust of the police, unwillingness to accept police authority, and with it, police testimony—that may lead to this negative outcome.

71. TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006).

VI. THE COST IN PUBLIC SAFETY AND POLICE ACCURACY: WHY RACIAL PROFILING IS NOT “WORTH IT” DESPITE THE SOCIAL COSTS

It is easy to envision a response to the cost arguments—both personal and societal—from proponents of racial profiling. We see them in comments from many defenders of pretext-based traffic stops and stop-and-frisks that have a racially disproportionate impact upon people of color, such as Marshall Frank. The bottom line: We should use racial or ethnic targeting as part of a crime-control strategy, because it works. It helps police officers target “the right people,” to quote from the testimony in the *Floyd* stop-and-frisk case, and that brings down crime and especially lethal gun violence. Since young black men become victims of gun homicide at the hands of other young black men far more often than others, the use of race-based profiling actually saves black lives, and those who oppose racial profiling are racists. Since racial profiling works, we must and we will do it, regardless of the costs to individual or group dignity. People in those crime-ridden communities will have to bear those costs, unfortunately, because that is what it takes to combat crime and restore order, or to fight terrorism (another context where profiling—in this instance, of people who appear Arab or Muslim—has found many defenders).

First, declaring that a social cost—even one parceled out based on race or ethnic appearance—simply must be accepted for the greater good is easier for those who do not bear it. Such costs, imposed by but not borne by the proponent or others of his or her group, are externalized: they are external to those imposing the cost, and therefore easy to ignore or to just pronounce acceptable. This is an understandable (if not very persuasive or moral) argument. But we must not fail to see what the argument assumes without questioning: that profiling actually does work, in the way that its proponents believe—that is, that it does help police apprehend more criminals. That fundamental question remains unanswered by profiling’s advocates: Does racial profiling actually work? Does it have the positive effects that its proponents believe in terms of boosting the effectiveness of police efforts to bring down crime?

Rigorous analysis of the data, in study after study, performed in areas around the country and in various law-enforcement contexts, says no. Using racial or ethnic appearance as one factor, among others, in deciding which drivers or pedestrians to target for routine police actions such as brief detentions, questioning, frisks, and searches does not increase the productivity of these kinds of police activity. In my work, I have referred to this idea as the hit rate: the rate at which officers’ activity results in the recovery of contraband or guns, the detection of other offenses, the making of arrests, or the writing

of summonses.⁷² On the contrary, using racial or ethnic appearance to target enforcement activity actually results in lower hit rates as compared to the rate of hits when not using racial or ethnic appearance—i.e., hits when stopping and searching whites.

Recall the evidence put before the court in *Floyd v. New York City*, the stop-and-frisk case decided by the federal district court in 2013. Notice that even though blacks bore a disproportionate number of stops, this did not result in a disproportionate number of seizures from them. Police seized contraband other than weapons in 1.8% of stops of blacks, in 1.7% of stops of Latinos, but in 2.3% of stops of whites. Police actions resulted in seizures of guns 1.0% of the time for blacks, 1.1% of the time for Latinos, but 1.4% of the time for whites.⁷³ In other words, while NYPD officers targeted a disproportionate number of people of color for stops and searches, their hit rates for those actions measured lower than the hit rates for those same actions against whites—directly contradicting the “it works” justification for these actions. The *Floyd* case was not the first time that data analysis had demonstrated the abysmal hit rates for blacks and Latinos, compared to the hit rates for whites. As early as 1999, a study by the New York State Attorney General’s Office showed the same pattern. Blacks and Latinos were “over-stopped” relative to their representation in the population of New York City; the stops yielded contraband, guns, arrests, and summons at lower rates for blacks and Latinos than they did for whites.⁷⁴

Given that so many in law enforcement have believed so strongly and for so long that racial profiling “works,” the data seem counterintuitive at best. Why would using a factor like racial or ethnic appearance not as the sole indicator but one among many not just fail to help, but seemingly hurt, law enforcement efforts? The answer lies in understanding what really counts in a law enforcement context, and in grasping some of what we have learned about how human attention works. What really counts, in brief, is behavior. When we have a description of a particular person who has engaged in a particular kind of criminal behavior, we look for someone who matches that particular description who may also be engaged in behavior like hiding or escaping. But when, instead, we know that criminal behavior may be taking place in a particular place among many people, *but the behavior is hidden and we have no description of who is engaging in that behavior*, police must focus tightly on the particulars of *behavior* that will tip us off to the crime. Of course, this latter situation describes perfectly what police face if they believe that one or a few

72. HARRIS, PROFILES IN INJUSTICE, *supra* note 4, at 78–84.

73. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013).

74. OAG REPORT, *supra* note 47.

of the tens of thousands of vehicles coming down an interstate highway may contain a cache of drug contraband. They cannot hope to stop any more than a fraction of the vehicles they see. And if they believe in racial or ethnic profiling, they think that using racial or ethnic appearance will increase their odds of finding “the right people.” This will give them a shortcut to finding the few vehicles to stop. What it does, instead, is create a short *circuit*: it pulls their eyes and their attention off of what counts—the particulars of behavior—and on to a factor that does not, in fact, predict criminal involvement—appearance. Profiling does not have to pull all police attention off of behavior for it to hurt their efforts; even just somewhat less attention to behavior is enough to make them less accurate in assessing suspicion. To use a baseball analogy, when the eye is taken off the ball, even just a little, it makes a difference in the ability to hit.

Beyond the stark fact that focusing on racial or ethnic appearance does not net more apprehensions of criminals, there are other, perhaps less obvious costs entailed in using racial or ethnic profiling. First, racial profiling generates false positives that actually cost law enforcement time, energy, and resources. Proponents of profiling say that using profiling is a way to narrow the pool of suspects, or that it’s a way to implement a kind of “better safe than sorry” regime—better to make sure you have all the possible right suspects, and direct efforts to them, instead of risking missing any of them.⁷⁵ But the reality of the situation is quite the opposite. Racial profiling is supposed to be a predictive tool, according to its proponents: In a large pool of possible suspects, it helps police or security officials predict which persons are the most likely suspects, and allows police to focus on them. Put another way, trying to figure out which vehicles on a busy interstate highway contain large loads of drugs is like trying to find the proverbial needle in a haystack. If this is true, the last thing one should do is (to stretch the analogy) add more hay to the stack. That is what racial profiling does, by focusing police on appearance, a factor unrelated to criminality, and taking attention away from behaviors that might provide actual clues to wrongdoing.

Moreover, using racial or ethnic profiling damages the ability of police to obtain intelligence about actual criminal activity. Police cannot, we know, be everywhere at once (nor would we want them to be, despite our eagerness to increase public safety). They will not witness most of the crime committed; they know about it from reports they receive—from victims or other members of the community who witness it. Thus in a very real sense, police depend on the community for information about what happened when officers were not present. An old saw among police captures this: When a shooting happens on

75. Thus the subtitle of Marshall Frank’s article, *supra* note 55: “Better Safe than Sorry.”

Saturday night, everyone in the neighborhood knows who did it by Monday morning—except the police. If the police want to receive this information, they must have real relationships—relationships built on mutual trust—with people in the communities they serve. Without those relationships, they fly blind, and must gather information catch as catch can or generate what evidence they can through other means—something that is never as easy as it appears on TV dramas featuring forensic-science miracles every week. When police have relationships with people in communities, information about criminal activity flows more freely—not only the shooting last weekend, but the low-level drug-dealing or thievery in the neighborhood every night. This kind of information also helps the police know the neighborhood and its residents better, which can become critical. For example, it can help officers know which one of the 20 kids in hooded sweatshirts who live on the street actually presents a danger, while the other 19 do not.

Racial profiling strikes at the heart of this kind of relationship. At bottom, by including racial or ethnic appearance as one of the factors police use to decide who to regard as suspicious, all black and brown people become suspect to some degree. When the suspiciousness of race combines with other factors, they logically seem more suspicious than whites, and the outcome is exactly what we see in study after study on traffic stops and stop-and-frisks: Police stop African-Americans and Latinos more often than whites, even though stops of whites yield contraband or arrests or summonses more often. Black and brown people know when their communities are being targeted, of course, and they understand it for what it is: Police using racial profiling consider the whole community suspect. Not surprisingly, this only alienates them from the police, making them less likely to want to help and cooperate with them—even if they know that such cooperation might help their communities. Some still do cooperate, of course; in fact, many support the police in these communities. But the use of racial profiling cannot help but discourage the level of cooperation with police, to some degree. And that hurts the ability of individual officers and their departments to fight crime.

VII. WHAT CAN BE DONE?

A. FEDERAL LEGISLATION AND DEPARTMENT OF JUSTICE POLICY GUIDANCE HAS NOT DONE THE JOB

Federal legislation on racial profiling has been introduced in every successive session of Congress beginning in 1997 with the Traffic Stops Statistics Study Act,⁷⁶ and then the End Racial Profiling Act.⁷⁷ All of these bills would have required data collection on traffic and/or pedestrian stops, and they also mandated other actions by police. None of these pieces of legislation passed, and proposals like them seem even less likely to pass in the near future.

In 2003, the U.S. Department of Justice, under then Attorney General John Ashcroft, issued a “Policy Guidance” on racial profiling.⁷⁸ The document, which was not a regulation or a policy, described how federal agencies performing policing activities should confront the issue of racial profiling. The Guidance contained a reasonably good definition of racial profiling, and prohibited its use in most circumstances.⁷⁹ But even so, it did not go far enough. First, it was a federal document, and as such applied only to federal agencies (and in fact, it could not apply to state or local agencies, as the federal government has no power to order state or local agencies to conduct police activity in any particular way).⁸⁰ With the exception of, perhaps, the U.S. Park Police or the U.S. Capitol Police, federal police agencies do not make traffic stops or perform stop-and-frisks; that activity occurs almost entirely at the state and local level. In addition, the Guidance created specific exceptions to the ban on profiling for the two areas in which the federal government had actually begun to use racial and ethnic appearance after the 9/11 terrorist attacks: national security and immigration.⁸¹ A revised version of the Policy Guidance, issued in 2014, improved on some of these issues, but it still applied only to the limited

76. Traffic Stops Statistics Study Act of 1998, H.R. 118, 105th Cong. (1997).

77. End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. (2015).

78. The Policy Guidance is described in *Fact Sheet: Racial Profiling*, U.S. DEP’T OF JUSTICE (June 17, 2003), https://www.justice.gov/archive/opa/pr/2003/June/racial_profiling_fact_sheet.pdf.

79. *Id.* at 3 (“federal law enforcement officers may not use race or ethnicity to any degree”).

80. The exception is the federal pattern or practice law, found at 42 U.S.C. § 14141, which gives the Department of Justice the power to investigate and litigate civilly when a state or local police department exhibits a pattern or practice of constitutional violation.

81. *Fact Sheet*, *supra* note 78, at 5 (“[F]ederal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our nation’s borders.... Therefore, the racial profiling guidance recognizes that race and ethnicity may be used in terrorist identification”).

universe of federal law-enforcement agencies.⁸² Thus, assuming that the 2014 Guidance remains in effect in the new federal administration that took office in 2017, it represents at best a partial measure that will not address most of the problem, which lies in the states.

B. CRIMINAL PROHIBITION: NOT A LIKELY SOLUTION

Another possible avenue of redress would be for legislative bodies to create criminal penalties for engaging in profiling. Under this kind of scheme, the relevant jurisdiction's law would make racial or ethnic profiling a criminal offense, punishable with criminal penalties such as incarceration and fines. The appeal of this seems logical: for citizens who feel they have suffered the sting of racial profiling, without seeing relief from the responsible government agencies, officers faced with the possibility of criminal charges would at least hesitate to use the tactic, and might leave it behind altogether.

But problems with this approach make it an unattractive option. First, assuming that the officer involved did not exhibit obvious signs of racial bias—use of a racial slur, for example—proving the use of racial profiling by a single officer in a particular instance, beyond a reasonable doubt, could prove quite difficult. Given the large number of possible explanations other than race for any particular officer's action, proving the officer engaged in racial profiling would constitute a formidable task. (In contrast, proving that a police agency, as a whole, used or condoned racial profiling in the actions of all or a significant number of its officers would allow statistical evidence of much wider patterns of evidence, covering all of the officers in the department, and would take place in civil court with the lower burden of proof used there.) Second, the fact that a police officer would face a criminal sanction might make prosecutors less, not more, willing to bring actions. The criminal law carries with it the stigma of criminal blameworthiness, and can result in the loss of a person's freedom. One can easily imagine a prosecutor—especially one who works with members of the defendant officer's own department day after day—feeling that a criminal charge for an offense as controversial as racial profiling (which a significant number of people in law enforcement still consider a legitimate tool) is simply too serious an action to take. Third, it is worth noting that, even over the last two and a half years, with multiple cases of police officers shooting unarmed African-Americans in the news constantly, prosecutors have brought relatively

82. U.S. DEP'T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (Dec. 2014), <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

few criminal homicide cases against police, even on less serious homicide charges such as manslaughter.⁸³ And among those brought, convictions have not always resulted. Think, for example, of the trial of Michael Slager, the police officer in North Charleston, South Carolina, seen on a passerby's video shooting a fleeing civilian, Walter Scott, in the back. Even with video evidence, the trial ended in a hung jury.⁸⁴ With juries unwilling to convict even in cases in which the action of the police officer has resulted in death, we would likely see prosecutors unwilling to charge criminal cases of racial profiling; the stakes—the injury done to the civilian by profiling—seem much lower than in a shooting.

C. STATE LEGISLATION REQUIRING TRACKING OF TRAFFIC AND PEDESTRIAN STOPS USING STANDARDIZED DATA

Various states have enacted laws concerning racial profiling. Contents of these laws varied, but many defined racial profiling, prohibited the practice, and required some data collection on traffic stops by police.⁸⁵ Many of these laws had sunset provisions, and have gone out of existence. The best of them, in Missouri, continues to require that every police agency in the state collect data on traffic stops by its officers, that the data go to the state's attorney general, and that the data be released to the public.⁸⁶ In the overwhelming majority of these statutes, engaging in the prohibited practice of racial profiling carried no consequences. In the Missouri statute—again, the best of the lot—the law describes a potential consequence: police departments that failed to submit data on their traffic stops could lose state funding.⁸⁷ But when a few Missouri departments refused to give the required data, their funding went undisturbed.

Overall, legislation has not had much of an impact on the profiling problem, even in Missouri, but this situation could be different. States could enact more robust legislation that prohibits the practice and requires actions by all police departments in the state. The legislation must continue on an indefinite

83. See generally L. Song Richardson, "Police Use of Force," in the present Volume.

84. Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html>.

85. E.g., 50 ILL. COMP. STAT. 727; CONN. GEN. STAT. § 54-11; CAL. GOV'T CODE § 12525.5; CAL. PENAL CODE §§ 13012, 13519.4.

86. MO. REV. STAT. § 590.650.

87. *Id.* subsec. 6 ("If a law enforcement agency fails to comply with the provisions of this section, the governor may withhold any state funds appropriated to the noncompliant law enforcement agency.").

basis—i.e., it should not sunset, and could lose effect only through regular and customary repeal; the presumption would keep the law in effect, like any other law. Moreover, the law would contain the following provisions:

- The law would prohibit racial or ethnic profiling, using the definition at the beginning of this article, or another substantially equivalent definition. It would also require all police departments to have an internal policy prohibiting profiling, using the same definition.
- The law would require that all police departments track—collect data about—every traffic and pedestrian stop conducted by its officers. These data would have to be tabulated or stored in an electronic format that makes analysis, search, and publication of the data possible. The data collected for traffic stops would include all of the following: (1) time, place, and length of the stop; (2) race or ethnic group of the subject driver as perceived by the officer; (3) the offense(s) witnessed by the officer that led to the stop; (4) whether the driver or other occupant of the vehicle was ordered to exit the vehicle, and for what purpose; (5) whether citation(s) or warnings were given, and for what offenses; (6) whether the driver, other occupants, or the vehicle were searched; (7) the legal basis for any searches (e.g., arrest, *Terry* suspicion, consent search, canine, etc.); (8) whether any search resulted in the discover of contraband; and (9) the nature of the contraband, including its likely identity and approximation amount if it is a suspected illegal drug. For pedestrian stops, the data collected would include all of the following: (1) time, place and length of the stop; (2) race or ethnic group of the pedestrian as perceived by the officer; (3) the basis for the officer's reasonable suspicion about the subject, in narrative form; (4) whether a frisk was performed; (5) the basis for the officer's reasonable suspicion that the subject was armed and dangerous; (6) whether the frisk revealed the presence of a weapon, and the type of weapon; (7) whether the frisk resulted in the recovery of other contraband, and if so, the nature of the contraband (if illegal drugs, type and approximate amount); and (8) whether the police action resulted in an arrest, summons, or other official action. The law would also require that the policy of each police department reflect this requirement to collect these data.
- The law would require that each police department would submit these data, in aggregate form and without identifying individual officers, to the state's attorney general or other appropriate officer at least once a year. That official would be required to perform a statistically

appropriate analysis of the information and report on the data and the analysis to the public at least as frequently as the data are submitted, in an electronic form that would allow further analysis of the data by any interested party.

- The law would require that each police department in the state create processes to periodically assess the traffic and pedestrian stop practices of each individual officer performing routine police duties in the department, utilizing the individual-level data on these activities for each officer, at least quarterly. For agencies using an early-intervention system, this assessment should be part of the operation of that system.
- The law would require that each department develop training on the policy, and create or utilize robust systems for supervision that assure that officers follow the policy, and hold officers accountable for breaking with policy if that happens.

D. INTERNAL DEPARTMENTAL REGULATIONS

Police departments are creatures of state and local governments; they exist and have authority by virtue of state and local law. They must, of course, honor and follow the U.S. Constitution (and its interpretations by courts) in their law enforcement practices, generally and in specific cases. And they must follow state law as well, such as the kind of statute described in the immediately preceding section.

Nevertheless, we should note that much police conduct responds to the internal rules, regulations, and procedures that each department has for its officers. These internal rules may simply codify, restate, or implement the rules and statutes that come from superior authorities: U.S. Supreme Court decisions on search procedures, for example, or state laws that govern record-keeping or other processes. Thus the recommendations above for state legislation say that the requirements of the hypothetical state anti-profiling legislation should also appear in departmental policies and rules. But this may not be enough. In order to meet the challenge of profiling, internal police department rules and regulations should take the principles and commands of state law and put them into concrete commands applicable in that department. Even more important, police department regulation must emphasize the primacy of policy; of training that reflects that policy; of ongoing, active supervision of officers by sergeants and lieutenants to assure compliance with policy and training; and of accountability for officers who fail to follow these rules (as well as supervisors who do a lousy job of supervision on these and other issues).

Where appropriate, accountability should lead to closer supervision; or to counseling and retraining; to discipline; or (in rare cases) to termination. Many departments attempt to assure compliance with policy with early-intervention systems, which track officer behaviors that show failure to comply with policies or even misconduct; these systems also track how supervisors responded. Not every department has, or needs, an early-intervention system, but all must have a sufficiently clear and strong policy against profiling, and mechanisms for assuring that officers follow that policy. To do the most we can to make this happen, the legislation recommended above must be joined with robust internal departmental rules aimed at the same issue.

E. ELIMINATING CONSENT SEARCHES FROM TRAFFIC AND PEDESTRIAN STOPS

As explained above, consent searches form a major part of the toolkit for police performing traffic stops as a pretext for investigating other crimes for which there exists no evidence to support probable cause. An officer who has a legal basis to stop a car for a traffic violation under the *Whren* case cannot proceed to search either the vehicle, the driver or other occupants without more: observed evidence of a crime other than the traffic offense, or discovery of a warrant for the arrest of the driver. But the Supreme Court allows police officers to ask for consent to search, and such consent constitutes complete legal justification for a search as long as the civilian gives consent freely and without coercion.⁸⁸ But, as discussed above, a request for consent from a police officer does not give a person receiving that request any kind of real choice to say yes or no. Rather, civilians respond to the police officer's request for consent to search with high rates of assent because they do not wish to displease authority and hope to avoid legal consequences that the officer can impose. The way the Supreme Court describes legal consent for a search simply creates a legal definition, or some would say, a legal fiction; it does not, in any real sense, reflect the reality of freely given permission. Add the fact that police ask African-Americans and Latinos for consent to search at rates far out of proportion to their (already disproportionate) share of police stops, and it becomes clear that police agencies use consent searches with no evidence of criminal conduct in a racially and ethnically disproportionate way. Use of consent searches is part and parcel of racial profiling; indeed, it is no exaggeration to say, as Professor

88. *Schneckloth v. Bustamonte*, 412 U.S. 217 (1973).

George Thomas has, that consent searches form the engine that powers the whole traffic-stop/racial-profiling mechanism, and restraining this power would do a lot to cut off profiling.⁸⁹

It is time that we recognize this. The existence of consent searches as defined by the Supreme Court completes and extends police power to use racial profiling. This should end. States can, and should, pass laws that prohibit their police from asking for consent to search during traffic stops and pedestrian stops, absent at least a reasonable, fact-based suspicion to believe that the vehicle and/or the driver, or the pedestrian, is involved in current criminal activity.⁹⁰ This is what New Jersey did a decade and a half ago, in *State v. Carty*⁹¹: the Supreme Court of New Jersey declared that, under the state's own Constitution, "consent searches following a lawful stop of a motor vehicle should not be deemed valid" unless, prior to the stop, there was "reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity."⁹² The use of the *Carty* standard would not abolish consent searches altogether, but it would bring them into a more reasonable balance. Police could not use them without having at least a fact-based reason for suspicion of crime that they could articulate to a court. There is no indication that this would be an unworkable standard for police to meet; with 15 years of experience with the *Carty* rule, no evidence exists that it has harmed public-safety efforts in New Jersey. Failing passage of a state law, municipalities can pass such laws or ordinances that govern their own agencies; departments can enact a ban on evidence-less consent searches in their own interval rules. Stopping the use of consent searches without any evidence would go a long way toward bringing racial profiling under control.

Of course, many in law enforcement will not want to give up this convenient and powerful tool. They will see it as a valuable source of authority to perform searches the law would not otherwise allow, which allows them to catch more criminals. But this shortsighted view ignores the fact that using this power comes at a price. Americans are not fools; they know the difference between asking a person for permission, and a request to search that is really no request at all. And black or brown Americans know that police seek their "permission" to search all the time, while if they were white this would happen much more

89. George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 *MISS. L. REV.* 525, 542, 548 (2003) ("The consent search doctrine is the handmaiden of racial profiling" and should, at the very least, require *Terry*-level reasonable suspicion before an officer can request consent.").

90. This proposal is Professor Thomas' idea, from the previous note, in my words.

91. *State v. Carty*, 170 N.J. 632 (2002).

92. *Id.* at 647.

rarely, if at all. And that represents a cost: to the humanity and dignity of these Americans, and also to police legitimacy, to their believability when they testify in front of juries, and to their credibility in their community.

*F. ELIMINATING LAW ENFORCEMENT'S RETENTION
OF MOST OF FORFEITURE FUNDS*

Seizing assets via civil forfeiture actions has become a major source of law enforcement revenue for some police departments, and these forfeitures have become one of the main purposes for traffic stops in some jurisdictions.⁹³ Therefore, if we want to curtail racial profiling in traffic stops, the discussion must include reform of civil asset forfeiture.

Asset forfeiture rests on an important principle: Those engaged in criminal activity have no entitlement to their ill-gotten gains, or to any tools or property used to commit crimes. Few would object to these ideas, standing alone. The problem arises when we look at where the proceeds of the forfeitures go. As discussed above, in many jurisdictions, some or even all of the seized assets (or the proceeds of those assets, when sold) may find their way into the hands of the seizing agencies—the police departments themselves—where these assets and funds have become important supplements to agency budgets and equipment stocks. Continued pressure on all kinds of public budgets, including those of police departments, will create incentives to use the forfeiture tool, and one of the easiest ways to do this is to increase the use of traffic stops. This, in turn, will create a greater number of opportunities for racial or ethnic profiling to take place.

There are many reasons to discuss reforming of civil asset forfeiture. Some contend that civil asset forfeiture has no place in our society, which values private property;⁹⁴ others say that forfeiture is a necessary tool, with only a little adjustment needed. Given the subject of this chapter, however, we need another intervention, because the civil asset forfeiture tool has long been wagging the traffic-stop dog in far too many places. The answer will not please many in law enforcement, but it is not complicated. We need not eliminate forfeiture, but the assets and proceeds seized simply cannot go to the seizing agency without creating a strong incentive for more forfeitures. All proceeds of forfeitures by police departments, except for the actual investigation costs

93. See *supra* notes 63–66 and accompanying text; see also Colgan, *supra* note 63.

94. See, e.g., DICK M. CARPENTER II ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* (2nd ed. 2015), <http://ij.org/report/policing-for-profit/>.

encountered by the agency,⁹⁵ therefore, must go to the general fund of the state. Any agency that can gain financially by using this tactic will do more of it. But the financial needs of police agencies should not determine whether or how many civil asset forfeitures take place. If forfeitures should be part of the justice system's constellation of tools, for appropriate situations, we can also agree the use of the tool should not be driven by unrelated fiscal issues. If forfeitures do not impact the financial situation of police agencies, we will see them when they are legally appropriate, and not when they are good for police agencies' fiscal needs. The current federal arrangement—the so-called “equitable sharing” program, in which federal agencies “assume” forfeitures that happen in states or localities that prohibit those agencies from keeping the proceeds of forfeitures, and share the proceeds with those state or local agencies—simply perpetuates the program, with a slightly less strong incentive.

G. CHANGING INCENTIVES WITHIN POLICE DEPARTMENTS

As things stand in most police departments, officers receive rewards—status as “good cops,” promotions, raises, favorable assignments and postings—because they perform well at easily measurable tasks: arrests, traffic stops, stop-and-frisks, seizures of drugs and weapons, and other “proactive” actions. It is easy to see that these sorts of patterns coincide with the very same behaviors identified here with racial profiling. Thus, another way of attacking the existence of profiling is to change those incentives, and to reward other types of behaviors.

For example, a police department might reward a police officer not for how he or she acts—the kinds of actions listed in the prior paragraph—but instead for the effect these actions have. In other words, the department should take the view that what will count for advancement and recognition of all kinds is what happens to crime and disorder in the officer's assigned area. Further, the department might couple this with rewarding measurable improvements in community regard for the police in each assigned area, as ascertained through regular community surveys. Were the incentives for individual officers to reflect these other types of actions, we could very well see a drop in the types of behavior that allow for racial and ethnic profiling to take root.

95. I thank Professor Mike Scott of Arizona State University for this insight. As he states, giving police the power to recover only their costs through forfeiture but not more might “encourage police to consider whether the strategy is worthwhile financially.” E-mail correspondence from Prof. Mike Scott (on file with author).

CONCLUSION

Racial and ethnic profiling by police has long been and remains a serious irritant in relations between police and communities of color. It poisons race relations, alienates communities of color from their police agencies, and does not improve law-enforcement results. Its costs burden communities of color specifically, but also society as a whole, with no discernable return in terms of public safety—all aside from its moral offensiveness. Racial and ethnic profiling has a corrosive and damaging effect on individual citizens, on racial and ethnic groups as a whole, and on the justice system itself. With that much damage done, and with no evidence that the practice makes policing more productive or efficient, it is high time to eliminate it, or at least reduce it to the greatest extent that we can. The recommendations here will move us in that direction.

RECOMMENDATIONS

The following steps will help to combat the persistent problem of racial profiling, even if they do not entirely eliminate it.

1. **Internal police department rules and regulations should incorporate and explicitly restate any applicable state laws enacted to combat racial profiling.** These rules—often regarded by departments and officers as the real rules, the ones they must follow—must make state anti-profiling laws into concrete commands and policy applicable in that department. This allows for training based on that policy, and accountability based on violation of that policy and training.
2. **States must enact legislation requiring that police officers track each and every traffic and pedestrian stop, using standardized data.** Without this kind of requirement, those wishing to make rules and public policy cannot know the extent of the problem they have, and how it may be changing—for better or for worse over time. Additionally, the tracking of these data serves as an accountability mechanism for police agencies.
3. **States must eliminate the use of consent searches in traffic and pedestrian stops, absent at least a reasonable, fact-based suspicion to believe that the vehicle and/or the driver, or the pedestrian, is involved in current criminal activity.** The current standard, based on Supreme Court case law, states that consent need only be voluntary and not coerced: a rule that seems to willfully ignore the reality of citizen/police interactions, with the purpose of extending state power to conduct searches without any evidence. Moving to a standard that requires at least reasonable, fact-based suspicion might help to at least recalibrate a system badly out of

balance. One state, New Jersey, has operated under this kind of rule for years, with no downside significant or apparent enough for any lawmaker to attempt to reverse the rule.

4. **Law enforcement agencies seizing cash or assets through civil asset forfeiture should keep only enough of the proceeds to pay for those enforcement actions.** As currently structured, civil asset forfeiture laws create far too strong an incentive to stop drivers in a hunt for cash and valuable assets. In many jurisdictions, the seizing police department can keep the money and use it to feed its own budgetary needs, and use assets for its purposes (e.g., using a seized vehicle as an undercover police car) or liquidate them for the resulting cash. This creates the incentive to use asset forfeiture—seizure of property from people, without the requirement of a guilty verdict—to supply funds for law enforcement activity. The concept and purpose of civil asset forfeiture remains a good one in the abstract: wrongdoers should not retain their ill-gotten gains after the authorities apprehend them. But giving much or all of those gains to law enforcement, beyond what would pay for the costs of the operations, creates incentives that have resulted in significant abuses.
5. **Incentives must change within police departments, moving from traditional “proactive” police action to crime reduction and community engagement.** Police officers behave just like other people in their professional settings: they respond to incentives. Currently, and for many years, police officers have received rewards—promotions, plum assignments, and raises—based on their most easily measurable tasks: arrests, stop-and-frisks, traffic stops, citations written, and seizures of weapons, drugs, other contraband, cash or assets. This creates an incentive for many of the actions that form part of, or accompany, racial profiling. Instead, police agency incentive structures should base rewards on crime reduction and order restoration, and on community engagement and satisfaction. Measurement of community engagement and satisfaction presents challenges, but new tools have or will soon become available for this purpose.

Race and the Fourth Amendment

*Devon W. Carbado**

This chapter employs “real life” scenarios to highlight how Fourth Amendment law works on the ground. Few people, including lawyers, journalists, legislators, educators, and community organizers, understand the enormously important role Fourth Amendment law plays in enabling the very thing it ought to prevent: racial profiling and police violence. This chapter does not tell the full story of Fourth Amendment law along the preceding lines. Rather, my purpose here is to zone in on the specific body of Fourth Amendment law that determines whether the Fourth Amendment will even apply to the police conduct in question or whether that conduct will escape Fourth Amendment scrutiny altogether. I have two hopes for the chapter. One is that, whatever your views about policing, you will leave the chapter feeling like you have had a “teachable moment” about the range of investigation tactics police officers can employ without triggering the Fourth Amendment. My second hope is that you will employ the chapter as a tool to educate others in the conduct of the work you do, whether that work takes the form of “street law” sessions, public forums, know-your-rights campaigns, legislative decision-making, media education projects, community organizing, op-eds, classroom teaching, or conversations with friends and family.

INTRODUCTION

Across the United States, many African-Americans believe that police officers regularly approach and question African-Americans with no evidence of wrongdoing. We hold this view either because we experience such without-basis police contact directly or because we live that contact vicariously through the experiences of our brothers and sisters, mothers and fathers, aunts and uncles, and friends and neighbors. Without-basis police contacts, or what I will sometimes call “pedestrian checks,” are part of our collective consciousness as African-Americans. To borrow from Michael Dawson, they help to constitute our “linked fate.”¹

* The Honorable Harry Pregerson Professor of Law and Associate Vice Chancellor, BruinX, the Office of Equity, Diversity, and Inclusion, University of California, Los Angeles.

1. MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1994).

What many African-Americans might not know is the long-standing role the Supreme Court has played pushing pedestrian checks beyond the reach of the Fourth Amendment. The exterior position pedestrian checks occupy outside the scope of Fourth Amendment law accounts, at least in part, for the interior position they occupy inside the lives of black people.

I should be clear to note that I am using the term “pedestrian checks” in a rather specific sense. Some of you may have read the Department of Justice Report on Ferguson, Missouri, which was published in the aftermath of social upheaval and protest in Ferguson following the police shooting death of Michael Brown, an African-American teenager. To those of you who have not read the Ferguson Report, you should. It is a sobering look at a regional criminal justice system in which racism and classism were bureaucratized as normal features of governance. I reference the report here for a very narrow reason: it includes a discussion of what Ferguson police officers regularly referred to as “ped checks.” Here’s the relevant passage from the report:

This incident [involving a police officer seizing an African-American man and running a warrant check without any evidence that the man had engaged in any wrongdoing] is also consistent with a pattern of suspicionless, legally unsupportable stops we found documented in FPD’s [Ferguson Police Department’s] records, described by FPD as “ped checks” or “pedestrian checks.” Though at times officers use the term to refer to reasonable-suspicion-based pedestrian stops, or “Terry stops,” they often use it when stopping a person with no objective, articulable suspicion. For example, one night in December 2013, officers went out and “ped. checked those wandering around” in Ferguson’s apartment complexes. In another case, officers responded to a call about a man selling drugs by stopping a group of six African-American youths who, due to their numbers, did not match the facts of the call. The youths were “detained and ped checked.” Officers invoke the term “ped check” as though it has some unique constitutional legitimacy. It does not. Officers may not detain a person, even briefly, without articulable reasonable suspicion.²

2. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 18 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf. For discussions of *Terry* stops and race-based decisionmaking, see Jeffrey Fagan, “Race and the New Policing,” in the present Volume; Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in the present Volume; and David A. Harris, “Racial Profiling,” in the present Volume.

When the Ferguson Report speaks of pedestrian checks, then, it is referring to instances in which Ferguson police officers seized people without any evidence of wrongdoing in violation of the Fourth Amendment. While the unconstitutional pedestrian checks the Ferguson Report describes should be highlighted and condemned, I am referring to pedestrian checks of an altogether different sort—police interactions that do not trigger the Fourth Amendment and therefore do not need to be supported by any evidence of wrongdoing.

So that you appreciate the difference between my use of pedestrian checks and the Ferguson Report's use, you need to understand the basic analytical structure of Fourth Amendment law. The Fourth Amendment protects us from "unreasonable searches and seizures."³ When police officers engage in conduct that is search or seizure, the Fourth Amendment requires them to justify it. Failure on the part of the government to offer the appropriate justification renders that search or seizure unreasonable and therefore unconstitutional. The Ferguson Report's invocation of "ped checks" is intended to draw attention to the fact that the Ferguson Police Department was performing unconstitutional pedestrian checks by seizing and sometimes searching African-Americans without any justification.

The focus of this chapter is different. My concern is with pedestrian checks that do not trigger the Fourth Amendment and therefore do not require any justification. Remember, every time the Court determines that a pedestrian check is not a search or a seizure, the Court is ducking the question of whether that pedestrian check is reasonable in the sense of requiring some justification. To put that point slightly differently, when the Supreme Court concludes that a pedestrian check is not a search or a seizure, the court is saying that police officers may perform that pedestrian check without any basis—that is to say, without a warrant, without probable cause, and without reasonable suspicion. In short, without any justification whatsoever. Far from being illegal under the Fourth Amendment, then, pedestrian checks that are neither searches nor seizures do not implicate the Fourth Amendment at all.

The problem is even worse. The Supreme Court's conclusion that a pedestrian check is neither a search nor a seizure makes the question of whether that pedestrian check is racially motivated entirely irrelevant for Fourth Amendment purposes. Again, if police conduct is not a search or a seizure, Fourth Amendment law has absolutely nothing to say about it, whether that conduct is racially motivated or not. Pause for a moment and think about what this means: If a pedestrian check does not trigger the Fourth

3. U.S. CONST. amend. IV.

Amendment, police officers have discretion not only to initiate that pedestrian check without any basis but to racially select whom they wish to subject to that pedestrian check. You might think that the Equal Protection Clause of the Fourteenth Amendment solves this problem. It does not, in large part because for plaintiffs to win an equal protection claim, they must prove that the officer acted intentionally.⁴ The burden of proof will almost always be impossible to meet. So, you should put the Equal Protection Clause to one side, as does the rest of this chapter. In the meantime, the remainder of the chapter highlights the discretion Fourth Amendment law effectively gives to police officers to target and engage African-American pedestrians without any basis. My hope is that the examples I will offer paint a clear picture of the range of pedestrian checks police officers can deploy against African-Americans without violating the Fourth Amendment.

I. DECISION 1: TO FOLLOW

Assume that Tanya, an African-American woman, is walking home from work at nine in the evening. Two officers observe her. They have no reason to believe that Tanya has done anything wrong. Nonetheless, they decide to follow her. Indeed, they follow her all the way home. They do so to ensure that Tanya does not commit a crime (a sex crime, let's say), and to arrest her if she does. Remember, the officers have no objective reason to believe that Tanya has done—or will do—anything wrong. There is no objective evidence, in other words, that Tanya has ever engaged in prostitution. Nevertheless, they follow her based solely on their gendered racial suspicion of black women as sex workers.

The foregoing conduct would not trigger the Fourth Amendment.⁵ The Supreme Court would conclude that Tanya has not been seized. Indeed, the officers haven't even approached her. That the officers' decision to follow Tanya was racially motivated along the gendered lines I have suggested does not matter. The Fourth Amendment is not a bar to this form of racialized surveillance.

4. *Washington v. Davis*, 426 U.S. 229 (1976).

5. *See Florida v. Royer*, 460 U.S. 491, 498 (1983) (suggesting that while police officers may approach an individual without reasonable suspicion or probable cause based on the notion that the individual is free to ignore the police). The Court has also addressed whether police following people in public places constitutes a search and answered that question in the negative. *See, e.g., United States v. Knotts*, 460 U.S. 276, 285 (1983).

II. DECISION 2: TO APPROACH

Stipulate now that the police officers decide to approach Tanya. That alone would not trigger Fourth Amendment protections. In this context as well, the Court would conclude that Tanya has not been seized.⁶ Because following and approaching Tanya is not conduct that implicates the Fourth Amendment, the officer does not need a prior justification to do so. As with the previous example, the outcome of this hypothetical remains the same if race influenced the officers' decision to approach Tanya.

III. DECISION 3: TO QUESTION WHEREABOUTS AND IDENTITY

But what if in the context of approaching Tanya, the officers decide to question her? Assume, more specifically, that they ask Tanya the following questions: "Do you live around here?" "What's your name?" "Where are you going?" "Where are you coming from?" "May I see your identification?" The officers' engagement⁷ with Tanya along the preceding lines still would not constitute a seizure.

IV. DECISION 4: TO QUESTION ON A BUS

Assume that officers engage Tanya not while she is walking on the street but as she boards a bus. Indeed, stipulate that the police specifically followed Tanya on the bus to question her. Again, our assumption is that the officers have no objective reason to believe that Tanya has done anything wrong. Could Tanya now successfully argue that she has been seized? No.

This is a good place to describe more precisely how the Supreme Court has defined what constitutes a seizure. The doctrinal standard is that a seizure does not occur if the person feels free to decline officers' requests or otherwise terminate the encounter.⁸ The Supreme Court has repeatedly stated that the mere fact that police officers question a person does not mean that that person is seized.⁹ Under the Court's view, suspects whom the police question are "free to leave."

One of the most striking articulations of this view appears in *Florida v. Bostick*.¹⁰ In that case, officers observed Bostick sitting in the back of a bus and proceeded

6. *Florida v. Bostick*, 501 U.S. 429, 434 (1990) (declaring that "a seizure does not occur simply because a police officer approaches an individual").

7. *Id.*

8. *Id.* at 436.

9. *Id.* at 434; *see also Florida v. Royer*, 460 U.S. 491 (1983); *INS v. Delgado*, 220 U.S. 210 (1984).

10. *Bostick*, 501 U.S. at 434.

to question him.¹¹ The government stipulated that the police officers had no reason to believe that Bostick had done anything wrong.¹² Thus, the government could not argue that Bostick was seized and that the seizure was reasonable. The thrust of the government’s argument, therefore, was that the officers’ conduct did not implicate the Fourth Amendment, for Bostick was not seized.¹³ Thus, the officers needed no justification to approach and engage Bostick.¹⁴

While the *Bostick* Court did not definitively decide the seizure question, it made clear that “mere police questioning” does not constitute a seizure—even if it occurs in the confined space of a bus.¹⁵ The Court maintained that passengers on buses are constrained, not necessarily because of what police officers do, but because of their decision to travel by bus. According to the Court, the officers merely “walked up to Bostick . . . asked him a few questions, and asked if they could search his bags.”¹⁶ The Court intimated that that is not enough to transform a consensual bus encounter into a seizure.¹⁷ More than a decade later, in *United States v. Drayton*,¹⁸ the Court made that point explicit: police officers may question people on buses without triggering the Fourth Amendment.¹⁹ Particularly remarkable about the Court’s conclusion in *Drayton* is that the record revealed that the officer in the case had boarded more than 800 buses in the past year to question passengers. Only five to seven passengers declined to have their luggage searched.²⁰

The Court’s reasoning in *Bostick* and *Drayton* would have even more traction with respect to a person who is on the street, not on a bus. Indeed, in both cases, the Court noted that had Bostick’s encounter occurred off the bus, like the hypothetical I describe in Decision 3, it would be easy to conclude that he was not seized.²¹ The Court’s reasoning in *Bostick* and *Drayton* suggests not only that a police officer would not need to justify his decision to approach and question Tanya on the street or on a bus, but also that his decision to do so could be racially motivated because his subjective intent does not matter.

11. *Id.* at 446 (Marshall, J., dissenting).

12. *Id.* at 431, 433–34 (maj. op.).

13. *Id.* at 434.

14. *Id.*

15. *Id.*

16. *Id.* at 437.

17. *Id.*

18. *United States v. Drayton*, 536 U.S. 194 (2002).

19. *Id.* at 194.

20. *United States v. Drayton*, 231 F.3d 787, 790–91 (11th Cir. 2000).

21. *Drayton*, 536 U.S. at 195; *Bostick*, 501 U.S. at 434.

V. DECISION 5: TO QUESTION ABOUT IMMIGRATION STATUS

Assume that the officers perceive Tanya to be a foreigner and question her about her immigration status.²² One might surmise, notwithstanding what I have said so far, that some forms of questioning, like questioning about immigration status, might be so intrusive or intimidating that an officer's decision to pursue them would automatically trigger the Fourth Amendment. One would be wrong to so conclude. Stipulate that the officers have no objective reason to believe that Tanya is undocumented. Nevertheless, one of the officers approaches Tanya and asks: "Do you speak English?" "How long have you been in this country?" "Are you an illegal alien?" "May I see proof of citizenship?" Police officers may ask these and other questions of Tanya without implicating the Fourth Amendment.²³

One of the most troubling examples of the Court's conclusion that questioning people about their immigration status does not trigger the Fourth Amendment is *INS v. Delgado*. The case adjudicated the constitutionality of so-called "factory sweeps"—the Immigration and Naturalization Service (INS) practice of entering workplaces, with the employer's consent, to question workers about their immigration status.²⁴ Today, such practices are carried out by the Immigration and Customs Enforcement, or ICE.

Like the bus sweep in *Bostick*, the factory surveys in *Delgado* were conducted without individualized suspicion. That is, in none of the surveys did the INS have reason to believe that any particular worker was undocumented.²⁵ Thus, as in *Bostick*, the Court had to decide whether the law enforcement's activity constituted a seizure. Answering that question in the affirmative would have made the INS's conduct an unreasonable seizure, since it was not supported by evidence that any individual person was undocumented.

The Court, per Chief Justice William Rehnquist, asked two questions: (1) whether the individual workers whom the INS questioned were seized, and (2) whether the INS's conduct effectuated a seizure of the entire workforce. He answered both in the negative. With respect to the first, Justice Rehnquist

22. These dynamics would affect Latinos who are not black. I include them here to disrupt the tendency of framing blackness outside of the Latino experience. As for the issue of the criminalization of immigration, see Jennifer M. Chacón, "Criminalizing Immigration," in Volume 1 of the present Report.

23. *INS v. Delgado*, 466 U.S. 210, 220 (1984) (holding that "factory sweep" questioning of workers by immigration officers with additional officers positioned at exits did not constitute seizure under the Fourth Amendment).

24. See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside of Law*, 59 DUKE L.J. 1723, 1747-49 (2011) (discussing how workplace raids affect employee rights).

25. *Delgado*, 466 U.S. at 212.

noted that the interactions were brief.²⁶ The INS merely “asked one or two questions.”²⁷ Moreover, the questions that the INS asked focused on place of birth, citizenship status, and proof of residency, and were “not particularly intrusive.”²⁸ According to Justice Rehnquist, the INS’s conduct “could hardly result in a reasonable fear that respondents were not free to continue working or to move about in the factory.”²⁹ Thus, he concluded, the individual workers whom the INS questioned were not seized.

Justice Rehnquist’s account sanitizes the episode, which involved between 20 and 30 INS agents. These agents wore their INS badges, carried handcuffs—and they were armed.³⁰ Some of the agents guarded the exits; others moved systematically through the factory, row by row, “in para-military formation.”³¹ The entire episode lasted between one and two hours. At no time during any of this did the agents inform the workers that they were free to leave.³² Presumably, the workers inferred just the opposite, especially since the INS arrested several of the workers who attempted to exit the factory.³³ Indeed, as one worker explained, “They see you leaving and they think I’m guilty.”³⁴ Against this backdrop, Justice Brennan is right to suggest in dissent that Justice Rehnquist’s analysis is “rooted ... in fantasy”³⁵ and “striking ... [in] its studied air of unreality.”³⁶

In addition to concluding that the individual workers whom the INS questioned were not seized, Justice Rehnquist also held that the workplace as a whole was not seized. He repeated his point that the mere questioning of individuals is not a seizure.³⁷ He then added that the fact that the questioning occurred in the workplace does not necessarily change the analysis. According to Justice Rehnquist, “[o]rordinarily, when people are at work their freedom to move about has been

26. *Id.* at 219.

27. *Id.* at 220.

28. *Id.* at 219–20.

29. *Id.* at 220–21.

30. Brief for Respondents at 4, *INS v. Delgado*, 466 U.S. 210 (1984) (No. 82-1271).

31. *Id.* at 17.

32. *Delgado*, 466 U.S. at 217.

33. Brief for Respondents, *supra* note 30, at 18.

34. *Id.* at 20 (testimony of one of the workers).

35. *Delgado*, 466 U.S. at 229 (Brennan, J., dissenting).

36. *Id.*

37. *Id.* at 216 (maj. op.).

meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."³⁸ In other words, assuming the employees in *Delgado* felt constrained, that sense of constraint derived from their workplace responsibilities and not the INS's actions.³⁹

As Tracey Maclin has observed, Justice Rehnquist's approach is tantamount to "blam[ing] the victim,"⁴⁰ The burden is placed not "on the government to show justification for the intrusion [but] on the citizen to challenge government authority."⁴¹ Moreover, Rehnquist's analysis discounts the ways in which law enforcement's presence alters how people experience social spaces. When, for example, the INS agents in *Delgado* entered the factory, they transformed that already confining space into a government-centered and more coercive environment: an INS raid.⁴²

The bottom line for Tanya is that whether she is on the street as a pedestrian or at her workplace as an employee, the government may question her about her immigration status without triggering the Fourth Amendment. Moreover, were an officer to say, "I questioned Tanya because she looked like a Nigerian immigrant in terms of her dress and appearance," that racial motivation would not violate the Fourth Amendment. In a related context, the Supreme Court has said that "apparent Mexican ancestry" (whatever that means) can be a basis for determining whether someone is undocumented.

38. *Id.* at 218.

39. *Id.* In its brief, the government advanced a similar argument: "Preliminarily, we note that it is only in a theoretical sense that the work force here, or in any typical factory survey, can be characterized as having a 'freedom to leave' that is restrained by the appearance of the INS. The factory surveys in this case were conducted entirely during normal working hours. At such times the employees presumably were obligated to their employer to be present at their work stations performing their employment duties; accordingly, quite apart from the appearance of the INS agents, the employees were not 'free to leave' the factory in any real sense." Brief for Petitioners at 22–23, *INS v. Delgado*, 466 U.S. 210 (1984) (No. 82-1271).

40. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1305 (1990).

41. *Id.* at 1306.

42. It is also important to note that at urban work sites such as the facilities raided in *Delgado*, as opposed to farming or ranching operations, there is a greater likelihood that citizens and legal residents work alongside illegal aliens. Asian immigrants also make up a substantial percentage of the labor force at factories subject to immigration raids. In 1995, federal and state authorities raided a garment factory in El Monte, California, where 72 Thai nationals were forced to work 18-hour days, seven days a week. The facility was surrounded by barbed wire to prevent escapes. See Editorial, *Slavery's Long Gone? Don't Bet on It*, L.A. TIMES, Aug. 4, 1995, at B8.

VI. DECISION 6: TO SEEK PERMISSION TO SEARCH

What if the officers approach Tanya, again without any objective reason to believe that she has done anything wrong, and ask her for permission to search her bag? Is Tanya now seized? Does the answer turn on whether the officer informs Tanya of her right to refuse consent?

The Supreme Court has held that police officers need not inform people of their right to refuse consent.⁴³ Their failure to do so does not make a search invalid. Nor does the failure to warn people of their right to refuse consent turn an encounter into a seizure.⁴⁴ Thus, consistent with Fourth Amendment law, police officers may approach individuals whom they have no reason to believe engaged in wrongdoing, and ask those individuals for permission to search their persons or effects. Under such circumstances, people are not seized because (ostensibly) they are free to say no and go about their business. That people may not know that they have this right to refuse consent—or would not feel empowered to exercise that right—is largely irrelevant for Fourth Amendment purposes.

The case in which the Supreme Court developed this doctrine is *Schneckloth v. Bustamonte*.⁴⁵ The facts are these: A police officer, Officer Rand, stopped a car after observing two burned-out lights.⁴⁶ Robert Bustamonte was a passenger, and five other men were in the car. Only one of the men, passenger Joe Alcala, had identification.⁴⁷ Officer Rand asked each man to exit the car.⁴⁸ By this time, two other officers had arrived.⁴⁹ (Why other patrol cars were summoned to the scene when the basis for the stop was a burned-out light, you tell me.) One of the officers, Officer Rand, requested permission to search the car.⁵⁰ Alcala responded, “Sure, go ahead.”⁵¹ While there was no indication that Officer Rand or the other two officers employed direct force to elicit Alcala’s consent, none of the officers informed Alcala that he had the right to refuse consent.⁵² Upon searching the car, the officers found three stolen checks under one of the seats.⁵³ Bustamonte challenged the legality of the search, and lost.

43. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973).

44. *Florida v. Bostick*, 501 U.S. 429, 429 (1990).

45. 412 U.S. 218 (1973).

46. *Id.* at 220.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 222.

53. *Id.* at 220.

Central to the Court's conclusion that the consent search was constitutional was the idea that "If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary."⁵⁴ The logic here seems reasonable enough. But adding race squarely into the analysis exposes some limitations in the Court's analysis. If African-Americans believe that police officers are likely to perceive African-Americans as criminally suspect, they may feel extra pressure to say yes to consent searches to disconfirm that stereotype. African-Americans might also feel pressured to say yes to consent searches on the view that saying no carries the risk of both prolonging the encounter and escalating the tension.

Of course, whites are also subject to pressures to comply with requests from the police. The point is that, because of racial stereotypes of black criminality, blacks are subject to a kind of surplus compliance. Blacks, as a general matter, are going to be less trusting of the police, less comfortable in their presence, and more concerned about their physical safety than whites. These fears, whether justified or not, create added pressure for blacks to terminate police encounters by giving up their rights, consenting to searches, and otherwise being overly cooperative. None of these racial concerns figures in the Court's analysis. What concerns, then, did? The following quote provides a partial answer:

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable.⁵⁵

54. *Id.* at 228.

55. *Id.* at 227-28.

The passage is quite remarkable. It links the legitimacy of consent searches to the fact that police officers often will not have the requisite justification—reasonable suspicion, probable cause, or a warrant—to intrude on a person’s privacy. This turns Fourth Amendment protections upside down; it is precisely because consent searches do not require reasonable suspicion, probable cause, or a warrant that they ought to be suspect.

Nor is the Court right in assuming that consenting to a search will “convince the police that an arrest with its possible stigma and embarrassment is unnecessary.”⁵⁶ While exposing the interior of one’s bag to a police officer is one way of saying, “I am not carrying drugs,” this innocence-signaling strategy will not always be enough to dissipate an officer’s suspicions. To understand why, let’s bring Tanya back into the analysis. Assume that a police officer perceives, but does not have objective reason to believe, that Tanya is a drug dealer. Assume that Tanya is carrying a bag and that the officer requests permission to search it. Stipulate that Tanya says yes, and the officer searches the bag but does not find any drugs. The officer’s suspicions of Tanya’s criminality will not necessarily disappear. Tanya’s consent to the search of her bag will not necessarily terminate the interaction. In fact, her consent may prolong it. The officer may believe that Tanya granted permission to search her bag because she is carrying drugs elsewhere on her person; the officer may further assume that Tanya strategically consented to conceal her criminality.

Alternatively, the officer may know that Tanya’s race puts her in a vulnerable position in that Tanya might be eager to terminate the encounter because of her fear of the police and eager to prove her innocence because of her worry that the officer perceives her to be criminally suspect. If the officer believes that any of the preceding concerns motivated Tanya’s consent, he may request permission to conduct another and more intrusive search: a search of Tanya’s clothing. If Tanya does not consent to this second search, the officer’s suspicions would presumably intensify. Why would a person who is not carrying drugs grant permission to search her bag but not her person? Something like this hypothetical played itself out in a Supreme Court case I mentioned earlier, *United States v. Drayton*.⁵⁷

In *Drayton*, three members of the Tallahassee Police Department—one black and two white—boarded a bus just as it was about to depart. Working from the back of the bus forward, the officers asked passengers questions as to their travel destinations, their identity, and their personal belongings. The

56. *Id.* at 228.

57. 536 U.S. 194 (2002).

“[d]efendants Drayton and Brown were seated next to each other a few rows from the rear.”⁵⁸ One of the officers identified himself as a police officer, informed the defendants that he was part of a drug interdiction team, and asked whether they had any luggage. Both responded in the affirmative. The officer then asked for permission to search the bag, to which Brown responded, “Go ahead.”⁵⁹ Another officer searched the bag but no illegal substances were found.

If Brown’s consent was a privacy-compromising performance tactic to disconfirm the assumption of his criminality and to end the encounter, the strategy did not work. Indeed, it had the opposite effect. Upon learning that Brown’s bag did not contain any illegal drugs, the officer requested permission to conduct another, more intrusive search of Brown’s person: a pat-down. His reason? He thought the defendants “were overly cooperative during the search [of the bag].”⁶⁰ In short, the fact that Brown and Drayton consented to the search of their bag created, rather than eliminated, the officer’s suspicion and prolonged, rather than terminated, the encounter. In this case, the officer’s suspicions were confirmed: The pat-down of Brown produced incriminating evidence, as did the subsequent pat-down of Drayton.⁶¹ The Court of Appeals concluded that because neither search was consensual, the evidence should have been excluded.⁶² The Supreme Court disagreed and ruled that the search was consensual.⁶³

Enter again Tanya. With *Drayton* in mind, it is fair to say that Tanya is vulnerable to multiple consent search requests, and not just one. Saying yes to an officer’s request for permission to search her bag won’t necessarily terminate the encounter. It could lead to another request, this time for permission to search Tanya’s person. Without more, the officer’s second request for permission to search would not make the encounter a seizure. Thus, the officer would not need any justification to seek that consent.

Nor, as stated earlier, does it matter whether the officer informed Tanya of her right to refuse consent. Police officers are free to exploit a person’s lack of knowledge with respect to their Fourth Amendment rights.

The question now becomes: Why would the Court interpret the Fourth Amendment in such a police-friendly way? Why not require police officers to inform people of their right to refuse consent? Is it really fair to say that a

58. United States v. Drayton, 231 F.3d 787, 789 (11th Cir. 2000).

59. *Id.*

60. *Id.*

61. *See id.* at 788-90.

62. *See id.* at 788.

63. *See* United States v. Drayton, 536 U.S. 194 (2002).

person consents to something when they do not know they have a right to refuse that consent? And even if people know their rights, wouldn't a requirement that police officers inform them of that right increase the likelihood that the average person, and certainly the average black person, would feel empowered to exercise it?

The Court was not oblivious to these questions and the concerns they raise. But far more important to the Court was the worry that requiring police officers to notify people of their right to refuse consent would impose too high a burden on law enforcement. The Court seemed to imagine that police officers would be required to employ something like the following script:

You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things that I couldn't even if I could get a warrant. You have the right to a lawyer before you decide, and if you can't afford a lawyer we will get you one and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information, you will need a lawyer to help you before you tell me I can search.⁶⁴

Many people would argue that requiring that kind of warning would be impractical.⁶⁵ Indeed, that is precisely what the government argued on appeal—"that the very complexity of such warnings proves its unworkability."⁶⁶ But to say that warnings of some sort should be required is not yet to establish the nature of the warnings. In other words, one might conclude that police officers should be required to warn people of their right to refuse consent and reject the idea that the warnings would need to be extensive. The choice is not between telling a person everything and telling her nothing. There is a middle

64. Brief for Petitioner at 21-22, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (No. 71-732) (quoting Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 158 (1967)).

65. *Bustamonte*, 412 U.S. at 231 (arguing that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning").

66. Brief for Petitioner, *supra* note 64, at 22.

ground: Prior to conducting a consent search, police officers could be required to inform a person of nothing more than “you have a right to refuse consent.” Full stop. At the time *Bustamonte* was litigated, federal law enforcement officials regularly dished such warnings.

But Tanya is unlikely to get them. Fourth Amendment law has created a fiction that people can exercise rights they don’t even know they have. Under *Bustamonte*, Tanya can unknowingly waive her Fourth Amendment right to refuse an officer’s request for permission to search, and police officers are free to exploit Tanya’s lack of knowledge. This does not mean that police officers may actively coerce a consent out of Tanya. Fourth Amendment law doesn’t allow that. But an officer may seek permission to search Tanya and her effects knowing that Tanya may not know her rights or may not feel empowered to exercise them.

To summarize where we are: Without any evidence of wrongdoing, police officers may follow and approach Tanya. They may question her, including about her immigration status. They may ask to search her person and her effects, without informing her of her right to refuse consent. These pedestrian checks are not subject to the constraints of the Fourth Amendment because none of them are considered seizures. This analysis does not change if the officers’ decisions along any of the preceding lines are racially motivated. Racial profiling that does not constitute a search or seizure is racial profiling about which the Fourth Amendment is unconcerned.

VII. DECISION 7: TO INFILTRATE

Assume for the next three scenarios that Tanya is Muslim and that the government is interested in investigating whether she has engaged in terrorist activity.⁶⁷ Let’s first explore how Tanya could be affected by the freedom with which the government may infiltrate mosques. Assume that Tanya regularly attends a neighborhood mosque. Assume further that the government enlists Mohammed (who goes by “Mo”), one of Tanya’s friends, to inform on her. As before, the government has no evidence that Tanya has engaged in criminal wrongdoing. The government’s view is that the fact that Tanya is Muslim and regularly attends a mosque whose leader routinely and publicly criticizes U.S.

67. As with the point about Latinos, clearly Muslims who are not black would experience the dynamics I describe. I frame the hypothetical this way to make clear that Muslim identity is one of the categories through which blackness is interposed.

foreign policy in the Middle East is reason enough to investigate her. Imagine that Mo surreptitiously records every conversation he has with Tanya for six months. Does this violate the Fourth Amendment? No. Indeed, Mo's activity would not even trigger the Fourth Amendment.

Unsurprisingly, if Tanya were to argue that she was seized, she would not get very far. After all, Mo is Tanya's best friend (or so Tanya believes), and Tanya was not aware that Mo was cooperating with the government. Under these circumstances, it stretches credulity to argue that a reasonable person in Tanya's position would *not* feel free to leave or otherwise terminate her many interactions with Mo.

But what about the other Fourth Amendment trigger question? Has the government searched Tanya or her conversation? No. The Supreme Court would conclude that Mo's conduct does not constitute a search. More specifically, the Court would reason that Tanya assumed the risk that the person with whom she had those interactions (Mo) was a government official.⁶⁸ The burden is on Tanya to choose her friends more carefully. That Mo surreptitiously recorded the conversation does not matter.⁶⁹ The point remains the same: The Fourth Amendment does not protect us from "misplaced confidence"⁷⁰ or "false friends."⁷¹ We assume the risk that the people with whom we interact will listen to, record, and transmit our conversations,⁷² even when they are acting under the direction of law enforcement.

Nor does it matter that the government's decision to focus on Tanya was racially and/or religiously motivated. The fact that Mo's conduct does not trigger the Fourth Amendment means that it is irrelevant, for Fourth Amendment purposes, whether that conduct was racially or religiously motivated.

The freedom with which law enforcement can use informants to investigate terrorism has become a profound problem for Muslim communities. As Amna Akbar explains, "There is reason to believe that there are informants at each and every mosque in the United States."⁷³ The potential chilling effects of the government's use of informants cannot be overstated. It creates an incentive for Muslims not to attend mosques, and to severely circumscribe their interactions when they do.

68. See *United States v. White*, 401 U.S. 745, 753 (1971) (holding that conversations with wired government informant are not protected by the Fourth Amendment).

69. *Id.* at 752.

70. *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

71. *On Lee v. United States*, 343 U.S. 747, 757 (1952).

72. *White*, 401 U.S. at 751.

73. Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809, 862 (2013).

VIII. DECISION 8: TO CONDUCT VOLUNTARY INTERVIEWS

Assume that law enforcement still suspects Tanya of terrorism, though they have no objective reason to believe that she is a terrorist. Here, again, race and religious affiliation motivate their suspicion. Agents show up at her house, knock on the door, and announce that they are the Federal Bureau of Investigation (FBI).⁷⁴ Tanya answers the door. FBI agent Nelson says, “Good afternoon, Tanya. Would you mind accompanying us to the FBI’s office? We are investigating terrorist activity and just want to make sure that you are not involved.” Tanya accompanies the agents to the office, where they question her for three hours and then indicate that she is “free to leave but that we might follow up.” Embarrassed, humiliated, and concerned that the FBI might seek to question her again, Tanya relays her experience to the American Civil Liberties Union (ACLU) to ascertain whether the agency violated her Fourth Amendment rights. She is surprised to learn that the answer is no and that the FBI regularly employs what it refers to as “voluntary interviews.”

That the FBI refers to investigatory engagements of the sort Tanya experienced as “voluntary interviews” is a window on how the Supreme Court would respond to the practice.⁷⁵ Likely, the Court would conclude that because Tanya voluntarily went to the FBI’s office, she was not seized. Because the FBI agents did not use a show of force or otherwise coerce Tanya into staying, she was free to leave at any time. As with prior examples, the fact that Tanya did not know her rights or may have felt disempowered to exercise them during the FBI questioning does not change this outcome. “Mere questioning,” even in the context of a police station, would not transform a voluntary encounter into a seizure. In short, the Court would conclude that Tanya went, stayed, and subjected herself to questioning at the FBI office of her own free will.

74. See Tracey Maclin, “*Voluntary*” Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror, 73 Miss. L.J. 471, 479–510 (2003) (explaining that people perceived to be Arab, Muslim, or Middle Eastern may not experience “voluntary” interviews as consensual).

75. See, e.g., *United States v. Ambrose*, 668 F.3d 943, 956–59 (7th Cir. 2012) (relatively restrictive security requirements at FBI building did not transform noncustodial voluntary interview into a custodial interview).

What if Tanya could demonstrate that, in fact, she exercised no such free will? Subjectively, she felt compelled both to accompany FBI agents to the station and to answer their questions while she was there. If you've recalled the doctrinal test for a seizure, you will recognize that Tanya's subjective feelings are not dispositive.⁷⁶ The inquiry concerns not what Tanya subjectively felt but what a reasonable person under the circumstances would have felt.⁷⁷

But that still leaves a central question: Upon what basis would the Court conclude that a reasonable person in Tanya's position would not feel free to leave a "voluntary interview"? After all, one could argue that no one would feel free to leave the FBI office under the circumstances I have described—and few, if any, of us would have felt free to decline the officers' invitation to accompany them in the first place. This sense of constraint would be all the more salient if Tanya is, or is perceived to be, a Muslim.

To put these points more doctrinally, even if we discounted Tanya's subjective feelings and interpreted the "free to leave" test in more objective terms by asking the standard question—whether a reasonable person would have felt free to leave?—or a more particularized one—whether a reasonable Muslim would have felt free to leave?—a strong argument can be made that the answer in each case is no.

But I have already said that the Court could conclude that Tanya has not been seized. Two structural features of the seizure analysis help to explain why. First, the free-to-leave framework is a normative inquiry rhetorically disguised as an empirical one. When the Court asks "whether a reasonable person would feel free to leave or otherwise terminate the encounter," it is really asking whether a reasonable person *should* feel free to leave or otherwise terminate the encounter. In every Supreme Court decision in which the question is whether a person has been seized, the Justices construct the very thing they purport empirically to locate—the reasonable person. Applying this insight to our hypothetical, the legal conclusion that a reasonable person is not seized in the context of a voluntary interview is a normative position that a reasonable person *should not* feel seized.

76. See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

77. See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

Consider now the second structural feature of the seizure doctrine that makes it difficult to argue that Tanya's "voluntary interview" constitutes a seizure. After an early nod in the direction of factoring race into the seizure analysis,⁷⁸ the Supreme Court has never since taken race into account in determining whether a person is seized, effectively adopting a colorblind approach to the seizure analysis.⁷⁹ This colorblind approach is particularly striking not only because the seizure test is a "totality of the circumstances" inquiry⁸⁰ (why isn't race considered a part of the "totality of the circumstances"?), but also because in a relatively recent opinion the Court concluded that age is a part of the "totality of the circumstances." According to the Court:

In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.⁸¹

The foregoing reasoning applies to race. To appreciate how, substitute race for age throughout the passage above, focusing specifically on black and white experiences. Under this thought experiment, the quote now reads:

In some circumstances, a person's *race* "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." That is, a reasonable *black* person subjected to police questioning will sometimes feel pressured to submit when a reasonable *white* person would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

78. *But see id.* at 545 (observing that race is "not irrelevant" to whether a person has been seized).

79. Devon Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 968 (2002) (arguing that the Court applies the Fourth Amendment with an assumption of race neutrality, that under this jurisprudence neither the way police engage people nor the way people interact with the police are shaped by race, and that race only becomes doctrinally relevant when an officer is overtly racist in her actions).

80. *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011) (reaffirming the Court's traditional objective test for custody based upon totality of the circumstances, but extending it to include a child's age among the factors).

81. *Id.* at 271–72.

That I am encouraging this race/age substitution is not to suggest that blacks are to whites what children are to adults. I am mindful of the racial infantilization of black people under both slavery and Jim Crow. My point in substituting race for age is simply to note that even if one thinks that age is more relevant than race in determining whether a person is seized, the claim that race is irrelevant is difficult to sustain.

The Court's elision of race should trouble us. It takes off the table an important factor that could heighten a person's sense of constraint in the context of a police encounter. Because, for example, whites and African-Americans are not similarly situated with respect to how their racial identity might affect this sense of constraint, the Court's failure to consider race is not race-neutral. It creates a racial preference in the seizure doctrine for people who are not racially vulnerable to, or who do not experience a sense of racial constraint in the context of, interactions with the police. Black people, across intraracial differences, are likely to feel seized earlier in a police interaction than whites, likely to feel "more" seized in any given moment, and less likely to know or feel empowered to exercise their rights. With reference to black men, Cynthia Lee puts the point this way:

A young black male who has grown up in South Central Los Angeles knows that if he is stopped by a police officer, he should do whatever the officer says and not talk back unless he wants to kiss the ground. This young man may not feel free to leave or terminate the encounter with the officer, but if the reviewing court believes the average (white) person would have felt free to leave, then the encounter will not be considered a seizure and the young black male will not be able to complain that his Fourth Amendment rights have been violated.⁸²

Lee's point pertains to blacks more generally. The racial asymmetry she describes is why Paul Butler describes the Fourth Amendment with more racial specificity as "the white Fourth Amendment."⁸³ His point is that the Supreme Court's colorblind interpretation of the Fourth Amendment ends up protecting whites more than it does people of color.

The Supreme Court does not take any of this into account. Its failure to do so elides a particular kind of precarity: racial insecurity. By racial insecurity I mean a racial sense of exposure, anxiety, and vulnerability that some people experience

82. Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 Miss. L.J. 1133, 1152 (2012).

83. See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 250 (2010).

in the context of police encounters.⁸⁴ Whites generally do not experience racial insecurity because whites generally are neither disproportionately targeted by the police nor burdened by the concern that their race exposes them to police surveillance, social control, and violence.

Certainly, incorporating race into the seizure analysis would not be a simple endeavor. Would that entail adopting a “reasonable black person” standard when the suspect is black, a “reasonable Latino” standard when the suspect is a Latino, and a “reasonable Muslim” standard when the suspect is Muslim? Not necessarily. Such particularized standards could get very messy very quickly. Thus, I am not advocating an identity-specific approach. It bears mentioning that when the Court included age in the custody analysis, it did not adopt a 16-year-old standard or a 15-year-old standard or a 13-year-old standard. The Court simply noted, “[a] child’s age is far ‘more than a chronological fact.’ It is a fact that ‘generates common sense conclusions about behavior and perception.’ Such conclusions apply broadly to children as a class.”⁸⁵ Suffice it to say that these points can be made about race as well.⁸⁶

My suggestion that the Court take race into account in determining whether a person is seized is modest given that the seizure analysis is a “totality of the circumstances” inquiry.⁸⁷ I am simply proposing including race as one of the contextual factors that guide the Court’s analysis. I am not the only one to advance this position. More than two decades ago, Tracey Maclin articulated a similar recommendation:

My tentative proposal is that the Court should disregard the notion that there is an average, hypothetical, reasonable person out there by which to judge the constitutionality of police encounters. When assessing the coercive nature of an encounter, the Court should consider the race of the person confronted by the police, and how that person’s race might have influenced his attitude toward the encounter.⁸⁸

84. For a discussion of racial anxiety, see L. Song Richardson, “Police Use of Force,” in the present Volume.

85. *J.D.B.*, 564 U.S. at 261.

86. See generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (discussing how race creates different common-sense understandings for black and white Americans).

87. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

88. Tracey Maclin, “*Black and Blue Encounters*”—*Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991).

Maclin goes on to link his argument to the holistic nature of the seizure framework:

Currently, the Court assesses the coercive nature of a police encounter by considering *the totality of the circumstances* surrounding the confrontation. All I want the Court to do is to consider the role race might play, along with the other factors it considers, when judging the constitutionality of the encounter.⁸⁹

In short, both Maclin and I are simply urging the Court to take the totality-of-the-circumstances test seriously by incorporating race into the analysis.

To return to my hypothetical, taking race into account might mean asking, among other things, whether widespread perceptions of Muslims as terrorists could cause someone in Tanya's position to feel compelled to acquiesce to the FBI's request for a voluntary interview. The Court might well answer that question in the negative (recall my earlier point that, as a substantive matter, the seizure analysis is normative, not empirical). But quite apart from how the Court would ultimately resolve the issue, its engagement with race would make it a matter of doctrinal concern, and this in turn would shape how, in the public arena, we discuss "voluntary interviews" and other surveillance practices the government deploys against Muslims and others. As things now stand, Tanya doesn't get the benefit of this potential discourse effect because Tanya's interaction with the FBI is not a Fourth Amendment event. As such, the interaction requires no justification and generates no juridical debates about reasonableness that could spill over into the public domain.

That the Fourth Amendment would not protect Tanya from "voluntary interviews" does not answer whether some other procedural safeguard offers protection. One might surmise that *Miranda* would be helpful in this context, particularly because the questioning occurred at the FBI's office. In fact, however, Tanya could not invoke the *Miranda* protections. For one thing, the state is not seeking to admit Tanya's statements against her—thus, there is no self-incrimination issue.⁹⁰ For another, the Court would conclude that Tanya was not in custody, a necessary predicate for the application of *Miranda*.⁹¹ The test for whether a person is in custody is whether that person is formally under arrest or experiencing its functional equivalent.⁹² Because, arguably, Tanya wasn't even seized, it is easy to conclude that she was not in custody.

89. *Id.* at 268–69 (emphasis in original).

90. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The opinion is grounded in the Fifth Amendment prohibition against compelled self-incrimination. *See id.* at 439–42, 457–58, 467–74.

91. *See Berkemer v. McCarty*, 468 U.S. 420, 429 (1984).

92. *See id.* at 441–42.

Similarly, the Sixth Amendment right to counsel would not help. Its procedural framework applies only when the state has commenced formal proceedings against a person.⁹³ Finally, because the Supreme Court would perceive “voluntary interviews” as consensual encounters, arguments against the practice that invoke due process also would fail.⁹⁴ The reality, then, is that Tanya is stuck with the Fourth Amendment, even as it offers her no protections from the racially motivated “voluntary interview” she experienced.

IX. DECISION 9: TO CONDUCT COMPUTER SURVEILLANCE

Assume now that the police, still suspecting Tanya of aiding or abetting terrorism, monitor the Internet websites she visits and track to and from whom she sends and receives e-mail. Yet again, race and religious affiliation form the sole basis for their suspicion. Moreover, the Fourth Amendment is not implicated, because neither of these surveillance activities is legally construed as a search or seizure. Online addresses used during Internet surfing or online communication are considered public information, unlike the actual content of communications, and courts have analogized the collection of such information to the government’s long-established right to monitor telephone transmission records and postal addresses/addressees appearing on the outsides of sealed envelopes.⁹⁵

X. DECISION 10: TO INVESTIGATE TO VERIFY WELFARE ELIGIBILITY

Assume now that Tanya has applied for welfare benefits. Her county has a program requiring that all prospective welfare recipients submit to mandatory home visits by county social workers to verify the recipients’ eligibility for welfare benefits. The county welfare agency notifies Tanya in advance that the inspection visit will occur at some point during the following week, between the hours of noon and five in the afternoon. When the social workers visit Tanya’s home, they find a small bag of marijuana owned by Tanya’s son on

93. See *Massiah v. United States*, 377 U.S. 201, 204–06 (1964).

94. To bring a due process claim, Tanya would have to argue that government’s conduct was “overreaching,” “oppressive,” and “coercive.” *Colorado v. Connelly*, 479 U.S. 157, 163–64, 167 (1986).

95. See, e.g., *United States v. Forrester*, 512 F.3d 500, 504, 505, 509–11 (9th Cir. 2008) (analogizing police internet surveillance to telephone pen registers, which were held not to constitute Fourth Amendment searches in *Smith v. Maryland*, 442 U.S. 735 (1979)); see also Christopher Slobogin, “Policing, Databases, and Surveillance,” in the present Volume; *Surveillance Under the PATRIOT Act*, ACLU, <https://www.aclu.org/infographic/surveillance-under-patriot-act> [<https://perma.cc/NW9Z-WR2H>]. Moreover, in certain situations, such as border crossings, police may seize computer hard drives for forensic examination based only on reasonable suspicion. See, e.g., *United States v. Cotterman*, 709 F.3d 952, 968, 970 (9th Cir. 2013); *United States v. Saboonchi*, 990 F. Supp. 2d 536, 571 (D. Md. 2014).

the floor of his bedroom. Per the terms of the county program, they report this finding to county prosecutors. Although the district attorney declines to prosecute, the county welfare agency uses the incriminating evidence as a basis to disqualify Tanya from welfare eligibility. Tanya cannot claim Fourth Amendment protection from the social workers' search, because courts, including the Supreme Court, have held either that such investigations do not constitute a Fourth Amendment "search," or else that they represent a "special needs" exception to the Fourth Amendment that is allowable so long as the primary purpose of the search is justifiable for reasons other than strictly law enforcement purposes.⁹⁶

XI. DECISION 11: TO CONDUCT SURVEILLANCE OF HOMELESS DWELLING

Within months of being found ineligible for welfare benefits, Tanya is evicted from her apartment and finds herself homeless. She ultimately joins other homeless people living in makeshift structures made from tarps and cardboard boxes in the Skid Row area of town. Like many other cities, Tanya's city has an ordinance against obstruction of municipal streets and sidewalks, but her "home," and the rest of the homeless tent city, intrudes a few feet onto a city sidewalk. Police officers appear at the tent city to investigate the theft of merchandise from a nearby business. The officers may freely look inside Tanya's dwelling, and may even pull aside a tarp flap or piece of cardboard to

96. *Griffin v. Wisconsin*, 483 U.S. 868, 872–76 (1987) (warrantless search of probationer's home comes under "special needs" exception to Fourth Amendment); *Wyman v. James*, 400 U.S. 309, 317–19 (1971) (mandatory home visit by welfare workers was not a Fourth Amendment search, and even if it were, it would have been reasonable); *Sanchez v. San Diego*, 464 F.3d 916, 920–26 (9th Cir. 2006) (applying both *Wyman* and *Griffin* to San Diego County welfare verification program).

do so; any evidence they see within will be, constitutionally, fair game. Courts generally have held that there is no reasonable expectation of privacy in an unauthorized dwelling illegally erected on public land, so police surveillance of such dwellings does not constitute a search under the Fourth Amendment.⁹⁷

XII. DECISION 12: TO CHASE

Assume that Tanya has had all the foregoing interactions with the police—and on more than one occasion. She does not want to have another encounter in which the police will presume her to be a criminal. Tanya is worried that she will be forced to compromise her rights and answer questions or consent to a search to prove that she is innocent. She believes that her failure to cooperate could ultimately lead to her arrest. While Tanya has not herself been arrested for refusing to cooperate with the police, many of her friends—men and women—in the neighborhood have been. Plus, for at least a decade, black women in the neighborhood have been complaining that police officers use the stop-and-frisk practice as a mechanism to engage in sexual harassment. Tanya thus decides that the next time she observes a police officer, she is going to avoid that officer altogether—by running away if necessary.

That is what she does one day. The police officers chase Tanya down the street, shouting, “Stop, it’s the police!” as they do so. Is Tanya now seized? No. The fact that she is not formally under the control of the police in the sense of submitting to authority or being apprehended means that she is not seized.⁹⁸ Thus, police officers are free to chase Tanya, even under circumstances where they have no reason to think she has engaged in wrongdoing—and even if their primary reason for doing so is the fact that she is a black woman.

The problem is even worse. If Tanya is running in a “high-crime area,” the officer is pretty close to having reasonable suspicion to justify stopping her. To back up: initially the officer has no reason to believe that Tanya has done anything wrong. Initially, Tanya has the right to avoid the police. To put the point

97. See, e.g., *People v. Thomas*, 38 Cal. App. 4th 1331, 1335 (1995) (“[A] person who occupies a temporary shelter on public property without permission and in violation of an ordinance prohibiting sidewalk blockages is a trespasser subject to immediate ejection and, therefore, a person without a reasonable expectation that his shelter will remain undisturbed.”); *United States v. Ruckman*, 806 F.2d 1471, 1472–74 (10th Cir. 1986) (no reasonable expectation of privacy in dwelling built in a cave on federal land); *State v. Tegland*, 269 Or. App. 1, 10–11 (2015) (“[W]here erecting a structure in the public space is illegal and the person has been so informed and told that the structure must be removed, there is no ‘reasonable expectation of privacy’ associated with the space.”); *People v. Nishi*, 207 Cal. App. 4th 954, 962–63 (2012) (repeated removal by law enforcement from campsite occupied illegally tends to negate legitimate expectation of privacy in that location).

98. *California v. Hodari D.*, 499 U.S. 621 (1991).

doctrinally, she is “free to leave.” But if Tanya exercises that right by running away, the officer may draw an adverse inference from her decision to flee. If Tanya is running in a “high-crime area,” which several scholars have suggested is code for a predominantly black or brown neighborhood,⁹⁹ the officer may now have a basis to stop her, at least according to Supreme Court law.¹⁰⁰

A very recent opinion by the highest court in Massachusetts challenges the idea that running from the police necessarily makes a person a suspect. According to the court:

[T]he finding that black males in Boston are disproportionately and repeatedly targeted for FIO [“field interrogation observation”] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.¹⁰¹

The Supreme Court has not embraced the foregoing reasoning, and it remains to be seen whether other jurisdictions will. What this mean for Tanya if she runs from the police is quite demoralizing: An officer’s decision to chase her will not amount to a seizure, so the officer is free to do so even if, prior to the chase, he has no reason to believe that Tanya did anything wrong. Moreover, if Tanya is subsequently seized—either because the officer apprehends her or because Tanya stops running and submits to the officer’s authority¹⁰²—a court may conclude that that seizure is reasonable, particularly if Tanya is running in a “high-crime area.”

You might be thinking that the scenario is not as dire as my hypothetical suggests. After all, Tanya’s options are not limited to running away or remaining in place. There’s a third way. Tanya could avoid the police by walking. Doing so would not be considered evasive behavior.

99. See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 254 (2010) (“The police have more power in high-crime neighborhoods than in low-crime neighborhoods.”); see also Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas,”* 63 HASTINGS L.J. 179, 183 (2011); Margaret Raymond, *Down on the Corner, out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999).

100. *Illinois v. Wardlow*, 528 U.S. 119 (2000). Importantly, *Wardlow* does not say expressly that fleeing in a high-crime area equals reasonable suspicion, but it comes pretty close.

101. *Commonwealth v. Warren*, 475 Mass. 530, 539 (2016). An FIO is a “field interrogation observation,” in which an officer approaches a person and asks why they are in a particular area. *Id.* at 532 n.5.

102. *Hodari D.*, 499 U.S. at 621.

Let's pursue this idea. Assume that Tanya does indeed walk away upon observing the officers. The officer would be perfectly free to follow Tanya (remember, the act of following a person does not trigger the Fourth Amendment). The officers could also question Tanya as they are following her (remember, the act of questioning does not, without more, trigger the Fourth Amendment). Technically, Tanya is "free to leave." But how is she to exercise that freedom if the officer is following and questioning her? Moreover, will Tanya even know that she is "free to leave"? At some point, Tanya is likely to simply "consent" to whatever the officer requests—a search, to produce her identification, to answer his questions—ostensibly of her own free will.

XIII. DECISION 13: TO SEIZE

In each of the foregoing examples, our assumption is that Tanya has not been seized. But let's now suppose that the officer seizes Tanya by, for example, compelling, and not merely asking, her to produce her identification. Stipulate that this violates the Fourth Amendment in the sense of constituting an unreasonable seizure because the officer has no evidence that Tanya engaged in wrongdoing. After obtaining Tanya's identification, the officer runs her name through a warrant database and discovers that Tanya has an outstanding warrant for a parking violation that she neglected (or could not afford) to pay. The officer handcuffs Tanya, arrests her, and then transports her to the station house.

Assume that Tanya argues that her arrest is unconstitutional. Her claim is that but for the officer's decision illegally to seize her and demand that she produce her identification, the officer would not have discovered the warrant for her parking ticket. To put this point in the language of Fourth Amendment law, the arrest was the "fruit of the poisonous tree" (the illegal seizure).¹⁰³

Tanya could very well lose that argument, particularly if a court concludes that the officer's unconstitutional seizure of Tanya was a reasonable mistake.¹⁰⁴ Under Fourth Amendment law, police officers not only have tremendous

103. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

104. See *Utah v. Strieff*, 136 S. Ct. 2056 (2016). In *Strieff*, an officer stopped someone without reasonable suspicion, demanded their identification, ran that information through a warrant database, and subsequently arrested the person based on the discovery that the person had an outstanding warrant. *Id.* at 2060. A search incident to arrest uncovered drugs. *Id.* The defendant moved to suppress the drugs on the ground that it was the fruit of an illegal seizure. *Id.* The Court concluded that suppression was not warranted because the officer's mistake as to reasonable suspicion was not flagrantly unlawful and because the discovery of the warrant acted as an intervening act between the illegal seizure and the discovery of the evidence. *Id.* at 2064.

discretion, they have broad latitude to make mistakes.¹⁰⁵ Were a court to conclude that the officer's unconstitutional seizure of Tanya was a reasonable mistake, it would also likely conclude that the officer's discovery of the outstanding warrant effectively cured the unconstitutional seizure in the sense of being a separate "intervening act." If you are confused by that argument, you should be. How does a warrant whose existence was discovered by an unconstitutional seizure become an intervening act—something that happened—between the unconstitutional seizure and the discovery of the warrant? The unconstitutional seizure of Tanya, not something else, led to the discovery of the warrant, and the warrant was the basis for Tanya's arrest.

The foundational case on how we should think about an intervening act, *Wong Sun v. United States*,¹⁰⁶ provides a more sensible way of thinking about causation and the "fruit of the poisonous tree" analysis. Simplifying the case, *Wong Sun* involved the admissibility of two confessions.¹⁰⁷ Let's call these confessions Statement 1 and Statement 2. Without too much difficulty, the Court concluded that Statement 1 was inadmissible because it was the product of an unreasonable seizure. Not so with respect to Statement 2. The defendant had argued that Statement 2 should be excluded as the fruit of the same poisonous tree that produced Statement 1—to wit, the unreasonable seizure.

The Court disagreed, pointing to, among other things, the fact that the defendant voluntarily showed up to the station house two days after Statement 1 and provided Statement 2. His decision to do so, reasoned the Court, was an "intervening act" that broke the chain of causation between the initial illegal seizure that produced Statement 1 and the defendant's utterance of Statement 2.

No such intervening act applies to my hypothetical. Instead, you have a line of causation from an unconstitutional seizure (the officer's decision to stop Tanya without reasonable suspicion), to the discovery of the outstanding warrant, to Tanya's arrest. The chain of causation between the officer's illegal seizure of Tanya and her arrest is like the chain of causation between the illegal seizure in *Wong Sun* and Statement 1; her illegal seizure and arrest bear virtually no resemblance to the illegal seizure and Statement 2 in *Wong Sun*. Nevertheless,

105. See, e.g., *Maryland v. Garrison*, 480 U.S. 79 (1987) (finding reasonable an officer's mistake as to the existence of two apartments on the third floor of a building).

106. *Wong Sun*, 371 U.S. at 471.

107. In fact, there were multiple defendants in the case and other evidentiary issues that we need not engage.

because of a recent Supreme Court case that effectively expands the meaning of an intervening act,¹⁰⁸ Tanya's argument that her arrest is unconstitutional—the “fruit of the poisonous tree” of an illegal seizure—could fall on deaf ears.

An African-American's vulnerability to a *legal* arrest that began as an *illegal* seizure is quite real given how many jurisdictions have engaged in what I call “predatory policing”—the utilization of policing as a mechanism to raise revenue for cities generally and police departments specifically.¹⁰⁹ Predatory policing includes issuing citations to people for minor infractions, which, when unpaid, result in the issuance of a warrant. The number of warrants that police officers issue in any given year may surprise you. Consider, for example, Ferguson Missouri. Ferguson's population numbers 21,000. As of 2014, Ferguson had issued 90,000 summonses and citations; and in 2013 alone, Ferguson issued 9,007 warrants.¹¹⁰

Against the background of that many outstanding warrants, police officers have an incentive not only to follow people and ask them for their identification (which many people will “voluntarily” turn over on the assumption that they have to), but also to demand their identification (when people refuse to comply or assert their rights). If it turns out that the person the officer stops does not have an outstanding warrant, the officer will simply send that person on her way. At worst for the officer, that person will file a formal complaint. Chances are, she won't even do that. Certainly, she won't file a lawsuit. Would you? If the officer's license check reveals that the person has an outstanding warrant, the officer will be able not only to arrest the person, but also to subject the person to a number of additional intrusions. The bottom line is that even though the officer had no reason to believe that Tanya did anything wrong when he approached her, he could end up with a legitimate basis on which to arrest her.

CONCLUSION

That I have employed hypotheticals to frame this chapter does not mean that pedestrian checks of the sort I have described are a hypothetical problem. They are not. Just ask any African-American. Likely, they will have a story to tell about themselves or someone they know. Moreover, the hypotheticals are grounded in Supreme Court cases in which many of the litigants are black. Take a look at Figure 1 below. The left column lists some of the pedestrian

108. See *Strieff*, 136 S. Ct. at 2056.

109. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1489 (2016); see Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

110. U.S. DEP'T OF JUSTICE, *supra* note 2, at 7, 55.

checks that the Supreme Court has ruled are not a search or a seizure; the middle column reveals the case and year in which the Court rendered that ruling; and the column to the right notes the race of the litigant in the case.

Figure 1: Supreme Court Cases Involving Black Litigants

Conduct ≠ Search or Seizure	Cases	Race of Defendant
Decision to Follow/Approach	United States v. Mendenhall (1980)	Black
Decision to Question Generally	United States v. Mendenhall (1980)	Black
Decision to Question on a Bus	Florida v. Bostick (1991) United States v. Drayton (2002)	Black Black
Decision to not Inform of right to not Cooperate	United States v. Drayton (2002)	Black
Decision to Verify Welfare Eligibility (via Home Inspection)	Wyman v. James (1971)	Black
Decision to Chase	California v. Hodari (1973)	Black

One might say, borrowing from Toni Morrison, that Figure 1 tells a story about Supreme Court decision-making “on the backs of blacks.”¹¹¹ The point being that, in deciding whether police conduct triggers the Fourth Amendment, the Court regularly adjudicates cases that involve and impact African-Americans without expressly engaging how members of that community perceive and experience the police.¹¹² The question then becomes whether the rest of Fourth Amendment law looks any better. The short answer, distressingly, is no, as my book, again using mostly hypotheticals, *The 4th: From Stopping Black People to Killing Black People*, will discuss in greater detail.

RECOMMENDATIONS

I have two hopes for the chapter. One is that, whatever your views about policing, you will leave the chapter feeling like you have had a “teachable moment” about the range of investigation tactics police officers can employ without triggering the Fourth Amendment. My second hope is that you will employ the chapter as a tool to educate others in the conduct of the work you do, whether that work takes the form of “street law” sessions, public forums,

111. Toni Morrison, *On the Backs of Blacks*, TIME, Dec. 2, 1993, at 57.

112. This is another moment to remind the reader that I am not suggesting that blacks are the only racial group who are impacted by the Court’s seizure analysis. Note, for example, that the case establishing the idea that law enforcement may question a person about their immigration status without implicating the Fourth Amendment involved Latina/o litigants.

know-your-rights campaigns, legislative decision-making, media education projects, community organizing, op-eds, classroom teaching, or conversations with friends and family.

There are four more specific recommendations that flow from the Fourth Amendment problems this chapter describes:

1. **Messaging to police officers.** Over the past few years, there has been quite a bit of discussion about whether police officers should be trained on implicit bias and de-escalation techniques. The consensus is they should. This chapter suggests that police officers should be “trained” in another sense: We should encourage them *not* to employ the power the Fourth Amendment effectively gives police officers to force interactions with people with little or no basis. Much of our engagement with law enforcement assumes that the police conduct that we find troubling is inconsistent with the United States Constitution. As this chapter makes clear, that assumption is flawed. “Bad” policing and constitutional policing are not the same thing. Thus, our collective message to police officers should be: Just because the Constitution allows you to do X, doesn’t mean you should.
2. **Police administrative procedures and protocols.** Consistent with the above, police departments should be clear in their training materials and regulatory and administrative guidelines about where their internal governance protocols are more stringent than Fourth Amendment law.
3. **State law.** State law decision-makers—including judges and legislatures—should take seriously that Fourth Amendment law sets the floor with respect to the scope of our privacy and security from governmental intrusions. That is to say, state law can provide more protections than Fourth Amendment law affords.
4. **Community organizing and social protest.** Although the foregoing suggestions are decidedly modest, likely they will not occur without political organizing and social protest. In other words, a “bottom up” approach to social change is required. To appreciate what a relatively narrow but important version of this strategy might look like, think about the LGBTQ movement for marriage equality. Proponents for marriage equality pushed cities, state courts, and state legislatures to legitimize same-sex marriage well before the Supreme Court did the same. There was nothing particularly radical about this strategy; it just didn’t overly rely on the Supreme Court or even litigation.

Advocates against police violence should, at a minimum, adopt a similar “bottom up” strategy. This chapter can help them do precisely that. Specifically, community organizers, political activists, policymakers and litigators can employ the race and Fourth Amendment story this chapter tells to generate on-the-ground political activity directed at moving the important levers of change I highlighted above: (1) police department rules and regulations, (2) municipal laws and ordinances, (3) state legislation, and (4) state supreme court decision-making.

Police Use of Force

L. Song Richardson*

Racial disparities in police uses of force persist. Two competing explanations are often given for these disparities. One is that these disparities are justified because police are simply responding to objectively threatening conduct. The other is that these disparities are the result of police racism. While both accounts are accurate some of the time, this chapter illuminates how “racial anxiety” can also enable racial disparities in police uses of force even in the absence of racial animus and even when people of color are acting identically to their white counterparts. The term racial anxiety references how concerns about police racism can influence the behaviors and perceptions of officers and people of color in ways that increase the potential for violence. Consideration of racial anxiety highlights the necessity of transforming policing in order to build community-police trust. Policymakers can aid in this endeavor by supporting programs, initiatives and legislation that will facilitate this transformation.

INTRODUCTION

This chapter addresses police uses of force. Given the breadth of the topic, it will focus only on uses of force against people of color since the past few years have once again brought national attention to this issue.¹ While the lack of uniform policies for data collection makes it impossible to know the

* Interim Dean and Professor of Law, University of California, Irvine School of Law. I wish to thank Erik Luna for inviting me to participate in this important project. Additionally, I appreciate the insightful comments and suggestions from Susan Bandes, Paul Butler, Devon Carbado, Barry Friedman, Brandon Garrett, Rachel Harmon, Richard McAdams, Stephen Smith, and Frank Zimring. I am grateful to Zackory Burns and Megan Brownlee for research assistance. Much of Part I of this Chapter comes directly from Rachel Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235 (2017).

1. For a description of recent cases involving people of color, see L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2015); and Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53 (2016).

full extent of the problem,² there is significant evidence that people of color bear the brunt of police uses of force.³ Data reported to the FBI indicate that officers killed Black individuals almost twice a week between 2005 and 2012.⁴ Another investigation found that “among fifty-four egregious incidents of police shootings between 2005 and 2015 that resulted in charges being brought against the officers (due to the victims being unarmed and fleeing, for instance), all but two of the victims were black.”⁵ Racial disparities in police use of force are not limited to deadly force, but also include, among other things, being

2. Kevin Johnson, Meghan Hoyer & Brad Heath, *Local Police Involved in 400 Killings Per Year*, USA TODAY (Aug. 15, 2014), <http://www.usatoday.com/story/news/nation/2014/08/14/police-killings-data/14060357/>. Only 750 of the approximately 18,000 law enforcement agencies in the United States participate. *Id.* This is the only national database that collects data on police uses of deadly force.

3. See, e.g., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015) [hereinafter FERGUSON REPORT] (noting that nearly 90% of uses of excessive force are against African-Americans); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 15 (2017), <https://www.justice.gov/opa/file/925846/download> (noting that officers use “almost ten times more often against blacks than against whites”); see also CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 12 (2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2229> (noting that “Blacks were more likely than whites or Hispanics to experience use or threat of force in 2008”). The Washington Post and the Guardian have collected use of force data that demonstrate racial disparities. *Fatal Force*, WASH. POST (2016), <http://wapo.st/police-shootings-2016> (last visited Jan. 29, 2017); *The Counted*, THE GUARDIAN (2016), <https://www.theguardian.com/us-news/series/counted-us-police-killings> (last visited Mar. 19, 2017).

4. Johnson, Hoyer & Heath, *supra* note 2.

5. Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOW. L.J. 5, 24 (2015) (internal citation omitted). Racially disparate uses of force are not a new phenomenon. Many of the major urban upheavals of the 1960s, which resulted in President Johnson establishing the National Advisory Commission on Civil Disorders, known as the Kerner Commission, were sparked by the fatal shootings of Black individuals. See also James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 162, 167–68 (discussing incidents); Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, 13 PERSP. ON POLICING 11 (1990).

pushed, punched, choked, threatened by objects such as a baton or flashlight, and restrained by dogs.⁶

Various explanations are given for these racially disparate uses of force, including that the police acted justifiably in response to objectively threatening conduct or that these uses of force are the result of police racism.⁷ Certainly, attributing force to the racial animus of officers or the threatening behaviors of victims simplifies the problem—either the individual officer or civilian is at fault. However, in recent years, the recognition that implicit (i.e. unconscious) racial biases can cause racially disparate effects even in the absence of conscious bias is becoming increasingly commonplace in mainstream discussions of police force.⁸ Implicit racial biases linking Blacks with criminality can lead even consciously egalitarian officers to incorrectly identify Blacks as criminal suspects⁹ and to interpret their ambiguous behaviors with more suspicion than the identical actions of Whites.¹⁰ Thus, consciously negative racial attitudes are not a necessary ingredient for racial disparities in police uses of force. Instead, as a result of implicit racial bias, Blacks face a greater risk of being the victims of police force even if Black and White individuals are acting identically.

6. See FERGUSON REPORT, *supra* note 3, at 30; see also *Shumate v. Cleveland*, 483 F. App'x 112, 114 (6th Cir. 2012) (affirming denial of summary judgment on an excessive-force claim against an officer who punched a handcuffed arrestee in response to being spit on, when the officer could have protected himself from further spitting by putting the arrestee in the back of a patrol car and closing the door); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999). Force has been defined as “any physical strike or instrumental contact with a person; any intentional attempted physical strike or instrumental contact that does not take effect; or any significant physical contact that restricts the movement of a person. The term includes the discharge of firearms; the use of chemical spray, choke holds or hard hands; the taking of a subject to the ground; or the deployment of a canine. The term does not include escorting or handcuffing a person, with no or minimal resistance.” Consent Judgment: Conditions of Confinement at 1-2, *United States v. City of Detroit*, No. 03-72258 (E.D. Mich., July 18, 2003), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/detroitpd_holdingcell_613.pdf; see also INT'L ASS'N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 116 (2006) [hereinafter IACP, PROTECTING CIVIL RIGHTS] (citing definition with approval).

7. Isabel Wilkerson, *Mike Brown's Shooting and Jim Crow Lynchings Have Too Much in Common. It's Time for American to Own Up*, THE GUARDIAN (Aug. 24, 2014), <http://www.theguardian.com/commentisfree/2014/aug/25/mike-brown-shooting-jim-crow-lynchings-in-common>.

8. See Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014), <http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice>.

9. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

10. For an extended discussion, see L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2045 (2011).

While implicit racial biases have received significant attention and increased our understanding of how problematic racialized consequences can occur in the absence of racial animus, this chapter focuses on another phenomenon that can also enable racial disparities in police uses of force, namely “racial anxiety.” The term racial anxiety references how concerns about police racism, defined here as conscious racial animus toward people of color, can influence both officers and individuals in ways that increase the potential for unnecessary violence. Unnecessary violence occurs when force does not need to be used, even if the law might view its use as reasonable.¹¹ Stated another way, violence is unnecessary if it would not have been used against a similarly situated White individual.

Focusing on racial anxiety highlights the importance of building trust between officers and communities in order to address troubling racial disparities in uses of force. Thus, while the chapter begins with a discussion of how racial anxiety can influence discrete police-civilian interactions, the primary objective is to highlight how these individual interactions are influenced by the broader context, including the historically fraught relationship between police and communities of color, criminal justice policies, and police department incentives. Each of these things facilitates negative interactions and exacerbates community-police tensions. Addressing these larger issues is essential to reducing unnecessary uses of force against people of color.

I. RACIAL ANXIETY

Racial anxiety arises out of concerns about police racism.¹² The effects of racial anxiety on both police and the public create interactions fraught with misunderstandings and mistaken judgments, increasing the risk that force will be used. Because racial anxiety is more likely to influence interactions between officers and Black civilians, racial disparities in uses of force are predictable.

A. RACIAL ANXIETY: THE CONSTRUCT

The focus of this section is on interactions between Black and White individuals since racism against Blacks is considered prototypical and has been studied almost exclusively in the social psychological literature relied upon in

11. See *Scott v. Harris*, 550 U.S. 372 (2007); *Graham v. Connor*, 490 U.S. 386 (1989); see, e.g., Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119 (2008) (arguing that the law of justifications can help create a cohesive and improved use of force doctrine, including a discussion of necessity); see also Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016).

12. For an extended discussion of racial anxiety, see Rachel Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. (forthcoming 2017).

this chapter.¹³ In general, both Whites and Blacks experience anxiety during interracial interactions. Whites are concerned that they will behave in ways that will be evaluated as racist by Black interaction partners¹⁴ while Blacks are concerned that they will be treated in a racially discriminatory manner.¹⁵ Thus, both Whites and Blacks feel apprehensive when anticipating and engaging in interracial interactions.¹⁶

Racial anxiety has predictable cognitive and physiological effects.¹⁷ Individuals who are worried about negative racial evaluations and treatment feel self-conscious and nervous before and during cross-race interactions.¹⁸ The result is heightened vigilance during the interaction,¹⁹ with both parties

13. Mary L. Inman & Robert S. Baron, *Influence of Prototypes on Perceptions of Prejudice*, 70 J. PERSONALITY & SOC. PSYCHOL. 727 (1996); Sam Sommers & Michael I. Norton, *Lay Theories about White Racists: What Constitutes Racism (and What Doesn't)*, 9 GROUP PROCESSES & INTERPERSONAL REL. 117, 119 (2006).

14. Jennifer A. Richeson & J. Nicole Shelton, *Stereotype Threat in Interracial Interactions* [hereinafter *Interracial Interactions*], in STEREOTYPE THREAT: THEORY PROCESS, AND APPLICATION 231, 236, 237 (Michael Inzlicht & Toni Schmader eds., 2012); Sophie Trawalter, Jennifer A. Richeson & J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERSONALITY & SOC. PSYCHOL. REV. 243, 249 (2009).

15. Rodolfo Mendoza-Denton et al., *Sensitivity to Status-Based Rejection: Implications for African American Students' College Experience*, 83 J. PERSONALITY & SOC. PSYCHOL. 896 (2002); Jennifer N. Shelton, *Interpersonal Concerns in Social Encounters between Majority and Minority Group Members*, 6 GROUP PROCESSES & INTERGROUP RELATIONS 171 (2003); J. Nicole Shelton & Jennifer N. Richeson, *Interracial Interactions: A Relational Approach*, 38 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 121 (2006).

16. Sophie Trawalter et al., *Concerns about Appearing Prejudiced Get Under the Skin: Stress Responses to Interracial Contact in the Moment and Across Time*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 282 (2012).

17. Richeson & Shelton, *Interracial Interactions*, *supra* note 14, at 236.

18. Derek R. Avery et al., *It Doesn't Have to be Uncomfortable: The Role of Behavioral Scripts in Interracial Interactions*, 94 J. APPLIED PSYCHOL. 1382, 1383 (2009); *see also* E. Ashby Plant & David Butz, *Perceiving Outgroup Members as Unresponsive: Implications for Approach-Related Emotions, Intentions, and Behavior*, 91 J. PERSONALITY & SOC. PSYCHOL. 1066 (2006) (Whites' concerns with being perceived leads to anxiety when anticipating interracial interactions and a desire to avoid these interactions); J. Nicole Shelton, Tessa V. West & Thomas Trail, *Concerns with Appearing Prejudiced: Implications for Anxiety During Interracial Interactions*, 13 GROUP PROCESSES & INTERGROUP REL. 329, 340 (2010) (finding that the more Whites are concerned with appearing racist, the more anxiety they experience during an interaction); Sophie Trawalter et al., *Concerns about Appearing Prejudiced*, *supra* note 16, at 282; Jacquie D. Vorauer, Kelley J. Main & Gordon B. O'Connell, *How Do Individuals Expect to Be Viewed by Members of Low Status Groups? Content and Implications of Meta-Stereotypes*, 75 J. PERSONALITY & SOC. PSYCHOL. 917 (1998) (finding that Whites' concerns over racism lead them to enjoy interracial interactions less).

19. Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 316 (2007).

becoming acutely attuned to and aware of their own behaviors²⁰ and any threat-relevant cues²¹ exhibited by their interaction partner in an attempt to determine whether they are confirming negative stereotypes or being judged on the basis of those stereotypes.²² This constant monitoring results in cognitive depletion,²³ increasing the risk of mistaken judgments since mental exhaustion makes people more likely to rely on unconscious stereotypes.²⁴

Individuals can become so self-conscious during these cross-race interactions that behaviors that would normally occur automatically and unconsciously are affected, leading people to be “more rigid and less warm and friendly than [they] would be in a nonthreatening context.”²⁵ Additionally, racial anxiety can produce a variety of physiological responses such as sweating, increased heart rate, facial twitches, fidgeting,²⁶ and avoiding eye contact,²⁷ all of which can also result in individuals appearing unfriendly and uncomfortable. Unsurprisingly, these nonverbal behaviors can foster awkward and unpleasant interracial interactions.²⁸ In the context of policing, the consequences of racial anxiety can be deadly.

20. Jennifer N. Shelton, *Interpersonal Concerns in Social Encounters between Majority and Minority Group Members*, 6 GROUP PROCESSES & INTERGROUP REL. 171 (2003).

21. Richeson & Shelton, *Interracial Interactions*, *supra* note 14, at 233.

22. Mary C. Murphy & Valeria Jones Taylor, *The Role of Situational Cues in Signaling and Maintaining Stereotype Threat*, in STEREOTYPE THREAT, *supra* note 14, at 18–19, 24; Richeson & Shelton, *Interracial Interactions*, *supra* note 14, at 232, 233, 234 (“vigilance and preoccupation with cues pertaining to the potential for negative evaluation”).

23. Murphy & Taylor, *supra* note 22, at 34; Jennifer A. Richeson & J. Nicole Shelton, *When Prejudice Does Not Pay: Effects of Interracial Contact on Executive Function*, 14 PSYCHOL. SCI. 287 (2003) (noting that after an interracial interaction, both black and white subjects performed worse on a cognitive challenging task and that fMRI confirms that stereotype threat in interracial interactions utilizes cognitive executive functions); Toni Schmader & Sian Beilock, *An Integration of Processes that Underlie Stereotype Threat*, in STEREOTYPE THREAT, *supra* note 14, at 37.

24. David M. Amodio, *Intergroup Anxiety Effects on the Control of Racial Stereotypes: A Psychoneuroendocrine Analysis*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 60 (2009).

25. Richeson & Shelton, *Interracial Interactions*, *supra* note 14, at 237–38.

26. Shelton, *supra* note 20, at 179; *see also* Trawalter et al., *Predicting Behavior*, *supra* note 14, at 244.

27. Jennifer L. Eberhardt, *Imaging Race*, 60 AM. PSYCHOL. 181, 183 (2005); Trawalter et al., *Concerns about Appearing Prejudiced*, *supra* note 16, at 290–91; Trawalter et al., *Predicting Behavior*, *supra* note 14, at 245.

28. Eberhardt, *supra* note 27, at 183; *see generally* Trawalter et al., *Concerns about Appearing Prejudiced*, *supra* note 16.

B. RACIAL ANXIETY IN POLICE-PUBLIC INTERACTIONS

Similar to its influence on interactions between White and Black individuals, racial anxiety can also affect police interactions with Black civilians. This is because police officers, regardless of race, are likely to worry about being perceived as racist. These anxieties arise, in part, from the history of police racism and racialized policing practices in the United States, beginning with the genesis of the police in the South from slave patrols,²⁹ continuing with police participation in anti-civil rights protests in the mid-1960s,³⁰ and enduring with current controversies, including the high-profile nature of police shootings of unarmed Black men and women. There is also evidence of the persistent existence of conscious police racism.³¹ This history helps explain why officers worry about being perceived as racist, why Black individuals are appreciably more likely than Whites to view the police as illegitimate, and why it is unsurprising that many Blacks view the police as racially prejudiced,³² aggressive, untrustworthy, and dangerous.³³

29. See generally SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2003).

30. David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1241 (2006) (noting that police activism during the late 1960s often took the form of "rabid, knee-jerk opposition to civilian oversight, active participation in far right-wing organizations, vigilante attacks on black activists, [and] organized brutality against political protesters").

31. See generally Williams & Murphy, *supra* note 5. The recent, high profile deaths of Black individuals at the hands of the police as well as reports from Department of Justice investigations reveal the racialized culture of many contemporary police departments. See, e.g., S.F. BLUE RIBBON PANEL, *REPORT OF THE BLUE RIBBON PANEL ON TRANSPARENCY, ACCOUNTABILITY, AND FAIRNESS IN LAW ENFORCEMENT* 8, 9, 143–44 (2016), <http://sfblueribbonpanel.com/> (noting that members of the police department had exchanged racist text messages); see also Craig B. Futterman, Chaclyn Hunt & Jamie Kalven, *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125.

32. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND THE COURTS* (2002); SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* (2007).

33. TYLER & HUO, *supra* note 32; WALKER, SPOHN & DELONE, *supra* note 32; Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 261 (2010) (noting that "research concerning citizens' attitudes toward police has consistently found that black adults and adolescents report more dissatisfaction and distrust than their counterparts from other racial groups"); Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class and Personal Experience*, 40 CRIMINOLOGY 435, 436 (2002); Jennifer L. Woolard, Samantha Harvell & Sandra Graham, *Anticipatory Injustice among Adolescents: Age and Racial/Ethnic Differences in Perceived Unfairness of the Justice System*, 26 BEHAV. SCI. & L. 207 (2008).

From the perspective of officers, racial anxiety refers to the concern that they will be perceived to be racist by the civilians they encounter.³⁴ This concern can affect both Black and White officers,³⁵ influencing their perceptions and judgments as well as their feelings of safety during an interaction. Racial anxiety is more likely to occur during interactions with Black individuals because the concerns animating it will be more salient.

Officers who worry that Black individuals will evaluate them as racist also likely believe that these individuals do not respect their legitimacy. Research reveals that when officers worry that civilians question their legitimacy, they become anxious and concerned for their safety.³⁶ Because of the potential safety threat, officers will become hyper-alert for clues that the Black person with whom they are interacting is evaluating them negatively, adversely influencing the officer's interpretation of the individual's ambiguous behaviors. Furthermore, this increased vigilance is likely to lead to mental exhaustion because even without the additional cognitive load of racial anxiety, officers already use significant executive resources to monitor their environment for potential threats.³⁷ Finally, the experience of racial anxiety is likely heightened when officers are engaged in highly discretionary policing practices such as stop-and-frisks because they know that Black individuals often believe that these practices are carried out in a racially biased fashion.³⁸

34. PHILLIP ATIBA GOFF ET AL., PROTECTING EQUITY: THE CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY ON THE SAN JOSE POLICE DEPARTMENT 1 (2012). Officers from the San Jose Police Department agreed with statements such as "I worry that others may stereotype me as prejudiced because I am a police officer," *id.* at 3–5; and "I worry that, because I know the racial stereotype about police officers and prejudice, my anxiety about confirming that stereotype will negatively influence my interactions." *Id.* at 17; *see also* Illinois v. Wardlow, 528 U.S. 119, 133 n.9 (2000).

35. *See* Gene Demby, *Does Having More Black Officers Reduce Police Violence?*, NPR (Feb. 4, 2017), <http://www.npr.org/sections/codeswitch/2017/02/04/513218656/does-having-more-black-officers-reduce-police-violence>; *see also* Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008). *But see* Gau & Brunson, *supra* note 33, at 270 ("[M]ost respondents did not mention the race of the police officers at all and, when asked, said they believed that officers' race is not a factor in the way they treat citizens. One exception to this trend was black study participants who reported that African American officers were more likely to show concern for their well-being.").

36. Phillip Atiba Goff et al., *Illegitimacy Is Dangerous: How Authorities Experience and React to Illegitimacy*, 4 PSYCHOL. 340 (2013).

37. Geoffrey P. Alpert, Roger G. Dunham & John M. MacDonald, *Interactive Police-Citizen Encounters that Result in Force*, 7 POLICE Q. 475, 476 (2004).

38. For discussions of police detentions, *see* Jeffrey Fagan, "Race and the New Policing," in the present Volume; and Henry F. Fradella & Michael D. White, "Stop-and-Frisk," in the present Volume.

From the Black civilians' perspective, racial anxiety is experienced as the fear of being victimized by police racism. While interactions with the police can be anxiety-provoking for any civilian, the concern about being the target of racism heightens feelings of anxiety and threat.³⁹ These feelings can influence their behaviors and judgments as well as the attributions they make about an officer's conduct during an interaction, creating expectations of discriminatory treatment, including the use of lethal force.⁴⁰ As a result, Black individuals often approach police interactions with heightened suspicion and anxiety, making them more likely to interpret the officer's tone of voice and behaviors as hostile and threatening, thereby confirming their concerns that the officer is a racist who poses a threat to their safety.⁴¹ These concerns will disproportionately influence Black individuals because White individuals will rarely experience fears of being victimized by police racism.

During interactions between officers and Black individuals, their mutual anxieties increase the risk that force will be used unnecessarily. If the civilian displays some of the nonverbal behaviors associated with anxiety such as fidgeting and lack of eye contact, officers may interpret these behaviors as indicative of dangerousness, thereby confirming their concern that the individual poses a threat. Indeed, police are trained to view these behaviors as suspicious and potentially dangerous.⁴² Additionally, officers might also exhibit identical nonverbal behaviors, which will likely confirm the civilian's worry that the officer poses a threat to their well-being.

39. Shelton, *Interpersonal Concerns*, *supra* note 15; Trawalter et al., *Predicting Behavior*, *supra* note 14, at 254 (noting that “[i]nterracial interactions often trigger anxiety, fear, and sometimes even anger for Whites and racial minorities”); *id.* at 249 (“[R]acial minorities ... who are concerned about being the target of prejudice ... are also likely to appraise interracial contact as a threat”).

40. TYLER & HUO, *supra* note 32.

41. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590 (1976); Charles Lord, Lee Ross & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

42. Previous research on police interrogations suggests that aggressive police behavior and/or behavior that assumes the guilt of an individual is likely to produce behavior that appears more suspicious. Carole Hill, Amina Memon & Peter McGeorge, *The Role of Confirmation Bias in Suspect Interviews: A Systematic Evaluation*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 357 (2008); Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187 (2003); Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006).

Complicating matters is that officers are trained to respond to potentially dangerous situations by enacting command presence, which requires them to establish dominance and to take immediate control of a situation.⁴³ The theory is that by doing so, a possibly dangerous individual is more likely to yield to the officer's authority.⁴⁴ However, racial anxiety may cause officers to enact command presence when it is unnecessary because the civilian does not actually pose a threat. The officer's actions will likely distress the civilian, who already fears that the officer will use force against him or her.⁴⁵

Furthermore, research demonstrates that an officer's behavior can influence the way individuals behave.⁴⁶ Psychologists refer to this as the self-fulfilling prophecy or behavioral confirmation effect. Thus, when officers exhibit signs of racial anxiety or when they enact command presence, civilians may mirror their behaviors. However, since officers are likely unaware of the role that their behaviors played in generating the individual's behaviors, officers may interpret the person's actions as confirmation that the individual poses a threat.

Even Black citizens' attempts to exercise their rights might be taken as a sign of danger by officers under the stress of racial anxiety. Under normal circumstances, officers often interpret civilian questioning of their behaviors as a sign of danger. For instance, merely asking officers about the reasons for a stop, sometimes known as "contempt of cop,"⁴⁷ often leads to uses of force. There are a number of reasons for this. First, officers are trained to believe that their safety is dependent upon them maintaining physical and psychological control of a situation.⁴⁸ Thus, when a civilian questions their actions, officers often interpret this as a challenge to their authority constituting an immediate threat to their safety. This is highly problematic since contesting the police is

43. Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674 (2009); see also Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2015).

44. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support to Policing*, 37 LAW & SOC'Y REV. 513, 520 (2003).

45. This technique might also backfire and create resistance where none would have occurred otherwise. Gau & Brunson, *supra* note 33, at 255–79; Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 369 (2001).

46. Gau & Brunson, *supra* note 33, at 269–70.

47. REGINA G. LAWRENCE, *THE POLITICS OF FORCE* 48 (2000); CHRISTY E. LOPEZ, *DISORDERLY (MIS)CONDUCT: THE PROBLEM WITH "CONTEMPT OF COP" ARRESTS* (June 2010).

48. Alpert, Dunham & MacDonald, *supra* note 37; see also Cooper, *supra* note 43.

sometimes the only way to protect one's constitutional rights.⁴⁹ As Eric Miller observes, "much of the Court's Fourth Amendment doctrine ... *requires* civilians to resist the police if they are to assert their rights."⁵⁰ Yet, contesting the police even in ways required by legal doctrine can lead to violence. While all of these issues can arise during the course of any police-citizen interaction, the likelihood of violence is exacerbated when officers are already experiencing heightened concern because of racial anxiety.

Racial anxiety might also lead individuals to flee from police out of fear that an officer's racism will lead to force.⁵¹ However, officers often find this behavior suspicious and typically give chase, even when they do not have any reason, besides flight, to believe that the individual is engaged in criminal behavior. Problematically, evidence reveals that officers engaged in foot pursuits are more likely to use force against Black individuals once these individuals are caught.⁵²

Thus far, the discussion in this chapter focuses on officers who are neither consciously racist nor attempting to goad civilians into reactions that justify uses of force. It is certainly true that there are officers who purposely bully individuals to provoke them into fleeing or resisting. Furthermore, the intentional use of command presence can incite reactions from civilians that officers can use to justify force.⁵³ While the existence of bad apples on both sides of an interaction is important to acknowledge, the point of this chapter is that as a result of racial anxiety, Black individuals face heightened risks of being the victims of police force, regardless of whether they actually pose a threat and even when officers are consciously egalitarian. In fact, recent evidence in social psychology suggests that

49. Eric J. Miller, *Encountering Resistance: Non-Compliance, Non-Cooperation and Procedural Justice*, 2016 U. CHI. LEGAL F. 295.

50. Eric J. Miller, *Rendering the Community, and the Constitution, Incomprehensible Through Police Training*, JOTWELL (Nov. 10, 2016), <http://crim.jotwell.com/rendering-the-community-and-the-constitution-incomprehensible-through-police-training/> (reviewing Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOWARD L.J. 5 (2015)).

51. See generally Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

52. Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014), <http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice>; see generally Marcus, *supra* note 5.

53. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 15 (2017), <https://www.justice.gov/opa/file/925846/download>; Cooper, *supra* note 43; Futterman, Hunt & Kalven, *supra* note 31, at 133–34 (describing the practice).

racial anxiety on the part of the police is a better predictor of violence against Black men than either conscious or unconscious racial bias. The next section discusses some implications of racial anxiety for policymakers.

II. IMPLICATIONS: TRANSFORMING POLICING

The primary point of this chapter is to introduce policymakers to the phenomenon of racial anxiety and to explain how it contributes to troubling racial disparities in police uses of force. This section will highlight a few implications of racial anxiety for policing policy. It is neither meant to be comprehensive nor to replace the many important proposals that have been made to address police uses of force in general.⁵⁴ However, unless interventions also contend specifically with racial anxiety, racial disparities in police uses of force will continue, even as officers improve their ability to limit uses of force more generally. Then, these disparities will influence perceptions of police racism, creating a feedback loop that sustains racialized violence.

Consideration of racial anxiety reveals that reducing unwarranted racial disparities in uses of force will require more than simply ridding departments of consciously bigoted officers and exhorting people of color to avoid criminal behavior since racial anxiety influences behaviors and judgments even when officers are consciously egalitarian and civilians do not pose a threat. The most important way to reduce racial anxiety is to increase police-community trust and understanding. Improved police-community relationships will alleviate officer concerns that they will be judged to be racist and community concerns that they will be victimized by officer racism. The question is how can policymakers nurture police-community trust and understanding.

Community policing is often touted as a mechanism for promoting better relationships between communities of color and the police. In its ideal formulation, it shifts the focus of law enforcement from attempting to reduce crime by making arrests as a first impulse to working with members of communities to increase safety while building legitimacy and trust.

54. For a description of some of the state and local reforms, see Associated Press, *Police Protests, Ferguson Spurred 40 New State Measures; Activists Want More*, WCPO CINCINNATI (Aug. 2, 2015), <http://www.wcpo.com/news/crime/police-protests-ferguson-spurred-40-new-state-measures-activists-want-more>. See also Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53, 102 (2016); *Analysis*, POLICE USE FORCE PROJECT, <http://useofforceproject.org/#analysis> (last visited Mar. 19, 2017); *Limit Use of Force*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/force>; POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 15–16, 72–73, 118 (Mar. 2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf>.

The problem is that the concept of community policing has become so vague as to be almost meaningless. Most police departments represent that they are engaged in community policing.⁵⁵ However, some use the philosophy to justify the highly discretionary, investigatory and aggressive policing tactics that helped foster community distrust and suspicion of the police in the first place.⁵⁶ These tactics include conducting stop-and-frisks, obtaining personal information from individuals in order to complete field-investigation cards, and bringing drug dogs to traffic stops, to name a few. These practices are borne disproportionately by people of color, contribute to beliefs about police racism, and foster negative police-community interactions.⁵⁷

Policymakers, including legislators, foundations, and others interested in police reform, can help facilitate improved police-community relationships by providing financial and other support to programs and initiatives that transform how policing is conducted. However, care is required when evaluating so-called community policing programs in order to ensure that they will actually promote better police-community relationships. Otherwise, simply putting police officers in closer contact with community members can increase negative contacts, surveillance, and control, thereby fostering distrust and racial anxiety.⁵⁸

A. EXAMPLES OF TRANSFORMATIVE POLICING

It is important to be careful and precise when evaluating policing innovations that will increase police and community interactions. Thus, this section gives examples of departments that successfully transformed relationships between the police and communities by building mutual trust and understanding while simultaneously increasing community safety. The first example describes a unit within a large, urban police department, while the second and third examples involve transforming the entire department.

55. Wesley G. Skogan, *The Promise of Community Policing*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 27, 27 (David Weisburd & Anthony A. Braga eds., 2006).

56. See, e.g., Gary Corder, *Community Policing*, in THE OXFORD HANDBOOK OF POLICE AND POLICING 148, 151 (Michael D. Reisig & Robert J. Kane eds., 2014); see also DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 40–42 (Aug. 10, 2016), <https://www.justice.gov/opa/file/883366/download>.

57. For discussions of such practices and their implications, see Fagan, *supra* note 38; Fradella & White, *supra* note 38; Devon W. Carbado, “Race and the Fourth Amendment,” in the present Volume; and David A. Harris, “Racial Profiling,” in the present Volume.

58. James Hawdon et al., *Policing Tactics and Perceptions of Police Legitimacy*, 6 POLICE Q. 469, 471 (2003).

1. Los Angeles Police Department: The community safety partnership

One example of transformative policing is the Los Angeles Police Department's Community Safety Partnership unit (CSP). The CSP was created in 2011 in conjunction with the Los Angeles Housing Authority. The unit, consisting of 45 officers, operates in some of the most dangerous housing communities.⁵⁹ Its mission is "to foster relationships with the residents ... to start and support community and youth programs, address quality of life issues and develop programs to address and reduce violent crimes."⁶⁰

Unlike the ubiquitous practice of rewarding officers based on the numbers of arrests made, field-investigation cards completed, or summonses written, officers in this unit are "mandated ... to take a problem-solving approach to community safety concerns rather than a suppression-only (e.g. arrests) approach."⁶¹ Incentives are designed "to reward officer behaviors that traditional metrics of enforcement practice do not capture (e.g. diversion of youth offenders, ensuring safe passage for students traveling to school, partnering with community stakeholders to solve safety issues)."⁶² The focus is on increasing safety and security through relationship-building rather than through traditional strategies associated with zero-tolerance and broken-windows policing, strategies that have significantly damaged police-community relationships in indigent communities of color.⁶³

The CSP has been highly successful. Officers in the unit have earned the trust of many community members by providing social services to residents as well as by participating in neighborhood activities.⁶⁴ Their accomplishments include creating an alternative youth program in lieu of arrest and providing referrals to drug and mental-health programs.⁶⁵ Because officers are deployed to neighborhoods for five-year terms,⁶⁶ community members and police officers

59. CONSTANCE RICE & SUSAN K. LEE, RELATIONSHIP-BASED POLICING: ACHIEVING SAFETY IN WATTS, A REPORT FOR THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 4 (2015), <http://advancementprojectca.org/wp/wp-content/uploads/2015/09/imce/President's%20Task%20Force%20CSP%20Policy%20Brief%20FINAL%2002-27-15.pdf>; see also Charlie Beck & Connie Rice, *How Community Policing Can Work*, N.Y. TIMES (Aug. 12, 2016), http://www.nytimes.com/2016/08/12/opinion/how-community-policing-can-work.html?emc=eta1&_r=0.

60. LAPD's *Community Safety Partnership Program NR15021SF*, L.A. POLICE DEP'T (Jan. 22, 2015), http://www.lapdonline.org/newsroom/news_view/57887 [hereinafter *LAPD Partnership Program*]; see also Beck & Rice, *supra* note 59.

61. Beck & Rice, *supra* note 59.

62. *Id.*

63. See generally Fagan, *supra* note 38.

64. *LAPD Partnership Program*, *supra* note 59.

65. *Id.*

66. RICE & LEE, *supra* note 59, at 5.

have the time to develop relationships of trust and understanding. Residents learn that these officers are “committed to the overall health and well-being of the community, not just the reduction of crime statistics through suppression-only police tactics.”⁶⁷ For instance, residents in the Watts housing development report that they “feel safer and know and trust police officers who have become a part of the community’s day-to-day landscape.”⁶⁸

This type of relationship-building reduces the racial anxiety that facilitates racial violence. It has also made the neighborhoods safer. There has been an over 50% reduction in violent crime, decreases in gang membership and activity, and vast reductions in homicide rates in some housing developments.⁶⁹ For instance, Jordan Downs, “one of the most violent housing development[s] and the home of the notorious Grape Street Crips has gone three years without a single homicide.”⁷⁰ CSP is only one example of the possibilities of transforming relationships between the police and community members while also increasing safety and reducing recidivism. As discussed next, another similar transformation was accomplished by the Richmond, California, police department under the leadership of Chief Chris Magnus.⁷¹

2. Richmond, California, Police Department

Richmond is a city with a population of approximately 110,000 people, who are predominantly Black and Latino.⁷² The city has the reputation of being one of the most violent in the nation, and community members have historically had bad relationships with the police.⁷³ After joining the department in 2005, Chief Magnus eliminated the “street teams” unit that engaged in aggressive proactive policing practices and, instead, made long-term assignments of officers to neighborhoods where they were asked to walk the streets and engage with community members in positive ways rather than simply stopping and searching people.⁷⁴ This long-term engagement allowed officers and individuals to become familiar with each other and to build positive relationships.

67. *Id.* at 6–7.

68. *Id.*

69. *Community Safety Partnership: Collaboration for Safer Neighborhoods*, URBAN PEACE INSTITUTE, <http://www.urbanpeaceinstitute.org/new-page-1/> (last visited Mar. 19, 2017).

70. RICE & LEE, *supra* note 59, at 5.

71. Futterman, Hunt & Kalven, *supra* note 31, at 203–06.

72. *Id.* at 204.

73. *Id.*

74. *Id.* at 204–05.

The chief also changed the incentives of the department to encourage problem-solving instead of arrests.⁷⁵ Officers were evaluated and rewarded based on whether they engaged with community members and built relationships, such as by speaking to students, visiting churches, attending community meetings, and meeting people at local businesses.⁷⁶ They were also rewarded when they were able to resolve situations without an arrest.⁷⁷ Additionally, when arrests were made, the department “prioritized those that flow from solving violent crime, which tend to require more investigative police work and relationship-building than simply rounding up a bunch of teenagers on low-level drug offenses.”⁷⁸ By the time Chief Magnus left the department in 2015, complaints against the police were lower than they had ever been and officers had not killed anyone in more than eight years.⁷⁹ Furthermore, “[c]ommunity trust in police had dramatically increased [and] Richmond police had never been more effective. Both violent and property crime were at historic lows. And there were fewer unsolved murders.”⁸⁰

3. Stockton, California, Police Department

Stockton is a community of approximately 300,000 people.⁸¹ Hispanics or Latinos make up approximately 40% of the population, followed by Whites (23%), Asians (21.5%) and Blacks (12%).⁸² The Stockton Police Department is one of six departments participating in the U.S. Department of Justice’s National Initiative for Building Community Trust and Justice.⁸³ Police Chief Eric Jones, who took over the department in 2012, recognizes that efforts to build trust and understanding with the community, in conjunction with reducing crime,

75. *Id.* at 205.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 206.

80. *Id.*

81. STOCKTON POLICE DEP’T, STOCKTON POLICE DEP’T STRATEGIC PLAN 2017–2019, at 10 (2017), http://stocktongov.com/files/SPD_Strategic_Plan_2017-2019.pdf [hereinafter STOCKTON STRATEGIC PLAN].

82. *Id.*

83. Information available at *Stockton Police Chief: Listening to our Community in a New Way*, NAT’L INITIATIVE FOR BUILDING COMMUNITY TRUST & JUST., <https://trustandjustice.org> (last visited Mar. 19, 2017).

requires organizational change, something he refers to as Principled Policing.⁸⁴ His mission is “organizational transformation” rather than simply engaging in a new policing strategy.⁸⁵

While training is an important component, he believes it is insufficient. Rather, in addition to training, his department is incorporating principles of procedural justice and fair and impartial policing into its “crime fighting tactics and strategies,” its “policies and procedures,” and its “performance management and crime analysis functions.”⁸⁶ Furthermore, officers are evaluated on their application of procedural justice principles when engaging with community members. Showing “exceptional progress” in community-building efforts is a prerequisite to obtaining promotions and special assignments.⁸⁷ The department also honors those who have engaged in positive community interactions and actions that build trust and bring pride to the badge.⁸⁸

The department is also committed to reconciliation with the community, which involves engaging in conversations with community members in order “to address historical tensions, grievances, and misconceptions with the ultimate goal of resetting relationships.”⁸⁹ In a project called “Courageous Conversations,” local schools, churches, and community centers are used to facilitate “candid dialogue” on “issues such as racial prejudice and police community relations.”⁹⁰ Additionally, the department does not shy away from “acknowledging and coming to terms with the historical perspectives minority groups and immigrant communities have on policing.”⁹¹ Rather, in addition to holding community meetings, Chief Jones personally takes part in “listening tours” in which he sits in people’s homes, offices, or wherever it is convenient for members of the city’s most vulnerable community members to meet. He listens as they recount their perceptions of racially biased policing as well as other concerns.⁹² Afterwards, he finds ways to address their concerns in department policy.⁹³

84. Eric Jones, *Principled Policing*, CAL. POLICE CHIEF 40 (Spring 2016), <https://uploads.trustandjustice.org/misc/ChiefJonesPrincipledArticle.pdf>.

85. STOCKTON STRATEGIC PLAN, *supra* note 81, at 10.

86. Jones, *supra* note 84, at 40–41.

87. STOCKTON STRATEGIC PLAN, *supra* note 81, at 9.

88. Conversation between the author and Chief Jones on March 8, 2017. *See also* STOCKTON STRATEGIC PLAN, *supra* note 81, at 9.

89. STOCKTON STRATEGIC PLAN, *supra* note 81, at 9.

90. *Id.*

91. Jones, *supra* note 84, at 40.

92. Eric Jones & Kurt Wilson, *Listening in a New Way*, RECORDNET (Mar. 4, 2017), <http://www.recordnet.com/opinion/20170304/listening-in-new-way>.

93. *Id.*

Finally, the department also has a Strategic Community Officer program, which assigns officers to communities that are experiencing high levels of crime.⁹⁴ These officers embed themselves in the community and develop relationships in order to help solve community problems.⁹⁵ All of these actions have transformed relationships between the community and the department, as well as reduced crime.⁹⁶

RECOMMENDATIONS

Nurturing police-community trust and understanding through relationship-building can help reduce unnecessary uses of force caused by racial anxiety. The three programs discussed in the previous section helped transform relationships between the police and community members while also increasing safety, reducing recidivism, and decreasing uses of force. Next, I identify some of the elements that made these programs successful to help policymakers make decisions about what types of programs, legislation, and initiatives to support through funding and other means.

1. **Long-term engagement.** Racial anxiety is more likely to exist when officers and community members are strangers to each other since this increases the risk that they will treat each other on the basis of stereotypes. Hence, policymakers should support programs that promote long-term engagement of the same officers in neighborhoods. Doing so will give both community members and officers time to become familiar with each other and to develop mutual trust. As this occurs, officers will be less likely to fear that they will be incorrectly perceived as racist, and community members will be less worried about being the victims of police racism.
2. **Incentives.** Another critical component of transformative policing is aligning officer incentives with the goals of increasing trust and positive engagements with the community. If departments continue to reward officers based upon the number of stop-and-frisks conducted, arrests made,

94. STOCKTON STRATEGIC PLAN, *supra* note 81, at 10.

95. *Id.*

96. Jones & Wilson, *supra* note 92.

field-investigation cards completed,⁹⁷ and other practices that increase negative contacts, then officers will continue to engage in them, and it will be difficult to build trust with neighborhood residents. These are the very practices that helped reduce police legitimacy in these neighborhoods in the first place. Even if officers attend to procedural justice concerns during these interactions by treating individuals respectfully, explaining the reasons for their actions, and listening to what civilians have to say,⁹⁸ there is evidence that people of color interpret interactions based on highly discretionary proactive policing practices as illegitimate, regardless of how the police treat them.⁹⁹ Thus, building trust involves more than attending to procedural justice concerns during an individual interaction.

Changing the metrics for evaluating officer performance to encourage officers to behave in ways that support building trust and understanding can also promote changes in police culture by elevating the importance of empathy and connections to community that are historically lacking in traditional policing.¹⁰⁰ If officers are rewarded for these skills, then individuals not interested in engaging in this type of policing will no longer be attracted to the field. In sum, creating evaluative mechanisms to support policing practices that value creativity and innovation over aggression and domination will disrupt stereotypes of police racism and reduce the cycle of aggression that leads to racially disparate and unnecessary uses of force.

97. Officer success continues to be measured largely by the number of arrests made and how quickly officers respond to calls for service. George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, in COMMUNITY POLICING: CLASSICAL READINGS 105–06 (Willard M. Oliver ed., 2000); GRAHAM A. RAYMAN, THE NYPD TAPES: A SHOCKING STORY OF COPS, COVER-UPS, AND COURAGE 43 (2013) (noting that in 2005, the NYPD patrol union challenged “the department’s obsession with numbers” in a case involving an officer employed by the 75th precinct who received a negative evaluation allegedly based on his failure to meet the unofficial quota); Adeshina Emmanuel, *How Union Contracts Shield Police Departments from DOJ Reforms*, IN THESE TIMES (June 21, 2016), <http://inthesetimes.com/features/police-killings-union-contracts.html> (noting that the N.J. police department union opposed orders from management to meet quotas that pressured officers “to conduct baseless stops and strained relations with community members”).

98. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361 (2001).

99. CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014).

100. Susan L. Miller & Emily Bonistall, *Gender and Policing: Critical Issues and Analysis*, in ROUTLEDGE HANDBOOK OF CRITICAL CRIMINOLOGY 319 (Walter S. DeKeseredy & Molly Dragiewicz eds., 2012).

In addition to supporting the use of metrics that reinforce behaviors associated with transformative policing, policymakers should also support efforts to develop these metrics and to test their efficacy. For instance, policymakers could fund collaborations between researchers and police departments to create new evaluation methods to determine whether they work to encourage positive community engagement.

3. **Acknowledging the history of racialized policing.** Building trust between the police and communities of color will require educating officers about the racialized history of policing. Officers may be unaware of this history or not understand its continued relevance within communities. Hence, this history can help officers understand why community members resent, distrust and fear them, and why civilians might flee from police even when they are not engaged in criminal activity. As Chief Jones of the Stockton Police Department recognizes, “There was a time where police were ... dispatched to keep lynchings civil. The badge we wear still does carry the burden, and we need to at least understand why those issues are still deep-rooted in a lot of our communities.”¹⁰¹

This programming should include particular emphasis on local incidents of racialized policing. For instance, CSP officers learn about “the history of LAPD relationships with L.A.’s communities of color and the historic enmity rooted in decades of LAPD practices that were overtly racist and oppressive. In short, the lesson is about ‘why does the community hate LAPD?’”¹⁰² This education is important because when officers lack awareness of how their own department’s actions have contributed to current perceptions of the police, community members will find it difficult to trust and respect them.

There are a number of ways policymakers can support this type of educational endeavor. First, they could fund groups with the expertise to conduct this training for officers. For instance, the Advancement Project, a multi-racial civil-rights organization, provided training to CSP officers.

101. Tina Rosenberg, *A Strategy to Build Police-Citizen Trust*, N.Y. TIMES (July 26, 2016), <http://mobile.nytimes.com/2016/07/26/opinion/a-strategy-to-build-police-citizen-trust.html?smid=tw-nytopinion&smtyp=cur&referer=https://t.co/Ah93GElvSS>.

102. RICE & LEE, *supra* note 59, at 6–7.

Second, policymakers could fund projects such as the Invisible Institute's Youth-Police Project.¹⁰³ The goal of the project is "building conversations with black teens about how their lives are affected by the character of the police presence in their neighborhoods."¹⁰⁴ The Project, located in the South Side of Chicago, videos high-school students as they express how aggressive over-policing negatively influences their feelings and beliefs not only about the police but also about their own place in society.¹⁰⁵ Creation of more local projects along these lines can help foster police empathy and understanding about how their actions affect community members. Finally, policymakers could support forums during which community members meet with officers in a structured environment to share their experiences of negative police contacts and its effects on their views of the police.

Third, departments can involve community members in some of their trainings. The Stockton Police Department routinely does this. Through this contact, Stockton police officers and civilians have developed a greater understanding of and familiarity with each other.

4. **Accountability.** It will not be possible to build police-community trust without some mechanism for discovering and removing problematic officers from the community. This is important because it takes only one officer to ruin community trust in the police, especially when residents continue to see the same problematic officers patrolling neighborhoods with impunity. Much has already been written about the importance of police accountability and transparency, so I will focus on the code of silence and the need for whistleblower protection. As one scholar writes, "the code of silence is not simply a phenomenon of silence... An officer's failure to adhere to the code can jeopardize her career, safety, and even her family."¹⁰⁶ When officers observe other officers act inappropriately, they should be encouraged and protected when they report it. Currently, however, officers who break the code are often not protected.¹⁰⁷ Policymakers should craft legislation to protect police whistleblowers.

103. Futterman, Hunt & Kalven, *supra* note 31; see also *Youth/Police Project*, INVISIBLE INSTITUTE, <https://invisible.institute/ypp/> (last visited Mar. 19, 2017) [hereinafter *Youth/Police Project*].

104. *Youth/Police Project*, *supra* note 103.

105. See Futterman, Hunt & Kalven, *supra* note 31; *Youth/Police Project*, *supra* note 103 (providing sample video clips).

106. Futterman, Hunt & Kalven, *supra* note 31, at 184.

107. Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 582–84 (2001); Futterman, Hunt & Kalven, *supra* note 31, at 184–86.

5. **Training.** Another hallmark of transformative policing is training officers in the skills they will need to build relationships with community members. Just as officers receive mandatory weapons training, they should also receive training on the skills necessary to facilitate positive interactions.¹⁰⁸ The training must be mandatory. Otherwise, it will send the message that these interpersonal skills are not as important as tactical skills. Developing and honing their ability to engage with people under stressful circumstances without resorting to command presence and aggression as a first response can help prevent situations from unnecessarily escalating, thereby reducing danger to both civilians and officers.
6. **Understanding racial anxiety.** Although building police-public trust is important, officers may be reluctant to interact with members of the community in new ways, especially when, because of racial anxiety, they anticipate negative and uncomfortable interactions. However, there is evidence that it is possible to reduce racial anxiety by teaching people about it, acknowledging its potential to negatively influence interactions, and informing people that choosing to engage in these interactions, even when the thought of doing so is anxiety-provoking, can help reduce racial anxiety in future interactions.¹⁰⁹ Thus, if officers understand that feeling anxious when interacting with members of the community is normal and that choosing to engage with one individual will help to decrease their anxiety in future interactions, they might be more open and willing to interact.

Teaching officers about how racial anxiety can influence their own behaviors and those of civilians can help them understand that fidgeting, lack of eye contact, and fleeing from officers may not necessarily indicate that the civilian is engaged in criminal behavior. Rather, the civilian may be mirroring the officer's nonverbal behaviors, or reacting to their own anxiety that the officer will treat them inappropriately. With this

108. RICE & LEE, *supra* note 59, at 6-7 (noting that the CSP program provided training on conflict resolution and communication skills, among other things).

109. Jennifer R. Schultz et al., *Reframing Anxiety to Encourage Interracial Interactions*, 4 *TRANSLATIONAL ISSUES IN PSYCHOL. SCI.* 392, 394 (2015). The instruction they provided stated: "Sometimes people feel anxious about interacting with a person from another race. To reduce this anxiety, they might choose to avoid situations in which a cross-race interaction is likely because avoiding that situation reduces your anxiety. However, research suggests that choosing to put yourself in situations in which you interact with a person from another race actually helps to reduce future feelings of anxiety." *Id.*

knowledge, officers may understand the wisdom of engaging in more careful and deliberate decision-making by taking more time to gather additional facts instead of acting quickly on their gut instincts.

Consideration of racial anxiety provides support for the Police Executive Research Forum's (PERF) recommendations that in order to reduce unnecessary uses of force, officers should "slow[] situations down; using distance and cover to officers' advantage."¹¹⁰ This is a departure from the training officers have received for decades which encouraged them to "immediately take control of every situation, to never back up or tactically reposition, and to resolve every matter as quickly as possible."¹¹¹ While PERF acknowledges that quick action will be required in certain situations, such as those involving an active shooter, they also recognize that in many instances, communication, tactical repositioning, and other de-escalation techniques can avoid the need to use force in the first place.¹¹²

7. **Scripts.** Research reveals that scripts, which are specific and detailed guidelines about what to say and do during interactions, can reduce racial anxiety.¹¹³ This explicit guidance about what constitutes unprejudiced behavior can help reduce officer concerns about being perceived as racist.¹¹⁴ These scripts can include how to begin a conversation, respond to a community member's anger, and answer questions without resorting to dominating force as a first response. Thus, providing officers with scripts and having them role-play how to interact with community members in a variety of circumstances will increase their competence, confidence, and resources to cope with their racial anxiety during interactions with civilians.¹¹⁵

110. POLICE EXEC. RESEARCH FORUM, *supra* note 54, at 29

111. *Id.* at 5, 21-22.

112. *Id.*

113. Trawalter et al., *Predicting Behavior*, *supra* note 14; Avery et al., *supra* note 18, at 1389.

114. Trawalter et al., *Predicting Behavior*, *supra* note 14, at 250.

115. For more information, see William A. Geller & Hans Toch, *Understanding and Controlling Police Abuse of Force*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 311 (William A. Geller & Hans Toch eds., 1996). See also POLICE EXEC. RESEARCH FORUM, *supra* note 54, at 23-24 (noting that the San Diego police department provides training on emotional intelligence in recognition of the fact that "competent police officers must possess and demonstrate exceptional interpersonal skills").

CONCLUSION

Consideration of racial anxiety highlights the necessity of transforming policing to build community-police trust. Without this, concerns about police racism will influence both officers and civilians, resulting in racial disparities in uses of force even when officers are consciously egalitarian and civilians are not engaged in criminal behaviors. Policymakers can aid in this endeavor by supporting programs, initiatives and legislation that will facilitate this transformation.

Policing, Databases, and Surveillance

*Christopher Slobogin**

Databases are full of personal information that law enforcement might find useful. Government access to these databases can be divided into five categories: suspect-driven; profile-driven; event-driven; program-driven and volunteer-driven. This chapter recommends that, in addition to any restrictions imposed by the Fourth Amendment (which currently are minimal), each type of access should be subject to its own regulatory regime. Suspect-driven access should depend on justification proportionate to the intrusion. Profile-driven access should likewise abide by a proportionality principle but should also be subject to transparency, vetting, and universality restrictions. Event-driven access should be cabined by the time and place of the event. Program-driven access should be authorized by legislation and by regulations publicly arrived-at and evenly applied. Information maintained by institutional fiduciaries should not be volunteered unless necessary to forestall an ongoing or imminent serious wrong.

INTRODUCTION

It is now a commonplace that virtually everything we do is memorialized on databases, some of them maintained by government, some of them in the hands of private enterprises. These databases—which for ease of reference this chapter will refer to as *The Cloud*—reside in the servers of Google, Netflix and Apple; the memory banks of phones, closed-circuit cameras, “smart cars,” and satellites; and the computers in government agencies and commercial establishments. They track an astonishing range of our intimate daily activities, including Internet usage, communications connections, financial transactions, travel routes, tax information, medical treatment, and biometric information, as well as more prosaic matters such as employment and residence history, utility usage, and car malfunctions. The question addressed here is when the government should be able to gain access to this wealth of personal information for law enforcement and national-security purposes.

* Milton Underwood Professor of Law, Vanderbilt University. A version of this paper was published in the National Constitution Center’s White Paper Series, as *Policing and the Cloud*, available at constitutioncenter.org.

In the United States, answering that question requires consulting a welter of statutes and a few Supreme Court decisions. For instance, when the government wants to access communications stored on a computer, federal and state laws usually require a warrant, issued by a judge who has found probable cause that the communication will lead to evidence of wrongdoing.¹ However, if officials want to access an opened message that is sitting on a server, or an unopened text that has been on a server for over 180 days, then they may only need to show that it is “relevant” to an investigation—a much lower standard than probable cause, albeit an assertion that at some point is challengeable by the target, as occurs with an ordinary subpoena.² And if the communication sits on a “private” server (belonging, say, to an employer), no court process is required.³

When law enforcement officials seek records from third parties outside the communications context, a wide array of statutes may be applicable. As a general matter, bank, educational, and even medical records can be obtained with a mere subpoena, which the target often does not find out about unless and until prosecution occurs.⁴ In a host of other situations, such as accessing commercial camera footage or obtaining data about credit-card purchases or past travel routes, most jurisdictions do not require police to follow any judicial process, but rather allow them to obtain the information at their discretion and that of the data holders.⁵ When law enforcement seeks information from the databases of other government agencies, as opposed to those maintained by private entities, usually all it needs is a written request from the head of the enforcement agency, although sometimes more is required.⁶

In theory, the U.S. Constitution, and in particular, the Fourth Amendment, could have something to say about all of this. The Fourth Amendment requires that the government act reasonably when it engages in a “search” or “seizure,” and the courts have held that, for many types of searches, this reasonableness requirement can only be met with a warrant. However, this requirement only applies to government actions that are considered “searches.” The Supreme

1. See, e.g., 18 U.S.C. §§ 2511 & 2518.

2. 18 U.S.C. § 2703(a), (b)(1)(B). On February 9, 2017, the House of Representatives unanimously voted to repeal this provision and instead require a warrant; the Senate had yet to vote at the time of this writing.

3. 18 U.S.C. § 2711(2) (defining remote computing service).

4. For a summary, see CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 174–75 (2007).

5. See generally Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485 (2013).

6. See SLOBOGIN, *supra* note 4, at 173 (describing the Privacy Act).

Court has defined that word very narrowly, to encompass only those actions that infringe “reasonable expectations of privacy” or that involve some type of physical intrusion.⁷ Most relevant here are the Court’s decisions holding that expecting constitutional protection from government acquisition of information surrendered to third parties—whether they be Internet service providers, banks, or phone companies—is not reasonable, since we “assume the risk” that those third parties will decide to give that information to the government.⁸ As discussed below, this “third party” doctrine has seen some erosion in recent years, but it remains the reason that, other than when access to the content of communications is involved,⁹ the Fourth Amendment has had very little impact on the government’s ability to obtain information from private databases, even when it relies on technology to do so.

When instead the database is created by law enforcement, the Constitution may have more impact. In particular, collection of the information for the database may require justification. For instance, taking a DNA sample through a cheek swab is a Fourth Amendment search,¹⁰ and forcing an individual to produce self-incriminating documents can implicate the Fifth Amendment unless the government can identify relatively precisely the documents it wants.¹¹ However, any important regulatory need will overcome Fourth Amendment claims that these types of data acquisition are unreasonable; in such cases, probable cause is not necessary.¹² And if the information is “nontestimonial” (as is assumed to be the case with fingerprints and DNA¹³), or is “voluntarily” surrendered for non-criminal purposes (as is assumed to be the case with a tax return or applications for

7. *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (indicating that the expectation of privacy test established in earlier case law is supplemented by inquiry into whether the government “engage[s] in [a] physical intrusion of a constitutionally protected area”).

8. *See, e.g., United States v. Miller*, 425 U.S. 435, 443 (1976) (holding one has no expectation of privacy in bank records, “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed”); *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (same holding with respect to phone numbers dialed).

9. *See, e.g., United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (holding that the Fourth Amendment requires a warrant to obtain stored emails).

10. *See Maryland v. King*, 133 S. Ct. 1958, 1969–70 (2013).

11. *See United States v. Hubbell*, 530 U.S. 27, 45 (2000).

12. *See, e.g., King*, 133 S. Ct. at 1977 (holding that the government’s need for DNA from arrestees outweighs the intrusion involved).

13. *See, e.g., Wilson v. Collins*, 517 F.3d 421, 431 (6th Cir. 2008).

government entitlements¹⁴), or is obtained from a source other than individual, the Fifth Amendment doesn't apply. Finally, the Constitution appears to have little to say about law enforcement agencies' access to the information once they or other government entities legitimately collect it.¹⁵

While many have criticized the laxness of both statutory and constitutional law, the most popular counter-proposal—that all or most Cloud access by the government should require a judicial warrant—has problems of its own. Conceptually, a warrant requirement glosses over the intuition that a large number of situations, while involving a viable privacy claim against the government, do not merit the full protection of a judicial probable-cause finding. Practically, it would handcuff legitimate government efforts to nab terrorists and criminals. A more nuanced approach is probably necessary.

That approach should begin with an assessment of the varying motivations that drive the government's use of The Cloud. Cloud-based searches can come in at least five different guises: suspect-driven, profile-driven, event-driven, program-driven, or volunteer-driven. Some database access by the state is aimed at getting as much information as possible about individuals suspected of wrongdoing. Other efforts do not start with a particular suspect, but rather with a profile of a hypothetical suspect, purportedly depicting the characteristics of those who have committed or will commit a particular sort of crime. A third type of Cloud-search starts neither with a suspect nor a suspect profile but with an event—usually a crime—and tries to figure out, through location and related information, who might be involved. Fourth, so as to have the information needed for suspect-, profile-, and event-driven operations at the ready, government might initiate data-collection programs. Finally, the government also relies on citizens to come forward on their accord when they find incriminating information about another person in The Cloud.

14. See, e.g., *Garner v. United States*, 424 U.S. 648, 657–58 (1976) (holding that the federal penalty for failing to file a tax return does not coerce answers to individual questions on the return, which the taxpayer can answer by asserting the privilege with impunity); *Balt. Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549, 556 (1990) (stating that “the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State’s public purposes unrelated to the enforcement of its criminal laws”).

15. See Erin Murphy, *DNA in the Criminal Justice System: A Congressional Research Service Report*, 64 *UCLA L. REV. DISCOURSE* 340, 364 (2016) (noting that even with respect to accessing genetic databases that can contain extremely personal information, “[s]tandards surrounding the legality of both [on-demand and volunteered] disclosure have not yet been fully adjudicated in the courts”).

Each of these endeavors is distinct from the other four. Each calls for a different regulatory regime. Below is a sketch of what those regimes might look like. While they borrow from Fourth Amendment jurisprudence, the principles developed here fill a void because, to date, that jurisprudence has had little to say about Cloud searches. Until the courts weigh in more definitively, policymakers are working pretty much on a clean slate in this area.

I. SUSPECT-DRIVEN CLOUD ACCESS—PROPORTIONALITY

Assume the police receive an anonymous phone call from a female claiming that John Slade, a fifth-grade public-school teacher, is also a drug dealer. In investigating this claim, police might want to obtain Slade's phone records to see if he has called known drug dealers, gang members, or drug users. They might also seek access to his bank records to discover whether the amount of money he deposits is consistent with his job as a school teacher. Additionally, the police might like to find out from GPS records and drone and camera feeds if Slade frequents areas of town where drugs are routinely sold.

Under current Fourth Amendment and statutory law, none of these policing moves requires a warrant or probable cause and, depending on the jurisdiction, some of them may not even require a subpoena. That lack of regulation is abetted by the Supreme Court's assertion that expecting privacy in information surrendered to a third party or in activities carried out in public is unreasonable.¹⁶ Yet most people surveyed on these matters come to a quite different conclusion, ranking perusal of their bank and phone records, for instance, as comparable to search of a bedroom, and ranking location tracking as similar in invasiveness to a frisk.¹⁷ On a more philosophical plane, scholars argue that allowing the government to invade databases so easily offends not

16. See *Jardines*, 569 U.S. at 5-6; *United States v. Knotts*, 460 U.S. 276, 281 (1983) (no expectation of privacy in public).

17. See SLOBOGIN, *supra* note 4, at 112 tbl. (compare items 14 and 16), 184 tbl. (compare items 24 and 25). This research has been replicated in Christine S. Scott-Hayward, Henry F. Fradella & Ryan G. Fischer, *Does Privacy Require Secrecy?: Societal Expectations of Privacy in the Digital Age*, 43 AM. J. CRIM. L. 19 (2015); and Jeremy E. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing "Lay" Expectations of Privacy*, 11 U. PA. J. CONST. L. 331, 345 (2009).

only privacy, but autonomy and dignity.¹⁸ They also claim it chills citizens' rights to expression and association, and creates huge potential for abuse; after all, knowledge—which The Cloud provides in troves—is power.¹⁹

The Supreme Court itself has begun to recognize these concerns. In *Riley v. California*,²⁰ despite centuries-old precedent permitting suspicionless searches of any item found on an arrested individual, it required a warrant for a search of a cell phone of an arrestee, in recognition of the fact that “the cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record.”²¹ In *United States v. Jones*,²² five members of the Court concluded that a Fourth Amendment search occurs when the police engage in “prolonged” tracking of a vehicle using GPS signals. While neither *Riley* nor *Jones* involved database access, Justice Sotomayor may have summed up where the Court is going when she stated in her concurring opinion in *Jones* that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”²³

On this view, government would not be foreclosed from perusing, at its discretion, blogs, tweets, public records, and other sources that are clearly meant to be consumed by the public. But it would prohibit police from accessing, in the absence of justification, non-public Cloud data people generate when they engage in “mundane tasks” like communicating with their friends, banking, and shopping. It would also prohibit suspicionless access to tracking data about everyday travels that the average person undertakes on the assumption of practical anonymity.

18. See, e.g., David Lametti, *The Cloud: Boundless Digital Potential or Enclosure 3.0?*, 17 VA. J.L. & TECH. 190, 196 (2012) (“[W]e may be witnessing another round of ‘enclosure’ in Cloud space that might have serious deleterious effects on what we have come to expect in the digital age: autonomy, exchange, spontaneity, and creativity, and all at a lightning pace.”).

19. See, e.g., Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1461 (2001) (“The problem with databases is ... a problem that involves power and the effects of our relationship with public and private bureaucracy—our inability to participate meaningfully in the collection and use of our personal information.”).

20. 134 S. Ct. 2473 (2014).

21. *Id.* at 2489.

22. 565 U.S. 400 (2012).

23. *Id.* at 417 (Sotomayor, J., concurring).

In short, there is a strong case to be made for requiring the government to demonstrate it has good reason to go after Cloud-based information about a particular person that is not readily available in public fora. Then the question becomes how good that reason must be. Normally, the Fourth Amendment requires that a search be based on probable cause, which amounts to a “fair probability” that a search will discover evidence of crime.²⁴ Return to the investigation of Slade. If the caller had identified herself and provided detail about Slade’s drug deals, perhaps the police would have had probable cause and grounds for a full-scale digital search. But recall that, in fact, the caller was anonymous and simply said Slade was selling drugs, thus making it difficult to dismiss the possibility that she was a disgruntled student or a spurned lover. Under Supreme Court case law, that call, by itself, would not permit a traditional search.²⁵

But suppose instead that the call, although anonymous, provides detail about John’s next drug deal. While, by itself, this would not be enough for probable cause, its predictive quality does provide an additional indication of reliability.²⁶ In that intermediate situation, police arguably have “reasonable suspicion” (a lesser level of cause but one that nonetheless requires an articulable reason to act).²⁷ In that scenario, police might still be prohibited from requisitioning the capacious digital record described above. But perhaps they would be justified in seeking more limited transactional data, say information about whether, near the predicted time, Slade calls a particular number or heads toward a particular location.

This measured approach to accessing The Cloud is based on what might be called the proportionality principle.²⁸ Under traditional Fourth Amendment rules, an arrest requires probable cause, but a short detention only reasonable suspicion; similarly, a full search of the person requires probable cause, a frisk only reasonable suspicion.²⁹ Analogously, significant invasions of privacy on The Cloud—obtaining a month’s worth of bank records or Internet logs, or as the Supreme Court itself suggested in *Jones*, travel records that track a person

24. See WAYNE R. LAFAVE ET AL., 2 CRIMINAL PROCEDURE 114–15 (3d ed. 2007).

25. See *Florida v. J.L.*, 529 U.S. 266 (2000) (holding unconstitutional a frisk based on an anonymous phone call stating that the defendant would be standing on a street corner wearing certain clothing with a gun on his person).

26. Cf. *Illinois v. Gates*, 462 U.S. 213 (1983) (holding police had probable cause based on an anonymous letter that provided considerable predictive detail, but only after some of the detail was corroborated by police).

27. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

28. See SLOBOGIN, *supra* note 4, ch. 2.

29. See *Terry*, 392 U.S. at 20–27.

for four weeks³⁰—might require cause about the target akin to that necessary to search a home or car. However, less significant invasions—accessing records about a single phone call, credit-card purchase, or car trip, pulling up an identity using facial-recognition technology, or tracking a car for a few hours—could be justifiable on something less. Not only does this type of proportionality principle better reflect the degree of the government’s intrusion, it also avoids the Catch-22 of requiring police to demonstrate probable cause before carrying out the preliminary investigative techniques they need to develop it.

Proportionality reasoning makes sense in the abstract. But it presents difficult line-drawing problems. What justification do police need if, rather than seeking data about Slade’s financial transactions or travels over the course of a month, they want only a week’s worth of data? Or if they want to ascertain, in combination, whether Slade calls a particular number, visits a particular location, and deposits a large amount of money during a given month, but seek no other information about him?

Answers to these types of questions will inevitably produce somewhat arbitrary classifications. Sometimes the answer might be categorical. That was the angle the Supreme Court took with respect to searches of home interiors carried out with sophisticated technology; in *Kyllo v. United States*, the Court held that *all* such searches require probable cause.³¹ Government access to Cloud data that is analogous to the interior of the home—for instance, private documents stored on The Cloud, or communications on a closed social network—should receive similar categorical protection.³²

Once data leaves such confines, however, an across-the-board warrant requirement for accessing personal information overprotects the interests at stake, as both the Court’s cases and people’s views on the matter suggest.³³ One approach is to differentiate between types of information. Perhaps

30. *Jones*, 565 U.S. at 403.

31. 533 U.S. 27, 37–38 (2001) (involving thermal imaging of the home).

32. Some have argued that encrypted material should receive similar, or even *absolute*, protection, simply by virtue of being encrypted. But given the fact that anything, including impersonal business records, can be encrypted, proportionality reasoning would suggest that the government should be able to force decryption of any material for which it has the requisite cause. The encryption debate is too complicated to address in this limited space. See Hugh J. McCarthy, *Decoding the Decryption Debate: Why Legislating to Restrict Strong Encryption Will Not Resolve the “Going Dark” Problem*, 20 J. INTERNET L. 1 (2016) (detailing practical problems and domestic and international legal issues associated with different approaches designed to permit government decryption).

33. See Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 335 (2008) (presenting survey data indicating significantly different “intrusiveness ratings” depending on the type of record accessed).

medical records would receive the most protection, bank records something less, utility records something less still.³⁴ Current federal law appears to adopt this approach with respect to communications, with subscriber information receiving minimal protection, phone numbers and e-mail addresses receiving more protection, stored communications even more, and interception of communications requiring probable cause.³⁵ But the intuition upon which this scheme is based is suspect: For instance, a month's worth of "metadata" about a person's contacts may reveal much more than the transcript of a conversation.³⁶ Similar comments can be made about other types of data: Bank records, credit-card statements, and utility logs can all be more or less private depending on the person and the context.

In these circumstances, an alternative or supplemental proportionality approach might rely on durational or aggregational limitations. In *Jones*, five members of the Court distinguished between "short-term" and "prolonged" tracking.³⁷ Similarly, the Court has indicated that, while a physical seizure lasting less than 15 minutes usually requires reasonable suspicion, a longer seizure amounts to an arrest requiring probable cause,³⁸ and an arrest must be judicially reviewed within 48 hours.³⁹ One might limit Cloud searches of non-public data outside the home context the same way, on the theory that the more one learns about a person—from whatever source—the more intrusion occurs. For instance, obtaining information about the transactions of someone like Slade on a particular day or over a couple of days might be permitted on a relevance showing, but seeking data shadowing his activities over more than a 48-hour period or with respect to several different days might require greater suspicion and a subpoena from a judge, and obtaining a month's worth of transactions could require probable cause and a warrant. While this

34. For an effort in this vein, see AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS (3d ed. 2013), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/third_party_access.authcheckdam.pdf.

35. See *supra* notes 1–4 (citing relevant statutes).

36. See Steven M. Bellovin et al., *It's Too Complicated: How the Internet Opens* Katz, Smith, and *Electronic Surveillance Law*, 30 HARV. J. L. & TECH. 1, 92 (2016) (given technological developments, "[t]he concept of metadata as a category of information that is wholly distinguishable from communications content and thus deserving of lower privacy protection is no longer tenable").

37. *Jones*, 565 U.S. at 430–31 (Alito, J., concurring).

38. See generally *United States v. Sharpe*, 470 U.S. 675, 684–88 (1985).

39. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

duration-based rule also has administrability problems,⁴⁰ it has the benefit of simultaneously protecting privacy in a roughly proportionate manner and permitting government to build its case without requiring probable cause from the outset. Ultimately, policymakers applying proportionality reasoning to suspect-driven Cloud access might choose rules based on a combination of record-type and aggregation considerations.

Even if one finds this type of reasoning persuasive in the abstract, it might be resisted in the specific context of national-security investigations. Where national security is at stake, the argument goes, any significant limitation on Cloud usage should be jettisoned. But this stance should be viewed with skepticism. “National security” is an extremely broad term, and it has too often been a blank check for government abuse.⁴¹ Concrete threats to the country might justify departure from the rules that normally govern domestic law enforcement; for instance, if there is a demonstrable, significant, and imminent danger, relaxation of the justification required by proportionality reasoning might be permissible in this context. But otherwise the National Security Agency and like government entities should probably be treated no differently than other law enforcement agencies.

II. PROFILE-DRIVEN CLOUD ACCESS—HIT RATES

Profile-driven searches are very similar to suspect-driven searches. The difference is that suspect-driven searches start with a person thought to be engaged in wrongdoing and then go to The Cloud, while with profile-driven searches the government has no particular suspect when it seeks out Cloud data; rather it utilizes a profile describing the characteristics of likely perpetrators that it hopes will identify wrongdoers. Again using John Slade as an example, imagine that the police focus on him not because of an anonymous tip but because of a drug-dealer profile developed with the help of computer scientists and criminologists. Such a profile might be composed, let’s say, of five factors having to do with travel, spending, and communication patterns. Or, similar to how credit-card companies identify theft and fraud, the profile might purport to tell police when and where a drug deal is occurring or is soon likely to occur, which allows them to conduct surveillance of that spot and

40. Compare Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2011) (describing some of the problems); with Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 24–30 (2012) (providing a model statute implementing mosaic theory).

41. See generally Erik K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285 (2005).

perhaps nab a perpetrator. Analogous to how researchers have developed risk-assessment instruments for pretrial detention and sentencing purposes,⁴² these profiles would initially be based on analysis of drug-dealer characteristics and behavior, and then cross-validated on new populations or locations.

Profiling using data accumulated from Cloud-related sources, sometimes called “predictive policing,” is in its infancy. But police departments appear to be committed to developing the necessary tools.⁴³ Such profiles are only useful, of course, if the government has access to databases that have the information needed to run the profile. Whether it should have such access is discussed below (under program-driven Cloud searches). Assume for now the data is available to government officials.

As with suspect-driven Cloud searches, the analysis of profile-driven Cloud inquiries should involve determining whether the justification is proportional to the intrusion. In other words, the profile must produce a “hit rate” equivalent to the certainty required by the proportionality principle. If one equates probable cause with approximately a 50% hit rate, a profile that correctly identifies a drug dealer only 20% of the time should be avoided if it accesses multiple intimate data sources. But use of such a profile might be fine if it only relies on arrest records, gang member lists, and other public or quasi-public data.

Achieving even a 20% rate may be impossible for most crime scenarios, however; certainly social scientists engaged in the analogous pursuit of predicting dangerousness for sentencing purposes have struggled to achieve such accuracy. There are scores of variables associated with criminal behavior, and the prognostic power of any given variable or combination of variables is likely to be very low. Further, profiles will probably need to be updated routinely, either because of naturally occurring changes in criminal behavior or because perpetrators get wind of the factors in the profile. When one adds to those challenges the fact that much of the information about individuals found on The Cloud is unreliable,⁴⁴ profiles that might justify apprehending specific suspects will be few and far between, at least if police action based on such data abides by the proportionality principle.

42. See e.g., Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, 73 FED. PROBATION 33 (Sept. 2009).

43. See Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 352–88 (2015); Jeffrey Fagan, “Race and the New Policing,” in the present Volume.

44. See Ferguson, *supra* note 43, at 398–99.

Assuming that profiles with acceptable hit rates can nonetheless be developed, a second limitation on profile-driven Cloud use is that it should be transparent. To avoid profiles concocted after the fact, allow perusal of hit-rate data, and ensure that those individuals who are targeted using a profile actually meet it, profiles must be accessible to courts and other oversight entities, at least on an *in camera* basis (i.e., in chambers, outside the presence of the public). Transparency also assures that the factors on which profilers rely are vetted to ensure that illegitimate ones, such as those that are racially discriminatory, are not influencing the results.

This vetting process could become difficult if, as occurs in some commercial contexts, profiles rely on complex algorithms generated through opaque machine-learning techniques or protected from disclosure for proprietary reasons.⁴⁵ Complicating matters further, risk factors such as criminal history, location, and employment may turn out to be proxies for race, class, and related traits, use of which are generally considered anathema in police work.⁴⁶

These concerns do not have to be paralyzing, however. For instance, profiles that are indecipherable could be banned in the law enforcement context, regardless of their accuracy,⁴⁷ or can be designed to ensure “procedural regularity.”⁴⁸ Steps can also be taken to alleviate the concern that some risk factors correlate with race as well as crime. For instance, developers of algorithms designed to detect potential hot spots or perpetrators could be directed to avoid arrest records for low-level or drug crimes that might reflect race-based policing practices; instead, developers can be told to rely on *reports* of crimes (for hot-spot profiles) and on crimes of violence or on property crimes (for suspect profiles), so as to reduce the influence of racially-discriminatory arrest rates for drug crimes and similarly bias-susceptible offenses.⁴⁹ It is also

45. See Michael L. Rich, *Machine Learning, Automated Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871, 883–86 (2016).

46. See Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671 (2016). For discussions of race and policing, see David A. Harris, “Racial Profiling,” in the present Volume; and Devon W. Carbado, “Race and the Fourth Amendment,” in the present Volume.

47. See Andrew D. Selbst & Solon Barocas, *Regulating Inscrutable Systems* (2017) (unpublished manuscript) (on file with authors) (identifying increasingly difficult-to-interpret approaches to algorithms, beginning with “decision tree” logic and ending with “deep learning” artificial intelligence).

48. See Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633 (2017) (sketching how computer programs can be constructed to ensure fairness and procedural regularity despite the black box nature of machine learning).

49. Cf. Michael Feldman et al., *Certifying and Removing Disparate Impact*, PROCEEDINGS OF THE 21ST ACM SIGKDD INTERNATIONAL CONFERENCE ON KNOWLEDGE DISCOVERY AND DATA MINING 259 (2015) (discussing similar moves in connection with hiring algorithms).

important to remember that traditional policing often relies on the same suspect, static factors, in ways that are inevitably more intuitive, and therefore less discoverable and more subject to invidious manipulation. Transparent algorithms that can produce the relevant hit rates and that avoid obviously illegitimate variables are very likely to be an improvement.⁵⁰

To limit further the extent to which bias creeps into the process, however, a third limitation that should be imposed on profile-driven Cloud searches is the maxim that everyone who fits a given profile must be treated the same. That means if a drug-dealer profile with the relevant hit rate identifies 200 people, police should not be able simply to single out someone like Slade but rather would either have to investigate everyone who fits the profile or, if that is not feasible, select individuals on a neutral, pre-specified basis (e.g., every third person). In the absence of this limitation, attempts to avoid illegitimate discrimination in construction of the profile will merely reappear at the post-profile investigation stage.

The added advantage of this third limitation on profile-driven actions is that it would make law enforcement think twice before engaging in them. Profile-driven searches will produce a large number of false positives, no matter how good they are. If, for instance, the predicted hit rate is 50%, half of those investigated are likely to be innocent, whether the police go after everyone identified by the algorithm or only a neutrally selected subgroup. Even if the post-profile police work is covert, much investigative energy will be expended with no gain. And in those situations where the investigation of those who meet the profile involves overt searching or seizing, a non-trivial number of false positives are likely to complain. Although the quantified, objective nature of profile-driven Cloud searches offers many advantages over traditional suspect-based techniques, their dragnet nature may end up being so practically or politically unpalatable when used to identify “persons of interest” that police abandon them.

III. EVENT-DRIVEN CLOUD ACCESS—HASSLE RATES

Some Cloud searches conducted by law enforcement start not with a suspect or a profile of a likely suspect, but with an event—usually a crime—and use Cloud data to try to figure out who perpetrated or witnessed it. Let’s return

50. See, e.g., Sharad Goel et al., *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181 (2017) (using stop and frisk data from New York City to create a risk profile that predicted who would be carrying a weapon 20-30% of the time; also finding that factors like “furtive movement,” a common police justification for stops, was not related to weapon possession and that, of those stopped using the profile, whites were much more likely than blacks to have a weapon).

to the example of John Slade, but this time as a victim rather than a potential suspect. Imagine that at 2 a.m. one Sunday morning, police are called to the scene of a homicide, a dark urban street, where they find Slade dead, drugs strewn around him. A medical examiner says the death probably occurred two hours earlier, around midnight. Pre-Cloud, the police would probably go door to door talking to those who live in the immediate vicinity, some or all of whom might claim—honestly or not—to have been elsewhere at the relevant time or to have seen or heard nothing. In contrast, today police might access phone or vehicle GPS records, as well as feeds from surveillance cameras with face-recognition or night-vision capacity, to identify people or cars near the crime scene at the time it happened, and then use suspect-driven techniques to zero in on the perpetrator.⁵¹

These event-driven uses of The Cloud could result in a large haul of people, among whom may be the perpetrator or a witness, but many of whom will be neither. At the same time, all that this “data dump” learns about any of these individuals is that they were near a particular place at a particular time, a discovery that proportionality reasoning would suggest requires little justification. Even so, the scope of the government’s Cloud inquiry should probably be limited, to reduce both the extent of the initial privacy invasion and the number of people subject to further law enforcement inquiry. In other words, the government should minimize what Jane Bambauer calls the “hassle rate”—the proportion of innocent people subject to police investigation in an effort to find the one or two bad people.⁵²

What that rate should be will depend on the likely number of people involved. In effect, an admonition to limit hassle rates is simply a call to shape event-driven searches around the relevant time and place. In investigating Slade’s death, for instance, police should be able to find out the identity of and question pedestrians and car drivers near the scene of the crime shortly before or after midnight (assuming the medical examiner’s assessment is correct). But perhaps the police should not be able to investigate people who never approached the scene closer than 50 yards or who were there before 11:30 p.m. or after 12:30 a.m.

51. Baltimore has used videos from plane cameras to “TiVo” backward from the scene of the crime to determine how individuals and vehicles got there. See Monte Reel, *Secret Cameras Record Baltimore’s Every Move from Above*, BLOOMBERG BUSINESSWEEK (Aug. 23, 2016), <https://www.bloomberg.com/features/2016-baltimore-secret-surveillance/>.

52. Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461 (2015).

The Cloud facilitates immensely the ability of investigators to carry out event-driven inquiries. Such inquiries can be quite broad, limited only by the imagination and priorities of law enforcement (because they are not limited by current law, at least in most jurisdictions). In contrast to the hit rates required for profile-driven Cloud searches, acceptable hassle rates for event-driven Cloud searches are not easy to establish, and should probably vary with the type of information sought and the type of crime being investigated.⁵³ If the law is called into play here, perhaps the best that can be done is to require police to seek authorization for such inquiries from a judge, who can take potential hassle rates and these other factors into account in determining whether and to what extent event-driven Cloud searches may occur.

IV. PROGRAM-DRIVEN CLOUD ACCESS— DEMOCRATIC AUTHORIZATION

Suspect-driven, profile-driven, and event-driven Cloud searches all rely in varying degrees on access to multiple databases, ranging from those that keep track of communications and travels to those that house records of financial and social transactions. From law enforcement's perspective, keeping these databases within their separate silos is, at the least, inefficient and, in the case of profile-driven Cloud access, perhaps fatal, since profiles usually only work when they can access several databases at once. It was in recognition of this fact that the Defense Department proposed, post-9/11, the Total Information Awareness (TIA) program. According to a chart prepared by the Department of Defense, TIA was meant to gather in one place a huge array of transaction information concerning, according to the official description, "financial, educational, medical, veterinary[!], entry [i.e., immigration and customs], transportation, housing, ... and communications" activities, as well as all government records.⁵⁴ Once collected, these data would be combed using algorithms designed to detect terrorist activity. Congress, apparently not enamored of this idea, defunded TIA in 2003 (by voice vote).⁵⁵ But if Edward Snowden is to be believed, several programs in operation today, run by the

53. In an analogous situation, the Supreme Court held that the analysis should consider "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (upholding a roadblock at the time of day and the place of a hit-and-run accident committed one week earlier, set up to find possible witnesses).

54. See *Total Information Awareness*, WIKIPEDIA, https://en.wikipedia.org/wiki/Total_Information_Awareness (last updated July 14, 2017) (depicting a chart purporting to have been prepared by the Defense Advanced Research Projects Agency).

55. See 149 Cong. Rec. S1379-02, S1416 (daily ed. Jan. 23, 2003).

NSA or other government agencies, bear at least some resemblance to it.⁵⁶

As the public reaction to Snowden's revelations indicates, a significant proportion of the citizenry is uncomfortable with these types of programs. Compilation of information from multiple sources in one "place" raises a host of concerns. As recent exposés of foreign machinations highlight, aggregation of data facilitates hacking and identity theft.⁵⁷ It also leads to "mission creep," as law enforcement realizes that information obtained for one reason (such as fighting terrorism) might be useful for other purposes. It can easily lead to more obvious abuses, ranging from illegitimate investigations of journalists, politicians, activists, and members of certain ethnic groups to leaks based on personal vendettas.⁵⁸ Most prominently, it tempts the government to combine all of the information it has collected to create "personality mosaics" or "digital dossiers" about each of its citizens, a phenomenon classically associated with totalitarian states.⁵⁹

In part because of the public reaction to Snowden's disclosures, the NSA supposedly no longer collects metadata and must now seek it through subpoenas from the relevant common carriers, in the suspect- and profile-driven manner described earlier.⁶⁰ But the NSA and other federal agencies continue to aggregate other types of data.⁶¹ Localities and states also engage in the data-collection enterprise. For instance, New York City's Domain Awareness system, co-created by the city's police department and Microsoft, collates information gleaned from thousands of closed-circuit surveillance cameras (CCTV), and combines it with geospatial data that reveals crime "hot spots," feeds from license-recognition systems, and GPS signals that permit

56. See Glenn Greenwald, *XKeyscore: NSA Tool Collects "Nearly Everything a User Does on the Internet,"* THE GUARDIAN (July 31, 2013), <https://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>.

57. See, e.g., Nicole Perlroth & David Gelles, *Russian Hackers Amass over a Billion Internet Passwords,* N.Y. TIMES (Aug. 5, 2014), <https://www.nytimes.com/2014/08/06/technology/russian-gang-said-to-amass-more-than-a-billion-stolen-internet-credentials.html>.

58. For some examples involving activists, journalists, members of minority groups and so on, see Robert H. Sloan & Richard Warner, *The Self, the Stasi, and the NSA: Privacy, Knowledge, and Complicity in the Surveillance State,* 17 MINN. J.L. SCI. TECH. 347, 347–80 (2016).

59. Daniel Solove popularized the term "digital dossiers," which he described as the aggregation of data to create "a profile of an individual's finances, health, psychology, beliefs, politics, interests, and lifestyle" that "increasingly flows from the private sector to the government, particularly for law enforcement use." Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy,* 75 S. CAL. L. REV. 1083, 1084 (2004).

60. USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 101, 129 Stat. 268, 269-71 (2015).

61. Zack Whittaker, *Freedom Act Will Kill Only One of NSA's Programs (and Not Even One of Its Worst),* ZERO DAY (May 4, 2014), <http://www.zdnet.com/article/freedom-act-metadata-phone-records-prism/#!>.

real-time and historical tracking of cars.⁶² A number of other cities operate large-scale CCTV systems, and many are also moving toward 24/7 drone or plane surveillance.⁶³ A different type of program, known as a “fusion center,” exists in more than half the states. These centers—over 75 at last count, some with more than 200 personnel—“fuse” financial, rental, utility, vehicular, and communications data from federal, state, and local public databases, law enforcement files, and private company records for investigative purposes.⁶⁴

These program-driven efforts, which have been called “panvasive” because they invade the records of large swaths of the population, occur with the foreknowledge that most of those affected have done nothing wrong.⁶⁵ Thus, this collection of data cannot be regulated through suspicion-based proportionality reasoning. Arguably, however, it does not need to be. Until the data are accessed by humans and used as a means of investigating or identifying particular people like Slade, no concrete intrusion has occurred. Only when such access does occur will government officials need to demonstrate the cause necessary to carry out suspect-, profile-, or event-driven searches.

For those who do not trust government to abide by such strictures, one further protection, illustrated by Congress’ changes to the NSA’s metadata program, would be to require that all databases be maintained outside the government. Even profile-driven Cloud searches could be carried out by a private entity, with the government providing the profile and the company providing the government only with the identities of those who meet it. While this arrangement would still present some of the problems associated with aggregation (hacking and the like), it would undoubtedly reduce the potential for mischief by government officials.

62. See Colleen Long, *NYPD, Microsoft Create Crime-Fighting “Domain Awareness” Tech System*, HUFFINGTON POST (Feb. 25, 2013).

63. See Somini Sengupta, *Privacy Fears Grow as Cities Increase Surveillance*, N.Y. TIMES (Oct. 13, 2013); Marc J. Blitz et al., *Regulating Drones under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49 (2015).

64. See THE CONST. PROJECT, RECOMMENDATIONS FOR FUSION CENTERS: PRESERVING PRIVACY AND CIVIL LIBERTIES WHILE PROTECTING AGAINST CRIME AND TERRORISM 4 (2012), www.constitutionproject.org/pdf/fusioncenterreport.

65. See Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721 (2014).

In the end, however, this attempt to separate government from data cannot work. Many of the databases useful to Cloud searches—those that house CCTV feeds, the data from highway tracking systems, and the billions of personal records relevant to criminal history, taxes, entitlements, real-estate transactions, and scores of other matters—would not exist but for the government. The executive branch needs this information for all sorts of legitimate reasons, some related to crime prevention and many that are not. Government should not be prohibited from collecting and maintaining it.

Instead, regulation of program-driven Cloud searches must come from the political process.⁶⁶ Given Congress' docility toward executive-branch surveillance proposals after 9/11, that suggestion may seem naïve. But legislatures are capable of action in this area, as the defunding of TIA and the revamping of the NSA's metadata program illustrate.⁶⁷ Especially when, as is the case with many types of Cloud-based efforts, the program affects significant segments of the population—including members of the legislature and their most powerful constituents—some type of political oversight is not only possible but likely.

At the same time, it must be admitted that law enforcement and tough-on-crime lobbies are a forceful presence at both the federal and state levels and may be able to exert influence that the populace as a whole cannot. That is where the courts could come into play, in two ways. On rare occasions, courts might declare a particular data-collection scheme unconstitutional under the Fourth Amendment. However, given the Supreme Court's narrow definition of the word "search" for Fourth Amendment purposes and its high level of deference even to programs that it is willing to say involve searches (under what it calls its "special needs" jurisprudence⁶⁸), that outcome is not likely in the near future.

A second way courts might nudge legislatures and law enforcement agencies toward a balanced view—and one that would operate independently of the Fourth Amendment—is by applying the same "hard look" analysis they apply to programs created by other administrative agencies like the Environmental

66. *Id.* at 1745–58.

67. Other examples are state statutes that limit the use of drone surveillance and federal statutes limiting access to various types of records. See Michael L. Smith, *Regulating Law Enforcement's Use of Drones: The Need for State Legislation*, 52 HARV. J. LEGIS. 423, 427–32 (2015) (cataloguing state drone statutes); Murphy, *supra* note 5, at 546 (appendix detailing federal laws).

68. For a description of this jurisprudence, see Slobogin, *Panvasive Surveillance*, *supra* note 65, at 1727–33.

Protection Agency and the Food and Drug Administration.⁶⁹ While law enforcement departments have seldom been subject to the type of judicial monitoring to which other agencies routinely submit, that lack of oversight is likely a historical accident rather than a considered policy. The full argument for why courts are obligated to engage in such oversight will not be set out here.⁷⁰ For present purposes, it suffices to say that, where program-driven, panvasive operations are involved, a solid case can be made that the courts should treat police agencies the same way they treat other agencies that are engaged in creating rules governing the circumstances under which people may carry out innocent conduct.

That conclusion has several consequences. First, under accepted administrative law principles, no agency program that affects the rights and obligations of the citizenry may exist unless the agency can point to authorizing legislation that, ideally, sets out the harm to be prevented, the persons and activities likely to be affected, and the general means for preventing the harm. That would mean that before programs like New York City's Domain Awareness operation and the states' fusion centers can come into being, municipal, state, or federal legislatures would have to think through the types of information they can obtain and for what purpose. That requirement of legislative authorization, enforced by the courts, would ensure at least some democratic assessment of such programs and how they should operate.

The impact of administrative law principles would not end there, however. Standard practice dictates that, once authorized to set up a program, an agency must draft implementing rules, subject them to a notice-and-comment process (or something similar) that allows public input, and provide written rationales for the rules ultimately chosen—rules that are reviewable by a court to ensure they are consistent with the legislative delegation and that they are applied even-handedly, without irrational distinctions between groups or areas.⁷¹ This further injection of democratic input and judicial oversight would exert significantly more pressure on police departments to consider competing views when contemplating the creation of a data-collection scheme. Regulated

69. See, e.g., Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151, 154–59 (2006) (discussing the Administrative Procedure Act and associated case law establishing the hard look doctrine).

70. See Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016); see also Barry Friedman & Maria Ponomarenko, "Democratic Accountability and Policing," in the present Volume.

71. Slobogin, *Policing as Administration*, *supra* note 70, at 144–45.

through this type of public process, it is likely that TIA-like programs, fusion centers, and other panvasive practices would be significantly curtailed or implemented with more care.

The even-handedness requirement, designed to prevent biased data collection, is particularly important, so important that some have argued it should also be enforced through equal protection doctrine.⁷² It would call either for universal or random data collection (as suggested above in connection with profiles) or for proof that uneven information collection is justified statistically. For instance, this principle might demand that CCTV camera systems be established citywide or, alternatively, *everywhere* within the city that has similar reported crime rates. Metadata collection would be nationwide, random, or based on algorithms with high hit rates. And DNA database programs focused on arrestees, like the one authorized by the Supreme Court,⁷³ would be hard to justify without some proof that arrestees are significantly more likely to commit crimes than the general population.⁷⁴

One possible drawback to the political-process approach to program-driven Cloud searches is that its transparent nature will enable the bad guys to learn the ins-and-outs of the programs and how to avoid them. But this traditional law enforcement concern, which administrative procedure acts specifically recognize as legitimate,⁷⁵ is exaggerated in this setting. The primary aim of most panvasive actions is deterrence, which publicity can only enhance. Further, matters of specific implementation need not be revealed. For instance, if camera surveillance is meant to be covert, the fact and general area of such surveillance should be disclosed, but exact camera locations need not be. The types of records sought by fusion centers should be revealed, but the algorithms that might be used to analyze them could be viewed *in camera*. Ultimately, however, the primary response to the tip-off concern is that democratic accountability requires that the public be told not only what panvasive capacities police have but how those capacities will be used.

72. Barry Friedman & Cynthia B. Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 327–43 (2016).

73. *Maryland v. King*, 567 U.S. 1301 (2012).

74. Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. J. CRIM. L. 295, 308–09 (2013) (explaining the virtues of a universal DNA database).

75. *See, e.g.*, 5 U.S.C. § 552(b)(7)(E).

V. VOLUNTEER-DRIVEN CLOUD SEARCHES— FIDUCIARY OBLIGATIONS

All of the foregoing Cloud searches involve government-initiated investigations. The assumption throughout this paper has been that when the government decides to intrude, some justification is necessary. But what if a data-holder—a bank, a common carrier, or hospital—comes across information it thinks is indicative of criminal activity and wants to hand it over to the police? While the discussion thus far has suggested several reasons why government should not be able to demand information from a third party without justification, the situation is clearly different when the third party comes forward of its own accord.

Even so, it is important to recognize that not all volunteer-driven Cloud searches are alike. In the cases in which the Supreme Court first announced the third-party doctrine, the third party was a personal acquaintance of the defendant.⁷⁶ Establishing a rule that the government must ignore disclosures from such people denigrates their autonomous choice to make the disclosures, and could even be said to undermine their First Amendment right to speech. Recall, for instance, the tipster in the hypothetical involving John Slade. Whatever that person's motives and however that person acquired the information, the choice to divulge it deserves respect and should be considered a legitimate basis for government action if it has sufficient indications of reliability.

However, in the Court's later third-party cases, *Miller v. United States*⁷⁷ and *Smith v. Maryland*,⁷⁸ the third party was not a person but an institution, more specifically, a bank and a phone company. Historically, corporations have not been considered autonomous "persons" in most contexts and have also been accorded lesser First Amendment rights than natural beings.⁷⁹ More importantly, unlike human confidantes, these institutions can be said to owe either formal or quasi-formal fiduciary duties to their customers, because unlike the human third party, they are able to obtain personal facts solely because they

76. See, e.g., *Lewis v. United States*, 385 U.S. 206 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966).

77. 425 U.S. 435 (1976).

78. 442 U.S. 735 (1979).

79. The Court's decision in *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310 (2010), focused on political speech rights of corporations, which are not implicated in this context. Further, corporations are still not considered "persons" for Fifth Amendment purposes, see *Hale v. Henkel*, 210 U.S. 43 (1906); and have very weak Fourth Amendment rights. See *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

purport to provide a particular service.⁸⁰ The most sympathetic example on point comes from the medical context, where a patient provides information to a treatment provider. Even the Supreme Court has balked at the notion that a hospital is entitled to ignore a patient's expectation of medical privacy for the purpose of catching criminals.⁸¹ Arguably, an analogous position is warranted with respect to banks and phone companies, to which we give information for the sole purpose of carrying out financial transactions or communicating.

Also important to recognize is that, when the third party is an institution, the degree to which information is "voluntarily" handed over to the government can vary greatly. In some cases, the government *commands* third parties to produce information about others, automatically and in the absence of a particularized court order. For instance, banks must report all deposits of \$10,000, regardless of circumstances.⁸² If this sort of command is justifiable, it should be so only if it comes from the legislature and is generally applicable (as is true in the deposit scenario). More commonly, the government exerts subtler pressures on third parties to produce information. Most obviously, some data brokers, although purportedly private and independent of the government, essentially see the government as their client,⁸³ and other companies, dependent on government largesse, may be especially eager to show they are helpful.⁸⁴ Unless defined narrowly, volunteer-driven Cloud searches might ultimately even undo efforts, like the recent NSA legislation, to keep as much data as possible out of government hands. That phenomenon is worrisome, because people should be able to trust that the private institutions on which they depend for the basics of life are not conduits to the government.

At the same time, it must be acknowledged that fiduciary obligations and concerns about corporate duplicity should not always trump speech rights and concerns about public safety. For instance, both the medical and legal professions recognize a duty to reveal information that would prevent a violent

80. See Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 *FORDHAM L. REV.* 611 (2015); SLOBOGIN, *supra* note 4, at 161 (arguing that recordholders have a fiduciary "duty of allegiance" to the subject of the record).

81. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

82. 31 U.S.C. § 5313(a).

83. Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 *N.C. J. INT'L L. & COM. REG.* 595, 617–18 (2004) (describing the FBI's "secret, classified contract" with Choicepoint).

84. Avidan Y. Cover, *Corporate Avatars and the Erosion of the Populist Fourth Amendment*, 100 *IOWA L. REV.* 1441, 1445 (2015) ("[T]echnology corporations are not likely to challenge government surveillance requests, and even less likely to make effective arguments asserting their individual customers' rights, because of their government connections, the legal constraints on transparency and disclosure, and their immunity for complying with the government.").

crime or forestall an ongoing one.⁸⁵ Explicitly applied to The Cloud, that norm would permit third-party institutions to disclose, and government to use, information about others that is likely to prevent a serious violent felony from taking place in the near future. Arguably, however, that norm should be the full extent to which the law bows to the volunteer notion where third-party institutions that are essential to living in the modern world are involved.⁸⁶

RECOMMENDATIONS

Databases are full of information that can enhance law enforcement's ability to detect and investigate crime and terrorism. Given the personal nature of much of this information, however, government should not be able to obtain, view, or use it at will. The following recommendations concerning law enforcement access to data arise out of the foregoing discussion.

- 1. If a policing agency seeks non-public records about an identified person, it should have to demonstrate suspicion of wrongdoing proportionate to the intrusion involved.** Whether or not courts modify current Fourth Amendment law to encompass such access, legislatures and agencies should require increasingly demanding justification requirements based on the nature of the data sought, the amount of data sought, or a combination thereof.
- 2. If a law enforcement agency is instead accessing data for the purpose of executing a profile to identify suspects, it should ensure the profile produces the requisite proportionality-derived hit rate, avoids illegitimate discrimination, and uses an understandable algorithm.** Courts should evaluate these profiles, *in camera* if necessary, to ensure they are properly validated and do not rely on obviously biased risk factors. If the profile is used to identify suspects, police should not be able to choose whom among them will be subject to further investigation, but rather should be required to investigate all of those who meet the profile or, if that is not possible, a neutrally selected subset of that group.

85. MODEL RULES OF PROF'L CONDUCT Rule 1.6(b)(1) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to prevent reasonably certain death or substantial bodily harm."); FLA. STAT. ANN. § 394.4615(3) (a) ("When a patient has declared an intention to harm other persons," the therapist may release "sufficient information to provide adequate warning to the person threatened.").

86. This is the rule Congress adopted in connection with communications. See 18 U.S.C. § 2702(c) (prohibiting ISPs from disclosing communications to law enforcement except in emergencies involving death or serious physical injury and a few technical situations).

3. **If policing agencies are relying on a crime rather than a suspect or a profile as the starting point of the investigation, the crime should be serious and the number of people investigated kept to the minimum dictated by the time and place of the crime.** At least when the investigation is extensive, judges should be involved in evaluating the need for and scope of such investigations.
4. **Collections of data needed by law enforcement should be maintained outside of government to the extent consistent with governing needs, but wherever maintained they should be authorized by specific legislation and administrative rules transparently and democratically arrived at.** Data-acquisition methods should be universal, random, or statistically justifiable. Courts should enforce these rules through either the administrative hard-look doctrine or equal protection analysis.
5. **Private institutions should be permitted to proffer to the government information about those to whom they owe a de facto fiduciary duty only when they have good reason to believe it would prevent an ongoing or future serious violent felony.** Courts should scrutinize any government incentives, financial or otherwise, that encourage the transfer of information that normally would be subject to the foregoing access and collection limitations.

These rules, accompanied by adequate accountability mechanisms that facilitate discovery of and sanctions for their breach,⁸⁷ would allow the government to take advantage of The Cloud's investigative potential while cabining the temptation to abuse it.

87. Such mechanisms might include, at a minimum: (1) auditing procedures indicating who accesses data, when, and for what purpose; (2) notice, either individualized (in the case of suspect-driven searches) or general (in other cases), detailing how Cloud access has occurred; (3) rules limiting data retention by the government or third parties; and (4) civil and criminal sanctions for wrongful collection or access. See SLOBOGIN, *supra* note 4, ch. 5, pt. III.

Interrogation and Confessions

Richard A. Leo*

In this chapter, I review and analyze the most important findings from the extensive empirical social-science research literature on police interrogation and confessions. I then review existing law and policy on interrogation and confessions, and offer empirically based policy and legal recommendations. I will argue that the most important legal and policy reforms for achieving both the elicitation (by police) and admission into evidence (by trial courts) of voluntary and reliable confession evidence are: mandatory full electronic recording of all police interviews and interrogations; improved police training and practice on pre-interrogation investigative procedures; a shift from guilt-presumptive accusatory interrogation techniques that prioritize eliciting confessions above all else to more professional investigative interviewing approaches that prioritize obtaining accurate information above all else; and pretrial reliability hearings to prevent false and unreliable confession evidence from being admitted into evidence at trial and leading to wrongful convictions.

INTRODUCTION

In July 1997, Michelle Moore-Bosko was brutally raped and murdered in Norfolk, Virginia. Based on the hunch of a friend of Moore-Bosko's that her neighbor Danial Williams might have committed the crime, investigators interrogated Williams overnight for more than 11 hours, eventually extracting multiple confessions from him to the horrific crime. During Williams' marathon interrogation, investigators repeatedly accused Williams of committing the crime; yelled at him; administered a polygraph examination and lied to him about the results; lied to him further by falsely telling him other evidence (DNA, hairs, witnesses) established that he had committed the crime when, in fact, no such evidence existed against him; poked him in the chest;

* Hamill Family Professor of Law and Psychology, University of San Francisco. For helpful comments and suggestions, I thank Eve Brensike Primus, Barry Feld, Lindsay Herf, Jason Kreag, Elizabeth Loftus, John Parry, Katherine Puzauskas, Andrea Roth, Dan Simon, Chris Slobogin, Chad Snow, Gary Wells, and Amy Wright. I am especially grateful to Erik Luna for hosting the world-class Academy for Justice conference on criminal justice reform and for creating and editing this report.

threatened him with capital murder charges if he did not confess; promised him a lesser charge if he did confess; and educated him about the details of the rape and murder. Months later, forensic testing would establish that Williams' DNA did not match the sperm, blood, or other genetic material recovered from the crime scene.¹

Norfolk police would mistakenly suspect many other innocent individuals of raping and murdering Michelle Moore-Bosko, and would go on to extract false confessions from three more individuals: Joseph Dick, Eric Wilson and Derek Tice. Like Williams, Dick, Wilson, and Tice confessed after lengthy, guilt-presumptive and accusatory interrogations in which they were: repeatedly yelled at and called liars; physically touched (e.g., tapped or poked); lied to about non-existent evidence that supposedly irrefutably linked them to the crime, including bogus polygraph results; threatened with the death penalty if they did not confess; promised leniency and an end to grueling interrogations if they did confess; and shown crime-scene photos and fed details of the crime. And, as with Williams, Dick's, Wilson's, and Tice's DNA did not match the sperm, blood, or other genetic material recovered from the crime scene. Eventually DNA testing along with other dispositive evidence would establish that Omar Ballard, a violent felon and rapist, had committed the murder and rape of Michelle Moore-Bosko alone, for which he confessed after a brief interrogation, pled guilty and received a life sentence. However, the fact of Ballard's demonstrable guilt and his conviction for the rape and murder of Michelle Moore-Bosko did not prevent Williams, Dick, Wilson, and Tice—who became known as the Norfolk 4—from all being wrongfully convicted of the crime and spending many years in prison despite their provable innocence.²

The Norfolk 4 case is one of hundreds of police-interrogation induced false-confession cases that have been documented in the last three decades in America. Like the Norfolk 4, many false confessors have been wrongfully convicted and spent years, if not decades, in prison for crimes they did not commit. As of this writing, approximately 15% of the more than 350 post-conviction forensic DNA exonerations documented by the Innocence Project have involved individuals who had falsely confessed after being interrogated by police,³ as have approximately 13% of the more than 2,000 DNA and non-DNA

1. TOM WELLS & RICHARD A. LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008).

2. *Id.*

3. INNOCENCE PROJECT, <https://www.innocenceproject.org/> (last visited Mar. 14, 2017).

exonerations documented by the National Registry of Exonerations.⁴ These figures are regarded as the very small tip of a much larger iceberg because most false confessions and wrongful convictions are invisible, impossible to locate or document, or impossible to prove. At the same time, many police interrogations have led to false confessions from innocent suspects who were not wrongly convicted but who nevertheless spent months, and sometimes years, in jail but were ultimately spared a prison sentence because the prosecutor eventually decided to drop charges, because the judge suppressed the confession at a pretrial hearing, or because the jury acquitted the innocent false confessor at trial.⁵ In short, the American criminal justice system has a false-confession problem of its own making, which often leads to the wrongful incarceration and conviction of the innocent. At the same time, when a police interrogation induces a false confession that leads to the wrongful incarceration or conviction of an innocent individual, the true perpetrator may go on to commit more violent crimes. Put differently, the underlying problem caused when police interrogation produces erroneous outcomes is not only that the innocent may be wrongfully convicted but also that the guilty may go free.

Police interrogation of criminal suspects is an important subject for criminal justice analysts and policymakers. The process of modern police interrogation, and the confessions it produces, raises a number of important empirical, legal and policy questions: How do police elicit confessions from reluctant suspects in America? How should they be permitted to interrogate in a democratic society that needs both crime control and due process to maintain public confidence in its institutions of criminal justice? How should law and public policy regulate police interrogation to accommodate the competing interests and values at stake while promoting fair procedures and achieving just and accurate results?

Police interrogation of criminal suspects has, at various times in American history, been politically and legally contested. In the 1920s and 1930s, the widespread use of the so-called “third degree”—methods of physical coercion and psychological duress—to extract confessions was controversial until it was replaced by more professional and sophisticated methods of psychological

4. THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited on Mar. 14, 2017). For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report.

5. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004); Jon B. Gould et al., *Preventing Wrongful Convictions*, 99 IOWA L. REV. 471 (2014).

pressure and persuasion.⁶ In the 1960s, the United States Supreme Court's imposition of *Miranda* warnings on custodial interrogation was controversial until police adjusted to the brief warning and waiver ritual and eventually came to see it as harmless.⁷ And, as mentioned above, from the 1990s to the present, American police interrogation methods and practices have again become controversial because of police-induced false confessions—widely publicized and well documented by both DNA and non-DNA exonerations⁸—that often lead to the wrongful conviction of the innocent.⁹

The central policy problem of American police interrogation is how to structure, incentivize and regulate the questioning of criminal suspects such that the resulting statements, admissions, or confessions are both “voluntary” (i.e., fairly and legally obtained) and “reliable” (i.e., factually accurate). In our democratic system of government, voluntary confessions are necessary out of respect for the dignity and autonomy of the accused, as well as for the integrity of the criminal justice process and to maintain fidelity to constitutional norms. However, it is almost never in a suspect's rational self-interest to make incriminating statements, admissions, or confessions to police. As a result, we must allow police interrogators some latitude to apply some level of pressure and persuasion to move criminal suspects from denial to admission. At the same time, regardless of where we draw the line between permissible and impermissible interrogation practices, we must regulate police methods so that resulting statements, admissions, and/or confessions are factually accurate. We must also structure subsequent pretrial and trial procedures to effectively recognize and exclude any false and unreliable confessions that are elicited through police interrogation.

In the remainder of this chapter, I will review and analyze the most important findings from the extensive empirical social-science research literature on police interrogation and confessions. I will then review existing law and policy on interrogation and confessions, and then offer empirically based policy and legal recommendations. I will argue that the most important legal and policy reforms for achieving both the elicitation (by police) and admission into evidence (by trial courts) of voluntary and reliable confession evidence are: mandatory full

6. Richard A. Leo, *The Third Degree and the Origins of Psychological Police Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37 (G. Daniel Lassiter ed., 2004).

7. Richard A. Leo & Welsh White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397 (1999).

8. INNOCENCE PROJECT, *supra* note 3; NATIONAL REGISTRY OF EXONERATIONS, *supra* note 4.

9. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010); Drizin & Leo, *supra* note 5.

electronic recording of all police interviews and interrogations; improved police training and practice on pre-interrogation investigative procedures; a shift from guilt-presumptive accusatory interrogation techniques that prioritize eliciting confessions above all else to more professional investigative interviewing approaches that prioritize obtaining accurate information above all else; and pretrial reliability hearings to prevent false and unreliable confession evidence from being admitted into evidence at trial and leading to wrongful convictions.

I. EXISTING LAW AND POLICY

Police interrogation and confession-taking in America is regulated almost entirely by federal constitutional law as applied to the states. Three legal doctrines in particular govern the admissibility of confession evidence at trial: the Fifth and Fourteenth Amendment due process voluntariness test; the Sixth Amendment right to counsel; and, perhaps most centrally, the Fifth Amendment *Miranda* doctrine.

A. FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS VOLUNTARINESS

In the mid-1880s, the United States Supreme Court began to evaluate the admissibility of confession evidence against criminal defendants at trial. The Court initially relied on the common-law voluntariness test, which was intended to protect against the danger of unreliable or untrustworthy confessions and exclude them. The underlying purpose of the voluntariness test, though, was never entirely clear and would continue to evolve throughout the 20th century. Initially, and arguably through at least the 1950s, the dominant rationale of the due process voluntariness test was to promote reliability in the trial process by excluding confessions that were likely to be false or untrustworthy because they were products of police coercion or improper influence. However, the idea that courts should admit into evidence only confessions that were the product of a free and independent will also began to gain ascendance in the 1930s and 1940s. A third but subordinate rationale underlying the voluntariness test was the idea that confessions elicited through fundamentally unfair police methods should be excluded so as to deter offensive police behavior, regardless of whether the suspect confessed involuntarily or his statements were likely to be trustworthy. The due process voluntariness test continued to evolve in the 1950s and 1960s as the Supreme Court made clear that the reliability or trustworthiness of a suspect's confession was no longer directly relevant to a determination of its voluntariness.¹⁰ In 1986, the Supreme Court in *Colorado*

10. *Rogers v. Richmond*, 365 U.S. 534 (1961).

*v. Connelly*¹¹ said that the reliability of the defendant's statement should have no role in the determination of its voluntariness and thus admissibility. A confession's lack of trustworthiness, it was argued, would not tend to establish that it is involuntary. Instead, the Court declared that a statement given by someone in the suspect's condition "might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum ... not by the Due Process clause of the Fourteenth Amendment."¹²

Today the contemporary Fifth and Fourteenth Amendment due process voluntariness test is concerned almost exclusively with protecting a suspect's independent free will and capacity for autonomous decision-making from coercive or otherwise improper police influence during interrogation. Trial judges are to evaluate, in their totality, both the police interrogation methods and the suspect's vulnerabilities on a case-by-case basis. If the trial judge determines that the interrogation pressures overbore the defendant's free will, then the confession will be excluded as involuntary under the Fourteenth Amendment (state) or Fifth Amendment (federal) due process clause and cannot be used against the defendant in future trial proceedings. Otherwise, the Fifth and Fourteenth Amendment due process clauses do not prohibit the government from using confession evidence against the accused at trial.

B. SIXTH AMENDMENT RIGHT TO COUNSEL

Americans have enjoyed a constitutional trial right to counsel in federal cases since the ratification of the Bill of Rights in 1791. This right was incorporated into state constitutions through the Fourteenth Amendment in capital offenses in 1932. It was subsequently modified in 1963 to include all felony offenses. The underlying rationale of the Sixth Amendment is to protect a suspect's right to a fair trial. In 1964, however, the Supreme Court in *Massiah v. United States*¹³ held that a suspect was entitled to the protections of the Sixth Amendment upon indictment. The Supreme Court subsequently held that a suspect has a right to legal representation as soon as judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arrangement. At that point, police thus cannot interrogate a suspect about matters relating to those proceedings absent an explicit relinquishment (i.e., a knowing and voluntary waiver) of the suspect's Sixth Amendment right to legal representation. Because virtually all police interrogation in America occurs prior to charges being filed or judicial proceedings commencing,

11. *Colorado v. Connelly*, 479 U.S. 157 (1986).

12. *Id.* at 167.

13. *Massiah v. United States*, 377 U.S. 201 (1964).

however, the Sixth Amendment right to counsel is almost always irrelevant to the admissibility of confession evidence in practice.

C. FIFTH AMENDMENT MIRANDA WARNINGS

In 1966, the Supreme Court decided *Miranda v. Arizona*,¹⁴ ushering in a new era in the American law of confessions. In *Miranda*, the Supreme Court applied the Fifth Amendment privilege against self-incrimination to the pretrial interrogation process. According to the Supreme Court in *Miranda*, modern police interrogation was fundamentally at odds with the privilege against self-incrimination because it contained inherently compelling pressures that threatened to undermine a suspect's ability to freely decide whether to provide information to police during interrogation. The Supreme Court held that the Fifth Amendment privilege against self-incrimination required procedural safeguards prior to any custodial questioning in order to dispel the inherent compulsion of psychological interrogation, or else the state could not use a suspect's interrogation-induced statements against him at trial.

More specifically, the Supreme Court held that police must forewarn suspects of their rights to silence and appointed counsel before any custodial questioning can legally commence. The typical *Miranda* warning thus reads:

- You have the right to remain silent.
- Anything you say can and will be used against you in a court of law.
- You have the right to an attorney.
- If you cannot afford an attorney, one will be appointed to you free of charge.

The Court required the four-fold *Miranda* warnings in all cases in which “questioning [was] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way.”¹⁵ In addition, the Court held that the state must demonstrate that the suspect's waiver of these constitutional rights was made “voluntarily, knowingly and intelligently.”¹⁶ As a result, police interrogators were directed to follow up the fourfold *Miranda* warnings with two further questions designed to elicit an explicit waiver:

- Do you understand these rights?
- Having these rights in mind, do you wish to speak to me?

14. *Miranda v. Arizona*, 384 U.S. 436 (1966).

15. *Id.* at 444.

16. *Id.*

On their face, the *Miranda* warning and waiver requirements seem relatively straightforward. In the last 50 years, however, the Supreme Court has substantially weakened *Miranda*'s original vision and carved out numerous significant exceptions to the *Miranda* rule, even though there are no exceptions to the Fifth Amendment privilege against self-incrimination on which the original *Miranda* decision was based.

These include exceptions for routine booking questions (no *Miranda* warnings are required);¹⁷ for impeachment at trial (a statement taken in violation of *Miranda* can nevertheless be used to impeach a defendant if he testifies at trial inconsistently with his previously suppressed *Miranda*-violative statement);¹⁸ for public safety (an interrogator need not give *Miranda* warnings in situations where they are otherwise required if the questions he seeks to ask are "reasonably prompted by a concern for public safety");¹⁹ and for witness statements²⁰ and physical evidence²¹ obtained as a result of a *Miranda* violation.

Perhaps more significantly, in the more than 50 years since *Miranda v. Arizona* was decided, the U.S. Supreme Court has destroyed its doctrinal foundation.²² In a series of decisions, the Burger and Rehnquist Courts in the 1970s and 1980s de-constitutionalized *Miranda*, declaring that *Miranda* warnings are "not themselves rights protected by the Constitution," that is, "measures to insure that the right against compulsory self-incrimination [is] protected."²³ This has led some police, prosecutors, and courts to interpret *Miranda* as a non-constitutional rule of evidence, and it has incentivized police interrogators to disregard the original *Miranda* warning and waiver regime altogether.²⁴ Related to this, the Supreme Court has watered down the legal meaning of custody at the front end of the *Miranda* ritual and lowered the legal standard for an acceptable waiver at the back end. By telling a suspect that he or she is not in custody or that he or she is free to leave, the interrogator need not provide the suspect with *Miranda* warnings because the interrogation is thereby considered legally non-custodial.²⁵ And even if a suspect is read his *Miranda* rights, the Supreme Court has held that waivers to *Miranda* can be

17. *Pennsylvania v. Muniz*, 496 U.S. 592 (1990).

18. *Harris v. New York*, 401 U.S. 222 (1971).

19. *Quarles v. New York*, 467 U.S. 649 (1984).

20. *Michigan v. Tucker*, 417 U.S. 433 (1974).

21. *United States v. Patane*, 542 U.S. 630 (2004).

22. Richard A. Leo & Alexa Koenig, *The Gatehouse and Mansions: Fifty Years Later*, 6 ANN. REV. L. & SOC. SCI. 323-339 (2010).

23. *Tucker*, 417 U.S. at 444.

24. Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998).

25. *California v. Beheler*, 463 U.S. 1121 (1983).

implicit²⁶ and increasingly opened the door for police interrogators to merely read the *Miranda* warnings and launch into interrogation,²⁷ making the formal requirement of a knowing, voluntary, and intelligent waiver virtually meaningless in practice.²⁸

The Fifth and Fourteenth Amendment due process voluntariness test, the Sixth Amendment *Massiah* doctrine, and the *Miranda* warning and waiver ritual are, for the most part, the only rules that govern the admissibility of confession evidence in state and federal trials. In a minority of jurisdictions—20 states and the District of Columbia²⁹—police interrogators are also legally required to electronically record their custodial interrogations in some or all felony cases or else a rebuttable presumption is created that the confession evidence should not be admitted into evidence against a criminal defendant.

II. LITERATURE REVIEW

With the decline of the third degree in the 1930s and 1940s, interrogation shifted to psychological methods and approaches. Initially police shifted to polygraphic lie detection and interrogation to elicit confessions. In addition, police developed purely psychological interrogation methods—based on influence, manipulation, deception, and ultimately pressure and persuasion—that they subsequently wrote about in training manuals, which later became the basis for interview and interrogation training programs.

In America, the primary method of interrogation is known as the “Reid” method of interrogation, named after former Chicago police investigator John Reid, who with Fred Inbau co-authored the leading interrogation manual in the United States, starting in 1942 and extending, many editions later, to the present. Just as it has been said that virtually all modern literature is a variation on Shakespeare, so too can it be said that virtually all modern American police interrogation is a variation of the Reid method.

The Reid method of interrogation can be described and divided a number of different ways. Commentators often begin by describing the “Behavioral Analysis Interview,” which is a recommended structured set of questions from

26. North Carolina v. Butler, 441 U.S. 369 (1979).

27. Berghuis v. Thompkins, 560 U.S. 370 (2010).

28. Alfred Garcia, *Is Miranda Dead, Overruled or Was It Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1998); Charles Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519 (2008). *But see* Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579 (2006).

29. Thomas Sullivan, *Compendium Shows More Jurisdictions Recording Interrogations*, CHAMPION, Apr. 2014, at 46-47.

which investigators are taught that they can infer whether suspects are lying or telling the truth based on their demeanor, body language, and the content of their answers. The underlying theory of behavioral analysis is that, as with the polygraph, a normally socialized individual will experience inner conflict and anxiety when lying, which will then manifest itself in involuntary physiological stress reactions. The deceptive individual, the theory goes, displays certain nonverbal behavior symptoms (manifested in body posture, eye contact, gestures, and movements) as well as verbal behaviors (e.g., attitudes and statements) in order to reduce the anxiety or conflict associated with lying, while the truthful individual does not. If the investigator judges the suspect deceptive after the Behavioral Analysis Interview, he or she then launches into the interrogation. Though it has been widely criticized as lacking any probative value by social scientists,³⁰ the Behavioral Analysis Interview may not always be necessary to understand how the Reid method of interrogation plays out in practice. Most interrogations in America are not preceded by a formal full-scale Behavioral Analysis Interview, though many involve selected questions from the Behavioral Analysis Interview.³¹

The Reid method of interrogation consists of guilt-presumptive, accusatory, and confirmatory questioning that, relying on pressure and persuasion, seeks to move a suspect from denial to admission and then to elicit a full narrative confession of guilt. The Reid method is guilt-presumptive because interrogators are trained only to interrogate those suspects whose guilt they believe to be reasonably certain. It is accusatory because the most fundamental interrogation technique is to accuse the suspect of committing the crime (usually repeatedly), and then to accuse the suspect of lying when he or she denies it. The Reid method is confirmatory because the investigator's goal during interrogation is not to evaluate whether the suspect is innocent or guilty, but to seek a confession that confirms what the investigator already believes to be the truth, i.e., to elicit a confession to the investigator's pre-existing theory of the crime. The Reid method relies on pressure and persuasion through a series of recommended interrogation techniques that seek first to convince him that resisting the investigator's accusations is futile, and then to induce him to perceive that it

30. RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (2008); see also Aldert Vrij, Samantha Mann & Ronald Fisher, *An Empirical Test of the Behavior Analysis Interview*, 30 *LAW & HUM. BEHAV.* 329 (2006); Jaume Masup et al., *Is the Behavior Analysis Interview Just Common Sense?*, 25 *APPLIED COGNITIVE PSYCHOL.* 593 (2011).

31. One field study reported Behavioral Analysis Interview questions present in 40% of the interrogations observed, while another observed them present in 29%. See Richard A. Leo, *Inside the Interrogation Room*, 86 *J. CRIM. L. & CRIMINOLOGY* 266 (1996); BARRY C. FELD, *KIDS, COPS AND CONFESSIONS: INSIDE THE INTERROGATION ROOM* (2013).

is in his self-interest to stop denying and start admitting to the alleged crime. To this end, the Reid method recommends that investigators ply the suspect with “themes” or scenarios that minimize the suspect’s blameworthiness, culpability or the consequences he will face if he confesses, while overstating his blameworthiness, culpability or the consequences he will face if he continues to deny the investigator’s accusations.³²

For many decades after the Reid method was first developed, police interrogation in practice largely remained a mystery because interrogations were not electronically recorded and empirical researchers did not have access to them. Indeed, at the time of the famous *Miranda* decision in 1966, the U.S. Supreme Court relied on interrogation training manuals, and primarily the one by Inbau and Reid,³³ to describe how police interrogation in America was likely practiced. In the late 1960s and early 1970s, a number of lawyers and law professors sought to empirically study the impact of *Miranda* requirements on police interrogation, confessions, and conviction rates.³⁴ In the 1990s, another set of researchers sought to study empirically the impact of *Miranda* requirements.³⁵ The scholarly consensus is that *Miranda*’s impact in the real world is, for the most part, negligible—the overwhelming majority (78% to 96%) of suspects waive their rights and appear to consent to interrogation, implicitly or explicitly.³⁶ The police have successfully adapted to *Miranda*, have learned how to issue *Miranda* (or avoid having to issue) warnings in ways that will result in legally acceptable waivers, and still elicit a high percentage of incriminating admissions and confessions.³⁷ Rarely are confessions ever

32. LEO, POLICE INTERROGATION, *supra* note 30.

33. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1st ed. 1962).

34. For a review, see Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001).

35. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996); Paul Cassell & Brett Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Leo & White, *supra* note 7.

36. Richard A. Leo, *Miranda and the Problem of False Confessions*, in THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING (Richard A. Leo & George C. Thomas III eds., 1998).

37. LEO, POLICE INTERROGATION, *supra* note 30.

suppressed for *Miranda* violations,³⁸ and even when they are, prosecutors can impeach the defendant with the confession if he takes the witness stand and even arguably testifies inconsistently with anything in the confession statement, as we have seen.³⁹

Though it dates back more than a century,⁴⁰ the modern empirical study of police interrogation practices and their effects took off in the early 1980s⁴¹ and has, in the last four decades, developed into a robust, extensive and generally accepted social-science research literature. Relying on a variety of well-established social-science research methodologies, this research literature consists of numerous observational studies;⁴² experimental studies;⁴³ archival studies relying on case files, materials or documents;⁴⁴ interview-based

38. George C. Thomas, *Stories About Miranda*, 102 MICH. L. REV. 1959 (2004). Very few scholars take the view that the prophylactic *Miranda* requirements have harmed law enforcement. *But see* Paul Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul Cassell & Richard P. Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998). Moreover, the bases for such claims have been widely criticized as unreliable. *See* Stephen Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Evidence*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); John Donahue, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998); Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS U. L. REV. 1 (2000).

39. *Harris v. New York*, 401 U.S. 222 (1971).

40. HUGO MUNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908).

41. Saul Kassin & Lawrence Wrightsman, *Confession Evidence*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 67 (Saul Kassin & Lawrence Wrightman eds., 1985).

42. Leo, *Inside the Interrogation Room*, *supra* note 31; Lesley King & Brent Snook, *Peering Inside the Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics and Coercive Strategies*, 36 CRIM. JUST. & BEHAV. 674 (2009); Feld, *supra* note 31; Stavoula Soukara et al., *What Really Happens in Police Interviews of Suspects? Tactics and Confessions*, 15 PSYCHOL. CRIME & L. 493 (2009).

43. Kassin et al., *Police-Induced Confessions*, *supra* note 9.

44. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 990-997 (1997); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010); Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 410 (2015); Dave Walsh & Ray Bull, *Interviewing Suspects: Examining the Association Between Skills, Questioning, Evidence Disclosure, and Interview Outcomes*, 21 PSYCHOL. CRIME & L. 661 (2015); Stephen Moston, Geoffrey M. Stephenson & Thomas M. Williamson, *The Effects of Case Characteristics on Suspect Behavior During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23 (1992); Hayley Cleary, *Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases*, 38 LAW & HUM. BEHAV. 271 (2014).

studies;⁴⁵ individual⁴⁶ and aggregated case studies;⁴⁷ survey studies;⁴⁸ and meta-analyses,⁴⁹ among others.⁵⁰

The empirical research literature on police interrogation and confessions is too vast to summarize in this chapter, which is primarily focused on policy recommendations that advance the twin goals of ensuring fairness in interrogation procedures and maximizing the accuracy of confession evidence. For our purposes, the relevant empirical findings from this large body of social-science research can be summarized as follows.

First, American police investigators routinely employ guilt-presumptive, accusatory and confirmatory Reid-based interrogation methods to elicit confession evidence from criminal suspects. These methods include the following: isolation, rapport-building, accusation, attacks on a suspect's denials, confrontation with evidence (both true-evidence ploys and false-evidence ploys, i.e., lies about non-existent or falsified evidence), pressure, repetition, minimization (i.e., suggesting that the suspect's blameworthiness,

45. LEO, POLICE INTERROGATION, *supra* note 30; Laurence Alison, Mark Kebbell & Joane Leung, *A Facet Analysis of Police Officers' Self-Reported Use of Suspect-Interviewing Strategies and Their Discomfort with Ambiguity*, 22 APPLIED COGNITIVE PSYCHOL. 1072 (2008); Mark Kebbell et al., *How Do Sex Offenders Think the Police Should Interview to Elicit Confessions from Sex Offenders?*, 16 PSYCHOL. CRIME & L. 567 (2010).

46. WELLS & LEO, THE WRONG GUYS, *supra* note 1; ROB WARDEN & STEVEN DRIZIN, TRUE STORIES ABOUT FALSE CONFESSIONS (2009).

47. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 483 (1998); Drizin & Leo, *supra* note 5.

48. Saul Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381-400 (2007); Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know about Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. & L. 381, 388-90 (2009). See generally Danielle Chojnacki, Michael Cicchini & Lawrence White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1 (2008); Linda Henkel, Kimberly Coffman & Elizabeth Dailey, *A Survey of People's Attitudes and Beliefs About False Confessions*, 26 BEHAV. SCI. & L. 555 (2008); Mark Costanzo, Netta Shaked-Schroer & Katherine Vinson, *Juror Beliefs About Police Interrogation, False Confession, and Expert Testimony*, 7 J. EMPIRICAL LEGAL STUD. 231 (2010).

49. Christian A. Meissner et al., *Interview and Interrogation Methods and their Effects on True and False Confessions*, CAMPBELL SYSTEMATIC REV. (2012), https://www.campbellcollaboration.org/media/k2/attachments/Meissner_Interview_Interrogation_Review.pdf; Christian A. Meissner et al., *Accusatorial and Information Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459 (2014); Christian A. Meissner, Christopher Kelly & Skye Woestehoff, *Improving the Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211 (2015).

50. For an example of a vignette study, see Deborah Davis, Richard A. Leo & William Follette, *Selling Confession: Setting the Stage with the Sympathetic Detective with a Time-Limited Offer*. 26 J. CONTEMP. CRIM. JUST. 441 (2010).

culpability or consequences he faces will be minimized if he makes or agrees to a confession) and maximization (suggesting that the suspect will be perceived as more blameworthy or more culpable or will face worse consequences if he refuses to make or agree to a confession), offers of help, implied and explicit promises of leniency/immunity (or their functional equivalent), and implied and explicit threats of harsher treatment (or their functional equivalent). American, Reid-based methods of interrogation appear to be highly effective at eliciting incriminating statements, admissions, and confessions.⁵¹

Second, American police interrogators are trained to believe that they can reliably infer a suspect's guilt from his or her body language, demeanor, and other non-verbal and verbal behaviors, and thus that they can distinguish accurately between truth-tellers and liars. Yet, like lay people who on average are only 54% accurate at distinguishing truth from deception,⁵² police exhibit slightly better than chance-level accuracy in their demeanor-based judgments of truth and deception. Reid-based police training in the detection of truth and deception leads investigators not only to make prejudgments of guilt that are frequently in error, but also to make them with high levels of confidence, which leads to and reinforces behavioral confirmation biases.⁵³

Third, confession evidence is uniquely damning and consequential in the American criminal justice system. Confessions are perceived to be the strongest evidence of guilt the state can bring against an individual.⁵⁴ Mock and real-world juries treat confession evidence as more impactful on verdicts than other forms of evidence, even when the confessions are judged to be the product of coercion or contradicted by other case evidence. Once a suspect has confessed, a whole set of cascading and reinforcing case-processing effects is set into motion: police are more likely to close their investigation and declare the case solved, ignoring contradictory or exculpatory evidence; prosecutors are more likely to set higher bail, file more and higher charges, and make the confession

51. DAVID SIMON, *HOMICIDE: A YEAR ON THE MEAN STREETS* (1991); Leo, *Inside the Interrogation Room*, *supra* note 31; Ofshe & Leo, *supra* note 44; King & Snook, *supra* note 42; FELD, *supra* note 31.

52. Bella DePaulo et al., *Cues to Deception*, 129 *PSYCHOL. BULLETIN* 74 (2003); Charles Bond & Bella DePaulo, *Accuracy of Deception Judgments*, 10 *PERSONALITY & SOC. PSYCHOL. REV.* 214 (2006).

53. Saul Kassin & Christina Fong, "I'm Innocent!": *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 *LAW & HUM. BEHAV.* 499 (1999); Saul Kassin & Christian Meissner, *He's Guilty: Investigator Bias in Judgments of Truth and Deception*, 26 *LAW & HUM. BEHAV.* 469 (2002); Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 *WIS. L. REV.* 291.

54. Saul Kassin, *Why Confessions Trump Innocence*, 67 *AM. PSYCHOLOGIST* 431 (2012).

the centerpiece of their case; defense attorneys are more likely to presume their client's guilt and pressure him or her to take a plea bargain; and juries are more likely to convict, even if the confession was coerced.⁵⁵ Moreover, confessions are such seemingly potent evidence of guilt that they may taint or corrupt other case evidence to misleadingly create the illusion of corroboration.⁵⁶ Confession evidence thus biases the collection, perception, and interpretation of subsequently obtained evidence, setting in motion what Saul Kassin and colleagues have dubbed *forensic confirmation biases*.⁵⁷

Fourth, though highly counterintuitive to most people, false confessions are far more common than previously imagined, and appear to occur regularly in the American criminal justice system. In the last quarter-century, researchers have documented hundreds of proven false confessions, which—because the phenomenon of false confession is difficult to identify and prove—are the tip of a much larger problem. False confessions often mimic true confessions: they are typically vivid, detailed, and contain unique non-public details that are said to reveal inside knowledge but instead are the product of police contamination (i.e., leaking or feeding of non-public case facts).⁵⁸ As a result, most people cannot reliably distinguish between true and false confessions.⁵⁹ Most people understand that psychologically coercive interrogation techniques can lead to true confessions, but they do not understand the relationship between psychologically coercive interrogation techniques and false confessions.⁶⁰ Sadly, when entered into the stream of evidence against an accused, false confessions appear to almost always lead to the wrongful conviction of the innocent.⁶¹

Fifth, researchers have identified two categories of factors that, when present, increase the risk of eliciting false confessions. *Situational* risk factors include lengthy custody and interrogation; police lies about non-existent evidence (i.e., false-evidence ploys); minimization; and implied or explicit

55. Saul Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469 (1997); Leo & Ofshe, *supra* note 47; Drizin & Leo, *supra* note 5; Kassin, *Why Confessions Trump Innocence*, *supra* note 54.

56. Saul Kassin et al., *Confessions that Corrupt: Evidence from the DNA Exoneration Files*, 23 PSYCHOL. SCI. 41 (2012).

57. Saul Kassin, Itiel Dror & Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives and Proposed Solutions*, 2 J. APPLIED RES. MEMORY & COGNITION 42 (2013).

58. Ofshe & Leo, *supra* note 44, at 990-997.

59. Saul Kassin et al., *I'd Know a False Confession if I Saw One: A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211 (2005).

60. Leo & Liu, *supra* note 48; Iris Blandon-Gitlin, Kathryn Sperry & Richard A. Leo, *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?*, 17 PSYCHOL. CRIME & L. 239 (2011).

61. Drizin & Leo, *supra* note 5; Kassin, *Why Confessions Trump Innocence*, *supra* note 54.

promises and threats. The psychological effects of these techniques may lead to false confessions from innocent suspects for a variety of related reasons: They wish to terminate the interrogation and escape from the stress, pressure, and confinement of the interrogation process; they come to perceive that they have no meaningful choice but to comply with the demands and requests of their interrogators; or they come to perceive that the benefits of admitting to some version of the offense outweighs the costs of denial,⁶² even as they tend to focus on more immediate rather than distant consequences.⁶³

Dispositional risk factors include adolescence and immaturity; cognitive and intellectual disabilities; mental illness; and certain personality traits, such as suggestibility and compliance.⁶⁴ Even though psychologically coercive interrogation methods are the primary cause of false confessions, individuals differ in their ability to withstand interrogation pressure and thus in their innate susceptibility to making or agreeing to false confessions.⁶⁵ Juveniles are more likely to falsely confess because they tend to be developmentally immature, impulsive, naively trusting of authority, submissive, eager to please adult figures, and thus more easily pressured, manipulated, and persuaded to make or agree to false statements without fully understanding the nature or gravity of an interrogation or the long-term consequences of their responses to police accusations.⁶⁶ Mentally handicapped individuals are more likely to confess falsely for a variety of reasons related to their low intelligence, short attention span, poor memory, and poor conceptual and communication skills, which cause them to become easily confused, highly suggestible and compliant, and easy to manipulate; in addition, people with intellectual disabilities have a tendency to mask or disguise their cognitive deficits and to look to others—particularly authority figures—for appropriate cues to behavior.⁶⁷ People with mental illness possess any number of psychiatric symptoms that make them more likely to agree with, suggest, or confabulate false and misleading information to detectives during interrogation, including faulty reality

62. Ofshe & Leo, *supra* note 44.

63. Stephanie Madon et al., *Temporal Discounting: The Differential Effect of Proximal and Distal Consequences on Confession Decisions*, 36 LAW & HUM. BEHAV. 13 (2012); Stephanie Madon et al., *How Factors Present During the Immediate Interrogation Situation Produce Short-Sighted Confession Decisions*, 37 LAW & HUM. BEHAV. 60 (2013).

64. Kassir et al., *Police-Induced Confessions*, *supra* note 9; see also Drizin & Leo, *supra* note 5.

65. Kassir et al., *Police-Induced Confessions*, *supra* note 9.

66. FELD, *supra* note 31.

67. LEO, POLICE INTERROGATION, *supra* note 30; GISLI H. GUDJONSSON ET AL., PERSONS AT RISK DURING INTERVIEWS IN POLICE CUSTODY: THE IDENTIFICATION OF VULNERABILITIES (1993).

monitoring, distorted perceptions and beliefs, an inability to distinguish fact from fantasy, proneness to feelings of guilty, heightened anxiety, mood disturbances, and a lack of self-control.⁶⁸

III. ANALYSIS AND ASSESSMENT

As mentioned above, this chapter seeks to describe the best available practices and policy recommendations that, based on the social-science research, are most likely to both ensure fair procedures and maximize the accuracy of the information police interrogators elicit. It is important that we discuss best practices or policy reforms in both the investigative stage of the criminal process (where errors are made) and the adjudicative phase (where errors are corrected).⁶⁹ To this end, we seek practices that will maximize the number of true confessions that police elicit and minimize the number of false ones. We thus also seek to recommend procedures prior to the interrogation that will prevent police from interrogating innocent suspects in the first place, as well as procedures following the interrogation that will prevent false confessions that have been elicited from being entered into evidence against criminal defendants at trial.

It can be difficult to describe precisely the line between fair and unfair psychological interrogation procedures. In American law, the Fifth and Fourteenth Amendment due process voluntariness test and the Fifth Amendment *Miranda* prophylactic rules have essentially become stand-ins for fairness in the interrogation process: If the suspect gives a voluntary confession and waives an adequate version of properly read *Miranda* rights, then the suspect's subsequent confession is in effect considered both fair and legal. But neither set of legal rules do a particularly good job at ensuring fairness, because no one knows what voluntariness (i.e., not overbearing the will) really means since it is such a vague, indeterminate and ethereal concept, and *Miranda* warnings, when given, are almost always waived in a moment that precedes the actual interrogation, which can last hours. More objective rules to ensure more fairness in the interrogation process could include time limits during interrogation (e.g., that no interrogation last more than four or six hours) or special rules for interrogating readily identifiable vulnerable groups such as juveniles or the obviously mentally handicapped or mentally ill.

68. Allison Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 LAW & PSYCHIATRY 19 (2004); GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* (2003).

69. DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (2012).

The most salient contemporary debate about the fairness of interrogation procedures is whether to permit police to use deception (lies, fabrications, falsehoods) to elicit confessions. In many first-world countries (e.g., England, Germany, Australia), police are not permitted to lie to suspects to elicit confessions. In America, police are permitted to lie so long as they do not otherwise overbear the will of the suspect per the Fifth and Fourteenth Amendment due process voluntariness test. In American interrogation, police lies take three primary forms: (1) lying about the alleged evidence the police claim to have against the suspect (e.g., about non-existent eyewitnesses, non-existent co-conspirator confessions, non-existent surveillance videos, non-existent DNA, etc.); (2) lying about their role by telling the suspect that their purpose is to help him, as if they are the suspect's institutional agent, friend, or representative; and (3) trying to persuade the suspect that it is in the suspect's material self-interest to make a confession, which it almost never is. If our system valued procedures that are fair to criminal suspects above all else, we would never allow any one of these types of police deception during interrogation.

Recommending procedures that seek to maximize the diagnosticity (i.e., ratio of true to false) of confession evidence—regulating police interrogation in a way that minimizes the likelihood of eliciting false confessions and maximizes the likelihood of eliciting true confessions—is, because of the empirical social-science research, more straightforward than analyzing where to draw the line between fair and unfair practices. False confessions leading to the wrongful conviction of the innocent usually result from a three-step process: first, the police misclassify a suspect who is innocent as guilty (the *misclassification error*); second, they subject the innocent suspect to a guilt-presumptive interrogation process that is designed to elicit an incriminating statement, not to test the hypothesis of guilt or obtain the truth (the *coercion error*); and third, police leak and feed the innocent suspect unique and/or non-public details that the innocent suspect, once broken, then repeats back and incorporates into his (false) confession statement, which makes it appear true and persuasive (the *contamination error*).⁷⁰

Empirical social-science research and best practices suggest ways to reduce all three errors in practice and thus increase the accuracy of confession evidence. The *misclassification error* often occurs because police investigators receive poor training about their ability to separate the innocent from the guilty based on flimsy to non-existent evidence. American police are taught falsely (by the Reid and other knock-off approaches) that they can be highly accurate human lie detectors, which is both wrong and dangerous. It is wrong because it is based

70. LEO, POLICE INTERROGATION, *supra* note 30.

on inaccurate speculation that is contradicted by the findings of virtually all the published scientific research on this topic. Studies have repeatedly demonstrated across a wide variety of contexts that people are poor human lie detectors and thus highly prone to error in their judgments about whether an individual is lying or telling the truth. Even specific studies of police interrogators have found that they cannot reliably distinguish between truthful and false denials of guilt at levels greater than chance; indeed, they routinely make erroneous judgments. The method of behavior analysis taught by Reid and Associates has been found empirically to actually lower judgment accuracy.⁷¹ The American police belief of interrogator as lie detector is dangerous because it can easily lead a detective to make an erroneous judgment about an innocent suspect's guilt based on little or nothing more than his body language and then, as a result, subject the suspect to a guilt-presumptive accusatory interrogation designed simply to get a confession. But this false belief is also dangerous because it has been shown to significantly increase detectives' confidence in their erroneous judgments. Erroneous prejudgments of deception lead to what Meissner and Kassin have called the *investigative response bias* (i.e., the tendency to presume a suspect's guilt with near or complete certainty).⁷² The overconfident police detective who mistakenly decides an innocent person is a guilty suspect will be far less likely to investigate new or existing leads, evidence, or theories of the case that point to other possible suspects, thus increasing the risk of eliciting a false confession.

Once detectives misclassify an innocent person as a guilty suspect, they will often subject him to a confirmatory interrogation in which they apply Reid-based methods of pressure and persuasion to move the presumed guilty suspect from denial to admission (the *coercion error*). Empirical researchers have identified several interrogation techniques that elevate the risk of eliciting a false confession when misapplied to innocent suspects. As mentioned earlier, these *situational* risk factors include false-evidence ploys; minimization; implied and explicit suggestions or promises of leniency or immunity; implied and explicit threats of harsher treatment or punishment; lengthy custody and interrogation; and sleep deprivation.⁷³ As we have seen, these techniques increase the risk of eliciting false confessions by causing suspects to perceive that their situation is hopeless and that they have no choice but to comply with the demands of their interrogator(s). As we have also seen, certain individual risk factors—such as adolescence, psychosocial immaturity, and subnormal

71. Vrij et al., *supra* note 30; Masup et al., *supra* note 30.

72. Kassin & Meissner, *supra* note 53.

73. Kassin et al., *Police-Induced Confessions*, *supra* note 9.

cognitive and intellectual functioning—make suspects more vulnerable to psychological coercion and making or agreeing to a false or unreliable statement, admission, or confession.⁷⁴

The *contamination error* occurs when police imply or communicate non-public case facts to innocent suspects, who, once broken, then incorporate and regurgitate these facts into their false confession.⁷⁵ Police feeding of facts appears to be inadvertent;⁷⁶ without realizing it, and in violation of their own training,⁷⁷ police interrogators often tell suspects how the crime occurred. Contamination occurs through the use of evidence ploys, such as telling the suspect the alleged evidence against him, showing him crime-scene photographs, taking the suspect to the crime scene, or repeating the victim's specific allegations and representing them as too detailed to be false.⁷⁸ The presence of non-public unique case facts gives false confessions verisimilitude. In addition, police interrogators sometimes also script suspect's confessions, pressuring and persuading suspects to incorporate plausible motives, expressions of remorse, acknowledgments of voluntariness, and even apology notes.⁷⁹ The upshot is that factually false confessions become vivid and detailed narratives that contain cues that third parties associate with truthful confessions and, on their face, become indistinguishable from them.

RECOMMENDATIONS

These three errors—misclassification, coercion, and contamination—that impede eliciting true confessions from the guilty and lead to false confessions from the innocent can be corrected and lessened by several policy reforms, as I will discuss in the remainder of this section. However, there is no single law, policy reform, or panacea that will solve all the problems associated with police interrogation and confession evidence in America; a multipronged approach is necessary. And, beyond any specific policy recommendation, the most important and challenging reform may be to change the culture of interrogation in America.

74. *Id.*

75. Ofshe & Leo, *supra* note 44.

76. Garrett, *Substance of False Confessions*, *supra* note 44.

77. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2013).

78. Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO ST. J. CRIM. L. 193 (2013).

79. LEO, *POLICE INTERROGATION*, *supra* note 30; Sara Appleby et al., *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 PSYCHOL. CRIME & L. 111 (2011).

1. **All police departments must electronically record interrogations in their entirety, as some already do by law in their jurisdictions and many others do voluntarily.**⁸⁰ The full electronic recording of police interrogations creates a comprehensive and reviewable factual record that can be used to resolve any swearing contests about whether investigators used coercion or contaminated their suspects (as well as false allegations against police).⁸¹ The mandatory full electronic recording of interrogation promotes truth-finding by making it unnecessary to rely on the incomplete, selective, and potentially biased accounts of the disputants about what occurred. Recording all promotes truth-finding by deterring police from using impermissible interrogation techniques,⁸² thereby preventing false confessions and erroneous convictions.⁸³ Even if police continue to elicit some false confessions, electronic recording will help prevent them from being introduced into the stream of evidence that can lead to wrongful convictions. Recording is also an effective investigative tool that protects police against false allegations, and allows them to investigate suspects more thoroughly because they can review the recording as a case unfolds and in light of subsequent evidence. By recording rather than taking notes, detectives are better able to focus on their interrogation strategy and getting information from suspects, who appear to be less defensive when police are not taking notes. Electronic recording is an effective law enforcement tool and technology.

Electronic recording has many additional benefits that extend beyond the interrogation room. Recording allows for the most effective monitoring of police interrogation by police, prosecutors, judges and juries. Recording also allows police to present the results of their interrogations in court more effectively, and is believed by prosecutors to facilitate eliciting plea bargains. Recording also conserves resources in an overburdened criminal justice system. It saves money by reducing the time that police, prosecutors, defense attorneys, judges and juries must spend reconstructing, testifying about, or evaluating interrogations and confessions. When police record, there will be fewer pretrial motions to suppress and fewer trials. In short, the electronic recording of police interrogations offers numerous benefits—to police, prosecutors, defense attorneys, judges, juries, and society in general—and few costs. Unlike some potential reforms, the recording of

80. Sullivan, *supra* note 29.

81. LEO, POLICE INTERROGATION, *supra* note 30.

82. Saul Kassin et al., *Does Video Recording Alter the Behavior of Police During Interrogation?*, 38 LAW & HUM. BEHAV. 73 (2014).

83. LEO, POLICE INTERROGATION, *supra* note 30.

police interrogations is not an adversarial or zero-sum solution: It benefits all parties who value accurate fact-finding and more-informed decision-making.⁸⁴ However, substantial empirical research also suggests that when recording, police should adopt an “equal focus” camera that shows both the interrogators and the suspect (rather than focusing exclusively on the suspect or the interrogators) in order for third parties to make more informed and balanced decisions about the voluntariness and reliability of any resulting confession statements.⁸⁵

2. **To increase the number of true and reliable confessions police elicit and reduce the number of false and unreliable ones, police interrogation training needs to be significantly improved in at least two ways.** Interrogators need to be taught that they cannot reliably intuit whether a suspect is innocent or guilty based on their perceptions of his demeanor, body language, and nonverbal behavior. Police interrogators are not highly accurate human lie-detectors and never will be; and the utility of the Behavior Analysis Interview is not supported by any empirical or scientific research.⁸⁶ As we have seen, scientific research has repeatedly demonstrated that the deception-detection training materials of police are flawed, that police judgments of truth-telling and deception are slightly better than chance and thus highly prone to error, and that interrogators cannot accurately assess their own lie-detection skills.⁸⁷

In addition, police investigators need to be taught not only that their interrogation methods can elicit true confessions, but also that they can elicit false ones and why, including which interrogation methods create the highest risk of eliciting unreliable statement evidence. Perhaps above all, interrogators must avoid implicit promises and threats—including those conveyed through Reid-based minimization techniques and strategies—as well as explicit ones; they must also better understand how and why guilt-presumptive, accusatory and manipulative Reid-based interrogation methods can and do move even innocent suspects from denial to admission and the making of a narrative and detailed false confession. Individuals under interrogation ultimately make or agree to

84. *Id.*

85. G. Daniel Lassiter et al., *Videotaped Confessions and Interrogations: A Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 J. APPLIED PSYCHOL. 867 (2002); G. Daniel Lassiter et al., *Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect*, 18 PSYCHOL. SCI. 224 (2007).

86. Vrij et al., *supra* note 30; Masup et al., *supra* note 30.

87. DePaulo et al., *supra* note 52.

false confessions either because they are distressed or coerced to a state of hopelessness and view the act of compliance or confessing as their only means of escaping an intolerably aversive situation or because the interrogation process convinces them that it is more likely than not that they committed the crime in question despite no memory of having done so.⁸⁸ If interrogators are taught the logic, principles and effects of their psychological interrogation methods, they will not only be more knowledgeable about the causes of false confessions but also more effective at eliciting truthful ones.

A word on the use of police lies during interrogation (i.e., the presentation of false evidence) is in order here. Unlike many other advanced Western democracies (e.g., England, Germany, Australia, Iceland, New Zealand, etc.), American police are permitted to confront suspects with fabricated evidence during interrogation, as we have seen. American police appear to almost universally support the use of false-evidence ploys because of its perceived role in eliciting true confessions from guilty suspects, whereas American scholars appear to almost universally oppose false-evidence ploys because of its perceived role in eliciting false confessions from innocent suspects. Experimental research indicates that false-evidence ploys are far more likely to elicit false confessions than true confessions,⁸⁹ and archival/documentary research indicates that false-evidence ploys are present in virtually all police interrogations leading to proven false confessions.⁹⁰ This is not surprising: More than 100 years of basic psychological research indicates that misinformation effects can substantially alter individual's perceptions, beliefs, and even memories.⁹¹ If policymakers are committed to regulating police interrogation such that the resulting statements are both voluntary and reliable, then the American criminal justice system must either ban the use of false evidence during interrogation or better use existing safeguards (such as some of the ones discussed in this section) to

88. Kassin & Wrightsman, *supra* note 41; Ofshe & Leo, *supra* note 44; Kassin et al., *Police-Induced Confessions*, *supra* note 9.

89. Melissa B. Russano et al., *Investigating True and False Confessions within a Novel Experimental Paradigm*, 16 *PSYCHOL. SCI.* 481, 484 (2005); Fadia Narchet, Christian Meissner & Melissa Russano, *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 *LAW & HUM. BEHAV.* 452 (2011); Allyson J. Horgan, Melissa B. Russano & Christian A. Meissner, *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 *PSYCHOL. CRIME & L.* 65 (2012).

90. Drizin & Leo, *supra* note 5.

91. Elizabeth Loftus, *Planting Misinformation in the Human Mind: A 30 Year Investigation of the Malleability of Memory*, 12 *LEARNING & MEMORY* 361 (2005).

place more effective limits on the use of false-evidence ploys (e.g., allowing some false-evidence ploys but not others; or allowing false-evidence ploys in some types of cases but not others; or allowing false-evidence ploys on some types of suspects but not others).

3. **Police should embrace interrogation methods that increase the elicitation of true relative to false confessions.** The most comprehensive empirical research and analysis currently available on this specific point⁹² suggests that American police should move away from Reid-based approaches relying on guilt-presumptive accusatory interrogation techniques and toward investigative interviewing methods. Investigative interviewing approaches differ from their Reid-based counterparts in several ways: Investigative interviewing approaches emphasize truthful information-gathering as their goal rather than eliciting a confession of guilt; they emphasize establishing rapport and letting suspects first tell their story before being confronted with inconsistencies or truthful existing evidence rather than accusatory approaches based on psychological control and manipulation; investigative interviewing approaches do not permit false-evidence ploys and lies and do not rely on minimization techniques that implicitly communicate promises and threats; and investigative interviewing approaches rely on open-ended exploratory questioning rather than close-ended confirmatory questioning. Investigative interviewing approaches in England and elsewhere have not resulted in a decline in the confession rates. The ultimate goal of shifting to investigative interviewing approaches is not only to improve the diagnostic accuracy of confession evidence, but also to change and professionalize the culture of police interrogation in America.
4. **The American criminal justice system should incentivize and increase (judicial and non-judicial) scrutiny of the reliability of confession statements before they are admitted into evidence against a defendant at trial.** This could be done in at least three ways. One would be to require police to meet a minimal evidentiary threshold—such as reasonable suspicion or probable cause—prior to allowing investigators to subject criminal suspects to the inherent jeopardy of an accusatory guilt-presumptive interrogation whose goal is to obtain a confirmatory confession. By subjecting the basis for the police decision to interrogate to an independent review by a third party, a reasonable suspicion requirement

92. Meissner et al., *Interview and Interrogation Methods*, *supra* note 49; Meissner et al., *Accusatorial and Information Gathering*, *supra* note 49.

could prevent fishing expeditions and ill-conceived interrogations, thus screening out the kinds of interrogations that tend to lead to false confessions. Another way to increase judicial scrutiny would be to make reliability a more explicit factor in the Fifth and Fourteenth Amendment due process voluntariness analysis at pretrial suppression hearings,⁹³ which would be more consistent with the historical purpose underlying the due process voluntariness.⁹⁴ A third would be to institutionalize pretrial reliability hearings in which trial judges—in their traditional gatekeeping role and informed by social-science research—are empowered to exclude confessions that contain substantial indications of unreliability and thus are, in the language of law, more prejudicial than probative.⁹⁵

Of course, there are a variety of other possible reforms that can and should increase the accuracy of confession evidence. These include, for example: time limits on interrogation, with a sliding-scale presumption of coercion/involuntariness as interrogation length increases; special protections for the vulnerable populations such as juveniles and people with mental handicaps; expert witness testimony in cases involving dispute interrogations and/or disputed confession evidence; and cautionary jury instructions.⁹⁶ The police interrogation training firm Reid and Associates has suggested that interrogators should not require more than four hours to obtain a confession,⁹⁷ and some academic commentators have proposed a limit of six hours on all custodial interrogations.⁹⁸ As Barry Feld has noted, “A limit of four or six hours gives police ample opportunity to obtain true confessions from guilty suspects without increasing the

93. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1 (2015).

94. GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* (2012).

95. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479; BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 19 (2011); Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pre-Trial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMPLE L. REV. 759 (2013).

96. LEO, *POLICE INTERROGATION*, *supra* note 30; FELD, *supra* note 31.

97. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 597 (4th ed. 2001) (“Rarely will a competent interrogator require more than approximately four hours to obtain a confession from an offender, even in cases of a very serious nature Most cases require considerably fewer than four hours.”).

98. WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 155 (2003).

risk of eliciting false confessions from innocent people.”⁹⁹ Additional safeguards for vulnerable populations could include model policies for interrogating juveniles, the mentally handicapped, and mentally ill; additional specialized interrogation training for police; and the provision of an appropriate adult or special representative during interrogation.¹⁰⁰ The purpose of expert witness testimony in cases involving a disputed interrogation and/or confession evidence—which is widely accepted by American courts and has become increasingly common—is to educate triers of fact about the general findings from scientific research on interrogation and confession so that they can better understand the psychological principles, practices, and processes of modern interrogation and thereby more accurately discriminate between reliable and unreliable confession evidence.¹⁰¹ Cautionary instructions should increase jury sensitivity about the confession evidence they are being asked to evaluate and thus lead to more accurate verdicts and fewer wrongful convictions based on unreliable confessions.¹⁰²

Regardless of the approach, the American legal system should move to a policy regime that emphasizes principles and practices that increase the accuracy (i.e., diagnosticity) of confession evidence—thereby maximizing true, and minimizing false, confessions.

99. FELD, *supra* note 31, at 260.

100. LEO, POLICE INTERROGATION, *supra* note 30. For a discussion of juvenile justice, see Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report. For a discussion of mental illness in the criminal justice system, see Stephen J. Morse, “Mental Disorder and Criminal Justice,” in Volume 1 of the present Report.

101. Keith Findley, Brian Cutler & Danielle Loney, *Expert Testimony on Interrogation and False Confessions*, 82 UMKC L. REV. 589 (2014); Kelsey Henderson & Lora Levett, *Can Expert Testimony Sensitize Jurors to Variations in Confession Evidence?*, 40 LAW & HUM. BEHAV. 638 (2016). See generally Garrett, *supra* note 4.

102. LEO, POLICE INTERROGATION, *supra* note 30.

Eyewitness Identification

Gary L. Wells*

Mistaken eyewitness-identification testimony is at the heart of a large share of the convictions of people whose innocence was later proven using forensic DNA testing. A considerable amount is now known about how to lower the rate of mistaken identifications through the use of better procedures for conducting identification. Several procedural reforms are described, such as double-blind lineups and pristine assessments of eyewitness-identification confidence. Although numerous jurisdictions have made improvements to their identification procedures in recent years, a large share of jurisdictions have still not made significant reforms. Although some courts have been making better use of the scientific findings on eyewitness identification, most courts are still using an approach that is largely unsupported by scientific findings.

INTRODUCTION

Mistaken eyewitness identification is a primary cause of the conviction of innocent people. At the same time, eyewitness identification is an important and necessary tool for convicting criminal perpetrators. Problems with eyewitness-identification evidence exist at two levels: (1) the collection and preservation of eyewitness-identification evidence at the level of the investigation by law enforcement and (2) the interpretation and use of eyewitness-identification evidence in court. At the level of the investigation, it is important to recognize that the methods used to collect and preserve eyewitness-identification evidence can themselves be highly unreliable. In general, the reliability of the results from a procedure, such as an eyewitness lineup, cannot be any better than the reliability of the procedures themselves. Accordingly, these identification procedures, which are mainly in the hands of police investigators, need to better conform to pristine protocols that are supported by scientific studies and best practices. This includes issues of when to conduct identification procedures, how to construct fair lineups, using proper pre-lineup instructions to witnesses, using double-blind and blinded procedures, securing witness statements of certainty at the time of the identification, and video-recording of identification procedures. Numerous jurisdictions in the U.S. now serve as

* Professor of Psychology, Distinguished Professor of Liberal Arts and Sciences, and the Wendy and Mark Stavish Chair in Social Sciences, Iowa State University.

models for these procedural reforms. In some jurisdictions, reforms have been totally voluntary and even initiated by police agencies themselves. In other jurisdictions, reforms have come about only through legislation or pressure from courts. A large share of jurisdictions in the U.S. have not yet made reforms. In addition, significant resources need to be directed at solutions to the problem of the use of showups, which are highly suggestive one-on-one identification procedures that, by their very nature, tend to have a high risk of mistaken identification. Technological solutions to the showup problem (rapid tablet-based photo lineups in the field) are now theoretically viable but require new resource allocations to refine and support such applications.

The second level at which eyewitness identification is a problem in the legal system concerns how such evidence is used in the courtroom. Courts need to take seriously the task of educating jurors on how to better evaluate eyewitness-identification evidence and courts need to play a stronger role in preventing questionable eyewitness-identification evidence from being admitted in the first place. Concrete progress at the courtroom level of the eyewitness-identification problem can benefit from discarding the U.S. Supreme Court's two-pronged test, as articulated four decades ago in *Manson v. Brathwaite*,¹ an approach that dominates how state and federal courts make determinations of admissibility in eyewitness-identification cases. The problem with the *Manson* approach is that it makes the assumption that self-reports by eyewitnesses of "reliability factors" (e.g., their certainty, how much attention paid during witnessing, etc.) are independent of suggestive identification procedures. But this assumption has been scientifically discredited.

I. HOW DO WE KNOW THERE IS AN EYEWITNESS-IDENTIFICATION PROBLEM?

In 1967, Justice William Brennan wrote that "the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification."² This was an interesting statement at the time, given that Brennan was able to cite very little evidence to back up his claim.³ Today, we know much more about mistaken eyewitness identification and we know it from three sources. First, the advent of forensic DNA testing in the 1990s has resulted in the exoneration of 349 people in the U.S. who were

1. See *Manson v. Brathwaite*, 432 U.S. 98 (1977).

2. *United States v. Wade*, 388 U.S. 218, 228 (1967).

3. Brennan's citations on this point were mostly confined to two books of case studies: EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932), and JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957).

convicted of crimes that they did not commit.⁴ Approximately 70% of these DNA exonerations are cases that involved mistaken eyewitness identification, often by multiple witnesses. A second source of evidence that eyewitness-identification evidence can be problematic is the now large body of scientific experiments using simulated crimes.⁵ These experiments show that mistaken eyewitness identification can occur at high rates under certain conditions and these experiments have managed to isolate a large number of factors that inflate the chances of mistaken eyewitness identification and false confidence by eyewitnesses. The third source of evidence that eyewitness identification is a problem comes from field studies (both archival and prospective) that have examined the outcomes of police lineups in ongoing criminal investigations.⁶ These field studies of eyewitnesses from actual cases show that eyewitnesses identify known-innocent lineup “fillers” at surprisingly high rates.

A. THE DNA EXONERATIONS

Although experiments describing problems with eyewitness identification were becoming prevalent in scientific psychology journals by the 1970s, it was not until forensic DNA testing began to uncover cases of mistaken identification in the 1990s that the legal system began taking seriously the extent of the problem. In 1997, U.S. Attorney General Janet Reno took careful notice of the fact that a new tool in criminal evidence, forensic DNA testing, was overturning convictions and that most of these exonerations involved mistaken eyewitness identification. Reno directed the National Institute of Justice to convene a working group of eyewitness researchers, prosecutors, police, and defense attorneys to prepare a guide for law enforcement on the collection

4. Cases, INNOCENCE PROJECT, <http://www.innocenceproject.org/all-cases/#exonerated-by-dna>. For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report. See also Richard A. Leo, “Interrogation and Confessions,” in the present Volume (discussing wrongful convictions as a result of false confessions).

5. See, e.g., 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (Rod C. L. Lindsay et al. eds., 1st ed. 2007).

6. See, e.g., Ruth Horry et al., *Archival Analyses of Eyewitness Identification Test Outcomes: What Can They Tell Us About Eyewitness Memory?*, 38 LAW & HUM. BEHAV. 94, 98–108 (2014); Gary L. Wells, Nancy K. Steblay & Jennifer E. Dysart, *Double-Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential Versus Simultaneous Lineup Procedure*, 39 LAW & HUM. BEHAV. 1 (2015).

and preservation of eyewitness evidence, which was published in 1999.⁷ This was the first time that a high-ranking official in the law enforcement and prosecution realm took up the cause of exploring the extent of the eyewitness-identification problem and what might be done about it. Notice that this was 30 years after Justice Brennan said that the “vagaries of eyewitness identification are well known.” But, in fact, the vagaries of eyewitness identification were not well known. Instead, the prominent role of mistaken eyewitness identification revealed vividly by the DNA exoneration cases seemed to take judges, prosecutors, police, and the general public by surprise.

Some continue to be dismissive of the DNA exonerations by noting that 245 or so DNA-based exonerations in eyewitness identification cases is a relatively small number given the large number of convictions that occur each year in the U.S. But, that is a misunderstanding of what these DNA-exoneration cases represent. The DNA-exoneration cases can be only a very small slice of the wrongful convictions based on mistaken eyewitness identification. The vast majority of wrongful convictions based on mistaken eyewitness identification are undiscovered and undiscoverable for several reasons. First, those who have been exonerated with DNA testing are a “lucky” small minority for whom the biological evidence was properly collected, properly preserved, not destroyed or lost after conviction, and did not deteriorate. In other words, even though there was no anticipation of the advent of forensic DNA testing, the biological evidence was preserved after the conviction for only a subset of cases and only in some jurisdictions. Second, it should be noted that DNA-exoneration cases are almost exclusively cases that involved sexual assault. It is not the case that sexual-assault witnesses are poor eyewitnesses. Instead, the reason that almost all DNA-proven mistaken identifications are cases of sexual assault is because very few other crimes leave behind DNA-rich biological trace evidence that could provide definitive exculpatory evidence for someone who was convicted based on mistaken identification. In fact, DNA evidence is extremely rare for most eyewitness-identification cases (e.g., robberies, shootings), which means

7. U.S. DEP'T OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999), <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>. This Guide was mailed to every law enforcement agency in the U.S. in 1999. The Guide described proper pre-lineup instructions, minimal numbers of lineup fillers, how to select lineup fillers, the need to secure a confidence statement from the witness at the time of an identification, and the preserving of clear records, among other things. However, the Guide did not call for double-blind administration, which eyewitness identification experts today consider an essential component of a proper eyewitness identification procedure. Also, the 1999 Guide had no force of law behind it. Jurisdictions across the U.S. were free to ignore it, and most did.

that very few convictions of innocent people based on mistaken eyewitness-identification evidence can ever be definitively overturned and thereby remain hidden injustices.

B. CONTROLLED EXPERIMENTS ON EYEWITNESS IDENTIFICATION

Since the mid-1970s, an extensive published literature has emerged on eyewitness identification that uses experimental methods.⁸ The primary feature of this scientific literature is that the researchers create events, usually simulated crimes, for unsuspecting people, thereby making them eyewitnesses. Because the researchers created the event, there is no question about what constitutes ground truth. In other words, the researchers know exactly what happened in the event, including who the “culprit” was. Hence, when the participant-witnesses are later shown a lineup, the researchers are able to know whether the witness made the correct decision (identified the culprit or rejected the lineup if the culprit was not present) or an incorrect decision (identified an innocent person or rejected the lineup even though the culprit was present). This methodology permits the researchers to systematically manipulate variables (e.g., view, presence/absence of the culprit in the lineup) to see how these variables impact the chances of accurate and mistaken eyewitness identifications.

Early in the development of programmatic science on eyewitness identification, a distinction was drawn between two types of variables that affect eyewitness identification. *System* variables are those that affect the reliability of eyewitness identification over which the justice system has (or could have) control; whereas *estimator* variables are those that affect eyewitness-identification reliability but the justice system can only estimate that influence after the fact rather than control it.⁹ Examples of system variables include pre-lineup instructions to witnesses,¹⁰ suggestive comments/behaviors by lineup

8. See, e.g., Gary L. Wells, Amina Memon & Steven D. Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 *PSYCHOL. SCI. PUB. INT.* 45 (2006); Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Memory for People and Events*, in 25 *HANDBOOK OF PSYCHOLOGY* 617 (Irving B. Weiner & Randy K. Otto eds., 2nd ed. 2013).

9. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 1546 (1978).

10. Pre-lineup instructions should warn the eyewitness that the culprit might not be in the lineup and witnesses should be given an explicit opportunity to not identify anyone. Failure to include such an instruction increases the chances that an eyewitness will identify someone even when the culprit is not in the lineup. See Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 *J. APPLIED PSYCHOL.* 482 (1981).

administrators,¹¹ and characteristics of fillers used in lineups.¹² Examples of estimator variables include whether or not the witness and the culprit are the same race,¹³ the view that the witness had of the culprit at the time of the crime,¹⁴ and stress or fear during witnessing.¹⁵ Both system and estimator variables affect the reliability of an identification. Hence, both system and estimator variables are relevant to the court. However, system variables have tended to receive more attention, both from researchers and from the justice system, because of the potential to use system variables intelligently in ways that help prevent mistaken identifications from occurring in the first place.

In effect, system variables in eyewitness identification generally refer to protocols that are used in the collection and preservation of eyewitness-identification evidence. A critical contribution of controlled experiments on eyewitness identification is that these experiments have vividly shown that mistaken-identification rates and false confidence can inflate dramatically from the use of biased lineups and suggestive procedures, both of which are system variables. False confidence refers to an eyewitness who is positive (certain, highly confident) and yet mistaken. In the DNA-exoneration cases, mentioned in the previous section, nearly every eyewitness expressed high confidence at trial that they had identified the actual perpetrator, but they were mistaken and, hence, were actually cases of false confidence.

11. The lineup administrator should be someone who does not know which lineup member is the suspect and which are fillers. Using a “blind” lineup administrator can prevent the administrator from inadvertently steering the witness or providing confirming feedback regarding their pick. See Sarah Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 *LAW & HUM. BEHAV.* 70 (2009).

12. The use of known-innocent fillers in the lineup who fit the description of the culprit is an essential component of a proper identification procedure. See Gary L. Wells, Sheila M. Rydell & Eric P. Seelau, *The Selection of Distractors for Eyewitness Lineups*, 78 *J. APPLIED PSYCHOL.* 835 (1993).

13. The ability of people to identify someone of their own race is considerably higher than their ability to identify someone of another race. See Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 *PSYCHOL. PUB. POL'Y & L.* 35 (2001).

14. Long distances, for example, severely impair the ability to recognize faces. See Geoffrey R. Loftus & Erin M. Harley, *Why is it Easier to Identify Someone Close than Far Away?*, 12 *PSYCHONOMIC BULL. & REV.* 43 (2005).

15. See, e.g., Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 *INT'L J. L. & PSYCHIATRY* 265 (2004).

It is not the purpose of this article to give an in-depth review of the scientific experiments on eyewitness identification. But it is useful to briefly describe a few core examples that go to the heart of the issue and here I single out three, namely: (1) the biased lineup, (2) confirming feedback, and (3) the mere absence of the culprit.

Biased lineup. The classic biased lineup is one in which the suspect, who might or might not be the culprit, stands out from the others in the lineup for any number of reasons. For example, the eyewitness might have described the culprit as a clean-shaven white male in his mid-20s of medium height with short, dark hair. Suppose the suspect fits that description but the fillers (non-suspects who are merely in the lineup to “fill it out”) do not because they have curly hair, or are not clean-shaven, or are in their 30s, or have light colored hair. Research experiments consistently show that eyewitnesses will identify an innocent person who fits that description if the other members of the lineup do not. In other words, to be at risk of mistaken identification, a person does not have to highly resemble the culprit; the person needs only to look more like the culprit than the remaining members of the lineup.

Confirming feedback. The research literature is now quite clear about the fact that, except in rare cases (e.g., coincidental resemblance), eyewitnesses who identify an innocent person from a fair lineup tend to not be very confident *at the time that they make the identification*. In other words, false confidence tends to not be present at the time of the identification but instead develops later, usually after the eyewitness is given some type of confirming feedback. A large body of research experiments shows that a simple confirmatory comment (e.g., “good, you identified the suspect”) following from a mistaken identification serves to dramatically inflate the confidence of the eyewitness and lead the eyewitness to believe that she or he was highly confident all along. In other words, post-identification confirmations serve to purge eyewitnesses of any memory that they were uncertain at the time of their identification. Moreover, confirmatory post-identification feedback to eyewitnesses not only inflates their recollections of confidence, but also inflates their recollections about how good their view was during the crime and how much attention they paid to the culprit’s face.¹⁶ In fact, this appears to be a major factor leading to convictions of innocent people in the DNA-exoneration cases. An analysis of the first 250 DNA-exoneration cases, for example, showed that even though all

16. See Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360 (1998).

of the eyewitnesses who mistakenly identified the defendants were positive at trial, almost all of these eyewitnesses showed evidence that they were in fact uncertain at the time of their identifications.¹⁷

Researchers have devised protocol solutions to the problem of confidence inflation: use a *double-blind lineup administrator* (who does not know which lineup member is the suspect), secure an explicit statement from the eyewitness at the time of the identification as to his or her confidence, videotape the identification and confidence statement, and ensure that courts use only the original confidence statement (not an inflated one that occurs later).¹⁸

Double-blind lineup administration is probably the most important single reform that a jurisdiction can make to its eyewitness-identification procedures. Double-blind lineup procedures solve three extremely important problems in the collection and preservation of eyewitness-identification evidence from photographic and live lineups. First, because the lineup administrator (and anyone else present during the lineup) does not know which lineup member is the suspect and which are mere fillers, the lineup administrator cannot intentionally or unintentionally cue the witness toward the suspect. Second, because the lineup administrator does not know which lineup member is the suspect and which are mere fillers, the lineup administrator would not be in a position to intentionally or unintentionally provide confirming feedback to the eyewitness (e.g., “good, you identified the person we suspected”). After all, a double-blind administrator cannot be sure whether the witness possibly picked a filler. Third, double-blind lineup procedures help ensure that the lineup administrator will make a clear and accurate record of the eyewitness’s identification decision. Studies of non-blind photo lineups show that case detectives tend to not make records of filler identifications but they always make a record if the witness identifies the suspect.¹⁹ But if a double-blind administrator is the one who has to make a record of the eyewitness’s decision, filler identifications would be recorded as faithfully as identifications of a suspect, because the lineup administrator would not know the status of the identified person.

17. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2012).

18. Nancy K. Steblay, Gary L. Wells & Amy Bradfield Douglass, *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 *PSYCHOL. PUB. POL’Y & L.* 1 (2014).

19. See, e.g., Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 *LAW & HUM. BEHAV.* 475 (2001).

The absence of the culprit. After all these years of experiments on eyewitness identification, it is quite clear that nothing increases the chances of mistaken identification more than the mere absence of the culprit from the lineup.²⁰ As far as we have been able to tell, all of the mistaken identifications in the DNA-exoneration cases were instances in which the eyewitness viewed an identification procedure in which the actual culprit was not present.²¹ This was not a surprise to eyewitness-identification researchers. As early as 1980, eyewitness-identification researchers using controlled experiments were observing that eyewitnesses have great difficulty recognizing the *absence* of the culprit even when warned that the actual culprit might not be in the lineup. As a result, eyewitnesses have a propensity to make affirmative identification decisions even when the culprit is not present in the lineup. This means that there is inherent risk to an innocent suspect from being placed in an eyewitness-identification procedure. The implications of this are immense. Currently, there appear to be no jurisdictions in the U.S. for which there is a standard (e.g., reasonable suspicion) that should be met in order to put an individual's photo into a photo lineup to see if an eyewitness will identify that person. In fact, a field study of lineups conducted in actual cases showed that 40% of the time there was no evidence at all against the person and an additional 30% of the time there was only minimal evidence.²² Similarly, in a national survey of U.S. law enforcement, more than one-third of investigators indicated that they needed no evidence at all to put someone in a lineup in order to try to get an identification.²³ More recently, John Wixted and his colleagues examined lineups conducted by a large U.S. police department and derived an estimate that the culprit was present in those lineups only 35% of the time.²⁴ Using Bayesian statistical methods, researchers have shown that any jurisdiction that

20. Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOLOGIST 553 (1993).

21. One seeming exception is the case of John Jerome White. In this case the victim-eyewitness viewed a live lineup in which White was the suspect and White was placed in position #3. Unbeknownst to the police, the "filler" who they placed in position 6 of the lineup was the actual culprit. Although the culprit was present, the eyewitness nevertheless identified the innocent suspect. The victim-witness, however, had already identified White from a photo-lineup. Hence, the original mistake occurred under conditions in which the actual culprit was not in the identification procedure.

22. Bruce W. Behrman & Regina E. Richards, *Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis*, 29 LAW & HUM. BEHAV. 279 (2005).

23. Richard A. Wise, Martin A. Safer & Christina M. Maro, *What U.S. Law Enforcement Officers Know and Believe About Eyewitness Factors, Eyewitness Interviews and Identification Procedures*, 25 APPLIED COGNITIVE PSYCHOL. 488 (2011).

24. John T. Wixted et al., *Estimating the Reliability of Eyewitness Identifications From Police Lineups*, 113 PROC. NAT'L ACAD. SCI. 304 (2016).

has a low base rate for the presence of the culprit in its lineups is risking a high rate of mistaken identifications.²⁵ In the eyewitness-identification area, this is known as the base-rate problem. I have called for some kind of standard, such as reasonable suspicion, before placing a possible suspect into the jeopardy of an eyewitness-identification procedure.²⁶

C. IDENTIFICATIONS OF KNOWN-INNOCENT FILLERS IN FIELD STUDIES

The third line of evidence that there is a problem with eyewitness-identification evidence comes from published field studies using data from lineups conducted by police. There are now 11 published studies that used either an archival method (going back through police files) or a prospective method (setting up a procedure to track lineups as they are conducted) to collect data on the outcomes of the lineups.²⁷ When properly constructed, a lineup contains only one possible suspect and the remaining members are known-innocent fillers. In these actual cases, when an eyewitness identifies the suspect, we cannot be positive that the suspect is guilty. However, when the eyewitness identifies a filler, we know that the eyewitness made a mistaken identification. Hence, the rate of filler identifications gives us some sense of how often eyewitnesses make mistaken identifications.

Aggregate data from these 11 published studies appear in the last two lines of Table 1. As Table 1 shows, among the 6,734 attempts by eyewitnesses to identify the perpetrator from a lineup, 2,746 (40.8%) identified the suspect, 1,599 (23.7%) identified a known-innocent filler, and 2,389 (35.5%) identified no one. Of course, as Table 1 shows, there is variation around these estimates

25. Gary L. Wells, Yueran Yang & Laura Smalarz, *Eyewitness Identification: Bayesian Information Gain, Base-Rate Effect-Equivalency Curves, and Reasonable Suspicion*, 39 LAW & HUM. BEHAV. 99 (2015).

26. See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006); Wells, Yang & Smalarz, *supra* note 24.

27. Behrman & Davey, *supra* note 18; Behrman & Richards, *supra* note 21; Horry et al., *supra* note 5; Ruth Horry et al., *Predictors of Eyewitness Identification Decisions From Video Lineups in England: A Field Study*, 36 LAW & HUM. BEHAV. 257 (2012); Amy Klobuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381 (2006); Amina Memon et al., *A Field Evaluation of the VIPER System: A New Technique for Eliciting Eyewitness Evidence*, 17 PSYCHOL. CRIME & L. 711 (2011); Tim Valentine, Alan Pickering & Stephen Darling, *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 APPLIED COGNITIVE PSYCHOL. 969 (2003); Wells, Steblay & Dysart, *supra* note 5; Wixted et al., *supra* note 23; Daniel B. Wright & Anne T. McDaid, *Comparing System and Estimator Variables Using Data From Real Lineups*, 10 APPLIED COGNITIVE PSYCHOL. 75 (1996); Daniel B. Wright & Elin M. Skagerberg, *Post-Identification Feedback Affects Real Eyewitnesses*, 18 PSYCHOL. SCI. 172 (2007).

from sample to sample. Hence, the best estimate of how often to expect suspect identifications, filler identifications, and no identifications from lineups should be based on the stable aggregate data shown in Table 1. For purposes of the current chapter, there are two figures that stand out. First, nearly one out of every four eyewitnesses (23.7%) identified a known-innocent filler. Second, if we restrict our estimate of error to only those who made an identification (35.5% made no identification), then we see that 36.8% of the witnesses who made an identification picked an innocent filler. We do not know how many of the identifications of the suspect were also mistaken identifications.

Table 1. Outcomes from 6,734 attempts by eyewitnesses to identify perpetrators from lineups in actual cases across the 11 peer-reviewed published studies.

Authors	No. of possible IDs	IDs of suspects	IDs of fillers	Rejections (No ID)	suspect%	filler%	no pick%	choosers %	Suspect rate among choosers	Filler rate among choosers
Behrman & Davey (2001)	58	29	14	15	50.0%	24.1%	25.9%	74.1%	67.4%	32.6%
Behrman & Richards (2005)	461	238	68	155	51.6%	14.8%	33.6%	66.4%	77.8%	22.2%
Horry, Halford, & Brewer (2014)	833	382	149	302	45.9%	17.9%	36.3%	63.7%	71.9%	28.1%
Horry, Memon, & Wright (2012)	1039	406	273	360	39.1%	26.3%	34.6%	65.4%	59.8%	40.2%
Klobuchar & Steblay (2006)	178	63	20	95	35.4%	11.2%	53.4%	46.6%	75.9%	24.1%
Memon & Havard (2011)	1044	456	437	151	43.7%	41.9%	14.5%	85.5%	51.1%	48.9%
Valentine & Pickering (2003)	584	237	121	226	40.6%	20.7%	38.7%	61.3%	66.2%	33.8%
Wixted, Mickes, Dunn, Clark, & Wells (2016)	348	114	104	130	32.8%	29.9%	37.4%	62.6%	52.3%	47.7%
Wells, Steblay, & Dysart (2014)	494	132	75	287	26.7%	15.2%	58.1%	41.9%	63.8%	36.2%
Wright & Skagerburg (2007)	134	78	28	28	58.2%	20.9%	20.9%	79.1%	73.6%	26.4%
Wright & McDaid (1996)	1561	611	310	640	39.1%	19.9%	41.0%	59.0%	66.3%	33.7%
Overall Sum	6734	2746	1599	2389						
Weighted means					40.8%	23.7%	35.5%	64.5%	63.2%	36.8%

The frequency with which witnesses identified fillers in these field studies raises the question of whether these eyewitnesses were properly instructed with the warning that the actual culprit might not be in the lineup and whether

they understood that they were free to make no identification. For most of these field studies, we cannot be certain how they were instructed. Lineup administrators might say that they gave this instruction, but we cannot be positive that was the case. But, for one of the field studies,²⁸ we know exactly how witnesses were instructed for every lineup, because the instructions were delivered by a laptop computer and each witness had to affirmatively indicate that they understood each element of the instructions before moving forward. And these instructions emphasized not only that the culprit might not be in the lineup but also that they do not have to make an identification. Nevertheless, the rate of filler identifications among those who made an identification (approximately 36%) in this field study is comparable to the average across all field studies (approximately 37%).

II. EXISTING EFFORTS TO ADDRESS THE EYEWITNESS-IDENTIFICATION PROBLEM

As described in the previous section, there is a great deal of evidence from controlled scientific experiments, field studies of outcomes from police lineups, and DNA exonerations to make the case that eyewitness-identification evidence has not been handled well by the criminal justice system. At the same time, there has been a remarkable amount of progress in many jurisdictions, especially in the last 15 years, to make certain types of reforms to how eyewitness-identification evidence is collected, preserved, and used in court.

These efforts to address the eyewitness-identification problem have operated at two levels, namely, policies implemented by administrative actions or legislative law on the one hand, and judicial rulings on the other hand. Policies implemented by administrative actions or legislative laws have been directed primarily at the procedures that are used by law enforcement for collecting eyewitness-identification evidence. In contrast, judicial rulings tend to revolve around questions of the admissibility of eyewitness-identification testimony, expert testimony by eyewitness experts, and so on.

A. REFORMS TO THE COLLECTION AND PRESERVATION OF EYEWITNESS-IDENTIFICATION EVIDENCE

Spurred in large part by media coverage of the continual unfolding of DNA exonerations, release of the Department of Justice guide on eyewitness evidence, concerted and effective work by the Innocence Project taking up eyewitness reform efforts, and partnerships between eyewitness researchers and policymakers, serious reforms in some jurisdictions began unfolding in

28. See Wells, Steblay & Dysart, *supra* note 5.

2002. New Jersey, through the unique authority of Attorney General John Farmer, became the first state to set out a specific set of requirements for how law enforcement collects eyewitness-identification evidence. Working with eyewitness researchers and members of the New Jersey Department of Justice, the New Jersey procedures laid out a set of requirements about how eyewitnesses need to be instructed prior to a lineup (warning them that the culprit might not be present and that they need not identify anyone), how the lineup needs to be composed (at least five known-innocent fillers who also fit the eyewitness's description of the culprit), the use of a lineup administrator who is uninvolved in the case and does not know which person is the suspect and which are fillers (a double-blind administration), and the collection of a statement of confidence from the witness at the time of identification (before the confidence statement can be contaminated by other events). Like most all of the reform documents adopted by jurisdictions that followed, violations of these procedures did not result in *per se* exclusion of the evidence.

New Jersey is unique because it is the only state for which there is someone who has statutory authority over all law enforcement (i.e., New Jersey's Attorney General). Hence, other jurisdictions could not follow the same model for effecting reforms to their eyewitness-identification procedures. Some states, such as North Carolina, used the legislative process to effect eyewitness-identification reform. In addition, some jurisdictions have made reforms to eyewitness-identification procedures at the local (county) level. Early examples include places such as Suffolk County (Boston and surrounds), Massachusetts, and Santa Clara County, California.

In general, jurisdictions that have made reforms to eyewitness-identification procedures from lineups have five basic elements:²⁹ (1) only one suspect per lineup with at least five fillers, (2) the use of fillers who fit the eyewitness's description of the suspect and do not let the suspect stand out in the lineup, (3) the use of double-blind administration, (4) pre-lineup instructions that the culprit might not be present, and (5) collection of a confidence statement from

29. Some jurisdictions have also adopted the use of the sequential method for lineups rather than the traditional simultaneous method. With the sequential lineup method, eyewitnesses view one lineup member (or one photo) at a time and make an identification decision on that one before going on to the next lineup member (or photo). Also, with the sequential procedure the eyewitness does not know how many people (or photos) are in the sequence. There is debate among scientists about which procedure, simultaneous or sequential, is best. The National Research Council has concluded that the evidence is not conclusive one way or the other. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION* (2014). Hence, whatever differences might exist between simultaneous and sequential procedures, those differences appear to be too small to make a strong case for one over the other.

the eyewitness at the time of the identification. Some jurisdictions require other things, such as videotaping of the entire identification procedure. And these reforms have spread fairly widely in recent years to include legislative law in the states of Florida, Ohio, Illinois, North Carolina, Maryland, Vermont, Kansas, Connecticut, and Colorado. In addition, some states have brought in laws requiring that all law enforcement agencies must have written policies on the collection of eyewitness evidence and have provided model policies (e.g., Texas, Wisconsin, West Virginia). These model policies tend to be versions of the same five eyewitness-identification procedures elements already mentioned.

As mentioned earlier, probably the single most important reform is the use of double-blind lineup procedures. Recall that double-blind administration of lineups prevents three problems, namely: (1) lineup administrators steering witnesses toward their suspect, (2) lineup administrators giving feedback to witnesses that can influence their confidence statements, and (3) lineup administrators failing to faithfully make records of filler identifications. At the same time, many jurisdictions have argued that a double-blind requirement is impractical for many police departments. The poster child for this anti-double-blind argument is the small police department that might have only two or five or seven officers. The argument for double-blind lineups being impractical for small police departments is that all their officers are likely to know who the suspect is and, hence, there is no one to be the double-blind administrator. Moreover, training a civilian employee (e.g., a dispatcher) who is not involved in investigations to administer lineups might not be wise because that person might have to provide testimony in court. But, there are two solutions to this problem of double-blind lineups in small departments. First, if the reforms occur at a statewide level (as in New Jersey, North Carolina, etc.), then it would be quite easy for a department to simply turn to a nearby jurisdiction and ask if they could send someone over to administer a lineup. Because the entire state is using the same procedures, no additional training is necessary for this “borrowed” officer. Neighboring police departments can have reciprocal arrangements. This is a highly manageable burden on a small police department because it would be quite rare that it would be needed. After all, a police department that is so small that it has only a handful of officers is one that will be doing an eyewitness-identification task only on very rare occasions. Because most identifications are from photo lineups rather than live lineups, a second solution to the problem of not having a double-blind administrator is the use of the envelope-shuffle method. The envelope-shuffle method is one in which the lineup photos are each placed in their own envelope, the envelopes are shuffled before the

witness views them (one at a time), and the lineup administrator is shielded from knowing which photo the eyewitness is viewing. The use of the envelope method, however, makes it even more important that the entire procedure be videotaped to ensure that the lineup administrator did nothing to influence the eyewitness's choice or the eyewitness's confidence in that choice.

B. EYEWITNESS-IDENTIFICATION EVIDENCE IN COURT

Another level at which there has been some progress in the legal system's treatment of eyewitness-identification evidence is in the courtroom. For example, almost every U.S. state now allows expert testimony on eyewitness identification at the discretion of the trial judge. On the other hand, with only a few exceptions, most states continue to model their rules on the admissibility of eyewitness-identification testimony based on the U.S. Supreme Court's 1977 decision in *Manson v. Brathwaite*.³⁰

Manson addresses the question of how lower courts should decide the admissibility of an identification when there is a claim that the state used suggestive methods to obtain the identification. After the Court's ruling in *Stovall v. Denno* in 1967,³¹ some thought that unnecessarily suggestive procedures would result in automatic exclusion of identification testimony at trial following a due process inquiry. But *Neil v. Biggers*³² and *Manson* made it abundantly clear that unnecessarily suggestive procedures would result in exclusion only if the suggestion created substantial risk of misidentification. Hence, the Court fashioned a two-pronged test. In the first prong, the question to be answered is whether the identification procedure was unnecessarily suggestive. If not, then the identification testimony could be admitted. If it was unnecessarily suggestive, then the inquiry turns to the second prong. The second prong asks the question of whether the identification is reliable despite the suggestiveness of the identification procedure. For the second prong, the Court mentioned five questions to consider: Did the witness provide a good *description* of the culprit? How much *time passed* between the witnessing and the identification? Did the witness have a good opportunity to *view* the culprit? How carefully did the eyewitness pay *attention* to the culprit during the witnessed event? And, how *certain* is the witness in his or her identification? The Court did not intend for these five considerations (description, time passed, view, attention, and certainty) to be exhaustive. But, in practice, these tend to be the criteria used in the second prong.

30. 432 U.S. 98 (1977).

31. See *Stovall v. Denno*, 388 U.S. 293 (1967).

32. See *Neil v. Biggers*, 409 U.S. 188 (1972).

The science that has developed around eyewitness identification has not been kind to the *Manson* approach to making determinations of the reliability of identification evidence that has been obtained under suggestive procedures. The scientific case against the *Manson* approach was summarized in a 2009 article that has held some sway in state supreme courts (e.g., Oregon, New Jersey) as those courts have come to recognize flaws in *Manson*-like approaches. The main problem with the *Manson* approach is that it assumes that the reliability criteria are uninfluenced by the suggestive procedure itself. Research studies clearly show that suggestive procedures not only increase the risk of mistakenly identifying an innocent suspect, but these suggestive procedures also lead eyewitnesses to inflate their recollections of how good their view was, how closely they attended to the culprit's face, and how confident (certain) they were when they made the identification. Hence, it has been described as somewhat ironic that the *Manson* factors of confidence, view, and attention “come into consideration by courts under precisely the circumstances in which they are least likely to be indicators of reliability due to their having been distorted [upward] by the suggestive procedure itself.”³³

Importantly, the majority opinion in *Manson* expressed the view that the two-pronged approach would effectively discourage the use of suggestive procedures. Because suggestive eyewitness-identification procedures inflate eyewitnesses' standing on three of the five *Manson* criteria, however, it is little wonder that *Manson* hearings almost never result in the exclusion of eyewitness-identification testimony, even when the suggestiveness of the identification procedures is relatively extreme. In fact, an argument can and has been made that the *Manson* approach encourages the use of suggestive procedures because suggestive procedures not only help ensure that the witness will identify the suspect but also inflate the perceived credibility of the witness (high confidence, good view, close attention) while risking virtually no chance that the identification testimony will be excluded from trial.

The U.S. Supreme Court has not revisited the question of how eyewitness-identification evidence should be evaluated in the 40 years since *Manson*. In 2012, however, the Supreme Court did consider the question of whether a defendant has a right to a pretrial hearing on the reliability of suggestively

33. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 17 (2009).

obtained eyewitness-identification evidence if state actors did not create the suggestiveness.³⁴ In that case, *Perry v. New Hampshire*, the Court ruled that there is no such constitutional right.

Although the U.S. Supreme Court has been silent for 40 years on the question of how to assess the reliability of eyewitness identification when suggestive procedures were used to obtain an identification, some state courts have taken up the issue. Two prominent examples are the New Jersey Supreme Court in *State v. Henderson*³⁵ and the Oregon Supreme Court in *State v. Lawson*.³⁶ The *Henderson* case is particularly interesting because, as noted earlier in this chapter, New Jersey was the first state to adopt statewide reforms in 2002 for how eyewitness-identification evidence is supposed to be collected. One of the requirements of the 2002 New Jersey eyewitness-identification procedures is that a photographic lineup must be conducted using a double-blind procedure. In other words, the case detectives cannot be present during an identification procedure. But the detectives violated that requirement and engaged in suggestive behaviors to secure an identification from the eyewitness. Like other states that have made reforms to eyewitness-identification procedures, violating the reform identification procedures in New Jersey does not result in *per se* exclusion of the identification evidence. In addition, at the time of *Henderson*, New Jersey followed the U.S. Supreme Court's use of the *Manson* criteria. But the New Jersey Supreme Court knew that there were problems with *Manson* and, hence, appointed a special magistrate to hold hearings with eyewitness experts and provide the New Jersey Supreme Court with the findings. Eventually, the New Jersey Supreme Court made a ruling that replaced the two-prong *Manson* test. Under the new test, the court placed the initial burden of showing some evidence of suggestiveness on the defense and noted that this would usually be linked to a system variable. At that point, the burden would shift to the state to offer proof that the identification is reliable, accounting for system and estimator variables. If, after weighing the evidence and looking at the totality of the circumstances, there is a substantial likelihood of irreparable misidentification, then the court can suppress the identification. If the evidence is admitted despite the suggestiveness, then the court must provide an appropriate, tailored jury instruction.

Like *Henderson*, the Oregon Supreme Court's ruling in *Lawson* changed the way the state's lower courts approach eyewitness-identification evidence in criminal trials. Under *Lawson's* framework, Oregon courts assess the reliability

34. See *Perry v. New Hampshire*, 565 U.S. 228 (2012).

35. See *State v. Henderson*, 208 N.J. 208 (2011).

36. See *State v. Lawson*, 352 Or. 724 (2012).

of eyewitness identifications under the Oregon Evidence Code (rather than *Manson*) and can provide remedies tailored to that concern. Additionally, the Oregon Supreme Court took judicial notice of an extensive body of research in the field and provided a non-exclusive list of considerations based on that research. In using the Oregon Evidence Code, the Oregon Supreme Court was able to go beyond mere constitutional considerations that have restricted the U.S. Supreme Court.

III. THE NEED FOR ADDITIONAL IMPROVEMENTS

There has been significant progress by many law enforcement agencies and courtrooms on improving the collection, preservation, and use of eyewitness-identification evidence. Nevertheless, a large proportion of law enforcement agencies in the U.S. have not made significant reforms and most courts in the U.S. still use some version of the *Manson* approach to dealing with eyewitness-identification evidence.

Moreover, even jurisdictions that have adopted a basic reform package for how to conduct lineups have generally fallen well short of additional steps that can and ought to be taken. For example, very few jurisdictions require that the identification procedure be videotaped. As few as 10 years ago, this might have been an unreasonable request. Today, however, almost everyone has a video recorder in their pocket, and video-storage costs are nearly zero. Also, many jurisdictions that want to claim that they have made reforms have resisted the important requirement that eyewitnesses be asked about their confidence immediately following any identification. And yet, the scientific evidence is clearer than ever that the only confidence statement that can be trusted for purposes of evaluating the likely accuracy of the identification is the confidence of the eyewitness at the time of the identification. Moreover, few police jurisdictions have concerned themselves with the prevalent use of showups. A showup is an identification procedure in which there are no fillers and instead the police present an eyewitness with only one person. Research has revealed that showups are the most dangerous of all identification procedures because, unlike a lineup, there are no known-innocent fillers to siphon mistaken identifications away from an innocent suspect.³⁷ Police agencies that have made eyewitness-identification reforms have dealt almost exclusively with the lineup. However, policies and procedures on showups (when they are necessary and

37. Andrew M. Smith et al., *Fair Lineups Are Better Than Biased Lineups and Showups, but Not Because They Increase Underlying Discriminability*, 41 *LAW & HUM. BEHAV.* 127 (2016).

when they can be avoided, how to reduce the suggestiveness of the showup, and so on) need to be a part of the reform packages that law enforcement agencies consider as well.

Another problem that the legal system has not addressed at all thus far is the “base rate” problem. Recall that the base-rate problem concerns the fact that there is no requirement that there be reasonable suspicion before putting a person in a lineup to see if the eyewitness will identify that person. Without any standard for deciding when to conduct an identification procedure, some jurisdictions could be running a high proportion of mistaken identifications purely because they run a large number of culprit-absent identification procedures. This base-rate problem is well known in diagnostic medicine and the problem is paralleled in eyewitness identification. When a medical diagnostic test is performed on individuals for whom there is little reason to suspect have a particular disease, the rate of false positives can be quite high. This is why, for example, prostate screening is not recommended for men under the age of 30. Although the prostate test itself is just as accurate for men under 30 as it is for men over 50, the base rate for prostate cancer for men under the age of 30 is so low that almost all positive test results are actually false positives. This same phenomenon occurs if the base rate for the guilty person being in lineups is low, namely a high percentage of identifications will be of innocent people. But, whereas the public health system has embraced the base-rate problem and regularly issues guidelines for when diagnostic tests (e.g., breast scans, pap smears, PSA) are inappropriate, the legal system has no rules, guidelines, or warnings about using an identification procedure in the absence of reasonable suspicion that the subject of that lineup is the culprit. Given the false-identification rate for culprit-absent lineups in controlled experiments and the rate at which eyewitnesses identify known-innocent fillers in lineups, there can be no doubt that eyewitness-identification procedures have inherent jeopardy for an innocent suspect. Hence, the question of whether there should be some reasonable suspicion that a person is the culprit in question before placing that person in jeopardy of an identification procedure should perhaps be part of a national conversation.

RECOMMENDATIONS

Crime investigators and courts need to begin treating eyewitness-identification evidence more like a form of trace evidence. Like physical trace evidence, eyewitness evidence needs to be collected and preserved using careful protocols, and investigators need to be carefully trained in how to carry out those protocols so as to maximize the probative value of the evidence.

1. **Every law enforcement agency should have written policies and training on how to conduct eyewitness-identification procedures.** There are model procedures based on the science and on best practices that law enforcement agencies can adopt. Minimal standards should include double-blind lineup administration, carefully selected lineup fillers so that the suspect does not stand out, pre-lineup instructions warning the eyewitness that the culprit might not be in the lineup, and the immediate collection of a confidence statement from any witness who makes an identification.
2. **Courts need to play a stronger role in incentivizing law enforcement to use eyewitness-identification procedures that are less suggestive** by imposing costs (e.g., jury instructions, admission of experts, and in some cases exclusion of testimony) when suggestive procedures are used.
3. **Crime investigators should be cautious about placing an individual into the inherent jeopardy of a lineup procedure** if there is not some evidence-based reasonable suspicion.

CONCLUSION

A great deal is known about how to make improvements in the collection, preservation, and use of eyewitness-identification evidence. And improvements have clearly been made in recent years. Nevertheless, a large proportion of U.S. law enforcement agencies have not made significant reforms to their eyewitness-identification procedures. Similarly, most U.S. courts continue to make judgments about the reliability and admissibility of eyewitness-identification evidence based on a problematic version of an approach that was put forward by the U.S. Supreme Court 40 years ago. In general, the U.S. legal system needs to handle eyewitness evidence as if it were like other forms of trace evidence. Like other forms of trace evidence (e.g., hair, fibers, fingerprints), in the case of eyewitness evidence the culprit left behind a trace (memory trace) that can help establish the identity of the culprit. And, like other forms of trace evidence, memory traces can be fragile, deteriorate, are easily contaminated, and need to be collected and preserved using scientifically validated protocols.

Informants and Cooperators

*Daniel Richman**

The police have long relied on informants to make critical cases, and prosecutors have long relied on cooperator testimony at trials. Still, concerns about these tools for obtaining closely held information have substantially increased in recent years. Reliability concerns have loomed largest, but broader social costs have also been identified. After highlighting both the value of informants and cooperators and the pathologies associated with them, this chapter explores the external and internal measures that can or should be deployed to regulate their use.

INTRODUCTION

There's nothing new about the police relying on informants to make cases. Nor is there anything new about prosecutors relying on cooperators to prove them. Such informational transactions have come to be a hallmark of the American criminal justice system, not just because they are so frequently used, but because these morally fraught arrangements are largely unregulated by formal law, pose such a risk to investigative and adjudicative reliability, and yet hold such a promise of bringing to justice those who exercise illegitimate power.

Informants and cooperators have figured prominently in studies, spurred by DNA exonerations, of how innocent people get convicted.¹ The trading of leniency for information also undermines the goals of horizontal equity in sentencing and can leave dangerous offenders under-punished, even able to commit crimes with impunity. Yet without these arrangements, we'd have to forgo the prosecution of all too many gang, mob, corruption, fraud, terrorism, and murder-for-hire cases, as well as the drug-trafficking cases, big and small, that so often figure in critiques.² We also might have to consider levels of undercover policing and surveillance that we've found intolerable or prohibitively expensive.

* Paul J. Kellner Professor of Law, Columbia Law School. Thanks to Erik Luna for putting this project together, to Susan R. Klein, Daniel S. Medwed, Caren Meyers Morrison, Jessica Roth, and Michael S. Scott for extremely helpful comments, and to Kathleen Marini for research assistance.

1 For a discussion of wrongful convictions, see Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in Volume 3 of the present Report.

2. See DEAN A. DABNEY & RICHARD TEWKSBURY, *SPEAKING TRUTH TO POWER: CONFIDENTIAL INFORMANTS AND POLICE INVESTIGATIONS 1* (2016).

Even a well-regulated system would be hard-pressed to ensure that these deals are done in the right cases for the right reasons, and that, when done, they are free from the dangers of self-dealing by police overeager to make cases, prosecutors looking to post convictions at any cost, informants seeking impunity, and cooperators currying favor at the expense of truth. The challenge is qualitatively greater in a decentralized criminal justice system that, as a matter of formal law, gives plenary discretion to police officers and prosecutors to use criminal liability to buy information. Absent foundational changes in the judicial control of enforcement decision-making, the path to managing these risks thus lies through governance and administrative controls, not adjudication and adversarial testing.³ To various degrees across diverse jurisdictions, these controls have been explored and need to be strengthened. At the same time, however, we need to embrace the reliability and transparency fostered when adversarial and public processes shine a light on these arrangements.

I. PREVAILING LAW AND POLICY

The absence of formal legal clarity creates definitional challenges: Is a whistleblower—someone with knowledge of, and perhaps some culpability in, organizational misconduct, and who may be rewarded, even publicly celebrated for reporting it—an “informant”? What about the neighbor who tells the police about criminal activities next door? Both may well be condemned as “snitches” (or some other of the many pejorative terms reserved for those who breach real or hoped-for solidarity) by the offenders they implicate.⁴ While fuzzy at the edges, however, the terms “informants” and “cooperators” are most usefully reserved for those with some personal criminal involvement who avoid prosecution or minimize punishment by incriminating others to law

3. See Barry Friedman & Maria Ponomarenko, “Democratic Accountability and Policing,” in the present Volume; see also Rachel A. Harmon, “Legal Remedies for Police Misconduct,” in the present Volume.

4. Susan Clampet-Lundquist, Patrick J. Carr & Maria J. Kefalas, *The Sliding Scale of Snitching: A Qualitative Examination of Snitching in Three Philadelphia Communities*, 30 Soc. F. 265 (2015) (“Defining ‘snitching’ as it relates to the criminal justice system is complicated, as it can include someone caught with an illegal firearm giving police information on someone else, an individual not involved in criminal activity testifying as a witness in a trial, or a neighborhood resident calling the police about illegal activities on the block.”). For an insightful exploration of the “social construction of snitches,” see MALIN ÅKERSTRÖM, *BETRAYAL AND BETRAYERS: THE SOCIOLOGY OF TREACHERY* (1990).

enforcement authorities in some structured relationship of exchange. (Even those informants who receive cash payments in exchange for information are usually recruited with some informal grant of leniency or immunity.⁵)

That is how I use the terms here, with the distinction between the two lying chiefly in the stage of the criminal process in which the state uses them. “Informants” provide information, and sometimes operational assistance (like setting up stings), to police officers and federal agents pursuing investigations. “Cooperators,” as cooperating defendants are formally called, testify—or more likely, in a world of plea bargaining, are prepared to testify—for the prosecution at the trials of charged defendants. Although there is considerable overlap in these categories—with many informants formalizing their deals and becoming cooperators—many informants will deal only with the police, and many cooperators “sign up” with prosecutors only after they and others have been charged. The formal separation of responsibility between police and prosecutors and the lack of a hierarchical relationship between those two institutions in just about all U.S. jurisdictions makes the distinction between informants and cooperators less a matter of function and more one of institutional management.

One type of prosecution witness merits its own category and special attention: jailhouse informants. Lacking any prior knowledge or involvement in an offense and, often, any certainty of reward (though usually in hope of one), they come forward to the authorities claiming to have overheard or otherwise acquired incriminating evidence about a fellow inmate. A reward will inevitably be forthcoming, in the form of a reduced sentence or some other governmental consideration.

One can easily imagine a rigorous regulatory regime—both administrative and judicial—governing all governmental relations with informants and cooperators. Indeed, the comparative literature, particularly the work of Jacqueline Ross,⁶ explores worlds in which the principle of legality (the obligation of law enforcers to pursue criminal activity that comes to their attention) and long-standing reservations about undercover policing and plea bargaining have led to regimes that considerably restrict the legal authority of

5. There is also a category of informants who are primarily motivated by money—under some federal agency guidelines, informants can receive up to 10% (for HSI) or 20% (for DEA) of cash seizures, up to a maximum of \$100,000 to \$250,000 a year.

6. See Jacqueline E. Ross, *Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint*, 4 ANN. REV. L. & SOC. SCI. 239 (2008); Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 555 (2007).

police and prosecutors to trade leniency for information and testimony. In the United States, however, strong legal norms of police and prosecutorial discretion relieve enforcers from having to rigorously justify these arrangements to judicial actors, and the effective regulatory regime is a mix of bureaucratic controls (of varying clarity and stringency, mostly weak), statutory controls (in some states), trial defenses of entrapment or outrageous government misconduct or appeals to juries' sense of proportionality,⁷ and political accountability (to the extent it exists).

A. INFORMANTS

In an effort to highlight the special regulatory challenges of informants—as opposed to those generally posed whenever human sources of information become the basis for police activity—let us focus on two groups: (1) those individuals who, faced with the possibility of an arrest on related or unrelated criminal charges, agree to provide information to the police about the criminal activities of others; and (2) those individuals who, perhaps acting at the loose or tight direction of the police, endeavor, notwithstanding their outsider status, to introduce themselves into some ongoing or nascent criminal scheme, usually as a trafficking counterparty or some sort of abettor (i.e., purveyor of needed material). The second group will not necessarily be motivated by the desire for leniency—cash rewards may do the trick—but it is not likely to include pillars of society. A great many informants will have sustained, structured relationships with one or more police officers or agents.

Informants are not a unique feature of narcotics investigations, but they are particularly prevalent in that area. Decades ago, Malin Åkerström explained why by pointing, first, to the nature of drug trafficking: With so many links in a distribution chain, the chances that the police will be able to break a link are greater, as is an informant's confidence that his associates won't immediately recognize his defection. Åkerström also noted the police-demand side of the equation: Where a type of crime is a high enforcement priority but lacks self-identified victims, the pressure to find informants is particularly great.⁸ Both of these explanations remain true today.⁹ Even so, the “true utility” of informants, as Jon Shane notes, stems as much from their ability to infiltrate hard-to-penetrate groups such as gangs, organized-crime syndicates, criminal tax evasion, money-laundering and fraud schemes, and “dangerous conspiracies”

7. See Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH. U. L. REV. 979, 987 (2014).

8. ÅKERSTRÖM, *supra* note 4, at 124.

9. See PETER K. MANNING, *THE NARC'S GAME: ORGANIZATIONAL AND INFORMATIONAL LIMITS ON DRUG LAW ENFORCEMENT* 147 (2d ed. 2004).

involving weapons trafficking, human trafficking, and terrorism—not just drug conspiracies.¹⁰ Moreover, we should expect even more reliance on informants, not just to make particular cases but to provide grist for the “intelligence-led” policing increasingly touted as the wave of the future.¹¹

The criminal background and self-interested motivations of many informants raise tough questions about their reliability and integrity—questions addressed, to some extent, through a patchwork of formal legal doctrines. When, for example, police draw on information obtained from an informant to support an application for a search or arrest warrant or to justify a warrantless search or arrest, a court will inquire into the informant’s reliability (perhaps his “track record” in past cases) and the extent to which he is corroborated.¹² When an informant helps put in motion the criminal activity for which a defendant is later prosecuted, the defendant may be able to get a court to scrutinize the government’s tactics by invoking the court’s “supervisory powers” (if the jurisdiction allows) or by raising an entrapment defense before the jury.¹³ The likelihood of obtaining relief under either of these approaches is pretty low, however, because courts are adverse to using supervisory powers to regulate police operations, and entrapment defenses open the door to evidence of the defendant’s predisposition to commit the crime.¹⁴ Moreover, what is unlikely to receive any judicial scrutiny at all is the informant’s role in target selection—the extent to which enforcement discretion has been effectively outsourced to him. The deference courts give to enforcer discretion prevents any scrutiny of this de facto power of the informant, with claims of “selective prosecution” doomed to fail.

10. JON SHANE, CONFIDENTIAL INFORMANTS: A CLOSER LOOK AT POLICE POLICY 3 (2016); see also DABNEY & TEWKSBURY, *supra* note 2, at 66 (finding reliance on informants among homicide, narcotics, prostitution, fraud, firearms, robbery, white-collar crime, and burglary investigators).

11. U.S. DEP’T OF JUSTICE, GLOBAL JUSTICE INFORMATION SHARING INITIATIVE, NAVIGATING YOUR AGENCY’S PATH TO INTELLIGENCE-LED POLICING (2009); Adrian James, *The Advance of Intelligence-Led Policing Strategies: The Emperor’s New Clothes?*, 76 POLICE J. 45 (2003).

12. Mary Bowman, *Full Disclosure: Cognitive Bias, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431 (2013).

13. See Roth, *Anomaly of Entrapment*, *supra* note 7, at 983; PAUL MARCUS, THE ENTRAPMENT DEFENSE §§ 4.04 (4th ed. 2009).

14. Roth, *Anomaly of Entrapment*, *supra* note 7, at 983; MARCUS, *supra* note 13, §§ 4.04, 6.02.

That an informant's whims or even personal vendettas might lead him to implicate one person as opposed to another is a milder form of a more dangerous problem: that an informant will use the police to target criminal rivals, so that he can commit his own crimes.¹⁵ Whitey Bulger's achievement of murderous impunity through his relationship with FBI agents is a notorious, but sadly not unique, example of this pathology.¹⁶

The broader social consequences of a police department's or federal agency's informant program, while bound to be significant, will always be difficult to assess. Some, doubtless large, number of investigations wouldn't go anywhere—particularly when it comes to identifying high-level conspirators—without informants. Moreover, the risk that associates might inform will destabilize conspiracies and thus reduce the long-term success of criminal organizations. On the other hand, because informants can substitute for more intensive investigative work, police officers may be tempted to “over buy” informant information and overlook more criminal activity by informants than necessary. And any perceived sense of impunity on the part of informants can only increase crime.

Of course informants themselves can be victimized by or as a result of their relationship with the police. The individual who faces prosecution because he refused to work with the police will at least have some adjudicative safeguards, including a lawyer. The individual who agrees to provide information will frequently not have had the benefit of counsel and will, unlike the innocent bystander, find himself at risk of illegitimate and unconstrained police exploitation. More grievous, of course, will be the risk of retaliation, not just from those about whom an informant provides information but from those worried about being targeted and those simply trying to gain status on the

15. See J. Mitchell Miller, *Becoming an Informant*, 28 JUST. Q. 203, 214 (2011) (empirical study of informants finding: “Inequitable drug deals, reactions to rumors that the target tried to snitch on a friend, scorned partners in intimate relationships, and competition elimination are but a few of the more typical situations that motivate revenge seeking informants.”).

16. See DICK LEHR & GERARD O'NEILL, *BLACK MASS: THE TRUE STORY OF AN UNHOLY ALLIANCE BETWEEN THE FBI AND THE IRISH MOB* (2001); *United States v. Flemmi*, 195 F. Supp. 2d 243, 247–48 (D. Mass. 2001); *United States v. Flemmi*, 225 F.3d. 78 (1st Cir. 2000); HOUSE COMM. ON GOV'T REFORM, *EVERYTHING SECRET DEGENERATES: THE FBI'S USE OF MURDERERS AS INFORMANTS*, 3RD REPORT, H.R. REP. NO. 108-414, at 454 (2004), <https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt414/html/CRPT-108hrpt414-vol1.htm>.

street.¹⁷ The violence that accompanies criminal fears of betrayal—whether those fears are justified or not—is another social cost of informant use.¹⁸

The extent that formal doctrine—particularly of the sort that can be invoked in the adversary process—constrains how the police use informants turns on whether information about police-informant interaction reaches prosecutors. With different priorities, interests, and accountabilities, prosecutors will often have different views on the deals that have been cut and the reliability of the information obtained.¹⁹ Prosecutors are also the necessary conduit of information to defense counsel and judges. None of this oversight and transmission can occur, however, when police are not candid with prosecutors about informant activities, and the absence of such candor risks severe miscarriages of justice.

The other, operationally more significant, sources of regulation are, at least potentially, bureaucratic controls within agencies, and sometimes political oversight. What these are and the degree to which they address informant pathologies vary greatly across jurisdictions. The U.S. Attorney General's Guidelines, for example, require that U.S. Justice Department agencies conduct suitability inquiries before signing up an informant and regular suitability reviews thereafter. Any illegal activity that informants engage in must be authorized and carefully overseen.²⁰ State and local agencies have their own

17. Cheryl W. Thompson, *Dozens in D.C., Maryland Paid the Ultimate Price for Cooperating with Police*, WASH. POST (Jan. 10, 2015); see also Brendan O'Flaherty & Rajiv Sethi, *Witness Intimidation*, 29 J. LEGAL STUD. 399 (2010).

18. See Richard Rosenfeld, Bruce A. Jacobs & Richard Wright, *Snitching and the Code of the Street*, 43 BRIT. J. CRIMINOLOGY 291, 306 (2003) ("snitching is a pervasive element of inner-city street life that posts dangers for street criminals and law-abiding residents alike"); MARGARET S. WILLIAMS, DONNA STIENSTRA & MARVIN ASTRADA, FED. JUDICIAL CTR., SURVEY OF HARM TO COOPERATORS (2016), [http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/\\$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf).

19. See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

20. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2002); U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES (2006), <https://www.ignet.gov/sites/default/files/files/ag-guidelines-use-of-fbi-chs.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-807, CONFIDENTIAL INFORMANTS: UPDATES TO POLICY AND ADDITIONAL GUIDANCE WOULD IMPROVE OVERSIGHT BY DOJ AND DHS AGENCIES (2015), <http://www.gao.gov/assets/680/672514.pdf>; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES (2005), <https://oig.justice.gov/special/0509/final.pdf>; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, AUDIT DIV. 15-28, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S CONFIDENTIAL SOURCE POLICIES AND OVERSIGHT OF HIGHER-RISK CONFIDENTIAL SOURCES (2015), <https://oig.justice.gov/reports/2015/a1528.pdf>.

guidelines, but often look to the policies and standards of the Commission on Accreditation for Law Enforcement Agencies (CALEA) and the International Association of Chiefs of Police (IACP).²¹

B. COOPERATORS

Like an informant, a cooperator may assist in investigations, but, unlike an informant, his point of contact is likely to be a prosecutor rather than a cop or agent. And his status is rooted in the adjudicative, not the investigative, stage: His arrangement with the government will be in lieu of his own trial and will oblige him to testify against others at their trials.

Cooperators, too, are often associated with drug cases, and certainly play important roles in federal narcotics prosecutions. Indeed more than half of the federal defendants receiving reduced sentences for “substantial assistance” to the government came from drug cases.²² Yet while the feds have the best data collection, drug cases are overrepresented in that system. To be sure, prosecutors from all jurisdictions rely on cooperators in cases involving underground markets and sustained organized crime. But cooperating witnesses are a feature in all multi-defendant cases, particularly where there are gradations in culpability that facilitate the driving of a wedge into what otherwise might be a joint defense. Indeed, the leading case on the Speedy Trial Clause arose when neither the prosecution nor the defense wanted to rush into the trial of one murder defendant before they knew the outcome of the multiple trials of a co-defendant who, the state hoped, would cooperate if convicted.²³

In theory, rather than purchasing testimony with sentencing discounts, prosecutors could first convict someone and then procure his testimony through grants of immunity and compulsion orders. The oath alone, however, has its limits when it comes to extracting truthful testimony from those deeply involved in criminal conduct. “Perjury cases are rarely brought, hard to prove, and unlikely to add much time to sentences that have already been or will be imposed for serious crimes.”²⁴

21. SHANE, *supra* note 10, at 30.

22. In fiscal year 2015, of 71,003 cases, 8,470 received substantial assistance departure. More than half of these were drug trafficking cases, with the median percent decrease from the guideline minimum in those cases of 48.4%. U.S. SENTENCING COMM’N, SOURCEBOOK OF SENTENCING STATISTICS tbl.30 (2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table30.pdf>.

23. See *Barker v. Wingo*, 407 U.S. 514 (1972).

24. Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 294 (1996).

Cooperator testimony thus must be obtained through explicit (although sometimes implicit) negotiation. Because introducing a cooperator's incriminating statements against a defendant without giving him a chance to cross-examine the cooperator would violate the Confrontation Clause, the cooperator must also be ready to appear at trial. Should he recant or otherwise muddy his testimony, the prosecution's case will be imperiled. The cooperator's protection against intimidation or persuasion from the defendant and his allies thus becomes a necessary part of prosecutorial planning. And his agreement will usually be structured to delay any sentencing leniency until after he has testified.

Even as prosecutors address one kind of risk from cooperator testimony—the risk that a cooperator will defect or otherwise torpedo the trial—they create another one: The risk that cooperators seeking to gain maximal leniency via the prosecutor's recommendation will shade their testimony to favor the government, at the expense of the defendant.²⁵ And there is a parallel risk that even prosecutors trying to restrict cooperators to truthful testimony won't be up to the task.²⁶

Because they have considerable control over how plea deals are structured, prosecutors are well-placed to address the risks that cooperators pose to their cases.²⁷ If they attend to their truth-promoting duties as well as their adversarial interests, prosecutors can also endeavor to ensure that cooperators tell the truth. But where prosecutors can't or won't rise to this considerable challenge, the safeguards of reliability come from defense counsel's exposure of a cooperator's criminal background and self-serving motives²⁸ and from a jury's ability to properly assess this impeachment material. Both of these safeguards turn on the adequacy of the prosecution's disclosure of this information (including all agreements or informal understandings with the cooperator)—which it is constitutionally obliged to turn over²⁹—and on the adequacy of cross-examination, perhaps supported by the trial judge's cautionary instructions. While several states have gone beyond the federal approach (which relies on

25. See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995).

26. See Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 774–77 (2016); Ellen Yaroshfsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999).

27. Richman, *Cooperating Clients*, *supra* note 25, at 94–111.

28. For a reminder that cooperation can reflect remorse and atonement, not simply self-interest, see Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1 (2003).

29. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). For a discussion of disclosure, see Darryl K. Brown, "Discovery," in Volume 3 of the present Report.

cautionary instructions) and have required that cooperator testimony be corroborated, those rules “typically require only some additional evidence ‘tending’ to connect the defendant to the crime.”³⁰

The social costs of cooperator testimony are not limited to those arising out of these reliability risks. Any sentencing regime committed to horizontal equity, proportionality, and to sentences that reflect offense seriousness must worry about the magnitude of the discounts that cooperators usually receive for testifying. To be sure, these costs are offset by the enforcement gains brought by the purchase of otherwise unavailable testimony, and the instability brought to every conspiracy by the Prisoner’s Dilemma (in which each conspirator worries that, should arrest occur, another conspirator will talk to the cops first). Yet the flip side of the Prisoner’s Dilemma is that the forward-looking conspirator might calculate that since, if quick enough, he can avoid his just deserts by informing or cooperating, he needn’t worry about—or be deterred by—highly punitive sanctions.³¹

II. LITERATURE REVIEW

A. INFORMANTS

Given that informants trade in betrayal of their associates and that the enforcement projects they assist often involve organizational misconduct whose targeting can itself be morally contestable (think Judas and any number of informants used against dissident political groups), it’s not surprising that the literature on informants is substantial and rich.³² A large body of comparative work reminds us that—however necessary informants are to important law-enforcement projects—issues of reliability, impunity, and corruption inevitably attend their use.³³

30. Roth, *Informant Witnesses*, *supra* note 26, at 760–61.

31. See Miriam H. Baer, *Cooperation’s Cost*, 88 WASH. U. L. REV. 903 (2011).

32. See, e.g., Richard C. Donnelly, *Judicial Control of Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); MALACHI L. HARNEY & JOHN CROSS, *THE INFORMER IN LAW ENFORCEMENT* (2d ed. 1968); GARY MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* (1988); Gary Marx, *Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informer*, 80 AM. J. SOC. 402 (1974); Peter Reuter, *Licensing Criminals: Police and Informants*, in *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* (Gerald M. Caplan ed., 1983). For a useful literature review, see DABNEY & TEWKSBURY, *supra* note 2, at 5–16.

33. See, e.g., Gustavo Fondevila, *Controlling the Madrinis: The Police Informer Management and Control System in Mexico*, 86 POLICE J. 116 (2013); Colin Dunnighan & Clive Norris, *A Risky Business: The Recruitment and Running of Informers by English Police Officers*, 19 POLICE STUD. 1 (1996).

Yet there are important new analytical strands. Perhaps because of the increasing scale of law enforcement activities and their carceral consequences in the United States, some scholars, particularly Alexandra Natapoff, have highlighted how police cultivation of and reliance on informants, particularly for narcotics cases, have pathological effects on “vulnerable communities.”³⁴ It is in these cases, she notes, where drug arrests and the “flipping” of arrestees to inform on their associates are concentrated and where the consequent toll on social capital is most marked. Others have written how the actual or perceived concentration of informant activity in inner-city, generally minority, communities has given rise to “an exaggerated anti-snitching ‘code of the street’” that “weakens informal social control by stigmatizing residents who witness and report neighborhood crime, and simultaneously interferes with the system of formal social control that is necessary for crime prevention and community safety and justice for victims.”³⁵ This “code,” when combined with other sources of distrust of police within minority communities, itself contributes to community devastation. Plunket and Lundman, for example, suggested in 2003 that “the significantly lower clearance rates in Black census tracts and integrated census tracts are a function of less trust and less cooperation and information from citizens.” They noted, “[w]hen people are reluctant to talk to homicide detectives, when they are uneasy about telling homicide detectives what they saw, what they know, and what they suspect, the necessary result is lower clearance rates.”³⁶

These social costs lead Natapoff and others to argue for data collection and better reporting on informant creation and deployment, and, Natapoff hopes, better governance of arrangements that lack transparency or accessibility to wholesale, or much retail, legal intervention. Like many others writing before and after her, including Clifford Zimmerman,³⁷ Natapoff would tighten up

34. ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 5 (2009); see also Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *A Multilevel Study of Collective Efficacy*, 277 *SCIENCE* 918 (1997).

35. Rachael A. Woldoff & Karen G. Weiss, *Stop Snitchin’: Exploring Definitions of the Snitch and Implications for Urban Black Communities*, 17 *J. CRIM. JUST. & POPULAR CULTURE* 184 (2010), http://www.albany.edu/scj/jcpc/vol17is1/Woldoff7_6.pdf.

36. Janice L. Puckett & Richard J. Lundman, *Factors Affecting Homicide Clearances: Multivariate Analysis of a Complete Conceptual Framework*, 40 *J. RES. CRIME & DELINQ.* 171, 185 (2003); see also Clampet-Lundquist, Carr & Kefalas, *supra* note 4; Jeffrey Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 *COLUM. L. REV.* 1235 (2017) (highlighting connection between low clearance rates and homicide spikes in certain cities).

37. Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 *HASTINGS CONST. L.Q.* 81 (1994).

controls over the coercion exerted on potential informants and would demand more of the police in assessing reliability. Even though, because of federal visibility and the accessibility of federal guidelines, FBI informant guidelines receive considerable attention, Jon Shane has put a spotlight on the best-practice principles of the International Association of Chiefs of Police and has explored the extent to which police department policies around the country are consistent with them.³⁸

Some recent calls for increased regulation of police-informant relationships come from those concerned as much for the plight of the informants themselves as for those on whom they inform and the communities in which they live. Michael Rich, in particular, has gone so far as to suggest a Thirteenth Amendment basis for regulating informant relationships and would demand, among other things, a far higher degree of counsel involvement in the recruitment process.³⁹

B. JAILHOUSE INFORMANTS

Because jailhouse informants usually have only passing knowledge of the defendants against whom their testimony is sought; because this thin interaction is often motivated by powerful self-interest; and because, not coincidentally, jailhouse informants have figured prominently in the conviction of a number of defendants who have thereafter been exonerated, this distinct category of witnesses has appropriately received special attention in the literature. Some, like Rory Little and Russell Covey, have cogently argued for their categorical exclusion.⁴⁰

C. COOPERATORS

Discussion of cooperators in the scholarly literature often overlaps with that of plea bargaining generally—for cooperation agreements are indeed a variant, albeit a distinctive variant, of plea agreements.⁴¹ Moreover, it is true that prosecutorial power—the target of most plea-bargaining critiques—gets

38. SHANE, *supra* note 10.

39. Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681 (2010); *see also* Robert L. Misner & John H. Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713 (1977); David Katz, *The Paradoxical Role of Informers within the Criminal Justice System: A Unique Perspective*, 7 U. DAYTON L. REV. 51, 68 n.104 (1981) (making a similar argument).

40. Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375 (2014); Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. L. REV. 965, 968–69 (2008). For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in Volume 3 of the present Report.

41. Richman, *Cooperating Clients*, *supra* note 25 (suggesting that while plea agreements are generally executory contracts, cooperation agreements are more like relational contracts).

supercharged when legislators create mandatory minimums or mandatory guidelines over which prosecutors, and not judges, have control.⁴² But the effects of these sentencing measures are often exaggerated by those who forget the extent to which judges, even when endowed with considerable sentencing discretion, would defer to prosecutorial leniency recommendations for defendants whose offenses would otherwise have led to maximal punishment. Cooperating witnesses are seeking deep discounts for their testimony and have generally received them, under any number of sentencing regimes.

If useful and reliable testimony is to come from such self-interested witnesses, a variety of actors must be capable of extraordinary discernment. Prosecutors, in particular, have to be able to figure out when a cooperator is fabricating or shading testimony to curry favor with the government, protect others, or advance some hidden personal agenda. They also, as Miriam Baer has noted, need to be able to discern whether they are making a deal with the right person and whether overall enforcement goals are served by a deal.⁴³ A growing literature has expressed skepticism that prosecutors have this capacity.⁴⁴ Others have focused on the capacity of juries—in the relatively small number of cases that go to trial—to assess cooperator credibility.⁴⁵ If they are going to properly assess testimony, juries, of course, need to know the full contours of deals with prosecutors, and scholars like Michael Cassidy have drawn attention to inadequate disclosure practices in this regard.⁴⁶

Given the reliability concerns, effects on sentencing equity, and public costs of giving deep sentencing discounts to cooperators, some like Ian Weinstein and Caren Morrison have called for more scrutiny of deals within prosecutors' offices and greater transparency of those arrangements for the general public.⁴⁷ Jessica Roth has called for an exploration of the optimal incentives

42. See Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report; see also Douglas A. Berman, "Sentencing Guidelines," in Volume 4 of the present Report.

43. See Baer, *supra* note 31, at 917.

44. See Yaroshefsky, *supra* note 26; Roth, *Informant Witnesses*, *supra* note 26, at 774–77.

45. See Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137 (2008) (experimental evidence suggests that information about cooperative witness' incentive did not affect participants' verdict decisions); see also Jeffrey S. Neuschatz et al., *Unreliable Informant Testimony*, in *CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH* (Brian L. Cutler ed., 2012).

46. R. Michael Cassidy, "Soft Words of Hope": Giglio, *Accomplice Witnesses*, and the Problem of Implied Inducements, 98 NW. U. L. REV. 1129, 1130 (2004).

47. Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 593 (1999); Caren Meyers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921 (2009).

in cooperation agreements and the optimal policies for handling cooperator trial preparation and testimony.⁴⁸ At the same time, it's also worth noting the growing interest in other countries in just these deals.⁴⁹

D. CORPORATE CONTEXT

The basic structure of the deal in which a corporate insider implicated in criminal misconduct commits to testifying against others within the firm or the firm itself is little different from the deal in which one gangster agrees to testify against racketeering associates. Yet the corporate context of these arrangements, and the readiness of firms, for their part, to cooperate against their employees in order to obtain leniency has appropriately given rise to its own special literature. Because the corporate version of the Prisoner's Dilemma—in which corporate executives, lower-level employees, and the firm itself will regularly jockey to influence prosecutors' understanding of the nature and causes of corporate misconduct and their charging decisions—has been identified as a source of inequities and ineffectiveness in the government's pursuit of such misconduct, this cooperation literature overlaps with critiques of white-collar enforcement policy, particularly in the wake of the 2008 financial crisis.⁵⁰

48. Roth, *Informant Witnesses*, *supra* note 26, at 789, 795.

49. See DANIEL C. RICHMAN, ACCOUNTING FOR PROSECUTORS (Columbia Public Law Research Paper No. 14-506, 2016), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2757811; SHAWN MARIE BOYNE, THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW? 138 (2013); Will Connors & Luciana Magalhaes, *How Brazil's "Nine Horsemen" Cracked a Bribery Scandal*, WALL ST. J. (Apr. 6, 2015); see also ORG. FOR ECON. CO-OPERATION & DEV., PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL 40–41 (Oct. 2014), <https://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf>.

50. See Daniel Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265 (2014); Baer, *supra* note 31; Brandon Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015); William S. Laufer, *Corporate Prosecution Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643 (2002); Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979 (2002); Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007); Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 2 (2006).

III. ANALYSIS AND ASSESSMENT

Informants and cooperators will continue to be key components of all non-patrol-based law enforcement projects—at least to the extent these projects are pursued through arrest and prosecution.⁵¹ Indeed, calls for better-targeted enforcement strategies and concerns about broad surveillance programs will only increase reliance on bad guys with critical inside information about the misconduct of others. The conversation about trade-offs between surveillance and “humint” (human intelligence) that is a standard trope in the intelligence business must be a part of criminal enforcement policy as well.⁵² Moreover, growing limitations on law enforcement’s ability to obtain personal communications and data via warrant will make informants even more valuable.⁵³

There is a cold brutality and inherent risk of unreliability in the way we use the threat of vastly greater prison time to squeeze information out of culpable defendants. But no equally effective tool for prying closely held information about corrupt dealings or other, less genteel forms of organized crime has been devised.⁵⁴ Even in the terrorism area—where any number of alternatives to criminal justice treatment have been explored—experts have come to appreciate the intelligence value of the “normal” coercive power of criminal sanctions.⁵⁵ In a criminal justice system like ours that has few clear priors on how police officers and prosecutors extract information from criminals through grants of leniency, it is unavoidable that one’s views on whether such deals are moral or proportionate will have much to do with one’s sense of the stakes, circumstances, and alternatives.

At a bare minimum, the use of informants should not be allowed to obstruct the accuracy and procedural fairness commitments of the adjudicatory system. Prosecutors must receive accurate and complete information about informants and their use from the police, so that prosecutors can adequately engage in their

51. The growing literature on problem-oriented policing and situational crime prevention counsels more attention to the costs of standard penal responses. For a sketch of the costs associated with sting operations, see GRAEME R. NEWMAN, U.S. DEP’T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., *STING OPERATIONS* 29–33 (2007), http://www.popcenter.org/Responses/pdfs/sting_operations.pdf.

52. See MARX, UNDERCOVER, *supra* note 32; Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008).

53. See MANHATTAN DIST. ATT’Y OFFICE, REPORT ON SMARTPHONE ENCRYPTION AND PUBLIC SAFETY (Nov. 2016), <http://manhattanda.org/sites/default/files/11.18.15%20Report%20on%20Smartphone%20Encryption%20and%20Public%20Safety.pdf>.

54. Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 67–68 (2013).

55. See David. S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT. SEC. L & POL’Y 1, 60–61 (2011).

gatekeeping functions and attend to their disclosure obligations. Prosecutors must, in turn, ensure that defense counsel receive the material they are legally entitled to in order to litigate defects in informant handling and reliability. Even so, much of the interaction between police officers and informants won't get aired in any adjudication process,⁵⁶ and other institutions are needed to address the risk of self-dealing endemic to informant arrangements.

A number of “agency costs” (distortions caused by self-interest) need to be addressed: Informants seeking impunity at the least personal cost will have reason to minimize their own culpability, maximize that of those they don't mind giving up to the police, and cut corners in information-gathering. Police officers will overlook informant misconduct, unreliability and targeting pathologies so as to make the next big case, or perhaps just a lot of little ones. Police agency costs can occur at the institutional as well as the individual level, with departmental priorities inappropriately skewed to case types in which informant information substitutes for expensive investigative work.

In theory, regulation of informant arrangements can be done by statute, and occasionally this has occurred. In the wake of a well-covered case in which an informant was killed during a sting operation, Florida enacted “Rachel's Law,” establishing new guidelines for the police when dealing with informants.⁵⁷ Because lawmakers either doubt their competence to seriously regulate in this area or are averse to limiting police options, however, statutory regulation is rare. Even in Florida, one of the most significant proposed reforms—requiring that informants have the assistance of counsel before entering into any deal—was stripped out of Rachel's Law before its enactment.⁵⁸

Internal regulation is thus the primary means of structuring and monitoring police-informant relationships. The Justice Department guidelines are the most conspicuous example of such regulation, and provide the basis for

56. While showing the reliability benefits of recording conversations between informants and the police, Robert Mosteller notes the operational impediments to doing so. Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 566 (2009).

57. FLA. STAT. ANN. § 914.28.

58. Ian Leson, *Toward Efficiency and Equity in Law Enforcement: “Rachel's Law” and the Protection of Drug Informants*, 32 B.C. J.L. & SOC. JUST. 391 (2012); NATAPOFF, *supra* note 34, at 183.

audits of agency practices.⁵⁹ Outside the federal government, however, the decentralization of most law-enforcement authority has made regulation more varied and episodic. Even in New Jersey, where the constitutional structure allows for more regulation than usual, there remains no mandated statewide police rules for recruiting, cultivating and using informants.⁶⁰ The regulatory action, if it is going to come, will therefore be at the city and county level, and certainly ought to be encouraged.⁶¹ The heterogeneity of police departments and their oversight mechanisms across the country precludes blind trust in internal regulatory mechanisms. But I'm not persuaded that this diminishes the promise of, and need for, pushing in this direction.

To some extent, the Confrontation Clause's demand that the witnesses against a defendant come into court and testify in person against him offers safeguards in the way of transparency and cross-examination that counsel less regulation of cooperators and even testifying jailhouse informants than may be needed for informants. For this to work, prosecutors must comply with their constitutional and statutory obligations to give defense counsel adequate information about the nature of the witness's deal. However clear the law is on these obligations, more training, enforcement, and sanctions are needed, because violations occur all too frequently.⁶² There are some close issues, however. Those who would have every aspect of a cooperator's interaction with prosecutors recorded need, for instance, to consider whether judges should step in when defense counsel turns her license to use prior inconsistent statements into a clock-running exercise.⁶³

59. See, e.g., OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES (2005), <https://oig.justice.gov/special/0509/final.pdf>; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T JUSTICE, AUDIT DIV. 15-28, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S CONFIDENTIAL SOURCE POLICIES AND OVERSIGHT OF HIGHER-RISK CONFIDENTIAL SOURCES (2015); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-807, CONFIDENTIAL INFORMANTS: UPDATES TO POLICY AND ADDITIONAL GUIDANCE WOULD IMPROVE OVERSIGHT BY DOJ AND DHS AGENCIES (2015), <http://www.gao.gov/assets/680/672514.pdf>.

60. DELORES JONES-BROWN & JON M. SHANE, AM. CIVIL LIBERTIES UNION, AN EXPLORATORY STUDY OF THE USE OF CONFIDENTIAL INFORMANTS IN NEW JERSEY 1 (2011), <https://www.aclu-nj.org/files/1113/1540/4573/0611ACLUCIReportBW.pdf>.

61. For a recent local audit, see NEW YORK CITY DEP'T OF INVESTIGATION, OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, AN INVESTIGATION OF NYPD'S COMPLIANCE WITH RULES GOVERNING INVESTIGATIONS OF POLITICAL ACTIVITY (2016), http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig_intel_report_823_final_for_release.pdf.

62. Roth, *Informant Witnesses*, *supra* note 26, at 785.

63. See Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 684–85 (2014).

Even heightened adversarial safeguards may not be good enough to justify the use of jailhouse informant witnesses. Russell Covey has argued:

Jailhouse snitch testimony is an inherently unreliable type of evidence. Snitches have powerful incentives to invent incriminating lies about other inmates in often well-founded hopes that such testimony will provide them with material benefits, including in many cases substantial reduction of criminal charges or sentences. At the same time, false snitch testimony is difficult if not altogether impossible to impeach. Because such testimony usually pits the word of two individuals against one another, both of whose credibility is suspect, jurors have little ability to accurately or effectively assess or weigh the evidence.⁶⁴

Although it is far from clear that this reasoning makes jailhouse informant testimony qualitatively different from cooperator testimony more generally, experience may justify this line-drawing and argue for categorical exclusion. Certainly, every prosecutor's office should think long and hard, and draw on the judgments of those outside the trial team, before putting a jailhouse informant on the stand. Daniel Medwed has cogently set out how—in the wake of the explosive revelation in 1988 of the systematic fabrication of testimony by inmates of the county jail—the Los Angeles District Attorney's Office has developed an elaborate protocol for scrutinizing these potential witnesses.⁶⁵ It is tempting to advocate for banning these witnesses entirely, but one can imagine situations where a jailhouse witness's testimony is not only critical for proving a matter of grave consequence but comes with extraordinary circumstantial indications of reliability.

A softer regulatory intervention could include turning judges into gatekeepers, requiring them to hold reliability hearings before allowing *any* cooperator testimony. Jessica Roth has touted the benefits of such hearings:

First, they would provide an external check on prosecutorial decisions regarding informant witnesses. Although not all cases involving informants would proceed to that stage, the possibility of such hearings would operate as a powerful incentive to prosecutors and agents to think more carefully about their choice of informants, since it is not always possible to tell *ex ante* which case will result in a reliability hearing. Hearings would pry open the “black

64. Covey, *supra* note 40, at 1428; see Little, *supra* note 40.

65. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT, 90–91 (2013).

box” of informant use, to a far greater extent than does current practice, providing greater accountability for prosecutorial use of informants. Second, reliability hearings would provide courts with the opportunity to develop a common law regarding the factors and practices associated with greater informant reliability.⁶⁶

While, if we are not going to categorically exclude jailhouse informant testimony, it makes sense to have searching reliability hearings for it, I’m not persuaded that we should use this judicial gatekeeping for all cooperating witnesses. It seems churlish, particularly in the wake of DNA exonerations, to question anything that promotes reliability, but this particular mechanism is troublingly asymmetrical, having the effect of keeping only key prosecution evidence out and to do so in many sorts of cases (corruption, organized crime, corporate fraud, police abuses) that, to my mind, go underprosecuted. However much we might, as a matter of theory, welcome thoughtful judicial interventions that avoid false negatives as well as false positives and leave adequate room for jury assessments, I would like to know more about the likelihood, as an institutional matter, that trial judges—in all their state and federal variation⁶⁷—would strike the right balance. In any event, any reliability gain would be limited by the plea bargaining that makes trials the exception to the general rule.

Given the institutional capacity—though not always the inclination—of prosecutors’ offices, I think it far preferable for rigorous testing of cooperator reliability and serious deliberation about the need to “purchase” testimony with leniency to occur within those offices (and not be limited to the trial team), rather than in courtrooms. Interventions that force officials to step up to their responsibilities, like Caren Morrison’s suggestion for more public disclosure of cooperator deals,⁶⁸ Ellen Yaroshefsky’s call for better training,⁶⁹ and Jessica Roth’s call for more reliability-focused experimentation,⁷⁰ are therefore the most promising.

66. Roth, *Informant Witnesses*, *supra* note 26, at 786; *see also* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 1 (2000); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 CRIM. LAW & CRIMINOLOGY 329, 364 (2012).

67. *See* Claire S.H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Judges*, 103 AM. ECON. REV. 1360 (2013).

68. Morrison, *supra* note 47.

69. Yaroshefsky, *supra* note 26, at 964.

70. Roth, *Informant Witnesses*, *supra* note 26, at 786–90.

Even as we tinker with the conditions under which information is obtained from bad guys and the measures by which our adjudicative system and political structures come to grips with those conditions, we should also try to reach out more to non-criminal sources of information. Resources for protecting witnesses need to be increased, and efforts to intimidate must be punished severely. But unless a police force can win the trust of its citizenry and patiently knock on doors, untainted information will be scarce indeed.⁷¹

RECOMMENDATIONS

1. **Clearer guidelines for assessing, monitoring, and protecting informants are needed, as well as better training for officers and agents, and compliance mechanisms.** Any deficiencies with respect to both guidelines and training should be attended to, with some sort of oversight by an entity insulated from the pressure to make cases. Deficiencies in the funding for witness protection, particularly in local jurisdictions, also need to be addressed.
2. **Departments and agencies should give far more consideration to the social costs of using informants and the alternatives.** Informants will inevitably be key investigative tools, but in the aggregate, their use can erode the social capital within crime-plagued communities. Protocols should be established to ensure that they are not overused. Moreover, their use should not be allowed to substitute for police efforts to develop bonds with law-abiding members of the communities they serve. Developing those bonds will require consideration of the impact of police tactics on those communities.
3. **Every jurisdiction should look closely at how it uses jailhouse informants, and should demand better justification of their use from prosecutors, both at the wholesale level and case by case.** Judicial gatekeeping may provide a satisfactory compromise, but rigorous testing of reliability is essential.

71. On the need for more focused information gathering in homicide investigations, see Fagan & Richman, *supra* note 36; JILL LOEVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015); and Benjamin Mueller & Al Baker, *Rife Between Officers and Residents as Killings Persist in South Bronx*, N.Y. TIMES, (Dec. 31, 2016), <http://www.nytimes.com/2016/12/31/nyregion/bronx-murder-40th-precinct-police-residents.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>.

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4. **Prosecutors should be trained to scrutinize the reliability of possible cooperators, and each office should have protocols to ensure that deals are made with cooperators only when necessary.** Committees that allow senior prosecutors outside the trial team to assess reliability and need should be established whenever possible.
 5. **Prosecutors must take care to comply with their discovery and disclosure obligations as to the nature of their deals with cooperators to ensure that cooperator reliability can be tested via cross-examination and explored by jurors.** To the extent possible—with due attention to the enormous personal risks that cooperators often take—information about such deals, both in individual cases and in the aggregate, should be disclosed to the public, to ensure that interested citizens can get a better sense of both the costs and benefits of cooperation.

A report by
The Academy for Justice

with the support of

